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ALLAHABAD SERIES

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(2021)11ILR A1
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.09.2021

BEFORE

THE HON'BLE SUNEET KUMAR, J.

Appeal U/S 37 of Arbitration and Conciliation Act 1996
No. 38 of 2021

Agtec Industries Pvt. Ltd., Greater Noida
...Appellant
Versus
M/s Nikon Systems Pvt. Ltd., New Delhi
...Respondent

Counsel for the Appellant:
Sri Gaurav Tripathi, Sri Syed Imran Ibrahim

Counsel for the Respondent:
Sri Syed Fahim Ahmed, Sri H.N. Singh

A. Civil Law - Arbitration and Conciliation Act, 1996-Section 37-suit was instituted for eviction and arrears of rent-appellant filed an application under Order VII Rule 11 of the C.P.C.-during the pendency of the trial proceedings, appellant filed an application under section 8 for settlement through mediation-Section 8 of Arbitration Act does not oust the jurisdiction of the civil court in landlord-tenant dispute, but leaves it to the party to the agreement to make a choice between the court or arbitration, not later than the date of submitting his first statement on the substance of the dispute-the rejection of the application filed by the appellant under Order VII Rule 11 have no bearing on the maintainability of an application under section 8 of the Arbitration Act-It is not the case of the appellant that the settlement Agreement was obtained by fraud, misrepresentation or coercion. (Para 1 to 16)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Himangi Enterprises Vs Kamaljeet Singh Ahliwalia (2017) AIR SC 5137

2. Vidya Drolia & ors. Vs Durga Trading Corporation (2020) 0 Supreme (SC) 727: 2021 2 SCC 1

3. Rashtriya Ispat Nigam Ltd. & anr. Vs Verma Transport Company(2006) 7 SCC 275

4. Ardy International (P) Ltd. Vs Inspiration Clothes & U & anr.(2006) 1 SCC 417

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

1. Heard Shri Gaurav Tripathi, along with Shri Syed Imran Ibrahim, learned counsel for the appellant and Shri H.N. Singh, learned Senior Counsel assisted by Shri Syed Fahim Ahmed, learned counsel for the opposite party.

2. The present appeal has been filed against the order dated 14 January 2021, passed by the learned Additional District Judge, Court No. 5, Gautam Budh Nagar, Noida, Uttar Pradesh in SCC Suit No. 09 of 2019 (M/s Nikon Systems Private Ltd. vs. Agtec Industries Private Ltd.). By the impugned order, the learned Court has rejected the application filed by the appellant/defendant under Section 8 of the Arbitration and Conciliation Act, 19961, declining to refer the parties to arbitration in terms of the registered rent agreement.

3. The facts giving rise in the present appeal, briefly stated, is that the opposite party, herein, is the landlord of the demised premises bearing No. 38-B, Udyog Vihar, Ecotech-II, Greater Noida, District Gautam Budh Nagar. The property was rented to the appellant for business and commercial purpose for manufacturing sheet metal and engineering goods. The parties reduced the terms of the agreement vide rent agreement dated 7 August 2018. Clause 13.5 of the rent agreement stipulated that in the event of a dispute arising between the parties, the matter would be referred

for arbitration to a panel of arbitrators. Clause 13.5 is extracted:

"Clause 13.5 - Arbitration

In the event of any dispute or difference arising out of or relating to or with reference to or in connection with Sub-Lease Deed, including the termination of the Sub-Lease Deed, the same shall be referred for arbitration to a panel of arbitrators, one to be appointed jointly by the two arbitrators so nominated, whose decision shall be final and binding on both the parties. The arbitrators so appointed shall give a reasoned award. The venue of the arbitration shall be at New Delhi and the arbitration proceedings shall be in accordance with the Indian Arbitration and Conciliation Act, 1996. The arbitration proceedings shall be conducted in English language."

4. It appears that a dispute arose between the parties with regard to payment of rent. Aggrieved, the opposite party instituted a suit before the Provincial Small Cause Court seeking eviction and arrears of rent. The appellant upon receiving the summons filed an application under Order VII Rule 11 of the Code of Civil Procedure, 19732, contending that in view of the arbitration clause, the court lacks jurisdiction, accordingly, prayed that the plaint be rejected and the parties be relegated for arbitration as per terms of the rent agreement. The application came to be rejected vide order dated 16 September 2019. Learned trial court while dismissing the application under Order VII Rule 11, placed reliance on the decision rendered by the Supreme Court in ***Himangi Enterprises vs. Kamaljeet Singh Ahliwalia3.*** Aggrieved, appellant approached this Court by filing a petition under Article 227 of the Constitution of India, being Writ Petition No. 7446 of 2019 (M/s Agtec Industries Private Ltd. vs. Nikon Systems Pvt. Ltd.) The petition came to be dismissed by this Court on 17.10.2019, upholding the order of the trial court.

5. The appellant chose not to assail the order, consequently, the judgement and order passed by this Court affirming the trial court order attained finality between the parties. Thereafter, appellant within thirty days from dismissal of the petition under Article 227, appeared and filed written statement on 5 November 2020, along with objection to an application filed by the opposite party/plaintiff under Order VIII Rule 10 for rejecting the defence of the appellant. Thereafter, appellant filed an application before the court below for referring the matter to mediation under Section 89 of the C.P.C. The parties agreed to mediation, accordingly, parties were referred to the Mediation Centre. The mediation between the parties succeeded. The Settlement Agreement was duly signed by the the parties and filed before the court. This fact is noted by the trial court in its order dated 23 December 2020. As per Settlement Agreement dated 10 December 2020, the appellant (second party to the agreement) agreed that the outstanding arrears of rent till November 2020 stands at Rs. 1,68,53,522/-. In compliance of the terms of the Settlement Agreement, appellant paid upfront an amount at Rs. 20,00,000/- towards part payment of arrears of rent from April 2020 till November 2020, at the signing of the Settlement Agreement, and vacated the demised premises.

6. It is alleged that to scuttle the Settlement Agreement and not to pay the agreed amount stipulated therein, an application under Section 8 of the Arbitration Act was filed by the appellant on 23 December 2020, raising an objection that in view of the law mandated by the Supreme Court in **Vidya Drolia and others Vs. Durga Trading Corporation4,** the rent agreement between the parties ought to be referred to arbitration in terms of the rent agreement. The

trial court by the impugned order has rejected the application. The order is under challenge.

7. Learned Counsel for the appellant submits that Section-8 application filed under the Arbitration Act was maintainable. It was filed before submitting to the jurisdiction of the trial court. It is urged that the written statement, though, filed earlier was not taken on record by the trial court. In other words, it is submitted that appellant had not submitted to the jurisdiction of the court or on the substance of the dispute. Learned counsel for the appellant has placed reliance on the Allahabad Amendment of Order-VIII Rule-11, to submit that in the event the defendant does not file defence within 30 days from the date of appearance, his defence would be struck off. Learned counsel, in support of his submission, placed reliance on the decisions rendered by the Supreme Court in **Rashtriya Ispat Nigam Ltd. and another v. Verma Transport Company5 and Ardy International (P) Ltd. v. Inspiration Clothes & U and another6.** It is sought to be urged the expression 'first statement on the substance of the dispute' contained in Section 8(1) of the Arbitration Act must be contra-distinguished with the expression 'written statement'. If an application is filed before actually filing the first statement on the substance of the dispute, the party cannot be said to have waived his right or acquiesced himself to the jurisdiction of the court.

8. Per contra, learned counsel for the respondent submits that appellant appeared and filed written statement within thirty days after the dismissal of his application under Order VII Rule 11 of C.P.C.. The appellant by raising objection/defence on the substance (merit) of the case submitted to the jurisdiction of the trial court. Admittedly, appellant thereafter got the matter settled through mediation. It is, thereafter, appellant submitted an application under Section 8 of the Arbitration Act which was not maintainable in view of the rejection of application under Order VII Rule 11 of C.P.C.. The trial court had to decree the suit in terms of the Settlement Agreement. The appeal lacks merit and is liable to be dismissed in limine.

9. In the facts of the instant case, the decisions relied upon by the learned counsel for the appellant is distinguishable. The objections were filed to the interim injunction application wherein the court was of the view that objection to an application for interim injunction would not tantamount to the defendant having waived his right or acquiesced itself to the jurisdiction of the court.

10. In the facts of the case at hand, the suit was instituted for eviction and arrears of rent, there was no occasion of passing any interim injunction. The suit had to be decided finally on merit. On receiving summons, the appellant appeared and filed an application under Order VII Rule 11 of the C.P.C. questioning the jurisdiction of the court in view of the arbitration agreement. The application under Order VII Rule 11 of the C.P.C. would not tantamount to acquiescence to the jurisdiction of the court. The application came to be rejected in view of the law applicable on the date of passing of the order. The order was carried in a petition under Article 227 of the Constitution, which came to be rejected, consequently, the order attained finality. Thereafter, the appellant appeared and filed written statement on the substance (merit) of the dispute, thus, submitting to the jurisdiction of the court. In other words, appellant waived his right under the rent agreement and acquiesced to the jurisdiction of the court. During pendency of the trial proceedings, appellant filed an application on 18 February 2020, for settlement through mediation, accordingly, parties were referred to the Mediation Centre. Parties participated in the mediation proceeding and entered into a settlement outside the court vide Settlement Agreement dated 23 December 2020. The

appellant, acted upon the settlement by making upfront payment towards rent and also vacated the premises. It is, thereafter, to thwart the Settlement Agreement, an application was filed under Section 8 for referring the dispute as per the rent agreement. In my opinion, parties have settled the dispute outside the court, the trial court was required to decree the suit in terms of the Settlement Agreement under Order XXIII Rule 3 of the C.P.C. The application under Section 8 at that stage to refer the matter to arbitration would not satisfy the condition stipulated under Section 8 of the Arbitration Act, i.e., appellant waived his right by acquiescence to the jurisdiction of the court by filing written statement— first statement on the substance of the dispute. Section 89 and Section 8 stand on different footing.

11. The ratio expressed in **Himangi** (supra) that landlord disputes governed by the provisions of Transfer of Property Act, 1882, are not arbitrable as this would be contrary to public policy. The ratio laid down came to be overruled in Vidya Drolia (supra) (decided on 14.12.2020). Relevant portion of para 49 is extracted:

"In view of the aforesaid, we overrule the ratio laid down in Himangni Enterprises and hold that landlord-tenant disputes are arbitrable as the Transfer of Property Act does not forbid or foreclose arbitration. However, landlord-tenant disputes covered and governed by rent control legislation would not be arbitrable when specific court or forum has been given exclusive jurisdiction to apply and decide special rights and obligations. Such rights and obligations can only be adjudicated and enforced by the specified court/forum, and not through arbitration."

12. Admittedly, the written statement was filed by the appellant on 5 November 2020 before the law declared in **Vidya Drolia;** Section 8 application was filed on 23 December 2020. As per Section 9 of C.P.C., civil court has jurisdiction to try all suits of civil nature unless barred explicitly or by implication. Section 8 of Arbitration Act does not oust the jurisdiction of the civil court in landlord-tenant dispute, but leaves it to the party to the agreement to make a choice between the court or arbitration, not later than the date of submitting his first statement on the substance of the dispute, notwithstanding any judgment, decree or order of any court.

13. In the backdrop of the legislative mandate the argument of the learned counsel for the appellant that the written statement was not taken on record by the court in view of the pending application under Order VIII Rule 10 filed by the opposite party, lacks merit. No such condition requiring an order of the court can be read or inferred in Section 8 of the Arbitration Act. Moment the defendant files his first statement (written statement) raising objections/defence on the substance (merit) of the dispute the embargo under Section 8 immediately operates. The order passed by the court on the application of the respondent under Order VIII Rule 10 is of no consequence. The rejection of the application filed by the appellant under Order VII Rule 11 would have no bearing on the maintainability of an application under Section 8 of the Arbitration Act in view of the language explicitly providing "notwithstanding any judgment, decree or order of the Supreme Court or any court", but with a caveat that the objection has to be raised not later than the date of submitting the first statement on substance of the dispute. In the facts of the case in hand, on 5 November 2020, the appellant filed his written statement, the application under Section 8 of the Arbitration Act filed, thereafter, was of no consequence. Further, the court would have to prima facie satisfy itself that there is a live dispute, inter se, parties. In view of the settlement reached between the parties arising from the rent agreement, the dispute, if any, no longer existed between the parties to be referred

to arbitration. The Arbitration Act facilitates settlement of dispute through arbitration with minimal interference of the court, provided there is a dispute. It is not the case of the appellant that the Settlement Agreement was obtained by fraud, misrepresentation or coercion.

14. Learned counsel for the appellant failed to point out any illegality, infirmity or jurisdictional error in the impugned order.

15. It is clarified that no other ground was pressed.

16. The appeal is, accordingly, dismissed at the admission stage.

17. No Cost.

(2021)11ILR A5
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.11.2021

BEFORE

THE HON'BLE RAJAN ROY, J.

ARBITRATION APPLICATION No. 38 of 2021

M/S Akash Engineers & Builders
...Applicants
Versus
U.P. Awas/Vikas Parishad & Ors.
...Opposite Parties

Counsel for the Applicants:
Pritish Kumar, Shantanu Gupta

Counsel for the Opposite Parties:
Ratnesh Chandra

A. Arbitration and Conciliation Act, 1996 - Section 11 - challenge to-appointment of arbitrator-the Housing Commissioner being ineligible to himself act as Arbitrator in the matter is also ineligible to appoint any Arbitrator to resolve the dispute-agreement relating to appointment of Arbitrator becomes void in view of section 12(5) of the Amendment Act-by virtue of section 12(5), if any person who falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as the arbitrator-the managing director becomes ineligible by operation of law and also becomes ineligible to nominate-the principle here applies "Qui facit per alium facit per se"-that which cannot be done directly may not be done indirectly by engaging another outside the prohibited area.(Para 1 to 22) (E-6)

List of Cases cited:

1. Perkins Eastman Architects DPC Vs. HSCC (India) Ltd.(2020) AIR SC 59.

2. TRF Ltd. Vs Energo Engineering Projects Ltd.(2017) AIR SC 3889

3. Roop Chand Vs. St. of Punj. (1963) AIR SC 1503

4. State Bank of India & anr. Vs. S.B.I. Employees (1987) 4 SCC 370

5. Agnigundata Venikata Ranga Rao Vs. Indukuru Ramachandra Reddy & ors. (2017) 7 SCC 694

(Delivered by Hon'ble Rajan Roy, J.)

1. Heard.

2. This is an application under section 11 of the Arbitration and Conciliation Act 1996 (hereinafter referred as 'Act 1996') for appointment of an Arbitrator.

3. Learned counsel for the applicant has invited attention of the court to the Arbitration Clause contained in Clause 32-C of the Agreement, a copy of which is annexed as Annexure-2 to the application.

4. The fact of the matter is that prior to filing of this application the Housing Commissioner has appointed a retired District Judge as Arbitrator to resolve the dispute.

5. Contention of the applicant's counsel in this regard is that the Housing Commissioner being ineligible to himself act as Arbitrator in the matter is also ineligible to appoint any Arbitrator in view of the law laid down by Hon'ble the Supreme Court in the case of ***Perkins Eastman Architects DPC v. HSCC (India) Ltd., AIR 2020 SC 59***. In this regard he contends that the arbitration clause in this case is similar to the arbitration clause in the said case and based on this he relies upon paras 15 and 16 of the said judgment. He also relies upon a Three Judge Bench decision of the Supreme Court in case of ***TRF Ltd. V. Energo Engineering Projects Ltd., AIR 2017 SC 3889***, which has also been considered in case of Perkins Eastman Architects DPC (supra). He also relies on paras 1, 53, 56 and 57 of the said report in support of his contention.

6. On the other hand, Sri Ratnesh Chandra, learned counsel for the opposite party says that the provisions contained in section 11(2), 11(6), 12, 13 and 14 of the Act 1996 have not been taken into consideration by Hon'ble the Supreme Court in the said decisions, therefore, in his opinion, as per the Arbitration Clause, the Housing Commissioner was well within his jurisdiction to appoint an impartial Administrator in the form of a retired District Judge and the same cannot be faulted. He in this regard refers to paras 17, 18 and 19 of his objections.

7. This court has perused the paragraphs 17 to 19 of the objections filed by the opposite party as also the decisions relied upon by the petitioner's counsel. Arbitration clause [Clause 32(c)] in the case at hand reads as under:

"Except where otherwise provided in the contract every dispute, difference or question which may at any time arise between the parties hereto or any Person claiming under them, touching or arising out or in respect of this deed or the subject matter thereof shall be referred to the sold arbitration of the person appointed by the Housing Commissioner of the Parishad. It will be no objection to any such appointment that the arbitrator so appointed is a servent of the parishad, that he had to deal with the matters to which the contract relates and that in the course of his duties as a servent of the parishad he had expressed views on all or any of the matters in dispute or difference in the event of the arbitrator to whom the matter is originally referred being transferred or vacting his officer or being unable to act for any reason he said Housing Commissioner shall appoint another person to act as arbitrator. Such person shall be entitled to proceed with the reference for the stage it was lefe be his predecessor. It is also a term of this contract that no person other than a person appointed as aforesaid should act as arbitrator and if for any reason that is not possible the matter is not to be referred to the arbitration at all. In all cases where the amount of the claim in dispute is Rs. 50,000/- (Rupees fifty thousand) and above the arbitrator shall give reasons for the award.

It is a term of the contract that the parties invoking the arbitration shall specify the dispute or disputes to be referred to arbitration together with the amount or amounts claimed in respect of each such dispute.

Subject as aforesaid, the provisions of the Arbitration Act 1940, or any statutory modification or re-enactment thereof and the rules made thereunder and for the time. being inforce shall apply to the arbitration proceedings.

The arbitrator may from time to time with the consent of the parties enlarge the time for making and publishing the award."

8. The above quoted clause contains an Arbitration Clause. As per the said clause, the Housing Commissioner of the U.P. Awas Evam Vikas Parishad is to appoint the sole Arbitrator for resolving the disputes mentioned therein.

9. The Arbitration Clause which was the subject matter of consideration by Hon'ble the Supreme Court in the case of Perkins Eastman Architects DPC (supra) reads as under :

" 24. DISPUTE RESOLUTION

24.1 Except as otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, design, drawings and instructions herein before mentioned and as to the quality of services rendered for the works or as to any other question, claim, night, matter or thing whatsoever in any way arsing out of or relating to the contract, design, drawings, specifications estimates instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof thereof shat be dealt with as mentioned hereinafter:

(i) If the Design Consultant considers any work demanded of him to be outside the requirements of the contract or disputes on any drawings, record or decision given in writing by HSCC on any matter in connection with arsing out of the contract or carrying out of the work, to be unacceptable, he shal promptly within 15 days request CGM, HSCC in writing for written instruction or decision. There upon, the CGM, HSCC shall give his written instructions or decision within a period of one month from the receipt of the Design Consultant's letter. If the CGM HSCC fails to give his instructions or decision in writing within the aforesaid period or if the Design Consultant(s) is dissatisfied with the instructions or decision of the CGM HSCC, the Design Consultants) may, within 15 days of the receipt of decision, appeal to the Director (Engg.) HSCC who shall offer an opportunity to the Design Consultant to be heard, if the latter so desires, and to offer evidence in support of his appeal The Director (Engg.1. HSCC shat give his decision within 30 days receipt of Design Consultant's appeal the Design Consultant is dissatisfied with the decision, the Design Consultant shall within a period of 30 days from receipt of this decision, give notice to the CMD, HSCC for appointment of arbitrator failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.

(ii) Except where the decision has become final, binding and conclusive in terms of sub-Para (i) above disputes or difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the CMD HSCC within 30 days form the receipt of request from the Design Consultant. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates

his office due to any reason, whatsoever another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the reference from the stage at which it was left by his predecessor. R is a term of this contract that the party invoking arbitration shal give a list of disputes with amounts claimed in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the rejection by the CMD, HSCC of the appeal it is also a term of this contract that no person other than a person appointed by such CMD, HSCC as aforesaid should act as arbitrator. It is also a term of the contract that if the Design Consultant does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from HSCC that the final bill is ready for payment, the claim of the Design Consultant shall be deemed to have been waived and absolutely barred and HSCC shall be discharged and released of all liabilities under the contract and in respect of these claims. The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modifications or re-

enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause."

10. In the said clause also the C.M.D.H.S.C.C. was required to appoint a sole Arbitrator.

11. Based on a consideration of the said clause the Supreme Court opined as under :

"It was thus held that as the Managing Director became ineligible by operation of law to act as an arbitrator and that once the identity of the Managing Director as the sole arbitrator was lost, the power to nominate someone else as an arbitrator was also obliterated. The relevant Clause in sat case had nominated the Managing Director himself to be the sole arbitrator and also empowered said Managing Director to nominate another person to act as an arbitrator. The Managing Director thus had two capacities under said Clause, the first as an arbitrator and the second as an appointing authority. In the present case we are concerned with only one capacity of the Chairman and Managing Director and that is as an appointing authority.

We thus have two categories of cases. The first, similar to the one dealt with in RTF Limited4 (AIR 2017 SC 3889) where the Managing Director himself is named as an arbitrator with an additional power to appoint any other person as an arbitrator. In the second category, the Managing Director is not to act as an arbitrator himself but as empowered or authorized to appoint any other person of his choice or discretion as an arbitrator If, in the first category of cases, the Managing Director was found incompetent, it was because of the interest that he would be said to be having in the outcome or result of the dispute. The element of invalidity would thus be directly relatable to and arise from the interest that he would be having in such outcome or decision. If that be the test, similar invalidity would always arise and spring even in the second category of cases. If the interest that he has in the outcome of the dispute, is taken to be the basis for the possibility of bias, it will always be present irrespective of whether the matter stands under the first or second category of cases. We are conscious that if such deduction is drawn from the decision of this Court in TRF Limited, all cases having clauses similar to that with which we are presently concerned, a party to the agreement would be disentitled to make any appointment of an Arbitrator on its own and it would always be available to argue that a party or an official or an authority having interest in the dispute would be disentitled to make appointment of an Arbitrator.

16. But, in our view that has to be the logical deduction from TRF Limited. Paragraph 50 of the decision shows that this Court was concerned with the issue, "whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an Arbitrator" The ineligibility referred to therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution

by having the power to appoint an arbitrator. The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter balanced by equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute

resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016) and recognised by the decision of this Court in TRF Ltd."

12. From a reading of the said judgment it is evident that various earlier decisions as also the provisions of the Act 1996 have been considered.

13. In the aforesaid decision Supreme Court has also considered the earlier decision in TRF Ltd. (supra). In para-1 of the T.R.F. Ltd. (supra) the Supreme Court has spelt out the question which fell for its consideration. It reads as under:

"In this batch of appeals, by special leave, the seminal issues that emanate for consideration are; whether the High Court, while dealing with the applications under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for brevity, the Act"), is justified to repel the submissions of the appellants that once the person who was required to arbitrate upon the disputes arisen under the terms and conditions of the contract becomes ineligible by operation of law, he would not be eligible to nominate a person as an arbitrator, and second, a plea that pertains to statutory disqualification of the nominated arbitrator can be raised before the court in application preferred under Section 11(6) of the Act, for such an application is not incompetent. For the sake of clarity, convenience and apposite appreciation, we shall state the facts from Civil Appeal No. 5306 of 2017."

14. In para 6 the submissions have been noticed one of which was that the relevant clause in the Agreement relating to appointment of Arbitrator has become void in view of section 12(5) of the Amendment Act, for the Managing Director having statutorily become ineligible, cannot act as an Arbitrator and that acts as a disqualification and in such a situation to sustain the stand, that is, the nominees have been validely appointed as Arbitrators would bring in an anomalous situation which is not countenanced in law. Once the owner/employer has been declared disqualified in law, a nominee by the owner to Arbitrate upon is legally unacceptable.

15. As the Arbitration Clause which was the subject matter of the said proceedings before the supreme court provided for the Managing Director or his nominee to be the sole Arbitrator in the event of a dispute, the Supreme Court of India held in paras 53, 54, 55, 56 and 57 as under:

"53. First, we shall deal with Clause (d). There is no quarrel that by virtue of Section 12(5) of the Act, if any person who falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as the arbitrator. There is no doubt and cannot be, for the language employed in the Seventh Schedule, the Managing Director of the Corporation has become ineligible by operation of law. It is the stand of the learned senior counsel for the appellant that once the Managing Director becomes ineligible he also becomes ineligible to nominate. Refuting the said stand, it is canvassed by the learned senior counsel for the respondent that the ineligibility cannot extend to a nominee if he is not from the Corporation and more so when there is apposite and requisite disclosure. We think it appropriate to make it clear that in the case at hand we are neither concerned with the disclosure nor objectivity nor impartiality nor any such other circumstance. We are singularly concerned with the issue, whether the Managing Director, after becoming ineligible by operation of law, is he

still eligible to nominate an arbitrator. At the cost of repetition, we may state that when there are two parties, one may nominate an arbitrator and the other may appoint another. That is altogether a different situation. If there is a clause requiring the parties to nominate their respective arbitrator, their authority to nominate cannot be questioned. What really in that circumstance can be called in question is the procedural compliance and the eligibility of their arbitrator depending upon the norms provided under the Act and the Schedules appended thereto. But, here is a case where the Managing Director is the "named sole arbitrator" and he has also been conferred with the power to nominate one who can be the arbitrator in his place. Thus, there is subtle distinction. In this regard, our attention has been drawn to a two-judge Bench decision in State of Orissa and others v. Commissioner of Land Records and Settlement, Cuttack and others. In the said case, the question arose can the Board of Revenue revise the order passed by its delegate. Dwelling upon the said proposition, the Court held:

"25. We have to note that the Commissioner when he exercises power of the Board delegated to him under Section 33 of the Settlement Act, 1958, the order passed by him is to be treated as an order of the Board of Revenue and not as that of the Commissioner in his capacity as Commissioner. This position is clear from two rulings of this Court to which we shall presently refer. The first of the said rulings is the one decided by the Constitution Bench of this Court in Roop Chand v. State of Punjab (AR 1963 SC 1503), In that case, it was held by the majority that where the State Government had, under Section 41(1) of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948, delegated its appellate powers vested in it under Section 21(4) to an officer, an order passed by such an officer was an order passed by the State Government itself and not an order passed by any officer under this Act" within Section 42 and was not revisable by the State Government. It was pointed out that for the purpose of exercise of powers of revision by the State under Section 42 of that Act, the order sought to be revised must be an order passed by an officer in his own right and not as a delegate of the State. The State Government was, therefore, not entitled under Section 42 to call for the records of the case which was disposed of by an officer acting as its delegate."

54. Be it noted in the said case, reference was made to Behan Kunj Sahkan Awas Samiti v. State of U.P. , which followed the decision in Roop Chand v. State of Punjab , is seemly to note here that said principle has been followed in Chairman, Indore Vikas Pradhikaran (AIR 2007 SC 2458) (supra).

55. Mr. Sundaram, has strongly relied on Firm of Pratapchand Nopaji (AIR 1975 SC 1223, Para 8(supra). In the said case, the three-judge Bench appled the maxim "Qui facit per alium facit per se". We may profitably reproduce the passage:

"9. ... The principle which would apply, if the objects are struck by Section 23 of the Contract Act, is embodied in the maxim "Qui facit per alium facit per se" (What one does through another is done by oneself). To put & in another form that which cannot be done directly may not be done indirectly by engaging another outside the prohibited area to do the legal act within the prohibited area. It is immaterial whether, for the doing of such an illegal act, the agent employed is given the wider powers or authority of the "pucca adatia", or, as the High Court had held, he is clothed with the powers of an ordinary commission agent only."

56. The aforesaid authorities have been commended to us to establish the proposition that if the nomination of an arbitrator by an ineligible arbitrator is allowed, it would tantamount to carrying on the proceeding of arbitration by himself. According to learned counsel for the appellant, ineligibility

strikes at the root of his power to arbitrate or get it arbitrated upon by a nominee.

57. In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our

analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view expressed by the High Court is not sustainable and we say so."

16. In view of the above decisions it is evident that even as per the arbitration clause which is involved in this case, although the Housing Commissioner was required to appoint the sole Arbitrator, but in view of the law discussed hereinabove and the provisions of the Act 1996 he himself being ineligible to arbitrate in a matter he ipso facto becomes ineligible for appointing an Arbitrator to resolve the dispute for the reasons already detailed in the above mentioned decisions.

17. Although after the amendment of 2015 in the Act 1996 this Court is only required to see the Arbitration Clause, but considering the contentions raised it was necessary to deal with the same as has been done hereinabove.

18. At this stage Sri Ratnesh Chandra submitted that he may be granted a certificate under Article 134A read with Article 133 of the Constitution of India. Contention of Sri Chandra is that the bar contained in Clause 3 of Article 133 is not attracted in this case in view of the subsequent insertion of Article 134A. He also submits that the judgment in T.R.F.'s case is not applicable as in the said case the Managing Director was himself empowered to act as sole Arbitrator or to appoint a nominee, whereas it is not so in this case. Sri Pritish Kumar, learned counsel for the applicant disagrees with this proposition and says that in view of Clause 3 of Article 133 of the Constitution of India State Appeal will not lie and the request of the learned counsel for the opposite party is misconceived.

19. In view of decision of the Supreme Court reported in (1987) 4 SCC 370, State Bank of India & anr. v. S.B.I. Employees' Union & anr., and the decision reported in (2017) 7 SCC 694, Agnigundala Venkata Ranga Rao v. Indukuru Ramachandra Reddy & ors., as this matter is being considered by a Single Judge Bench, therefore, in view of the Article 133(3) of the Constitution, Article 134A is not attracted.

20. Now in view of the aforesaid the name of Hon'ble Mr. Justice Pankaj Naqvi (Retd.) R/o Bungalow No. 24, Behind Sai Mandir, Drumund Road, Allahabad, is proposed for appointment as Arbitrator.

21. Parties have agreed for arbitral proceedings for taking place at Lucknow.

22. Let a copy of the pleadings on record be sent to Hon'ble Mr. Justice Pankaj Naqvi (Retd.) for eliciting his disclosure in terms of

Section 11(8) read with Section 12(1) of the Act, 1996 and Schedule VI and VII as amended by Act 2015, appended thereto, as also his consent for appointment as an arbitrator for resolving the dispute.

23. Needless to say that fees shall be payable to the Arbitrator as per the Fourth Schedule, read with the proviso to section 11(3)(A) of the Act 1996.

24. Steps to be taken by the applicant to facilitate the aforesaid.

25. List this case on 06.12.2021 for further proceedings.

(2021)11ILR A12
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.12.2021

BEFORE

THE HON'BLE RAJAN ROY, J.

ARBITRATION APPLICATION No. 39 of 2021

M/S Akash Engineers & Builders
...Applicants
Versus
U.P. Awas/Vikas Parishad & Ors.
...Opposite Parties

Counsel for the Applicants:
Pritish Kumar, Shantanu Gupta

Counsel for the Opposite Parties:
Ratnesh Chandra

A. Arbitration and Conciliation Act, 1996-Section 11-challenge to-appointment of arbitrator-the Housing Commissioner being ineligible to himself act as Arbitrator in the matter is also ineligible to appoint any Arbitrator to resolve the dispute-agreement relating to appointment of Arbitrator becomes void in view of section 12(5) of the Amendment Act-by virtue of section 12(5), if any person who falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as the arbitrator-the managing director becomes ineligible by operation of law and also becomes ineligible to nominate-the principle here applies "Qui facit per alium facit per se"-that which cannot be done directly may not be done indirectly by engaging another outside the prohibited area.(Para 1 to 22) (E-6)

List of Cases cited:

1. Perkins Eastman Architects DPC Vs. HSCC (India) Ltd.(2020) AIR SC 59.

2. TRF Ltd. Vs Energo Engineering Projects Ltd.(2017) AIR SC 3889

3. Roop Chand Vs. St. of Punj. (1963) AIR SC 1503

4. S.B.I. & anr. Vs. S.B.I. Employees (1987) 4 SCC 370
5. Agnigundata Venikata Ranga Rao Vs. Indukuru Ramachandra Reddy & ors. (2017) 7 SCC 694

(Delivered by Hon'ble Rajan Roy, J.)

1. Heard.

2. This is an application under section 11 of the Arbitration and Conciliation Act 1996 (hereinafter referred as 'Act 1996') for appointment of an Arbitrator.

3. Learned counsel for the applicant has invited attention of the court to the Arbitration Clause contained in Clause 32-C of the Agreement, a copy of which is annexed as Annexure-2 to the application.

4. The fact of the matter is that prior to filing of this application the Housing Commissioner has appointed a retired District Judge as Arbitrator to resolve the dispute.

5. Contention of the applicant's counsel in this regard is that the Housing Commissioner being ineligible to himself act as Arbitrator in

the matter is also ineligible to appoint any Arbitrator in view of the law laid down by Hon'ble the Supreme Court in the case of ***Perkins Eastman Architects DPC v. HSCC (India) Ltd., AIR 2020 SC 59.*** In this regard he contends that the arbitration clause in this case is similar to the arbitration clause in the said case and based on this he relies upon paras 15 and 16 of the said judgment. He also relies upon a Three Judge Bench decision of the Supreme Court in case of ***TRF Ltd. V. Energo Engineering Projects Ltd., AIR 2017 SC 3889,*** which has also been considered in case of Perkins Eastman Architects DPC (supra). He also relies on paras 1, 53, 56 and 57 of the said report in support of his contention.

6. On the other hand, Sri Ratnesh Chandra, learned counsel for the opposite party says that the provisions contained in section 11(2), 11(6), 12, 13 and 14 of the Act 1996 have not been taken into consideration by Hon'ble the Supreme Court in the said decisions, therefore, in his opinion, as per the Arbitration Clause, the Housing Commissioner was well within his jurisdiction to appoint an impartial Administrator in the form of a retired District Judge and the same cannot be faulted. He in this regard refers to paras 17, 18 and 19 of his objections.

7. This court has perused the paragraphs 17 to 19 of the objections filed by the opposite party as also the decisions relied upon by the petitioner's counsel. Arbitration clause [Clause 32(c)] in the case at hand reads as under:

"Except where otherwise provided in the contract every dispute, difference or question which may at any time arise between the parties hereto or any Person claiming under them, touching or arising out or in respect of this deed or the subject matter thereof shall be referred to the sold arbitration of the person appointed by the Housing Commissioner of the Parishad. It will be no objection to any such appointment that the arbitrator so appointed is a servent of the parishad, that he had to deal with the matters to which the contract relates and that in the course of his duties as a servent of the parishad he had expressed views on all or any of the matters in dispute or difference in the event of the arbitrator to whom the matter is originally referred being transferred or vacting his officer or being unable to act for any reason he said Housing Commissioner shall appoint another person to act as arbitrator. Such person shall be entitled to proceed with the reference for the stage it was lefe be his predecessor. It is also a term of this contract that no person other than a person appointed as aforesaid should act as arbitrator and if for any reason that is not possible the matter is not to be referred to the arbitration at all. In all cases where the amount of the claim in dispute is Rs. 50,000/- (Rupees fifty thousand) and above the arbitrator shall give reasons for the award.

It is a term of the contract that the parties invoking the arbitration shall specify the dispute or disputes to be referred to arbitration together with the amount or amounts claimed in respect of each such dispute.

Subject as aforesaid, the provisions of the Arbitration Act 1940, or any statutory modification or re-enactment thereof and the rules made thereunder and for the time. being inforce shall apply to the arbitration proceedings.

The arbitrator may from time to time with the consent of the parties enlarge the time for making and publishing the award."

8. The above quoted clause contains an Arbitration Clause. As per the said clause, the Housing Commissioner of the U.P. Awas Evam Vikas Parishad is to appoint the sole Arbitrator for resolving the disputes mentioned therein.

9. The Arbitration Clause which was the subject matter of consideration by Hon'ble the

Supreme Court in the case of Perkins Eastman Architects DPC (supra) reads as under :

" 24. DISPUTE RESOLUTION

24.1 Except as otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, design, drawings and instructions herein before mentioned and as to the quality of services rendered for the works or as to any other question, claim, night, matter or thing whatsoever in any way arsing out of or relating to the contract, design, drawings, specifications estimates instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof thereof shat be dealt with as mentioned hereinafter:

(i) If the Design Consultant considers any work demanded of him to be outside the requirements of the contract or disputes on any drawings, record or decision given in writing by HSCC on any matter in connection with arsing out of the contract or carrying out of the work, to be unacceptable, he shal promptly within 15 days request CGM, HSCC in writing for written instruction or decision. There upon, the CGM, HSCC shall give his written instructions or decision within a period of one month from the receipt of the Design Consultant's letter. If the CGM HSCC fails to give his instructions or decision in writing within the aforesaid period or if the Design Consultant(s) is dissatisfied with the instructions or decision of the CGM HSCC, the Design Consultants) may, within 15 days of the receipt of decision, appeal to the Director (Engg.) HSCC who shall offer an opportunity to the Design Consultant to be heard, if the latter so desires, and to offer evidence in support of his appeal The Director (Engg.1. HSCC shat give his decision within 30 days receipt of Design Consultant's appeal the Design Consultant is dissatisfied with the decision, the Design Consultant shall within a period of 30 days from receipt of this decision, give notice to the CMD, HSCC for appointment of arbitrator failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.

(ii) Except where the decision has become final, binding and conclusive in terms of sub-Para (i) above disputes or difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the CMD HSCC within 30 days form the receipt of request from the Design Consultant. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates

his office due to any reason, whatsoever another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the reference from the stage at which it was left by his predecessor. R is a term of this contract that the party invoking arbitration shal give a list of disputes with amounts claimed in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the rejection by the CMD, HSCC of the appeal it is also a term of this contract that no person other than a person appointed by such CMD, HSCC as aforesaid should act as arbitrator. It is also a term of the contract that if the Design Consultant does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from HSCC that the final bill is ready for payment, the claim of the Design Consultant shall be deemed to have been waived and absolutely barred and HSCC shall be discharged and released of all liabilities under the contract and in respect of these claims. The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modifications or re-enactment thereof and the rules made thereunder and for the time being in force shall

apply to the arbitration proceeding under this clause."

10. In the said clause also the C.M.D.H.S.C.C. was required to appoint a sole Arbitrator.

11. Based on a consideration of the said clause the Supreme Court opined as under :

"It was thus held that as the Managing Director became ineligible by operation of law to act as an arbitrator and that once the identity of the Managing Director as the sole arbitrator was lost, the power to nominate someone else as an arbitrator was also obliterated. The relevant Clause in sat case had nominated the Managing Director himself to be the sole arbitrator and also empowered said Managing Director to nominate another person to act as an arbitrator. The Managing Director thus had two capacities under said Clause, the first as an arbitrator and the second as an appointing authority. In the present case we are concerned with only one capacity of the Chairman and Managing Director and that is as an appointing authority.

We thus have two categories of cases. The first, similar to the one dealt with in RTF Limited4 (AIR 2017 SC 3889) where the Managing Director himself is named as an arbitrator with an additional power to appoint any other person as an arbitrator. In the second category, the Managing Director is not to act as an arbitrator himself but as empowered or authorized to appoint any other person of his choice or discretion as an arbitrator If, in the first category of cases, the Managing Director was found incompetent, it was because of the interest that he would be said to be having in the outcome or result of the dispute. The element of invalidity would thus be directly relatable to and arise from the interest that he would be having in such outcome or decision. If that be the test, similar invalidity would always arise and spring even in the second category of cases. If the interest that he has in the outcome of the dispute, is taken to be the basis for the possibility of bias, it will always be present irrespective of whether the matter stands under the first or second category of cases. We are conscious that if such deduction is drawn from the decision of this Court in TRF Limited, all cases having clauses similar to that with which we are presently concerned, a party to the agreement would be disentitled to make any appointment of an Arbitrator on its own and it would always be available to argue that a party or an official or an authority having interest in the dispute would be disentitled to make appointment of an Arbitrator.

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are two parties, one may nominate an arbitrator and the other may appoint another. That is altogether a different situation. If there is a clause requiring the parties to nominate their respective arbitrator, their authority to nominate cannot be questioned. What really in that circumstance can be called in question is the procedural compliance and the eligibility of their arbitrator depending upon the norms provided under the Act and the Schedules appended thereto. But, here is a case where the Managing Director is the "named sole arbitrator" and he has also been conferred with the power to nominate one who can be the arbitrator in his place. Thus, there is subtle distinction. In this regard, our attention has been drawn to a two-judge Bench decision in State of Orissa and others v. Commissioner of Land Records and Settlement, Cuttack and others. In the said case, the question arose can the Board of Revenue revise the order passed by its delegate. Dwelling upon the said proposition, the Court held:

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57. In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our

analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view expressed by the High Court is not sustainable and we say so."

16. In view of the above decisions it is evident that even as per the arbitration clause which is involved in this case, although the Housing Commissioner was required to appoint the sole Arbitrator, but in view of the law discussed hereinabove and the provisions of the Act 1996 he himself being ineligible to arbitrate in a matter he *ipso facto* becomes ineligible for appointing an Arbitrator to resolve the dispute for the reasons already detailed in the above mentioned decisions.

17. Although after the amendment of 2015 in the Act 1996 this Court is only required to see the Arbitration Clause, but considering the contentions raised it was necessary to deal with the same as has been done hereinabove.

18. At this stage Sri Ratnesh Chandra submitted that he may be granted a certificate under Article 134A read with Article 133 of the Constitution of India. Contention of Sri Chandra is that the bar contained in Clause 3 of Article 133 is not attracted in this case in view of the subsequent insertion of Article 134A. He also submits that the judgment in T.R.F.'s case is not applicable as in the said case the Managing Director was himself empowered to act as sole Arbitrator or to appoint a nominee, whereas it is not so in this case. Sri Pritish Kumar, learned counsel for the applicant disagrees with this proposition and says that in view of Clause 3 of Article 133 of the Constitution of India State Appeal will not lie and the request of the learned counsel for the opposite party is misconceived.

19. In view of decision of the Supreme Court reported in (1987) 4 SCC 370, State Bank of India & anr. v. S.B.I. Employees' Union & anr., and the decision reported in (2017) 7 SCC 694, Agnigundala Venkata Ranga Rao v. Indukuru Ramachandra Reddy & ors., as this matter is being considered by a Single Judge Bench, therefore, in view of the Article 133(3) of the Constitution, Article 134A is not attracted.

20. Now in view of the aforesaid the name of Hon'ble Mr. Justice Pankaj Naqvi (Retd.) R/o Bungalow No. 24, Behind Sai Mandir, Drumund Road, Allahabad, is proposed for appointment as Arbitrator.

21. Parties have agreed for arbitral proceedings for taking place at Lucknow.

22. Let a copy of the pleadings on record be sent to Hon'ble Mr. Justice Pankaj Naqvi (Retd.) for eliciting his disclosure in terms of Section 11(8) read with Section 12(1) of the Act, 1996 and Schedule VI and VII as amended by Act 2015, appended thereto, as also his consent for appointment as an arbitrator for resolving the dispute.

23. Needless to say that fees shall be payable to the Arbitrator as per the Fourth Schedule, read with the proviso to section 11(3)(A) of the Act 1996.

24. Steps to be taken by the applicant to facilitate the aforesaid.

25. List this case on 06.12.2021 for further proceedings.

(2021)11ILR A19
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.07.2021

BEFORE

THE HON'BLE SANJAY KUMAR SINGH, J.

Criminal Misc. Bail Application No. 42092 of 2020

Dheeraj Kumar Shukla ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Rajiv Lochan Shukla, Sri Arya Suman Pandey

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

(A) Criminal Law - Narcotic Drugs and Psychotropic Substances Act, 1985 - Section 8/20,35,37,50,54 - The Code of criminal procedure, 1973 - Section 439 - presumption shall be drawn against the accused unless and until the contrary is proved - Possession is the core ingredient to be established before the accused are made criminally liable - Physical Possession, Constructive Possession and Conscious Possession - Recording of finding in terms of Section 37 of N.D.P.S. Act is a *sine qua non* for granting bail under N.D.P.S. Act - discretion is required to be exercised judiciously and judicially - proper administration of the criminal justice delivery system, requires balancing the rights of the accused and the prosecution.(Para - 12,13,17,19)

Recovery of huge quantity of Ganja (157.570 Kgs) - Commercial quantity (20 kg) - applicant was apprehended at the spot.

HELD:- Conscious and constructive possession of the accused applicant over the recovered Ganja is apparent on record . No prior ill-will or enmity of the applicant with the police personnel concerned. Co-accused obtained bail by misrepresentation of facts, other accused on same footing are not entitled to bail on the ground of parity. No reasonable ground in terms of Section 37 of the N.D.P.S. Act to hold that applicant is not guilty of an offence and he is not likely to commit any offence while on bail. (Para - 13,14,17,20)

Bail application rejected. (E-7)

List of Cases cited:-

1. U.O.I. Vs Rattan Mallik @ Habul, 2009 (1) SCC (Crl) 831

2. U.O.I. Vs Ram Samujh, 1999 (9) SCC 429

3. U.O.I. Vs Shiv Shankar Kesari, (2007) 7 SCC 798

4. St. of Kerala Etc. Vs Rajesh Etc., AIR 2020 Supreme Court 721

5. U.O.I. Vs Prateek Shukla, AIR, 2021 SC 1509

6. Megh Singh Vs St. of Punj., 2003 CRI. L.J. 4329

7. Gunwantlal Vs The St. of M.P., AIR 1972 SC 1756

8. Health Vs Drown, (1972) (2) All ER 561 (HL)

9. Sullivan Vs Earl of Caithness, 1976 (1) All ER 844 (QBD)

10. Madan Lal & anr. Vs St. of H.P., 2003 (6) SCALE 483

11. Dehal Singh Vs St. of H.P., 2011 (72) ACC 661

12. Sonu Vs Sonu Yadav & anr., AIR 2021 SC 201

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

1. Keeping in view the Pandemic (COVID-19), the case is taken up through video conferencing.

2. Heard Mr. Rajiv Lochan Shukla, learned counsel for the applicant and Mr. Virendra Kumar Maurya, learned Additional Government Advocate assisted by Mr. Prashant Kumar Singh, learned Brief holder appearing on behalf of State of U.P. through video conferencing and perused the material placed on record.

3. By means of this application, the applicant, who is involved in Case Crime No. 0532 of 2020, under sections 8/20 of Narcotic Drugs & Psychotropic Substances Act, police station Jhunsi, district Prayagraj, is seeking enlargement on bail during the pendency of trial.

Facts

4. In nutshell, the facts which led to the prosecution of accused are that on 23.6.2020 informant (Sub Inspector Ranendra Kumar Singh, UP S.T.F. field Unit Prayagraj) lodged First Information Report at police station Jhusi, District Prayagraj against four accused persons, namely, Dhiraj Kumar Shukla (applicant), Praveen Maurya alias Punit Maurya, Dhiraj Maurya and Rishabh Kumar alleging *inter alia* that on 23.6.2020, he along with other police personnel were busy in the city area for collecting information regarding illicit trafficking of narcotics substance and criminals declared as wanted, where he received information through informer that some persons are about to come at Jhunsi near Trivenipuram gate on vehicle with illegal and suspicious goods, if quick action be taken, they can be caught. On such information, he after giving information to higher officers proceeded for the place of occurrence along with informer and other police personnel and reached at Trivenipuram gate, Jhunsi through Nyay Nager Crossing. Effort was made to persuade the local persons to become witness, but due to fear no body became ready. Thereafter, they walked towards railway crossing and reached on the bridge and started waiting there. After some time, they saw that two vehicles white coloured Swift Dzire car and grey coloured Honda City car were coming. On the indication of informer, said vehicles were caught by the police team using necessary force and persons sitting in the vehicles were pulled out. On questioning, they disclosed about transportation of illegal Ganja in the said vehicles. On interrogation, the apprehended accused persons, who were sitting in Honda City car, disclosed their names as Praveen Maurya alias Punit Maurya (owner), Rishabh Kumar (Driver) and Dhiraj Maurya, whereas person, who was driving Swift Dzire car disclosed his name as Dheeraj Kumar Shukla (applicant). The accused were enlightened about their legal rights to be searched before a Gazetted Officer, to which they declined and gave their consent saying that informant may take their search. Accordingly, they were searched, but no contraband was recovered from their personal search, except mobile phones and some cash amount etc. as mentioned in the recovery memo. On taking search of aforesaid vehicles, total 92.410 Kgs. of Ganja were recovered from the dicky of Honda City car bearing No. MH 04 AF 0076 and 65.160 Kgs. of Ganja were recovered from the dicky of Swift Dzire car bearing No. UP 70 EW 0246. As such, total 157.570 Kgs of illegal Ganja have been recovered in this case. Accused persons could not show the authorization for keeping and transporting the same. Separate samples of about 100-100 grams each of Ganja were taken out from each packets, thereafter samples and remaining Ganja as well as other recovered materials were separately sealed in white cloths. Specimens of seal were prepared. Accused persons disclosed that they have been engaged in the trafficking of Ganja since last several years. They also disclosed that they purchased the Ganja from one Hari, resident of Kodpad, Odisha and sell the same on higher price in Prayagraj. Both the aforesaid vehicles were also seized. Contents of recovery memo were explained to the accused persons and after taking

their signature, copy of recovery memo was handed over to them. On the basis of aforesaid recovery, a case was registered against the accused persons at Case Crime No. 0532 of 2020, under section 8/20 of N.D.P.S. Act, police station Jhunsi, district Prayagraj.

Submissions on behalf of the applicant

5. Learned counsel for the applicant argued that as per the prosecution case, total 157.570 Kgs illegal Ganja are said to have been recovered in this case, out of which 92.410 Kgs Ganja were recovered from the dicky of Honda City car, which was driven by the co-accused Rishabh Kumar and 65.160 Kgs Ganja were recovered from the dicky of Swift Dzire car, which was driven by Dheeraj Kumar Shukla (applicant). The co-accused Rishabh Kumar, who was the driver of the Honda City car, has already been granted bail by co-ordinate Bench of this Court vide order dated 31.05.2021 in Criminal Misc. Bail Application No.17226 of 2021, therefore the applicant is also entitled to be released on bail on the ground of parity. It is next submitted by the learned counsel for the applicant that Investigating Officer has not followed the procedure of N.D.P.S. Act. The applicant is Diploma holder in Electrical Engineering and has been falsely implicated. Charge sheet has been filed in this case on 16.8.2021. Applicant has no criminal antecedent and is in jail since 24.6.2020. Lastly, it is prayed to release the applicant on bail on the ground of parity of bail order dated 31.05.2021 of co-accused Rishabh Kumar.

Submissions on behalf of the State of U.P.

6. Per contra, learned Additional Government Advocate appearing on behalf of Sate of UP/opposite party, vehemently opposed the aforesaid submissions of learned counsel for applicant by contending that recovered 157.570 Kgs Ganja in this case, is much more than commercial quantity, out of which 65.160 Kgs Ganja were recovered from the dicky of Swift Dzire car occupied by the applicant. The accused applicant was driver of Swift Dzire car and was having conscious possession of aforesaid recovery as well as constructive possession over recovered 65.160 Kgs Ganja from his car. There is no enmity between the applicant and police team, therefore, allegation of false implication of the applicant is without any basis and against the evidence on record. The huge quantity of 157.570 Kgs Ganja cannot be planted. The mandatory requirements as provided under the Narcotics Drugs & Psychotropic Substances Act have been followed by the officer concerned. Samples were sent to laboratory for chemical analysis. Applicant is also involved in a case being case crime no.598 of 2020, under Section 2/3 U.P. Gangsters and Anti Social Activities (Prevention) Act. Sonu Shukla (brother of applicant) is owner of the vehicle Swift Dzire car in question, who has also made an accused in this case and has been arrested on 03.04.2021. Swift Dzire car bearing no. U.P.70 EW 0246 has been seized by the police, thereafter a letter has been sent to the District Magistrate for initiating confiscation proceedings. So far as bail order dated 31.05.2021 of co-accused Rishabh Shukla is concerned, it is submitted by learned A.G.A. that argument advanced on behalf of State of UP has neither been considered nor noted in the order dated 31.05.2021 and the same has been passed without considering the provisions of section 37 of Narcotics Drugs & Psychotropic Substances Act accepting wrong submission on behalf of co-accused that recovered Ganja is less than commercial quantity and the same was not sent for chemical examination, therefore no case of parity is made out and bail application of the applicant is liable to be rejected.

Now rival submissions fall for analysis.

Issue

7. After having heard the learned counsel for the parties, I find that one of the issue that arises for consideration before this Court is *"as to whether applicant is entitled to be released on bail only on the ground of parity of bail order dated 31.05.2021 of co-accused Rishabh Kumar".*

8. Before delving into the matter it would be relevant to quote the relevant extract of bail order dated 31.05.2021 of co-accused Rishabh Kumar passed in Criminal Misc. Bail Application No.17226 of 2021, which is being reproduced herein-below:

"This matter is listed for hearing through video conferencing. Link has been sent to the respective learned counsels. Learned Counsel for the applicant and learned A.G.A. for the State are connected through the link.

Heard learned counsel for the applicant as well as learned A.G.A for the State and perused the record.

By means of this application, the applicant who is involved in Case Crime No.325 of 2020, under Section 8/20 N.D.P.S. Act, Police Station Jhunsi, District Prayagrj, is seeking enlargement on bail during the trial.

Submission made by learned counsel for the applicant is that the applicant has been falsely implicated in the present case. Learned counsel for the applicant submits that nothing incriminating materials have been recovered from the possession of the applicant at the time of recovery. He further submits that the police has falsely shown the recovery of Ganja from the possession of the applicant and the alleged recovery of Ganja was also not sent for chemical examination. The applicant has no criminal history. He further submits that the alleged recovery of Ganja is less than the commercial quantity. The applicant is nothing to do with the aforesaid offence. The applicant is languishing in jail since 23.06.2020.

Learned counsel for the informant as well as learned A.G.A opposed the prayer for bail but could not dispute the aforesaid facts and the legal submissions as argued by the learned counsel for the applicant.

Keeping in view the nature of the offence, evidence, complicity of the accused and submissions of learned counsel for the parties, I am of the view that the applicant has made out a case for bail.

Let the applicant Rishabh Kumar, who is involved in Case Case Crime No.325 of 2020, under Section 8/20 N.D.P.S. Act, Police Station - Jhunsi, District Prayagrj, be released on bail on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned subject to following conditions. Further, before issuing the release order, the sureties be verified....."

Section 37 of N.D.P.S. Act

9. There is no dispute that commercial quantity of Ganja is 20 Kgs. Recovered and seized total 157.570 Kgs. of Ganja (recovery of 92.410 Kgs. of Ganja from Honda City car and 65.160 Kgs. of Ganja from Swift Dzire car) in this case are much more than the commercial quantity, therefore, provisions of section 37 of Narcotics Drugs & Psychotropic Substances Act are attracted in this case, which is in addition to section 439 of Cr.P.C. and mandatory in nature.

10. In view of Section 37 of the N.D.P.S. Act, before granting bail for the offence under N.D.P.S. Act twin conditions as provided under Section 37(1)(b) (i) and (ii) have to be satisfied. Section 37 of the N.D.P.S. Act is quoted herein below:

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

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

(b) no person accused of an offence punishable for [offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless-

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

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

11. On several occasions, the Apex Court has considered the issue relating to provisions of Section 37 of the N.D.P.S. Act and after wholesome treatment laid down guidelines in this regards, which would be useful to quote herein-below:

i. The expression 'reasonable grounds' has not been defined in the N.D.P.S. Act, but the Apex Court in the case of **Union of India Vs. Rattan Mallik @ Habul, 2009 (1) SCC (Crl) 831**, has settled the expression "reasonable grounds". Relevant paragraphs no. 12, 13 and 14 are quoted herein below:

"12.It is plain from a bare reading of the non-obstante clause in the Section and sub-section (2) thereof that the power to grant bail to a person accused of having committed offence under the NDPS Act is not only subject to the limitations imposed under Section 439 of the Code of Criminal Procedure, 1973, it is also subject to the restrictions placed by sub-clause (b) of sub- section (1) of Section 37 of the NDPS Act. Apart from giving an opportunity to the Public Prosecutor to oppose the application for such release, the other twin conditions viz; (i) the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail, have to be satisfied. It is manifest that the conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty, has to be based on "reasonable grounds".

13. The expression `reasonable grounds' has not been defined in the said Act but means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence he is charged with. The reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. [Vide Union of India Vs. Shiv Shanker Kesari, 2007(7) SCC 798] Thus, recording of satisfaction on both the aspects, noted above, is sine qua non for granting of bail under the NDPS Act.

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

ii. In case of **Union of India Vs. Ram Samujh 1999 (9) SCC 429,** Apex Court has made following observations in paragraph 7 of the said judgment, which are reproduced herein below:-

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

"24.With deep concern, we may point out that the organised activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have led to drug addiction among a sizeable section of the public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming proportion in the recent years. Therefore, in order to effectively control and eradicate this proliferating and booming devastating menace, causing deleterious effects and deadly impact on the society as a whole, the Parliament in the wisdom has made effective provisions by introducing this Act 81 of 1985 specifying mandatory minimum imprisonment and fine."

iii. In **Union of India Vs. Shiv Shankar Kesari, (2007) 7 SCC 798**, Apex Court elaborated and explained the conditions for granting of bail as provided under Section 37 of the Act. Relevant paragraph Nos. 6 and 7 are extracted here in below :

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

7. The expression used in Section 37 (1)(b) (ii) is "reasonable grounds". The expression means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence charged and this reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged."

iv. In recent decision of Apex Court in **State of Kerala Etc. Vs. Rajesh Etc. AIR 2020 Supreme Court 721,** Apex Court again considered the scope of Section 37 of N.D.P.S. Act and relying upon earlier decision in Ram Samujh (Supra) held as under:

"20. The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 of the CrPC, but is also subject to the limitation placed by Section 37 which commences with non-obstante clause. The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to

oppose the application; and the second, is that the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates.

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

v. The Apex Court in **Union of India vs Prateek Shukla, AIR, 2021 SC 1509** has held that merely recording the submissions of the parties does not amount to an indication of a judicial or, for that matter, a judicious application of mind. The provisions of Section 37 of the N.D.P.S. Act provide the legal norms which have to be applied in determining whether a case for grant of bail has been made out. The relevant paragraph nos. 11,12 and 13 of the said judgment are reproduced herein under :

"11. Ex facie, there has been no application of mind by the High Court to the rival submissions and, particularly, to the seriousness of the allegations involving an offence punishable under the provisions of the NDPS Act. Merely recording the submissions of the parties does not amount to an indication of a judicial or, for that matter, a judicious application of mind by the Single Judge of the High Court to the basic question as to whether bail should be granted. The provisions of Section 37 of the NDPS Act provide the legal norms which have to be applied in determining whether a case for grant of bail has been made out. There has been a serious infraction by the High Court of its duty to apply the law. The order granting bail is innocent of an awareness of the legal principles involved in determining whether bail should be granted to a person accused of an offence under the NDPS Act. The contention of the respondent that he had resigned from the Company, Altruist Chemicals Private Limited, must be assessed with reference to the allegations in the criminal complaint which has been filed in the Court of the District and Sessions Judge. Gautam Budh Nagar (Annexure P-6).

The relevant part of the complaint reads as follows:

"18. That during investigation of the case, letter dated 27.11.2018 was sent to the Registrar of Companies for providing details of the Directors etc of the company in question i.e. U/s Altruist Chemicals Pvt Ltd and vide its report dated 03.12.2018 Registrar of Companies provided the said information and from the perusal of said information/documents, it reveals that accused Prateek Shukla and Bismillah Khan are the Directors.

Accused Himanshu Rana was also Director but he has resigned from the directorship. From the perusal of the documents, it also reveals that they had registered the company, i.e., Altruist Chemical Pvt. Ltd. At 001, Block Ab-Sector-45, Noida, which is a residential area and accused persons also obtained Unique Registration No. from the NCB on the above said premises."

12. We may also note at this stage the contention of the respondent in the application for bail which was filed before the High Court (Annexure P-8) that he had transferred 99% of his shareholding in the Company to Bismilla Khan Ahmadzai. Bismilla Khan Ahmadzai, as the prosecution alleges at this stage, is an Afghan national. The application for bail which

had been filed before the High Court as well as the counter affidavit which has been filed in the present proceedings suppress more than what they disclose. Be that as it may, we are of the view that the High Court was clearly not justified in granting bail and the reasons provided by the High Court, as we have already indicated above, do not reflect application of mind to the seriousness of the offence which is involved. Indicating that the respondent as an educated person with a Bachelor of Technology "may not commit any offence" is an extraneous circumstances which ought not to have weighed with the High Court in the grant of bail for an offence under the NDPS Act.

13. For the above reasons, we are of the view that the High Court has mis-applied the law to the facts in arriving at a decision for the grant of bail to the respondent. We accordingly allow the appeal and set aside the impugned judgment and order of the High Court dated 7 May 2019. As a consequence, the bail which has been granted by the High Court to the respondent shall stand cancelled. The respondent shall surrender forthwith as a result of the cancellation of bail by the present order of this Court."

vi. **Narcotics Control Bureau vs Laxman Prasad Soni, Etc,** (Criminal Appeal No. 438-440 of 2021 decided by the Apex Court on 19.04.2021).

In the said case, there was recovery of 229 Kgs. of Ganja from the possession of accused persons. Out of which 25 Kgs. of Ganja was recovered from one vehicle occupied by the accused. There was another vehicle namely truck in which rest of the contraband material was found. The accused persons, who were arrested along with 25 Kgs. Ganja have been granted bail by the co-ordinate Bench of this Court vide order dated 23.09.2019 in Criminal Misc. Bail Application Nos. 38036 of 2019, 38066 of 2019 and 38048 of 2019 without considering provisions of Section 37 of the N.D.P.S. Act.

The aforesaid order dated 23.09.2019 has been set-aside by the Apex Court on account of the reason that the applications for bail were allowed by the High Court without considering the import and effect of Section 37 of the N.D.P.S. Act.

Possession

12. Possession is the core ingredient to be established before the accused are made criminally liable. The expression 'possession' is a polymorphous term, which assumes different colour in different context as settled by the Apex Court. There are three kind of possession, namely, Physical Possession, Constructive Possession and Conscious Possession. The words 'conscious possession' connotes a particular state of mind which is deliberate and intended.

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

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

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

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

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

13. Once possession is established the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles. This position was highlighted in ***Madan Lal and Anr. v. State of Himachal Pradesh (2003 (6) SCALE 483).***

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

ii. The Apex Court in the case of **Dehal Singh v. State of Himanchal Pradesh, 2011 (72) ACC 661,** has again consider the issue of "conscious possession".

In the said case, two accused persons were travelling in a car and they knew to each other. From the windows/door of the said car, recovery of 27 Kgs. 800 gms. of charas was made, which were found concealed between the shields and doors of the car. The Apex Court in the said case taking into consideration the provisions of Sections 35 and 54 of the N.D.P.S. Act has held that accused was not only in possession, but conscious possession of recovered contraband also.

Presumption under Section 54 of the N.D.P.S. Act

13. In this case, total 157.570 Kgs. Ganja has been recovered from two vehicles, out of which 92.410 Kgs. Ganja has been recovered from Honda City car, in which three persons, namely, Rishabh Kumar (driver), Dhiraj Maurya and Praveen Maurya alias Punit Maurya (owner of vehicle) were travelling. Similarly, 65.160 Kgs. Ganja has been recovered from Swift Dzire car, which was driven by the applicant, which is in the name of his brother Sonu Shukla, who also made accused during investigation. Both the aforesaid vehicles were apprehended together by police personnel. The applicant was the only person, who was in actual control of Swift Dzire car containing 65.160 Kgs. of Ganja. As such, conscious and constructive possession of the accused applicant over the recovered Ganja is apparent on record.

There is specific statutory presumption in relation to contraband that comes within the ambit of N.D.P.S. Act. In view of Section 54 of the N.D.P.S. Act presumption shall be drawn against the accused unless and until the contrary is proved. The expression *"unless and until the contrary is proved"*, clearly imposes the burden

of proving that possession of prohibited substance is legal on the accused himself.

Enmity and False Implication

14. No material has been brought on record by the applicant to show that there was any prior ill-will or enmity of the applicant with the police personnel concerned. Illicit trafficking is an organized crime and are done adopting different modus operandi by a group of persons with their different role. So far as plea of false implication is concerned, in my view, it is a stereo typed defence raised in every case, where accused are found in possession of contraband. Experience shows that such statements are made in almost every case, therefore, such kind of plea of false implication without any basis is not liable to be accepted at this stage.

Independent Witness

15. Nowadays, totally unconcerned people do not dare to become witness against criminals, as they have a lot of financial and political patronage available to them as well as muscle power. Public witnesses against the criminals and drug traffickers are always under the threat, therefore police personnel cannot be seen within eye of suspicion particularly when there is a huge recovery of contraband and there is no prior ill-will of police personnel with the accused and they are discharging their official duty. Huge quantity of recovered 157.570 Kgs. Ganja cannot be planted.

Detention Period

16. So far as argument of learned counsel for the applicant that applicant is in jail since 24.06.2020 is concerned, it is relevant to mention that in the case of **Union of India v. Rattan Mallik** (supra), the accused was in jail for last three years, but the Apex Court has made an observation that the stated circumstances may be relevant for grant of bail in matters arising out of conviction under Penal Code etc., but are not sufficient to satisfy the mandatory requirements as stipulated in clause (b) of sub-section (1) of Section 37 of the N.D.P.S. Act.

Parity

17. From perusal of bail order dated 31.05.2021 of co-accused Rishabh Kumar passed in Criminal Misc. Bail Application No. 17226 of 2021, I find that co-accused Rishabh Kumar has been granted bail without considering the provisions of Section 37 of N.D.P.S. Act. It is well settled that recording of finding in terms of Section 37 of N.D.P.S. Act is a *sine qua non* for granting bail under N.D.P.S. Act. Though, there was a huge recovery of 92.410 Kgs Ganja from the Honda City car, which was driven by co-accused and the same is much more than commercial quantity, but on behalf of co-accused it has been wrongly argued before the co-ordinate bench that alleged recovery of Ganja is less than commercial quantity. Apart from above, no reason has been recorded while granting bail to co-accused Rishabh Kumar. In such circumstances, this Court is of the considered view that if co-accused obtained bail by misrepresentation of facts, other accused on same footing are not entitled to bail on the ground of parity, ergo order dated 31.05.2020 is not helpful to the applicant.

In quite recent, the Apex Court in the case of **Sonu vs Sonu Yadav and another, AIR 2021 SC 201;** deprecated the practice of passing such kind of orders. The relevant paragraph nos. 11 and 12 of the said judgments are reproduced herein under :

"11. In the earlier part of this judgment, we have extracted the lone sentence in the order of the High Court which is intended to display some semblance of reasoning for justifying the grant of bail. The sentence which we have extracted earlier contains an omnibus amalgam of (i) "the entire facts and circumstances of the case"; (ii) "submissions of learned Counsel for the parties"; (iii) "the nature Crl.A.377/2021 of offence"; (iv) "evidence"; and (v) "complicity of accused". This is followed by an observation that the "applicant has made out a case for bail", "without expressing any opinion on the merits of the case". This does not constitute the kind of reasoning which is expected of a judicial order. The High Court cannot be oblivious, in a case such as the present, of the seriousness of the alleged offence, where a woman has met an unnatural end within a year of marriage. The seriousness of the alleged offence has to be evaluated in the backdrop of the allegation that she was being harassed for dowry; and that a telephone call was received from the accused in close-proximity to the time of death, making a demand. There are specific allegations of harassment against the accused on the ground of dowry. An order without reasons is fundamentally contrary to the norms which guide the judicial process. The administration of criminal justice by the High Court cannot be reduced to a mantra containing a recitation of general observations. That there has been a judicious application of mind by the judge who is deciding an application under Section 439 of the CrPC must emerge from the quality of the reasoning which is embodied in the order granting bail. While the reasons may be brief, it is the quality of the reasons which matters the most. That is because the reasons in a judicial order unravel the thought process of a trained judicial mind. We are constrained to make these observations because the reasons indicated in the judgment of the High Court in this case are becoming increasingly familiar in matters which come to this Court. It is time that such a practice is discontinued and that the reasons in support of orders granting bail comport with a judicial process which brings credibility to the administration of criminal justice. Crl.A.377/2021.

12. For the above reasons, we are of the view that the order of the High Court granting bail without due application of mind to the relevant facts and circumstances as well to the provisions of the law requires the interference of this Court."

18. As such, in the light of dictum of aforesaid judgments of the Apex Court as well as the reasons mentioned in preceding paragraph no.17, this Court is of the view that the orders which have been passed ignoring the settled law laid down by the Apex Court regarding Section 37 of the N.D.P.S. Act have no persuasive value and the same is not binding upon this Court. Hence, the benefit of parity of order dated 31.05.2021 of co-accused Rishabh Kumar cannot be extended to present applicant. Accordingly, the submission of learned counsel for the applicant for granting bail to the applicant on the ground of parity of order dated 31.05.2021 is hereby rejected. The issue of parity as mentioned in paragraph no. 7 is decided against the applicant.

Discretion

19. At this juncture it would be relevant to note that discretion is required to be exercised judiciously and judicially. The devastating effects of narcotic drugs and psychotropic substance on any person who comes to its touch are well known. Normally, such person ceases to be a normal human being. It is also well settled that a proper administration of the criminal justice delivery system, requires balancing the rights of the accused and the prosecution. Undoubtedly rights of the accused are important, but equally important is the societal interest for

bringing the offender to book and for the system to send right message to all in the society. Undue sympathy for offender would be more harm to justice system to undermine the public confidence in the efficacy of law.

Conclusion

20. In the light of analysis of the case as mentioned above and considering the recovery of huge quantity of Ganja as mentioned above, coupled with the fact that applicant was apprehended at the spot and was having conscious and constructive possession over the recovered Ganja, I do not find any reasonable ground in terms of Section 37 of the N.D.P.S. Act to hold that applicant is not guilty of an offence and he is not likely to commit any offence while on bail.

It is made clear that this finding is for a limited purpose and is confined to the question of releasing the accused applicant on bail only. The trial court shall be absolutely free to arrive at its independent conclusions on the basis of evidence led unaffected by anything said in this order.

Result

21. In view of the facts and circumstances of the case and on account of the reasons mentioned above, I do not find any good ground for enlarging the applicant on bail at this stage. The bail application of the applicant is accordingly **rejected.**

(2021)11ILR A30
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.11.2021

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SAMEER JAIN, J.

Capital Cases No. 5 of 2021

Bal Govind @ Govinda ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Vinayak Mithal

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

Evidence Law - Indian Evidence Act, 1872- Section 3- Circumstantial Evidence- There must be a chain of circumstances so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused. The circumstances concerned 'must or should' and not 'may be' established. The prosecution evidence may, at best, give rise to a suspicion against the appellant but fails to prove the circumstances of a conclusive nature and tendency from which we may, with certitude, hold that the accused has committed the crime.

Settled law that in a case of circumstantial evidence the prosecution has to link the chain of circumstances that leaves no other conclusion but the guilt of the accused.

Evidence Law - Indian Evidence Act, 1872- Section 7 – Section 114- Circumstantial Evidence – "Last Seen" alive in the company of the accused- Ordinarily, the circumstance of the deceased being last seen alive with the accused may alone not be sufficient to record conviction-But, it is an important link in the chain of circumstances that would point towards the guilt of the accused with some certainty. The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when

there is long gap and possibility of other persons coming in between exists.

The theory of the deceased having been last seen in the company of the accused comes into play only where the duration of the accused last seen in the company of the deceased and the recovery of the dead body is so minimal that the possibility of any other person interfering is ruled out.

Evidence Law - Indian Evidence Act, 1872- Section 118- Competency of Witnesses- Child Witness- A child witness is as much a competent witness as any other witness but, as a rule of prudence, before recording the testimony of a child, the court must undertake an exercise to find out whether the child understands the duty of speaking the truth. Where such an exercise is not done it may be presumed that the witness was competent to testify though, from the contents of his or her deposition, an inference may be drawn whether the testimony is an outcome of tutoring.

A child witness is a competent witness but where the trial court fails to conduct the exercise to ascertain his duty of speaking the truth, then the appellate court can draw the inference of tutoring from the testimony.(Para 12, 13, 17, 19, 26)

Criminal Appeal allowed. (E-3)

Judgements/ Case law relied upon:-

1. Hanumat Govind Nargundkar & anr. Vs St. of M.P, AIR 1952 SC 343

2. Sharad Birdhichand Sarda Vs St. of Maha., (1984) 4 SCC 116)

3. Vijay Shankar Vs St. of Har., (2015) 12 SCC 644

4. Nizam Vs St. of Raj., (2016) 1 SCC 550

5. Navneetakrishnan Vs State, (2018) 16 SCC 161

6. Kanhaiya Lal Vs St. of Raj., (2014) 4 SCC 715

7. St. of U.P. Vs Satish, (2005) 3 SCC 114)

8. Ramreddy Rajesh Khanna Reddy & anr. Vs St. of A.P., (2006) 10 SCC 172

9. Rameshwar Vs St. of Raj.: AIR 1952 SC 54

10. Panchhi & ors. Vs St. of U.P. (1998) 7 SCC 177

11. Dattu Ramrao Sakhare & ors. Vs St. of Maha. (1997) 5 SCC 341

12. Suryanarayana Vs St. of Kar. (2001) 9 SCC 129

13. Suresh Vs St. of U.P. (1981) 2 SCC 569

14. St. of U.P. Vs Ramesh & anr. (2011) 4 SCC 786

15. Shivaji Sahabrao Bobade & anr. Vs St. of Maha., (1973) 2 SCC 793

16. Devi Lal Vs St. of Raj., (2019) 19 SCC 447

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

1. The appellant - Bal Govind alias Govinda was tried in Special Sessions Trial No. 198 of 2020 and by the order of Special Judge, Pocso Act /Additional District & Sessions Judge, Jaunpur dated 06.03.2021 has been convicted under Sections 302, 376 AB, 201, 363 of the Indian Penal Code (for short IPC) and under Section 5/6 of Protection of Children from Sexual Offences Act, 2012 (for short POCSO Act) and, by order dated 08.03.2021, awarded punishment as follows:

(i) Death sentence for offence punishable under Section 302 I.P.C;

(ii) Death sentence for offence punishable under Section 5/6 Pocso Act (as amended by Act No.25 of 2019);

(iii) Seven years R.I. and Rs. 5,000/- fine for offence punishable under Section 363 I.P.C. with a default sentence of one year;

(iv) Seven years R.I. and Rs. 5,000/- fine for offence punishable under Section 201 I.P.C. with a default sentence of one year.

All sentences to run concurrently.

2. As death sentence was awarded, a reference (i.e. Reference No.4 of 2021) was

made to the High Court under Section 366 Cr.P.C. for confirmation of death penalty. The appellant, who is in jail, expressing his inability to engage a counsel of his choice, requested for submission of his appeal against the order of conviction and sentence. As a result, the Superintendent District Jail, Jaunpur wrote a letter to the Secretary Legal Services Authority, Jaunpur to present a Jail appeal on behalf of the appellant. In furtherance whereof, the Secretary, Legal Services Committee, High Court Allahabad, by letter dated March 20, 2021, after examining the claim of the appellant that he was not in a position to engage a counsel to submit his appeal, appointed Sri Vinayak Mithal Advocate from the panel as a counsel to represent the appellant and submit appeal and submissions on behalf of the appellant before the High Court. Whereafter, this appeal against the aforesaid judgment and order of conviction and sentence was reported and registered as Capital Cases No.5 of 2021, and admitted, on 05.07.2021, for hearing.

INTRODUCTORY FACTS

3. (i) The prosecution case was instituted on a thumb marked written application i.e. Exb. Kha-1, dated 08.08.2020, submitted by Kolai @ Bakey Lal i.e. the father of the deceased, which was registered as first information report (for short FIR) (Exb. Ka-3) on 08.08.2020, at 10:30 hrs, at Police Station (for short P.S.) Madhiyahun, District Jaunpur; the Chik FIR reflects the name of the place of occurrence as village Kumbh about 8 km away from the police station. In the FIR, it is alleged: (i) that informant's daughter Reshmi Saroj (the deceased), aged 11-12 years, was enticed away by Musahar Balgovind @ Govinda, a resident of district Chandauli, who stays in his *Sasural* (in-laws place) at village Kumbh, and Nandu Musahar, a resident of village Kumbh, district Jaunpur, on 06.08.2020 at about 8.00 p.m; (ii) that the informant and his family members were searching for Reshmi but she could not be found; and (iii) that on 08.08.2020, upon information that body of a girl has been found in a Maize field of Munni Lal son of Niranjan, the informant went to the spot, with fellow villagers, and found the body of his daughter (Reshmi). The FIR was registered for offences punishable under Sections 363, 302 and 201 I.P.C. against the appellant and Nandu Musahar. The inquest proceeding as per the record commenced on 08.08.2020 at about 16.30 hrs and completed by 19.00 hrs. Inquest report (Exb. Ka-1) was prepared by Ramdavar Yadav (PW-7). Inquest witnesses were Kolai Saroj (informant); Sonu Saroj; Sushil Saroj (PW-3); Pradeep Kumar (PW-4); and Ramakant Saroj. In the inquest report it was observed that the body of the deceased had a blue colour Kurti and a torn dirty white colour undergarment. The body and the clothes were sealed and sent for post-mortem / forensic examination. Sample of bloodstained earth and plain earth from where the body was recovered was taken and a memo was prepared on 08.08.2020 by Prabhari Nirikshak Trivenilal Sen (PW-11). On 09.08.2020, at about 3:35 pm, autopsy was conducted by Doctor Ashok Kumar Baudhist (PW-9) and an autopsy report (Exb. Ka-5) was prepared.

(ii) According to the autopsy report, following anti-mortem injuries were noticed: Contusion over mouth, nose, cheek and chin. In addition to above, whole body was found swollen with skin peeling off; foul smell present; putrefaction started; and maggots coming out. Whole vagina, labia majora, minora including clitoris were found swollen and hymen was found old healed ruptured. Two vaginal smear slides and swab were prepared and handed over to the constable. The estimated time of death was three days before. Mouth was found half open; larynx, vocal chords and hyoid bone was found intact. Oesophagus, trachea, bronchial tree, pleura cavities, etc were found congested and it was noticed that the skin of the abdomen was peeling off. Stomach contents had semi

digested food; small intestine had gases; and large intestine had gases with faecal matter. According to the Doctor, the cause of death was due to asphyxia as a result of anti-mortem smothering and throttling.

(iii) The appellant was arrested on 09.08.2020 from village Bisauli in district Chandauli. On his confession to the police that he had been wearing the same dress which he had worn at the time of the incident, the lower half of his dress was taken and sealed for forensic examination.

(iv) An undated report (Paper No. 25 Ka-2) of Forensic Laboratory, U.P., Ramnagar, Varanasi was obtained in respect of: (a) bloodstained earth and plain earth lifted from the spot where the body of the deceased was found; (b) lower half garment of the accused; (c) slide and swab; and (d) dress pieces of the victim. The chemical examination of the bloodstained earth, slide and the dress pieces of the deceased disclosed presence of blood. There was human blood found on the slide and the clothes of the deceased whereas the blood found in the mud had disintegrated therefore, its nature could not be determined. The lower half garment of the accused did not show presence of blood and all the samples examined did not show presence of spermatozoa or semen.

4. The investigation was conducted by Trivenilal Sen (PW-11) but charge-sheet (Exb. Ka-6) was submitted by Ghanshyam Shukla (PW-10). The appellant alone was charge-sheeted whereas the other accused Nandu Mushar was exonerated.

5. The Special Judge, Pocso Act /First Additional Sessions Judge, Jaunpur framed charge of offences punishable under Sections 363, 302, 201, 376 A B I.P.C. and Section 5/6 Pocso Act against the appellant. The appellant denied the charges and claimed for trial.

PROSECUTION EVIDENCE

6. On commencement of the trial, the prosecution examined the following witnesses:-

(i) **PW-1**- Pooja i.e younger sister of the deceased and daughter of the informant - Kolai. Her deposition was recorded on 12.01.2021. Her age in the statement is recorded as about 6 years old. She stated on oath that she does not remember the date of the incident; that on the date of the incident she and her elder sister (Reshmi) were on way to the Bazaar when Govinda (the appellant) bought her a toffee and sent her back and he went away with her elder sister; that she knows Govinda, who does brick baking work; that her sister went with Govinda and never returned; that her mother searched for her sister in the night but her sister could not be found; that in the morning, villagers found her sister's body in a maize field, then her father and mother got information; that her father thereafter went to the police station to inform the police about death of her elder sister; that a number of policemen had come and had taken the body of her sister; that the police had asked her about her elder sister going with Govinda; and that Govinda killed her sister.

In her cross-examination, she stated that she is not literate and she does not know her age.

No further question was put to her.

It be noted that this witness does not disclose the time when she allegedly went with her sister (the deceased) and the accused (the appellant) and was offered a toffee.

(ii) **PW-2-** Chandrabali. He stated that Kolai Saroj (i.e. deceased's father) was his *pattidar*. He narrated the prosecution story that the appellant took the deceased at about 7 pm for toffee; that at that time her younger sister was with her; that the appellant sent back her younger sister after getting her toffee, etc. He stated that the appellant is a resident of district Chandauli; that Nandu Musahar is his *Saala* (wife's brother); that the appellant is of bad character; and that in connection with his work

of brick baking appellant resides with his wife's brother (Nandu Musahar).

In his cross-examination held on 12.1.2021, he stated that the deceased (i.e. his niece) and her family resided separate; that in connection with his work as a welder, on a daily basis, he goes to Jaunpur in the morning, where he works there from 10 am, and returns back home by 6 pm. His work place is about 18 km away.

In his cross-examination held on 19.1.2021, he stated that he neither met Govind @ Govinda (the accused) nor Kolai (deceased's father) on 6th; that on 8th he came to know about the death of Kolai's daughter while he was going to Jaunpur, between 9 and 9.30 am; that on getting the information he went to the spot, where already 100-150 people were there and the police had arrived and, by that time, it must have been 10 am; that the police had taken the body in a vehicle; that the villagers had staged a protest demanding the body back but the body was handed over on the next day from the mortuary; that at the time the villagers were making protest, none seemed to be informed as to how the deceased died. He further added that Govinda (the appellant) is addicted to liquor but denied the suggestion that because he used to take liquor, Govinda has been named. He admitted that he does not know as to how Kolai's daughter died.

(iii) **PW-3-** Sushil Kumar. In his statement-in chief, he stated that on 06.08.2020, his fellow villager's (i.e. Kolai's) daughter-Reshmi, aged 11 years, was enticed away by Balgovind who used to stay at his *Sasural* (Nandu Mushar's house); that Balgovind had lured Reshmi under the pretext of getting her a toffee and thereafter he took her to Munni Lal's maize field where he committed rape on her and strangulated her and also poured acid on her so that she could not be recognized; that PW-3, as well family members of Reshmi, searched for her but she could not be found; that on 08.08.2020, in the morning, her body was discovered in the field of Munni Lal; that information of recovery of the body was given by PW-3 to the police; that the police arrived at the spot and, on the same day night, the police arrested the appellant from Chandauli where the appellant has his house; that information about appellant's arrest was given by the police; that PW-3 has witnessed the inquest proceeding.

In his cross-examination, he stated that though he had received information that Kolai's daughter had gone missing but, as a village Pradhan, he had not given any information to the police as he suspected that she might have gone somewhere and would return. But when she did not return, on the next day, by dialling 112, information was given. Later, he changed his version and stated that on 06.08.2020 itself he gave information to the police regarding involvement of Balgovind @ Govinda by dialling 112. He stated that on 06.08.2020, he saw Balgovind taking away Reshmi.

In his cross-examination, held on 08.02.2021, he stated that on 08.08.2020 he received information about the incident at about 6 am. On receipt of information he immediately went to the spot and within next 10 minutes, the police also arrived. He stated that the police conducted inquest proceeding and took away the body. His signatures are there on the inquest report.

It be noted that this witness does not disclose the time when he saw the appellant (accused) with the deceased or her sister.

(iv) **PW-4 -** Pradeep Kumar. He stated that he, with others, had been searching for the girl. In the morning, on information, he went to the spot to find her dead. He witnessed the inquest proceeding.

In his cross-examination, he admitted that he is not a witness of the incident. First, he stated that the inquest was carried out at the place where the body was recovered but,

immediately, thereafter he stated that it was held at the police station.

(v) **PW-5 -** Head Constable Dev Kumar Yadav. He stated that he was posted at P.S. Madhiyahun on 08.08.2020; that, in the morning, he received information that at village Kumbh, missing girl's body has been found; that, upon receipt of the information, he took the Panchayatnama register, other papers, materials and left for the spot with constable Satyam Singh, lady constable Mamta and Sub Inspector Ramdawar Yadav; that the Sub Inspector completed inquest proceeding and sealed the body in a kit-bag which was handed over to him and constable Satyam Singh for being taken to the mortuary; that on 09.08.2020, the body was handed over to the doctor at the mortuary and till the time the body was handed over to the doctor, it was kept secured and no one was able to even touch it.

In his cross-examination, he stated that he had reached the spot at 9.30 am and that he does not remember the exact time by which they had brought the body to the police station.

(vi) **PW-6** - Dilip Kumar @ Ajay: He stated that he has a Kirana Shop; on 06.08.2020, at about 7 pm, when he was about to close his shop, Govinda @ Balgovind (appellant) came to his shop with one girl and purchased a packet of biscuit worth Rs. 5, at that time, he could not recognize the girl but, later, when the body was recovered he came to know that that girl was Kolai's daughter (Reshmi) who had come to the shop with the appellant. He stated that ordinarily his shop remains open till 8 pm but due to lockdown directions, his shop had to be shut by 7 pm.

In his cross-examination, he improved his statement by stating that both daughters of Kolai had come to his shop at that time and that Govinda (appellant) had purchased salted snacks, toffee and biscuit also, and had sent back the younger daughter, after giving her toffee, and had taken Reshmi with him. He stated that he cannot tell as to where Govinda had taken Reshmi. Only the third day, he came to know that the girl who was with him has been murdered. He stated that he could not decipher the age of the girl who was there as it was evening time but Kolai's daughter, who was murdered, was there with Govinda at that time. He denied the suggestion that he is telling a lie.

(vii) **PW-7** - Ramdawar Yadav. He stated that information of the murder, upon discovery of the body, was received from Kolai i.e. father of the deceased-Reshmi, at 10.30 am, on 08.08.2020. Whereafter, on registration of the FIR, he along with head constable Dev Kumar, constable Satyam Singh reached the spot where a number of persons had gathered. He proved the inquest report.

In his cross-examination, he stated that inquest proceeding started at 4.30 pm and was completed by 7 pm.

(viii) **PW-8 -** Mahendra Tiwari. He stated that he was posted at P.S. Madiyahun as a constable on 08.08.2020; on that day, at about 10.30 am, Kolai @ Bankelal son of Banke Saroj had brought a written report and, thereafter, he had put his thumb impression on the report, by using the Ink pad taken from him, and gave the same to the Station House Officer (SHO). On the direction of the SHO, a chik FIR was prepared and entry was made on the computer. A free copy was delivered. He proved the chik FIR, which was marked as Exibit Ka-3, and the GD entry of the report, which was marked as Exb. Ka-4.

In his cross-examination, he stated that there were 4-5 persons with Kolai Saroj. The report was not written in front of him. The FIR was submitted to the SHO and on his direction, the report was entered. He denied the suggestion that the time mentioned in the FIR is not the correct time of lodging the report. He also denied the suggestion that information about the incident was received at the police station from some other person.

On court's order dated 17.02.2021, PW-8 was again produced on 20.02.2021 to

prove the thumb impression of Kolai on the written report, which was marked Exb. Kha-1.

(ix) **PW-9** - Dr. Ashok Kumar Baudhist. He disclosed that he had conducted the autopsy on 09.08.2020. He proved the contents of the autopsy report.

On 03.03.2021, PW-9 was again examined on the order of the Court dated 01.03.2021. He stated that on internal examination of the vagina, labia majora/ minora, clitoris of the deceased, upon finding swelling, old healed ruptured hymen, two vaginal slide smear were taken to confirm whether she was sexually assaulted. He stated that they were sent to forensic laboratory Lucknow but he has not seen the forensic report.

(x) **PW-10** - Ghanshyam Shukla. He stated that he took over charge of P.S. Madiyahun on 16.08.2020 and took over investigation of the case. After collecting the materials and examining the papers in respect of the investigation already carried out, he submitted charge-sheet under his signature against Balgovind @ Govinda S/o Ram Lal Banwasi, R/o Village Pura, P.S. Sakaldiha, district Chandauli, which was exhibited as Exb Ka-6. He proved the dispatch of the plain and blood stained earth, undergarment of the accused, clothes of the victim and slides prepared at the time of the autopsy for forensic examination.

In his cross-examination, he stated that it was his predecessor who had sent the material for forensic examination and by the time he submitted charge-sheet, the forensic examination report had not been received. He stated that he did not send any reminder letter to the forensic laboratory.

(xi) **PW-11** -Triveni Lal Sen. He stated that upon registration of the case, he carried out investigation; that when he had arrived at the spot, a large number of people had already gathered; that Sub-Inspector Ram Dawar Yadav and S.I. Deepti Singh were ordered to proceed with the inquest; after completion of the inquest proceeding, body was sent for post-mortem; that, on the same day, he recorded the statement of the scribe of the FIR, namely, constable Mahendra Tiwari, and Kolai (the informant); that, on the same day, he also prepared site plans (Exb. Ka-7 and Exb. Ka-8) on the directions of the informant and lifted samples of bloodstained and plain earth from the spot where the deceased's body was found; that, thereafter, he conducted search/raid/operation to apprehend the accused and, on 09.08.2020, he arrested the accused from Bisauli Mushar Basti; that, on 10.08.2020, he recorded statement of witnesses Pooja Saroj (PW1) and Sonu Saroj; that on 12.08.2020 he recorded statement of Dr. Ashok Kumar Baudhist; clarificatory statement of Kolai; and statements of Sushil Kumar, Ramakant, Pradeep Kumar, etc; and on 14.08.2020, he prepared the memo of dispatch of the materials for forensic examination.

In his cross-examination, he stated that in the written report there were two accused, one Bal Govind @ Govinda (the appellant) and the other was Nandu (Bal Govind wife's brother) but as no sufficient evidence was found against Nandu, his name was removed from the accused column. He denied the suggestion that to save Nandu, the appellant has been framed. He also denied the suggestion that the accused Balgovind @ Govinda had left village Kumbh since before the date of the incident to go to his native village and has been falsely implicated.

In addition to above, the court examined head constable Shailendra Kumar Yadav, as a court witness **(CW-1)**, who stated that the informant Kolai @ Bankelal died on 21.09.2020 regarding which, a death certificate was provided by the Gram Pradhan of the Gram Panchayat concerned.

7. After closure of the prosecution evidence, incriminating material emanating from the prosecution evidence was put to the accused-appellant for recording his statement under Section 313 Cr.P.C.The accused-appellant in his

statement under Section 313 Cr.P.C. denied the incriminating material against him; claimed that he has been framed to save the real culprit; and that the witnesses have falsely deposed against him due to enmity.

SUMMARY OF TRIAL COURT FINDINGS

8. The trial court found the following circumstances against the accused-appellant proved: (i) that the deceased was aged below 12 years; (ii) that on 06.08.2020, the accused took the deceased under the pretext of getting her a toffee, which is established by the testimony of PW1; (iii) that PW1 also accompanied them up to a distance but was sent back by the accused after getting her a toffee; (iv) that PW-6 is an independent witness from whose shop the accused purchased toffee, etc for the deceased and PW1; (v) that the deceased was last seen alive with the accused when he purchased toffee etc for her and her sister (PW1) and thereafter the deceased did not return; (vi) that in the morning of 08.08.2020 deceased's body was recovered from a maize field about one and one-half km away; (vii) that the post mortem examination disclosed ruptured hymen and smothering which indicated that she was ravished and then murdered; (viii) that the accused resides at his *Sasural* at village Kumbh, namely, the village where the incident took place, but ran away to district Chandauli from where he was arrested on 09.08.2020; (ix) that all these circumstances, in absence of explanation, complete the chain to rule out all other hypothesis than the conclusion that the accused took the deceased and her sister (P.W.-1) by offering them toffee, sent back her sister (PW1), ravished the deceased and then killed her. Upon finding that the accused was aged 25 years and the deceased was aged below 12 years, concluded that the case warranted a death penalty.

9. We have heard Sri Vinayak Mithal for the appellant; Sri Amit Sinha, learned A.G.A., for the State; and have perused the record.

SUBMISSIONS

10. Sri Vinayak Mithal, on behalf of the appellant, submitted as follows:

(a) The contents of the FIR cannot be read in evidence because its author was not examined. Thus, the testimony of the witnesses examined during the course of trial can draw no support from the FIR.

(b) That from the testimony of PW-2, PW-3 and also PW-7, it is clear that the police had arrived at the spot, when the body was found, much before 10 am in the morning, that is before the lodging of the FIR, and a large number of people had gathered, which is suggestive of the fact that prosecution case was developed to ward off pressure on the police to solve the case. Therefore, the prosecution story is a cooked up story just to solve out the case.

(c) That the forensic examination of the lower garment of the accused did not disclose presence of blood or spermatozoa and there is no DNA matching report linking the appellant with any incriminating material recovered from the spot or from the body or clothes of the victim.

(d) That the evidence of the appellant being last seen alive with the deceased provided by PW-1; PW-3; and PW-6 does not at all inspire confidence for the following reasons:-

(i) PW-1 is a child witness, aged 6 years, and before recording her statement the Court did not adopt precautionary tests to ascertain whether she understands the gravity of her statement and was a competent witness. Otherwise also, PW-1 did not remember the date of the incident. She also did not disclose the time when she was in the company of the accused and her elder sister (the deceased). Further, her statement is not in sync with the prosecution case as, according to the prosecution case, body of the deceased was found two days after she went missing whereas, according to her, next day, in the morning, body was found.

She also appears tutored because even though she is not a witness of any act of assault on her sister by the accused but she states that her sister was murdered by the accused. Therefore, in absence of corroboratory evidence of her mother or father, that could have supplied meaning to her disjointed thoughts in reference to the facts in issue, not much reliance can be placed on her testimony. Further, she is a vulnerable illiterate child who does not even know her age as could be gathered from her statement in cross-examination and, above all, whether she had accompanied the deceased up to the toffee shop, on that fateful day, is neither disclosed in the FIR, allegedly lodged by her father, nor in the site plan prepared at the instance of her father by the police.

(ii) PW-3, though in his cross-examination states that he saw appellant taking away the deceased on 06.08.2020 but does not disclose the time when he saw them together. Therefore, his testimony is inconsequential. Further, he stated that he gave information to the police by dialling 112 but the same is not confirmed by the police. Moreover, his testimony is not confidence inspiring inasmuch as at one stage he states that he did not consider it necessary to report about the girl having gone missing as he thought that she might return; whereas, at another stage of his statement he stated that he had reported to the police by dialling 112.

(iii) In so far as the testimony of PW-6-Dilip Kumar is concerned, his testimony does not inspire confidence inasmuch as in his statement-in-chief, he only says that Govinda (i.e accused-appellant) had come with a girl whom he could not recognise whereas, during cross-examination, he improves upon his statement to state that Govinda had come with two girls, one was sent home after getting her a toffee, etc. and the other girl, he took away. This improvement in his testimony suggests that there was a deliberate attempt on his part to show the presence of the other girl also, as he had failed to disclose her presence in his statement-in-chief. Other than that, it appears from his statement that he could not recognise the girl though, later, after the body was recovered, he thought that it was that girl. His testimony thus appears to be a mixture of guess work, knowledge and thought therefore, it is not of much value.

(e) That the entire prosecution evidence is silent as to whether any effort was made to find out the victim at the house of Nandu Musahar with whom the appellant allegedly resided. Moreover, the prosecution has suppressed a vital witness, namely, the mother of the deceased, who could have thrown light on the issue whether PW-1, or any body else, had given information at home that the accused-appellant had taken the deceased.

(f) That the delay in lodging even a missing report, and lodging of FIR only after arrival of police on spot, on discovery of the body, proves fatal to the prosecution case. Because, if there had been information as to with whom the deceased had left on 06.08.2020, on her having not returned home, missing report would have been lodged earlier and the informant would not have waited till the discovery of her daughter's body. Thus, nobody saw the accused-appellant taking the deceased.

(g) Even assuming that the deceased had been with the accused during any time of that day, in absence of evidence that the place from where the body was recovered was in close proximity to the place where she was last seen alive with the accused, nothing much turns on that evidence, particularly, when the body was recovered two days later. Therefore, intervening circumstances, such as involvement of some other person, cannot be ruled out. Under the circumstances, the chain of circumstances is not complete as to rule out all other hypothesis than the guilty of the appellant.

(h) The view of the court below that the appellant had absconded is incorrect because he was arrested from his native village on 09.08.2020, next day of recovery of the body

and lodging of the FIR; and there is nothing on record that there was any declaration under section 82 CrPC.

(i) The forensic reports do not confirm rape or the involvement of the appellant to link the appellant with the crime.

(j) In the alternative, it was submitted that even assuming that the appellant was guilty of the offence, it is not a case, rarest of rare in nature, warranting death penalty.

11. **Per contra**, Sri Amit Sinha, learned A.G.A., submitted that PW-1 though may be a child witness but no question has been put to her to discredit her testimony. A child witness is as much a competent witness as any other witness unless the Court considers that the child is unable to understand the nature of his or her deposition. Once, the court proceeds to record the testimony of a child witness it could be presumed that the court considers the child as a competent witness and therefore the testimony of the child would have to be tested on its own merit and it cannot be discarded merely because it comes from a child. He submits that PW-1 has not been cross-examined on relevant particulars, namely, that she had accompanied the accused and her elder sister (the deceased) up to the toffee shop whereafter she was not seen alive; and that the accused sent her back after giving her a toffee. As this particular part of her statement has not been subjected to cross-examination, it would be deemed to be correct and therefore her subsequent statement that in the morning her sister's body was found would not render her statement unreliable because she doesn't specifically say that body was found on the next day morning. Moreover, her testimony finds corroboration from the testimony of PW-6. Further, the autopsy report indicates that the death probably occurred three days before, meaning thereby, that it could have taken place in the night of 06.06.2008 when the deceased was last seen alive with the accused and, therefore, the burden was on the accused to explain whether he parted company with the deceased. As no explanation was offered by the accused, his conviction is justified. He further submits that the statement of some of the prosecution witnesses that the police had arrived early morning is not sufficient to discredit the FIR because the inquest report carries the details of the case number registered pursuant to the FIR including the name of the person who had given the information to the police. He submits that even assuming that the vaginal smear did not disclose presence of spermatozoa that, by itself, would not be sufficient to discard the charge of rape as the hymen was found ruptured and there was swelling on the private parts. He, therefore, submits that the conviction of the appellant is justified and since it is a case of rape and murder of a minor by luring her with a toffee, the death penalty awarded should be confirmed.

ANALYSIS

12. Before we proceed to weigh the rival submissions and analyse the evidence on record, we may remind ourselves that we are dealing with a case based on circumstantial evidence. It is well settled that to sustain a conviction, where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of circumstances so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused **(vide Hanumat Govind Nargundkar & Anr. V. State of Madhya Pradesh, AIR**

1952 SC 343; Sharad Birdhichand Sarda V. State of Maharashtra, (1984) 4 SCC 116). In Vijay Shankar V. State of Haryana, (2015) 12 SCC 644, the Supreme Court following its earlier decisions in **Sharad Birdhichand Sarda (supra) and Bablu V. State of Rajasthan, (2006) 13 SCC 116,** in respect of a case based on circumstantial evidence, held that *"the normal principle is that in a case based on circumstantial evidence the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that these circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation of hypothesis other than that of the guilt of the accused and inconsistent with their innocence".*

13. Ordinarily, the circumstance of the deceased being last seen alive with the accused may alone not be sufficient to record conviction **(vide Nizam V. State of Rajasthan, (2016) 1 SCC 550; Navneetakrishnan V. State, (2018) 16 SCC 161; and Kanhaiya Lal v. State of Rajasthan, (2014) 4 SCC 715).** But, it is an important link in the chain of circumstances that would point towards the guilt of the accused with some certainty. The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is long gap and possibility of other persons coming in between exists (vide **State of U.P. V. Satish, (2005) 3 SCC 114).** Similar is the view taken in **Ramreddy Rajesh Khanna Reddy & Another V. State of A.P., (2006) 10 SCC 172,** where, following the decisions in **State of U.P. V. Satish (supra) and Bodhraj V. State of J & K, (2002) 8 SCC 45,** in paragraph 27 of the judgment, it was held that *"the last seen theory, furthermore, comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that possibility of any person other than the accused being the author of crime becomes impossible. Even in such cases the courts should look for some corroboration."*

14. Bearing in mind the legal principles noticed above, we now proceed to analyse the evidence to find out whether the prosecution is successful in its endeavour of proving the appellant guilty. Before we proceed to analyse the testimony of the prosecution witnesses we must bear in mind that this is a case based on the last-seen theory explained above. Other than that there is no eye witness account of the offence or recovery of incriminating material or forensic evidence to link the appellant with the crime.

15. In this case, the last seen theory has been applied by the prosecution on the basis of the testimony of P.W-1; P.W.-3 and P.W.-6.

16. P.W.-1 is a child aged six years. On her competence as a witness an objection has been taken by the learned counsel for the appellant by stating that the court below did not put questions to her to test her mental understanding with regard to the duty of speaking the truth; and have straight away proceeded to record her statement.

17. In ***Rameshwar Vs. State of Rajasthan: AIR 1952 SC 54*** it was held that every witness is competent unless the Court considers he is prevented from understanding the questions put to him, or from giving rational answers by reason of tender years, extreme old age, disease

whether of body or mind, or any other cause of the same kind. It was held that there is always competency in fact unless the court considers otherwise. The court observed that it is desirable that judges and magistrates should always record their opinion that the child understands the duty of speaking the truth and state why they think that, otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether. But whether the Magistrate or Judge really was of that opinion can be gathered from the circumstances when there is no formal certificate. It was observed that as a matter of prudence a conviction should not ordinarily be based on the uncorroborated evidence of a child witness. It was further observed that the rule is not that corroboration is essential before there can be a conviction but as a matter of prudence there is necessity of corroboration except where the circumstances make it safe to dispense with it. The Court, however, cited with approval observations made by the Privy Council that it is not to be supposed that any judge would accept as a witness a person who he considered was incapable not only of understanding the nature of an oath but also the necessity of speaking the truth when examined as a witness.

18. In ***Panchhi and others Vs. State of U.P. (1998) 7 SCC 177*** it was observed that it is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring. In ***Dattu Ramrao Sakhare and others Vs. State of Maharashtra (1997) 5 SCC 341*** it was observed that a child witness if found competent to depose to the facts, and is reliable, such evidence could be the basis of conviction. Even in the absence of oath the evidence of a child witness can be considered provided that such witness is able to understand the question and able to give rational answers thereof. In ***Suryanarayana Vs. State of Karnataka (2001) 9 SCC 129*** it was observed that if the child witness stood the test of cross-examination and there is no infirmity in her evidence, in absence of any allegation of tutoring or using the child witness for ulterior purposes of the prosecution, it can be relied upon as the basis for conviction. In that case the sole witness was a girl aged four years at the time of the incident and six years at the time of her deposition before the trial court. In ***Suresh Vs. State of U.P. (1981) 2 SCC 569***, the Apex Court made certain observations with regard to the child psychology. It was observed that children, in the first place, mix up what they see with what they like to imagine to have seen and besides, a little tutoring is inevitable in their case in order to lend coherence and consistency to their disjointed thoughts which tend to stray. In ***State of U.P. Vs. Ramesh and another (2011) 4 SCC 786*** it was held that every witness is competent to depose unless the court considers that he is prevented from understanding the question put to him, or from giving rational answers by reason of tender age etc. Only in case there is evidence on record to show that a child has been tutored, the Court can reject his statement partly or fully. An inference as to whether child has been tutored or not, can be drawn from the contents of his deposition.

19. From the decisions noticed above, the legal principle deducible is that a child witness is as much a competent witness as any other witness but, as a rule of prudence, before recording the testimony of a child, the court must undertake an exercise to find out whether the child understands the duty of speaking the truth. Where such an exercise is not done it may be presumed that the witness was competent to testify though, from the contents of his or her deposition, an inference may be drawn whether the testimony is an outcome of tutoring.

20. Bearing in mind the aforesaid legal position, we may now proceed to examine and evaluate the statement of PW-1. PW-1, a child

aged six years, is put by the prosecution to utilise the last seen theory to draw conviction by proving that on the date of the incident, PW-1, the deceased and the appellant were together and that the appellant sent back P.W.-1 after getting her a toffee while he took away the deceased with him; whereafter, the deceased was not seen alive. Noticeably, PW-1 has not been questioned by the court to record its opinion whether PW-1 understands the duty of speaking the truth, yet, PW-1 has been administered oath. Assuming that there is a presumption that judicial and official acts are regularly performed, we, now, proceed to evaluate the merit of PW-1's testimony. PW-1 does not speak of the date and time when she was with her sister (the deceased) on way to the Bazaar and was offered a toffee by the appellant. Though she stated that since thereafter her sister is missing but, assuming that we accept the testimony of this witness as it is, in absence of disclosure of the date and time when she was with the deceased and the appellant, it could be anybody's guess whether she is referring to the date and time relevant to the fact in issue or of some other day and time when she might have been offered toffee by the accused-appellant. No doubt, she opens her narration by relating it to the date of the incident but, unless the day is qualified by the time also, it would be unsafe to come to a definite conclusion as to whether her testimony would fit in the scheme of events justifying a conclusion that thereafter, the deceased was not seen alive by any one who may have had in normal course of events opportunity to see the deceased. This we say so, because in absence of disclosure of date and time in the testimony of PW-1, her statement leaves the Court guessing whether she had been with the appellant and the deceased during noon or after noon or any other time of that day which may not be relevant to the fact in issue. It could also be possible that the two girls might have been together in the noon or afternoon of that day and might not have had the opportunity to see each other thereafter. Likewise, it could also be possible that the two girls, as PW-1 statement is, might be on way to the Bazaar when the appellant met them and got her a toffee. This possibility gains probability from the circumstance that it is not the case of P.W.-1 that she and her sister (the deceased) were taken by the accused-appellant from home to have toffee. Of course, more meaning could have been lent to P.W.-1's testimony had her mother or father been examined to pin point as to when she returned after having toffee and informed her parents about the appellant having taken her sister (the deceased) with him. But, unfortunately, neither father nor mother of PW-1 has been examined. At this stage, we may observe that if, in her testimony, P.W.-1 had disclosed the name of the toffee vendor, then, probably, from the statement of that toffee vendor, we could have made an effort to figure out the time when she was with the accused-appellant and her deceased sister. But since she has not disclosed as to from whose shop the appellant got her a toffee, the time when she was allegedly with the deceased and the appellant cannot be fixed from the testimony of P.W.-6, particularly, when no evidence has been led to demonstrate that there is no other toffee seller in the village than P.W.-6. Thus, on a careful scrutiny of her testimony, notwithstanding that she was not subjected to multiple questions in her cross-examination, we find very little in her statement on the basis of which we may conclude that the deceased was last seen alive in the company of the appellant on or about the evening /night time of 06.08.2020.

21. The statement of PW-3 is equally inconsequential to carry the last seen theory forward as he also does not disclose the time as to when he saw the deceased in the company of the appellant.

22. Now, comes the statement of P.W.-6, the shop keeper, for evaluation. He, in his statement-in-chief, speaks of the accused-

appellant visiting his shop with one girl whom he could not recognise though, later, when the body of the girl was recovered he could connect it with that girl. In his cross examination, he improves his stand and says that on that evening there were two girls with Govinda (accused-appellant) at his shop and both were daughters of Kolai (informant); one, he sent back after giving her toffee, etc and the other he took away. PW-6 could not tell in which direction the accused-appellant went with that other girl. Further, in his cross examination, he stated that on the third day he came to know that the girl which Govinda had brought to his shop was killed. When asked about the age of the girls, he stated that it had turned dark and, therefore, he could not guage the age of those girls. When we read his statement as a whole, it appears to us that he is not certain that Govinda was with that girl who had died though he thinks so from the subsequent turn of events. Keeping in mind that PW-6 makes a material improvement in his statement during the course of cross-examination, as noticed above, as also that his deposition is based more on his thoughts than knowledge, PW-6's testimony does not inspire our confidence to record with conviction that the accused-appellant was with the deceased in the evening/night of 06.08.2020. Such an evidence may, at best, create suspicion but would not partake the character of proof.

23. Having found the evidence of the deceased being last seen with the accused-appellant in the evening of 06.08.2020 not convincing, we shall now notice another aspect of the matter. None of the witnesses state that in the evening/night of the date of the incident or the day following the incident, they made a search at the house of Nandu Musahar with whom, allegedly, the accused used to reside. There is also no evidence that during the search for the victim, Nandu Musahar was questioned by any of the fellow villagers with regard to the whereabouts of the accused-appellant. Noticeably, PW-1 states that in the evening her mother had made a search for her sister. PW-1 does not make a statement with regard to her father joining her mother in that effort. Importantly, it does not appear from the statement of investigation officer (PW-11) that he recorded the statement of victim's mother. Admittedly, the father of the victim, namely, the informant, expired and was not examined and so was the mother of the victim, even though it has not come on record that she has also died. Further, there is no eye witness account of the rape/murder and there is also no eye witness account of the accused-appellant having been seen near the spot where the body was found, either with, or without, the deceased, on or about the probable time of death of the deceased. Under these circumstances, though the prosecution could succeed in proving that the first information report was lodged but, the witnesses examined by the prosecution, in absence of examination of the first informant or his wife, could not establish with certitude the allegation in the FIR that the deceased was taken by the appellant on 06.08.2020 at about 8.00 p.m. And, in any view of the matter, the prosecution evidence could not complete the chain of circumstances to prove the guilt of the accused-appellant by excluding all other hypothesis.

24. We may now examine the matter from another angle that is whether the allegations made in the FIR were on the basis of own knowledge of the informant or were made at the instance of the police on strong suspicion to solve out a sensitive case. In this regard, it be noticed that according to the police witnesses the FIR was lodged at about 10.30 AM on 08.08.2020. But, from the statement of PW-3, Susheel Kumar, the village Pradhan, made during the course of cross examination, it appears that he received information of recovery of the body at about 6 AM and immediately thereafter he went to the spot and, within 10

minutes, the police also arrived. Further, from the statement of PW-2, Chandra Bali (uncle of the deceased), made during the course of his cross examination on 19.01.2021, on August 8, 2020 while he was going to Jaunpur in connection with his work, between 9-9.30 AM, on getting information in respect of discovery of the body, he went to the spot where already 100-150 people had gathered and the police had arrived. He stated that by that time it must have been 10 AM. He stated that the villagers had staged a protest and were demanding the body back and at that time none seemed to have information as to how the deceased had died. PW-5, Head Constable Dev Kumar Yadav, in his cross-examination, stated that he had reached the spot at 9.30 AM and that he does not remember the exact time by which they had brought the body to the police station. PW-4, Pradeep Kumar, the witness of the inquest proceeding, during his cross examination, initially stated that the inquest was carried out at the place where the body was recovered, but, immediately thereafter, stated that it was held at the police station. PW-8, Mahendra Tiwari, who had been a Constable at P.S. Madiyahun and had entered the written report in the General Diary, during his cross examination, stated that there were 4-5 persons with Kolai Saroj (the informant); the report was not written in front of him; the FIR was submitted to the SHO; and on his direction, the report was entered. A suggestion was put to him that the time mentioned in the FIR is not the correct time of lodging the report and that information about the incident was received at the police station from some other source/person. Though, he denied both the suggestions but from the circumstances emanating from the evidence discussed above, it is clear that information about discovery of the body of the victim in a Maize field of Munni Lal was received early in the morning of August 8, 2020 whereas, the FIR was lodged after the police had arrived at the spot. Assuming that the police, on an informal information in respect of discovery of a body, had arrived even before the FIR was registered, what is relevant is that 100-150 people who were there at the spot were not aware about the genesis of the crime and were protesting. Thus, there must have been immense pressure on the police to solve out the case. When we bear all this in mind, we apprehend that the accused appellant was named on mere suspicion, and not on evidence, to solve out the case, particularly, when neither a missing report nor an FIR was lodged till after expiry of few hours from the discovery of the body, even though, allegedly, the victim had been missing since the evening of 06.08.2020. Our apprehension expressed above, could have been dispelled if the informant or his wife in their testimony had explained the delay in lodging the report. But as neither the informant nor his wife has been examined, the delay is fatal to the prosecution case, particularly, when there is no convincing and clinching substantive evidence on record.

25. Another circumstance that now remains to be considered, which has been found incriminating by the trial court, is, whether by his conduct in leaving the village Kumbh i.e. the place of incident and going to Chandauli, the accused appellant had reflected a guilty mind. In this regard, the prosecution evidence is that the accused-appellant in connection with his work had been residing with his *Saala* (brother in law) Nandu at village Kumbh but, after the incident the accused-appellant escaped to his native village in district Chandauli, from where he was arrested on 09.08.2020. It is the prosecution case that this conduct reflects a guilty mind. This evidence, firstly, by itself is not sufficient to record conviction; secondly, there is nothing on record to show that any one had noticed the accused-appellant leaving the village in the night of the incident or soon thereafter; thirdly, it has not been shown that the accused-appellant had evaded arrest raids or summons or warrants and that coercive processes had to be issued to

secure his arrest; and, fourthly, the appellant was arrested from his own house in district Chandauli, where his presence was natural. Thus, in absence of any clinching evidence that he was seen in the night leaving the place from where the body was recovered or seen running away from the village soon after the alleged crime, merely because the accused-appellant was arrested on the next day from his own village is not a determinative factor from which we may infer that the accused-appellant held a guilty mind.

26. Having noticed, discussed and analyzed the entire prosecution evidence, we are of the firm view that the prosecution evidence may, at best, give rise to a suspicion against the appellant but fails to prove the circumstances of a conclusive nature and tendency from which we may, with certitude, hold that the accused has committed the crime. At this stage, we may remind ourselves of the observations made in paragraph 153 of the celebrated judgment in **Sharad Birdhichand Sarda's case (supra)** where it was observed that the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must or should' and not 'may be' established. The court while laying emphasis on the above legal principle relied on a judgment of the Supreme Court in **Shivaji Sahabrao Bobade and another v. State of Maharashtra, (1973) 2 SCC 793** where it was observed *"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."* The aforesaid legal principle was noticed and reiterated by a three-judge Bench decision of the Supreme Court in **Devi Lal v. State of Rajasthan, (2019) 19 SCC 447** wherein, in paragraphs 18 and 19 of the judgment, it was held as follows:-

"18.On an analysis of the overall fact situation in the instant case, and considering the chain of circumstantial evidence relied upon by the prosecution and noticed by the High Court in the impugned judgment, to prove the charge is visibly incomplete and incoherent to permit conviction of the appellants on the basis thereof without any trace of doubt. Though the materials on record hold some suspicion towards them, but the prosecution has failed to elevate its case from the realm of "may be true" to the plane of "must be true" as is indispensably required in law for conviction on a criminal charge. It is trite to state that in a criminal trial, suspicion, howsoever grave, cannot substitute proof.

19. That apart, in the case of circumstantial evidence, two views are possible on the case of record, one pointing to the guilt of the accused and the other his innocence. The accused is indeed entitled to have the benefit of one which is favourable to him. All the judicially laid parameters, defining the quality and content of the circumstantial evidence, bring home the guilt of the accused on a criminal charge, we find no difficulty to hold that the prosecution, in the case in hand, has failed to meet the same."

27. For the foregoing reasons, we have no hesitation in holding that the prosecution has failed to prove the charges for which the accused-appellant was tried and, therefore, the judgment and order of the court below is liable to be set aside. As a result whereof, the reference to affirm the death penalty is rejected. The appeal of the appellant is **allowed.** The judgment and order of the trial court is set aside. The appellant is acquitted of all the charges for which he has been tried and convicted. The appellant shall be released from jail forthwith, unless wanted in any other case, subject to compliance of the provisions of 437-A Cr.P.C. to the satisfaction of the trial court below.

Let a copy of this order along with the record be sent to the court below for information and compliance.

(2021)11ILR A46
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.09.2021

BEFORE

THE HON'BLE AJIT KUMAR, J.

Contempt Application (Civil) No. 7438 of 2019
&
Contempt Application (Civil) No. 7418 of 2019

Mahendra Kumar Srivastava ...Applicant
Versus
Sri Ajai Kumar Srivastava-I, Registrar General, Allahabad High Court & Ors.
...Opposite Parties

Counsel for the Appellant:
Sri Anoop Kumar Srivastava

Counsel for the Respondent:
Sri Ashish Mishra, Sri Mata Prasad (S.C.)

A. Civil Law - Contempt of Courts Act,1971-Section 12-the retired employee would not have any right of redetermination of his pension but only in cases where salary is revised with retrospective effect, the retired employee gets the benefit of additional pension and that too in certain cases-the present case is not exception for redetermination of pension using upgraded pay scale by desired retrospective effect-even though they retired prior to the upgradation of pay scale of PPS/HPS, they would be given benefit of the upgraded pay scale that was made applicable to such class of employees who were in service subsequent to the retirement of the applicants only because they retired as officiating Deputy Registrars-Thus, three employee who were wrongly given benefit of upgraded pay scale necessary correction in their records have already been made-Besides that there can be no claim of equality even if a similarly placed employee is given higher pay scale which would not have been admissible in law-no ground to give benefit to the applicant on the basis of parity otherwise every pensioner would stand entitled to a consolidated pension at par ignoring the years of qualifying service-Thus, no cause survives for the applicants to maintain this contempt application any further.(Para 1 to 20)

The application is disposed off. (E-6)

List of Cases cited:

1. Exide industries Ltd. Vs. U.O.I. & ors. (2015) II AD SC 635

2. St. of W.B. & ors. Vs. W.B. Govt. Pensioners Association & ors. (2002) AIR SC 538

3. Sudhir Kumar Consul Vs Allahabad Bank (2011) 3 SCC 486

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

1. Heard Sri Anoop Kumar Srivastava, learned counsel for the petitioner, Sri Kamlesh Kumar Yadav, learned counsel for the petitioners in Contempt Application (Civil) No. 7418 of 2019. Sri Mata Prasad, learned Standing Counsel for State respondent nos. 1 & 2 and Sri Ashish Mishra, learned counsel for newly impleaded opposite party no. 3.

2. By means of this contempt application filed under Section 12 of the Contempt of Courts Act, 1971 non-compliance of the order dated 24.05.2019 passed in Writ - A No. 61048 of 2016 is complained of.

3. A compliance affidavit has been filed in this case on behalf of the opposite party no. 3 on 28.01.2020 annexing therewith the order dated 03.09.2019, whereby it is claimed that the pension of the applicant has come to be revised w.e.f. 01.01.2006, as per recommendation of the 6th Pay Commission, and thus, it is claimed that the order of writ Court stood complied with in its letter and spirit.

4. Having heard learned counsel for the respective parties and their arguments raised across the bar and having gone carefully through

the order of writ Court, I find that the main issue before the writ Court was as to whether the applicant who belonged to the cadre of Personal Assistant and reached to the stage of Principal Private Secretary/ Head Private Secretary, though retired while working as Deputy Registrar on officiating basis only, could have been denied benefits of 6th pay commission for the purposes of revision in pension, as admissible to Principal Private Secretary/ Head Private Secretary (for short 'PPS/HPS').

5. The writ Court after examining the relevant rules, held that prior to 2001, the pay scale of the Deputy Registrars of the High Court and that of the PPS/HPS was same and therefore, taking recourse to Rule 20(c)(ii) of the rules they were permitted to officiate as Deputy Registrars. It is a case of the applicants that they retired in the relevant years on attaining age of superannuation between years 1999 and 2000 respectively while working as Officiating Deputy Registrars. It is thus, they came to set up a case that they have been treated to have retired as Deputy Registrar instead of PPS/ HPS and consequently they were being denied benefit of revision in pension as per the recommendation made by the 6th Central Pay Commission. The writ Court referred to Rules, 2001, whereby, Rule 20(c)(ii) of the Rules, 1976 came to be repealed w.e.f. 15.11.2001 and the pay scale of PPS/HPS also came to be upgraded. The issue was raised in the writ petition to set up a claim to give revised pension of PPS/HPS as per the recommendation of 6th Pay Commission as if the applicants were made to retire as Deputy Registrar and conveyed the impression that since they had retired as such they were denied pay scale of PPS/HPS and subsequent revision in pension. Accordingly, the Court permitted this to be a pivotal question to be adjudicated upon in the writ petition by framing the point thus:

"The pivotal question on which the claim of the petitioners revolve is as to whether the petitioners were appointed substantively on the post of Deputy Registrar or in the alternative whether petitioners continued to have lien on the post of PPS/HPS upon being appointed on transfer in officiating capacity to the post of Deputy Registrar."

6. Thus, the writ Court proceeded to decide this above question as substantial relief claimed in the writ petition and after long discussion on the point of lien of a person working in officiating capacity and referring to various authorities and placing substantial reliance upon them, the writ Court finally held that applicants who had retired as officiating Deputy Registrar since were not working in a substantive capacity as such, so they held their respective lien in their parent cadre of PPS/HPS even at the time of retirement. Thus, the applicants were held also to be entitled to revised pension admissible to the class of pensioners that retired from the post of PPS/HPS and it is after holding as above that the Court proceeded to pass the order for the Chief Treasury Officer, Collectorate, Prayagraj to revise pension of the applicants giving benefit to them of the recommendation of the 6th Pay Commission w.e.f. 01.01.2006 at par with those persons of the PPS/HPS cadre as would have been admissible to them w.e.f. 01.01.2006.

7. Learned counsel for the respective applicants have argued that since the applicants in the writ petition were held to have retired as PPS/HPS, they would be consequently entitled to the pension as was admissible to the pensioners of the PPS/HPS cadre and also the revised pension w.e.f. 01.01.2006.

8. Learned Standing Counsel has submitted that admissibility of pension has to be judged in a particular cadre as a pensioner on the date he retired because pension has to be calculated on the basis of the pay last drawn by the employee. He submits that if the applicants' had retired prior to the upgradation of pay scale in PPS/HPS

cadre, though they might have been mentioned as officiating Deputy Registrar at the time of superannuation but technically they had retired as PPS/HPS only and in the pay scale that was also of the PPS/HPS at that point of time. He has argued further that revised pension as has been directed to be paid to the applicants giving them benefit of the 6th Pay Commission's recommendation w.e.f. 01.01.2006, was never an issue for the simple reason that the pension has to be revised on the basis of pension drawn. Learned Standing Counsel has submitted that before the writ Court, the respondents might have taken the defence that the applicants were rightly retired as Deputy Registrar but that does not change the situation either, the pay scale of the Deputy Registrar and the PPS/HPS on the date of such retirement being the same. Learned Standing Counsel submitted that writ Court has also held that a pension is calculated only on the basis of last pay drawn.

9. Testing the arguments advanced by learned counsel for respective parties on the testing *anvil* of service jurisprudence *qua* employer and employee relationship, I find that the admissibility of the pension of any employee would be dependant upon two factors: (i) pension as admissible to the class of service; and (ii) the requisite period of *qua*lifying service for such pension is attained, as per the rules. Both these factors are governed under rules framed. So far fixation of pension is concerned, it is dependent upon the salary last fixed and drawn as admissible under the relevant rules framed for such purposes. Any upgradation of pay scale admissible to a class of employee, if made after a cut off date, such an upgradation cannot be made applicable/ admissible to employees who ceased to be employees of the establishment before the cut off date either by virtue of superannuation or resignation or termination/ removal, if such termination and removal has attained finality, unless and until such rules are given retrospective operation. So unless and until such rules are held to be ultra vires and are struck down by giving it retrospective effect, an employee while in service will governed in the matter of payment of pay scale and so also after retirement the procedure provided for computation of pension under such rules only. In the case of **Exide Industries Ltd. vs. Union of India and others 2015 II AD (S.C.) 635**, the Supreme Court has very clearly observed that:

"In normal circumstances when an employee retires from service, his relationship with the employer comes to an end. It is also well settled that after retirement, normally no disciplinary action can, be initiated against the concerned employee. ***Similarly, the retired employee would not have any right of redetermination of his pension but only in cases where salary is revised with retrospective effect, the retired employee gets the benefit of additional pension and that too in certain cases."*** *(emphasis added)*

10. Applying the above principle, I do not find that the applicants' case can be taken as an exception for redetermination of pension using upgraded pay scale by desired retrospective effect. In the entire judgment, non compliance of which is complained of in this contempt application, I do not find any finding returned in favour of the petitioners/ applicants that even though they retired prior to the upgradation of pay scale of PPS/ HPS, they would be given benefit of the upgraded pay scale that was made applicable to such class of employees who were in service subsequent to the retirement of the petitioners/ applicants only because they retired as officiating Deputy Registrars. Thus, three employees who were wrongly given benefit of upgraded pay scale necessary correction in their records have already been made. Besides that there can be no claim of equality even if a similarly placed employee is given higher pay scale which would not have been admissible in law. In the case of **State of West Bengal and**

others vs. West Bengal Government Pensioners Association and others AIR 2002 SC 538, the Supreme Court has cited with approval its earlier judgment in the case of K.L. Rathi vide para 25 which is reproduced hereunder:

"25. Again in K.L. Rathee v. Union of India and others, the case of the petitioner was that following Nakara case he had to be given the same amount of pension as other employees of his rank irrespective of the date of retirement. The Court noted that Nakara did not strike down the definition of 'emoluments' and held that:

"Nakara case does not lay down that the same amount of pension must be paid to all persons retiring from government service irrespective of the date of retirement .... Even if pension is calculated on the basis of the same formula the basis of calculation has to be the average of the last ten months emoluments. This principle of adopting last ten months emoluments as the basis for calculating of pension must be uniformly applied to all persons drawing pension from the Central Government. This was also that was laid down in Nakara case. It, however, did not lay down that the quantum of emoluments drawn during the last ten months of service of each government employee must be taken to be the same for this purpose ....

The emoluments have to be calculated according to the government rules in force at the time of retirement of the employees."

11. In the case of **Sudhir Kumar Consul vs. Allahabad Bank (2011) 3 SCC 486,** the Supreme Court reaffirmed its earlier judgment passed in the case of State of Punjab vs. Boota Singh, Ex Services League vs. Union of India and K.L. Rathi (supra) vide para 15 thus:

"15. ... We are of the view that the retired employees (respondents), who had retired from service before 1- 7-1986 and those who were in employment on the said date, cannot be treated alike as they do not belong to one class. The workmen, who had retired after receiving all the benefits available under the Contributory Provident Fund Scheme, cease to be employees of the appellant-Board w.e.f. the date of their retirement. They form a separate class."

16) In State of Punjab v. Boota Singh case, (2000) 3 SCC 733, this Court has held that the benefit conferred by the notification dated 9-7-1985 can be claimed by those who retire after the date stipulated in the notification and those who have retired prior to the stipulated date in the notification are governed by different rules. They are governed by the old rules, i.e., the rules prevalent at the time when they retire. The two categories of persons are governed by different sets of rules. They cannot be equated. The grant of additional benefit has financial implications and the specific date for the conferment of additional benefits cannot be considered arbitrary. This Court held:

"In the case of Indian Ex-Services League v. Union of India (1991) 2 SCC 104 this Court distinguished the decision in Nakara case (1983) 1 SCC 305 and held that the ambit of that decision cannot be enlarged to cover all claim by retirees or a demand for an identical amount of pension to every retiree, irrespective of the date of retirement even though the emoluments for the purpose of computation of pension be different. We need not cite other subsequent decisions which have also distinguished Nakara case (1983) 1 SCC 305. The latest decision is in the case of K.L. Rathee v. Union of India (1997) 6 SCC 7 where this Court, after referring to various judgments of this Court, has held that Nakara case (1983) 1 SCC 305 cannot be interpreted to mean that emoluments of persons who retired after a notified date holding the same status, must be treated to be the same. The respondents are not entitled to claim benefits which became available at a much later date to retiring employees by reason of changes in the rules relating to pensionary benefits."

12. Thus, So far as the post and its cadre is concerned, the writ Court rightly observed that one who has been confirmed in service and has been appointed in a substantive capacity in a particular cadre would continue to belong such cadre until his cadre is changed by giving him substantive appointment either by transfer or by promotion and a mere officiating charge would not deny lien to an employee against his original post in a cadre and so the applicants were rightly held to have retired as PPS/HPS. But so far the question of admissibility of pay scale is concerned, an employee continues to be in a regular cadre and the pay scale, so long as he is in the employment, as admissible to him, would be the pay scale that has been prescribed for such employment against the post occupied. The terms and conditions of payment of salary under the Rules would operate in respect of an employee so long as he is in employment and after employee ceases to be an employee and becomes a pensioner, he is shifted to a different class from those working in a regular cadre. For the purpose of pension, his last pay drawn is taken into account and merely because an employee has retired as PPS/HPS, he would not become entitle to any pay scale which might have been revised or upgraded after his attaining the age of superannuation because the admissibility of pay scale is to be commensurate to a person's status of holding a particular post while in employment.

13. The applicants have set up a claim that since they were treated to have retired as PPS/HPS, they would be entitled to the revised pension on the last pay drawn in the upgraded pay scale by an employee of their cadre in the year 2001.

14. This above argument cannot be accepted. The applicants have been held to have retired as PPS/HPS but the writ Court has not directed that the upgraded pay scale of the PPS/HPS after the superannuation of the applicants would also be applicable to them.

15. In the considered opinion of the Court also, such above plea is legally not maintainable.

16. Applicants' next submission that they are not able to draw benefit of the order of writ Court because they are already drawing revised pension w.e.f. 01.01.2006 calculated on the basis of pension that they were drawing on the last pay drawn and that they have been made to retire as Deputy Registrar, does not e*qua*lly hold any merit. The Court finds no contradiction in the judgment. The judgment says that the applicants would be taken to have retired as PPS/HPS and so orders that they are entitled for revised pension w.e.f. 01.01.2006 as admissible to class of pensioners of PPS/HPS. The applicants have not brought any instance that any PPS/HPS who had retired prior to year 2001 and whose pay scale was at par with that of the Deputy Registrar, had been awarded upgraded pay scale as was made admissible w.e.f. 2001 only. Learned counsel for the applicants further submitted that three of the PPS/HPS who had retired like the applicants, were granted higher pay grade even after retirement and so consequential benefits were conferred upon them in the revision of pension w.e.f. 01.01.1986. The applicants are right to the extent that three such PPS/HPS namely Abdul Ahad Khan, Lallan Mishra and Prakash Chandra Gupta who had retired on 31.12.1984, 31.08.1999 and 31.01.2000 were those who had been accorded with such benefit. However, learned Standing Counsel as well as learned counsel for the High Court have submitted that this above anomaly later came to be noticed and has now stood rectified in the order dated 03.09.2019, wherein, they had been accorded pension at par with the applicants but of course commensurate to their pay scale that they had last drawn at the time of retirement.

17. In view of the above therefore, I do not find any ground to give benefit to the applicants on the basis of parity either.

18. Furthermore, the issue of admissibility is always related to the words and expression "in accordance with law" and so what is legally not sustainable can also not be legally admissible and therefore, when the Court directs for payment of salary or pension, saying as admissible, meaning thereby it has to be in accordance with law. When the Court refers to the words and expression "class of pensioners", it means class of pensioners with admissibility of pension, as commensurate to their pay scale and emoluments lastly drawn, otherwise every pensioner would stand entitled to a consolidated pension at par ignoring the years of *qua*lifying service and the benefits drawn of promotional pay scale or Acquired Career Progression scheme respectively. This Court, therefore, finds that neither opposite parties have acted in violation of either the mandate contained in the order of the writ Court, non compliance of which is complained of, nor the petitioners-applicants' claim could be justified on the principles governing conferment of benefits of pension.

19. In view of the above, I find that the order of revised pension dated 03.08.2019 and 03.09.2019 passed by the Registrar (Accounts), High Court of Judicature at Allahabad and the order passed by the Treasury Officer, Prayagraj dated 13.09.2019 fully comply the order of writ Court in its letter and spirit. Thus, no cause survives for the applicants to maintain this contempt application any further.

20. Contempt application is accordingly consigned to record.

21. Notices issued, if any, stand discharged.

(2021)11ILR A51
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.11.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

Criminal Appeal No. 1197 of 2020

Amar Dayal ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Laxmi Narayan Rathour, Sri Akhilesh Kumar Khare, Sri Noor Muhammad, Sri Yogesh Kumar Srivastava

Counsel for the Respondent:
A.G.A.

A. Criminal Law - Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code, 1860-Section 302-challenge to-conviction- the appellant had inimical relation with his wife as he had illicit relationship with some other women-He used to regularly beat her-appellant poured kerosene oil and set her ablazed-she was 50% burnt and after 11 days she was succumbed to injuries-cause of death was found to be septicemia-death of deceased was a homicidal death-Five witnesses turned hostile-death caused by the accused was not premeditated-the injuries were though sufficient in the ordinary course of nature to have caused death-Hence, the conviction of the appellant u/s 302 IPC is converted into conviction u/s 304 (Part-I) IPC.(Para 1 to 38)

B. Dying declaration can be acted upon as per the contours laid down by the authoritative pronouncements, we would like to go by the the juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood

is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on death bed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the court insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. (Para 18 to 29)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Maniben Vs St. of Guj. (2009) Lawsuit SC 1380

2. Koli Lakhmanbhai Chandabhai Vs St. of Guj. (1999) 8 SCC 624

3. Ramesh Harijan Vs St. of U.P. (2012) 5 SCC 777

4. St. of U.P. Vs. Ramesh Prasad Misra & anr. (1996) AIR SC 2766

5. Lakhan Vs St. of M.P. (2010) 8 SCC 514

6. Krishan Vs St. of Har. (2013) 3 SCC 280

7. Ramilaben Hasmukhbhai Khristi Vs. St. of Guj.(2002) 7 SCC 56

8. St. of U.P. Vs. Mohd. Iqram & anr..(2011) 8 SCC 80

9. Bengai Mandal @ Begai Mandal Vs St. of Bih.(2010) 2 SCC 91

10. Maniben Vs. St. of Guj. (2009) 8 SCC 796

11. Chirra Shivraj Vs St. of A.P. (2010) 14 SCC 444

12. Gautam Manubhai Makwana Vs St. of Guj. CRLA NO. 83 of 2008

(Delivered by Hon'ble Ajai Tyagi, J.)

1. This appeal has been preferred against the judgment and order dated 7.1.2020, passed by the learned Additional Sessions Judge, Court No.5, Jhansi, in Session Trail No.55 of 2016 State of UP vs. Amar Dayal Sahu arising out of Case Crime No.202 of 2015 under Section 302 IPC, Police Station-Lahchura, District-Jhansi, whereby the appelant is convicted and sentenced for the offence under Section 302 IPC for life imprisonment with a fine of Rs.60,000/- and in defalut of payment of fine, further imprisonemnt for one year.

2. The brief facts of the case are that first information report of this case was registered on the basis of application moved by complainant, father of the deceased, through the application under Section 156 (3) Cr.P.C. in which it is stated that complainant's daughter, namely, Jaikali got married with accused Amar Dayal Sahu about 7-8 years before the occurrence. They had two children. Amar Dayal Sahu had illicit relationship with one Kiran Sahu, which was bone of contention between husband and wife and the accused always got support of his family members. All of them were harrassing his daughter and were giving life-threats. His daughter used to disclose all that matter with him, his wife and relatives. He tried to convince the accused so many times, but accused and his family members did not mend the ways. On 12.5.2015, his daughter Jaikali was in her matrimonial home then mobile phone of accused was rang up, which was took up by his daughter. Accused snatched his mobile from her and abused and gave beating to his daughter. He locked her in the room and in the morning at about 5:00 a.m., on 13.5.2015 accused Amar Dayal Sahu with the help of his family members poured kerosene oil on his daughter and set her on fire with the intention to kill her. Consequently his daughter sustained serious burn injuries. She was admitted in hospital and during treatment on 24.5.2015, she succumbed to injuries.

3. On the basis of above application under Section 156 (3) Cr.P.C., a Case Crime No.202 of 2015 was registered under Section 302 IPC at Police Station-Lahchura, District-Jhansi. SI Sundar Lal took up the investigation. During the coruse of investigation, he recorded the statements of witnesses, prepared site-plan. Victim's dying declaration was recorded by Priti Jain-Nayab Tehsildar. After the death of the victim, inquest report was prepared and dead body was sent for post mortem. Dr. S.N. Kanchan conducted the postmortem and prepared report. After completing the investigation, Investigating Officer submitted charge-sheet against the appellant Amar Dayal Singh under Sections 302, 323, 504, 506 IPC. The case being triable exclusively by the court of session, was committed by competent Magistrate to the court of session. Learned Trail Court framed charges against the appellant under Section 302 IPC. Accused denied the charge and claimed to be tried.

4. Prosecution examined following witnesses:

1.	Har Prasad	PW1
2.	Pukhan	PW2
3.	Dr. SN Kanchan	PW3
4.	Sundar Lal	PW4
5.	Chandrabhan Dubey	PW5
6.	SI Sanjeev Kumar	PW6
7.	Jitendra Sahu	PW7
8.	Pradeep Sahu	PW8
9.	Laxmi Prasad	PW9
10.	Dr. Mahendra Pal Singh	PW10
11.	Priti Jain	PW11

5. Apart from aforesaid witnesses, prosecution submitted following documentary evidence, which was proved by leading the evidence:

1.	Application U/S 156 (3) Cr.P.C.	Ex.ka1
2.	Inquest Report	Ex.ka2
3.	Postmortem Report	Ex.ka3
4.	First Information Report	Ex.ka4
5.	Site-Plan	Ex.ka5
6.	Charge-Sheet	Ex.ka6
7.	General Diary	Ex.ka7
8.	Dying-Declaration	Ex.ka8

6. Deceased was hospitalised just after the occurrence took place and she died after about 11 days of the incident. In the meantime, she remained under treatment, continuously. Her medical papers were also filed by prosecution, which are on record.

7. Heard Mr.Noor Mohammad, learned counsel for the appelalnt, Shri Vikas Goswami, learned AGA appearing on behalf of the State and perused the record.

8. Learned counsel for the appelant argued in the very beginning that in this case no prosecution witness has supported the prosecution case and all the witnesses of fact have turned hostile. Learned Counsel submitted that Harprasad (PW1) is complainant and father of the deceased, but in his statement before learned trial court, he did not support the prosecution story. He was cross-examined by prosecutor, but nothing was extracted in his cross-examination agaisnt the accused. Similarly, Pukhan (PW2) was examined who was the mother of the deceased. She also did not support the prosecution case. Apart from PW1 and PW2, Jitendra Sahu (PW7), Pradip Sahu (PW8) and Laxmi Prasad (PW9) were also examined. Jitendra Sahu (PW7) and Laxmi Prasad (PW9) are relative of the deceased while Pradip Sahu (PW8) is brother of the deceased.

All these witnesses also did not support the prosecution version and they were also declared hostile. On the basis of analysis of all the five witnesses of fact, no guilt against accused appellant is established.

9. Learned counsel for the appellant next submitted that dying declaration of deceased was recorded when she was surviving, but this dying declaration has no corroboration with any prosecution evidecne. All the witnesses of fact have turned hostile and nobody supported the version which is mentioned in dying delcaration. Therefore, learned trial court committed grave error by convicting the accused on the basis of dying declaration only when it was not corroborated at all.

10. Learned counsel for the appellant additionally submitted that if, for the sake of arugment, it is assumed that appellant has committed the offence, in that case also no offence under Section 302 IPC is made out. Maximum this case can travel up to the limits of offence under Section 304 IPC because the deceased died after 11 days of the occurrence due to developing the infection in her burn-wounds, i.e., septicemia. As per catena of judgments of Hon'ble *Apex Court* and this Court, offence cannot travel beyond section 304 IPC, in case the death occurred due to septicimia. Learned counsel for the appellant also submitted that postmortem report also shows that cause of death was septicimia. Learned counsel relied on the judgment in the case of ***Maniben vs. State of Gujarat*** *[2009 Lawsuit SC 1380]*, and the judgment in Criminal Appeal Nos.1438 of 2010 and 1439 of 2010 dated 7.10.2017 and judgment of Criminal Appeal No.2558 of 2011 delivered on 1.2.2021 by this Court and several other judgments.

11. No other point or argument was raised by learned cousel for the appellant and confined his arguments on above points only.

12. Learned AGA, *per contra*, vehemently opposed the arguments placed by counsel for the appellant and submitted that conviction of accused can be based only on the basis of dying declaration, if it is wholly reliable. It requires no corroboration. Moreover, testimony of hostile witnesses can also be relied on to the extent it supports the prosecution case. Learned trial court has righty convited the appellant under Section 302 IPC and sentenced accordingly. There is no force in this appeal and the same may be dismissed.

13. First of all, learned counsel for the appellant has raised the issue relating to the hostality of witnesses. Five witnesses of fact were examined before learned trial court, namely Harprasad, complainant and father of the deceased (PW1), Pukhan, mother of the deceased (PW2), Jitendra Sahu, relative (PW7) and Laxmi Prasad, relative (PW9) and Pradip Sahyu (PW8), brother. All these witnesses have turned hostile, but the testimony of hostile witnesses cannot be thrown away just on the basis of the fact that they have not supported the prosecution case and were cross-examined by the prosecutor. The testimony of the hostile witnesses can be relied upon to the extent it supports the prosecution case. Needless to say that the testimony of hostile witnesses should be scrutinized meticulously and very cautiously.

14. Hon'ble *Apex Court* in ***Koli Lakhmanbhai Chandabhai vs. State of Gujarat*** *[1999 (8) SCC 624]*, as held that evidence of hostile witness can be relied upon to the extent it supports the version of prosecution and it is not necessary that it should be relied upon or rejected as a whole. It is settled law that evidence of hostile witness also can be relied upon to the extent to which it supports the prosecution version. Evidence of such witness cannot be treated as washed off the record. It remains admissible in the trial and there is no legal bar to base his conviction upon his

testimony if corroborated by other reliable evidence.

15. In ***Ramesh Harijan vs. State of U.P.*** *[2012 (5) SCC 777]*, the Hon'ble *Apex Court* has also held that it is settled legal position that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witness cannot be treated as effaced or washed off the record altogether.

16. In ***State of U.P. vs. Ramesh Prasad Misra and another*** *[1996 AIR (Supreme Court) 2766]*, the Hon'ble *Apex Court* held that evidence of a hostile witnesses would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. Thus, the law can be summarized to the effect that evidence of a hostile witness cannot be discarded as a whole, and relevant part thereof, which are admissible in law, can be used by prosecution or the defence.

17. Perusal of impugned judgment shows that learned trail court has scrutinised the evidence on record very carefully.

18. As far as the dying declaration is concerned, it was recroded by Priti Jain, Nayab Tehsildar, who was examined as PW11. Dying declaration as recorded by PW11 after obtaining the certificate of mental-fitness from Dr. Mahendra Pal Singh, who was examined as PW10. After completion of dying delaration also the said docter has given certificate that during the course of statement, the victim remained conscious.

19. Learned counsel for the appellant has argued that dying declaration is doubtful and not corroborated by witnesses of fact, hence, it cannot be the sole basis of conviction. Legal position of dying declaration to be the sole basis of conviction is that it can be done so if it is not tutored male voluntarily and is wholly reliable. In this regard, Hon'ble *Apex Court* has summarized the law regarding dying declaration in ***Lakhan vs. State of Madhya Pradesh*** *[(2010) 8 Supreme Court Cases 514]*, in this case, Hon'ble *Apex Court* held that the doctrine of dying declaration is enshrined in the legal maxim *nemo moriturus praesumitur mentire*, which means, *"a man will not meet his Maker with a lie in his mouth"*. The doctrine of dying declaration is enshrined in Section 32 of Evidence Act, 1872, as an exception to the general rule contained in Section 60 of Evidence Act, which provides that oral evidence in all cases must be directed, i.e., it must be the evidence of a witness, who says he saw it. The dying declaration is, in fact, the statement of a person, who cannot be called as witness and, therefore, cannot be cross-examined. Such statements themselves are relevant facts in certain cases.

20. The law on the issue of dying declaration can be summarized to the effect that in case the court comes to the conclusion that the dying declaration is true and reliable, has been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration and it has not been made under any tutoring/duress/prompting; it can be the sole basis for recording conviction. In such an eventuality no corroboration is required. It is also held by Hon'ble *Apex Court* in the aforesaid case, that a dying declaration recorded by a competent Magistrate would stand on a much higher footing than the declaration recorded by office of lower rank, for the reason that the competent Magistrate has no axe to grind against the person named in the dying declaration of the victim.

21. Deceased survived for 11 days after the incident took place. Her dying declaration was

recorded by Priti Jain Nayab Tehsildar and doctor Mahendra Pal Singh appended certificate of mental health of the victim before and after making of dying declaration, which is proved as Ex.ka8. Both the above witnesses PW10 and PW11 are absolutely independent witnesses. In the wake of aforesaid judgments of Lakhan (supra), dying declaraion cannot be disbelived, if it inspires confidence. On reliability of dying declaration and acting on it without corroboration, Hon'ble *Apex Court* held in ***Krishan vs. State of Haryana*** *[(2013) 3 Supreme Court Cases 280]* that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused. Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. Hence, in order to pass the test reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused, who had no opportunity of testing the veracity of the statement by cross-examination. But once, the court has come to the conclusion that the dying declaration was the truthful version as to the circumstance of the death and the assailants of the victim, there is no question of further corroboration.

22. In ***Ramilaben Hasmukhbhai Khristi vs. State of Gujarat,*** *[(2002) 7 SCC 56],* the Hon'ble *Apex Court* held that under the law, dying declaration can form the sole basis of conviction, if it is free from any kind of doubt and it has been recorded in the manner as provided under the law. It may not be necessary to look for corroboration of the dying declaration. As envisaged, a dying declaration is generally to be recorded by an Executive Magistrate with the certificate of a medical doctor about the mental fitness of the declarant to make the statement. It may be in the from of question and answer and the answers be written in the words of the person making the declaration. But the court cannot be too technical and in substance if it feels convinced about the trustworthiness of the statement which may inspire confidence such a dying declaration can be acted upon without any corroboration.

23. From the above case laws, it clearly emerges that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused when such dying declaration is true, reliable and has been recorded in accordance with established practice and principles and if it is recorded so then there cannot be any challenge regarding its correctness and authenticity.

24. In dying delcaration of deceased (Ex.ka8), it is also important to note that it was recorded on 20.5.2015 and the deceased died on 24.5.2015 while the incident took place on 13.5.2015. It means that she remained alive for 4 days after making dying declaration. Therefore, truthfulness of dying declaration can further be evalated from the fact that she survived for 4 days after making it from which it can reasonably be inferred that she was in a fit condition to make the statment at the relevant time. Moreover, in the dying declaration, the deceased did not unnecessarily involved the other family members of the accused appellant. She only attributed the role of burning to her husband.

25. In such a situation, the hostality of witnesses of fact cannot demolish the value and reliability of the dying declaration of the deceased, which has been proved by prosecution in accordance with law and is a truthful version

of the event that occurred and the circumstances leading to her death.

26. As already noticed, none of the witnesses or the authorities involved in recording the dying declaration had turned hostile. On the contrary, they have fully supported the case of prosecution. The dying declaration is reliable, truthful and was voluntarily made by the deceased, hence, this dying declaration can be acted upon without corroboration and can be made the sole basis of conviction. Hence, learned trial court has committed no error on acting on the sole basis of dying declaration. Learned trial court was completely justified in placing reliance on dying declaration Ex. KA-8 and convicting the accused-appellant on the basis of it.

27. Now we come to the point of argument raised by learned counsel for the appellant that deceased died due to septicimia, hence this case falls within the ambit of Section 304 IPC and not under Section 302 IPC. In this regard, learned counsel has submitted that deceased died after 11 days of incident due to the poisonous infection developed in her burn injuries, whcih could be avoided by good treatment. There was no intention of the appellant to cause the death of his wife.

28. In order to appreciate the rival contentions advanced by the parties and issues involved, it would be necessary to mention by us that incidence of this case took place on 13.5.2015 when the appellant poured kerosene oil on the body of the deceased and set her ablazed. She was admitted in Medical College, Jhansi, on 13.5.2015 and discharged on 15.5.2015 as suggested by medical papers on record. Doctor has written that she was having 50% burn. Medical papers also show that she was again hospitalized in the same hospital on 19.5.2015 where she succumbed to the injuries on 24.5.2015. In postmortem report, cause of death was found to be septicimia. Hence, there is no doubt that deceaced died due to septicimia and it is very relevant fact that after first hospitalization the deceased was discahrged after 2 days and again she was hospitalized after 4 days of discharge where she died after 5 days of her second admission.

29. The finding of fact regarding the presence of witnesses at the place of occurrence cannot be faulted with. Death of deceased was a homicidal death. The fact that it was a homicidal death takes this Court to most vexed question whether it would fall within the four-corners of murder or culpable homicide not amounting to murder. Therefore, we are considering the question whether it would be a murder or culpable homicide not amounting to murder and punishable under Section 304 IPC. Accused is in jail for the last more than 14 years.

30. In ***State of Uttar Pradesh vs. Mohd. Iqram and another***, [(2011) 8 SCC 80], the *Apex Court* has made the following observations in paragraph 26, therein:

"26. Once the prosecution has brought home the evidence of the presence of the accused at the scene of the crime, then the onus stood shifted on the defence to have brought-forth suggestions as to what could have brought them to the spot in the dead of night. The accused were apprehended and, therefore, they were under an obligation to rebut this burden discharged by the prosecution and having failed to do so, the trial-court was justified in recording its findings on this issue. The High Court committed an error by concluding that the prosecution had failed to discharge its burden. Thus, the judgment proceeds on a surmise that renders it unsustainable."

31. In ***Bengai Mandal alias Begai Mandal vs. State of Bihar*** *[(2010) 2 SCC 91]*, incident occurred on 14.7.1996, while the deceased died

on 10.8.1996 due to septicemia caused by burn injuries. The accused was convicted and sentenced for life imprsonment under Section 302 IPC, which was confirmed in appeal by the High Court, but Hon'ble The *Apex Court* converted the case under Section 304 Part-II IPC on the ground that the death ensued after twenty-six days of the incident as a result of septicemia and not as a consequence of burn injuries and, accordingly, sentenced for seven years' rigorous imprisonment.

32. In ***Maniben vs. State of Gujarat*** *[(2009) 8 SCC 796]*, the incident took place on 29.11.1984. The deceased died on 7.12.1984. Cause of death was the burn injuries. The deceased was admitted in the hospital with about 60 per cent burn injuries and during the course of treatment developed septicemia, which was the main cause of death of the deceased. Trial-court convicted the accused under Section 304 Part-II IPC and sentenced for five years' imprisonment, but in appeal, High Court convicted the appellant under Section 302 IPC. Hon'ble The *Apex Court* has held that during the aforesaid period of eight days, the injuries aggravated and worsened to the extent that it led to ripening of the injuries and the deceased died due to poisonous effect of the injuries. Accordingly, judgment and order convicting the accused under Section 304 Part-II IPC by the trial-court was maintained and the judgment of the High Court was set aside.

33. In ***Chirra Shivraj vs. State of Andhra Pradesh*** *[(2010) 14 SCC 444]*, incident took place on 21.4.1999. Deceased died on 1.8.1999. As per the prosecution version, kerosene oil was poured upon the deceased, who succumbed to the injuries. Cause of death was septicemia. Accused was convicted under Section 304 Part-II IPC and sentenced for five years' simple imprisonment, which was confirmed by the High Court. Hon'ble The *Apex Court* dismissed the appeal holding that the deceased suffered from septicemia, which was caused due to burn-injuries and as a result thereof, she expired on 1.8.1999.

34. We can safely rely upon the decision of the Gujarat High court in Criminal Appeal No.83 of 2008 ***(Gautam Manubhai Makwana Vs. State of Gujarat)*** decided on 11.9.2013 wherein the Court held as under:

"12. In fact, in the case of ***Krishan vs. State of Haryana*** *reported in (2013) 3 SCC 280, the Apex Court has held that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused. Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. But where the dying declaration itself is attended by suspicious circumstances, has not been recorded in accordance with law and settled procedures and practices, then, it may be necessary for the court to look for corroboration of the same.*

13. However, the complaint given by the deceased and the dying declaration recorded by the Executive Magistrate and the history before the doctor is consistent and seems to be trustworthy. The same is also duly corroborated with the evidence of witnesses and the medical reports as well as panchnama and it is clear that the deceased died a homicidal death due to the act of the appellants in pouring kerosene and setting him ablaze. We do find that the dying declaration is trust worthy.

14. However, we have also not lost sight of the fact that the deceased had died after a month of treatment. From the medical reports,

it is clear that the deceased suffered from Septicemia which happened due to extensive burns.

15. In the case of the B.N. Kavatakar and another (supra), the Apex Court in a similar case of septicemia where the deceased therein had died in the hospital after five days of the occurrence of the incident in question, converted the conviction under section 302 to under section 326 and modified the sentence accordingly.

15.1 Similarly, in the case of Maniben (supra), the Apex Court has observed as under:

"18. The deceased was admitted in the hospital with about 60% burn injuries and during the course of treatment developed septicemia, which was the main cause of death of the deceased. It is, therefore, established that during the aforesaid period of 8 days the injuries aggravated and worsened to the extent that it led to ripening of the injuries and the deceased died due to poisonous effect of the injuries.

19. It is established from the dying declaration of the deceased that she was living separately from her mother-in-law, the appellant herein, for many years and that on the day in question she had a quarrel with the appellant at her house. It is also clear from the evidence on record that immediately after the quarrel she along with her daughter came to fetch water and when she was returning, the appellant came and threw a burning tonsil on the clothes of the deceased. Since the deceased was wearing a terylene cloth at that relevant point of time, it aggravated the fire which caused the burn injuries.

20. There is also evidence on record to prove and establish that the action of the appellant to throw the burning tonsil was preceded by a quarrel between the deceased and the appellant. From the aforesaid evidence on record it cannot be said that the appellant had the intention that such action on her part would cause the death or such bodily injury to the deceased, which was sufficient in the ordinary course of nature to cause the death of the deceased. Therefore, in our considered opinion, the case cannot be said to be covered under clause (4) of Section 300 of IPC. We are, however, of the considered opinion that the case of the appellant is covered under Section 304 Part II of IPC."

16. In the present case, we have come to the irresistible conclusion that the role of the appellants is clear from the dying declaration and other records. However, the point which has also weighed with this court are that the deceased had survived for around 30 days in the hospital and that his condition worsened after around 5 days and ultimately died of septicemia. In fact he had sustained about 35% burns. In that view of the matter, we are of the opinion that the conviction of the appellants under section 302 of Indian Penal Code is required to be converted to that under section 304(I) of Indian Penal Code and in view of the same appeal is partly allowed.

35. On the overall scrutiny of the facts and circumstances of the case coupled with medical evidence and the opinion of the Medical Officer and considering the principle laid down by the Courts in above referred case laws, we are of the considered opinion that in the case at hand, the offence would be punishable under Section 304 (Part-I) IPC.

36. From the upshot of the aforesaid discussions it appears that the death caused by the accused was not pre-meditated. Accused had no intention to cause the death of the deceased. The injuries were though sufficient in the ordinary course of nature to have caused death, accused had no intention to do away with deceased. Hence the instant case falls under the exceptions (1) and (4) to Section 300 of IPC. While considering Section 299 IPC, offence committed will fall under Section 304 (Part-I) IPC.

37. In view of the aforesaid discussion, we are of the view that appeal has to be partly allowed. The conviction of the appellant under Section 302 IPC is converted into conviction under Section 304 (Part-I) IPC and the appellant is sentenced to undergo seven years of incarceration with fine of Rs. 10,000/- and in case of default of payment of fine, the appellant shall further undergo simple imprisonment for 1 year.

38. Accordingly, the appeal is **partly allowed.**

(2021)11ILR A60
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.10.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

Criminal Appeal No. 1673 of 2013

Ramesh @ Baba ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri S.N. Verma

Counsel for the Respondent:
A.G.A.

A. Criminal Law - Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code, 1860 - Sections 363, 376-challenge to-conviction-modification of sentence-6 year old child was missing-several abrasion found on the face of the victim, injuries were found on private part and blood was oozing out-in her statement she supported prosecution version, victim identified the accused, doctor (PW3) examined and he stated that the victim was very serious and remained hospitalized for 10 days-other witnesses also supported the prosecution version-accused awarded life time imprisonment-appellant is in jail for last 10 years-keeping in view the facts and circumstances and reformative theory of punishment is adopted and converting the life imprisonment into the sentence of a period of 14 years R.I.-The appeal is partly allowed with modification of sentence.(Para 1 to 22)

B. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. the judicial trend in the country has been towards striking a balance between reform and punishment. the protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. (Para 15)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Mohd. Giasuddin Vs St. of A.P. (1977) AIR SC 1926

2. Deo Narain Mandal Vs St. of U.P. (2004) 7 SCC 257

3. Ravada Sasikala Vs. St. of A.P. (2017) AIR SC 1166

4. Jameel Vs. St. of U.P. (2010) 12 SCC 532

5. Guru Basavraj Vs. St. of Karnatak (2012) 8 SCC 734

6. Sumer Singh Vs. Surajbhan Singh (2014) 7 SCC 323

7. St. of Punj. Vs. Bawa Singh (2015) 3 SCC 441

8. Raj Bala Vs. St. of Har.(2016) 1 SCC 463

(Delivered by Hon'ble Ajai Tyagi, J.)

1. This appeal has been preferred against the judgment and order dated 27.02.2013 passed by Additional Sessions Judge, Court No.6, Ramabai Nagar in Session Trial No.477 of 2011 arising out of Case Crime No.155 of 2011, under Sections 363 and 376 IPC, Police Station-Sikandra, District- Ramabai Nagar, whereby the

accused-appellant was convicted under Section 363 and 376 IPC and was awarded sentence under Section 363 IPC for five years R.I. and fine of Rs.3,000/-, one year R.I. was awarded in case of default of fine and under Section 376 IPC life imprisonment was awarded with Rs.45,000/-. Accused was directed to undergo two years R.I. in case of default of fine. It was directed that Rs.40,000/- shall be paid to the victim as compensation.

2. The brief facts of the case are that a written report was submitted at police station-Sikandra, District- Ramabai Nagar by father of the victim stating that in the night of 05.10.2011 his mother Shanti Devi, wife Nisha Devi, Six years old daughter and eight years old son Vishesh had gone to Jawahar Nagar, Sikandra to see *Ramleela.* At about 1:00 a.m. in the night, his daughter-victim misplaced in the crowd. She was not found anywhere. At about 2:00 a.m. in the night his mother returned to the house and informed him regarding the incident then he also started searching his daughter but no clue was found. Next day in the morning at about 6 a.m., one Manish Kumar informed that his daughter is lying fainted in injured condition near *Kali Mathya* when he reached the spot, he saw his daughter lying in injured condition and there was injury on her face and blood was found in her private part. In this written report complainant doubted on Istekar @ Rishtedar to be responsible for the crime.

3. Investigation was taken up by S.I. Sanjay Shukla who recorded the statements of victim and other witnesses, visited the spot, preapred site-plan. Medical examination of the victim was conducted. After completing the investigation, investigating officer submitted charge sheet against the accused-appellant Ramesh @ Baba. The matter being triable by court of Sessions was committed to the Session court for trial.

4. The learned trial court framed charges against the accused under Sections 363 and 376 IPC, which were read over to the accused. The accused denied the charges and claimed to be tried. The prosecution so as to bring home the charges, examined 10 witnesses, namely:-

1.	Anil Kumar	PW1
2.	Daneshwari	PW2
3.	Dr. Gaurav Katiyar	PW3
4.	Dr. Rama Sarraf	PW4
5.	Dr. Rakesh Kumar Tripathi	PW5
6.	H.C. Govind Hari Verma	PW6
7.	Smt. Nishra Devi	PW7
8.	Constable Ram Singh	PW8
9.	S.I. Sanjay Shukla	PW9
10.	Victim	PW10

5. After completion of prosecution evidence, the accused was examined under Section 313 Cr.P.C. The accused did not examine any witness in defence. In support of the ocular version of the witensses, following documents were produced and contents were proved by leading evidence:-

1.	Written report	Ext. Ka-1
2.	Information to	Ext. Ka-2
3.	Medical report of victim	Ext. Ka-3
4.	Supplementary report	Ext. Ka-6
5.	Hospital discharge report	Ext. Ka-8
6.	FIR	Ext. Ka9
7.	Recovery memo of clothers	Ext. Ka-11
8.	FSL report	Ext. Ka-12
9.	Site-plan	Ext. Ka-13
10.	Charge sheet	Ext. Ka-17

6. Heard Shri S.N. Verma, learned counsel for the appellant and learned AGA for the State as well as perused the record.

7. Perusal of the record shows that occurrence of this case took place sometime in the night of 5/6.10.2011 victim was examined in Sikandra hospital by medical officer Dr. Gaurav Katiyar. In medical examination, several abrasion were found on the face of the victim and blood were found on legs and private part. Victim was complaining of pain in the lower part of the abdomen. Victim was referred to lady Dr. Rama Sarraf but found extensive torn of hymen. Injuries were also found on the private part and blood was oozing from the injuries.

8. The victim was examined as PW10. In her statement she supported the prosecution version. During her statement, the victim identified the accused-appellant in court room before learned trial court. Defence could not extract anything in cross-examination which would adversely impact the prosecution case.

9. Doctor conducting medical examination of the victim, was also orally examined in evidence Dr. Gaurav Katiyar proved medical examination as PW3) as PW3, Dr. Rama Sarraf deposed as PW4 and she had stated in her statement that condition of the victim was very serious at the time of medical examination. In internal examination, doctor found that hymen was badly torn. It was torn at 6 o'clock position. There were several injuries on private part from where blood was oozing. Perusal of the evidence also shows that victim remained hospitalized for 10 days and she had to be operated. The other prosecution witnesses also supported the prosecution case. Learned trial court sentenced the accused-appellant for the offence under Sections 363 and 376 IPC. The accused was awarded life term under Section 376 IPC along with fine of Rs.45,000/-, apart from five years imprisonment under Section 363 IPC and Rs.3,000/- as fine.

10. This appeal is filed in the year 2013 and the appellant is in jail since 07.10.2011. Since the appellant is in jail for nearly last 10 years, we consider this appeal on the view point of the gravity of the offence and sentence in the interest of justice.

11. Learned counsel for the appellant after submitting for clean acquittal submitted that he is not pressing this appeal on its merit, but he prays only for reduction of the sentence as the sentence of life imprisonment awarded to the appellant by the trial court is very harsh. Learned counsel also submitted that appellant is languishing in jail for the past more than 10 years.

12. This case pertains to the offence of 'rape', defined under Section 375 IPC, which is quoted as under:

[375. Rape.- *A man is said to commit "rape" if he-*

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

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

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

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven descriptions :-

First.- *Against her will.*

Secondly.- *Without her consent.*

Thirdly.- *With her consent, when her consent has been obtained by putting her or any*

person in whom she is interested, in fear of death or of hurt.

Fourthly.- *With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.*

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

Sixthly.- *With or without her consent, when she is under eighteen years of age.*

Seventhly.*- When she is unable to communicate consent.*

Explanation 1.- *For the purposes of this section, "vagina" shall also include labia majora.*

Explnation 2.- *Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act.*

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.- *A medical procedure or intervention shall not constitute rape.*

Excpetion 2.- *Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.]*

13. In ***Mohd. Giasuddin Vs. State of AP,*** [AIR 1977 SC 1926], explaining rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court:

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by reculturization. Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

14. The term 'Proper Sentence' was explained in ***Deo Narain Mandal Vs. State of UP*** [(2004) 7 SCC 257] by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

15. In ***Ravada Sasikala vs. State of A.P.*** AIR 2017 SC 1166, the Supreme Court referred the judgments in ***Jameel vs State of UP*** [(2010) 12 SCC 532], ***Guru Basavraj vs State of Karnatak***, [(2012) 8 SCC 734], ***Sumer Singh vs Surajbhan Singh,*** [(2014) 7 SCC 323], ***State of Punjab vs Bawa Singh,*** [(2015) 3 SCC 441], and ***Raj Bala vs State of Haryana,*** [(2016) 1 SCC 463] and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on

factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system.

16. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

17. Since the learned counsel for the appellant has not pressed the appeal on its merit, we have only perused the matter from the view point of gravity of the offence. However, after perusal of the entire evidence on record and judgement of the trial court, we consider that the appeal is devoid of merit and is liable to be dismissed. Hence, the conviction of the appellant is upheld.

18. As discussed above, 'reformative theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. It appears from perusal of impugned judgment that sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence. Hon'ble Apex Court, as discussed above, has held that undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system.

19. Learned AGA also admitted the fact that the appellant is in jail since 07.10.2011.

20. Learned trial court has awarded sentence of life imprisonment under Section 376 IPC which seems to be harsh as discussed above. Hence, we are of the considered view that converting the sentence of life imprisonment under Section 376 IPC into the sentence of a period of 14 years R.I. would meet the ends of justice. It goes without saying that remissions as admissible would be admissible in case of accused.

21. Hence the sentence awarded to the appellant by learned trial court for life imprisonment and fine of Rs.45,000/- is converted into the 14 years R.I. and fine of

Rs.25,000/-. In case of default of fine, the appellant shall undergo additional simple imprisonment for one year. Sentence for the offence under Section 363 IPC shall remain intact. On reliazation of fine, the victim shall be paid Rs.25,000/- as compensation. All sentences shall run concurrently.

22. Accordingly, the appeal is partly allowed with the modification of the sentence, as above.

(2021)11ILR A65
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.10.2021

BEFORE

THE HON'BLE AJIT SINGH, J.

Criminal Appeal No. 1709 of 1981

Mahendra Rai & Anr. ...Appellants
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri N.N. Singh, Sri A.P. Sahi, Sri D.K. Singh

Counsel for the Opposite Party:
A.G.A., Sri K.K. Misra, Sri U.K. Misra

(A) Criminal Law - The Indian Penal Code, 1860 - Section 307/34 - Appeal against conviction - Rehabilitary & Reformative aspects in sentencing - doctrine of proportionality - Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically - in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix - duty of every court to award proper sentence having regard to nature of offence and manner of its commission - striking a balance between reform and punishment - criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective.(Para - 11,14,15,17)

Accused along with his family members armed with lathi-danda and country made pistol - assaulted uncle of the informant - fell down - accused-appellant assaulted on his knee by lathi - injuries caused by hard and blunt object - simple in nature - charge-sheet.submitted against appellant - does not propose to challenge the impugned judgement and order on its merits - modification of order of sentence for the period already undergone.(Para -5,10)

HELD:- The injuries sustained by the victim were not grievous in nature and fatal to life. Appellant suffered physical and mental agony of trial and after conviction for a long period of about 45 years, the sentence awarded to him under Section 307/34 is converted under Section 324 I.P.C with a fine of Rs. 1000/- each and at this stage it does not appear appropriate to send the accused-appellant to jail.(Para - 19,20)

Criminal Appeal partly allowed. (E-7)

List of Cases cited:-

1. Mohd. Giasuddin Vs St. of A.P., AIR 1977 SC 1926

2. Sham Sunder Vs Puran, (1990) 4 SCC 731

3. St. of M.P. Vs Najab Khan, (2013) 9 SCC 509

4. Jameel Vs St. of U.P., (2010) 12 SCC 532

5. Guru Basavraj Vs St. of Karnatak, (2012) 8 SCC 734

6. Deo Narain Mandal Vs St. of U.P., (2004) 7 SCC 257

7. Shyam Narain Vs St. (NCT of delhi), (2013) 7 SCC 77

8. Sumer Singh Vs Surajbhan Singh, (2014) 7 SCC 323

9. St. of Punj. Vs Bawa Singh, (2015) 3 SCC 441

10. Raj Bala Vs St. of Har., (2016) 1 SCC 463

11. Kokaiyabai Yadav Vs St. of Chhattisgarh,(2017) 13 SCC 449

12. Ravada Sasikala Vs St. of A.P., AIR 2017 SC 1166

13. Jameel Vs St. of U.P., (2010) 12 SCC 532

14. Guru Basavraj Vs St. of Karnatak, (2012) 8 SCC 734

15. Sumer Singh Vs Surajbhan Singh, (2014) 7 SCC 323

16. St. of Punjab Vs Bawa Singh, (2015) 3 SCC 441

17. Raj Bala Vs St. of Har.a, (2016) 1 SCC 463

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

1. Learned counsel for the accused-appellants submits that the appellant no. 2 Balram had died and in this regard, CJM, Azamgarh has submitted its reported dated 14.9.2021.

2. Considering the report of the CJM, Azamgarh, appeal against the appellant no.2 Balram stands abated.

3. Heard Sri Durgesh Kumar Singh, learned counsel for the surviving appellants, Dr. S.B. Maurya, learned A.G.A. and perused the record.

4. This criminal appeal has been filed against a judgement dated 01.08.1981 passed by the IVth Addl. District & Sessions Judge, Azamgarh in S.T. No. 72 of 1977, whereby learned Judge had convicted the appellants under sections 307/34 IPC and sentenced them to undergo four years rigorous imprisonment.

5. The prosecution story in brief is that an FIR of the incident was lodged on 1.12.1974 in which it has been mentioned that on 1.12.1974, Poojan Rai, the uncle of the informant was threshing the crop of paddy at his door and at that time the accused Nar Singh Rai came at the house of his neighbourer Dhanesar and was talking with him. Regarding engagement of labour, Poojan Rai asked the accused Nar Singh Rai to contest the litigation peacefully and it is not proper to beat or prevent the labour and on this, an altercation took place between them and thereafter accused Nar Singh Rai abused the informant's uncle and accused Triloki Rai has threatened to kill him. The accused Nar Singh Rai along with his family members armed with lathi-danda and country made pistol came at the door of the informant and on exhortation accused Nar Singh Rai had assaulted upon the head of Poojan Rai and thereafter Poojan Rai fell down and then accused-appellant Mahendra had assaulted on his knee by lathi. The PW-4 Dr. Santosh Kumar Srivastava has examined the injured and he found that the injuries, which were caused by hard and blunt object, were simple in nature. The Investigating Officer, after completion of investigation, has submitted charge-sheet.

6. The trial court recorded statements of the witnesses and after hearing the argument of both the sides, convicted the appellants as aforesaid.

7. At the very outset, learned counsel for the appellants, on instructions, stated that he does not propose to challenge the impugned judgement and order on its merits. He, however, prayed for modification of the order of the sentence for the period already undergone by the appellants.

8. Learned counsel for the appellant submits that initially the FIR was lodged against ten persons and only two persons were convicted by the trial court and the specific role assigned to the surviving appellant that he had assaulted injured Poojan Rai on his knee and other accused Nar Singh Rai was assigned the role of assaulting him on his head. Learned counsel for the appellant has further submitted that the accused Nar Singh Rai had died during the trial. Learned counsel for the appellant has further submitted that the present surviving accused should not be convicted under section 307 IPC and he should have been convicted under

sections 323 or 325 IPC and he has further submitted that he does not want to press the appeal on merit as the present appellant is 85 years of age. He next submits that although the trial court has convicted the present accused on the basis of mere conjuncture while the appellant is absolutely innocent and has been falsely implicated in this case with the ulterior intention of harassing him. Further submission is that there is no bread earner in the family of the appellant. He also submits that on the question of legality of sentence he is not pressing this appeal and only pressing on the quantum of sentence and he has prayed for taking a lenient view considering the age of the accused and their age related ailments.

9. Learned A.G.A. has vehemently opposed the submission made by learned counsel for the appellant. He has however, submits that if slight reduction in sentence is made, he has no objection.

10. I have perused the entire material available on record and the evidence as well as judgment of the trial court. The learned counsel for the accused-appellant does not want to press the appeal on its merit and requests to take a lenient view of the matter.

11. In ***Mohd. Giasuddin Vs. State of AP, AIR 1977 SC 1926,*** explaining rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court:

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by reculturization.Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

12. In ***Sham Sunder vs Puran, (1990) 4 SCC 731,*** where the high court reduced the sentence for the offence under section 304 part I into undergone, the supreme court opined that the sentence needs to be enhanced being inadequate. It was held:

"The court in fixing the punishment for any particular crime should take into consideration the nature of offence, the circumstances in which it was committed, the degree of deliberation shown by the offender. The measure of punishment should be proportionate to the gravity of offence."

13. In ***State of MP vs Najab Khan, (2013) 9 SCC 509,*** the high court, while upholding conviction, reduced the sentence of 3 years by already undergone which was only 15 days. The supreme court restored the sentence awarded by the trial court. Referring the judgments in ***Jameel vs State of UP (2010) 12 SCC 532, Guru Basavraj vs State of Karnatak, (2012) 8 SCC 734,*** the court observed as follows:-

"In operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature

of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. We also reiterate that undue sympathy to impose inadequate sentence would do more harm to the justice dispensation system to undermine the public confidence in the efficacy of law. It is the duty of court to award proper sentence having regard to the nature of offence and the manner in which it was executed or committed. The courts must not only keep in view the rights of victim of the crime but also the society at large while considering the imposition of appropriate punishment."

14. Earlier, "Proper Sentence" was explained in ***Deo Narain Mandal Vs. State of UP (2004) 7 SCC 257*** by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the principle of proportionately. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

15. In subsequent decisions, the supreme court has laid emphasis on proportional sentencing by affirming the doctrine of proportionality. In ***Shyam Narain vs State (NCT of delhi), (2013) 7 SCC 77***, it was pointed out that sentencing for any offence has a social goal. Sentence is to be imposed with regard being had to the nature of the offence and the manner in which the offence has been committed. The fundamental purpose of imposition of sentence is based on the principle that the accused must realize that the crime committed by him has not only created a dent in the life of the victim but also a concavity in the social fabric. The purpose of just punishment is that the society may not suffer again by such crime. The principle of proportionality between the crime committed and the penalty imposed are to be kept in mind. The impact on the society as a whole has to be seen. Similar view has been expressed in ***Sumer Singh vs Surajbhan Singh, (2014) 7 SCC 323 , State of Punjab vs Bawa Singh, (2015) 3 SCC 441, and Raj Bala vs State of Haryana, (2016) 1 SCC 463.***

16. In ***Kokaiyabai Yadav vs State of Chhattisgarh(2017) 13 SCC 449***, it has been observed that reforming criminals who understand their wrongdoing, are able to comprehend their acts,have grown and nartured into citizens with a desire to live a fruitful life in the outside world, have the capacity of humanising the world.

17. In ***Ravada Sasikala vs. State of A.P. AIR 2017 SC 1166,*** the Supreme Court referred the judgments in ***Jameel vs State of UP (2010) 12 SCC 532, Guru Basavraj vs State of Karnatak, (2012) 8 SCC 734, Sumer Singh vs Surajbhan Singh, (2014) 7 SCC 323 , State of Punjab vs Bawa Singh, (2015) 3 SCC 441, and Raj Bala vs State of Haryana, (2016) 1 SCC 463*** and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society

as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system."

18. Considering the facts and circumstances of the case and the substantive period already undergone by the appellant in this case and the fact that the surviving appellant is old and aged person; and he has realized the mistake committed by him and are remorseful to his conduct and feel it necessary to serve with his polite and cooperative behaviour to the society to which he belongs to and now he wants to transform themselves into a law abiding citizen, I am of the considered opinion that he should be given a chance to reform himself and extend his better contribution to the society to which he belongs to.

19. Considering the facts and circumstances of the case, considering the evidence available on record and considering that the doctor in his statement has not stated anywhere that the injuries sustained by the victim were grievous in nature and it was fatal to life, this Court deems it fit to alter the conviction from section 307/34 I.P.C. to section 324 I.P.C.

20. Consequently, taking into consideration the period already undergone in prison by the appellant in this case as well as considering that he has suffered physical and mental agony of trial and after conviction for a long period of about 45 years, the sentence awarded to him under Section 307/34 is converted under Section 324 I.P.C with a fine of Rs. 1000/- each and at this stage it does not appear appropriate to send the accused-appellant to jail.

21. Accused-appellant is directed to deposit the fine of Rs. 1,000/- before learned lower court within three months from the date of passing of the judgement, the entire amount deposited by the appellant shall be paid to the injured, if he is alive and in case he is dead then it would be paid to his legal heirs and in default of payment of fine as directed above, he shall undergo simple imprisonment for a period of fifteen days.

22. Appeal is partly allowed in the above terms and surety bonds of the sureties are discharged.

23. Office is directed to transmit a copy of this order to the learned Sessions Judge, Allahabad for compliance and compliance report be submitted to this Court also.

24. Office is directed to transmit the lower court record along with a copy of this judgment to the learned court below for information and necessary compliance as warranted.

25. The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad, self attested by the learned counsel for the applicant alongwith a self attested identity proof of the said persons (preferably Aadhar Card) mentioning the mobile number (s) to which the

said Aadhar Card is linked before the concerned Court/Authority/Official.

26. The concerned Court/ Authority/ Official shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

(2021)11ILR A70
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.11.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

Criminal Appeal No. 2436 of 2013

Rajiv @ Paji ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri S.K. Srivastava, Sri Anuj Srivastava, Sri Ravendra Singh, Sri V.K. Srivastava

Counsel for the Respondent:
A.G.A., Sri Chetan Chatterjee

(A) Criminal Law - The Indian Penal Code, 1860 - Sections 376 & 511 - The Code of criminal procedure, 1973 - Sections 164 & 313 -appeal against conviction - Rehabilitary & Reformative aspects in sentencing - proper sentence - quantum of sentence - doctrine of proportionality - Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically - in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix - duty of every court to award proper sentence having regard to nature of offence and manner of its commission - striking a balance between reform and punishment - criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective - undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system .(Para - 18,19,20,22)

Accused committed rape with seven years old daughter of complainant - accused-appellant convicted under Section 376 IPC - sentenced to imprisonment for life with fine of Rs.20,000/-.

HELD:- No accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream. Sentence awarded by trial court for life term is very harsh . Sentence awarded to appellant by trial-court modified and reduced to ten years rigorous imprisonment. Imposition of fine and additional imprisonment in case of default of fine shall remain intact. Rs.15,000/- shall be paid as compensation to the victim.(Para - 20,23,24)

Criminal Appeal partly allowed. (E-7)

List of Cases cited:-

1. Mohd. Giasuddin Vs St. of A.P., AIR 1977 SC 1926

2. Deo Narain Mandal Vs St. of U.P., (2004) 7 SCC 257

3. Ravada Sasikala Vs St. of A.P., AIR 2017 SC 1166

4. Jameel Vs St. of U.P., (2010) 12 SCC 532

5. Guru Basavraj Vs St. of Karnatak, (2012) 8 SCC 734

6. Sumer Singh Vs Surajbhan Singh, (2014) 7 SCC 323

7. St. of Punj. Vs Bawa Singh, (2015) 3 SCC 441

8. Raj Bala Vs St. of Haryana, (2016) 1 SCC 463

(Delivered by Hon'ble Ajai Tyagi, J.)

1. By way of this appeal, the appellant-Rajiv @ Paji has challenged the Judgment and order dated 6.5.2013 passed by court of Additional Sessions Judge, Court No.4,

Saharanpur in Session Trial No.78 of 2013 arising out of Case Crime No.341 of 2012, under Section 376 Indian Penal Code, Police Station-Rampur Maniharan, District Saharanpur whereby the accused-appellant was convicted under Section 376 IPC and sentenced to imprisonment for life with fine of Rs.20,000/- and in case of default of payment of fine, to undergo further imprisonment for six months.

2. The brief facts as per prosecution case are that on 14.10.2012, a written report was submitted by Naseem stating therein that today in the morning his seven years old daughter (victim) was playing with neighbour Ramesh's children. At about 1:00 p.m. Rajiv @ Paji, son of Ramesh, took her daughter to his house and tried to commit rape with her. A case crime No.341 of 2012 was registered at Police Station Rampur Maniharan under Section 376 IPC read with Section 511 IPC.

3. S.I.-Dheeraj Singh tookup the investigation, visited the spot, prepared site plan, recorded statements of the prosecutrix and witnesses. Medical examination of prosecutrix was conducted by the doctor.

4. After completion of investigation, charge sheet was submitted against appellant - Rajiv @ Paji under Section 376 IPC. The case being triable by Court of Sessions, was comitted by concerned Magistrate to the Court of Sessions for trial.

5. The learned trial court framed charge against the appellant under Section 376 IPC. The accused denied the charge and claimed to be tried. The prosecution so as to bring home the charge, examined six witnesses, who are as under:-

1.	Mohd. Naseen	P.W.1
2.	Imrana	P.W.2
3.	Km. Sahiba	P.W.3
4.	Dr. Renu Sharma	P.W.4
5.	Arvind Kumar Singh	P.W.5
6.	Dheeraj Singh	P.W.6

6. After completion of prosecution evidence, the accused was examined under Section 313 Cr.P.C. in which he denied entire evidence against him and stated that he was innocent and had been falsely implicated. The accused did not examine any witness in his defence.

7. In support of the ocular version of the witnesses, following documents were produced and contents were proved by leading evidence:

1.	F.I.R.	Ext. Ka-5
2.	Written report	Ext. Ka-1
3.	Recovery Memo of Clothes & Supurdinama	Ext. Ka-8
4.	Medical Examination Report	Ext. Ka-3
5.	Supplementary report	Ext. Ka-4
6.	Charge sheet (Mool)	Ext. Ka-12
7.	Statement U/s 164	Ext. Ka.2
8.	Site Plan with Index	Ex.Ka.10

8. Heard Shri Anuj Srivastava, learned counsel for the appellant, Sri Janardan Prakash, learned AGA for the State and also perused the record.

9. Perusal of record shows that occurrence of this case took place on 14.10.2012.The prosecution has alleged that the accused committed rape with seven years old daughter of complainant - Naseem. The victim's statement under Section 164 Cr.P.C. was recorded by the concerned Magistrate. During the course of investigation, medical examination of victim was conducted and the medical report was prepared. Dr. Renu Sharma, conducted the medical examination. She has stated in her

evidence as PW-4 that there was laceration posterior of size 3 x 2 x 2 mm. Blood clot was present there which started bleeding on touching. Hymen was intact. Vaginal smear was sent for examination and according to

10. The victim was examined by prosecution as PW-3. In her statement recorded under Section 164 Cr.P.C., the victim supported the prosecution version. She was produced before the Trial Court as PW-3. In her statement before the Trial Court also, she supported the prosecution version. Her mother- Imrana -PW-2 also supported the case against accused.

11. Complainant- father of the victim, Naseem was produced as PW-1. He has proved the written report as Ex. Ka-1 which was submitted by him at police station for registration of the case against accused.

12. Learned counsel for the appellant tried to establish that as per FIR, this case was of an attempt to commit rape while on the basis of legal consultation it was led as the appellant was successful in committing the rape and the prosecution was conducted for the offence under Section 376 IPC.

13. Learned AGA submitted that the age of victim at the time of commission of offence was just seven years and as per the medical examination, she was found aged between 9-12 years. She has supported prosecution version in her statement and her testimony is supported with medical evidence. There is recovery of blood stained cloth of victim. It is also submitted that the appellant remained silent in his statement under Section 313 Cr.P.C. regarding the circumstances under which he was implicated in this case. Prosecution case is proved beyond doubt and accused is rightly convicted by the trial Court.

14. Learned Trial Court relied on the testimony of witnesses, mainly the testimony of victim coupled with medical evidence, convicted and sentenced the accused appellant for life imprisonment and fine under section 376 IPC.

15. After some arguments, learned counsel for the appellant submitted that he is not pressing this appeal on its merit, but he prays only for reduction of the sentence as the sentence of life imprisonment awarded to the appellant by the trial court is very harsh. Learned counsel also submitted that appellant is languishing in jail for past more than 9 years.

16. This case pertains to the offence of 'rape', defined under Section 375 IPC, which is quoted as under:

[375. Rape.- *A man is said to commit "rape" if he-*

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

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

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

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven descriptions :-

First.- *Against her will.*

Secondly.- *Without her consent.*

Thirdly.- *With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.*

Fourthly.- *With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.*

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

Sixthly.- *With or without her consent, when she is under eighteen years of age.*

Seventhly.- *When she is unable to communicate consent.*

Explanation 1.- *For the purposes of this section, "vagina" shall also include labia majora.*

Explnation 2.- *Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act.*

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.- *A medical procedure or intervention shall not constitute rape.*

Excpetion 2.- *Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.]*

17. In ***Mohd. Giasuddin Vs. State of AP,*** [AIR 1977 SC 1926], explaining rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court:

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by reculturization. Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

18. 'Proper Sentence' was explained in ***Deo Narain Mandal Vs. State of UP*** [(2004) 7 SCC 257] by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

19. In ***Ravada Sasikala vs. State of A.P.*** AIR 2017 SC 1166, the Supreme Court referred the judgments in ***Jameel vs State of UP*** [(2010) 12 SCC 532], ***Guru Basavraj vs State of Karnatak,*** [(2012) 8 SCC 734], ***Sumer Singh vs Surajbhan Singh,*** [(2014) 7 SCC 323], ***State of Punjab vs Bawa Singh,*** [(2015) 3 SCC 441], and ***Raj Bala vs State of Haryana,*** [(2016) 1 SCC 463] and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on

factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system.

20. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

21. Since the learned counsel for the appellant has not pressed the appeal on its merit, however, after perusal of entire evidence on record and judgment of the trial court, we consider that the appeal is devoid of merit and is liable to be dismissed. Hence, the conviction of the appellant is upheld.

22. As discussed above, 'reformative theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. It appears from perusal of impugned judgment that sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence. Hon'ble Apex Court, as discussed above, has held that undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system.

23. Learned AGA also admitted the facts that appellant is languishing in jail for the last more than 9 years. Keeping in view of theory of 'doctrine of proportionality' as discussed above, the sentence awarded to the appellant seems harsh. Since, the appellant has already served 9 years of sentence and ends of justice would be met if sentence is reduced from life imprisonment to the period of ten years.

24. Hence, the sentence awarded to the appellant by the learned trial-court is modified and is reduced to ten years rigorous imprisonment. Imposition of fine and additional imprisonment in case of default of fine shall remain intact. Rs.15,000/- shall be paid as compensation to the victim out of the fine imposed as directed by learned Trial Court.

25. Accordingly, the appeal is **partly allowed** with the modification of the sentence, as above.

(2021)11ILR A75
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.10.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

Criminal Appeal No. 3038 of 2005

Ved Prakash @ Danny @ Raju @ Bona ...Appellant

Versus

State of U.P. ...Respondent

Counsel for the Appellant:
Sri Aditya Prasad Mishra, Sri Noor Muhammad, Sri Yogesh Srivastava

Counsel for the Respondent:
A.G.A.

(A) Criminal Law - The Indian Penal Code, 1860 - Sections 376 & 376(2)(f) -appeal against conviction - Rehabilitary & Reformative aspects in sentencing - proper sentence - quantum of sentence - doctrine of proportionality - Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically - in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix - duty of every court to award proper sentence having regard to nature of offence and manner of its commission - striking a balance between reform and punishment - criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective - undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system.(Para - 18,19,20,23)

Incident occurred on 8.11.2003 at 5:00 am in the morning - prosecutrix at the time of incident was 8 years of age - accused was seen committing the offence - ran away - saw accused in light of bulb - daughter of the complainant was in precarious condition - Trial Court held appellant guilty of offence u/s 376(2)(f) IPC whereby the accused-appellant was convicted under Section 376 IPC - sentenced to imprisonment for life with fine of Rs.10000/-

HELD:- No accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream. Sentence awarded by trial court for life term is very harsh . Sentence awarded to the appellant by the learned trial-court is modified and is reduced to 15 years rigorous imprisonment. Fine of Rs.10,000/- imposed by Trial Court modified to Rs.20,000/- payable as compensation to the victim.(Para-21,23,25)

Criminal Appeal partly allowed. (E-7)

List of Cases cited:-

1. Mohd. Giasuddin Vs St. of A.P., AIR 1977 SC 1926

2. Deo Narain Mandal Vs St. of U.P., (2004) 7 SCC 257

3. Ravada Sasikala Vs St. of A.P., AIR 2017 SC 1166

4. Jameel Vs St. of U.P., (2010) 12 SCC 532

5. Guru Basavraj Vs St. of Karnatak, (2012) 8 SCC 734

6. Sumer Singh Vs Surajbhan Singh, (2014) 7 SCC 323

7. St. of Punj. Vs Bawa Singh, (2015) 3 SCC 441

8. Raj Bala Vs St. of Har., (2016) 1 SCC 463

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. By way of this appeal, the appellant has challenged the Judgment and order dated 28.5.2005 passed by court of Sessions Judge, Bulandshahar in Sessions Trial No.106 of 2004, State Vs. Ved Prakash @ Danny @ Raju arising out of Case Crime No.74 of 2003, under Section 376 IPC, Police Station Narora, District Bulandshahar by which learned Trial Court was

pleased to find appellant guilty of offence u/s 376(2)(f) IPC whereby the accused-appellant was convicted under Section 376 IPC and sentenced to imprisonment for life with fine of Rs.10,000/-, and in case of default of payment of fine, to undergo further simple imprisonment for two years.

2. The brief facts as per prosecution case is that on 8.11.2003 at 8:15 am one Indresh Kumar resident of L.G.C. Colony, Narora, lodged a written report at Police Station Narora to the effect that on that day at about 5:00 am, he and his wife Smt. Babli were sleeping in their house and when they woke up, they found their daughter aged about 8 years not present on her cot. When they came out of the house then they heard the shrieks of their daughter from the side of the Lavatory, when they reached there, they saw that accused Danny, resident of village Sheikhpura, Police Station Chhatari, who used to loiter near Hamid crossing, had committed rape on their daughter and on seeing them, accused took to heels and ran away. The facts reveal that the daughter of the complainant was in precarious condition. She was brought to PHC Narora wherefrom she was referred to Bulandshahar. He came with his daughter to get her treated. On the basis of this Tehrir report of case crime no.74 of 2003 under Section 376 IPC was registered against the accused and its substance was entered in G.D. No.17 at 18:15 am. On 8.11.2003 the prosecutrix was examined by Dr. Sudha Sharma, Medical officer, K.M.C. Bulandshahar. She was brought by constable 1016-Bharat Singh. At the time of medical examination she was found to be fully conscious. Her height is 3 feet 10 inches, teeth 14 x 12, weight 20 Kg.

3. The prosecution so as to bring home the charges examined nine witnesses are as under:-

1.	Deposition of Indresh Kumar Sharma	P.W.1
2.	Deposition of Prosecutrix	P.W.2
3.	Deposition of Dr. Sudha Sharma	P.W.3
4.	Deposition of Dr. B.K. Gaur	P.W.4
5.	Deposition of Jawahar Lal	P.W.5
6.	Deposition of Dr. M.P. Singh	P.W.6
7.	Deposition of Kiran Pal Singh	P.W.7
8.	Deposition of Ramendra Singh	P.W.8
9.	Deposition of Babu Ram	P.W.9

4. In support of the ocular version of the witnesses, following documents were produced and contents were proved by leading evidence:

1.	F.I.R.	Ext. Ka-6
2.	Written report	Ext. Ka-1
3.	Recovery memo blood stained frock	Ext. Ka-10
4.	Injury Report	Ext. Ka-8
5.	Supplementary report	Ext. Ka-3
6.	X-ray Report	Ext. Ka-4
7.	Pathologist Report	Ext. Ka-5
8.	Charge Sheet Mool	Ext. Ka-12

5. Heard Sri Yogesh Srivastava, assisted by Sri Noor Mohammad, learned counsel for the appellant, Smt. Alpana Singh, learned AGA for the State and also perused the record.

6. Sri Noor Mohammad, learned counsel for appellant has submitted that he presses for clean acquittal of his client.

7. Deposition of the father of prosecutrix was recorded as PW-1 and in his oral testimony, he has identified to the accused. He has stated that the incident occurred on 8.11.2003 at 5:00 am in the morning. The prosecutrix at the time of incident was 8 years of age. In the morning, when he did not see his daughter, they went to search for his daughter. The accused was seen committing the offence and he ran away. His

daughter was taken for medical treatment. He had called one Pankaj Sharma and gave the report at the concerned Police Station between 8:15 a.m. in the morning. The prosecutrix was taken to Women Hospital at Bulandshahar and from where PHS Narora she was referred to Bulandshahar where she was examined and she was admitted in the hospital as her condition was serious. He has withstood the cross examination. He has denied the fact that he was knowledge the accused belongs to Aligarh. The incident occurred on 8.11.2003 and he saw the accused in the light of bulb.

8. Indresh Kumar Sharma-PW-1, in his cross examination accepted that the blood stained clothes were given to the police personal and he had already conveyed that there was blood stained on the cloths of the prosecutrix, if the police officer has not mentioned the same, he is not aware why he has not mentioned. He had even seen blood on the frock and cot of the prosecutrix.

9. The prosecutrix examined as PW-2 and she stated that the accused took her and tied her both legs and thereafter brought a cot and made her to sit on the cot. She has conveyed how the accused had behaved, he had shown her a big knife and had threatened to tear stomach, he shouted and she became unconscious after he did the bad work which means rape. There was blood which oozed from her vagina. He has beaten on her check and she was rubbed. There were brusen on her back. Even in her cross examination, she withstood the fact that the accused had done some bad work with her. When the accused took her, she was with her sister.

10. PW-3 is Dr. Sudha Sharma,, the medical examination showed that she in her oral testimony has conveyed that whether it was on her, she should not be tell certainly but the injuries were possible, if a girl of 8 years was rapped and even if there is an attempt of rape such injuries are possible. She has conveyed that seeing position of the vagina, it was not possible that any penetration could take place.

11. Dr V.K. Garg was a senior radioligist was also examined on oath nothing much turn his evidence except the fact he could not even convey what was the age of the prosecutrix. The testimony of PW-6 Dr. M.P. Singh is very important. He has opinied that there were about three injuries and injury no.1 could not be possible, if somebody bit teeth. Nothing has been stated by the accused in his statement under Section 313 Cr.P.C.

12. In respect of the victim, the doctor in medical report has opined as under :-

"1) Contused swelling 3 c.m. X 5 c.m. on both side of right eye.

2) Contused swelling on both sides of left eye.

3) Oval shape abraded contused traumatic swelling 5 c.m. x 4 c.m. with teeth marks on right side face. One c.m. below and outer to right eye.

In his report, doctor opined that injuries are simple in nature. Injury No.3 caused by teeth bite and injuries no. 1 and 2 caused by hard blunt object."

13. Learned Judge in paragraph no.12 has recorded the finding which is necessary for us to reproduced as under : -

"The accused absconded for a long period after the commission of the offence and he was arrested by I.O. on 13.1.2004. This conduct of the accused is also very relevant u/s 8 of the Evidence Act. After arrest, he did not claim to be put to Test Identification Perade. He has different names and has given different places of abode; he was known to PW-1 and duly named in the FIR. He was seen committing

rape upon the victim. Both PW-1 and PW-2 have identified him in the court as well and therefore identify of the accused is proved beyond all doubts."

14. Learned Judge had relied on the judgment in the case of Prem Lal alias Prem Narayan Versus State of M.P., 2005Cr.L.J.1145 in which it is mentioned that if the report of F.S.L. On vaginal smear has not been found, it will not create any dent on the prosecution case.

15. We concur with the reasoning given by learned Judge in Paragraph no. 19 that the vaginal midline perinal was torn by one inch and hymen was also found torn and its margin bleeds on touch. The suggestions were made that some other person might have committed rape. PW-1 and 2 withstood the cross examination also .

16. This case pertains to the offence of 'rape', defined under Section 375 IPC, which is quoted as under:

[375. Rape.- *A man is said to commit "rape" if he-*

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

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

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

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven descriptions :-

First.- *Against her will.*

Secondly.- *Without her consent.*

Thirdly.- *With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.*

Fourthly.- *With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.*

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

Sixthly.- *With or without her consent, when she is under eighteen years of age.*

Seventhly.- *When she is unable to communicate consent.*

Explanation 1.- *For the purposes of this section, "vagina" shall also include labia majora.*

Explnation 2.- *Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act.*

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.- *A medical procedure or intervention shall not constitute rape.*

Excpetion 2.- *Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.]*

17. Having concurred with the learned Sessions Judge on the finding of fact we now

propose to examine whether the sentence awarded is just or requires consideration.

18. In ***Mohd. Giasuddin Vs. State of AP,*** [AIR 1977 SC 1926], explaining rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court:

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by reculturization. Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

19. 'Proper Sentence' was explained in ***Deo Narain Mandal Vs. State of UP*** [(2004) 7 SCC 257] by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

20. In ***Ravada Sasikala vs. State of A.P.*** AIR 2017 SC 1166, the Supreme Court referred the judgments in ***Jameel vs State of UP*** [(2010) 12 SCC 532], ***Guru Basavraj vs State of Karnatak,*** [(2012) 8 SCC 734], ***Sumer Singh vs Surajbhan Singh,*** [(2014) 7 SCC 323], ***State of Punjab vs Bawa Singh,*** [(2015) 3 SCC 441], and ***Raj Bala vs State of Haryana,*** [(2016) 1 SCC 463] and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system.

21. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

22. Since the learned counsel for the appellant has also pressed the appeal on its merit, however, after perusal of entire evidence on record and judgment of the trial court, we consider that the appeal is requires to be considered only for sentence. The conviction of the appellant is upheld but sentence requires to be altered.

23. As discussed above, 'reformative theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. It appears from perusal of impugned judgment that sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence. Hon'ble Apex Court, as discussed above, has held that undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system.

24. Learned AGA also admitted the facts that appellant is languishing in jail for the last more than 9 years. Keeping in view of theory of 'doctrine of proportionality' as discussed above, the sentence awarded to the appellant seems harsh. Since, the appellant has already served 9 years of sentence and ends of justice would be met if sentence of imprisonment of life is reduced from life imprisonment to the period of ten years with all remission would meet the ends of justice.

25. Looking to the age of the girl, we do not think that the judgment of the Court below requires to be upturn. However, the sentence awarded to the appellant by the learned trial-court is modified and is reduced to 15 years rigorous imprisonment. Imposition of fine and additional imprisonment in case of default of fine shall remain intact. The fine of Rs.10,000/- imposed by the learned Trial Court be modified to Rs.20,000/- which shall be paid as compensation to the victim if amount of fine is not deposited within 12 weeks of release he shall be subjected to six months imprisonment if fine is already deposited be paid to prosecutrix.

26. Appeal is partly allowed. Record be sent back to the Trial Court forthwith.

(2021)11ILR A80
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.11.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

Criminal Appeal No. 3248 of 2014

Suresh ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Piyush Dubey, Sri Dinesh Tiwari, Sri Virendra Singh

Counsel for the Respondent:
A.G.A.

(A) Criminal Law - The Indian Penal Code, 1860 - Sections 376 & 506 , The Schedule Castes And The Schedule Tribes (Prevention of Atrocities) Act , 1989 - Section 3(2)(v) - The Code of criminal procedure, 1973 - Section 313 -appeal against conviction - Appellate Court is

bound to sift the evidence of all witness who have been examined - High Court should also consider the evidence of the witness threadbare before it takes a different view then that taken by the Sessions Judge, in appeal preferred against the order of acquittal/conviction.(Para - 10,19)

(B) Criminal law - Quantum of sentence - doctrine of proportionality - Rehabilitary & Reformative aspects in sentencing - Proper sentence - Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically - in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix - duty of every court to award proper sentence having regard to nature of offence and manner of its commission - criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective.(Para - 10,28,29,33)

Prosecutrix , 16 years of age (disabled) - gone for grazing cattle - when she was in field of Gutti - accused forcefully took her to field of Gutti - committed forcible sexual intercourse with her - daughter conveyed the entire incident to her father (complainant) - complainant along with his daughter lodged compliant - trial court convicted accused - hence appeal - appellant argued matter for lesser sentence under Section 376.

HELD:- No case is made out under Section 3 (2) (v) of the SC/ST Act, 1989. No accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream. Conviction upheld . Incident occurred before the amendment provision of Indian Penal Code in the year 2000 which culminated into the charge sheet and sessions case was registered in the year 2002. Minimum sentence for Section 376 IPC was seven years and, therefore, in our case, it is not that heinous crime with life sentence should be substituted. Conviction and sentence awarded to the appellant , is hereby set aside. (Para - 22,31,32,36)

Criminal Appeal partly allowed. (E-7)

List of Cases cited:-

1. Hitesh Verma Vs The St. of Uttarakhand & anr., 2020 0 Supreme (SC) 653

2. Ramawatar Vs St. of M. P., 2021 0 Supreme (SC) 625

3. Vishnu Vs St. of U.P., Criminal Appeal No.204 of 2011

4. Patan Jamal Vali Vs The St. Of A.P., AIR 2021 SC 2190

5. Mohd. Giasuddin Vs St. of A.P., AIR 1977 SC 1926

6. Deo Narain Mandal Vs St. of U.P., (2004) 7 SCC 257

7. Ravada Sasikala Vs St. of A.P., AIR 2017 SC 1166

8. Jameel Vs St. of U.P., (2010) 12 SCC 532

9. Guru Basavraj Vs St. of Kar., (2012) 8 SCC 734

10. Sumer Singh Vs Surajbhan Singh, (2014) 7 SCC 323

11. St. of Punj. Vs Bawa Singh, (2015) 3 SCC 441

12. Raj Bala Vs St. of Har., (2016) 1 SCC 463

13. Manoj Mishra @ Chhotkau Vs The St. of U.P., Criminal Appeal No.1167 of 2021

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. By way of this appeal, the appellant-Suresh has challenged the Judgment and order dated 23.7.2014 passed by court of Special Judge SC/ST Act, Agra in Sessions Trial No.150 of 2002, State Vs. Suresh arising out of Case Crime No.378 of 2000, under Sections 376, 506 of Indian Penal Code (for short 'IPC') and read with Section 3(2)(v) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter refeerred to as 'S.C./S.T.Act, 1989'), Police Station Malpura, District Agra, whereby the accused-appellant was convicted under Section 376 IPC and sentenced to life imprisonment with fine of Rs.1,000/-, and in case of default of payment of fine, to undergo further imprisonment for six

months; he was further convicted under Section 3(2)(v) of Scheduled Casts and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and sentenced to imprisonment for life with fine of Rs.1,000/- and in case of default of payment of fine, to undergo further simple imprisonment for six months.

2. Brief facts of the present case are that on 13.12.2000 at about 15.10 p.m., Hakim Singh, son of Madho Singh Jatav, gave a written complainant that on 12.12.2020 when his daughter, namely, prosecutrix who was 16 years of age (who is disabled) had gone for grazing the cattle and when she was in the field of Gutti, accused Suresh son of Mohan Singh Thakur forcefully took her to the field of Gutti and had committed forcible sexual intercourse with her. When the prosecutrix shouted, Navvar and Jayanti son of Bhagwan Singh Jatav and Mukesh son of Faguni Ram Jatav came there and saw the offence being committed but at that time Suresh ran away from there. When the complainant returned back from Agra, his daughter conveyed the entire incident to him namely, her father. The accused was serving with Gutti Thakur. When the complainant went to Gutti Thakur to complain, his son threatened him and, therefore, on the next date, complainant along with his daughter lodged the compliant.

3. The accused-appellant being, prima facie, found to have committed the offence by the Investigating Authority. Investigating Authority laid the charge-sheet before the learned Magistrate.

4. As the offences with which the accused was charged were triable by the court of session. The case was committed to the court of session.

5. The trial was initiated against the accused and the accused was summoned. The accused pleaded not guilty and wanted to be tried. The learned Judge framed the charge and the accused pleaded not guilty

6. The prosecution so as to bring home the charges, framed against the accused, examined the following witnesses:

1.	Prosecutrix	PW-1
2.	Hakim Singh	PW-2
3.	Dr. Meetu Agarwal	PW-3
4.	Mukesh	PW-4
5.	Constable Netrapal	PW-5
6.	Jayanti Prasad	PW-6
7.	S.I. Madhu Sudan Mishra	PW-7
8.	Constable Satyarai	PW-8
9.	Munni Devi	PW-9
10.	Rajendra Kumar	PW-10

7. In support of the ocular version of the witnesses, following documents were produced and contents were proved by leading evidence:

1.	Written report	Ex.Ka-1
2.	Medical Report	Ex.Ka-2
3.	Supplementary Report	Ex.Ka-3
4.	FIR	Ex.Ka-4
5.	G.D.	Ex.Ka-5
6.	Site-plan	Ex.Ka-6
7.	Charge-sheet	Ex.Ka-7
8.	Charge-sheet	Ex.Ka-8

8. The prosecution after leading ocular and documentary evidence decided that no further evidence was necessary. The accused thereafter was examined under Section 313 of the Cr.P.C. Learned Additional Sessions Judge convicted the accused and sentenced him as herein above mentioned.

9. Heard Shri Virendra Singh, learned counsel for the appellant and Shri N.K. Srivastava, learned AGA appearing on behalf of the State.

10. In view of the latest decision of the Apex Court while hearing an appeal against

conviction, the Appellate Court is bound to sift the evidence of all witness who have been examined.

11. Learned counsel for the appellant has contended that the impugned order and judgment is based on surmises and conjuncture. It is further submitted that the appellant has been falsely implicated which fact has been totally ignored by the learned Judge. While returning the finding of guilt, it is further submitted that though the prosecutrix witness did not even convey or depose that the act was committed because of the caste of the prosecutrix or her parent. It is submitted that the Court below failed to consider the fact that no act of rape has been proved by medical evidence either ocular or documentary.

12. Learned counsel for the appellant has placed reliance on the decisions of the Apex Court in Hitesh Verma Vs. The State of Uttarakhand and another, 2020 0 Supreme (SC) 653, Ramawatar Vs. State of Madhya Pradesh, 2021 0 Supreme (SC) 625 and a reported judgment of this Court in Criminal Appeal No.204 of 2011 ***[Vishnu vs. State of UP]*** dated 28.1.2021 penned by one of us (Dr.Kaushal Jayendra Thaker, J.) contending that no case under Section 3 (2) (v) of SC/ST Act is made out and the conviction under the said section requires to be upturned.

13. It is submitted by learned counsel for the State that prosecutrix belongs to Scheduled Caste community and the judgment of learned trial Judge cannot be found fault with just because there is silence about caste on the part of the prosecutrix. It is submitted that the incident occurred because of the caste of the prosecutrix. It is further submitted that any incident on person belonging to a particular caste would be an offence.

14. Learned AGA appearing on behalf of State contends that the victim belongs to the community mentioned in the SC/ST Act, any act done would itself with such knowledge be sufficient for convicting the accused and upholding the conviction under Section Section 3 (2) (v) of the SC/ST Act.

15. The provisions of Section 3 (2) (v) of the SC/ST Act provides as under:

"(v) commits any offence under the Indian Penal Code (45 of 1860) punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine"

16. Before we go through the provisions of the Act, it would be relevant for us to discuss threadbare the evidence of the prosecution so as to concur with the judgment and/or reverse the finding of learned Sessions Court as far as Section 3 (2) (v) of the SC/ST Act are concerned.

17. Learned counsel for the appellant has also relied on the judgment in **Patan Jamal Vali vs The State Of Andhra Pradesh, AIR 2021 SC 2190** and contends that as the prosecutrix has not laid any evidence to prove that the offence was committed knowing that the victim belongs to scheduled caste category within a meaning of Section 3(2)(v) of S.C./S.T.Act.

18. Learned Trial Judge has returned the finding holding the accused guilty without even evidence being laid for commission of the said offence the said will also inure the benefit of the accused as ingredients of offence under Section 3(2)(v) of SC./ST Act were not established.

19. In a recent judgment in State of Gujarat Vs. Bhalchandra Laxmishankar Dave, the Apex Court has held that the High Court should also consder the evidence of the witness threadbare before it takes a different view then that taken by the Sessions Judge, in appeal preferred against the order of acquittal/conviction.

20. While going through the record, neither the prosecutrix nor the father of the prosecutrix has mentioned that the accused was having knowledge about their community and the act was perpetrated because of the fact that prosecutrix belonged to a particular community. There are several contradictions and variations. Sallu (PW4) is the maternal uncle of the prosecutrix, who has also not alleged that accused was in knowledge of caste of prosecutrix. The prosecution witness PW4, PW5 and PW6 are not eyewitness rather that they are hearsay witness who were examined after a period of one month of the incident. Even before the doctor, the prosecutrix has never stated that the act was committed in furtherance of harassment based on castism. The ocular version of PW2, who had lodged the FIR, does not speak that the act was perpetrated because of the caste of the prosecutrix.

21. In view of the evidence adduced, it transpires that there is no evidence whatsoever to prove the commission of offence under Section 3 (2) (v) of the SC/ST Act. The mere fact that the victim happened to be a girl belonging to the scheduled caste does not attract the provisions of the Act, 1989, the sine qua non is that the victim should be a person, who belongs to the scheduled caste or the scheduled tribe and that the offence under the Indian Penal Code is committed against him/her on the basis that such a person belongs to the scheduled caste or the scheduled tribe, and that accused had knowledge of her/his caste before he committed the offence. In the absence of such ingredients, no conviction under Section 3 (2) (v) of the Act, 1989, can be sustained.

22. Hence, we are of the considered view that no case is made out under Section 3 (2) (v) of the SC/ST Act, 1989, and learned trial-court could not have convicted and sentenced the appellant for the aforesaid offence.

23. Learned counsel for the appellant argued the matter for lesser sentence under Section 376 after we conveyed that we were not inclined to interfere looking to the medical report and the version of prosecution. He has taken us to the fact in the evidence no injury on the private part of the prosecutrix was found. The prosecutrix was 16 years of age at time of incident. Hymen was intact. Vaginal smear was sent for examination and according to supplementary medical report, no spermatozoa was found.

24. As far as Section 3 (2) (v) of the SC/ST Act is concerned, we upturn the finding of the learned Sessions Judge for the reasons mentioned.

25. Since the learned counsel for the appellant has not pressed the appeal on merit as far as other offences, the punishment period which already undergone by the accused.

26. This case pertains to the offence of 'rape', defined under Section 375 IPC, which is quoted as under:

*[**375. Rape.**- A man is said to commit "rape" if he-*

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

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the

vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

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

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven descriptions :-

***First.-** Against her will.*

***Secondly.-** Without her consent.*

***Thirdly.-** With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.*

***Fourthly.-** With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.*

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

***Sixthly.-** With or without her consent, when she is under eighteen years of age.*

***Seventhly.-** When she is unable to communicate consent.*

***Explanation 1.-** For the purposes of this section, "vagina" shall also include labia majora.*

***Explnation 2.-** Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act.*

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

***Exception 1.-** A medical procedure or intervention shall not constitute rape.*

***Excpetion 2.-** Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.]*

27. In ***Mohd. Giasuddin Vs. State of AP,*** [AIR 1977 SC 1926], explaining rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court:

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by reculturization. Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

28. 'Proper Sentence' was explained in ***Deo Narain Mandal Vs. State of UP*** [(2004) 7 SCC 257] by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on

facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

29. In ***Ravada Sasikala vs. State of A.P.*** AIR 2017 SC 1166, the Supreme Court referred the judgments in ***Jameel vs State of UP*** [(2010) 12 SCC 532], ***Guru Basavraj vs State of Karnatak,*** [(2012) 8 SCC 734], ***Sumer Singh vs Surajbhan Singh,*** [(2014) 7 SCC 323], ***State of Punjab vs Bawa Singh,*** [(2015) 3 SCC 441], and ***Raj Bala vs State of Haryana,*** [(2016) 1 SCC 463] and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective.At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system.

30. A very recent judgment of Hon'ble Supreme Court titled as Manoj Mishra @ Chhotkau Vs. The State of Uttar Pradesh (Criminal Appeal No.1167 of 2021) decided on 8th October, 2021 is also considered by us. The facts were similar and, therefore, we cannot disagree with the finding of facts of the Court below but at the same time considering the factual scenario and sentencing the policy will permit us to reduce the life imprisonment to lesser punishment of incarceration as far as Section 376 IPC is concerned. In **Patan Jamal Vali vs The State Of Andhra Pradesh (supra)** the conviction under Section 3(2)(v) SC/ST Act cannot be sustained and is set aside. As far as punishment the punishment under Section 506 is concerned, he has already been exonerated. In section 506 IPC read with 3(1)(x) of the Atrocities Act, there is no appeal preferred by the State. The provision of Section 3(2)(v) of SC/ST Act are not attracted as opined by us on the factual data and the judgment applicable.

31. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

32. Since the learned counsel for the appellant has not pressed the appeal on its merit,

however, after perusal of entire evidence on record and judgment of the trial court, we consider that the appeal is devoid of merit and is liable to be dismissed. Hence, the conviction of the appellant is upheld.

33. As discussed above, 'reformative theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. It appears from perusal of impugned judgment that sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence. Hon'ble Apex Court, as discussed above, has held that undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system.

34. Learned AGA also admitted the fact that the appellant is in jail for more than nine years. Perusal of the record also shows that appellant is in jail for **past nine years.**

35. The incident occurred before the amendment provision of Indian Penal Code. The incident occurred before the amendment and incident occurred in the year 2000 which culminated into the charge sheet and sessions case was registered in the year 2002. The accused is in jail since 23.7.2014 and might have been in custody as under trial the prisoner also, the minimum sentence in those days was seven years which would be just and proper.

36. We are aware of the disadvantage faced by the prosecutrix who is a disabled girl. Minimum sentence for Section 376 IPC was seven years and, therefore, in our case, it is not that heinous crime with life sentence should be substituted.

37. In such view of the matter, the conviction and sentence awarded to the appellant for the offence under Section 3 (2) (v) of the SC/ST Act, 1989, is hereby set aside.

38. Accordingly, the appeal is ***partly-allowed*** with the modification of sentence, as above.

(2021)11ILR A87
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.11.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

Criminal Appeal No. 3571 of 2013
&
Criminal Appeal No. 4478 of 2013

Santosh Bind @ Kallu ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Sunil Dubey, Sri S.K. Dwivedi, Sri Sushil Kumar Dwivedi, Sri Mohd. Kalim

Counsel for the Respondent:
A.G.A.

'Proper Sentence'- 'Principle of Proportionality'- Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

Sentence should be proportionate to the gravity of the offence, manner of the commission of the offence and facts of the case as well as the age and sex of the accused.

In view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable

of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream. Perusal of the record also shows that appellants are in jail for past nine years and three months. As discussed above that in view of the facts and circumstances of this case and keeping in view of the gravity of the offence, life term imprisonment is very harsh. In our opinion, ends of justice would be met, if sentence is reduced to the period of 7 years.

As the criminal jurisprudence of India is reformative and corrective and is not retributive, hence opportunity of reforming the accused should be given. Sentence modified accordingly.

Criminal Appeal partly allowed. (E-3)

Judgements/ Case law relied upon:-

1. Mohd. Giasuddin Vs St. of AP, AIR 1977 SC 1926

2. Deo Narain Mandal Vs St. of UP [(2004) 7 SCC 257]

3. Ravada Sasikala Vs St. of A.P. AIR 2017 SC 1166

(Delivered by Hon'ble Ajai Tyagi, J.)

1. These are two appeals against the same judgement by different accused persons. Hence, both the appeals are being decided together.

2. By way of these appeals the appellants Santosh Bind Alias Kallu and Vikash Keshri have challenged the judgement and order dated 20.07.2013 passed by learned Additional Sessions Judge, Court No.6, Allahabad in Session Trial No.213 of 2013 arising from Case Crime No.241 of 2012, under Sections 363/149, 366/149, 376(G)/149, 506 and 368 IPC, Police Station- GRP Allahabad, District- Allahabad, whereby accused/appellant in both appeals was convicted and sentenced under Section 363 r/w section 149 IPC for four years R.I. and fine of Rs.4,000/-, under Section 363 r/w Section 149 IPC for seven years and fine of Rs.7,000/-, under Section 506 IPC for one year R.I. and under Section 376 (2)(G) r/w Section 149 IPC for life imprisonment and fine of Rs.1 lac.

2. The brief facts of the prosecution case are that in the night 17/18.05.2012 when prosecutrix was travelling from Jabalpur (MP) to Mirzapur by train. At about 12:15 am, the train stopped at platform No.6 at Allahabad Junction, the prosecutrix alighted at the platform for taking water. One Vikash Keshri and his friend Santosh Kumar Bind @ Kallu were already present on that platform. They took the prosecutrix from platform No.6 to out of railway station by persuading her. When the complainant talked to the prosecutrix on mobile phone, she conveyed that above persons were taking her somewhere forcibly. The above named persons talked to the complainant on phone and conveyed that they have taken his daughter and will leave her on 26.05.2012. The accused threatened the complainant not tell anything to the police. Complainant submitted a *Gumshudagi* (Missing) report at police station-GRP Allahabad, after lodging report, as conveyed on phone on 26.05.2012, the accused persons left the prosecutrix near her house in Mirzapur in serious condition. The prosecutrix told that Vikash Keshri, Santosh Kumar Bind, Abhishek Singh and Gappu committed rape (forcible sex) with her.

3. S.I. Shyam Vart Singh took up the investigation, visited the spot, prepared site-plan. On his transfer, another I.O. completed the investigation after recording the statements of witnesses and submitted the charge sheet against all accused persons. The case being triable by the court of Session was committed to the court of Session for trial by the learned Magistrate.

4. The learned trial court summoned the accused and as accused persons denied the charges and claimed to be tried, charges were framed against all the accused persons except Raghunath Bind under Section 363/149 IPC,

366/149, 376(G) and 506 IPC and charge was framed under Section 368 IPC against the accused Raghunath Bind. The prosecution so as to bring home the charges, examined 11 witnesses, namely:

1.	Shailesh Kumar	PW1
2.	Victim	PW2
3.	Santosh Kumar	PW3
4.	Dr. Vandana Srivastava	PW4
5.	Shaym Vart Singh	PW5
6.	Raghvendra Singh	PW6
7.	Dr.R.N. Gupta	PW7
8.	Dr. S.K. Rai	PW8
9.	Dr. Rajendra Singh	PW9
10.	Paramjeet Kaur	PW10
11.	Arvind Kumar Trivedi	PW11

5. In support of the ocular version of the witnesses, following documents were produced and contents were proved by leading oral evidence:

1.	FIR	Ext. Ka-7
2.	Written report	Ext. Ka-1
3.	Application	Ext. Ka-2
4.	Application	Ext. Ka-3
5.	Application	Ext. Ka-6
6.	Medicolegal Report	Ext. Ka-9
7.	Medicolegal Report	Ext. Ka-10
8.	Radiology and Ultrasound Report	Ext. Ka-16
9.	Radiology and Ultrasound Report	Ext. Ka-17
10.	Pathology Report	Ext. Ka-18
11.	Charge-Sheet "Mool'	Ext. Ka-14

6. After completion of prosecution evidence, accused persons were examined under Section 313 Cr.P.C. They told the prosecution evidence is false and Santosh Kumar Yadav was examined as defence witness being DW1.

7. Heard learned counsel for the appellants, learned AGA for the State and perused the record.

8. Perusal of the record shows that occurrence of ths case took place in the night of 17/18.05.2012 at about 12.15 am when the prosecutrix alighted at platform from the train to take water. Out of all some of the accused persons were already present on the platform. They took the prosecutrix out of the railway station by persuading her from where. They took her with some other accused persons in the van and kept her in a house for about one week, and as per prosecution case, the accused forcibly had sex with prosecutrix several times during this one week. When the prosecutrix returned home as the FIR was lodged and investigation had started, prosecutrix was medically examined by doctors. Dr. Vandana Srivastava was produced by prosecution as PW4 but told that she along with Dr. Tabasum and Dr. Shamim Ahmed examined the prosecutrix who was brought by police GRP, Allahabad. Doctor has deposed before the learned trial court that no injury mark was found on the private parts of the prosecutrix. The hymen of prosecutrix was old torn. It is also stated by the doctor that no spermatozoa was found in vaginal swab and supplementary report was filed. Doctor has opined that prosecutrix was habitual for sexual intercourse. The prosecutrix was examined under Section 164 Cr.P.C. before the competent Magistrate. Where she narrated the incident

9. Prosecutrix was examined by prosecution as PW2, in her statement, she has stated that she was forcibly taken away by the accused persons from railway station Allahabad and she was kept somewhere in the room and accused persons Vikash Keshri, Santosh Kumar

Bind and two others had sexaul intercourse with her continously for one week without her consent. She was kept under threat. Later on accused Santosh Kumar Bind left her near her house in Mirzapur. Complainant, the father of the prosecutrix was examined as PW1. He reiterated what was stated in FIR and proved the same and the said document was exhibited.

10. The accused Vikash Keshri has claimed that on the date of said occurrence, he was not at Allahabad station. He has examined DW1- Santosh Kumar Yadav in his defence, who has stated that Vikash Keshri was student and he was tenant in his room and from 17.05.2012 to 19.05.2012, he was there in his tenanted room. Learned trial court relied on the evidence, led by the prosecution only in connection with the accused Vikash Keshri and Santosh Bind and convicted them as aforesaid. Learned trial court acquitted the co-accused persons Gappu @ Mahendra, Abhishek Singh and Raghunath from all the charges levelled against them.

11. After argument on merits, the learned counsel for the appellants submitted that as accused are in jail for a long period, he is not pressing this appeal on its merit, but prays for reduction of the sentence as the sentence of life imprisonment awarded to the appellants by the trial court is very harsh and unwarranted. Learned counsel also submitted that appellants are in jail since 10.06.2012.

12. This case pertains to the offence of 'rape', defined under Section 375 IPC, which is quoted as under:

[375. Rape.- *A man is said to commit "rape" if he-*

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

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

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

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven descriptions :-

First.- *Against her will.*

Secondly.- *Without her consent.*

Thirdly.- *With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.*

Fourthly.- *With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.*

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

Sixthly.- *With or without her consent, when she is under eighteen years of age.*

Seventhly.- *When she is unable to communicate consent.*

Explanation 1.- *For the purposes of this section, "vagina" shall also include labia majora.*

Explnation 2.- *Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates*

willingness to participate in the specific sexual act.

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

***Exception 1.-** A medical procedure or intervention shall not constitute rape.*

***Excpetion 2.-** Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.]*

13. In case cited ***Mohd. Giasuddin Vs. State of AP, AIR 1977 SC 1926***, the Apex Court while explaining rehabilitary & reformative aspects in sentencing has observed as follows:-

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by reculturization. Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

14. The term 'Proper Sentence' was explained in ***Deo Narain Mandal Vs. State of UP [(2004) 7 SCC 257]*** by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

15. In ***Ravada Sasikala vs. State of A.P.*** AIR 2017 SC 1166, the Supreme Court referred the judgments in ***Jameel vs State of UP*** [(2010) 12 SCC 532], ***Guru Basavraj vs State of Karnatak,*** [(2012) 8 SCC 734], ***Sumer Singh vs Surajbhan Singh,*** [(2014) 7 SCC 323], ***State of Punjab vs Bawa Singh,*** [(2015) 3 SCC 441], and ***Raj Bala vs State of Haryana,*** [(2016) 1 SCC 463] and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges

confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the
reformative approach underlying in our criminal justice system.

16. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

17. Keeping in view the facts and circumstances, we will have to fall back what is known as corrective measures. The accused were young as narrated above. There were certain loop-holes even in the investigation. The factual scenario as narrated also to some extent would persuade us to take a different view than that taken by the learned Judge as far as committal of forcible sex is concerned but even if that be shown the age of girl namely, the prosecutrix does not permit us to take different view but at the same time the judgements of the Apex Court will permit us to fall back on what is known reformative theory of punishment. The conviction of the appellants can be interfered only for the purpose of sentence as according to us keeping the gravity of offence, the punishment of life imprisonment is too harsh.

18. As discussed above, 'reformative theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. It appears from perusal of impugned judgment that sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence. Hon'ble Apex Court, as discussed above, has held that undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system.

19. Learned AGA also admitted the fact that the appellants are languishing in jail for more than nine years. Perusal of the record also shows that appellants are in jail for past nine years and three months. As discussed above that in view of the facts and circumstances of this case and keeping in view of the gravity of the offence, life term imprisonment is very harsh. In our opinion, ends of justice would be met, if sentence is reduced to the period of 7 years.

20. Hence, the sentence awarded to the appellants by the learned trial court under Section 376(2)(G) r/w 149 IPC is reduced to the period of seven years R.I. with all remissions and fine is reduced from Rs.1 lac to Rs.10,000/- each. Appellants have to undergo simple imprisonment for one year in case of default of fine. Rest of sentences in other offences shall remain intact and all the sentences shall run concurrently as directed by learned trial court.

21. Accordingly, the appeal is **partly allowed** with the modification of sentence, as above.

(2021)11ILR A92
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.11.2021

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE SAMIT GOPAL, J.

Criminal Appeal No. 4399 of 2015

Ramji Yadav **...Appellant**

Versus

State of U.P. **...Respondent**

Counsel for the Appellant:
Sri Sanjay Kumar Singh, Sri Ajay Kumar Pandey, Sri Faizan Siddiqui, Fatma Khatoon, Sri Rajesh Kumar, Sri Rajrshi Gupta, Sri Rajul Bhagava, Sri Rama Shanker, Sri Rahul Yadav, Sri Muktesh Singh, Sri Irfan Ahmad, Sri Rizwan Ahmad, Sri Rajesh Kushwaha, Sri Satish Trivedi

Counsel for the Respondent:
A.G.A.

Evidence Law - Indian Evidence Act, 1872- Sections 3 & 134- It is trite law that a related witness may not be labelled as interested witness. Interested witnesses are those who want to derive some benefit from the result of litigation or implicating the accused. Once it is established that witnesses were present at the scene, to witness the occurrence, they cannot be discarded merely on the ground of being closely related to the victim. Relationship is not sufficient to discredit a witness unless there is motive to give false evidence to spare the real culprit and falsely implicate an innocent person.

A related witness is not an interested witness unless he stands to gain some benefit by implicating the accused and testimony of a natural witness cannot be discarded on the basis of his relationship as it is the quality of evidence which is important.

Evidence Law - Indian Evidence Act, 1872- Sections 137 & 145- The delay in sending of the First Information Report to the Magistrate is concerned, there is no date and time mentioned in the Chik of sending it to the Magistrate. Even there is no cross examination done on behalf of the accused with regards to the same. In the event of no cross examination being done with regards to the same, the accused cannot take benefit of it by just placing arguments for which the relevant witnesses have not been cross examined. As such, it cannot be said that there was no compliance of Section 157 Cr.P.C. and the First Information Report was an anti-timed document.

Settled law that where no question is put in cross-examination to a witness on a particular fact, then the same cannot be argued at a subsequent stage.

Criminal Law - Indian Penal Code, 1860- Sections 302 & 304 Part-I- The incident started with some quarrel between the parties. The accused-appellant fired a shot from his gun. The incident was not premeditated. The accused-appellant is not said to have acted on his own. The act of firing by him is said to have been done on impulse and that too upon being instigated and therefore under these circumstances, it cannot be said that the accused-appellant has committed an offence under section 302 IPC.- It can be inferred that the genesis of the occurrence has not been established in this case, though, it is proved beyond doubt that the accused-appellant fired a gun-shot on the deceased resulting in his death. Therefore, the offence committed by the accused-appellant would not fall under section 302 IPC, but in our considered view, the offence would fall under section 304 Part-I IPC. Accused-appellant is convicted under Section 304 Part-I IPC to a sentence of twelve (12) years rigorous imprisonment.

Where it stands established that homicide was committed as a result of instigation and provocation, with no premeditation and repetition of assault, then the same would amount to culpable homicide not amounting to murder punishable u/s 304 Part I of the IPC. Sentence modified accordingly. (Para 30, 31, 32, 34, 35, 36)

Criminal Appeal partly allowed. (E-3)

Judgements/ Case law relied upon:-

1. St. of U.P Vs Kishanpal & ors: (2008) 16 SCC 73

(Delivered by Hon'ble Samit Gopal, J.)

1. This criminal appeal has been preferred by Ramji Yadav S/o Sri Chhannu Yadav, resident of Village Pahari, Police Station Maruadih, District Varanasi against the judgment and order dated 17.09.2015 passed by the Additional Sessions Judge, Court No. 13, Varanasi in Sessions Trial No. 390 of 2011 (State of U.P. Vs. Ramji Yadav) whereby the accused-appellant has been convicted and sentenced under Section 302 of the Indian Penal

Code, 1860 (hereinafter referred to as the 'IPC') to life imprisonment, a fine of Rs. 40,000/- and in default of payment of fine to one year rigorous imprisonment. It is ordered that Rs. 20,000/- as realised from fine will be paid to Nihori Yadav the father of the deceased Sanjay Yadav as compensation under Section 357 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Cr.P.C.'). The trial court has ordered that benefit of Section 428 Cr.P.C. be extended to the accused.

2. The entire trial court records of the present case went missing from the trial court itself. It had been reconstructed under the order dated 01.12.2014 of the District Judge, Varanasi.

3. The prosecution case as per the First Information Report lodged by Nihori Yadav PW-1 is that on 15.01.2011 at 06:15 pm Ramji Yadav was coming from village Kadipur. Sanjay Yadav, his son was standing at the door. Ramji Yadav on seeing his son started hurling abuses. His son then asked him as to why he is abusing on which there were some hot talks between them. Mohan Yadav and Sohan Yadav @ Patali Yadav the brothers of Ramji Yadav then exhorted on which Ramji Yadav who was carrying a 12 bore gun fired from it on his son with an intention to kill him. Persons of village took his son to the hospital. The first informant, his brother and persons of the village have seen the occurrence. Ramji Yadav was apprehended there only. He was also taken to the hospital.

4. An application dated 15.01.2011 was given by Nihori Yadav for lodging of a First Information Report which is marked as Exb.: Ka-1 to the records. Roop Chandra is the scribe of the same.

5. A First Information Report was then registered on 15.01.2011 at 19:30 hrs (7:30 pm) as Case Crime No. 20 of 2011 under Section 307 IPC at Police Station Maruadih, District Varanasi of which Nihori Yadav is the informant. The same is Exb.: Ka-3 to the records. The distance between the place of occurrence and the Police Station is 4-1/2 kilometres.

6. Sanjay Yadav S/o Nihori Yadav aged about 35 years died on 15.01.2011 at 08:35 pm in Heritage Hospital, Lanka, Varanasi. His postmortem examination was conducted on 16.01.2011 at about 3:30 pm by Dr. Santosh Kumar Gupta PW-4 which is marked as Exb.: Ka-6 to the records. The doctor found the following injuries on his body:-

(i) Firearm entrance wound 2.5 cm diameter x cavity deep on left side chest, 3 cm below cavity border of left clavicle 6 cm outer to midline, 133 cm above left above diaphragm and 7 cm above left nipple.

(ii) Surgical drainage with stitches (2 cm size) 10 cm below left axilla.

Cause of death is opined as shock and haemorrhage as a result of firearm injury left chest which was cause of rupture of left lung.

7. After the death of Sanjay Yadav, the case was converted under Section 302 IPC. The investigation concluded and a charge sheet No. 55 of 2011 dated 30.03.2011 under Section 302 IPC was submitted against the accused-appellant, the same is marked as Exb.: Ka-16 to the records.

8. The trial court vide order dated 17.08.2011 framed charge against the accused-appellant under Section 302 IPC. The accused-appellant pleaded not guilty and claimed to be tried.

9. A SBBL 12 bore gun bearing Gun No. 17283 - 96 of the Bhargava Arms Company with an empty cartridge embedded in its chamber and 4 (four) cartridges in its cover were recovered on 16.01.2011. Sobhash Yadav and Rajendra

Yadav PW-2 are the witnesses to the same. A recovery memo regarding the said recovery was prepared which is marked as Exb.: Ka-2 to the records.

10. Certain articles were sent to the ballistic expert for examination. A report dated 22.12.2011 has been sent, the same is on record. The gun which was recovered was sent, was marked as 1/2001. Two cartridges were fired as test cartridges in the laboratory which were marked as TC-1 and TC-2. The cartridge recovered from the barrel of the gun was marked as EC-1. As per the opinion of the ballistic expert, the marks of EC-1 were identical to that of TC-1 and TC-2 and they matched with them.

11. The prosecution in order to prove its case examined Nihori Yadav PW-1 who is the first informant and also father of the deceased. Rajendra Yadav PW-2 is the brother of the deceased and son of Nihori Yadav PW-1. These two witnesses are produced and examined as the eye witnesses of the incident.

12. As formal witnesses, Umesh Rai PW-3 was the Head Constable of Police Station Maruadih, Varanasi who transcribed the First Information Report and prepared its Chik. Dr. Santosh Kumar Gupta PW-4 conducted the postmortem examination of the deceased Sanjay Yadav. Arun Kumar Yadav, Sub-Inspector PW-5 conducted the inquest on the body of the deceased which is Exb.: Ka-7 to the records. Sageer Ahmad PW-6 is the Investigating Officer of the matter who took up the investigation and concluded it by filing charge sheet against the accused-appellant Ramji Yadav.

13. The accused-appellant denied the occurrence and claimed false implication due to enmity with the first informant due to some land dispute and claimed to be tried. No defence was led by him.

14. The trial court after considering the entire evidence on record came to the conclusion that the evidence of witnesses and the entire records go to show that the accused Ramji Yadav has committed the said offence which has been proved against him beyond reasonable doubts and the prosecution has been successful in proving the case against him and thus convicted him under the aforesaid section.

15. We have heard Sri Rajrshi Gupta & Sri Rama Shankar Yadav, learned counsels for the accused-appellant and Sri Attreya Dutta Mishra, learned Additional Government Advocate for the State of U.P. and have perused the entire reconstructed records and the judgment and order of conviction.

16. Learned counsels for the accused-appellant have made the following submissions before us:-

(i) There has been a delay in sending of the First Information Report to the Magistrate. The Chik First Information Report states that the same is being sent by dak. There is no recital of the date and time of its dispatch. The same is in violation of Section 157 of the Cr.P.C. The First Information Report is thus an anti-time document.

(ii) In the First Information Report, there is a specific allegation of Mohan Yadav and Sohan Yadav @ Patali Yadav, the brothers of the accused-appellant Ramji Yadav to have exhorted him after which he fired but the first informant and Rajendra Yadav later on exonerated them and as such in the investigation they were exonerated. After investigation no charge sheet was submitted against them. This would go to show that the prosecution case is not truthful. There has been an attempt to increase the number of accused persons and thus the implication of the accused-appellant also becomes doubtful. The genesis of the occurrence is also doubtful.

(iii) The accused-appellant had no motive at all to commit the said offence. The prosecution has not come out with any motive at all for the accused-appellant to indulge in the said incident.

(iv) The arrest of the accused-appellant is in dispute. In the First Information Report, it is stated that he was apprehended by the villagers and he was also taken to the hospital. There is no document whatsoever on record to show that the accused-appellant was taken to the hospital as narrated in the First Information Report and by the first informant. Sageer Ahmad PW-6 who is the Investigating Officer of the case states that he arrested the accused-appellant from the hospital and then he took him for the recovery of the weapon. The link of the accused-appellant being apprehended and being taken and admitted in the hospital and then being arrested from there is missing.

(v) The two eye witnesses being Nihori Yadav PW-1 and Rajendra Yadav PW-2 are the father and brother respectively of the deceased Sanjay Yadav. They are family members of the deceased and as such are interested witnesses. There is no independent witness to support the prosecution case. It would be very unsafe to rely upon the testimony of the alleged eye witnesses as they are the family members of the deceased and are interested witnesses.

(vi) It is lastly argued that even if presuming all the evidences to be true and correct, the matter would not travel beyond Section 304 Part-I of the IPC. The case is a case of a single shot without any repetition of firing as is evident from the prosecution evidence and the postmortem report. There was no motive for the accused-appellant to commit the said offence. The incident started with an altercation in which a single shot was fired. The accused-appellant has been in jail since 16.01.2011 and as such has suffered imprisonment for about 10 years and 10 months which would be an appropriate sentence for him under Section 304 Part-I IPC.

17. Learned Additional Government Advocate for the State on the other hand opposed the submissions of learned counsels for the accused-appellant by arguing that the present case is a case of direct evidence. The incident took place on 15.01.2011 at 06:15 pm and the First Information Report was lodged on 15.01.2011 itself at 19:30 hrs which was after about one hour and fifteen minutes of the incident. The distance between the place of occurrence and Police Station is four and a half kilometres. The First Information Report has been lodged promptly. Sanjay Yadav, the deceased in an injured condition was taken to the hospital and as such the First Information Report was lodged under Section 307 IPC but after getting information about his death, the case was converted under Section 302 IPC. PW-1 Nihori Yadav and PW-2 Rajendra Yadav are the eye witnesses of the incident and were natural witnesses present.

18. It is further argued that the SBBL gun used in the incident was recovered on the pointing out of the accused-appellant which had an empty cartridge in its chamber. The same was sent to ballistic expert for examination. The report of the ballistic expert clinches the case as he opined that the said empty was fired from the said weapon after testing it and comparing it from the test cartridges. Thus the use of the said weapon gets corroborated from the ballistic report.

19. It is argued that in so far as the argument of the First Information Report being anti-time is concerned, there is no foundation laid by the accused in the cross-examination of the witnesses for the same. Only drawing a presumption about it by the fact that the date and time of sending the First Information Report is not mentioned therein would not in any manner be conclusive of the fact that there was a delay in sending of the same to the Magistrate. It is argued that the testimony of the two eye witnesses are correct and intact and they are

natural and truthful witnesses. There is ample evidence on record to prove that the accused-appellant is the person who shot the deceased. The appeal lacks merit which is liable to be dismissed.

20. PW-1 Nihori Yadav is the first informant of the case and the brother of the deceased. He states that the incident is of 15.01.2011 at about 06:15 pm. He was present in his house. Accused Ramji Yadav started abusing Amit and Sanjay. His son was shot by him. He was carrying a gun, the shot hit his left chest. Ramji Yadav shot him while he was standing at the door of his house. His son was taken to the hospital by his family members. He later on came to know that his son died while going to the hospital. Ramji Yadav tried to run away after firing. He was apprehended by the villagers. Police came and took him away. He lodged the First Information Report. He also went with Ramji to the Police Station. He proves the application given by him for lodging of the First Information Report.

21. In his cross examination, he states that he had given an affidavit dated 14.02.2011 to the D.I.G., Varanasi. He states that in the said affidavit in para 3, he has stated that Mohan Yadav and Sohan Yadav have been falsely implicated in the present case. To a suggestion that he has enmity with many people he refuses. He further refuses the suggestion that unknown person shot his son and he did not witness the incident. He refuses that he has falsely implicated the accused.

22. PW-2 Rajendra Yadav is the other son of the first informant Nihori Yadav and is the brother of the deceased Sanjay Yadav. He states that the accused-appellant shot his brother with his licensed gun which hit his left chest. His brother then walked 2-3 steps and then fell down after which he with the help of villagers took him to Heritage Hospital wherein the doctors declared him dead at about 08:30 pm. He is also a witness of the recovery of the gun and cartridges which was on the pointing out of the accused-appellant on 16.01.2011. He states about the said recovery being effected before him and the recovery memo being prepared before him. He is also the witness of the recovery of blood stained mud and plain mud, the recovery memo of which is Exb.: Ka-13 to the records which was also done on 16.01.2011. He is a witness of the inquest. He states that he had also given an affidavit in the matter through his lawyer which was prepared on his instructions. He had stated in the same that Mohan and Sohan were not present at the place of incident at the date and time of the occurrence. Their names have been wrongly mentioned in the First Information Report. To a suggestion to him that unknown persons have murdered his brother in the night he denies. He further denies that he is not an eye witness to the incident. It is further denied by him that he has falsely implicated the accused-appellant and he was not present at the place of occurrence. He denies the suggestion that no such incident took place as stated by him in his examination-in-chief and also denies the suggestion that he is giving a false statement in court.

23. PW-3 Umesh Rai is the Head Constable who transcribed the First Information Report and prepared the Chik. He proves the same.

24. PW-4 Dr. Santosh Kumar Gupta conducted the postmortem examination of the deceased Sanjay Yadav. He states that he conducted the postmortem on 16.01.2011 at about 03:30 pm. The deceased had died on 15.01.2011 at about 08:35 pm in Heritage Hospital. He proves the postmortem report and states that the cause of death was shock and haemorrhage as a result of firearm injury on the left chest with rupture of left lung.

25. PW-6 Sageer Ahmad is the Investigating Officer of the case. He states about

his taking over the investigation on 16.01.2011 and conducting the Panchayatnama on the body of the deceased in the mortuary of Heritage Hospital, Varanasi which is marked as Exb.: Ka-7 to the records. He then prepared other documents relating to the same and sent the body for postmortem. He states that on 16.01.2011 he prepared the site plan which was marked as Exb.: Ka-12 to the records. He prepared the recovery memo of the blood stained mud and plain mud in the presence of witnesses which was dictated by him to Sub-Inspector Arun Kumar Yadav. The same was marked as Exb.: Ka-13 to the records.

26. Accused Ramji Yadav gave his statement to him which was marked as Exb.: Ka-14 to the records. Subsequently, as he was admitted in Kabir Chaura, Hospital he reached the hospital and recorded his statement and took him for the recovery of the 12 bore gun. The same was then got recovered on the pointing out of the accused. The recovered gun was bearing Gun No. 17283 - 96 of The Bhargava Arms Company and had an empty cartridge in its barrel and four cartridges in its cover. The gun and the cartridges were sealed and a recovery memo of the same was prepared which was marked as Exb.: Ka-2 to the records. He then proceeded with the investigation and subsequently on 24.01.2011 Section 34 IPC was added in the investigation. The statements of witnesses were recorded. Smt. Girja Devi and Smt. Dulari Devi were also interrogated by him on 09.03.2011 as eye witnesses of the incident. The statement of formal witnesses were recorded by him. After investigation he submitted a charge sheet under Section 302 IPC against the accused-appellant. The said charge sheet is marked as Exb.: Ka-16 to the records. Articles were sent to the Director Forensic Lab, Lucknow through Constable-188 Rajesh Pandey in a sealed condition for analysis. A report was received from the ballistic expert in the matter after examination of the articles received in the lab.

27. He states that in the First Information Report, it is mentioned that Mohan Yadav and Sohan Yadav exhorted Ramji who then fired and in the statement of the first informant, he had stated about the same but later on he gave an affidavit and an affidavit was also received from Rajendra Yadav stating therein that the said persons have been falsely implicated. To a suggestion that he did not get the recovery of the weapon done, he denies the same. He further denies the suggestion that in conspiracy he brought the licensed weapon of the accused from his house and fired from it at the Police Station and made a false case. In the end, he denies the suggestion that he has not investigated the matter properly and in conspiracy with the villagers, has filed charge sheet against the accused-appellant without any evidence. He further denies the fact that the deceased had enmity with many people of the village and was murdered in the night by someone and due to the enmity with the accused he has been falsely implicated.

28. The accused-appellant in his statement under Section 313 Cr.P.C. states that the case has been instituted against him due to enmity. He further states that Nihori Yadav and Rajendra Yadav have enmity with many people of the village. There is a dispute with regards to land between the accused-appellant and his brother with Nihori Yadav and as such he has enmity with him. The deceased has been murdered by some unknown persons in the dark.

29. The prosecution case is specific in so far as it relates to the firing upon the deceased Sanjay Yadav is concerned. The role of firing has been assigned to the accused-appellant Ramji Yadav with his licensed gun. The time of occurrence and the place of occurrence is also specified. There is no challenge by the accused

with regards to the date and place of occurrence. Two eye witnesses examined in the trial being Nihori Yadav PW-1 and Rajendra Yadav PW-2 although are the father and brother of the deceased but are natural witnesses of the incident. Since the place of occurrence is the house of the first informant, the presence of the said two witnesses cannot be doubted.

30. The occurrence in the present case is of 15.01.2011 at 6:15 pm and the First Information Report has been lodged on the same day at 19:30 hrs (07:30 pm) which is after about one hour and fifteen minutes of the incident. The same was lodged after Sanjay Yadav while being in an injured condition was taken away to the hospital by Rajendra Yadav PW-2 and other villagers. The distance between the place of occurrence and the Police Station is four and a half kilometres. The First Information Report is a prompt report lodged by Nihori Yadav PW-1. There is a recovery of SBBL gun on the pointing out of the accused-appellant which was having an empty cartridge embedded in it which is said to have been used in the present incident. The gun was sent to the ballistic expert for examination and empty cartridge found in it, was found to have been fired from the same. Since the matter is having eye witnesses being present, the motive does not play an important role and the non-mentioning of any motive in the First Information Report would not make the entire prosecution case doubtful.

It is trite law that a related witness may not be labelled as interested witness. Interested witnesses are those who want to derive some benefit from the result of litigation or implicating the accused. Once it is established that witnesses were present at the scene, to witness the occurrence, they cannot be discarded merely on the ground of being closely related to the victim. The Apex Court in **State of Uttar Pradesh Vs. Kishanpal and others : (2008) 16 SCC 73** held as under:

"18. The plea of defence that it would not be safe to accept the evidence of the eye witnesses who are the close relatives of the deceased, has not been accepted by this Court. There is no such universal rule as to warrant rejection of the evidence of a witness merely because he/she was related to or interested in the parties to either side. In such cases, if the presence of such a witness at the time of occurrence is proved or considered to be natural and the evidence tendered by such witness is found in the light of the surrounding circumstances and probabilities of the case to be true, it can provide a good and sound basis for conviction of the accused. Where it is shown that there is enmity and the witnesses are near relatives too, the Court has a duty to scrutinize their evidence with great care, caution and circumspection and be very careful too in weighing such evidence. The testimony of related witnesses, if after deep scrutiny, found to be credible cannot be discarded.

19. It is now well settled that the evidence of witness cannot be discarded merely on the ground that he is a related witness, if otherwise the same is found credible. The witness could be a relative but that does not mean his statement should be rejected. In such a case, it is the duty of the Court to be more careful in the matter of scrutiny of evidence of the interested witness, and if, on such scrutiny it is found that the evidence on record of such interested witness is worth credence, the same would not be discarded merely on the ground that the witness is an interested witness. Caution is to be applied by the court while scrutinizing the evidence of the interested witness.

20. It is well settled that it is the quality of the evidence and not the quantity of the evidence which is required to be judged by the court to place credence on the statement. The ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. Relationship is not a factor to affect credibility

of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the Court has to adopt a careful approach and analyse the evidence to find out whether it is cogent and credible."

31. Relationship is not sufficient to discredit a witness unless there is motive to give false evidence to spare the real culprit and falsely implicate an innocent person.

32. The exoneration of two accused persons who were assigned the role of exhortation only cannot be a ground for discarding the entire prosecution evidence. In so far as, the delay in sending of the First Information Report to the Magistrate is concerned, there is no date and time mentioned in the Chik of sending it to the Magistrate. Even there is no cross examination done on behalf of the accused with regards to the same. In the event of no cross examination being done with regards to the same, the accused cannot take benefit of it by just placing arguments for which the relevant witnesses have not been cross examined. As such, it cannot be said that there was no compliance of Section 157 Cr.P.C. and the First Information Report was an anti-timed document. The presence of the eye witnesses and their unblemished testimony is sufficient enough to prove the case. The prosecution cannot fail even for the reason that it has not proved the motive for the commission of the incident. Even during lengthy cross examination of PW-1 Nihori Yadav and PW-2 Rajendra Yadav no material could be elucidated by the accused in his benefit and favour from them which could be safely taken to discard their testimony in full. The prosecution has succeeded its case beyond reasonable doubts against the accused-appellant.

33. The alternative arguments of learned counsels for the accused-appellant that the matter would not be one under Section 302 IPC but would fall under Section 304 Part-I IPC is being taken up for consideration now.

34. The incident started with some quarrel between the parties. The accused-appellant fired a shot from his gun. The incident was not premeditated. The accused-appellant is not said to have acted on his own. The act of firing by him is said to have been done on impulse and that too upon being instigated by his brothers Mohan Yadav and Sohan Yadav @ Patali Yadav. From the evidence of PW-1 and PW-2 it is evident that there had been hot exchange of words. The injury as received by the deceased Sanjay Yadav is a single injury on his body which was the cause of his death. The other injury was a surgical drainage with stitches which has been stated by the doctor to be present on his body which was a procedure done during the course of his treatment.

35. The accused-appellant has caused a single gun-shot injury to the deceased that too on being instigated by his two brothers who have been exonerated during investigation and therefore under these circumstances, it cannot be said that the accused-appellant has committed an offence under section 302 IPC. But according to the learned counsels for the accused-appellant, the offence would fall under section 304 Part-I IPC. Learned counsel submitted that the accused-appellant has already suffered imprisonment of more than ten (10) years and ten (10) months and he is first offender and he should be released on the sentence already undergone by him.

We have meticulously considered the evidence in this case in the light of the above submission of the learned counsels for the accused-appellant. The alleged eyewitnesses Nihori Yadav PW-1 and Rajendra Yadav PW-2 have deposed that the accused-appellant was abusing the deceased who objected to it and

some hot talks between them took place after which his brothers Mohan Yadav and Sohan Yadav @ Patali Yadav, the exonerated co-accused instigated the accused-appellant Ramji Yadav and on this, he fired a shot on the deceased. None of these witnesses have disclosed as to what was the cause or reason by the accused-appellant to abuse the deceased. The accused-appellant had caused a single gun-shot injury, on being instigated by his brothers Mohan Yadav and Sohan Yadav @ Patali Yadav. Thus, if there was no dispute or quarrel or enmity before the incident and it has not been made clear by the witnesses as to what was the cause or reason for hurling abuses then certainly it can be inferred that the genesis of the occurrence has not been established in this case, though, it is proved beyond doubt that the accused-appellant fired a gun-shot on the deceased resulting in his death. Therefore, the offence committed by the accused-appellant would not fall under section 302 IPC, but in our considered view, the offence would fall under section 304 Part-I IPC.

36. So far as sentence is concerned, from the records it is clear that the accused-appellant was arrested on 16.01.2011 and during trial he remained in custody and even after the impugned judgment he has remained in jail till date. Thus, he has suffered imprisonment of about ten years and ten months and if remission part is considered then this sentence would be more. The incident is of the year 2011 and the accused-appellant has suffered mental agony of this case for more than ten years. The accused-appellant is not reported to have any previous criminal history. Looking to the overall facts and circumstances of the case, nature of evidence available on record, this Court is of the conclusion that the present case would fall under Section 304 Part-I IPC and not under Section 302 IPC and a conviction of twelve (12) years alongwith fine already imposed by the trial court with compensation to the father of the deceased as ordered by the trial court would meet the ends of justice.

37. In the result, the appeal is **partly allowed.**

38. The accused-appellant is convicted under Section 304 Part-I IPC to a sentence of twelve (12) years rigorous imprisonment. The amount of fine as imposed upon him by the trial court and the compensation as directed to be paid from it under Section 357 Cr.P.C. is maintained. The default sentence as ordered by the trial court is also maintained.

39. The lower court record along with a copy of this judgment be sent back forthwith to the trial court concerned for compliance and necessary action.

(2021)11ILR A101
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.11.2021

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE OM PRAKASH TRIPATHI, J.

Criminal Appeal No. 5508 of 2007
connected with
Criminal Appeal No. 4794 of 2007

Sanjay @ Kalla ...Appellant

Versus

State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Raghuraj Kishore, Sri Ajay Kumar Sharma, Sri Ashutosh Tripathi, Sri Atmaram Nadiwal, Sri Dharmendra Singhal, Sri Dharmendra Singhal, Sri Hari Om Yadav, Sri Maqsood Ahmad, Sri Mohd. Farooq, Sri Shiv Prakash, Sri Yogesh Srivastav

Counsel for the Respondent:

A.G.A.

Criminal Law - Code of Criminal Procedure, 1973- Section 174- Inquest Report- In panchayatnama, names of the assailants have not been mentioned, which shows that panchayatnama has been prepared prior to lodging the FIR. Crime number and Section details of GD has been mentioned in the panchayatnama. Mentioning the name of the accused is not required in inquest report.

Merely not mentioning the names of the accused in the inquest report will not result in doubting the timing of the FIR as there is no requirement in law to mention the names of the accused in the inquest report.

Evidence Law - Indian Evidence Act, 1872- Section 8- Motive-It is a case of direct evidence. In the case of direct evidence, motive becomes insignificant. It is not required to mention each and everything in the FIR. If motive has not been mentioned in the FIR, this will not damage the prosecution case.

Settled law that in a case of direct evidence motive pales into insignificance. Not mentioning the motive in the FIR will not dent the case of the prosecution as all facts not required to be stated in the FIR.

Criminal Law - Indian Penal Code, 1860- Section 34 IPC- Common intention should be gathered by the act and conduct of the accused.

Where it is proved from the act and conduct of the accused that they committed the offence in furtherance of a common intention and overt acts are attributed to all the accused, then they will be vicariously liable for committing the said offence.

Evidence Law - Indian Evidence Act- Section 3- Interested Witness- P.W.-2 and Kaley P.W.-3 are the natural witnesses-. Both witnesses were present on the spot, witnessed the occurrence and informed the father of the deceased P.W.-1-; their evidences are supported by medical evidence; the evidence of P.W.-2 and P.W.-3 is fully reliable and credible. Witnesses have no enmity with the accused and there is no ground to falsely implicate them. The submission of defence that witnesses are related one, is not tenable. This does not affect prosecution case. Injury inflicted by the accused on the vital part of the deceased in furtherance of common intention of both the accused is proved beyond reasonable doubt.

Settled law that an interested witness is one who stands to benefit from the false implication of the accused and merely because a natural witness is related to the deceased, would not make him an interested witness.(Para 30, 36, 45, 54)

Criminal Appeal rejected. (E-3)

Judgements/ Case law relied upon:-

1. Seikh Ayuub Vs St. of Maha. 1999 SCC Crl.1055

2. Pratap Singh & ors Vs St. of UP 2021, SCC Online All 686

3. Abu Thaker Vs St. of T.N, (2010) 5 SCC 91

4. Bipin Kumar Mondal Vs St. of W.B, (2010) 12 SCC 91

5. Mohd. Rojali Ali & ors. Vs St. of Assam (2019) 19 SCC 567

6. Laltu Ghosh Vs St. of W.B (2019) 15 Supreme Court Cases 344

(Delivered by Hon'ble Om Prakash Tripathi, J.)

1. Heard Sri Dharmendra Singhal, learned Senior Advocate assisted by Sri Atmaram Nadiwal, Sri Sudhir Kumar Agarwal and Sri Naveen Kumar Yadav, learned counsel for the appellants as well as Sri A. N. Mulla, learned AGA for the State and perused the material on record.

2. The appellants have preferred these criminal appeals aggrieved by the judgment and order dated 18.07.2007 passed by the Additional Sessions Judge, Fast Track Court-I, Baghpat in Sessions Trial No. 544 of 2006, arising out of Case Crime No. 406 of 2006, Police Station

Barot, District Baghpat convicting and sentencing the appellants to undergo rigorous life imprisonment under Section 302/34 of IPC with a fine of Rs.25,000/- each, in default thereof, to undergo two years rigorous additional imprisonment, therefore, these appeals are heard and being decided together by this common judgment.

3. The prosecution case is as follows:

4. Rishi Pal, the complainant, S/o Bhullan, R/o Wazidpur, Police Station Baraut, District Baghpat lodged the first information report on 24.07.2006 at the Police Station Baraut, District Baghpat alleging therein that on 24.07.2006 at 04:30 pm, the son of the complainant namely, Mange was going to see buffalo at the house of Rajiv S/o Padam with Pappu, S/o Vijay Pal and Kaley, S/o Nahar. When all these three persons came in front of the shop of Tejpal Jhevar, Pappu, S/o Vijay Pal began to purchase *gutka*, where Mange Ram and Kaley, stood before the shop. Suddenly, Sanjay @ Kalla and Vinod @ Bhura came from the back side and Vinod @ Bhura caught hold Mange Ram and Sanjay @ Kalla with intention to kill, inflicted gun shot injury upon Mange (son of the complainant), which resulted in the death of the deceased on the spot.

5. On the basis of the written report (Exhibit Ka.-1), the police registered a case as Crime No. 406 of 2006, under Section 302 IPC and entry about registration of the case was made in the General Diary on 24.07.2006. Investigation of the case was taken over by the Sub-Inspector Suraj Pal Singh (P.W.-5). He rushed to the spot and recorded the statement of the complainant Rishi Pal and prepared the site plan.

6. The postmortem examination was conducted on the dead body of the deceased Mange Ram by P.W.-4, Dr. P. Kapoor, Medical Officer, Community Health Centre, Baghpat on 25.07.2006 at 10:45 am. As per the post mortem report, the deceased was about 26 years old at the time of the death and possibility of death of the deceased was about 3/4th day from the date of postmortem. On internal examination of the deceased, the doctor opined that the deceased died due to coma, shock and haemorrhage due to ante mortem injuries. Ante mortem injuries are as follows :

Gun shot wound of exit on right side of head of size 3.5 cm x 1.5 cm margin everted.

Gun shot wound of entry on left side of neck of size 7 cm x 5 cm located above left collar bone margin inverted on dissecting underlying tissues and vessels lacerated and torn. On dissecting and probing injury nos. 1 and 2 in direct communication.

7. During investigation, the Investigating Officer recorded the statements of the witnesses. After completing all formalities of investigation, he submitted the charge sheet (Exhibit Ka.-13) against the appellants in the Court of Chief Judicial Magistrate, Baghpat under Section 302 IPC and the cognizance of offence was taken by the Magistrate. The case was committed to the Court of Sessions Judge by the Chief Judicial Magistrate and thereafter, the case was transferred to the Court of Additional Sessions Judge, Fast Track Court-I, Baghpat. On 17.04.2017, charge was framed against the appellants under Section 302 IPC and the accused-appellants pleaded not guilty and claimed to be tried.

8. In order to prove the charges framed against the appellants, the prosecution has examined the complainant (P.W.-1) Rishi Pal, (P.W.-2) Pappu, (P.W.-3) Kaley, (P.W.-4) Dr. Pradeep Kapoor, (P.W.-5) Sub Inspector

Surajpal Singh, (P.W.-6) Clerk Surendra Singh, (P.W.-7) Ashok Kumar, (P.W.-8) Head Constable Ram Kishan Rathi.

9. In examination-in-chief the complainant Rishi Pal (P.W.-1) who is a witness of fact, but not eye witness, stated that the incident took place on 24.07.2006. His son Mange was going to see buffalo at the house of Rajiv with Pappu and Kaley. At 4:30 p.m., they reached at the shop of Tej Pal Jhevar, then Sanjay @ Kalla and Vinod @ Bhura came from back side, Vinod @ Bhura caught hold his son and Sanjay @ Kalla, fired gun shot injury by country made pistol, which hit on the head of the deceased and resultantly he died on the spot. Pappu (P.W.-2) and Kaley (P.W.-3) came at the house of the complainant and narrated the story to the him. The complainant has proved the written report as Exhibit Ka-1. There was hot-talk among Mange, accused Sanjay @ Kalla and Vinod @ Bhura prior to 12 days prior to the incident and both have threatened him. In his cross examination, P.W.1 stated that the incident took place at about 4:30 pm. The house of P.W.-2 is at about one and a half km far from his house. P.W.-2 went to see buffalo. He visited the spot 10-15 minutes after the incident. The information was given by P.W.-2 and P.W.-3, but they have not visited the spot again. The police came on the spot 15 minutes after the incident. Police has recovered one *empty cartridge*s, blood stained soil and plain soil. Recovery memos were not prepared before me. There was injury on the left side of the ear of the deceased, except this, there was no other injury on the body of the deceased.

10. P.W. 2 Pappu, who is an eye witness of the incident had deposed that incident took place on 24.07.2006, they were going to see buffalo at the house of Rajeev with Mange and Kaley (P.W.-3). They reached at the shop of Tej Pal Jhevar at 04:25 pm. He went to take *dilbag* (*gutka*) from the shop. Mange and Kaley were standing on *Kharanja*, in the meanwhile, accused namely, Vinod @ Bhura and Sanjay @ Kalla came there, Vinod caught hold Mange from the back side and Sanjay shot fire from country made pistol, which hit on the head of deceased. Seeing the incident, Pappu (P.W.-2), Kaley (P.W.-3) and accused fled away from the place of occurrence. P.W.-2 and P.W.-3 went to the house of the complainant and narrated the story to him. The complainant (P.W.-1) rushed to the place of incident. They also accompanied him and saw that Mange was dead. He wrote the report of the incident. He has identified his handwriting and signature on the written report (Ex.Ka-1).

11. In cross-examination, P.W.-2 stated that the shop of Tej Pal is about four steps far from the place of occurrence. He stood at the gate of the shop and there was no other person. Tej Pal has not seen the occurrence, because he was inside of the shop. There was only one fire on the spot. When accused Vinod caught Mange (deceased), the deceased shouted, then P.W.-2 reached there. He told the complainant that Kalla fired gun shot upon Mange, but he did not tell about the death of the deceased on the spot. Written report was dictated by the complainant P.W.-1 and some lines were written by P.W.-2, both prepared the written report jointly. The complainant had not seen the occurrence. He told the complainant that Mange received gun shot injury and he rushed from the spot. All the facts are not required to be narrated in the FIR. After receiving fire arm injury, Mange fell down and all of them along with the accused fled away from there. This fact was not mentioned in the FIR. Mange died on the spot. After incident, we ran in the north side and accused ran in the south side. In the spot map, direction of fleeing away has not been shown by the Investigating Officer. The reason is not known to him. Sanjay put fire arm over Mange from 4-5 steps. When Sanjay shot fire on Mange, Vinod caught hold the leg of Mange. This fact was not written in the FIR. He has shown the place from where accused fired

upon Mange, if this place was not shown in the spot map, then he could not give reasons therefor. He has heard that there was hot talk among deceased and accused about 15 days prior to the incident. This fact was told by him. Regarding this, no report has been lodged. The appellants-accused murdered the deceased due to enmity. In the report, it was not alleged that country made pistol was not used as weapon in the commission of offence, only *''weapon'* word has been used. Country made pistol and *Katta*, both are the same weapons. When Mange received fire arm injury on his head, he was five steps far from the spot. When accused Vinod caught hold Mange, accused Sanjay was about five steps far from Vinod. When Vinod caught Mange, the back of the Mange was in south and west side. Face of Vinod was very near to the back of Mange. Face of Mange was towards shop. When police took the dead body of the deceased, then there was protest by villagers to pressurise the police to arrest the accused. When Vinod caught hold Mange, he was in bent position. Vinod caught hold both the legs of Mange. Accused Sanjay had not stated to Vinod to catch hold Mange before him. Mange tried to save himself, meanwhile, he received fire arm injuries. At the time, when Vinod caught hold Mange, he had not taken *dilbag* (*gutka*), shopkeeper was taking the *dilbag* from the shop, he did not know that there were fifty cases against Mange and faced long litigation. It is wrong to say that due to terror of deceased someone has murdered him.

12. P.W.-3. Kaley, who is an eye witness, had supported the prosecution case and deposed that incident took place about 9-10 months ago. Kaley, Mange, father of Mange, Rishi Pal sat in the house. Pappu came in the house and said to give company in seeing the buffalo. They proceeded to see the buffalo. They reached at the shop of Tej Pal, Pappu said that it is not the time for milking, he wanted to purchase *gutka*. Pappu went to the shop of Tej Pal to purchase *gutka* at 4:00-4:15 pm. He was standing there, Mange was also standing behind Kaley. Bhura caught hold Mange from the back side and Kalla put fire arm injury on the head of Mange. Bhura and Kalla fled away from the spot Kaley and Pappu also fled towards the house and told the incident to the father of the deceased Mange that Mange received fire arm injury. On hearing, they proceeded towards spot and saw that Mange died on the spot. They again returned back to his house and report of the incident was written by Pappu. Election took place 20 days prior to the incident. Accused threatened Mange that they would not leave him.

13. In cross-examination, he has stated that Mange is the son of his real uncle Rishi Pal. Pappu s/o Vijay Pal had good friendly relations with Mange. Mange was affected by *folize* (disease) from 14 years. He was under treatment. He was standing in the left side of the shop of Tej Pal at the time of incident. He has not visited the school; there was *Kharanja* on the spot. The house of accused Sanjay and Vinod are nearby and they can be approached there within 3-4 minutes. There were houses in all directions from the spot. It was well developed area. After the incident, he went from the place of occurrence. Sanjay and Vinod also fled away from the place of occurrence. Police came on the spot after half an hour of the incident and recovered one *empty cartridge* from the spot and taken soil from there and sent for FSL report. Police recorded the evidence of the complainant Rishi, Kaley and Pappu. Rishi Pal went to the police station for lodging FIR in the vehicle of Anuj. He has told that incident took place at 4:15 pm. Police station is about 3 kms far from his village. Police Chauki is about 1 km far from his village. Written report was prepared by P.W.-2 and then given to the complainant. As soon as they reached the shop, incident took place within a second. It took 15 minutes time in reaching the house of the complainant. He told the Investigating Officer that Bhura and Kalla

fled away from the spot. If this statement was not written by Investigating Officer, he could not disclose the reason. He visited three times on the spot on the date of incident, where the dead body of Mange was lying; Rishi Pal wept bitterly. Mother of Mange also came there and she also wept. He and accused did not flee in the same direction. Accused had not abused Mange on the spot. Mange, the deceased was unmarried. Vinod lives in the village. It is wrong to say that Vinod was doing job in Delhi and Muzaffar Nagar in security service. I saw the incident, there was only one fire arm shot. Accused Sanjay came with country made pistol from his back side; when Sanjay shot fire upon Mange, he was about four steps far from him. Deceased and accused Sanjay were on the same height. Kaley was on the platform *(chabutara)*. He saw the incident standing on platform, Pappu was standing at the gate of the shop, blood was lying on the bricks of *kharanja*. After the incident, Kaley fled away from the place of occurrence. There was fire arm injury on the head of Mange; due to the said fire arm injury, Mange died on spot. Pappu was with Kaley. The entire incident which was seen by Kaley, was narrated to complainant.

14. P.W.-4 Dr. Pradeep Kapoor, evidence of the doctor has already been stated earlier.

15. P.W.-5 S.I. Suraj Pal Singh had proved recovery memo of blood stained and plain earth (Ex.Ka.-3) and recovery memo of *empty cartridge* (Ex.Ka.-4). This witness has also proved that site plan *(naksha nazri)* (Ex.Ka.-5) and inquest report (Ex.Ka.-6), which was prepared by S.I. Sompal Singh. Letter R.I. (Ex.Ka.-7), letter, Chief Medical Officer (Ex.Ka.-8), photo of dead body (Ex.Ka.-9), Challan (Ex.Ka.-10), report of FSL (Vidhi Vigyan Prayogshala) (Ex.Ka.-14), pant material (Ex.-5), shirt material (Ex.-6), Kalava (band) material (Ex.-7), shoes material (Ex.-8) and cloth material (Ex.-9) have been produced by the prosecution as documentary evidence.

16. P.W.-6 Constable Clerk, Surendra Singh had proved FIR as (Ex.Ka.-14) and carbon copy of GD (Ka.-15).

17. P.W.-7 Constable Ashok Kumar had proved recovery memo of country made pistol (Ex.Ka.-11).

18. P.W.-8 ASI Ram Kishan Rathi, who was Investigating Officer of Crime No. 432 of 2006 under Section 25/27 Arms Act, had proved smart map (Ka.-16), prosecution signature (Ka.-17), chik FIR (Ka.-19) and carbon copy of GD (Ka.-20).

19. Accused had examined D.W.-1 (Dhare) and D.W.-2 (Constable Sudesh Kumar) in his defence and had proved the history-sheet of Mange (Ex.Kha.-1), accused Vinod @ Bhura had filed photostat copy of Security Services from the list. No other evidence has been adduced by the defence.

20. After evaluating the evidence available on record, the Trial Court reached to the conclusion that the prosecution has successfully proved its case against the appellants beyond reasonable doubts and accordingly convicted and sentenced the appellants as referred above.

21. Learned counsel for the appellants has submitted that they have been falsely implicated in this case. He further submitted that the case of the prosecution falls within the ambit of Section 304 Part-1 IPC. Accused was history-sheeter, notorious person, he has enmity with so many persons, but there was no motive to cause the incident. There is contradiction in the statements of the witnesses. They are related to the deceased. Their testimonies are not reliable and trustworthy.

22. Learned counsel for the appellant Vinod @ Bhura has submitted that role of accused Vinod is quite different, he was not present on the spot. Role of catching hold the deceased has been assigned to the accused as alleged by prosecution, is false.

23. Statement of the accused under Section 313 Cr.P.C. had been recorded, in which, he has stated that witnesses had given their evidence due to enmity and village party bandi and accused had been falsely implicated in the present case. Accused -Sanjay @ Kalla has stated that deceased was defamed in the area. He had enmity with others and he has ill will against the females of the village. In this regard, many times panchayat was organized. His father and family members insulted the father of Mange and Pappu, so he was falsely implicated. Vinod @ Bhura had stated in his statement that he is living in Delhi and Muzaffar Nagar with his children prior to 7-8 years of the incident; he was working as Security Guard and on the day of the incident he was not present in the village.

24. Police had filed another charge sheet against accused Sanjay @ Kalla under Section 25/27 Arms Act. Prosecution case, in brief, in this regard is that recovery memo had been prepared on 11.08.2006 (Ex.Ka.-11), in which, it has been stated that while in police remand the accused Sanjay @ Kalla had taken the police personnel to the place where weapon of the murder had been hidden by the accused and on the pointing out of accused Sanjay @ Kalla, *Alha katal* was recovered; accused had concealed country made pistol of 315 bore in the field of sugar cane. Accused has also stated that on 24.07.2006, he had committed the murder of Mange by that country made pistol.

25. Prosecution had examined PW-7 (Constable Ashok Kumar) to prove the recovery memo and P.W.-8 (ACP Ram Kisan Rathi), who conducted the investigation of this case and filed charge sheet under Section 25/27 Arms Act against the accused Sanjay @ Kalla (Ex.Ka.-18). He also proved GD of this Crime No. (Ex.Ka.-19). After examination of the entire evidence, learned trial court had acquitted the accused Sanjay @ Kalla for the charges under Section 25/27 Arms Act against which no appeal has been preferred.

26. Learned AGA vehemently opposed the submissions made by learned counsel for the appellants and submitted that it is a daylight murder; eye witnesses had been examined, whose testimony is fully reliable and credible. There is no cause to falsely implicate the accused. Accused had committed very serious offence, which has been proved by the prosecution through cogent, reliable and trustworthy evidence beyond reasonable doubt. In this way, learned trial Judge has passed the judgment and order dated 18.07.2007 and sentenced the appellants properly as per law. The evidence on record is sufficient on the basis of which learned trial Judge has concluded the conviction of appellants which is right in the eyes of law. There is no illegality or impropriety in the order dated 18.07.2007. The appeals are of no force and are liable to be dismissed.

27. We have heard Sri Dharmendra Singhal, learned Senior Advocate assisted by Sri Atmaram Nadiwal, Sri Sudhir Kumar Agarwal and Sri Naveen Kumar Yadav, learned counsel for the appellants as well as learned AGA for the State and perused the material available on record.

28. Learned counsel for the appellants has submitted that present FIR is ante-time and has pointed out the statement of complainant (PW-1), which is on page 38 of paper book, that he has not stated in the report that there was hot talk among his son and accused 10 days prior to the incident. He has not stated the fact in the report that he was unaware about that fact. He

came to know about that fact after lodging report on the basis of rumour in the village.

29. The incident took place on 24.07.2006 at 4:30 pm and FIR was lodged at 6:15 pm, place of occurrence is about 4 kms far from the police station. PW-1 (complainant) has proved (Ex.Ka.-1), written report through his statement. Scribe of the said written report i.e. Pappu (PW-2), also proved the writing and contents of the written report. On the basis of this report, FIR was lodged. PW-6 (Constable Clerk Surendra Singh) has proved chik FIR as (Ex.Ka-14A) and GD as (Ex.Ka.-15).

30. PW.-1 has stated in his statement that he had prepared written report with the help of Pappu s/o Vijay Pal. Pappu is the writer of the report. Contents of the report has been told to Pappu by him and few facts were also written by Pappu himself, as he was eye witness. Police came on the spot after lodging the report, there was protest against the police for 24 hours for the reason that actual name of assailants were not told to him clearly. On this point PW-2 has stated that protest was made against the police to pressurize the police for arresting the accused. Thus, it is evident that FIR has been lodged against the accused within two hours from the time of incident. Police station is 4 kms far from the place of occurrence. Deceased was 26 years old and after the murder of such young son, father has consoled himself and lodged FIR within 2 hours. It shows that FIR was lodged promptly without consultation or legal advice. Natural facts were stated in the FIR. It is also alleged that in panchayatnama, names of the assailants have not been mentioned, which shows that panchayatnama has been prepared prior to lodging the FIR. Crime number and Section details of GD has been mentioned in the panchayatnama. Mentioning the name of the accused is not required in inquest report as held in the case of **Seikh Ayuub Vs. State of Maharashtra 1999 SCC** Criminal page 1055. Thus, from the evidence on record, it is clear that FIR was lodged prior to panchayatnama. FIR is not anti-time but lodged promptly within two hours from the time of the occurrence without due consultation.

31. Learned counsel for the appellants has submitted that there was no motive to cause that incident. Motive has not been stated in the FIR. In the evidence, it has come that 10 days prior to the incident, there was hot talk among the deceased and accused. From the evidence on record, it is evident that deceased was a man of criminal mentality and he was within top 10 criminals of the police station. From the evidence on record, it is also proved that the incident took place at 4:30 pm, there was ample light on the spot to recognize the accused by the witnesses. It is a case of direct evidence. In the case of direct evidence, motive becomes insignificant.

32. In support of above contentions, learned A.G.A. placed reliance on following decisions :

33. In **Pratap Singh and others vs. State of UP 2021, SCC Online All 686**, the Court held that :

"motive is not very relevant in a case of direct evidence, where it dependable ocular version is available. Once, there is evidence forthcoming on the basis of an eye witness account that is consistently narrated by multiple witnesses motive is hardly relevant. "

34. In **Abu Thaker Vs. State of Tamil Nadu, (2010) 5 SCC 91**, the Court held that :

"It is settled legal proposition that even if the absence of motive and if allowed is accepted that is of no consequence and pales into insignificance when direct evidence

establishes the crime, therefore, in case, there is direct, trustworthy evidence of witnesses as to commission of an offence, the motive part uses its significance. Therefore, if the genesis of motive of occurrence is not proved, the ocular testimony of the witnesses as to the occurrence could not be discarded only by reason of absence of motive, if otherwise the evidence is worthy of reliance."

35. In **Bipin Kumar Mondal Vs. State of West Bengal, (2010) 12 SCC 91**, the Court held that :

"motive is of no consequence and pales into insignificance when direct evidence establishes the crime. Motive is a thing which is primarily known to the accused himself and it may not be possible for the prosecution to explain it. Ocular testimony of the witnesses if reliable cannot be discarded only by the reason of the absence of motive."

36. Trial court was also of the view that P.W.-2 and P.W.-3 has deposed that both were present at the time of occurrence. Murder of Mange has been committed before them. They have witnessed the occurrence. Thus, in the presence of direct and reliable evidence, motive looses its importance. It is not required to mention each and everything in the FIR. If motive has not been mentioned in the FIR, this will not damage the prosecution case.

37. The postmortem examination was conducted on the dead body of the deceased Mange Ram by Dr. P. Kapoor, Medical Officer, Community Health Centre, Baghpat on 25.07.2006 at 10:45 am. Deceased was about 26 years old and possibility of death of the deceased was about 3/4th day from the date of the postmortem.

38. On internal examination, doctor found that the deceased died due to coma, shock & haemorrhage due to ante mortem injuries. Ante mortem injuries have already been discussed above. In the opinion of the doctor, cause of death was due to coma, shock & haemorrhage and due to ante-mortem injuries.

39. The main question before us is that, whether accused Sanjay @ Kalla and Vinod @ Bhura caused the murder of Mange in furtherance of common intention? P.W.-1 the complainant (father of the deceased) has deposed in his evidence that incident took place on 24.07.2006, his son Mange along with Pappu and Kaley went at the house of Rajeev to see a buffalo. They reached at the shop of Tej Pal Jhevar at 4:30 pm, Pappu went to purchase *dilbag* (*gutka*) from the shop. Mange and Kaley were standing outside the shop, then Sanjay @ Kalla and Vinod @ Bhura came from the back side, Vinod caught hold his son Mange and Sanjay fired from country made pistol which hit in the head of Mange and he died on the spot. Pappu and Kaley came at the house and told the story to the complainant.

40. P.W.-2 is the eye witness who has deposed that incident took place on 24.04.2006, when they were going to see buffalo at the house of Rajeev with Mange and Kaley. They reached at the shop of Tej Pal Jhevar at 04:25 pm. He went to take *dilbag* (*gutka*) from the shop. Mange and Kaley were standing on *Kharanja*, in the meanwhile, accused namely, Vinod @ Bhura and Sanjay @ Kalla came, Vinod caught hold Mange from the back side and Sanjay shot fire from country made pistol on the head of Mange. Seeing the incident, Pappu, Kaley and accused fled away from the place of occurrence. Pappu and Kaley went at the house of the complainant Rishi and told about the incident.

41. P.W.-3 who has given eye witness account, has also stated that incident took place about 9-10 months ago. Kaley, Mange, father of Mange, Rishi Pal; sat in the house. Pappu came

in the gher and said to give company in seeing the buffalo. They proceeded to see the buffalo. They reached at the shop of Tej Pal; Pappu said that it is not the time for milking; he wanted to purchase *gutka*. Pappu went at the shop of Tej Pal to purchase *gutka* at 4:00-4:15 pm. He was standing there, Mange was also standing behind Kaley. Bhura caught hold Mange from the back side and Kalla fired on the head of Mange. Bhura and Kalla fled away from the spot. Kaley and Pappu also fled away towards the house and told the father of Mange, Rishi Pal that Mange received fire arm injury. On hearing that, they proceeded towards spot and saw that Mange died on the spot.

42. In cross-examination, he stated that there is no evidence on record which shows that accused had not committed the heinous crime. The presence of accused, deceased and witnesses were proved on the spot. It is evident from the postmortem report that deceased sustained gun shot injury-exit on right side of head of size 3.5 cm x 1.5cm margin everted, gun shot wound of entry on left side of neck of size 7 cm x 5 cm located 3cm above left collar bone margin inverted on dissecting underlying tissues and vessels lacerated and torn and dissecting & probing injury nos. 1 & 2 in direct communication.

43. It is also submitted that such injury is not possible five steps far from where the accused shot fire over the deceased. The nature of injury shows that injury has been caused on vital part of the neck of the deceased but there was no blackening and tattooing on the entry wound, which shows that firing was made from some distance from the deceased. Thus, from the evidence, it is proved beyond reasonable doubt that weapon used by Sanjay @ Kalla matches with the injury sustained by the deceased and accused Sanjay @ Kalla is only the person who caused gun shot injury to the deceased by which, the deceased Mange succumbed to death.

44. So far as the role of Vinod @ Bhura is concerned, the role of catching hold the deceased from the back side has been assigned to accused Bhura. Witnesses P.W.-2 and P.W.-3 had stated that Vinod had caught hold the leg of the deceased in bent position so there was no danger to receive any injury to Vinod. Before the Court, the witness has also shown after catching the advocate below his hip. In such position, co-accused Vinod caught hold the deceased keeping in mind his safety, Sanjay @ Kalla had also fired gun shot injury in the neck and head of the deceased. There is no reason to falsely implicate the accused by the prosecution.

45. So far as section 34 IPC is concerned, the act of accused was done in furtherance of common intention to kill the deceased Mange. It is very difficult to know the mental status of a person. Common intention should be gathered by the act and conduct of the accused. Both the accused came jointly from the same direction, Sanjay was carrying loaded country made pistol, Vinod caught hold Mange and Sanjay fired upon him. After committing the crime, they fled in the same direction from the place of occurrence. Deceased become helpless to save himself due to catching hold by the accused Vinod. Thus with the help of the said act and conduct, the accused persons succeeded in their common intention to kill the deceased Mange. Accused Sanjay @ Kalla caused fire arm injury on the neck which is on the vital part of the deceased and the exit wound is on right side of the head of the deceased.

46. So far as the role of Vinod @ Bhura is concerned, Vinod has taken the plea of alibi that he was not present on the spot and was doing service in Delhi or Muzaffar Nagar. In this support, Vinod had filed few papers from the said firm vide 73(b), but the papers had not been proved by any witness and no witness has been produced by Vinod @ Bhura in his support that

at the time of occurrence he was not present on the spot.

47. Contrary to this, it is averred by P.W.-3 on page-4 that Mange was suffering from disease *folize* from 10 years, his leg was comparatively thin. Knowing this fact, accused Vinod caught hold Mange, by which, he became unable to defend himself and the act of Vinod had facilitated accused Sanjay @ Kalla in commission of crime. Accused Vinod @ Bhura had caught Mange at koli, leg, hip is immaterial. The role of Vinod shows that his act was effective in facilitating the commission of crime and his participation in commission of the crime was active one.

48. So far as the defence taken by the accused under Section 313 Cr.P.C. is concerned, accused Vinod had not stated that someone had thrown the dead body of the deceased after killing him. In the statement under Section 313 Cr.P.C., Sanjay had also not stated that someone has thrown the body of the deceased before the shop of Tej Pal. Defence has examined Dhare as D.W.-1, who has deposed that about 3:00 pm, three assailants came after covering their face by *chaddar* and throw the body of Mange before the shop of Tej Pal. In fact this was not the case of defence. No suggestion has been placed in the cross-examination of witnesses of fact that unknown assailant threw the dead body of the deceased Mange on spot. Trial court has not relied on the evidence of D.W.-1 Dhare. Evidence of D.W.-1 is totally improbable and unreliable. But the evidence of the witness shows that dead body of Mange was lying before the shop of Tej Pal. No argument has been placed on the point of spot map, spot map was not challenged by the defence. Spot map is prepared according to place of occurrence. From the evidence, it is proved that deceased with witnesses were going to see the buffalo, he was not returning from there. From evidence of D.W.-2, it is proved that deceased Mange was history-sheeter and was within the top ten criminals of the police station but there is no evidence that some other person had committed this crime except the accused. The defence taken by the accused is not probable.

49. Contradictions are minor in nature, evidence of eye witnesses i.e. ocular evidence has been supported by medical evidence.

50. It is also submitted that witness P.W.-2 Pappu is friend of the deceased and Kaley P.W.-3 is nephew of the deceased. Thus, they are related witnesses and the testimony of these witnesses is not reliable. No independent witness has been produced by the defence.

51. In support of the above contentions, the learned A.G.A. placed reliance on the decisions in following cases :

52. In **Mohd. Rojali Ali and others vs. State of Assam (2019) 19 SCC 567**, the Court held that :

"A related witness cannot be said to be an interested witness merely by virtue of being a relative of the victim, a witness may be called interested only when he or she drags some benefit from result of litigation which is in the context of a criminal case would mean that witness has a direct or indirect interest in seeing accused punished due to prior enmity or other reasons and thus has a motive to falsely implicate the accused."

53. In **Laltu Ghosh Vs. State of West Bengal (2019) 15 Supreme Court Cases 344,** the Court held that :

"Related witness cannot be said to be an interested witness merely by virtue of being the relative of the victim. The scrutiny of evidence of related witness should be more caution."

54. In the present case, Pappu P.W.-2 and Kaley P.W.-3 are the natural witnesses. There is long cross-examination but nothing adverse came out against prosecution. Both witnesses were present on the spot, witnessed the occurrence and informed the father of the deceased P.W.-1. There is no ground to discard the evidence of P.W.-2 and P.W.-3 eye witnesses; their evidences are supported by medical evidence; the evidence of P.W.-2 and P.W.-3 is fully reliable and credible. Witnesses have no enmity with the accused and there is no ground to falsely implicate them. The submission of defence that witnesses are related one, is not tenable. This does not affect prosecution case. Injury inflicted by the accused on the vital part of the deceased in furtherance of common intention of both the accused is proved beyond reasonable doubt. The submission of the learned counsel for the appellants that the case of the prosecution comes within the ambit of Section 304 Part-I of IPC, is not applicable in present facts, circumstances and evidence of the case.

55. In our opinion, the guilt of appellants has been established by the prosecution beyond reasonable doubt. Death of the deceased Mange is homicidal one caused by gun shot injury inflicted by accused Sanjay with active support of accused Vinod. There is no manifest error or illegality in the finding of the trial court.

56. On the basis of above discussion, we are of the view that judgment and order of the trial court dated 18.07.2007 passed by Additional Sessions Judge, Fast Track Court-I, Baghpat in Sessions Trial No. 544 of 2006, arising out of Case Crime No. 406 of 2006, Police Station Barot, District Baghpat convicting and sentencing the appellants to undergo rigorous life imprisonment under Section 302/34 of IPC with a fine of Rs.25,000/- each, in default thereof, to undergo two years rigorous additional imprisonment, is hereby confirmed.

57. During trial, accused Sanjay @ Kalla remained in judicial custody and accused Vinod @ Bhura is on bail. The appellant Vinod @ Bhura shall surrender before C.J.M. Baghpat forthwith to serve the remaining period of sentence. Bail bond filed by accused Vinod @ Bhura is forfeited and sureties are discharged.

58. The appeals a**re devoid of merits and liable to be dismissed. The appeals are, accordingly,** dismissed.

(2021)11ILR A112
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.10.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

Criminal Appeal No. 7329 of 2011

Chhotu @ Diwakar @ Karamveer ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Hitesh Pachori, Sri Ghan Shyam Dubey, Sri Noor Mohammad, Sri Rajiv Sharma, Sri Vivek Mishra, Sri V.C. Mishra

Counsel for the Respondent:
A.G.A.

'Proper Sentence'- While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically. the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be

avoided keeping in view the reformative approach underlying in our criminal justice system.

The judicial trend is that Sentence must be proportionate to the offence committed but at the same time effort should be made to reform the convict so that he is aligned with the social mainstream.

Proportionate Sentence-The victim was about 11 years old at the time of occurrence, therefore, the case is fully covered by clause (f) of sub-section (2) of Section 376 of IPC and the sentence awarded cannot be less than 10 years unless there are adequate and special reasons for doing so. We do not find any adequate and special reasons for imposing of sentence less than 10 years. It appears from perusal of impugned judgement that sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence. We substitute the sentence under Section 452 IPC from seven years to three years and fine is reduced to Rs.2,000/-. Additional imprisonment of one year in case of default of fine shall remain the same. We substitute the sentence under Section 376 IPC from life imprisonment to the rigorous imprisonment of 13 years with all remissions and fine of Rs.40,000/-.

As no adequate and special reasons exist for modifying the sentence to less than ten years, but considering the judicial trend of reformation and the facts of the case, sentence awarded by the trial court found to be too harsh and therefore appropriately modified. (Para 12, 13, 14, 16, 18)

Criminal Appeal partly allowed. (E-3)

Judgements/ Case law relied upon:-

1. Bavo @ Manubhai Ambalal Thakore Vs St. of Guj. 2012 (1) All JIC 319

2. Rajendra Datta Zarekar Vs St. of Goa 2008 (1) All JIC 123

3. Deo Narain Mandal Vs St. of UP [(2004) 7 SCC 257]

4. Ravada Sasikala Vs St. of A.P. AIR 2017 SC 1166

(Delivered by Hon'ble Ajai Tyagi, J.)

1. Heard learned counsel for the appellant and learned AGA for the State as well as perused the record.

2. This appeal has been preferred against the judgement and order dated 11.11.2011 passed by learned Additional Sessions Judge court No.1, Agra in S.T. No.853 of 2010 (State Vs. Chhotu @ Diwakar @ Karamveer) arising out of Case Crime No.109 of 2010, under Section 452 and 376 IPC, Police Station-Khandoli, District- Agra, whereby the accused-appellant was convicted and sentenced under Section 376 (2) F IPC for life imprisonment and fine of Rs.50,000/-. He was directed to undergo further imprisonment for three years in case of default of fine. He was further convicted and sentenced under Section 452 IPC for seven years rigorous imprisonment and fine of Rs.20,000/- and further simple imprisonment for one year in case of default of fine. Learned trial court directed that both the sentences shall run separately.

3. The brief facts of this appeal are that the written report was submitted at police station-Khandoli, District- Agra by Jagdish Singh stating that on 27.04.2010, he was working in his field and his wife Usha Devi had gone to Aligarh. Her daughter (victim) aged about 11 years was alone in the house and was cooking the food. At about 10 a.m. in the morning, one Chhotu, resident of his village, aged about 21 years entered his house and committed rape with his daughter. On the basis of this written report, Ext. Ka-1, a Case Crime No.109 of 2010 was registered against the accused Chhotu. Investigation of this case was taken up by S.O. Dharmendra Singh, who recorded the statements of victim and other witnesses, prepared site-plan. During the course of investigation,

statement of victim was recorded under Section 164 Cr.P.C. Victim was medically examined and medical report Ext. Ka-5, supplementary report Ext. Ka-6 were prepared. Slides of smear swab were sent for examination. Victim's skirt was sent to FSL, Agra from where report Ext. Ka-9 was received, which shows that human sperm and spermatozoa were found on the skirt. After completing the investigation, investigating officer submitted charge sheet against the accused-appellant Chhotu under Section 452 and 376 IPC. The case, being triable by court of sessions, was committed by competent Magistrate to the court of session for trial. Learned trial court framed charges against the accused-appellant under Section 452 and 376 IPC and accused was put on trial.

4. The prosecution so as to bring home the charges examined six witnesses, namely:-

1.	Jagdish Singh	PW1
2.	Victim	PW2
3.	Shibbu	PW3
4.	Mahabir Singh	PW4
5.	Dr. Sheilly Singh	PW5
6.	Dharmendra Singh Mutaina	PW6

5. In support of the ocular version of witnesses, following documents were produced and contents were proved by leading evidence:

1.	FIR	Ext. Ka-3
2.	Written Report	Ext. Ka-1
3.	Medical Examination Report	Ext. Ka-5
4.	Supplementary Report	Ext. Ka-6
5.	Report of Vidhi Vigyan Prayogshala	Ext. Ka-9
6.	Charge Sheet (Mool)	Ext. Ka-8
7.	Statement u/s 164 Cr.P.C. of victim	Ext. Ka-2
8.	Site-plan with index	Ext. Ka-7

6. After completion of prosecution evidence, the accused was examined under Section 313 Cr.P.C., in which accused told that false evidence has been led against him and due to old family enmity, he was implicated falsely in this case. The accused did not examine any witness in defence.

7. perusal of record shows that occurrence of this case took place in day light, i.e., at 10 am in the morning in the house of victim when she was alone and cooking the food. After the occurrence, the father of victim took her to District Women Hospital, Agra where she was medically examined by Dr. Sheilly Singh. As per medical report of victim, it was found that fresh and dried blood was present on her legs which was oozing from her vagina. During the course of internal examination, it was found there was torn hymen of second degree at 6 o'clock position. Vagina and muscles were found torn. Injury was fresh and there was excess bleeding due to injury. Slides of smear swab were prepared and sent for examination. No spermatozoa was seen in supplementary report. Doctor opined that no definite opinion for rape could be given but it was opined that there was some insertion of some hard blunt object in the vagina and that hard blunt object could be male sex organ. Forensic Science Laboratory report shows that human spermatozoa was present on the victim's skirt.

8. Victim was examined before learned trial court as PW2. She has stated in her statement that on the date of occurrence, she was alone in the house. At about 10 am, accused entered her house and forcibly committed rape with her. Victim has stated the occurrence in detail in her statement and also said that her vagina was started bleeding. On her hue and cry, her aunt Usha and younger brother Shibbu came to the spot and accused fled away. In her cross-examination, she had also supported the prosecution case. Nothing was extracted by the

defence which could affect the prosecution case adversely. She remained hospitalized for five days. Her younger brother Shibbu, who is eye-witness of the crime has deposed as PW3. He has supported the prosecution case in his statement and narrated the story, seen by him. Complainant of this case is father of the victim. He is examined as PW1. He has proved written report submitted by him at police station. The version of aforesaid witnesses is fully corroborated with medical evidence on record.

9. After some arguments, learned counsel for the appellant submitted that he is not pressing this appeal on its merit but he prays only for reduction of sentence as the sentence of life imprisonment awarded to the appellant by the trial court is very harsh. Learned counsel for the appellant relied on judgements in case of ***Bavo @ Manubhai Ambalal Thakore Vs. State of Gujarat Saudan 2012 (1) All JIC 319 and Rajendra Datta Zarekar Vs. State of Goa 2008 (1) All JIC 123,*** in which Hon'ble Apex has reduced the sentence in the specific facts and circumstances of above case.

10. This case pertains to the offence of 'rape', defined under Section 375 IPC, which is quoted as under:

[375. Rape.- *A man is said to commit "rape" if he-*

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

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

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

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven descriptions :-

First.- *Against her will.*

Secondly.- *Without her consent.*

Thirdly.- *With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.*

Fourthly.- *With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.*

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

Sixthly.- *With or without her consent, when she is under eighteen years of age.*

Seventhly.- *When she is unable to communicate consent.*

Explanation 1.- *For the purposes of this section, "vagina" shall also include labia majora.*

Explnation 2.- *Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act.*

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.- *A medical procedure or intervention shall not constitute rape.*

Excpetion 2.- *Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.]*

11. In ***Mohd. Giasuddin Vs. State of AP,*** [AIR 1977 SC 1926], explaining rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court:

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by reculturization. Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

12. 'Proper Sentence' was explained in ***Deo Narain Mandal Vs. State of UP*** [(2004) 7 SCC 257] by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

13. In ***Ravada Sasikala vs. State of A.P.*** AIR 2017 SC 1166, the Supreme Court referred the judgments in ***Jameel vs State of UP*** [(2010) 12 SCC 532], ***Guru Basavraj vs State of Karnatak,*** [(2012) 8 SCC 734], ***Sumer Singh vs Surajbhan Singh,*** [(2014) 7 SCC 323], ***State of Punjab vs Bawa Singh,*** [(2015) 3 SCC 441], and ***Raj Bala vs State of Haryana,*** [(2016) 1 SCC 463] and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be

avoided keeping in view the reformative approach underlying in our criminal justice system.

14. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

15. Learned counsel for the appellant further submitted that the sentence of life imprisonment awarded by the trial court is very severe and same may be reduced along with other sentence awarded under Section 452 IPC. It may be pertinent to mention that Section 376 (2)F of IPC specifically provides that whereby the victim has less than 12 years of age, the sentence awarded shall not be less than 10 years but it may be for life and the accused shall also be liable to fine. Here the victim was about 11 years old at the time of occurrence, therefore, the case is fully covered by clause (f) of sub-section (2) of Section 376 of IPC and the sentence awarded cannot be less than 10 years unless there are adequate and special reasons for doing so. We do not find any adequate and special reasons for imposing of sentence less than 10 years. Since the learned counsel for the appellant has not pressed the appeal on its merit, however, after perusal of entire evidence on record and judgement of trial court, we consider that the appeal is devoid of merit and is liable to be dismissed. Hence, the conviction of the appellant is upheld.

16. As discussed above, "reformative theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the "doctrine of proportionality'. It appears from perusal of impugned judgement that sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence. Hon'ble Apex Court, as discussed above, has held that undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system.

17. In the FIR of this case, the age of accused is shown 21 years. Keeping in view the entire facts and circumstances of this case and evidence on record, we are of the considered view that ends of justice would be met if sentence is reduced.

18. Hence, we substitute the sentence under Section 452 IPC from seven years to three years and fine is reduced to Rs.2,000/-. Additional imprisonment of one year in case of default of fine shall remain the same. We substitute the sentence under Section 376 IPC from life imprisonment to the rigorous imprisonment of 13 years with all remissions and fine of Rs.40,000/-. Additional imprisonment in case of default of fine shall remain the same. Out of the amount of fine, Rs.40,000/- shall be paid to the victim as compensation.

19. It is made clear that both the sentences shall run concurrently.

20. Accordingly, the appeal is **partly allowed** with the modification of sentence as above.

(2021)11ILR A117
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.11.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

Criminal Appeal No. 8196 of 2008

Jai Karan @ Pappu ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:

Sri S.N. Pandey, Sri Amit Tripathi, Sri Havaldar Verma, Sri Ram Ashrey Kashyap, Sri Syed Wajid Ali

Counsel for the Respondent:
A.G.A.

(A) Criminal Law - The Indian Penal Code, 1860 - Sections 363, 366 & 376 , The Code of criminal procedure, 1973 - Section 164 , 313 - The Schedule Castes And The Schedule Tribes (Prevention of Atrocities) Act , 1989 - Section 3(1)(xi) & Section 3(2)(v) - appeal against conviction .

Prosecutrix kidnapped by appellant and two other unknown persons - committed gang rape with her by gagged her mouth at gunpoint - girl found by her father in the field of sorghum in an unconscious condition after two days - written information about kidnapping by Father of prosecutrix - after completing investigation submitted charge sheet against the accused - conviction - hence appeal.

HELD:- Trial Judge wrongly came to the conclusion that as the prosecutrix belonged to community falling in the scheduled caste and the appellant belonged to upper caste the provision of SC/ST Act are attracted in the present case. The accused has been wrongly convicted, hence, the judgment and order impugned is reversed and the accused is acquitted of charges levelled. The accused appellant, if not wanted in any other case, be set free forthwith.(Para -35,38)

Criminal Appeal allowed. (E-7)

List of Cases cited:-

1. Sadashiv Ramrao Hadbe Vs St. Of Mah., 2006 (10) SCC 92

2. Narain Trivedi Vs St. of U.P., LAW (ALL)-2009-1-147

3. Vishnu Vs St. of U.P., Criminal Appeal No. 204 of 2021

4. Narain Trivedi Vs St. of U.P., LAW (ALL)-2009-1-147

5. Hitesh Verma Vs St. of Uttarakhand & anr., 2020 (10) SCC 710

6. Gujarat Vs Bhalchandra Laxmishankar Dave, 2021 (0) AIJEL-SC 66983

7. Guru Dutt Pathak Vs St. of U.P., LAW (SC) 2021 5 5

8. Ganesan Vs St., Criminal Appeal No. 680 of 2020 (Arising from S.L.P. (Criminal) No.4976 of 2020)

9. Rafiq Vs St. of U.P., AIR 1981 SC page 559

10. Nawab Khan Vs St., 1990 Cri.L.J. Page 1179

11. Bharvada Bhogin Bhai Hirji Bhai Vs St. of Guj., AIR 1983 SC page 753

12. Pudav Bhai Anjana Patel Vs St. of Gujarat, Criminal Appeal No.74 of 2006

(Delivered by Hon'ble Ajai Tyagi, J.)

1. By way of this appeal, the appellant has challenged the Judgment and order dated 24.11.2008 passed by court of Special Judge, S.C. & S.T Act/Additional Sessions Judge, Kanpur Dehat in Sessions Trial No.269 of 2001, arising out of Case Crime No.216 of 2001, under Sections 363/366/376 I.P.C., read with Section 3(1)(xi) of Scheduled Casts and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as, 'S.C./S.T. Act, 1989'), Police Station Akbarpur, District Kanpur Dehat whereby the accused-appellant was sentenced under Section 363 Indian Penal Code (I.P.C.) for three years' rigorous impriosonment and with a fine of Rs.1000/-; under Section 366 I.P.C. with the sentence of five years' rigorous imprisonment and fine of Rs.1000/- and; under Section 376 I.P.C. with the sentence of rigorous imprisonment for 10 years and a fine of Rs.2000/- and; under Section 3 (2) (v) of S.C. & S.T. Act with a sentence of life imprisonment and fine of Rs.2000/- with a direction that all the sentences will run simultaneously and in event of default of payment of fine, to undergo two months' further imprisonment.

2. The brief facts as per prosecution case are that on 12.8.2001 at about 8:00 p.m., the

prosecutrix was kidnapped by appellant-Jai Karan @ Pappu and two other unknown persons. Father of the prosecutrix given the written information about the kidnapping to the near police station. After two days on 14.8.2001 at about 10.00 a.m., the girl was found by her father in the field of sorghum which is the farm of Shiv Ram Shukla in an unconscious condition. After came to consciousness, she disclosed the whole incident to her family members that accused-appellant with two unknown persons committed gang rape with her by gagged her mouth at gunpoint and went away extending threat that if any report is lodged at the police station or this fact is divulged to anyone, they will kill her whole faimly. When she along with her father hiding themselves went to the police station for reporting the said incident and after denied lodging the FIR, they sent a complaint report to the Superintendent of Police, Kanpur Dehat then FIR was lodged on 15.8.2011 by the police.

3. Police Station Incharge, Akbarpur, Kashmir Singh Yadav tookup the investigation visited the spot, prepared site plan, recorded statements of the prosecutrix and witnesses and after completing investigation submitted charge sheet against the accused.

4. The accused being charge sheeted for offence triable by court of session. The learned Magistrate committed the case to the court of session. The court of session summoned the accused who pleaded not guilty to the charges framed and wanted to be tried.

5. The prosecution so as to bring home the charges examined eight witnesses, who are as under:-

1.	Suryapal	PW1
2.	Prosecutirx	PW2
3.	Shiv Nath	PW3
4.	Dr. Narendra Kumar Jaiswal	PW4
5.	Dr. Raj Rani	PW5
6.	Kashmir Singh Yadav	PW6
7.	Ramesh Chandra Pradhan	PW7
8.	Amar Singh	PW8

6. In support of the ocular version of the witnesses, following documents were produced and contents were proved by leading evidence:

1.	F.I.R.	Ext. Ka-6
2.	Written report	Ext. Ka-1
3.	Statement of Prosecutrix under Section 164 Cr.P.C.	Ext. Ka-2
4.	Recovery memo of Blood & Semen stained Cloth Chaddhi and Salwar Ext.	Ext. Ka-9
5.	X-Ray Report	Ext. Ka-3
6.	Injury Report	Ext. Ka-4
7.	Supplementary report	Ext. Ka-5
8.	Charge Sheet Mool	Ext. Ka-14
9.	Site Plan with Index	Ext. Ka-13

7. Heard learned counsel for the appellant, learned AGA for the State and also perused the record.

8. It is submitted by the counsel for the appellant that as far as commission of offence under Section 3(1)(xi) and 3(2)(v) of S.C./S.T. Act, 1989 is concerned, the learned Sessions Judge convicted the accused due to the fact that the victim was a person belonging to Scheduled Caste Community, though there were no allegations as regard the offence being committed due to the caste of the prosecutrix and there were no allegations of commission of offence which would attract the provision of Section 3(2)(v) read with Section 3(1)(xi) of SC/ST Act, 1989.

9. Learned counsel for appellant has relied on the following decisions of the Apex Court

rendered in the case of **Sadashiv Ramrao Hadbe Vs. State of Maharashtra, 2006 (10) SCC 92** and the judgments of this Court titled **Narain Trivedi v. State of Uttar Pradesh, LAW(ALL)-2009-1-147** decided on 15 Jan 2009 and case titled **Vishnu v. State of U.P. in Criminal Appeal No. 204 of 2021**, decided on 28.1.2021 so as to contend and submit that in fact no case is made out against the accused under Section 376 IPC or the offences under Sections 363, 366 IPC and Section 3(1)(xi) read with Section 3(2)(v) of S.C./S.T. Act, 1989. It is submitted that the prosecutrix and her family members have roped in the accused with ulterior motive.

10. It is submitted by learned counsel for the State that prosecutrix belongs to Scheduled Caste community and the judgment of learned Trial Judge cannot be found fault with just because there is silence on the part of the prosecutrix about the caste and this is not so grave a lapse that benefit can be granted to accused. It is submitted that the incident occurred because of the caste of the prosecutrix. It is further submitted that any incident on person belonging to a particular caste would be an offence. It is further submitted by learned counsel for the State that the accused ravished the prosecutrix who was a minor and was belonging to lower strata of life.

11. Learned counsel for the appellant has relied on the judgment of Sadashiv Ramrao Hadbe Vs. State of Maharashtra (supra) and has submitted that learned counsel presses for clean acquittal of the accused and not for a fixed term incarceration though the appellant has been in jail for more than 13 years. In support of submission, learned counsel presses into service the judgment in the case of **Narain Trivedi v. State of Uttar Pradesh, LAW(ALL)-2009-1-147** rendered by this Court and learned counsel has relied on findings returned in paragraphs 4 and 5 of the said judgment, which lay down as follows :-

"4. Let the appellants Sri Narain Trivedi, Ashok Kumar @ Khanna and Pramod Kumar @ Nanhkau be released on bail in the above case till disposal of the appeal on their furnishing personal bond and two sureties each in the like amount to the satisfaction of the trial court concerned. Realization of fine to the extent of fifty per cent shall remain stayed till disposal of the appeal. Remaining fifty per cent fine shall be deposited in the trial court prior to the release.

It is worthwhile to mention that the learned Sessions Judge has convicted and sentenced the appellants to undergo imprisonment for life and to pay a fine of Rs.3000/- each under section 3(2)(5) SC/ST Act. They have also been convicted separately under section 307/34 I.P.C. and sentenced to undergo imprisonment for seven years and to pay a fine of Rs.2000/- each. This method of convicting and sentencing the appellants is not in accordance with law. Section 3(2)(5) SC/ST Act does not constitute any substantive offence and hence, conviction and sentence of the appellants under section 3(2)(5) SC/ST Act simplicitor is wholly illegal. Section 3(2)(5) SC/ST Act provides as under:-3(2) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe.-(i) to (iv).....(v) commits any offence under the Indian Penal Code (45 of 1860) punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine;

As would appear from the language used by the Legislature in section 3(2)(5) SC/ST Act, it is clear that this section does not constitute any substantive offence and if any person not being a member of a Scheduled Caste or a Scheduled Tribe commits any offence under the Indian Penal Code punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of Scheduled Caste or

Scheduled Tribe or such property belongs to such member, then enhanced punishment of life imprisonment would be awarded in such case, meaning thereby that conviction and sentence under section 3(2)(5) SC/ST Act simplicitor is not permissible and in cases where an offence under the Indian Penal Code punishable with imprisonment for a term of ten years or more is committed against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, then in such case the accused will be convicted and sentenced for the offence under Indian Penal Code read with Section 3(2)(5) SC/ST Act with imprisonment for life and also with fine. Therefore, in the present case, the appellants could not be convicted and sentenced under section 3(2)(5) SC/ST Act simplicitor.

5. Mistake which has been committed by the learned Sessions Judge in present case in convicting and sentencing the appellants under section 3(2)(5) simplicitor has been noticed by us in some other cases also. The Registrar General is directed to send a copy of this order to Sri Dilip Singh, the then Addl. Sessions Judge/Special Judge, SC/ST Act, Fatehpur for his future guidance.

12. Learned counsel for appellant presses into service the judgment in the case of **Sadashiv Ramrao Hadbe Vs. State of Maharashtra** (supra) more particularly observations in paras 9, 10, 11 of the said judgment, which are verbatim reproduced as follows :-

"9. It is true that in a rape case the accused could be convicted on the sole testimony of the prosecutrix, if it is capable of inspiring of confidence in the mind of the court. If the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix. The courts shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen.

10. In the present case there were so many persons in the clinic and it is highly improbable the appellant would have made a sexual assault on the patient who came for examination when large number of persons were present in the near vicinity. It is also highly improbable that the prosecutrix could not make any noise or get out of the room without being assaulted by the doctor as she was an able bodied person of 20 years of age with ordinary physique. The absence of injuries on the body improbablise the prosecution version.

11. The counsel who appeared for the State submitted that the presence of semen stains on the undergarments of the appellant and also semen stains found on her petticot and her sari would probablise the prosecution version and could have been a sexual intercourse of the prosecutrix.

12. It is true that the petticot and the underwear allegedly worn by the appellant had some semen but that by itself is not sufficient to treat that the appellant had sexual intercourse with the prosecutrix. That would only cause some suspicion on the conduct of the appellant but not sufficient to prove that the case, as alleged by the prosecution."

13. Learned counsel for the appellant has also relied on the latest decision of Apex Court in the case of **Hitesh Verma Vs. State of Uttarakhand & another, 2020(10)SCC 710,** pertaining to Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and has contended that the incidence reported is prior to 2016, amendment more particularly relates to the year 2000, where no offence of S.C./S.T. Act, 1989 has been committed on the lady on the basis of her caste belonging to a particular caste. The learned Trial Judge has misread the provisions of law, just because the

prosecutrix is belonging to scheduled caste community, the offence would not be made out the ingredients and facts must prove the same.

14. The accused is in jail since more than 12 years. Hence he has already remain in jail and has already undergone the punishment under Sections 363, 366 and 376 of the Indian Penal Code as senteced by the court below. The main submission is regarding the sentence under Section 3(2)(v) of SC/ST Act could not have been returned against the accused when it was not proved and even if proved life imprisonment is too harsh and sentence.

15. Learned counsel for the State has vehemently submitted that this is a clear case of allurement and the learned trial Judge has rightly convicted the accused under Sections 363, 366 and 376 of the Indian Penal Code for life under Scheduled Casts and Scheduled Tribes Act (SC/ST Act, 1989) and heavily relied on the deposition of the prosecutrix and the medical evidence so as to contend that the incident occurred with girl who is below the age of 14 and has submitted that the FIR and the evidence cannot be brused aside on minor contradictions and that the rape was committed during the entire night, the evidence of the prosecutrix clinches the issue and that the medical evidence is against the accused. We are unable to convince ourselves with the submission made by learned AGA for State that she has been a victim of atrocity as she belonged to particular community. We have been taken through the evidence and the deposition mainly of prosecution witnesses and judgment of Trial Court. We have read the same.

16. The recent decision of the Apex Court in the case of State of **Gujarat v. Bhalchandra Laxmishankar Dave, 2021 (0) AIJEL-SC 66983,** decided on 2nd February, 2021 wherein the Apex Court has held that while dealing with the matter relating to conviction, the Court should discuss the decision of the trial court and also the judgment in **Guru Dutt Pathak v. State of Uttar Pradesh, LAW(SC) 2021 5 5,** decided on 5th May, 2021. All the principles laid down in this latest decision, we are oblige to consider the evidence afresh.

17. We venture to discuss the evidence of the prosecutrix on which reliance is placed by learned trial judge and whether it inspires confidence or not so as to sustain the conviction of accused. There were concrete positive signs from the oral testimony of the prosecutrix as regards the commission of forcible sexual intercourse. In case of **Ganesan Versus State Represented by its Inspector of Police, Criminal Appeal No. 680 of 2020 (Arising from S.L.P. (Criminal) No.4976 of 2020)** decided on 14.10.2020 wherein the principles of accepting the evidence of the minor prosecutrix or the prosecutrix are enshrined the words may be that her testimony must be trustworthy and reliable then a conviction based on sole testimony of the victim can be based. In our case when we rely on the said decision, it is borne out that the testimony of the prosecutrix cannot be said to be that of a sterling witness and the medical evidence on evaluation belies the fact that any case is made out against the accused.

18. PW-1, Surya Pal is the father of the prosecutrix. It was he who was the person whom the prosecutrix had conveyed about the incident. In his cross examination, conveyed that After two days of kidnapping on 14.8.2001 at about 10.00 a.m., the girl was found by him in the filed of sorghum which is the farm of Shiv Ram Shukla in an unconscious condition. After she regained conscious, she disclosed the whole incident to her family members that accused-appellant with one unknown person committed rape one by one with her. The accused gagged her mouth at gunpoint. The accused went away extending threat that if any report is lodged at the police station or this fact is divulged to anyone, they will kill her with entire faimly.

19. PW-2, is the prosecutrix who in her ocular version has reiterated the statement made under Section 164 to Magistrate and contents of FIR version that she was 14 years of age when incident occurred. She was found in an unconscious condition from the filed of Corn. The Prosecutrix conveyed to the author of the FIR that two persons had taken her rather forced her on gunpoint and had threatened her with dire consequnces and gagged her that is why she could not shout. The prosecutrix also mentioned that both of them committed sexual intercourse with her and both of them used to commit rape. Jai Karan aged about 33 years of age whose village is next to her village and when they were commmitting this act they had done it on gunpoint. She has also conveyed that when her FIR was not lodged by the police station then she dictated the typed FIR and sent to the Superintendent of Police, Kanpur Dehat, in her cross examination she deposed that she (prosecutrix) belonged to the community known as Chamar community which is enumerated as scheduled caste. The prosecutrix in her oral testimony has narrated the version of forcible sex on her and that the accused had gauged her, she did not convey this to anybody because of threats given by the accused. In her cross examination, she conveyed that her father had dictated the report to the police. If the police did not mention in the FIR that the accused had done the illegal act she could not possibly know why the same is not reflected in the report. According to her, she was aged 17 and half years at the time of deposition. She knew one accused- Jai Karan @ Pappu by name, but did not know the name of another accused.

20. PW-3 is the uncle of prosecutrix who has deposed on oath that his Niece was going out of her cottage to piss and when she did not return till late night PW-3, complainant and other family members started searching her. After two days the girl was found in filed of sorghum in an unconscious condition. After she conscious, she disclosed the whole incident.

21. The ocular version of PW-4 and 5 who are Medical Officers, PW-6 who is the Officer who had conducted the investigation. PW-7 who is the Principal of School stated that age of the prosecutrix as per the school record is 1.3.1987. The medical officer in his ocular version opined that on local examination, there was no mark of injury on private parts and inside the thighs, no blood was present on internal examination of prosecutrix. Her hymen was torn and two fingers could easily pass without pain. Doctor in her medical certificate opined that on the above findings, it cannot be said that rape has been committed or not, but she was habituated to sexual intercourse, she was referred to the Radiologist and Pathology lab. The pathology report showed that no live or dead sperm was seen in the vaginal smear and therefore the medical evidence belies the theories of the complainant that she was raped.

22. We now decide to sift the evidence threadbare of the prosecution story, the evidence led and discussed before the trial court and appreciated by the learned Trial Judge. The Apex Court recently in **State of Gujarat v. Bhalchandra Laxmishankar Dave** has held that trial court judgment and findings should be dealt with threadbare which we are doing and therefore when there is no finding of fact that as to how the offence under Section 3(2)(v) of SC/ST Act is made out, the accused could be punished. Jai Karan and other person committing gang rape and the leanred Judge did not accept the version of the accused. There is no finding of fact as to how the case under SC/ST Act or as popularly known Atrocities Act is made out. There is no finding corroborated by the evidence of the prosecutrix which would bring whom the charge under Section 3(2)(v) else neither the prosecutrix nor her father nor

other witnesses have mentioned that she was lured, kidnapped and raped because she belonged to a particular community.

23. Provision of Section **3(1)(xi)** of the Scheduled Castes and Scheduled Tribes Act, 1989 read as follows : -

"(xi) assaults or uses force to any woman belonging to a Scheduled Caste or a Scheduled Tribe with intent to dishonour or outrage her modesty;"

24. Provision of Section **3(2)(v)** of the Scheduled Castes and Scheduled Tribes Act, 1989 which reads as follows has not been complied with and, therefore, the accused could not have been convicted under the provisions of Section 3(2)(v) of the SC/ST Act.

(v) commits any offence under the Indian Penal Code (45 of 1860) punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine;

25. Provision of Section 376 I.P.C. read as follows :

"376. Punishment for rape.--

(1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the women raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both: Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

(2) Whoever,--

(a) being a police officer commits rape--

(i) within the limits of the police station to which he is appointed; or

(ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or

(iii) on a woman in his custody or in the custody of a police officer subordinate to him; or

(b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or

(c) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a woman's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or

(d) being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or

(e) commits rape on a woman knowing her to be pregnant; or

(f) commits rape on a woman when she is under twelve years of age; or

(g) commits gang rape, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine: Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years. Explanation 1.--Where a woman is raped by one

or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section. Explanation 2.--"Women's or children's institution" means an institution, whether called an orphanage or a home for neglected woman or children or a widows' home or by any other name, which is established and maintained for the reception and care of woman or children. Explanation 3.--"Hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation."

26. In respect of the victim, the doctor in medical report has opined as under :-

"In the x-Ray of both wrist A.P., all eight carpal bones were found present. The lower epiphyses of both wrist joints have not fused. In the x-Ray of both elbow joints, all the bony epiphyses around both elbow joints had fused

In her supplementary report, lady doctor opined that no spermatozoa was seen by her. According to physical appearance, age of the prosecutrix was 15 to 16 years. No definite opinion about rape was given"

27. The evidence as discussed by learned Judge shows that the mere fact that no external marks of injury was found by itself would not throw the testimony of the prosecutrix over board as it has been found that the prosecutrix had washed all the tainted cloths worn at the time of occurrence as she was a minor girl. We also do not give any credence to that fact and would like to go through the merits of the evidence led.

28. As far as the commission of offence under Section 376 IPC is concerned, the learned Judge has relied on the judgments of **(1) Rafiq Versus State of U.P., AIR 1981 SC page 559, (2) Nawab Khan Versus State, 1990 Cri.L.J. Page 1179 and the judgment in (3) Bharvada Bhogin Bhai Hirji Bhai Versus State of Gujarat, AIR 1983 SC page 753** and convicted the accused. The accused has not sought benefit of Section 155(4) of Evidence Act.

29. The evidence of Dr. Raj Rani Kansal, District Hosptial/Dafrin Hospital, Medical Officer, PW-5 who medically examined the prosecutrix on 16.8.2000 at 12.00 noon, found no external or internal injury on the person of the victim. On preabclomen examination, uterus size was 20 weeks and ballonement of uterus was present. On internal examination, vagina of the victim was permitting insertion of two fingers. Internal uterine ballonement was present. The victim complained of pain during internal examination but no fresh injury was seen inside or outside the private part. Her vaginal smear was taken on the slide, sealed and sent for pathological investigation for examination. The doctor opined both in occular as well as her written report that the prosecutrix was having five months pregnancy and no definite opinion about rape could be given.

30. In the x-ray examination, both wrist A.P., all eight carpal bones were found present. Lower epiphyses of both writst joints were not fused. All the bony epiphyses around both elbow joints were fused. In the supplementary report, the docotr opined that no spermatozoa was seen by her and according to the physical appearance, age of the victim was appearing to be 15 to 16 years and no definite opinion about rape could be given.

31. As far as the medical evidence is concerned, there are three emerging facts. Firstly, no injury was found on the person of the victim. We are not mentioning that there must be any corroboration in the prosecution version and medical evidence. The judgment of the Apex

Court rendered in the case of **Bharvada Bhogin Bhai Hirji Bhai Versus State of Gujarat, AIR 1983 SCC page 753**, which is a classical case reported way back in the year 1983, on which reliance is placed by the learned Session Judge would not be helpful to the prosecution. The medical evidence should show some semblance of forcible intercourse, even if we go as per the version of the prosecutrix that the accused had gagged her mouth for ten minutes and had thrashed her on ground, there would have been some injuries to the fully grown lady on the basis of the body.

32. The findings in the case of Vishnu (supra) are verbatim reproduced as there is similarly affects:-

"In our finding, the medical evidence goes to show that doctor did not find any sperm. The doctor categorically opined that no signs of forcible sexual intercourse were found. This was also based on the finding that there were no internal injuries on the lady who was grown up lady.

The factual data also goes to show that there are several contradictions in the examination-in-chief as well as cross examination of all three witnesses. In her examination-in-chief, she states that incident occurred at about 2:00 p.m. but nowhere in her ocular version or the FIR, she has mentioned that she was going to the fields with lunch for her father-in-law. This statement was made for the first time in the ocular version of the husband of the prosecutrix i.e. PW-3 and that it was father-in-law who narrated incident to the police authority. The father-in-law as PW-2 in his testimony states that he was told about the incident by her daughter-in-law (Bahu) on which he complained some villagers about the accused who denied about the incident, therefore, they decided to go to the police station on the next day but the police refused to lodge the report on the ground that no one was present in the police station, therefore, they went on third day of the incident to lodge the FIR. After this, again he contradicts his story in his own statement recorded on cross-examination on the next date stating that the incident was told by his daughter-in-law to his wife who told him about the same. There is further contradiction in the statements of this witness. In examination-in-chief he states that the parties called for Panchayat in the village but there is nothing on record that who were the persons called for Panchayat. If the pregnant lady carries fifth month pregnancy is thrashed forcefully on the ground then there would have been some injury on her person but such injuries on her person are totally absent."

33. The judgment relied on by the learned counsel for the appellant will also not permit us to concur with the judgment impugned of the learned Trial Judge where perversity has crept in.

34. As far as Section 3(2)(v) of Scheduled Casts and Scheduled Tribes (Prevention of Atrocities) Act, 1989 is concerned, the FIR and the evidence though suggest that any act was done by the accused on the basis that the prosecutrix was a member of Scheduled Castes and Scheduled Tribes then the accused can be convicted for commission of offence under the said provision. The learned Trial Judge has materially erred as he has not discussed what is the evidence that the act was committed because of the caste of the prosecutrix. The sister-in-law of the prosecutrix had filed such cases, her husband and father-in-law had also filed complaints. We are unable to accept the submission of learned AGA that the accused knowing fully well that the prosecutrix belongd to lower strata of life and therefore had caused her such mental agony which would attract the provision of Section 3(2)(v) of the S.C./S.T. Act. The reasonings of the learned Judge are against the record and are perverse as the learned Judge

without any evidence on record on his own has felt that the heinous crime was committed because the accused had captured the will of the prosecutrix and because the police officer had investigated the matter as an attrocities case which would not be undertaken within the purview of Section 3(2)(v) of S.C./S.T. Act and has recorded conviction under Section 3(2)(v) of the Act which cannot be sustained. We are supported in our view by the judgment of Gujarat High Court in **Criminal Appeal No.74 of 2006 in the case of Pudav Bhai Anjana Patel Versus State of Gujarat decided on 8.9.2015 by Justice M.R. Shah and Justice Kaushal Jayendra Thaker.**

35. Learned trial Judge wrongly came to the conclusion that as the prosecutrix belonged to community falling in the scheduled caste and the appellant belonged to upper caste the provision of SC/ST Act are attracted in the present case.

36. While perusing the entire evidence beginning from FIR to the statements of PWs-1, 2 and 3 we do not find that commission of offence was there because of the fact that the prosecutrix belonged to a certain community.

37. The learned Judge further has not put any question in the statement recorded under Section 313 Cr.P.C. of the accused relating to rape which is against him.

38. In view of the facts and evidence on record, we are convinced that the accused has been wrongly convicted, hence, the judgment and order impugned is reversed and the accused is acquitted of charges levelled. The accused appellant, if not wanted in any other case, be set free forthwith.

39. Appeal is allowed accordingly.

40. Record be sent to the trial court.

41. We are thankful to learned counsel for appellant and learned AGA for the State who have ably assisted the Court.

(2021)11ILR A127
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.10.2021

BEFORE

THE HON'BLE RAJEEV MISRA, J.

Criminal Revision No. 2183 of 2021
connected with
Application U/S 482 No. 13664 of 2021

Ravindra Pratap Shahi @ Pappu Shahi ...Revisionist

Versus

State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Rakesh Kumar Srivastava, Sri Gopal Swaroop Chaturvedi (Senior Adv.)

Counsel for the Opposite Parties:
G.A., Sri Satyendra Narayan Singh, Sri Shesh Narain Mishra

A. Criminal Law - Criminal Procedure Code, 1973 - Sections 227 & 228 - Once the charges have been framed, the issue of discharge becomes redundant, as Courts have no jurisdiction to allow discharge after charges having been framed. After charges have been framed, Court can neither convict or acquit an accused. (Para 29)

At the time of examining the framing of charge order under Section 228 Cr.P.C., arguments from both the parties have to be considered. Such an exercise is not permissible while deciding the correctness of charge order as it will amount to mini trial. (Para 33)

Revision Rejected. (E-10)

List of Cases cited:-

1. Arnab Manoranjan Goswami Vs The St. of Mah. & ors. 2021 (2) SCC 427

2. Ranganayaki Vs State by Inspector of Police (2004) 12 SCC 521

3. Yogesh Joshi Vs St. of Mah. AIR 2008 Supreme Court 2971

4. Tarun Jit Tejpal Vs St. of Goa & anr. 2019 SCC Online Sc 1053

5. Ratilal Bhanji Mithani Vs St. of Mah. & ors. (1979) 2 SCC 179 *(followed)*

6. Bharat Parikh Vs C.B.I & anr. (2008) 10 SCC 109 *(followed)*

7. State through C.B.I. New Delhi Vs Jitendra Kumar *(followed)*

8. Hardeep Singh Vs S. of Punj. (2014) 3 SCC 92 *(followed)*

9. Bhawna Bai Vs Ghanshya, & ors. 2020 (2) SCC 217 *(followed)*

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

1. Heard Mr. Gopal Swaroop Chaturvedi, learned Senior Advocate assisted by Mr. Rakesh Kumar Srivastava and Mr. Mithlesh Kumar Tiwari, learned counsel for revisionist/applicant, Mr. Prashant Kumar, learned A.G.A. for State along with Mr. P.K. Sahi, learned Brief Holder and Mr. S.N. Singh, learned counsel representing first informant opposite party 2.

2. Perused the record.

3. Criminal Misc. Application under Section 482 Cr. P. C. No. 13664 of 2021, (Ravindra Pratap Shahi @ Pappu Shahi Vs. State of U.P. and others) has been filed challenging charge sheet dated 10.05.2021, submitted in Case Crime No. 0085 of 2021, under Section 306 IPC, P.S. Mahuli, District Sant Kabir Nagar, the Cognizance Taking Order dated 12.05.2021, passed by Chief Judicial Magistrate, Sant Kabir Nagar, upon aforesaid charge sheet as well as entire proceedings of consequential criminal case No. 6488 of 2021 (State Vs. Ravindra Pratap Shahi @ Pappu Shahi), under Section 306 IPC, P.S. Mahuli, District Sant Kabir Nagar, now pending in the Court of Chief Judicial Magistrate, Sant Kabir Nagar.

4. Criminal Revision No. 2183 of 2021 (Ravindra Pratap Shahi @ Pappu Shahi Vs. State of U.P.) has been filed challenging order dated 02.09.2021, passed by Sessions Judge, Sant Kabir Nagar, in S.T. No. 554 of 2021 (State Vs. Ravindra Pratap Shahi @ Pappu Shahi) arising out of Case Crime No. 0085 of 2021, under Section 306 IPC, P.S. Mahuli, District Sant Kabir Nagar, whereby discharge application filed by revisionist has been rejected.

5. During pendency of aforementioned criminal revision, revisionist filed an amendment application seeking challenge to the order dated 04.09.2021, passed by Court below, whereby charges have been framed against revisionist.

6. Record shows that one Raghuveer Gupta (deceased) son of first informant opposite party 2 Ram Bachan, was a railway employee and posted as Gate Man at Railway Station Takia, District Unnao. On the fateful day i.e. 13.03.2021, he consumed some poisonous substance. Ultimately, Raghuveer Gupta died on 13.03.2021 at around 22.00 hours at District Hospital, Unnao, where he was undergoing treatment.

7. Upon death of Raghuveer Gupta, Station Superintendent, Railway Station Takia, District Unnao, sent a written report to Station House Officer, Police Station Bihar, District Unnao. Upon receipt of aforesaid information, an entry regarding same was made in the General Diary of above mentioned Police Station, as G.D. entry no. 19.

8. On the basis of aforesaid G.D. entry, inquest of Raghveer (deceased) was conducted

on 14.03.2021. Accordingly, an inquest report dated 14.03.2021 was prepared.

9. Thereafter, post-mortem of the body of deceased was conducted on 14.03.2021 and a post-mortem report dated 14.03.2021 was prepared.

10. Subsequent to above, first informant/opposite party 2 Ram Bachan lodged an F.I.R. dated 15.03.2021, which was registered as Case Crime No. 0085 of 2021, under Section 306 IPC, P.S. Mahuli, District Sant Kabir Nagar. In the aforesaid F.I.R., applicant/revisionist Ravindra Pratap Shahi and Jitendra Kannaujia have been nominated as named accused, whereas one unknown person has also been nominated as an accused.

11. After registration of aforementioned F.I.R., Investigating Officer, proceeded with statutory investigation of above mentioned case crime number in terms of Chapter XII Cr. P. C. Investigating Officer recorded statements of first informant and other witnesses under Section 161 Cr. P. C. Witnesses so examined substantially supported the prosecution story, as unfolded in F.I.R. On the basis of above and other material gathered by Investigating Officer during course of investigation, Investigating Officer opined to submit a charge sheet but only against applicant/revisionist. Accordingly, Investigating Officer submitted charge sheet dated 10.05.2021, whereby applicant/revisionist alone has been charge sheeted, whereas named and unknown accused mentioned in F.I.R. have been exculpated.

12. After submission of above noted charge sheet, In-charge Chief Judicial Magistrate, Sant Kabir Nagar, vide order dated 12.05.2021, took cognizance and simultaneously summoned applicant/revisionist in aforementioned criminal case, vide Cognizance Taking Order/Summoning Order dated 12.05.2021, passed in Case No. 6488 of 2021 (State Vs. Rasvindra Pratap Shahi @ Pappu Shahi).

13. Feeling aggrieved by the charge sheet dated 10.05.2021, Cognizance Taking Order/Summoning Order dated 12.05.2021, passed by Chief Judicial Magistrate, Sant Kabir Nagar, as well as entire proceedings of above mentioned criminal case, applicant, who is a charge sheeted accused, approached this Court by means of aforementioned Criminal Misc. Application.

14. Instant application came up for admission on 07.09.2021 and this Court passed following order:-

"Heard Mr. Gopal Swarup Chaturvedi, learned Senior Counsel assisted by Mr. Mithilesh Kumar Tiwari, learned counsel for applicant, learned A.G.A. for State and Mr. Satyendra Narayan Singh, learned counsel representing opposite party-2.

At the very outset, Mr. S.N. Singh, learned counsel for first informant/opposite party-2 informs the Court that during pendency of present application under Section 482 Cr.P.C., applicant moved a discharge application in terms of Section 227 Cr.P.C. before court below which have been dismissed. He, therefore, contends that in view of above, no relief can be granted to present applicant.

At this juncture, Mr. G.S. Chaturvedi, learned Senior Counsel submits that hearing of present application be deferred so as to enable applicant to file criminal revision, challenging the order passed by court below on discharge application and thereafter the Criminal Revision as well as present application be heard together.

Submission urged by Mr. G.S. Chaturvedi, learned Senior Counsel merits

consideration. Accordingly, hearing of present application is deferred.

Matter shall re-appear as fresh on 17.09.2021."

15. During pendency of aforementioned Criminal Misc. Application, concerned Magistrate committed the case to Court of Sessions, as offence complained of, is triable by Court of Sessions.

16. Consequently, Sessions Trial No. 554 of 2021 (State Vs. Ravindra Pratap Shahi @ Pappu Shahi) came to be registered. Subsequently, applicant/revisionist filed a discharge application dated 24.08.2021, claiming discharge in above mentioned Sessions Trial.

17. Discharge application dated 24.08.2021 filed by applicant came to be rejected, vide order dated 02.09.2021 passed by Sessions Judge, Sant Kabir Nagar.

18. Feeling aggrieved by above order dated 02.09.2021, revisionist has filed Criminal Revision No. 2183 of 2021 (Ravindra Pratap Shahi @ Pappu Shahi Vs. State of U.P. and another).

19. During pendency of above noted criminal revision, Court below, vide order dated 04.09.2021, framed charges against revisionist.

20. Consequently, revisionist filed an amendment application challenging framing of charge order dated 04.09.2021.

21. Mr. Gopal Swaroop Chaturvedi, learned Senior counsel assisted by Mr. Rakesh Kumar Srivastava and Mr. Mithlesh Kumar Tiwari, learned counsel for revisionist/applicant submits that entire proceedings of above mentioned criminal case are wholly malicious and therefore liable to be quashed by this Court. In support of his challenge to the entire proceedings of above mentioned criminal case as well as order dated 04.09.2021, whereby Court below has rejected the discharge application filed by revisionist, learned Senior counsel contends that from the material collected by Investigating Officer, no offence under Section 306 IPC is made out against applicant/revisionist. He has then invited attention of Court to the suicide note of the deceased, which is part of the case diary and is also on record at page 64 of the paper book. On the basis of above, learned Senior counsel contends that no abetment, instigation or conspiracy is made out against applicant/revisionist. He further contends that from a plain reading of suicide note, it is apparent that no grudge has been expressed by deceased against applicant/revisionist. The deceased had grievance with the police, who according to deceased, falsely implicated him in a criminal case and in spite of repeated request made by deceased, he was not exculpated. Elaborating his submission, learned Senior counsel further contends that deceased was implicated in a case under Section 354 IPC. Deceased was charge-sheeted and therefore, remedy of deceased was to initiate appropriate legal proceedings for quashing of aforesaid proceedings, which admittedly were not undertaken by him. On the basis of above, learned Senior Counsel further contends that it cannot be that there was any abetment to suicide on the part of applicant/revisionist. He has further invited attention of Court to the judgement rendered by Supreme Court in **Arnab Manoranjan Goswami Vs. The State of Maharastra and others, 2021 (2) SCC 427** and has relied upon paragraphs-46, 47, 48, 49, 50, 51, 52 of the judgement. It is also contended by learned Senior counsel that cancellation of lease granted to deceased cannot be attributed to applicant/revisionist. Lease granted to deceased has been cancelled by District Magistrate, as

same was illegal. In case, deceased was aggrieved by the cancellation of lease, remedy was to challenge the order of District Magistrate, before appropriate forum. It is, thus, sought to be contended that even on aforesaid premise, it cannot be said that applicant/revisionist has abetted in commission of suicide by deceased. On the aforesaid premise, learned Senior Counsel vehemently submits that applicant/revisionist had made out a cast iron case for discharge. In the present case neither there is any material to establish abetment to suicide on the part of applicant/revisionist nor there is grave suspicion against applicant/revisionist regarding commission of alleged crime. It is thus urged that revision be allowed. Impugned order dated 02.09.2021 be set aside and applicant/revisionist be discharged in afore-mentioned Sessions Trial.

22. Per contra, learned A.G.A. has opposed above mentioned criminal misc. application as well as criminal revision. Mr. Prashant Kumar, learned A.G.A. along with Mr. P.K. Sahi, learned Brief Holder contends that all the submissions urged by learned Senior Counsel in support of criminal revision referred to above, are no longer available to the applicant/revisionist to claim discharge. According to learned A.G.A., it is an admitted position that vide order dated 04.09.2021, charges have been framed against applicant/revisionist. He therefore, submits that once charges have been framed, plea of discharge becomes infructuous. According to learned A.G.A., discharge can be claimed only prior to the framing of charge. Once charges have been framed, Court has no jurisdiction to discharge an accused. After framing of charge, Court can either convict an accused or acquit an accused, but cannot discharge an accused. On the aforesaid premise, learned A.G.A. contends above mentioned criminal misc. application as well as criminal revision require no interference by this court and are liable to be consigned to the record.

23. Mr. S. N. Singh, learned counsel representing first informant/opposite party-2 has adopted the arguments raised by learned A.G.A. He further submits that apart from above on date four prosecution witnesses of fact namely P.W.-1 Ram Bachan, P.W.-2 Shiv Bachan Gupta, P.W.-3 Jai Kisun, P.W.-4 Hari Ram have been examined upto this stage. Therefore, challenge to the framing of charge order dated 04.09.2021 has virtually become meaningless. He further submits that charges can be framed on the basis of grave suspicion or on the basis of material on record. Elaborating his contention, Mr. S. N. Singh submits that abetment to suicide can be gathered from the conduct of an accused also. To lend legal support to his submission, he has relied upon paragraph 11 of judgement in **Ranganayaki Vs. State by Inspector of Police, (2004) 12 SCC, 521**. For ready reference, paragraph 11 is, accordingly, reproduced herein under:-

"Under Section 109 the abettor is liable to the same punishment which may be inflicted on the principal offender; (1) if the act of the latter is committed in consequence of the abetment and (2) no express provision is made in the IPC for punishment for such an abetment. This section lays down nothing more than that if the IPC has not separately provided for the punishment of abetment as such then it is punishable with the punishment provided for the original offence. Law does not require instigation to be in a particular form or that it should only be in words. The instigation may be by conduct. Whether there was instigation or not is a question to be decided on the facts of each case. It is not necessary in law for the prosecution to prove that the actual operative cause in the mind of the person abetting was instigation and nothing else, so long as there was instigation and the offence has been committed or the offence would have been committed if the person committing the act had the same knowledge and intention as the

abettor. The instigation must be with reference to the thing that was done and not to the thing that was likely to have been done by the person who is instigated. It is only if this condition is fulfilled that a person can be guilty of abetment by instigation. Further the act abetted should be committed in consequence of the abetment or in pursuance of the conspiracy as provided in the Explanation to Section 109. Under the Explanation an act or offence is said to be committed in pursuance of abetment if it is done in consequence of (1) instigation (b) conspiracy or (c) with the aid constituting abetment. Instigation may be in any form and the extent of the influence which the instigation produced in the mind of the accused would vary and depend upon facts of each case. The offence of conspiracy created under Section 120A is bare agreement to commit an offence. It has been made punishable under Section 120B. The offence of abetment created under the second clause of Section 107 requires that there must be something more than mere conspiracy. There must be some act or illegal omission in pursuance of that conspiracy. That would be evident by Section 107 (secondly), "engages in any conspiracy.....for the doing of (hat thing, if an act or omission took place in pursuance of that conspiracy". The punishment for these two categories of crimes is also quite different. Section 109 IPC is concerned only with the punishment of abetment for which no express provision has been made in the IPC. The charge under Section 109 should, therefore, be along with charge for murder which is the offence committed in consequence of abetment. An offence of criminal conspiracy is, on the other hand, an independent offence. It is made punishable under Section 120B for which a charge under Section 109 is unnecessary and inappropriate. [See Kehar Singh and Ors. v. The State (Delhi Admn,), AIR (1988) SC 1883]. Intentional aiding and active complicity is the gist of offence of abetment."

24. He has further referred to the order dated 05.04.2021 passed by Court below, whereby bail application of applicant/revisionist was rejected. Photo copy of aforesaid order, relied upon by learned counsel representing opposite party 2 was placed before Court, which was taken on record. It is thus urged that framing of charge order dated 04.09.2021 is perfectly just and legal. Consequently, it is submitted that no indulgence be granted by this Court in favour of applicant/revisionist.

24. Having heard learned counsel for applicant/revisionist, learned A.G.A. for State, Mr. S. N. Singh, learned counsel representing opposite party-2 and upon perusal of material on record, this Court finds that the fate of criminal misc. application no. 13664 of 2021 (Ravindra Pratap Shahi @ Pappu Shahi Vs. State of U.P. and Another) shall ultimately abide by the result of Criminal Revision No. 2183 of 2021 (Ravindra Pratap Shahi @ Pappu Shahi Vs. State of U.P. and Another). Consequently, Court is required to examine the veracity of order dated 02.09.2021, whereby discharge application filed by applicant/revisionist has been rejected and also the necessity to decide the same.

25. Case in hand arises out of proceedings of Sessions Trial. Consequently, discharge could be claimed by applicant/revisionist under Section 227 Cr.P.C. Accordingly Section 227 Cr.P.C. is reproduced herein under:-

"227. Discharge.--If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is no sufficient ground for proceeding against the accused, he shall

discharge the accused and record his reasons for so doing."

26. Section 227 Cr.P.C. contemplates that court shall discharge an accused provided there is no sufficient ground for proceeding against the accused. The term "sufficient ground" has been explained by Supreme Court and therefore, no longer subject matter of debate. Apex Court in **Yogesh Joshi Vs. State of Maharastra, AIR 2008 Supreme Court 2971,** considered the aforesaid term and ultimately delineated its views in paragraphs- 13, 14 and 15, which are reproduced herein-under:-

"13. Before adverting to the rival submissions, we may briefly notice the scope and ambit of powers of the Trial Judge under Section 227 of the Code.

14. Chapter XVIII of the Code lays down the procedure for trial before the Court of Sessions, pursuant to an order of commitment under Section 209 of the Code. Section 227 contemplates the circumstances whereunder there could be a discharge of an accused at a stage anterior in point of time to framing of charge under Section 228. It provides that upon consideration of the record of the case, the documents submitted with the police report and after hearing the accused and the prosecution, the Court is expected, nay bound to decide whether there is "sufficient ground" to proceed against the accused and as a consequence thereof either discharge the accused or proceed to frame charge against him.

15. It is trite that the words "not sufficient ground for proceeding against the accused" appearing in the Section postulate exercise of judicial mind on the part of the Judge to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. However, in assessing this fact, the Judge has the power to sift and weigh the material for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine a prima facie case depends upon the facts of each case and in this regard it is neither feasible nor desirable to lay down a rule of universal application. By and large, however, if two views are equally possible and the Judge is satisfied that the evidence produced before him gives rise to suspicion only as distinguished from grave suspicion, he will be fully within his right to discharge the accused. At this stage, he is not to see as to whether the trial will end in conviction or not. The broad test to be applied is whether the materials on record, if unrebutted, makes a conviction reasonably possible. [See: State of Bihar Vs. Ramesh Singh and Prafulla Kumar Samal (supra)]"

27. Subsequently, the ambit and scope of Section 227 Cr.P.C. as well as parameters regarding exercise of jurisdiction under Section 227 Cr.P.C. came to be considered by a three Judges Bench of Supreme Court in **Tarun Jit Tejpal Vs. State of Goa and Another, 2019 SCC Online Sc 1053**, wherein Court concluded as under in paragraphs 27, 28, 29, 30, 31, 32:

" 27. Now, so far as the prayer of the appellant to discharge him and the submissions made by Shri Vikas Singh, learned Senior Advocate on merits are concerned, the law on the scope at the stage of Section 227/228 CrPC is required to be considered.

28. In the case of N. Suresh Rajan (Supra) this Court had an occasion to consider in detail the scope of the proceedings at the stage of framing of the charge under Section 227/228 CrPC. After considering earlier decisions of this Court on the point thereafter in paragraph 29 to 31 this Court has observed and held as under:

"29. We have bestowed our consideration to the rival submissions and the submissions made by Mr Ranjit Kumar

commend us. True it is that at the time of consideration of the applications for discharge, the court cannot act as a mouthpiece of the prosecution or act as a post office and may sift evidence in order to find out whether or not the allegations made are groundless so as to pass an order of discharge. It is trite that at the stage of consideration of an application for discharge, the court has to proceed with an assumption that the materials brought on record by the prosecution are true and evaluate the said materials and documents with a view to find out whether the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. At this stage, probative value of the materials has to be gone into and the court is not expected to go deep into the matter and hold that the materials would not warrant a conviction. In our opinion, what needs to be considered is whether there is a ground for presuming that the offence has been committed and not whether a ground for convicting the accused has been made out. To put it differently, if the court thinks that the accused might have committed the offence on the basis of the materials on record on its probative value, it can frame the charge; though for conviction, the court has to come to the conclusion that the accused has committed the offence. The law does not permit a mini trial at this stage.

30. Reference in this connection can be made to a recent decision of this Court in Sheoraj Singh Ahlawat v. State of U.P. [(2013) 11 SCC 476 : (2012) 4 SCC (Cri) 21 : AIR 2013 SC 52] , in which, after analysing various decisions on the point, this Court endorsed the following view taken in Onkar Nath Mishra v. State (NCT of Delhi) [(2008) 2 SCC 561 : (2008) 1 SCC (Cri) 507] : (Sheoraj Singh Ahlawat case [(2013) 11 SCC 476 : (2012) 4 SCC (Cri) 21 : AIR 2013 SC 52] , SCC p. 482, para 15)

"15. '11. It is trite that at the stage of framing of charge the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom, taken at their face value, disclosed the existence of all the ingredients constituting the alleged offence. At that stage, the court is not expected to go deep into the probative value of the material on record. What needs to be considered is whether there is a ground for presuming that the offence has been committed and not a ground for convicting the accused has been made out. At that stage, even strong suspicion founded on material which leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that offence.' (Onkar Nath case [(2008) 2 SCC 561 : (2008) 1 SCC (Cri) 507] , SCC p. 565, para 11)" (emphasis in original)

31. Now reverting to the decisions of this Court in Sajjan Kumar [Sajjan Kumar v. CBI, (2010) 9 SCC 368 : (2010) 3 SCC (Cri) 1371] and Dilawar Balu Kurane [Dilawar Balu Kurane v. State of Maharashtra, (2002) 2 SCC 135 : 2002 SCC (Cri) 310] , relied on by the respondents, we are of the opinion that they do not advance their case. The aforesaid decisions consider the provision of Section 227 of the Code and make it clear that at the stage of discharge the court cannot make a roving enquiry into the pros and cons of the matter and weigh the evidence as if it was conducting a trial. It is worth mentioning that the Code contemplates discharge of the accused by the Court of Session under Section 227 in a case triable by it; cases instituted upon a police report are covered by Section 239 and cases instituted otherwise than on a police report are dealt with in Section 245. From a reading of the aforesaid sections it is evident that they contain somewhat different provisions with regard to discharge of an accused:

31.1. Under Section 227 of the Code, the trial court is required to discharge the accused if it "considers that there is not sufficient ground for proceeding against the accused". However, discharge under Section 239 can be ordered when "the Magistrate considers the charge against the accused to be groundless". The power to discharge is exercisable under Section 245(1) when, "the Magistrate considers, for reasons to be recorded that no case against the accused has been made out which, if unrebutted, would warrant his conviction".

31.2. Section 227 and 239 provide for discharge before the recording of evidence on the basis of the police report, the documents sent along with it and examination of the accused after giving an opportunity to the parties to be heard. However, the stage of discharge under Section 245, on the other hand, is reached only after the evidence referred in Section 244 has been taken.

31.3. Thus, there is difference in the language employed in these provisions. But, in our opinion, notwithstanding these differences, and whichever provision may be applicable, the court is required at this stage to see that there is a prima facie case for proceeding against the accused. Reference in this connection can be made to a judgment of this Court in R.S. Nayak v. A.R. Antulay [(1986) 2 SCC 716 : 1986 SCC (Cri) 256] . The same reads as follows: (SCC pp. 755 56, para 43)

"43. ... Notwithstanding this difference in the position there is no scope for doubt that the stage at which the Magistrate is required to consider the question of framing of charge under Section 245(1) is a preliminary one and the test of 'prima facie' case has to be applied. In spite of the difference in the language of the three sections, the legal position is that if the trial court is satisfied that a prima facie case is made out, charge has to be framed."

29. In the subsequent decision in the case of S. Selvi (Supra) this Court has summarised the principles while framing of the charge at the stage of Section 227/228 of the CrPC. This Court has observed and held in paragraph 6 and 7 as under:

"6. It is well settled by this Court in a catena of judgments including Union of India v. Prafulla Kumar Samal [Union of India v. Prafulla Kumar Samal, (1979) 3 SCC 4 : 1979 SCC (Cri) 609] , Dilawar Balu Kurane v. State of Maharashtra [Dilawar Balu Kurane v. State of Maharashtra, (2002) 2 SCC 135 : 2002 SCC (Cri) 310] , Sajjan Kumar v. CBI[Sajjan Kumar v. CBI, (2010) 9 SCC 368 : (2010) 3 SCC (Cri) 1371] , State v. A. Arun Kumar [State v. A. Arun Kumar, (2015) 2 SCC 417 : (2015) 2 SCC (Cri) 96 : (2015) 1 SCC (L&S) 505] , Sonu Gupta v. Deepak Gupta [Sonu Gupta v. Deepak Gupta, (2015) 3 SCC 424 : (2015) 2 SCC (Cri) 265] , State of Orissa v. Debendra Nath Padhi [State of Orissa v. Debendra Nath Padhi, (2003) 2 SCC 711 : 2003 SCC (Cri) 688] , Niranjan Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijjaya [Niranjan Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijjaya, (1990) 4 SCC 76 : 1991 SCC (Cri) 47] and Supt. & Remembrancer of Legal Affairs v. Anil Kumar Bhunja [Supt. & Remembrancer of Legal Affairs v. Anil Kumar Bhunja, (1979) 4 SCC 274 : 1979 SCC (Cri) 1038] that the Judge while considering the question of framing charge under Section 227 of the Code in sessions cases (which is akin to Section 239 CrPC pertaining to warrant cases) has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out; where the material placed before the court discloses grave suspicion against the accused which has not been properly explained, the court will be fully justified in framing the charge; by and large if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not

grave suspicion against the accused, he will be fully within his rights to discharge the accused. The Judge cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the statements and the documents produced before the court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the materials as if he was conducting a trial.

7. In Sajjan Kumar v. CBI [Sajjan Kumar v. CBI, (2010) 9 SCC 368 : (2010) 3 SCC (Cri) 1371] , this Court on consideration of the various decisions about the scope of Sections 227 and 228 of the Code, laid down the following principles: (SCC pp. 376, 77, para 21)

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

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

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

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

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

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

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

30. In the case of Mauvin Godinho (Supra) this Court had an occasion to consider how to determine prima facie case while framing the charge under Section 227/228 of the CrPC. In the same decision this Court observed and held that while considering the prima facie case at the stage of framing of the charge under Section 227 of the CrPC there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

31. At this stage the decision of this Court in the case of Stree Atyachar Virodhi Parishad (Supra) is also required to be referred to. In that aforesaid decision this Court had an occasion to consider the scope of enquiry at the

stage of deciding the matter under Section 227/228 of the CrPC. In paragraphs 11 to 14 observations of this Court in the aforesaid decision are as under :

"11. Section 227 of the Code of Criminal Procedure having bearing on the contentions urged for the parties, provides:

"227. Discharge.--If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is no sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing."

12. Section 228 requires the Judge to frame charge if he considers that there is ground for presuming that the accused has committed the offence. The interaction of these two sections has already been the subject matter of consideration by this Court. In State of Biharv. Ramesh Singh [(1977) 4 SCC 39 : 1977 SCC (Cri) 533 : (1978) 1 SCR 257] , Untwalia, J., while explaining the scope of the said sections observed: [SCR p. 259 : SCC pp. 41 42 : SCC (Cri) pp. 535 36, para 4]

Reading the two provisions together in juxtaposition, as they have got to be, it would be clear that at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the Prosecutor proposes to adduce are not to be meticulously Judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under Section 227 or Section 228 of the Code. At that stage the court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the court to think that there is ground for presuming that the accused has committed an offence then it is not open to the court to say that there is no sufficient ground for proceeding against the accused.

13. In Union of India v. Prafulla Kumar Samal [(1979) 3 SCC 4 : 1979 SCC (Cri) 609 : (1979) 2 SCR 229] , Fazal Ali, J., summarised some of the principles: [SCR pp. 234 35 : SCC p. 9 : SCC (Cri) pp. 613 14, para 10] "

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

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

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

(4) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced court cannot act merely as a post

office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial."

14. These two decisions do not lay down different principles. Prafulla Kumar case [(1979) 3 SCC 4 : 1979 SCC (Cri) 609 : (1979) 2 SCR 229] has only reiterated what has been stated in Ramesh Singh case [(1977) 4 SCC 39 : 1977 SCC (Cri) 533 : (1978) 1 SCR 257] . In fact, Section 227 itself contains enough guidelines as to the scope of enquiry for the purpose of discharging an accused. It provides that "the Judge shall discharge when he considers that there is no sufficient ground for proceeding against the accused". The "ground" in the context is not a ground for conviction, but a ground for putting the accused on trial. It is in the trial, the guilt or the innocence of the accused will be determined and not at the time of framing of charge. The court, therefore, need not undertake an elaborate enquiry in sifting and weighing the material. Nor is it necessary to delve deep into various aspects. All that the court has to consider is whether the evidentiary material on record if generally accepted, would reasonably connect the accused with the crime. No more need be enquired into."

32. Applying the law laid down by this Court in the aforesaid decisions and considering the scope of enquiry at the stage of framing of the charge under Section 227/228 if the CrPC, we are of the opinion that the submissions made by the learned Counsel appearing on behalf of the appellant on merits, at this stage, are not required to be considered. Whatever submissions are made by the learned Counsel appearing on behalf of the appellant are on merits are required to be dealt with and considered at an appropriate stage during the course of the trial. Some of the submissions may be considered to be the defence of the accused. Some of the submissions made by the learned Counsel appearing on behalf of the appellant on the conduct of the victim/prosecutrix are required to be dealt with and considered at an appropriate stage during the trial. The same are not required to be considered at this stage of framing of the charge. On considering the material on record, we are of the opinion that there is more than a prima facie case against the accused for which he is required to be tried. There is sufficient ample material against the accused and therefore the learned Trial Court has rightly framed the charge against the accused and the same is rightly confirmed by the High Court. No interference of this Court is called for."

28. Having noted the law regarding exercise of jurisdiction under Section 227 Cr.P.C., this Court is further required to examine as to whether after charges have been framed the issue relating to discharge of an accused can be considered by court or not. Aforesaid issue is no longer res-integra and stands concluded by the judgement of Supreme Court in **Ratilal Bhanji Mithani Vs. State of Maharastra and others (1979) 2 SCC 179, paragraph 28,** which has been followed in **Bharat Parikh Vs. C.B.I. and another, (2008) 10 SCC 109, paragraph 16, State through C.B.I. New Delhi Vs. Jitendra Kumar Singh, (2014) 11 SCC, 724, paragraph 40, Hardeep Singh Vs. State of Punjab, (2014) 3 SCC, 92, paragraph 31.**

29. It is thus apparent that once charges have been framed, the issue of discharge becomes redundant, as Courts have no jurisdiction to allow discharge after charges having been framed. After charges have been framed, Court can either convict or acquit an accused. Admittedly, in the present case, charges have been framed, vide order dated 04.09.2021.

Resultantly, this Court now cannot examine the veracity of order dated 02.09.2021, whereby discharge application filed by applicant was rejected.

30. This leads to the last question to be considered by this Court i.e. the veracity of the order dated 04.09.2021, whereby charges have been framed against applicant/revisionist.

31. In a Sessions Trial, charges are framed under Section 228 Cr. P. C. Parameters regarding exercise of jurisdiction under Section 228 Cr. P. C. has now been considered by a three Judges Bench of Apex Court in **Bhawna Bai Vs. Ghanshyam and others, 2020 (2) SCC, 217,** wherein Court has held as follows in paragraphs 15 and 16.

"15. Considering the scope of Sections 227 and 228 Crl.P.C., in Amit Kapoor v. Ramesh Chander and another (2012) 9 SCC 460, the Supreme Court held as under:-

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

19. At the initial stage of framing of a charge, the court is concerned not with proof but with a strong suspicion that the accused has committed an offence, which, if put to trial, could prove him guilty. All that the court has to see is that the material on record and the facts would be compatible with the innocence of the accused or not. The final test of guilt is not to be applied at that stage. We may refer to the well-settled law laid down by this Court in State of Bihar v. Ramesh Singh (1977) 4 SCC 39: (SCC pp. 41-42, para 4) "4. Under Section 226 of the Code while opening the case for the prosecution the Prosecutor has got to describe the charge against the accused and state by what evidence he proposes to prove the guilt of the accused. Thereafter comes at the initial stage the duty of the court to consider the record of the case and the documents submitted therewith and to hear the submissions of the accused and the prosecution in that behalf. The Judge has to pass thereafter an order either under Section 227 or Section 228 of the Code. If ''the Judge considers that there is no sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing', as enjoined by Section 227. If, on the other hand, ''the Judge is of opinion that there is ground for presuming that the accused has committed an offence which -- ... (b) is exclusively triable by the court, he shall frame in writing a charge against the accused', as provided in Section 228. Reading the two provisions together in juxtaposition, as they have got to be, it would

be clear that at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the Prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under Section 227 or Section 228 of the Code. At that stage the court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction.

Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the court to think that there is ground for presuming that the accused has committed an offence then it is not open to the court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the court should proceed with the trial or not. If the evidence which the Prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. An exhaustive list of the circumstances to indicate as to what will lead to one conclusion or the other is neither possible nor advisable. We may just illustrate the difference of the law by one more example. If the scales of pan as to the guilt or innocence of the accused are something like even at the conclusion of the trial, then, on the theory of benefit of doubt the case is to end in his acquittal. But if, on the other hand, it is so at the initial stage of making an order under Section 227 or Section 228, then in such a situation ordinarily and generally the order which will have to be made will be one under Section 228 and not under Section 227.""

16. After referring to Amit Kapoor, in Dinesh Tiwari v. State of Uttar Pradesh and another (2014) 13 SCC 137, the Supreme Court held that for framing charge under Section 228 Crl.P.C., the judge is not required to record detailed reasons as to why such charge is framed. On perusal of record and hearing of parties, if the judge is of the opinion that there is sufficient ground for presuming that the accused has committed the offence triable by the Court of Session, he shall frame the charge against the accused for such offence.

32. Admittedly, discharge claimed by applicant/revisionist has been refused by Court below, vide order dated 02.09.2021. Criminal Revision preferred by applicant/revisionist cannot be considered now as charges have already been framed. Thus by necessary implication, this Court now cannot examine the veracity of the framing of charge order dated 04.09.2021.

33. Apart from above, when framing of charge order is examined in the light of ambit and scope of Section 228 Cr. P. C. as defined by Apex Court in aforementioned judgement, this Court is of considered opinion that at this stage, it cannot be said that no offence under Section 306 IPC is made out against applicant/revisionist. Arguments raised on

behalf of applicant/revisionist, the submissions urged by learned A.G.A. and Mr. S.N. Singh, learned counsel representing opposite party 2 will all have to be considered to decide the correctness of order dated 04.09.2021. This exercise will itself amount to mini trial, which is not permissible, while deciding the correctness of an order passed in terms of Section 228 Cr. P. C.

34. For the facts and reasons noted above, this Court does not find any good ground to interfere. As a result, Criminal Misc. Application as well as Criminal Revision filed by applicant/revisionist are liable to be dismissed.

35. They are, accordingly, dismissed.

36. Cost made easy.

(2021)11ILR A141
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.10.2021

BEFORE

THE HON'BLE VIKAS BUDHWAR, J.

Criminal Revision No. 2247 of 2021

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

Counsel for the Revisionist:
Sri Bhaskar Bhadra, Sri Dinesh Singh

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

A. Criminal Law - Code of Ciminal Procedure, 1973 - Sections 154, 156(3), 397 & 401 -First Information Report – Two opportunities has been provided under Section 154 of the Cr.P.C., at first instance before the concerned police authorities at the concerned police station and secondly before the Senior Superintendent of Police. If the police authorities and the Senior Superintendent of Police does not register the FIR, only then the Magistrate may direct for lodging of the FIR under Section 156(3) of Cr.P.C. Since the applicant-revisionist has not complied with the mandatory requirements of approaching the Senior Superintendent of Police before the Magistrate therefore the court below has rejected the application. (Para 33,36,39)

The Court cannot go into the factual issues and implant its own views as it is a revisional jurisdiction and not appellate jurisdiction. (Para 38)

Criminal Revision Rejected. (E-10)

List of Cases cited:-

1. K. Chinnaswamy Reddy Vs St. ofA.P. & anr. AIR 1962 S.C. 1788

2. Mahendra Pratap Singh Vs Sarju Singh & anr. AIR (55) 1968 S.C. 707

3. Johar & ors. Vs Mangal Prasad & Ors. 2008 Cr. L.J. 1627

4. St. of Kerala Vs Puttumanna Illath Jathavedan Namboodiri 1999 (2) SCC 452

5. Sanjaysinh Ramarao Chavan Vs Dattatray Gulabrao Phalke (2015) 3 SCC 123

6. Kishan Rao Vs Shankargouda (2018) 8 SCC 165

7. Lalita kumari Vs Govt. of U.P. & ors. (2014) 2 SCC 1 *(followed)*

8. Priyanaka Srivastava & ors. Vs St. of U.P. & ors. AIR 2015 SC 1758 *(followed)*

9. Rambabu Gupta Vs St. of U.P. Criminal Misc. Writ Petition No. 3672 of 2000 *(followed)*

10. Sukhbali Vs St. of U.P. 2007 (59) ACC 739 *(followed)*

(Delivered by Hon'ble Vikas Budhwar, J.)

1. This is a revision purported to be under Section 397/401 of Code of Criminal Procedure,

1973 assailing the validity and the correctness of the order dated 4.8.2021 passed by Special Judge SC/ST Act, Bareilly in Criminal Case No.1117 of 2021, under Section 156(3) Cr.P.C., Police Station Fatehganj West, District Bareilly (Smt. Rajni Vs. Jameel Ahamad and others).

2. Sri Dinesh Singh, AOR No.A-1-18-0439/2012 had made a statement that he is holding brief of Sri Bhaskar Bhadndra, AOR No.A/B-0142/2012, who has filed the present revision and he has been authorised by Sri Bhaskar Bhadndra, AOR No.A/B-0142/2012 to argue the present revision.

3. Heard Sri Dinesh Singh, AOR No.A-1-18-0439/2012 holding brief of Sri Bhaskar Bhadndra, AOR No.A/B-0142/2012, learned counsel for the revisionist and Sri Pankaj Saksena, learned AGA for opposite party no.1.

4. In view of the order so passed in the present revision, there is no need to issue notices to opposite parties no.2 and 3.

5. Brief facts of the case as recapitulated in the present revision are as under:-

6. As per the pleading set forth in the application purported to be under Section 156 Cr.P.C. 1973 before the Court of Special Judge, SC/ST Act, Bareilly dated 4.8.2021 which is annexure-1 at page 25 of the paper book, it will reveal that the applicant-revisionist is the daughter of Sri Kasturi Lal r/o Mohalla Mali, Police Station Fatehganj West, District Bareilly and belongs to Other Backward Classes (OBC category). She has further pleaded that she is poor and about 14 years ago from the date of the filing of the present application under Section 156(3) Cr.P.C. before the court below on 4.8.2021, she came in touch for the opposite party no.2 being Sri Jameel Ahmad, s/o Nawab Dulla, r/o Mohalla-Thather, Bawasi wali gali, P.S. Ganj, District Rampur.

7. The opposite party no.1 Sri Jameel Ahmad did not disclose his religion and portrayed himself to be a Hindu by religion and introduced himself as Sri Rajesh. The opposite party no.1 thereafter became quiet cordial with the applicant-revisionist and he trapped the applicant-revisionist on account whereof the applicant-revisionist proceeded to have live in relationship with the opposite party no.2. So much so they also entered into physical relationship and which resulted into birth of two sons in one of the private hospitals in Bareilly.

8. It was further alleged in the application under Section 156(3) Cr.P.C. so preferred by applicant-revisionist that after a long span of time the applicant-revisionist could know about the religion and the name of the opposite party no.2. The applicant-revisionist has also come with a case that the opposite party no.2 used to molest and have physical relationship without the consent of the applicant-revisionist and when she repeatedly requested for solemnisation of the marriage then the opposite party no.2 on one pretext or other he used to exhibit his difficulties with relation to the marriage of his sisters and assured that he will marry later. About five months ago from the date of the lodging of complaint under Section 156(3) Cr.P.C. dated 4.8.2021, when the applicant-revisionist pressurised the opposite party no.2 for solemnisation of marriage then abuses in Hindi vernacular were used by the opposite party no.2 and thereafter the opposite party no.2 left the applicant-revisionist and went to Rampur and after waiting for about 4-5 days, the applicant-revisionist made mobile calls which were not attended as the mobile was switched off. The applicant-revisionist along with her mother Smt. Sagar Devi, went to Rampur at the shop of the opposite party no.2 where at the opposite party no.2 was not present. However, his younger brother Waseem and uncle Firasat were present. On being asked about whereabouts of the opposite party no.2, they took the applicant-

revisionist and her mother to the nearby shop of one Sri Akhater. When the revisionist asked the whereabouts the opposite party no.2 then again abuses in Hindi vernacular were used and threats were administered for murdering the applicant-revisionist.

9. The applicant-revisionist has further come up with a case that Sri Waseem along with Firasat and Akhtar assured the applicant-revisionist that a settlement will be prepared and they induced the applicant-revisionist to come inside the house stopped the mother of the applicant-revisionist being Sagar Devi, from coming in the house and she was told to remain outside the house.

10. After closing the door Sri Firasat and Sri Akhlak told Sri Waseem to commit rape and when force was being sought to be exerted than the applicant-revisionist screamed and thereafter and the mother of the applicant-revisionist Smt. Sagar Devi, slammed the door and on account of said development, the applicant-revisionist ran away.

11. The applicant-revisionist have also set up a case that on 14.6.2021, she approached the concerned police station, Meerganj, Bareilly, wherein at 14.6.2021 a settlement has been made between the parties.

12. The applicant-revisionist had also stated in her application under Section 156 of the Code of Criminal Procedure that she had approached concerned police station for lodging an FIR and when the FIR was not lodged then she approached Senior Superintendent of Police for lodging of FIR. However, FIR has not been lodged, thus, request was made before court below for issuing the appropriate direction for lodging an FIR.

13. The application so preferred by the applicant-revisionist under Section 156(3) Cr.P.C. before the court below was registered as Criminal Case No.1117 of 2021, CNR No.UPB ROI-008167-21 (Smt. Rajni Vs. Jameel Ahamad and others).

14. The court below by virtue of the order dated 27.8.2021 has rejected the application so preferred by the applicant-revisionist under Section 156(3) of the Cr.P.C. holding that the applicant-revisionist had not complied with the conditions so enshrined in Section 154 of the Cr.P.C., as there is no document available on record that after non-lodging of an FIR by the concerned police and she has approached the S.S.P.,Bareilly for lodging the same. However, court below has also recorded a categorical finding of fact that the present case did not warrant passing of an order for lodging of the FIR.

15. Before proceeding further it is apt to discuss and analyse the statutory provisions purported to be under Section 397/401 Cr.P.C., 1973 as applicable in the State of U.P.

"397. Calling for records to exercise powers of revision.

(1) The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order,- recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

Explanation.- *All Magistrates whether Executive or Judicial, and whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for*

the purposes of this sub- section and of section 398.

(2) The powers of revision conferred by sub- section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding.

(3) If an application under this section has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them.

401. High Court' s Powers of revisions.

(1) In the case of any proceeding the record of which has been called for by itself or Which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections 386, 389, 390 and 391 or on a Court of Session by section 307 and, when the Judges composing the Court of revision are equally divided in opinion, the case shall be disposed of in the manner provided by section 392.

(2) No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence.

(3) Nothing in this section shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction.

(4) Where under this Code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.

(5) Where under this Code tan appeal lies but an application for revision has been made to the High Court by any person and the High Court Is satisfied that such application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interests of justice

so to do, the High Court may treat the application for revision as a petition of appeal and deal with the same accordingly."

16. A conjoint reading of the provisions contained under Section 397 as well as 401 of the Code of Criminal Procedure, it will clearly reveal that High Court of any Sessions Judge may call for and examine the record of any proceedings before any inferior criminal court situate within its or its local jurisdiction for the purposes of satisfying itself or himself as to the correctness, legality or probability of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of such inferior court.

17. The issue with regard to the scope and the extent of revisional jurisdiction under Section 391 read with Section 401 of the Code of Criminal Procedure, 1973 is no more res integra as the Hon'ble Supreme Court and this Court in catena of decisions interpreted the same which is being recapitulated hereunder:-

18. The Apex Court in the case of **K. Chinnaswamy Reddy Vs. State of Andhra Pradesh and another** reported in **AIR 1962, S.C. 1788** in para 7 observed as under :-

"7. It is true that it is open to a High Court in revision to set aside an order of acquittal even at the instance of private parties, though the State may not have though fit to appeal; but this jurisdiction should in our opinion be exercised by the High Court only in exceptional cases, when there is some glaring defect in the procedure or there is a manifest error on a point of law and consequently there has been a flagrant miscarriage of justice. Sub-section (4) of s. 439 forbids a High Court from converting a finding of acquittal into one of conviction and that makes it all the more incumbent on the High Court to see that it does not convert the finding of acquittal into one of conviction by the indirect method of ordering retrial, when it cannot itself directly convert a finding of acquittal into a finding of conviction. This places limitations on the power of the High

Court to set aside a finding of acquittal in revision and it is only in exceptional cases that this power should be exercised. It is not possible to lay down the criteria for determining such exceptional cases which would cover all contingencies. We may however indicate some cases of this kind, which would in our opinion justify the High Court in interfering with a finding of acquittal in revision. These cases may be : where the trial court has no jurisdiction to try the case but has still acquitted the accused, or where the trial court has wrongly shut out evidence which the prosecution wished of produce, or where the appeal court has wrongly held evidence which was admitted by the trial court to be inadmissible, or where material evidence has been overlooked either by the trial court or by the appeal court, or where the acquittal is based on a compounding of the offence, which is invalid under the law.

These and other cases of similar nature can properly be held to be cases of exceptional nature, where the High Court can justifiably interfere with an order of acquittal; and in such a case it is obvious that it cannot be said that the High Court was doing indirectly what it could not do directly in view of the provisions of s. 439.

(4) We have therefore to see whether the order of the High Court setting aside the order of acquittal in this case can be upheld on these principles."

19. The Apex Court in the case of **Mahendra Pratap Singh Vs. Sarju Singh and another** reported in **AIR (55) 1968, S.C. 707** in para 7 observed as under:-

"7. In revision, the learned Judge in the High Court went into the evidence very minutely. He questioned every single finding of the learned Sessions Judge and gave his own interpretation of the evidence and the inferences to be drawn from it. He discounted the theory that the weapon of attack was a revolver and suggested that it might have been a shot gun or country made pistol which the villagers in the position of Kuldip and Sarju could not distinguish from a revolver. He then took up each single circumstance on which the learned Sessions Judge had found some doubt and interpreting the evidence de novo held, contrary to the opinion of the Sessions Judge that they were acceptable. All the time he appeared to give the benefit of the doubt to the prosecution. The only error of law which the learned Judge found in the Sessions Judge's judgment was a remark by the Sessions Judge that the defence witnesses who were examined by the police before they were brought as defence witnesses ought to have been cross-examined with reference to their previous statements recorded by the police, which obviously is against the provisions of the Code. Except for this error, no defect of procedure or of law was discovered by the learned Judge of the High Court in his appraisal of the judgment of the Sessions Judge. As stated already by us, he seems to have gone into the matter as if an appeal against acquittal was before him making no distinction between the appellate and the revisional powers exercisable by the High Court in matters of acquittal except to the extent that instead of convicting the appellant he only ordered his retrial. In our opinion the learned Judge was clearly in error in proceeding as he did in a revision filed by a private party against the acquittal reached in the Court of Session."

20. The Apex Court in the case of **Johar and Ors. vs. Mangal Prasad and Ors.** reported in **2008 Cr. L.J. 1627** in paras 9, 10, 11, 12, 13 has observed as under:-

"9. Revisional jurisdiction of the High Court in terms of Section 397 read with Section 401 of the Code of Criminal Procedure is limited. The High Court did not point out any error of law on the part of the learned Trial Judge. It was not opined that any relevant

evidence has been left out of its consideration by the court below or irrelevant material has been taken into consideration. The High Court entered into the merit of the matter. It commented upon the credentiality of the Autopsy Surgeon. It sought to re- appreciate the whole evidence. One possible view was sought to be substituted by another possible view.

10. Sub-section (3) of Section 401 reads as under:

401(3). Nothing in this section shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction.

Technically, although Ms. Makhija may be correct that the High Court has not converted the judgment of acquittal passed by the learned Trial Court to a judgment of conviction, but for arriving at a finding as to whether the High Court has exceeded its jurisdiction or not, the approach of the High Court must be borne in mind. For the said purpose, we may notice a few precedents.

11. In D. Stephens v. Nosibolla [1951] 1 SCR 284 this Court opined:

10. The revisional jurisdiction conferred on the High Court under Section 439 of the Code of Criminal Procedure is not to be lightly exercised when it is invoked by a private complainant against an order of acquittal, against which the Government has a right of appeal under Section 417. It could be exercised only in exceptional cases where the interests of public justice require interference for the correction of a manifest illegality, or the prevention of a gross miscarriage of justice. This jurisdiction is not ordinarily invoked or used merely because the lower court has taken a wrong view of the law or misappreciated the evidence on record.

12. The same principle was reiterated in Logendra Nath Jha and Ors. v. Polailal Biswas [1951 SCR676] stating:

...Though Sub-section (1) of Section 439 authorises the High Court to exercise, in its discretion, any of the powers conferred on a court of appeal by Section 423, Sub-section (4) specifically excludes the power to "convert a finding of acquittal into one of conviction". This does not mean that in dealing with a revision petition by a private party against an order of acquittal the High Court could in the absence of any error on a point of law re-appraise the evidence and reverse the findings of facts on which the acquittal was based, provided only it stopped short of finding the accused guilty and passing sentence on him. By merely characterizing the judgment of the trial court as "perverse" and "lacking in perspective", the High Court cannot reverse pure findings of fact based on the trial Court's appreciation of the evidence in the case. That is what the learned Judge in the court below has done, but could not, in our opinion, properly do on an application in revision filed by a private party against acquittal....

13. In the instant case the High Court not only entered into the merit of the matter but also analysed the depositions of all the witnesses examined on behalf of the prosecution. It, in particular, went to the extent of criticizing the testimony of Autopsy Surgeon. It relied upon the evidence of the so called eye witnesses to hold that although appellants herein had inflicted injuries on the head of the deceased, Dr. Y.K. Malaiya, PW-9, deliberately suppressed the same. He was, for all intent and purport, found guilty of the offence under Section 193 and 196 of the Indian Penal Code. The Autopsy Surgeon was not cross-examined by the State. He was not declared hostile. The State did not even prefer any appeal against the judgment."

21. In the case of **State of Kerala Vs. Puttumana Illath Jathavedan Namboodiri reported in 1999(2) SCC 452**, the Hon'ble Supreme Court interpreted the scope and the extent jurisdiction to be exercised by High Court under the provisions contained under Section 397/401 of the Code of Criminal Procedure.

"5..... In its revisional jurisdiction, the High Court can call for and examine the record of any proceedings for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order. In other words, the jurisdiction is one of supervisory jurisdiction exercised by the High Court for correcting miscarriage of justice. But the said revisional power cannot be equated with the power of an appellate court nor can it be treated even as a second appellate jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to reappreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Magistrate as well as the Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice. On scrutinizing the impugned judgment of the High Court from the aforesaid standpoint, we have no hesitation to come to the conclusion that the High Court exceeded its jurisdiction in interfering with the conviction of the Respondent by reappreciating the oral evidence....."

22. Yet in the case of **Sanjaysinh Ramrao Chavan Vs. Dattatray Gulabrao Phalke, reported in (2015) 3 SCC 123,** Hon'ble Supreme Court observed as under:-

"14..... Unless the order passed by the Magistrate is perverse or the view taken by the court is wholly unreasonable or there is non-consideration of any relevant material or there is palpable misreading of records, the Revisional Court is not justified in setting aside the order, merely because another view is possible. The Revisional Court is not meant to act as an appellate court. The whole purpose of the revisional jurisdiction is to preserve the power in the court to do justice in accordance with the principles of criminal jurisprudence. The revisional power of the court Under Sections 397 to 401 Code of Criminal Procedure is not to be equated with that of an appeal. Unless the finding of the court, whose decision is sought to be revised, is shown to be perverse or untenable in law or is grossly erroneous or glaringly unreasonable or where the decision is based on no material or where the material facts are wholly ignored or where the judicial discretion is exercised arbitrarily or capriciously, the courts may not interfere with decision in exercise of their revisional jurisdiction."

23. The aforesaid two judgments in the case of **Kishan Rao vs. Shankargouda (2018) 8 SCC 165** in para 14 observed as under:-

"14. In the above case also conviction of the Accused was recorded, the High Court set aside the order of conviction by substituting its own view. This Court set aside the High Court's order holding that the High Court exceeded its jurisdiction in substituting its views and that too without any legal basis."

24. From the legal proposition so culled out by the Hon'ble Apex Court in the aforesaid decisions itself goes to show that the power so exercised under Section 397/401 of the Code of Criminal Procedure is limited and until and unless the order so challenged therein passed by the Magistrate is perverse or the view taken by the Court wholly unreasonable or there is non-consideration of any relevant material or there is palpable misreading of record, the revisional court is not justified in interfering with the order that too merely because also another view is possible.

25. In nutshell, the Hon'ble Apex Court has cautioned the High Court not to act as an appellate court as the whole purpose of revisional jurisdiction is to preserve the power in the court to do justice in accordance with the principles of criminal procedure.

26. Now, the present case in hand is to be decided in the light of the principles of the law laid down by the Hon'ble Apex Court while exercising the powers under Section 397/401 of the Code of Criminal Procedure, 1973.

27. Sri Dinesh Singh, who is holding the brief of Bhaskar Bhadra has invited the attention of this Court towards annexure-1 at page 25 of the paper book which is the complaint preferred by the applicant-revisionist on 4.8.2021 before the court below so as to contend that cognizable offence was made out and FIR ought to have been lodged by the concerned police.

28. Sri Pankaj Saksena, learned AGA appearing for the opposite party no.1 has supported the order under challenge and has urged that the order under challenge is a reasoned and speaking order taking into consideration each and every aspect of the matter and in particular the fact that the court below was within its jurisdiction/discretion in not passing an order for lodging of an FIR. He has further invited this Court attention towards the pleadings in the application under Section 156 of the Code of Criminal Procedure relating to the fact that though the averment was made in the said application that the applicant-revisionist had approached the officer-in-charge of the concerned police station giving information relating to commission of cognizable offence but the FIR was not registered and thereafter the applicant-revisionist had approached the S.S.P. as per Sub-section (3) of Section 154 of the Cr.P.C. hence in absence of any document or factual details in this regard was the order impugned does not suffer from any infirmity.

29. Before proceeding further this Court finds necessary to quote provisions contained under Section 154 and Section 156 of the Code of Criminal Procedure which reads as under:

"154. Information in cognizable cases.

(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.

(2) A copy of the information as recorded under sub- section (1) shall be given forthwith, free of cost, to the informant.

(3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in subsection (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence."

"156. Police officer' s power to investigate cognizable case.

(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2)No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under section 190 may order such an investigation as above- mentioned."

30. Sub-section (1) of Section 154 Cr.P.C. itself provides that every information relating to commission of cognizable offence, if given orally to an officer-in-charge of a police station shall be reduced to writing by him or under his direction and to read over to the informant and every such information whether given in writing or reduced to writing shall be signed by a person giving it and the substance thereof shall be entered in the book to be kept by the officer.

31. Further Sub-section (3) of Section 154 itself mandates that any person aggrieved by a refusal on the part of an officer-in-charge of police station to record the information referred to in Sub-section (1) may send the substance of the information in writing and by post to Senior Superintendent of Police concerned, who have satisfied that such information discloses the commission of cognizable offence shall either investigate case himself and direct an investigation to be done by a police officer subordinate to it.

32. Thus two opportunities have been provided under Section 154 of the Cr.P.C. at first instance before the concerned police authorities at the concerned police station and secondly before the Senior Superintendent of Police.

33. In case the officer-in-charge of the police station and also the Senior Superintendent of Police does not register the FIR on the basis of the information of the informant regarding commission of cognizable offence then under Section 156(3) of the Cr.P.C. Magistrate may direct for lodging of the FIR.

34. The said is no more res integra as the Hon'ble Apex Court has had the occasion to consider the said issue in the case of **Lalita kumari Vs. Government of Uttar Pradesh and others reported in (2014) 2 SCC 1** reads as under:-

"82. Mr Naphade, learned Senior Counsel further pointed out that the provisions have to be read in the light of the principle of malicious prosecution and the fundamental rights guaranteed under Articles 14,19 and 21. It is the stand of learned senior counsel that every citizen has a right not to be subjected to malicious prosecution and every police officer has an in-built duty under Section 154 to ensure that an innocent person is not falsely implicated in a criminal case. If despite the fact that the police officer is not prima facie satisfied, as regards commission of a cognizable offence and proceeds to register an FIR and carries out an investigation, it would result in putting the liberty of a citizen in jeopardy. Therefore, learned senior counsel vehemently pleaded for a preliminary inquiry before registration of FIR.

83. In terms of the language used in Section 154 of the Code, the police is duty bound to proceed to conduct investigation into a cognizable offence even without receiving information (i.e. FIR) about commission of such an offence, if the officer in charge of the police station otherwise suspects the commission of such an offence. The legislative intent is therefore quite clear, i.e., to ensure that every cognizable offence is promptly investigated in accordance with law. This being the legal position, there is no reason that there should be any discretion or option left with the police to register or not to register an FIR when information is given about the commission of a cognizable offence. Every cognizable offence must be investigated promptly in accordance with law and all information provided under Section 154 of the Code about the commission of a cognizable offence must be registered as an FIR so as to initiate an offence. The requirement of Section 154 of the Code is only that the report must disclose the commission of a cognizable offence and that is sufficient to set the investigating machinery into action.

84. The insertion of Sub-section (3) of Section 154, by way of an amendment, reveals

the intention of the legislature to ensure that no information of commission of a cognizable offence must be ignored or not acted upon which would result in unjustified protection of the alleged offender/accused.

85. The maxim expression unius est exclusion alterius (expression of one thing is the exclusion of another) applies in the interpretation of Section 154 of the Code, where the mandate of recording the information in writing excludes the possibility of not recording an information of commission of a cognizable crime in the special register.

86. Therefore, conducting an investigation into an offence after registration of FIR under Section 154 of the Code is the "procedure established by law" and, thus, is in conformity with Article 21 of the Constitution. Accordingly, the right of the accused under Article 21 of the Constitution is protected if the FIR is registered first and then the investigation is conducted in accordance with the provisions of law."

35. The issue with respect to exercise of powers under Section 156(3) of the Code of Criminal Procedure has also been taken note in the case of **Priyanka Srivastava and Ors. vs. State of U.P. and Ors. reported in AIR 2015 SC 1758** wherein para 26 and 27 following has observed:-

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

27. In our considered opinion, a stage has come in this country where Section 156(3) Code of Criminal Procedure applications are to be supported by an affidavit duly sworn by the applicant who seeks the invocation of the jurisdiction of the Magistrate. That apart, in an appropriate case, the learned Magistrate would be well advised to verify the truth and also can verify the veracity of the allegations. This affidavit can make the applicant more responsible. We are compelled to say so as such kind of applications are being filed in a routine manner without taking any responsibility whatsoever only to harass certain persons. That apart, it becomes more disturbing and alarming when one tries to pick up people who are passing orders under a statutory provision which can be challenged under the framework of said Act or Under Article 226 of the Constitution of India. But it cannot be done to take undue advantage in a criminal court as if somebody is determined to settle the scores. We have already indicated that there has to be prior applications Under Section 154(1) and 154(3) while filing a petition Under Section 156(3). Both the aspects should be clearly spelt out in the application and necessary documents to that effect shall be filed. The warrant for giving a direction that an the application Under Section 156(3) be supported by an affidavit so that the person making the application should be conscious and also endeavour to see that no false affidavit is made. It is because once an affidavit is found to be false, he will be liable for prosecution in accordance with law. This will deter him to casually invoke the authority of the Magistrate Under Section 156(3). That apart, we have already stated that the veracity of the same can also be verified by the learned Magistrate, regard being had to the nature of allegations of the case. We are compelled to say so as a number of cases pertaining to fiscal sphere, matrimonial dispute/family disputes, commercial offences, medical negligence cases, corruption cases and the cases where there is abnormal delay/laches in initiating criminal prosecution, as are illustrated in Lalita Kumari are being

filed. That apart, the learned Magistrate would also be aware of the delay in lodging of the FIR."

36. The court below in the order under challenge has recorded a clear cut finding of fact that the mandatory requirement under Section 154 of the Cr.P.C. has not been followed by the applicant-revisionist. For kind reference same is quoted hereunder:-

"आवेदन में वर्णित तथ्यों से स्पष्ट है कि आवेदिका 14 वर्षों से विपक्षी सं0–1 जमील अहमद के साथ रह रही है तथा उसके दो बच्चे हैं। आवेदिका ने स्वयं आवेदन में वर्णित किया है कि दिनांक 14ण्6ण्2021 को उसका विपक्षी से समझौता हो गया है, जिसमें एक माह से ज्यादा का समय व्यतीत हो चुका है। आवेदिका की तरफ से सम्बंधित थाने पर दिये गये प्रार्थना पत्र देने का उल्लेख अपने आवेदन में किया गया है, परनतु आवेदिका .ारा सम्बंधित थाने पर दिये गये प्रार्थना पत्र अन्तर्गत धारा 154(1) दण्ड प्रक्रिया संहिता की प्रति भी अभिलेख पर दाखिल नहीं की गयी है।

उपरोक्त सम्पूर्ण विवेचना उपरान्त न्यायालय इस निष्कर्ष पर पहुँचती है कि आवेदिका के आवेदन के सम्बंध में अभियोग पंजीकृत कर विवेचना कराये जाने का आदेश पारित किया जाना न्यायोचित व विधिसंगत नहीं है तथा आवेदन सारहीन होने के कारण निरस्त किये जाने योग्य है।"

37. The said findings have not been assailed in the grounds of revision also.

38. Though learned counsel for the revisionist has made argument on factual aspect of the matter, but this Court under revisional jurisdiction cannot go into the factual issues and implant its own view, as this Court is not exercising the appellate jurisdiction.

39. Be that as it may this Court finds that the present case is not fit for exercising of revisional jurisdiction under Section 397/401 Cr.P.C. on account of the following facts:-

a. It is highly inconceivable that the applicant-revisionist was not knowing about the name and the religion of opposite party no.2 for a period of 14 years.

b. Applicant-revisionist and the opposite party no.2 as admitted by the applicant-revisionist were in live in relation.

c. Applicant-revisionist and the opposite party no.2 had given birth to two male child.

d. Mandatory requirement under Section 154 of the Cr.P.C. have not been complied with by the applicant-revisionist.

e. Moreover the Magistrate while exercising powers under Section 156(3) of the Cr.P.C. cannot act as a post office as the Magistrate has to apply his mind with regard to the fact as to whether the case before it warrant passing of an order for lodging of an FIR on the basis of the information so submitted by the complainant regarding commissioning of cognizable offence.

40. In other words, on mere asking, without anything on record, Magistrate cannot proceed to pass orders thereon.

41. As discussed above, the information of the applicant-revisionist informant did not comply with the mandatory conditions as discussed hereinabove and on account whereof this Court does not find any manifest illegality or procedural irregularity committed by the court below.

42. The Full Bench of this Hon'ble Court in ***Criminal Misc. Writ Petition No.3672 of 2000 decided on 27.4.2001, Rambabu Gupta Vs. State of U.P.*** in para 17 observed as under:-

"17. In view of the aforesaid discussion on the legal provisions and decisions of the Supreme Court as on date, it is hereby held that on receiving a complaint, the Magistrate has to apply his mind to the allegations in the complaint upon which he may not at once proceed to take cognizance and may order it to go to the police station for being registered and investigated. The Magistrate's

order must indicate application of mind. If the Magistrate takes cognizance, he proceeds to follow the procedure provided in Chapter XV of Cr P.C. The first question stands answered thus."

43. Yet a Division Bench of this Court in Criminal Misc. Application No.9297 of 2007 decided on 18.9.2007. A Division Bench of this Court in the case of ***Sukhbali Vs. State of Uttar Pradesh*** reported in **2007 (59) ACC 739** in para 22 has observed as under:-

"22. Applications under Section 156(3) Cr. P.C. are now coming in torrents. Provisions under Section 156(3) Cr.P.C. should be used sparingly. They should not be used unless there is something unusual and extra ordinary like miscarriage of justice, which warrants a direction to the Police to register a case. Such applications should not be allowed because the law provides them with an alternative remedy of filing a complaint, therefore, recourse should not normally be permitted for availing the provisions of Section 156(3) Cr.P.C."

A judicial notice has been taken by this Court in the case of ***Sukhbali (Supra)*** that applications under Section 156(3) Cr.P.C. are now coming in torrent and thus exercise of the powers under Section 156(3) Cr.P.C. should be used sparingly and not in routine manner.

44. Looking into the facts and circumstances of the present case in relation to the statutory provisions as contained under Cr.P.C. as well as the scope under Section 397/401 of the Cr.P.C. this Court does not find any infirmity in the order dated 27.8.2021 passed by passed by Special Judge SC/ST Act, Bareilly in Criminal Case No.1117 of 2021, under Section 156(3) Cr.P.C., Police Station Fatehganj West, District Bareilly (Smt. Rajni Vs. Jameel Ahamad and others), hence the present criminal revision is wholly misconceived and is liable to be dismissed.

45. No other points raised by counsel for the applicant-revisionist.

46. Accordingly, criminal revision is **dismissed**. No order as to costs.

(2021)11ILR A152
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.11.2021

BEFORE

THE HON'BLE SANJAY KUMAR PACHORI, J.

Criminal Revision No. 2318 of 2021

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

Counsel for the Revisionist:
Sri Madan Singh

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

A. Criminal Law - The Juvenile Justice (Care and Protection of Children) Act, 2015- Sections 12 & 13(1)(ii) - The Juvenile Justice (Care and Protection of Children) Model Rules, 2016 - Rule 2(xvii) - The intention of the legislature is to grant bail to the juvenile and it can be declined only if any of the three contingencies specified under Section 12(1) of the Act of 2015 is available but the gravity of offence has no relevance in declining the bail to the juvenile. (Para 16)

Moreover, the Social Information Report (SIR) submitted by the Probation Officer did not disclose any negative remarks about him or his family and in absence of any material or evidence of reasonable grounds, the conclusion that his release would defeat the ends of justice is not appreciated by this Court. (Para 27)

Revision Allowed. (E-10)

List of Cases cited:-

1. Appashaeb Vs St. of Mah. (2007) 9 SCC 721

2. Manoj Singh Vs St. of Raj.2004 (2) RCC 995 *(followed)*

3. Lal Chand Vs St. of Raj. 2006 (1) RCC 167 *(followed)*

4. Prakash Vs Sta. of Raj. 2006 (2) RCR (Crl.) 530 *(followed)*

5. Udalbhan Singh @ Bablu Vs St. of Raj. 2005 (4) Crimes 649 *(followed)*

6. Shiv Kumar @ Sadhu Vs St. of U.P. (68) ACC 61 (LB) *(followed)*

7. Maroof Vs St. of U.P. 2015 (6) ADJ 203 *(followed)*

8. Nand Kishore (in JC) Vs State (2006) 4 RCR (Cri.) 754

9. Manmohan Singh Vs St. of Punj. PLR (2004) 136 P&H 497

10. Gurbaksh Singh Sibla Vs St. of Punj. (1980) 2 SCC 565

11. U.O.I. Vs Shiv Shankar Kesari (2007) 7 SCC 798

12. Shilpa Mittal Vs NCT Delhi (2020) 2 SCC 787 *(followed)*

(Delivered by Hon’ble Sanjay Kumar Pachori, J.)

1. Heard Sri Madan Singh, learned counsel for the revisionist, Sri Manoj Kumar Dwivedi, learned A.G.A for the State. Despite of service of notice upon opposite party no. 2, no one has appeared on behalf of the opposite party no. 2.

2. The Present Criminal Revision has been preferred under Section 102 of The Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as "JJ Act, 2015") against the judgment dated 9.3.2021 passed by Additional Sessions Judge/Special Judge, POCSO Act, Moradabad, in Criminal Appeal No. 10 of 2021 (arising out of Case No. 21 of 2020), whereby the learned appellate court has rejected the appeal and affirmed the order dated 22.1.2021 passed by Juvenile Justice Board, Moradabad. The Juvenile Justice Board has also rejected the bail application of juvenile 'X' which has been filed by his natural guardian/father, under Section 12 of "JJ Act, 2015", in case Crime No. 162 of 2020 under Sections 302, 34 of The Indian Penal Code (in short "IPC") Police Station Bhojpur, District Moradabad by the order dated 22.1.2021.

3. Being aggrieved of the judgment and order dated 9.3.2021 and 22.1.2021 passed by the Appellate Court as well as the Juvenile Justice Board, the juvenile 'X' through his father has preferred the instant revision before this Court.

4. Learned counsel for the revisionist vehemently submitted that the juvenile was below 18 years of age at the time of the incident. The Juvenile Justice Board has declared the juvenile 'X' was 9 years 6 months and 10 days old at the time of incident vide order dated 14.12.2020 and no proceeding is pending against the order dated 14.12.2020. It has been further submitted that juvenile 'X' is not named in the first information report and has been falsely implicated during the investigation without any material evidence. After four days of the incident, the juvenile has been implicated and apprehended by the police on 24.5.2020 on the basis of suspicion. It has been further submitted that there is no evidence to show that if in case the juvenile is released on bail, then his release is likely to bring him into association with any known criminal, or expose him to moral, physical, or psychological danger, or that his release would defeat the ends of justice, no such finding was recorded as to how he will come in contact with known criminals and how he will be exposed to moral, physical, or psychological danger, or that his release would defeat the ends of justice. The juvenile is in protective custody in an observation home since 24.5.2020.

5. Learned counsel for the revisionist further submits that juvenile 'X' has not committed any offence and has no criminal antecedent to his credit except the present case and is not a previous convict nor is associated in any kind of unsocial or criminal activities. There is no report regarding any previous criminal antecedents of the family of the revisionist and also there is no chance of the juvenile re-indulgence to bring him into association with known criminals. The natural guardian/father of the revisionist giving an undertaking that if juvenile is released on bail, he will keep him in his custody and look after him properly and assure on behalf of the juvenile that he is ready to cooperate with the process of law and shall faithfully make the juvenile available before the court whenever required and is also ready to accept all the conditions which the Court may deem fit to impose upon him.

6. It has been further submitted that the Juvenile Justice Board as well as the Appellate Court have not appreciated the Social Information Report of the Probation Officer in its right perspective and passed the impugned judgment and order in a cursory manner without considering the position of law and have declined bail to the revisionist. The bare perusal of the impugned orders demonstrates that the same has been passed on flimsy grounds, which have occasioned a gross miscarriage of justice. The judgment and order passed by the learned court below are illegal, contrary to law, and based on the erroneous assumption of facts and law.

7. **Per contra**; learned A.G.A. defended the impugned judgment and order passed by the Appellate Court as well as the Juvenile Justice Board and contended that the juvenile has committed the offence in a pre-planned manner. The ghastly crime was committed by the juvenile. There is every possibility that if the juvenile is released, he will come in contact with the known criminals and will get exposed to moral, physical or psychological danger. Considering the gravity of offence, the present revision is liable to be dismissed.

8. I have carefully considered the submissions made by the learned counsel for the revisionist and learned A.G.A. for the State and perused the material on record.

9. The learned Juvenile Justice Board declared juvenile 'X' as juvenile vide order dated 14.12.2020 after conducting an enquiry and held that juvenile 'X' was 9 years 6 months 10 days old at the time of the incident on the basis of school leaving certificate wherein date of birth of juvenile 'X' is 11.11.2010.

10. The bail application under Section 12 of "JJ Act, 2015" has been rejected by the Juvenile Justice Board vide order dated 2.1.2021 observing that there appears a reasonable ground for believing that the guardian of the juvenile has no effective control over juvenile 'X' and there is a possibility of re-occurrence of the offence after his release, which is likely to bring him into association with other known criminals. Furthermore, the juvenile was indulged in this activity due to lack of discipline. Learned appellate court has also affirmed the order passed by the Juvenile Justice Board and observed that juvenile 'X' has committed the heinous offence along with other co-accused. However, the appellate court cited the case laws wherein, it has been observed that the gravity of offence is not a relevant consideration for declining the bail of the juvenile. The appellate court without considering the social information report of the Probation Officer in the right perspective as well as without returning any finding on the three exceptions, declined the bail to juvenile 'X' and rejected the appeal.

11. To examine the validity of the impugned order, it is useful to note the relevant

provisions of the Act as well as the case laws relating to the subject.

12. Section 12 of Juvenile Justice (Care and Protection of Children) Act, 2015 reads as under:

"12. Bail to a person who is apparently a child alleged to be in conflict with law.- *(1) When any person, who is apparently a child and is alleged to have committed a bailable or non-bailable offence, is apprehended or detained by the police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person:*

Provided that such person shall not be so released if there appears reasonable grounds for believing that the release is likely to bring that person into association with any known criminal or expose the said person to moral, physical or psychological danger or the person's release would defeat the ends of justice, and the Board shall record the reasons for denying the bail and circumstances that led to such a decision.

(2) When such person having been apprehended is not released on bail under sub-section (1) by the officer-in-charge of the police station, such officer shall cause the person to be kept only in an observation home in such manner as may be prescribed until the person can brought before a Board.

(3) When such person is not released on bail under sub-section (1) by the Board, it shall make an order sending him to an observation home or a place of safety, as the case may be, for such period during the pendency of the inquiry regarding the person, as may be specified in the order.

(4) When a child in conflict with law is unable to fulfill the conditions of bail order within seven days of the bail order, such child shall be produced before the Board for modification of the conditions of bail."

(emphasis added)

13. It is a settled position of law that the use of the word 'shall' in sub-section (1) of Section 12 of "JJ Act, 2015" is of great significance. The use of the word 'shall' raises a presumption that the particular provision is imperative, but this prima facie inference may be rebutted by other considerations such as the object and scope of the enactment and the consequences flowing from such construction. The word 'shall' has been construed as ordinarily mandatory, but it is sometimes not so interpreted if the context or intention otherwise demands.

14. Provisions of Section 12 of "JJ Act, 2015" manifest that ordinarily, the Juvenile Justice Board is under obligation to release the juvenile on bail with or without surety. The juvenile shall not be so released in certain circumstances as the latter part of the section also uses the word 'shall' imposing certain mandatory conditions prohibiting the release of the juvenile by the Juvenile Justice Board. If there appear reasonable grounds for believing; (a) that the release is likely to bring him into association with any known criminal; (b) that release is likely to expose him to moral, physical, or psychological danger and (c) that release of juvenile in conflict of law would defeat the ends of justice.

15. The term 'known criminal' has not been defined in "the Juvenile Justice Act" or Rules framed thereunder. It is a well-settled rule of interpretation that in the absence of any statutory definition of any term used in any particular statute the same must be assigned meaning as in commonly understood in the context of such statute as held by Supreme Court in **Appasaheb**

v. State of Maharashtra, (2007) 9 SCC 721 in para 11 as under: (SCC p. 726 para 11)

"11.....It is well settled principle of interpretation of statute that if the Act is passed with reference to a particular trade, business or transaction and words are used which everybody conversant with that trade, business or transaction knows or understand to have a particular meaning in it, then the words are to be construed as having that particular meaning. [See: Union of India v. Garware Nylons Ltd., (1996) 10 SCC 413: AIR 1996 SC 3509 and Chemical and Fibers of India v. Union of India, (1997) 2 SCC 664: AIR 1997 SC 558]..."

16. From a bare reading of the provisions of Section 12 of "JJ Act, 2015", it appears that the intention of the legislature is to grant bail to the juvenile irrespective of the nature or gravity of the offence alleged to have been committed by the juvenile, and bail can be declined only in such cases where there are reasonable grounds to believe that the release is likely to bring the juvenile into an association of any known criminal or expose him to moral, physical, or psychological danger, or that his release would defeat the ends of justice. The gravity of offence is not a relevant consideration for declining the bail to the juvenile. A juvenile can be denied the concession of bail if any of the three contingencies specified under Section 12(1) of "JJ Act, 2015" is available. A similar view has been taken in cases of **Manoj Singh v. State of Rajasthan, 2004 (2) RCC 995, Lal Chand v. State of Rajasthan, 2006 (1) RCC 167, Prakash v. State of Rajasthan, 2006 (2) RCR (Cri.) 530, Udaibhan Singh @ Bablu Singh v. State of Rajasthan, 2005 (4) Crimes 649, Shiv Kumar @ Sadhu v. State of U.P., 2010 (68) ACC 616 (LB), Maroof v. State of U.P., [2015 (6) ADJ 203].**

17. In **Nand Kishore (in JC) v. State (2006) 4 RCR (Cri.) 754,** Delhi High Court, while considering the first condition of proviso of Section 12 of Juvenile Justice Act, observed that "as regards the first exception, before it can be invoked to deny bail to a juvenile there must be a reasonable ground for believing that his release is likely to bring him into association with any known criminal. The expression known criminal is not without significance when the liberty of a juvenile is sought to be curtailed by employing the exception, the exception must be construed strictly. Therefore, before this exception is invoked, the prosecution must identify the 'known criminal', and then the court must have reasonable grounds to believe that the juvenile, if released would associate with this 'known criminal'. It cannot be generally observed that the release of the juvenile would bring him into association with criminals without identifying the criminals and without returning a prima facie finding with regard to the nexus between the juvenile and such criminal..."

18. Similar view has been taken in **Manmohan Singh v. State of Punjab, PLR (2004) 136 P & H 497** wherein, it was observed as under:

"7....The reasonable grounds for believing that his release is likely to bring into association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice, should be based upon some material/evidence available on the record. It is not a matter of subjective satisfaction but while declining bail to the juvenile on the said ground, there must be objective assessment of the reasonable grounds that the release of the juvenile is likely to bring him in association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice...

8. In Sanjay Kumar's case (supra) it has been held by the Allahabad High Court that every juvenile whatever offence he is charged

with, shall be released on bail but he may, however, be refused bail if there appears reasonable ground for believing that the release is likely to bring him into association with the any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice and that the existence of such ground should not be mere guess work of court but it should be substantiated by some evidence on record."

19. Section 26 of the IPC defined the expression "Reason to believe" means a person is said to have "reason to believe" a thing, if he has sufficient cause to believe that thing but not otherwise. In view of Section 26 of IPC, if there is sufficient cause to believe, reason to believe exists. The expression "reason to believe" excludes a mere suspicion. The word 'believe' is very much a stronger word than 'suspect'.

20. The Constitution Bench of Apex court in **Gurbaksh Singh Sibia v. State of Punjab, (1980) 2 SCC 565,** while interpreting the expression "reason to believe" observed as under: (SCC p. 589 para 35)

"35. Section 438(1) of the Code lays down a condition which has to be satisfied before anticipatory bail can be granted. The application must show that he has "reason to believe" that he may be arrested for a non bailable offence. The use of the expression "reason to believe" shows that the belief that the applicant may be so arrested must be founded on reasonable grounds. Mere 'fear' is not 'belief or which reason it is not enough for the applicant to show that he has some sort of a vague apprehension that some one is going to make an accusation against him, in pursuance of which he may be arrested. The grounds on which the belief of the applicant is based that he may be arrested for a non-bailable offence, must be capable of being examined by the court objectively, because it is then alone that the court can determine whether the applicant has reason to believe that he may be so arrested....."

21. The Supreme Court again in the case of **Union of India v. Shiv Shankar Kesari, (2007) 7 SCC 798,** interpreted the expression "reasonable ground to believe" as under: (SCC p. 801, 802 paras 7, 8, 9 and 10)

"7. The expression used in Section 37(1)(b)(ii) is "reasonable grounds". The expression means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence charged and this reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged.

8. The word "reasonable" has in law the prima faice meaning of reasonable in regard to those circumstances of which the actor, called on to act reasonably, knows or ought to know. It is difficult to give an exact definition of word "reasonable".

7. ...In Stroud's Judicial Dictionary, 4th Edn., p. 2258 states that it would be unreasonable to expect an exact definition of the word 'reasonable'. Reason varies in its conclusions according to the idiosyncrasy of the individual, and the times and circumstances in which he thinks. The reasoning which built up the old scholastic logic sounds now like the jingling of a child's toy."

[See Municipal Corpn. of Delhi v. Jagan Nath Ashok Kumar1, and Gujarat Water Supply and Severage Board v. Unique Erectors (Gujarat) (P) Ltd.2

9. "9. ...It is often said that 'an attempt to give a specific meaning to the word "reasonable" is trying to count what is not number and measure what is not space.' The author of Words and Phrases (Permanent Edn.)

has quoted from Nice & Schreiber, In re3 to give a plausible meaning for the said word. He says

'the expression "reasonable" is a relative term, and the facts of the particular controversy must be considered before the question as to what constitutes reasonable can be determined'

It is not meant to be expedient or convenient but certainly something more than that"

10. The word "reasonable" signifies "in accordance with reason". In the ultimate analysis it is a question of fact, whether a particular act is reasonable or not depends on the circumstances in a given situation. (See Municipal Corpn. of Greater Mumbai v. Kamla Mills Ltd.4)

22. Section 13(1)(ii) of "JJ Act, 2015" provides that the Probation Officer shall submit a social investigation report within two weeks from when a child is apprehended or brought, to the Board containing information regarding the antecedents and family background of the child and other material circumstances likely to be of assistance to the Board for making the inquiry. The "social investigation report" which has been defined in Rule 2(xvii) of The Juvenile Justice (Care and Protection of Children) Model Rules, 2016, means the report of a child containing detailed information pertaining to the circumstances of the child, the situation of the child on economic, social, psycho-social and other relevant factors, and the recommendation thereon. This report becomes important for the inquiry to be done by the Board while passing such orders in relation to such a child as it deems fit under Sections 17 and 18 of this Act. The purpose behind this provision is to enable the Juvenile Justice Board to get a glimpse of the social circumstances of the child before any order regarding bail or of any other nature is passed.

23. 'Form-6' of The Juvenile Justice (Care and Protection of Children) Model Rules, 2016, contains a detailed proforma of the social investigation report. The report has three parts; the first part requires the Probation Officer to give the data or information regarding the close relatives in the family, delinquency records of the family, social and economic status, ethical code of the family, attitude towards religion, relationship amongst the family members, the relationship with the parents, living conditions etc. Thereafter, the report requires the Probation Officer to provide the child's history regarding his mental condition, physical condition, habits, interests, personality traits, neighbourhood, neighbours' report, and school, employment, if any, friends, the child being subject to any form of abuse, circumstances of apprehension of the child, mental condition of the child. The most important part of the report is the third part i.e. the result of inquiry where the Probation Officer is required to inform the Board about the emotional factors, physical condition, intelligence, social and economic factors, suggestive cause of the problems, analysis of the case including reasons/contributing factors for the offence, opinion of experts consulted and recommendation regarding rehabilitation by the Probation Officer/Child Welfare Officer. It is incumbent upon the Juvenile Justice Board to take into consideration the social investigation report and make an objective assessment of the reasonable grounds for rejecting the bail application of the juvenile.

24. Section 3 of "JJ Act, 2015" provides that the Central Government, the State Government, the Board, and other agencies, as the case may be, while implementing the provisions of the Act, shall be guided by the fundamental principles of care and protection of children. Some of the principles are as under:

(i) *Principle of presumption of innocence:* Any child shall be presumed to be an innocent of any mala fide or criminal intent up to the age of eighteen years.

(ii) *Principle of dignity and worth*: All human being shall be treated with equal dignity and rights.

(iii) *Principle of best interest*: All decisions regarding the child shall be based on the primary consideration that they are in the best interest of the child and to help the child to develop full potential.

(iv) *Principle of family responsibility*: The primary responsibility of care, nurture and protection of the child shall be that of the biological family or adoptive or foster parents, as the case may be.

(v) *Principle of non-stigmatising semantics:* Adversarial or accusatory words are not to be used in the process pertaining to a child.

(vi) *Principle of right to privacy and confidentiality:* Every child shall have a right to protection of his privacy and confidentiality, by all means and through out the judicial process.

25. After noticing the position of law, now I revert back to the facts of the present case, as per the Social Information Report (SIR), which is paper book page no. 72 demonstrates that the house of the juvenile is situated near a Primary School. The juvenile aged about 9 years has passed Class IV, and has one elder and one younger brother having ages of 12 years and 7 years and are studying in Class V and Class I, respectively. The parents of the juvenile are illiterate and relations among the family members are cordial; parents and grand parents of the juvenile have no criminal antecedent. Father does labour work and resides along with his family in a constructed house having three rooms. The juvenile has an interest in reading books and playing cricket. The SIR further noted that discipline in the house of the juvenile is normal/moderate. Further, the Probation Officer has noted as "**उक्त प्रकरण मे अपचारी किशोर हम उम्र समूह के प्रभाव से अपराध की ओर अग्रसर होना प्रतीत होता है जिसके कारण अपचारिकता विकसित हुई**" (In the above case, the delinquent juvenile appears to be committing a crime due to the influence of children of his age group, due to which delinquency developed.)

26. First Information Report of the present case has been lodged by the opposite party no. 2 on 21.5.2020 at 20:32 hrs., under Section 302 IPC against the unknown persons. According to the FIR, on 21.5.2020 at about 4:00 P.M., his son Faizan about 6 years old had gone towards an abandoned brick kiln for playing where unknown person murdered his son by cutting his neck, the dead body of his son is lying at the brick kiln. During the investigation, the role of catching hold of the deceased has been assigned to the juvenile 'X' by a chance witness (elder brother of the deceased aged about 18 years), who was not able to speak but he narrated the incident by indications after four days of the incident. This witness had not disclosed the incident to anyone since he was afraid.

27. In view of the above foregoing discussion, I am not satisfied with the reasoning and conclusion arrived by the Appellate Court as well as the Juvenile Justice Board in the impugned judgment and order. The Juvenile Justice Board as well as the Appellate Court have not properly appreciated the mandatory provisions of Section 12 of "JJ Act, 2015" as well as other provisions in relation to juvenile 'X' and declined the bail merely on the basis of unfounded apprehension. In the absence of any material or evidence of reasonable grounds, it cannot be said that his release would defeat the ends of justice and have failed to give reasons on three contingencies for declining the bail to juvenile 'X'. The findings recorded by the Juvenile Justice Board as well as the Appellate Court are based on the heinousness of the offence, therefore, the order dated 21.1.2021 passed by the Juvenile Justice Board and judgment dated 9.3.2021 passed by the Appellate Court are not sustainable. Hence, are set aside and the present revision is allowed.

28. Let juvenile 'X' through his natural guardian/father be released on bail in Case Crime No. 162 of 2020 under Sections 302, 34 of I.P.C. Police Station- Bhojpur District-Moradabad furnishes a personal bond on his father (Sipte Hasan) with two sureties of his relatives each in the like amount to the satisfaction of Juvenile Justice Board, Moradabad, subject to the following conditions:

(i) Natural guardian/father will furnish an undertaking that upon release on bail juvenile 'X' will not be permitted to go into contact or association with any known criminal or allowed to be exposed to any moral, physical, or psychological danger and further that the father will ensure that the juvenile will not repeat the offence.

(ii) Natural guardian/father will further furnish an undertaking to the effect that the juvenile will pursue his study at the appropriate level which he would be encouraged to do besides other constructive activities and not allowed to waste his time in unproductive and excessive recreational pursuits.

(iii) Juvenile and natural guardian/father will report to the Probation Officer on the first Monday of every calendar month commencing with the first Monday of December 2021, and if during any calendar month the first Monday falls on a holiday, then on the following working day.

(iv) The Probation Officer will keep a strict vigil on the activities of the juvenile and regularly draw up his social investigation report that would be submitted to the Juvenile Justice Board, Moradabad, on such a periodical basis as the Juvenile Justice Board may determine.

29. Before parting with the judgment, it is necessary to point out that the identity of the juvenile in the present matter has been disclosed in the impugned judgment and order which violates the right to privacy and confidentiality of the juvenile and against the law laid down by the Supreme Court in **Shilpa Mittal v. NCT Delhi, (2020) 2 SCC 787** wherein, it was held that the identity of the juvenile shall not be disclosed.

30. The present revision has been filed by Juvenile 'X' through his natural guardian/father. The memo of parties discloses the name of the juvenile. The Registry is directed to conceal the names of juvenile from the cause list as well as the record of this case so that the names and identities are not disclosed as directed by the Supreme Court in **Shilpa Mittal** (supra).

31. Let a copy of the instant judgment shall be transmitted by the Registry of this Court to all the District Judges within one week for circulation to all the Juvenile Justice Boards and Children's Courts, constituted under the "JJ Act, 2015". The office is further directed to enter the judgment in compliance register maintained for the purpose of the Court.

(2021)11ILR A160
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.11.2021

BEFORE

THE HON'BLE MANOJ MISRA, J.

Election Petition No. 4 of 2017

Jay Veer Singh **...Petitioner**

Versus

Hari Om Yadav **...Respondent**

Counsel for the Petitioner:
Sri Jaiveer Singh(In Person), Sri K.R. Singh

Counsel for the Respondent:
Sri Shivam Yadav, Sri Shaurav Yadav, Sri Aditya Yadav

A. Civil Law-The Representation of People Act, 1951-Sections 81, 123(1)- to declare the election of the respondent as Member of

Legislative Assembly as null and void on the ground of corrupt practice-in absence of any foundational plea of corrupt practice, the election petition may be rejected under Order VII Rule 11 CPC-whether the work projects promised, completed or executed by way of a bargain to induce voters to vote for the returned candidate or an exercise to complete projects already undertaken by the Zila Panchayat in ordinary course of its business is a matter of evidence and no definite opinion can be formed at the stage while addressing the prayer to reject the election petition under Order VII Rule 11 CPC-an electoral promise to the voters in general to ameliorate the condition or improve the general condition of their constituency may not by itself amount to a corrupt practice-in the instant case the argument that the returned candidate had been sitting Member of the Legislative Assembly and had a duty towards the constituency; and that his son was a President of Zila Panchayat having its own obligations to the public therefore the alleged promise/execution of work per se, would not amount to corrupt practices is a matter to be examined on the weight of the evidence led by the parties-there is nothing in the election petition to suggest that the work carried out was sanctioned from before; and that it was completed as a matter of course.(Para 1 to 15)

The application is dismissed. (E-6)

List of Cases cited:

1. Ghasi Ram Vs Dal Singh & ors. (1968) AIR SC 1191

2. Mohan Singh Vs Bhanwar Lal (1964) AIR SC 1366

3. Dhartipakar Madan Lal Agarwal Vs Rajeev Gandhi (1987) Supp. SCC 93

4. Samant N. Balkrishna Vs George Fernandez (1969) 3 SCC 238

5. Harjit Singh Mann Vs S. Umrao Singh & ors. (1980) 1 SCC 713

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

In Re:- Civil Misc. Application No.2 of 2019 under Order VII Rule 11 CPC

1. Jay Veer Singh (the election petitioner) has filed Election Petition No.4 of 2017, under section 81 of The Representation of the People Act, 1951 (the 1951 Act) to declare the election of the respondent Hari Om Yadav as Member of Legislative Assembly from 99 Sirsaganj Assembly Constituency, District Farrukhabad as null and void and to set aside the same. The declaration as prayed for is sought on the ground that the respondent committed the corrupt practice of bribery, as defined in sub-section (1) of Section 123 of the 1951 Act, by offering; promising and gifting to the electors of the constituency road, etc on the condition that they agree to vote for him.

2. The averments made in the election petition to demonstrate commission of corrupt practice of bribery are contained in paragraphs 10 to 33 of the petition, which are extracted below:-

"10. That Sri Vijay Pratap Yadav the son of the respondent Hari Om Yadav is the President (Chairman) of Zila Panchayat Firozabad. Being the son of the respondent Sri Vijay Pratap Yadav always accompanied the respondent during the campaign in the constituency.

11. That as the respondent was having very bad reputation in the constituency therefore he adopted a very clever mode of corrupt practice of bribery to the electors to vote for him. Where ever the respondent went for campaign during the election, he offered and promised the electors that he will get a road constructed at the doorstep of electors only if they will vote for him otherwise the road will not be constructed. He also assured that his son is the President of Zila Panchayat Firozabad and he (the respondent) will fullfil their promise if the electors promise to vote for respondent.

12. That the election of 99 Sirsaganj Legislative Assembly Constituency was held in 1st phase of election. From the said election the notification was issued on 17.01.2017. The Model Code of Conduct was already imposed by the Election Commission of India upon declaration of the dates of the election.

13. That the respondent filed his nomination paper on 23.01.2017 and after filing the nomination paper he became a candidate at the election as defined under Section 79(b) of Representation of the People Act, 1951.

14. That after being a candidate in the election the respondent went to village Karikhera, Gram Panchayat Karikhera, Block Araon, which is one of the village in the constituency, on 25.01.2017 at about 2.00 P.M. at the Temple in the village. The respondent was accompanied by following persons-

Vijay Pratap alias Chhotu Yadav son of Harim Om Yadav, President Zila Panchayat Firozabad (son of the respondent).

Radha Krishna Rajput, President of Samajwadi Party Vidhan Sabha Sirsaganj, resident of village Nagla Khandari, Post Ukhraind, District Firozabad.

Mata Deen Dhangar son of Kali Charan, Member Zila Panchayat Firozabad, resident of village Nagla Khushhali, Post Karhara, District Firozabad.

Pradeep Singh son of Netra Pal Singh resident of Kaurara Road, Sirsaganj, District Firozabad.

Jogendra Yadav, Block Pramukh, Block Madanpur, resident of Village and Post Garhsaan, District Firozabad.

Durg Pal Yadav (D.P. Yadav), Member Zila Panchayat Firozabad, resident of Sirsaganj, District Firozabad.

The respondent along with aforesaid persons went in four vehicles with registration numbers UP 83 W 4444, UP 83 AK 4444, UP 83 X 0001 and UP 83 Z 4545.

15. That when the respondent along with the aforesaid persons reached at the Temple in village Karikhera at 2.00 P.M. then a number of villagers get collected at the said place including Ram Bharose son of Charan Das, Dauji Ram son of Tulsi Ram, Rahul son of Mulayam Singh and Chandra Pal son of Raghubar Dayal, all the resident of village Karikhera. The respondent said to them that there is no road and he will get a road constructed for them before the polling of votes with the condition that they shall vote for respondent in lieu of the said road. The villagers agreed to it. After a short deliberation it was decided that the respondent shall get a Cement Concrete (CC) road constructed before poll from the house of Ram Bharose up to the house of Ram Nath and from the house of Vijai Singh up to the house of Ram Nath. The respondent immediately directed his son Vijay Pratap Singh to get the road constructed before poll and he agreed for the same.

16. That as per offer and promise made by the respondent the construction of the road started from 26.01.2017 and the material for construction of the road was also collected at the said place. The construction of the road was as per promise made by the respondent for getting the votes of the electors of the village in lieu of the said road. The road completed before the date of poll. The aforementioned persons told the aforesaid fact to the petitioner.

17. That the respondent also went to village Nagla Khandari, Gram Panchayat Karikhera, Block Araon, which is one of the village in the constituency, on 25.01.2017 at about 4.00 P.M. at the Chabutara of Anar Singh's house in the village. The respondent was accompanied by following persons-

Vijay Pratap Yadav alias Chhotu Yadav son of Hari Om Yadav, President Zila Panchayat Firozabad (son of the respondent).

Radha Krishna Rajput, President of Samajwadi Party Vidhan Sabha Sirsaganj, resident of village Nagla Khandari, Post Ukhraind, District Firozabad.

Mata Deen Dhangar son of Kali Charan, Member Zila Panchayat Firozabad,

resident of Village Nagla Khushhali, Post Karhara, District Firozabad.

Pradeep Singh son of Netra Pal Singh resident of Kaurara Road, Sirsaganj, District Firozabad.

Jogendra Yadav, Block Pramukh, Block Madanpur, resident of Village and Post Garhsaan, District Firozabad.

Durg Pal Yadav (D.P. Yadav), Member Zila Panchayat Firozabad, resident of Sirsaganj, District Firozabad.

The respondent along with aforesaid persons went in four vehicles with registration numbers UP 83 W 4444, UP 83 AK 4444, UP 83 X 0001 and UP 83 Z 4545.

18. That when the respondent along with the aforesaid persons reached at the Chabutara of Anar Singh's house in village Nagla Khandari at 4.00 P.M. then a number of villagers collected at the said place including Ajeet Rajput son of Tara Singh, Indra Pal Singh son of Pati Ram, Ajab Singh son of Kunwar Sen and Dipty Singh son of Mahtab Singh, all residents of village Nagla Khandari. The respondent said to them that he will get a road constructed for them before the polling of votes with the condition that they shall vote for respondent in lieu of the said road. The villagers agreed to it. After a short deliberation it was decided that the respondent shall get a Cement Concrete (CC) road constructed before poll from the house of Diwari Lal up to the house of Ram Prakash. The respondent immediately directed his son Vijay Pratap Yadav to get the road constructed before poll and he agreed for the same.

19. That as per offer and promise made by the respondent the construction of the road started from 27.01.2017 and the material for construction of the road was also collected at the said place. The construction of the road was as per promise made by the respondent for getting the votes of the electors of the village in lieu of the said road. The road completed before the date of poll. The aforementioned persons told the aforesaid fact to the petitioner.

20. That the respondent also went to village Fakkarpur, Gram Panchayat Fakkarpur, Block Araon, which is one of the village in the constituency, on 27.01.2017 at about 11.00 A.M. at the Chabutara of Omkar's house in the village. The respondent was accompanied by following persons-

Vijay Pratap Yadav alias Chhotu Yadav son of Hari Om Yadav, President Zila Panchayat Firozabad (son of the respondent).

Radha Krishna Rajput, President of Samajwadi Party Vidhan Sabha Sirsaganj, resident of village Nagla Khandari, Post Ukhraind, District Firozabad.

Mata Deen Dhangar son of Kali Charan, Member Zila Panchayat Firozabad, resident of Village Nagla Khushhali, Post Karhara, District Firozabad.

Pradeep Singh son of Netra Pal Singh resident of Kaurara Road, Sirsaganj, District Firozabad.

Jogendra Yadav, Block Pramukh, Block Madanpur, resident of Village and Post Garhsaan, District Firozabad.

Durg Pal Yadav (D.P. Yadav), Member Zila Panchayat Firozabad, resident of Sirsaganj, District Firozabad.

The respondent along with aforesaid persons went in four vehicles with registration numbers UP 83 W 4444, UP 83 AK 4444, UP 83 X 0001 and UP 83 Z 4545.

21. That when the respondent along with the aforesaid persons reached at the Chabutara of Omkar's house in village Fakkarpur at 11.00 A.M. then a number of villagers got collected at the said place including Ankit Rajput son of Lalta Prasad, Subodh son of Vidya Ram, Laxman Singh son of Rohan Singh and Prithvi Raj son of Satya Dev Singh, all residents of village Fakkarpur. The respondent said to them that he will get a road constructed for them before the polling of votes

with the condition that they shall vote for respondent in lieu of the said road. The villagers agreed to it. After a short deliberation it was decided that the respondent shall get a Cement Concrete (CC) road constructed before poll from the house of Mansha Ram up to the house of Vijai Pal. The respondent immediately directed his son Vijay Pratap Yadav to get the road constructed before poll and he agreed for the same.

22. That as per offer and promise made by the respondent the construction of the road started from 29.01.2017 and the material for construction of the road was also collected at the said place. The construction of the road was as per promise made by the respondent for getting the votes of the electors of the village in lieu of the said road. The road completed before the date of poll. The aforementioned persons told the aforesaid fact to the petitioner.

23. That thereafter the respondent along with all the aforesaid persons proceeded to nearby village Naadau, Gram Panchayat Bahadurpur, Block Araon and reached there at about 2.00 P.M. in front of the house of Hare Lal. Within a short while some of the villagers collected at the said place including Vinod Singh son of Ujagar Singh, Arun Kumar son of Jagannath Singh, Sandeep son of Jai Pal Singh, Ranjeet Singh son of Preetam Singh and Pramod Singh son of Ujagar Singh. The villagers made complaint about absence of road then the respondent made an offer that he will get the road constructed but the villagers have to vote for him in lieu of the road. It was decided that the road will be constructed from the house of Netra Pal up to the house of Ganga Singh. The villagers agreed and the respondent directed his son Vijay Pratap Yadav to get the Cement Concrete (CC) road constructed before the poll and he agreed for the same.

24. That as per offer and promise made by the respondent the construction of the road started from 29.01.2017 and the material for construction of the road was also collected at the said place. The construction of the road was as per promise made by the respondent for getting the votes of the electors of the village in lieu of the said road. The road completed before the date of poll. The aforementioned persons told the aforesaid fact to the petitioner.

25. That the respondent also went to village Rudhaini, Gram Panchayat Rudhanini, Block Araon, which is one of the village in the constituency, on 28.01.2017 at about 01.00 P.M. at the Chabutara of the house of Veerul Kashyap in the village. The respondent was accompanied by following persons-

Vijay Pratap Yadav alias Chhotu Yadav son of Hari Om Yadav, President Zila Panchayat Firozabad (son of the respondent).

Radha Krishna Rajput, President of Samajwadi Party Vidhan Sabha Sirsaganj, resident of village Nagla Khandari, Post Ukhraind, District Firozabad.

Mata Deen Dhangar son of Kali Charan, Member Zila Panchayat Firozabad, resident of Village Nagla Khushhali, Post Karhara, District Firozabad.

Pradeep Singh son of Netra Pal Singh resident of Kaurara Road, Sirsaganj, District Firozabad.

Jogendra Yadav, Block Pramukh, Block Madanpur, resident of Village and Post Garhsaan, District Firozabad.

Durg Pal Yadav (D.P. Yadav), Member Zila Panchayat Firozabad, resident of Sirsaganj, District Firozabad.

Awadhesh Baghel alias Papai son of ex-minister Late Sunder Singh Baghel resident of village Kathphori, Post Bachhela-Bachheli, District Firozabad

The respondent along with aforesaid persons went in four vehicles with registration numbers UP 83 W 4444, UP 83 AK 4444, UP 83 X 0001 and UP 83 Z 4545.

26. That when the respondent along with the aforesaid persons reached at the Chabutara of the house of Veerul Kashyap in village Rudhaini at 01.00 P.M. then a number of

villagers get collected at the said place including Rohit Tenguria son of Vidya Shankar, Arjan Singh son of Gulab Singh, Milan son of Mukut Singh, Mohit son of Yatesh and Chandra Kumar son of Sobaran Singh, all the resident of village Rudhaini. The respondent said to them that he will get a road constructed for them before the polling of votes with the condition that they shall vote for respondent in lieu of the said road. The villagers agreed to it. After a short deliberation it was decided that the respondent shall get a Cement Concrete (CC) road constructed before poll from the house of Balbir up to the house of Khunni Lal. The respondent also said that there is no marriage hall (Barat Ghar) in the village and he will give Gitti and Sand for the same but the villagers have to vote for him. The villagers agreed for the same. The respondent immediately directed his son Vijay Pratap Yadav to get the road constructed and to dump the Gitti and Sand for Barat Ghar before poll and he agreed for the same.

27. That as per offer and promise made by the respondent the construction of the road started from 30.01.2017 and Gitti and Sand for construction of Barat Ghar was dumped in the village. The construction of the road was as per promise made by the respondent for getting the votes of the electors of the village in lieu of the said road. The road completed before the date of poll. The aforementioned persons told the aforesaid fact to the petitioner.

28. That the respondent also went to village Chirhuli, Gram Panchayat Chirhuli, Block Araon, which is one of the village in the constituency, on 29.01.2017 at about 11.00 A.M. at S.F. Public School in the village. The respondent was accompanied by following persons-

Vijay Pratap Yadav alias Chhotu Yadav son of Hari Om Yadav, President Zila Panchayat Firozabad (son of the respondent).

Radha Krishna Rajput, President of Samajwadi Party Vidhan Sabha Sirsaganj, resident of village Nagla Khandari, Post Ukhraind, District Firozabad.

Mata Deen Dhangar son of Kali Charan, Member Zila Panchayat Firozabad, resident of Village Nagla Khushhali, Post Karhara, District Firozabad.

Pradeep Singh son of Netra Pal Singh resident of Kaurara Road, Sirsaganj, District Firozabad.

Jogendra Yadav, Block Pramukh, Block Madanpur, resident of Village and Post Garhsaan, District Firozabad.

Durg Pal Yadav (D.P. Yadav), Member Zila Panchayat Firozabad, resident of Sirsaganj, District Firozabad.

The respondent along with aforesaid persons went in four vehicles with registration numbers UP 83 W 4444, UP 83 AK 4444, UP 83 X 0001 and UP 83 Z 4545.

29. That when the respondent along with the aforesaid persons reached at S.F. Public School in village Chirhuli at 11.00 A.M. then a number of villagers were collected at the said place including Sunny Tomar son of Santosh Singh, Shivraj Baghel son of Ram Singh and Suresh Tomar son of Kedar Singh all resident of village Chirhuli. The respondent said to them that he will get a road constructed for them before the polling of votes with the condition that they shall vote for respondent in lieu of the said road. The villagers agreed to it. After a short deliberation it was decided that the respondent shall get a Cement Concrete (CC) road constructed before poll from big water tank up to the house Mohabbat Ali, from house of Babu Mahtar up to the school and from the house of Shyam Veer Baghel up to the house of Ram Chandra Baghel. The respondent immediately directed his son Vijay Pratap Yadav to get the road constructed before poll and he agreed for the same.

30. That as per offer and promise made by the respondent the construction of the

road started from 02.02.2017 and the material for construction of the road was also collected at the said place. The construction of the road was as per promise made by the respondent for getting the votes of the electors of the village in lieu of the said road. The road completed before the date of poll. The aforementioned persons told the aforesaid fact to the petitioner.

31. That the respondent also went to village Khaurai, Gram Panchayat Khaurai Ajnaura, Block Madanpur, which is one of the village in the constituency, on 31.01.2017 at about 03.00 P.M. in front of the house of Atul Baghel in the village. The respondent was accompanied by following persons-

Vijay Pratap Yadav alias Chhotu Yadav son of Hari Om Yadav, President Zila Panchayat

Firozabad (son of the respondent).

Radha Krishna Rajput, President of Samajwadi Party Vidhan Sabha Sirsaganj, resident of village Nagla Khandari, Post Ukhraind, District Firozabad.

Mata Deen Dhangar son of Kali Charan, Member Zila Panchayat Firozabad, resident of Village Nagla Khushhali, Post Karhara, District Firozabad.

Pradeep Singh son of Netra Pal Singh resident of Kaurara Road, Sirsaganj, District Firozabad.

Jogendra Yadav, Block Pramukh, Block Madanpur, resident of Village and Post Garhsaan, District Firozabad.

Durg Pal Yadav (D.P. Yadav), Member Zila Panchayat Firozabad, resident of Sirsaganj, District Firozabad.

Awadhesh Baghel alias Papai son of ex-minister Late Sunder Singh Baghel resident of village Kathphori, Post Bachhela-Bachheli, District Firozabad.

The respondent along with aforesaid persons went in four vehicles with registration numbers UP 83 W 4444, UP 83 AK 4444, UP 83 X 0001 and UP 83 Z 4545.

32. That when the respondent along with the aforesaid persons reached in front of Atul Baghel's house in village Khaurai at 03.00 P.M. then a number of villagers were collected at the said place including Jaskaran Pandey son of Siya Ram Pandey and Mahi Pal Singh son of Ram Gopal both residents of village Khaurai. The respondent said to them that he will get a road constructed for them before the polling of votes with the condition that they shall vote for respondent in lieu of the said road. The villagers agreed to it. After a short deliberation it was decided that the respondent shall get a Cement Concrete (CC) road constructed before poll from the house of Mukut Singh Baghel up to the house of Shiv Raj Singh Kushwah. The respondent immediately directed his son Vijay Pratap Yadav to get the road constructed before poll and he agreed for the same.

33. That as per offer and promise made by the respondent the construction of the road started from 01.02.2017 and the material for construction of the road was also collected at the said place. The construction of the road was as per promise made by the respondent for getting the votes of the electors of the village in lieu of the said road. The road completed before the date of poll. The aforementioned persons told the aforesaid fact to the petitioner."

3. Before the Court proceeds to notice and address the grounds on which rejection of the election petition under Order VII Rule 11 CPC is sought, it would be appropriate to notice the notified relevant dates of the election in question. These are:-

Last date for nomination 24.01.2017

Date for scrutiny of nomination papers 25.01.2017

Date for withdrawal of Candidature 27.01.2017

Date for poll 11.02.2017

Date for counting of votes 11.03.2017

Date of declaration of result 11.03.2017

4. I have heard Sri Shivam Yadav for the returned candidate (i.e. the respondent) and Sri K.R. Singh for the election petitioner on the application under Order VII Rule 11 CPC.

5. On behalf of the returned candidate, Sri Shivam Yadav urged that assuming the averments made in the election petition to be correct, no case of bribery is made out for the following reasons: (a) that there is no offer or promise or gift to any person in particular; rather, the allegation is with regard to carrying out development work for the benefit of public at large which cannot be considered bribe more so when it is done at the instance of a member of legislative assembly returned in the previous election as is the returned candidate; (b) that there is no claim that the returned candidate offered any bribe to any person in particular for votes; (c) that carrying out development work in the constituency per se is not a corrupt practice; (d) that the work as alleged was carried out by the returned candidate's son who completed the work in the capacity of a President of Zila Panchayat therefore, the work, if any, carried out by Zila Panchayat, would not amount to a corrupt practice or bribe by the candidate; (e) that the allegations are made on the basis of information received without disclosing as to who had passed on the information; and (f) that there is no disclosure by the election petitioner as to the number of votes secured by him as well as the returned candidate from the concerned villages to demonstrate whether the votes from those villages had a material impact on the election. To support his contentions, Shri Shivam Yadav cited following decisions: **(i) AIR 1968 SC 1191 - Ghasi Ram Vs. Dal Singh & Ors; (ii) AIR 1964 SC 1366 - Mohan Singh Vs. Bhanwar Lal; and (iii) 1987 (Supp) SCC 93 - Dhartipakar Madan Lal Agarwal Vs. Rajeev Gandhi.**

6. Per Contra, Sri K.R. Singh, for the election petitioner, submitted that while addressing the issue whether the plaint/election petition is liable to be rejected under Order VII Rule 11 CPC only the averments made therein are to be read as a whole to find out whether they disclose a cause of action to sustain the relief sought. At this stage, the factual correctness of the allegations is not to be examined and, therefore, the allegations have to be taken on their face value. Whether those allegations are correct or not would have to be tested after leading of evidence. He argued that, according to the averments, the returned candidate extended promises as a bargain for votes after submission of nomination and those promises were allegedly fulfilled before the polling date. All this clearly amounted to corrupt practice of bribery for which the election is liable to be annulled. He submitted that whether the work projects were part of the scheduled work of Zila Panchayat or not, is a matter of evidence. But, as it is not the case in the election petition that the work alleged was part of the scheduled work of Zila Panchayat, merely because the son of the returned candidate is a Zila Panchayat President, it cannot be made basis to assume that the Zila Panchayat performed the work already sanctioned by it. He also submitted that once the use of corrupt practices by the returned candidate is substantiated, under section 100 (1) (b) of the 1951 Act, it is immaterial whether the margin of defeat is large or small because the election would be rendered void.

7. Having noticed the rival submissions, before I proceed to weigh the merit of the rival submissions, it be observed that at the stage of consideration of a prayer to reject the plaint / election petition under Order VII Rule 11 CPC, it is well settled, the correctness of the allegations is not to be tested on the basis of material produced by the defendant/ respondent. At this stage, the averments made in the plaint or

the petition, as the case may be, are alone to be considered as a whole to find out whether they disclose a cause of action to sustain the prayer made. In the instant case, therefore, what is to be seen is whether the averments in the election petition, as they stand, make out a case of Bribery as contemplated in Section 123 of the 1951 Act.

8. Section 123 of the 1951 Act defines corrupt practices and sub-section (1) thereof deals with the corrupt practice of Bribery. It provides as follows:-

"123. Corrupt practices.--*The following shall be deemed to be corrupt practices for the purposes of this Act:--*

(1) "Bribery", that is to say--

(A) any gift, offer or promise by a candidate or his agent or by any other person with the consent of a candidate or his election agent of any gratification, to any person whomsoever, with the object, directly or indirectly of inducing--

(a) a person to stand or not to stand as, or to withdraw or not to withdraw from being a candidate at an election, or

(b) an elector to vote or refrain from voting at an election, or as a reward to--

(i) a person for having so stood or not stood, or for having withdrawn or not having withdrawn his candidature; or

(ii) an elector for having voted or refrained from voting;

(B) the receipt of, or agreement to receive, any gratification, whether as a motive or a reward--

(a) by a person for standing or not standing as, or for withdrawing or not withdrawing from being, a candidate; or

(b) by any person whomsoever for himself or any other person for voting or refraining from voting, or inducing or attempting to induce any elector to vote or refrain from voting, or any candidate to withdraw or not to withdraw his candidature.

Explanation.--For the purposes of this clause the term "gratification" is not restricted to pecuniary gratifications or gratifications estimable in money and it includes all forms of entertainment and all forms of employment for reward but it does not include the payment of any expenses bona fide incurred at, or for the purpose of, any election and duly entered in the account of election expenses referred to in section 78.

9. Section 100 of the 1951 Act specify the grounds for declaring an election void. The relevant portion of sub-section (1) of section 100 of the 1951 Act is extracted below:-

"100. Grounds for declaring election to be void.- *(1) Subject to the provisions of sub-section (2) if the High Court is of opinion--*

(a) .....

(b) that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent; or

(c).....

(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected--

(i) ....., or

(ii) by any corrupt practice committed in the interests of the returned candidate by an agent other than his election agent, or

(iii) ....., or

(iv).....,

the High Court shall declare the election of the returned candidate to be void"

10. In **Samant N. Balkrishna v. George Fernandez, (1969) 3 SCC 238,** interpreting the inter play between clause (b) and clause (d) (ii) of sub-section (1) of section 100 of the 1951 Act, it was held that the corrupt practices are

viewed separately according as to who commits them. The first class consists of corrupt practices committed by the candidate or his election agent or any other person with the consent of the candidate or his election agent. These, if established, avoid the election without any further condition being fulfilled. Then there is the corrupt practice committed by an agent other than election agent. Here an additional fact has to be proved that the result of the election was materially affected. In the instant case, as the allegations in respect of commission of corrupt practices are direct against the returned candidate, sub-clause (b) of sub-section (1) of section 100 of the 1951 Act would get attracted and, therefore, it is not necessary for the election petitioner to demonstrate by averments in the election petition as to how the result has been materially affected by such corrupt practices. Thus, the contention of the returned candidate that because the election petition is bereft of pleading as to how the result was materially affected by the alleged corrupt practices, the election petition is liable to be rejected, under Order VII rule 11 CPC, is devoid of merit.

11. Now, what is to be seen is whether the alleged conduct of the returned candidate in promising / executing /carrying out work projects/ roads, etc in return of promise by voters to vote for him amounts to bribery as per the provisions of sub-section (1) of section 123 of the 1951 Act. In **Ghasi Ram's case (supra)** cited by the learned counsel for the returned candidate it was held that a corrupt practice involving bribery must be fully established. The evidence must show clearly that the promise or gift directly or indirectly was made to an elector to vote or refrain from voting at an election. In the context of a Minister, it was observed, *the position is different because he cannot cease to function when his election is due. He must of necessity attend to the grievances, otherwise he must fail. If everyone of his official acts done bona fide is to be construed against him and an ulterior motive is spelled out of them, the administration would come to a stand still.* In that background it was observed that discretionary grants part of the general scheme to better community development projects and to remove the immediate grievances of the public would not amount to corrupt practices. While holding as above, a caveat was added, by observing, that *"if there was good evidence that the Minister bargained directly or indirectly for votes, the result might have been different...."* After observing as above, the Supreme Court in **Ghasi Ram's case (supra)**, went on to observe that *"election is something which must be conducted fairly. To arrange to spend money on the eve of elections in different constituencies although for general public good is, when all is said and done, an evil practice, even if it may not be corrupt practice. The dividing line between an evil practice and a corrupt practice is a very thin one. It should be understood that energy to do public good should be used not on the eve of elections but much earlier and that even slight evidence might change this evil practices into corrupt practice. Payments from discretionary grants on the eve of elections should be avoided."*

12. In **Harjit Singh Mann Vs. S. Umrao Singh and Ors., (1980) 1 SCC 713** while noticing the decision in **Ghasi Ram's case (supra)** it was observed *"that the trial court rightly took the view that it was necessary for the purpose of proving corrupt practice of bribery to establish that there was an element of bargaining in what the respondent was alleged to have done... Reference in this connection may be made to the decision of this Court in Ghasi Ram v. Dal Singh and others where it was held with reference to the decision in Amirchand v. Surendra Lal Jha and Ors. that if a Minister redress the grievances of a class of the public or people of a locality or renders them any help, on the eve of an election, it is not a corrupt practice unless he obtains promises from the voters in*

return, as a condition for his help. It was also held that the evidence must show clearly that the promise or gift directly or indirectly was made to an elector to vote or refrain from voting at an election, and that if there was good evidence that the Minister bargained directly or indirectly for votes, the result might have been different. .....It was therefore necessary for the appellant to plead and prove that there was bargaining between the respondent and the voters."

13. From the decisions noticed above the legal position that emerges is that if grants etc, or projects etc, are doled out on the eve of the election, after the filing of nomination, by way of a bargain for votes then it may amount to a corrupt practice. Otherwise also, it is not considered appropriate and has been termed an evil practice. But, whether it dons the character of a corrupt practice is to be determined on the weight of evidence brought on record. Ordinarily, though, completion of pending work projects does not, in absence of anything else, amount to any gift or promise to voters as has been held in **Dhartipakar Madan Lal Agarwal v. Rajeev Gandhi's case (supra)** and, in absence of foundational plea of a corrupt practice, the election petition may be rejected under Order VII Rule 11 CPC. Further, as held in **Dhartipakar Madan Lal Agarwal v. Rajeev Gandhi's case (supra)**, an electoral promise to the voters in general to ameliorate their condition or to improve the general condition of their constituency may not by itself amount to a corrupt practice.

14. The judgment of the Supreme Court in **Mohan Singh V. Bhanwarlal & Ors (supra)** cited by Sri Shivam Yadav does not apply at all to the facts of the case as there the promise was for a job. Hence, I do not propose to discuss the said judgment.

15. Having noticed the legal position, what is to be determined, now, is whether the averments made in the election petition refer to a bargain for votes or they are just with regard to completion of pending projects. On a perusal of the averments made in the election petition, the relevant portion of which has already been extracted above, it transpires that the works were promised after filing of nomination and, after taking promise from the voters that if they vote for him (i.e. the returned candidate) the work would be done, the works were completed before the polling date. Thus, according to the allegations, a bargain for votes was struck which, if proved, would amount to a corrupt practice as contemplated in sub-section (1) of section 123 of the 1951 Act. The argument that the returned candidate had been the sitting Member of the Legislative Assembly and had a duty towards the constituency; and that his son was a President of Zila Panchayat having its own obligations to the public therefore the alleged promises/ execution of work per se, would not amount to corrupt practices is a matter to be examined on the weight of the evidence led by the parties. At this stage, while addressing the prayer to reject the petition under Order VII Rule 11 CPC only the allegations made in the petition are to be considered. In the instant case, there is nothing in the election petition to suggest that the work carried out was sanctioned from before; and that it was completed as a matter of course as was the case in **Dhartipakar Madan Lal Agarwal v. Rajeev Gandhi's case (supra)**. No doubt, on behalf of returned candidate, it has been argued that from the averments it could be gathered that the Zila Panchayat carried out the work but there is nothing in the election petition to suggest that it was part of a sanctioned project of the Zila Panchayat. Therefore, in my view, whether the work projects promised /completed /executed were by way of a bargain to induce voters to vote for the returned candidate or an exercise to complete projects already undertaken by the Zila Panchayat in ordinary course of its business is a matter of evidence and no definite opinion with

regard thereto can be formed at this stage while addressing the prayer to reject the election petition under Order VII Rule 11 CPC. I am therefore of the considered view that the prayer to reject the election petition under Order VII Rule 11 CPC is liable to be rejected.

16. Accordingly, the application under Order VII Rule 11 CPC is dismissed. Let the matter be listed on 24.11.2021 for framing of issues.

(2021)11ILR A171
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.10.2021

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE BRIJ RAJ SINGH, J.

Government Appeal No. 31 of 2020

State of U.P. ...Appellant
Versus
Salim ...Respondent

Counsel for the Appellant:
A.G.A.

Counsel for the Respondent:

A. Criminal Law - Code of Criminal Procedure, 1973-Section 378(3) - Indian Penal Code, 1860-Sections 302, 120-B-challenge to-acquittal-accused was not named in the FIR, his name surfaced later during investigation-Testimony of PW2 cannot be relied as a person cannot be visible from a distance of 100 meters-PW-5 & PW-6 were declared hostile-ingredients of the offence of section 120-B IPC is not made out as no credible or circumstantial evidence has been proved-no evidence to show that the accused had in any manner agreed, aided or conspired in execution of the offence-finding of trial court is just and proper.(Para 1 to 14)

B. In order to constitute conspiracy, meeting of mind of two or more persons to do an illegal act or an act by illegal means is a must. in other words, their presence and participation in such meeting alone is sufficient. (Para 9 to 11)
The appeal is dismissed. (E-6)

List of Cases cited:

1. Bilal Hajar @ Abdul Hameed Vs. St.(2019) 17 SCC 451
2. Major E.G. Barsay Vs St. of Bom.(1962) 2 SCR 195
3. Baldev Singh Vs. St. of Punj.(2009) 6 SCC 564
4. Sharad Birdhichand Sarda Vs. St. of Mah.(1984) 4 SCC 116
5. Shivaji Sahabrao Bobade Vs. St. of Mah.(1973) 2 SCC 793

(Delivered by Hon'ble Suneet Kumar, J.
&
Hon'ble Brij Raj Singh, J.)

1. Heard learned A.G.A. and perused the lower court record.

2. The instant appeal is directed against the judgment and order dated 28.09.2019, passed by the Additional Sessions Judge, Court No. 5, Bulandshahar in Sessions Trial No. 339 of 1996 (State vs. Salim), acquitting the accused respondent, under Sections 302, 120B IPC, Police Station Sikandrabad, District Bulandshahar.

3. The facts and circumstances giving rise to the instant appeal is that on 23..05.1995 at about 10:00 A.M. accused Mohd. Ragib and Irfan came to the shop and quarreled with Muzib Urrehman, uncle of the informant, Irfan Ahmad, over outstanding dues. In the evening at about 7:00 P.M. uncle of the informant and informant after closing the shop, while returning home, were intercepted by Mohd. Ragib, Irfan and Rizwan. Accused Irfan stabbed uncle (Muzib Urrehman) while Rizwan was holding his hand.

A report came to be lodged by informant Irfan Ahmad under Section 307 IPC at about 19:50 hours. The deceased Muzib Urrehman succumbed to the injury. After investigation, a report (charge sheet) came to be filed under Section 302, 120B and 114 IPC. Accused Rakib and Rizwan died during trial in 1999 and 1996 respectively, accordingly, trial abated against them. Accused Irfan on the date of incident was aged about 16 years, consequently, matter was referred to the Juvenile Justice Board on 15.09.1997. Accused Salim was summoned to face the trial. Charge under Section 302 read with 120B IPC was framed against him. He denied the charge and sought trial. Accused was not named in the F.I.R., his name surfaced during trial as being conspirator to the crime. The prosecution to prove the charge examined PW-1 Irfan Ahmad, PW-2 Ibrahim, PW-3 Dr. Rajiv Kumar Gupta, PW-4 Dr. S. Kant Sharma, PW-5 Sarfaraz, PW-6 Rais Ahmad, PW-7 Retired Deputy Inspector Trilok Chand and PW-8 Police Inspector Jaswant Singh.

4. After the evidence of prosecution, accused recorded statement under Section 313 Cr.P.C. denying the charge. He further stated that he has been falsely implicated due to party bandi. Primarily the allegation against the accused respondent is that of conspirator, conspiring with the other accused in commission of the offence.

5. Irfan Ahmad, (PW-1) in cross examination stated that he had not seen accused Salim on the spot but he was subsequently informed that he was waiting in a Maruti vehicle about 100 meter from the place of incident. PW-2 claiming to be eye-witness stated that incident occurred 60-70 yards from the crossing where vehicle was parked. He stated that after commission of the offence, the accused fled towards the crossing where accused Salim was standing outside the vehicle. In cross examination, he, however, stated that he had seen accused Salim sitting in the vehicle. Sarfaraz (PW.-5) stated that about 7:00 P.M. he was in the market where he met Rais Ahmad (PW-6) who had come to purchase milk and they entered into a conversation. He further stated that vehicle was standing and accused Salim was sitting in the vehicle. In contradiction to the statement of PW-5, PW-6 stated that he had not gone to the market on the date of incident to purchase milk and accused Salim is not known to him. As per site plan (Ex.-4), place of incident is approximately 100 meters away from where the vehicle was parked at the crossing. As per statement of Ibrahim (PW-2), after the incident of stabbing accused fled towards the vehicle which was standing 60-70 yards from the place of the incident, he followed the accused 10-5 steps, thereafter, stopped. It is then he saw accused Salim standing outside the vehicle. In contradiction to the statement of PW-2, Sarfaraz (PW-5) who was in the market on the date of incident stated that he saw Salim sitting in the vehicle. Testimony of PW-2 was not relied upon being contrary and improbable as a person cannot be visible or identified from a distance. As per the site plan, distance of market from place of incident is 100 meters. PW-5 & PW-6 were declared hostile. Presence of the accused at the place of occurrence has not been proved beyond reasonable doubt.

6. Taking the case of prosecution that accused was present at the vehicle, ingredients of the offence of Section 120-B IPC is not made out as no credible or circumstantial evidence has been proved or shown by the prosecution to link the accused in conspiring with the other accused in commission of the offence. There is no evidence direct or circumstantial to show that the accused had in any manner agreed, aided or conspired in execution of the offence. The mere presence of the accused at a distance of 100 yards, and the accused running towards the vehicle after commission of the crime is not sufficient to bring home the charge of

conspiracy beyond reasonable doubt against the accused-respondent. The presence of the accused was not proved, he was not named in the F.I.R., his name surfaced later during investigation.

7. Supreme Court in ***Bilal Hajar alias Abdul Hameed v. State1,*** considered the factors that must be present to constitute an offence under Section 120B IPC :

"30. Reading of Section 120A and Section 120B, IPC makes it clear that an offence of "criminal conspiracy" is a separate and distinct offence. Therefore, in order to constitute a criminal conspiracy and to attract its rigor, two factors must be present in the case on facts: first, involvement of more than one person and second, an agreement between/among such persons to do or causing to be done an illegal act or an act which is not illegal but is done or causing to be done by illegal means.

8. The expression "criminal conspiracy" was aptly explained by this Court in a case reported in ***Major E.G. Barsay vs. State of Bombay2***. Learned Judge Subba Rao (as His Lordship then was and later became CJI) speaking for the Bench in his distinctive style of writing said:

"31..... The gist of the offence is an agreement to break the law. The parties to such an agreement will be guilty of criminal conspiracy, though the illegal act agreed to be done has not been done. So too, it is not an ingredient of the offence that all the parties should agree to do a single illegal act. It may comprise the commission of a number of acts."

9. Therefore, in order to constitute a conspiracy, meeting of mind of two or more persons to do an illegal act or an act by illegal means is a must. In other words, it is sine qua non for invoking the plea of conspiracy against the accused. However, it is not necessary that all the conspirators must know each and every detail of the conspiracy, which is being hatched and nor it is necessary to prove their active part/role in such meeting.

10. In other words, their presence and participation in such meeting alone is sufficient. It is well known that a criminal conspiracy is always hatched in secrecy and is never an open affair to anyone much less to public at large.

11. It is for this reason, its existence coupled with the object for which it was hatched has to be gathered on the basis of circumstantial evidence, such as conduct of the conspirators, the chain of circumstances leading to holding of such meeting till the commission of offence by applying the principle applicable for appreciating the circumstantial evidence for holding the accused guilty for commission of an offence. (See also ***Baldev Singh vs. State of Punjab3.***

12. Supreme Court in a decision rendered in ***Sharad Birdhichand Sarda Vs. State of Maharashtra4*** held as follows:

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

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

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in ***Shivaji Sahabrao Bobade v. State of Maharashtra5*** where the observations were made:

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

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

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

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

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

13. Considering the inconsistency, improvement, contradiction and also the fact that essential ingredients to constitute the offence charged against the accused is not found to be proved beyond reasonable doubt, we are of the view that the view taken by the trial court is a possible view.

14. In view thereof, application (Leave to Appeal) is rejected. Consequently, government appeal is also dismissed.

(2021)11ILR A174
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.10.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

Government Appeal No. 149 of 2020

State of U.P. ...Appellant

Versus

Sachin ...Respondent

Counsel for the Appellant:
A.G.A.

Counsel for the Respondent:

A. Criminal Law - Code of Criminal Procedure, 1973-Section 378(3) & Indian Penal Code, 1860-Sections 376, 452-challenge to-acquittal-statement of prosecutrix is self contradictory-PW4 doctor found no injury on the private part of the prosecutrix-as per pathological report, no spermatozoa was found-hair and piece of nail of prosecutrix was sent for DNA examination, but no such DNA-test-report was produced-accused was handicapped by one leg, while prosecution version states that on making hue and cry by prosecutrix, accused fled away by jumping the wall of her house-findings recorded by court below is absolutely just and proper-no illegality has been committed by court-below.(Para 1 to 20)

B. It is a settled legal position that in acquittal appeal, the appellate court is not required to rewrite the judgment or to give fresh reasoning, when the reasons assigned by the court below are found to be just and proper. (Para 14)

The appeal is dismissed. (E-6)

List of Cases cited:

1. M. S. Narayana Menon @ Mani Vs. St. of Ker. & anr.,(2006) 6 SCC 39

2. Chandrappa Vs. St. of Kan. (2007) 4 SCC 415

3. St. of Goa Vs. Sanjay Thakran & anr. (2007) 3 SCC 75

4. St. of U.P. Vs. Ram Veer Singh & ors. (2007) AIR SCW 5553

5. Girja Prasad (Dead) By LRs Vs St. of MP (2007) AIR SCW 5589

6. Luna Ram Vs. Bhupat Singh & ors.(2009) SCC 749

7. Mookkiah & anr. Vs. St. rep. by the Inspector of Police, T.N. (2013) AIR SC 321

8. St. of Karnataka Vs. Hemareddy (1981) AIR SC 1417

9. The St. of Guj. Vs B.L. Dave (2021) 2 SCC 735
10. Umedbhai Jadavbhai Vs. St. of Guj.(1978) 1 SCC 228

(Delivered by Hon'ble Ajai Tyagi, J.)

1. This appeal under Section 378 (3) Cr.P.C. has been preferred by the State against the judgment and order of acquittal dated 18.2.2020, passed by learned Additional Sessions Judge/Fast Track Court-II, Gautambudh Nagar, in S.T. No.69 of 2016 arising out of Case Crime No.199 of 2015 under Sections 452, 376 IPC, Police Station-Jarcha, District-Gautambudh Nagar, whereby the respondent-original accused has been acquitted of all the charges levelled against him.

2. The brief facts of the prosecution case are that a first information report was lodged at Police Station-Jarcha by Sube Singh, husband of the prosecutrix, stating that on 14.8.2015, he had gone to school where he was teacher. At about 11:30 am, his neighbor Sachin (accused/respondent) entered his house where his wife was alone. On the pointing out of knife, Sachin threatened his wife and by molesting, tried to rape her and on making hue and cry by his wife, Sachin fled away by giving life threat to her.

3. A case crime bearing No.199 of 2015 was registered at the police station under Sections 452, 376 IPC against accused Sachin. Investigating Officer recorded statement of prosecutrix and other witnesses under Section 161 Cr.P.C. and prepared site-plan. The statement of prosecutrix was also recorded under Section 164 Cr.P.C. before competent Magistrate and she was also medically examined. On completion of investigation, the Investigating Officer submitted charge-sheet under Sections 452, 376 IPC.

4. The case was triable exclusively by the court of sessions, therefore, it was committed to the court of sessions for trial. The trial-court framed charges against the accused under Sections 452, 376 IPC. The accused pleaded not guilty and claimed to be tried. After recording the evidence, the court-below acquitted the respondent of all the charges vide impugned judgment and order dated 18.2.2020. Hence, this appeal.

5. Heard Ms.Alpana Singh, learned AGA appearing on behalf of State of UP and perused the record.

6. Learned AGA submitted that the trial-court has committed grave error while acquitting the respondent/accused since there was sufficient evidence on record to connect the accused with the crime; learned trial-court has failed to appreciate the evidence in right perspective. She has also submitted that evidence on record is enough to lead the conviction of the respondent because the prosecutrix has supported the prosecution version in her statement under Section 161 Cr.P.C. as well as under Section 164 Cr.P.C. and even she has supported the prosecution case before learned trial-court, but the trial-court failed to give correct appreciation of evidence and wrongly acquitted the accused-respondent.

7. At the outset, it is required to be noted that the principles, which would govern and regulate the hearing of appeal by this Court, against an order of acquittal passed by the trial-court, have been very succinctly explained by the Apex Court in a catena of decisions. In the case of ***M.S.Narayana Menon @ Mani vs. State of Kerala & Another,*** [(2006) 6 SCC 39], the Apex Court has narrated the powers of High Court in appeal against the order of acquittal. In

paragraph-54 of the decision, the Apex Court has observed as under:

"54. In any event, the High Court entertained an appeal treating to be an appeal against acquittal, it was in fact exercising the revisional jurisdiction. Even while exercising an appellate power against a judgment of acquittal, the High Court should have borne in mind the well-settled principles of law that where two views are possible, the appellate court should not interfere with the finding of acquittal recorded by the court-below."

8. Further, in the case of ***Chandrappa vs. State of Kanataka*** [(2007) 4 SCC 415], the Apex Court laid down the following principles:

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973, puts no limitation, restriction or condition on exercise of such power and and appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", etc. are not intended to curtain extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasis the reluctance of an appellate curt to interfere with acquittal than to curtain the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial-court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial-court."

9. Thus, it is a settled principle that while exercising appellate power, even if two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial-court.

10. Even in the case of ***State of Goa vs. Sanjay Thakran & Anr. [(2007) 3 SCC 75]***, the Apex Court has reiterated the powers of the High Court in such cases. In paragraph-16 of the said decision, the Court has observed as under:

"16. From the aforesaid decisions, it is apparent that while exercising the powers in appeal against the order of acquittal the Court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the court of appeal would not take the view which would upset the judgment delivered by the court-below. However, the appellate court has a power to review the evidence it fit is of the view that the conclusion arrived at by the court-below is perverse and the court has committed a manifest error of law and ignored the material evidence on record. A duty is case

upon the appellate court, in such circumstances, to reappreciate the evidence to arrive to a just decision on the basis of material placed on record to find out whether any of the accused is connected with the commission of the crime he is charged with."

11. Similar principle has been laid down by the Apex Court in the cases of ***State of Uttar Pradesh vs. Ram Veer Singh & others,*** [2007 AIR SCW 5553] and in ***Girja Prasad (Dead) by LRs vs. State of MP*** [2007 AIR SCW 5589]. Thus, the powers, which this Court may exercise against an order of acquittal are well settled.

12. In the case of ***Luna Ram vs. Bhupat Singh and others*** [(2009) SCC 749], the Apex Court in paragraphs-10 & 11 has held as under :

"10. The High Court has noted that the prosecution version was not clearly believable. Some of the so called eye-witnesses stated that the deceased died because his ankle was twisted by an accused. Others said that he was strangulated. It was the case of the prosecution that the injured witnesses were thrown out of the bus. The doctor who conducted the postmortem and examined the witnesses had categorically stated that it was not possible that somebody would throw a person out of the bus when it was in running condition.

11. Considering the parameters of appeal against the judgment of acquittal, we are not inclined to interfere in this appeal. The view of the High Court cannot be termed to be perverse and is a possible view on the evidence."

13. Even in a recent decision of the Apex Court in the case of ***Mookkiah and Anr. vs. State, represented by the Inspector of Police, Tamil Nadu*** [AIR 2013 SC 321], the Apex Court in paragraph-4 has held as under :

"4. It is not in dispute that the trial-court, on appreciation of oral and documentary evidence led in by the prosecution and defence, acquitted the accused in respect of the charges leveled against them. On appeal by the State, the High Court, by impugned order, reversed the said decision and convicted the accused under Section 302 read with Section 34 of IPC and awarded RI for life. Since counsel for the appellants very much emphasized that the High Court has exceeded its jurisdiction in upsetting the order of acquittal into conviction, let us analyze the scope and power of the High Court in an appeal filed against the order of acquittal. This Court in a series of decisions has repeatedly laid down that as the first appellate court, the High Court, even while dealing with an appeal against acquittal, was also entitled, and obliged as well, to scan through and if need be re-appreciate the entire evidence, though while choosing to interfere only the court should find an absolute assurance of the guilt on the basis of the evidence on record and not merely because the High Court could take one more possible or a different view only. Except the above, where the matter of the extent and depth of consideration of the appeal is concerned, no distinction or differences in approach are envisaged in dealing with an appeal as such merely because one was against conviction or the other against an acquittal [Vide State of Rajasthan vs. Sohan Lal and others (2004) 5 SCC 573]."

14. It is also a settled legal position that in acquittal appeal, the appellate court is not required to rewrite the judgment or to give fresh reasoning, when the reasons assigned by the court-below are found to be just and proper. Such principle is laid down by the Apex Court in the case of ***State of Kanataka vs. Hemareddy*** [AIR 1981 SC 1417], wherein it is held as under :

"... This Court has observed in Girija Nandini Devi vs. Bigendra Nandini Choudhary [(1967) 1 SCR 93 : AIR 1967 SC 1124] that it is

not the duty of the appellate court on the evidence to repeat the narration of the evidence or to reiterate the reasons given by the trial-court expression of general agreement with the reasons given by the court the decision of which is under appeal, will ordinarily suffice."

15. Thus, in case, the appellate court agrees with the reasons and the opinion given by the lower court, then the discussion of evidence is not necessary.

16. We have gone through the judgment and order passed by learned trial-court as well as perused the evidence on record and considered the submissions made by learned AGA. In this case, first information report is written and lodged by Sube Singh, husband of the prosecutrix, in which it is said that the accused, on the date of occurrence, entered the house of prosecutrix and threatened her on the point of knife. It is further submitted that the accused molested the complainant's wife and tried to commit rape with her. First information report was lodged under Sections 452 and 376/511 IPC because as per the prosecution case, accused only tried to commit rape, but later on, the prosecutrix stated in her statements that accused succeeded in committing rape. In the light of circumstances above, the report of medical examination becomes more relevant and important. Medical examination of prosecutrix was conducted by medical officer. This report does not support the version of prosecutrix. Dr.Anshu Gupta, the doctor, who conducted the medical examination, is examined as PW4. She has stated in her oral testimony that at the time of medical examination of the prosecutrix, she did not find any mark of injury on the private-parts of the prosecutrix. Her hymen was old torn. It is also stated in her evidence that vaginal smear was collected for the examination of spermatozoa, but as per the pathological report, no spermatozoa was found. As per statement of the doctor (PW4), hair and piece of nail of prosecutrix was sent for DNA examination, but no such DNA test-report is produced by prosecution on record. Learned AGA also admitted the fact that DNA test-report was not filed. It is admitted case that prosecutrix was married-lady of 30 years at the time of said occurrence and having two children. It is also admitted case that the accused was handicapped by one leg because prosecution story is that on making hue and cry by prosecutrix, accused fled away by jumping the wall of her house. Learned trial-court very elaborately considered and appreciated the evidence on record.

17. Recently, the Apex Court in ***The State of Gujarat vs. B.L. Dave*** *[(2021) 2 SCC 735]* has held that High Court, being first appellate court, is required to re-appreciate entire evidence on record and reasonings given by the trial court have also required to be looked into. The decision of ***Umedbhai Jadavbhai vs. State of Gujarat*** *[(1978) 1 SCC 228]* is also considered by us. In this case, the trial court has acquitted the accused and on perusal of impugned judgment and order of acquittal, passed by the learned trial judge, we find that the decision is based on totality of the facts and circumstances. There is no ignoring of settled legal position by the learned trial judge. The approach of the trial court in dealing with the evidence was absolutely legal and cannot be said to have led to miscarriage of justice. We are of the opinion that the order passed by learned trial court does not require any interference.

18. More so, learned AGA was not in a position to show any evidence to take a contrary view in the matter that the accused had committed offence as alleged against him. The ingredients of said offence were also held not to be proved on the touchstone of the judgments on which the learned Judge placed reliance.

19. In such view of the matter, we are of the considered view that the findings recorded

by the court-below are absolutely just and proper and while recording the said findings, no illegality or infirmity has been committed by court-below. We are also in complete agreement with the reasoning and the findings arrived at by the learned trial-court. Therefore, we hold that the learned trial Judge has not committed any error, which requires interference by this Court under Section 378 (3) of the Criminal Procedure Code.

20. The appeal is **dismissed,** accordingly.

(2021)11ILR A179
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.10.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

Government Appeal No. 198 of 2020

State of U.P. ...Appellant
Versus
Anil Kumar Jaiswal ...Respondent

Counsel for the Appellant:
A.G.A.

Counsel for the Respondent:

A. Criminal Law - Code of Criminal Procedure, 1973-Section 378(3) - Indian Penal Code, 1860-Sections 376, 504, 506-challenge to-acquittal-delay in FIR-testimony of prosecutrix cannot be believed as the door was open and her children were there, accused was there for 20 to 25 minutes, but she could not shouted-as per medical evidence there was no internal injuries and the spermatozoa which belong to the accused was not present in the vaginal swab-Learned session judge rightly adjudged the matter.(Para 1 to 22)

B. There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. if two views are possible, one pointing to the guilt of accused and the other to his innocence, the view which is favourable to the accused should be adopted. (Para 9 to 17)

The appeal is dismissed. (E-6)

List of Cases cited:

1. M. S. Narayana Menon @ Mani Vs. St. of Ker. & anr. (2006) 6 SCC 39

2. Chandrappa Vs. St. of Kanataka (2007) 4 SSC 415

3. St. of Goa Vs. Sanjay Thakran & anr.. (2007) 3 SCC 75

4. St. of U.P. Vs. Ram Veer Singh & ors. (2007) AIR SCW 5553

5. Girja Prasad (Dead) By LRs Vs. St. of M.P. (2007) AIR SCW 5589

6. Luna Ram Vs. Bhupat Singh & ors. (2009) SCC 749

7. Mookkiah & anr. Vs. St. rep. by the inspector of Police , Tamil Nadu,(2013) AIR SC 321

8. St. of Kan. Vs Hemareddy (1981) AIR SC 1417

9. Shivsharanappa & ors. Vs. St. of Karn. (2013) 7 JT SC 66

10. St. of Punj. Vs. Madan Mohan Lal Verma (2013) 14 SCC 153

11. Jayaswamy Vs. St. of Karn. (2018) 7 SCC 219

12. Shailendra Rajdev Pasvan Vs. St. of Guj. (2020) 14 SC 750

13. Samsul Haque Vs. St. of Assam (2019) 18 SCC 16

14. Ravindra Mahto Vs. St. of Jharkhand (2006) 54 ACC 543 SC

15. Ravi Kumar Vs. St. of Punj. (2005) 02 ACJ 505

(Delivered by Hon'ble Ajai Tyagi, J.)

1. Heard learned A.G.A. for the State and perused the record.

2. This appeal under Section 378 (3) of Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.'), at the behest of the State, has been preferred against the judgment and order dated 29.02.2020 passed by learned Additional Sessions Judge/F.T.C., Varanasi acquitting accused-respondent who have been tried for commission of offence under Sections 376, 504 & 506 of Indian Penal Code, 1860 (hereinafter referred to as 'IPC').

3. Brief facts as culled out from the record are that on 6.2.2014 the prosecutrix was alone at her home and at about 9.00 p.m., when the children were sleeping, the accused who was known to the family entered the house, closed the door from inside and had sexual intercourse with the prosecutrix against her will. The prosecutrix tried to lodge complaint on 10.2.2021 but the police did not record the same and, therefore, on 10.2.2021 she moved concerned Magisterial Court who directed investigation under Section 156 (3) of Cr.P.C. The First Information Report was lodged as 114 of 2014 on 21.3.2014.

4. The accused was nabbed and on 8.7.2015, the case was committed to the Court of Sessions. The prosecution examined about five witnesses. P.W.1 was the prosecutrix, P.W.2 was Ram Lal, Sub Inspector, P.W.3 was Ramesh Yadav, P.W.4 was Mohd. Alamgir & P.W.5 was Dr. Sakshi Gupta who medically examined the prosecutrix. The prosecution relied on eight documents which are sought to be proved by the oral testimony of the witnesses. After the prosecution evidence was completed, the accused was put to question under Section 313 of Cr.P.C. and accept stating that he was falsely implicated and no such incident had occurred, the accused did not lead any evidence nor he examined any witness.

5. The learned Sessions Judge raised two points of determination namely; (a) whether the First Information Report was belated & (b) whether the victim was forced to enter into sexual intercourse against her will and wish.

6. Before we embark on testimony and the judgment of the Court below, the contours for interfering in Criminal Appeals where accused has been held to be non guilty would require to be discussed.

7. The principles which would govern and regulate the hearing of an appeal by this Court, against an order of acquittal passed by the trial Court, have been very succinctly explained by the Apex Court in catena of decisions. In the case of **"M.S. NARAYANA MENON @ MANI VS. STATE OF KERALA & ANR", (2006) 6 S.C.C. 39,** the Apex Court has narrated the powers of the High Court in appeal against the order of acquittal. In para 54 of the decision, the Apex Court has observed as under:

"54. In any event the High Court entertained an appeal treating to be an appeal against acquittal, it was in fact exercising the revisional jurisdiction. Even while exercising an appellate power against a judgment of acquittal, the High Court should have borne in mind the well settled principles of law that where two view are possible, the appellate Court should not interfere with the finding of acquittal recorded by the Court below."

8. Further, in the case of **"CHANDRAPPA Vs. STATE OF KARNATAKA",** reported in (2007) 4 S.C.C. 415, the Apex Court laid down the following principles;

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate Court while dealing with an appeal against an order of acquittal emerge:

[1] An appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

[2] The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

[3] Various expressions, such as,"substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtain extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasis the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

[4] An appellate Court, however, must bear in mind that in case of acquittal there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent Court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.

[5] If two reasonable conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court."

9. Thus, it is a settled principle that while exercising appellate powers, even if two reasonable views/conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court.

10. Even in the case of **"STATE OF GOA Vs. SANJAY THAKRAN & ANR.",** reported in **(2007) 3 S.C.C. 75,** the Apex Court has reiterated the powers of the High Court in such cases. In para 16 of the said decision, the Court has observed as under:

"16. From the aforesaid decisions, it is apparent that while exercising the powers in appeal against the order of acquittal the Court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower Court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the Court of appeal would not take the view which would upset the judgment delivered by the Court below. However, the appellate Court has a power to review the evidence if it is of the view that the conclusion arrived at by the Court below is perverse and the Court has committed a manifest error of law and ignored the material evidence on record. A duty is cast upon the appellate Court, in such circumstances, to re-appreciate the evidence to arrive to a just decision on the basis of material placed on record to find out whether any of the accused is connected with the commission of the crime he is charged with."

11. Similar principle has been laid down by the Apex Court in cases of **"STATE OF UTTAR PRADESH VS. RAM VEER SINGH & ORS.", 2007 A.I.R. S.C.W. 5553** and in **"GIRJA PRASAD (DEAD) BY L.R.s VS. STATE OF MP"**, 2007 A.I.R. S.C.W. 5589.

Thus, the powers, which this Court may exercise against an order of acquittal, are well settled.

12. In the case of **"LUNA RAM VS. BHUPAT SINGH AND ORS.",** reported in **(2009) SCC 749,** the Apex Court in para 10 and 11 has held as under:

"10. The High Court has noted that the prosecution version was not clearly believable. Some of the so called eye witnesses stated that the deceased died because his ankle was twisted by an accused. Others said that he was strangulated. It was the case of the prosecution that the injured witnesses were thrown out of the bus. The doctor who conducted the postmortem and examined the witnesses had categorically stated that it was not possible that somebody would throw a person out of the bus when it was in running condition.

11. Considering the parameters of appeal against the judgment of acquittal, we are not inclined to interfere in this appeal. The view of the High Court cannot be termed to be perverse and is a possible view on the evidence."

13. Even in a recent decision of the Apex Court in the case of **"MOOKKIAH AND ANR. VS. STATE, REP. BY THE INSPECTOR OF POLICE, TAMIL NADU",** reported in AIR 2013 SC 321, the Apex Court in para 4 has held as under:

"4. It is not in dispute that the trial Court, on appreciation of oral and documentary evidence led in by the prosecution and defence, acquitted the accused in respect of the charges leveled against them. On appeal by the State, the High Court, by impugned order, reversed the said decision and convicted the accused under Section 302 read with Section 34 of IPC and awarded RI for life. Since counsel for the appellants very much emphasized that the High Court has exceeded its jurisdiction in upsetting the order of acquittal into conviction, let us analyze the scope and power of the High Court in an appeal filed against the order of acquittal. This Court in a series of decisions has repeatedly laid down that as the first appellate court the High Court, even while dealing with an appeal against acquittal, was also entitled, and obliged as well, to scan through and if need be reappreciate the entire evidence, though while hoosing to interfere only the court should find an absolute assurance of the guilt on the basis of the evidence on record and not merely because the High Court could take one more possible or a different view only. Except the above, where the matter of the extent and depth of consideration of the appeal is concerned, no distinctions or differences in approach are envisaged in dealing with an appeal as such merely because one was against conviction or the other against an acquittal. [Vide State of Rajasthan vs. Sohan Lal and Others, (2004) 5 SCC 573]"

14. It is also a settled legal position that in acquittal appeals, the appellate Court is not required to rewrite the judgment or to give fresh reasonings, when the reasons assigned by the Court below are found to be just and proper. Such principle is laid down by the Apex Court in the case of **"STATE OF KARNATAKA VS. HEMAREDDY", AIR 1981, SC 1417,** wherein it is held as under:

"...This Court has observed in Girija Nandini Devi V. Bigendra Nandini Choudhary (1967) 1 SCR 93:(AIR 1967 SC 1124) that it is not the duty of the Appellate Court on the evidence to repeat the narration of the evidence or to reiterate the reasons given by the trial Court expression of general agreement with the reasons given by the Court the decision of which is under appeal, will ordinarily suffice."

15. In a recent decision, the Hon'ble Apex Court in **"SHIVASHARANAPPA & ORS. VS.**

STATE OF KARNATAKA", JT 2013 (7) SC 66 has held as under:

"That appellate Court is empowered to reappreciate the entire evidence, though, certain other principles are also to be adhered to and it has to be kept in mind that acquittal results into double presumption of innocence."

16. Further, in the case of **"STATE OF PUNJAB VS. MADAN MOHAN LAL VERMA", (2013) 14 SCC 153,** the Apex Court has held as under:

"The law on the issue is well settled that demand of illegal gratification is sine qua non for constituting an offence under the 1988 Act. Mere recovery of tainted money is not sufficient to convict the accused when substantive evidence in the case is not reliable, unless there is evidence to prove payment of bribe or to show that the money was taken voluntarily as a bribe. Mere receipt of the amount by the accused is not sufficient to fasten guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification. Hence, the burden rests on the accused to displace the statutory presumption raised under Section 20 of the 1988 Act, by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in Section 7 of the 1988 Act. While invoking the provisions of Section 20 of the Act, the court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt. However, before the accused is called upon to explain how the amount in question was found in his possession, the foundational facts must be established by the prosecution. The complainant is an interested and partisan witness concerned with the success of the trap and his evidence must be tested in the same way as that of any other interested witness. In a proper case, the court may look for independent corroboration before convincing the accused person."

17. The Apex Court recently in **Jayaswamy vs. State of Karnataka, (2018) 7 SCC 219,** has laid down the principles for laying down the powers of appellate court in re-appreciating the evidence in a case where the State has preferred an appeal against acquittal, which read as follows:

"10.It is by now well settled that the Appellate Court hearing the appeal filed against the judgment and order of acquittal will not overrule or otherwise disturb the Trial Court's acquittal if the Appellate Court does not find substantial and compelling reasons for doing so. If the Trial Court's conclusion with regard to the facts is palpably wrong; if the Trial Court's decision was based on erroneous view of law; if the Trial Court's judgment is likely to result in grave miscarriage of justice; if the entire approach of the Trial Court in dealing with the evidence was patently illegal; if the Trial Court judgment was manifestly unjust and unreasonable; and if the Trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of the ballistic expert etc. the same may be construed as substantial and compelling reasons and the first appellate court may interfere in the order of acquittl. However, if the view taken by the Trial Court while acquitting the accused is one of the possible views under the facts and circumstances of the case, the Appellate Court generally will not interfere with the order of acquittal particularly in the absence of the aforementioned factors.

.It is relevant to note the observations of this Court in the case of Ramanand Yadav vs.

Prabhu Nath Jha & Ors., (2003) 12 SCC 606, which reads thus:

"21.There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to re-appreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not."

18. The Apex Court recently in ***Shailendra Rajdev Pasvan v. State of Gujarat, (2020) 14 SC 750,*** has held that the appellate court is reversing the trial court's order of acquittal, it should give proper weight and consideration to the presumption of innocence in favour of accused, and to the principle that such a presumption sands reinforced, reaffirmed and strengthened by the trial court and in ***Samsul Haque v. State of Assam, (2019) 18 SCC 161*** held that judgment of acquittal, where two views are possible, should not be set aside, even if view formed by appellate court may be a more probable one, interference with acquittal can only be justified when it is based on a perverse view.

19. We have scrutinized the evidence as read by Sri N.K. Srivastava, learned A.G.A. appearing for the State who has taken us through the entire record. The whole testimony of the prosecutrix has been threadbare discussed by the learned Sessions Judge. While going through the deposition of the prosecutrix, the settled legal position of law is that she cannot be treated to be accomplish and her evidence is to be seen with non microscopic eyes. The learned Sessions Judge has threadbare discussed that the F.I.R. was not only belated but it was highly belated, namely, the incident took place on 6.2.2014 and the F.I.R. was lodged on 21.3.2014. Even if we did not agree with the learned Sessions Judge on this aspect, the second aspect would be more important for our purpose. The learned Sessions Judge has considered the the decisions in **Ravindra Mahto Vs. State of Jharkhand, 2006 (54) ACC 543 (SC) & Ravi Kumar Vs. State of Punjab, 2005 (02) ACJ 505.**

20. Learned Sessions Judge has very categorically come to the conclusion that there was no rape committed by the accused. The testimony of prosecutrix has not been believed by the learned Sessions Judge. It can be said that when the door was open, the accused was there for 20-25 minutes and her children were there, she could have started shouting. When the accused is said to have removed his trousers and went to bathroom that time also she could have raised alarm but the same was not raised.

21. The medical evidence goes to show that there was no internal injuries. The spermatozoa which belong to the accused was not present in the vaginal swab. Had it been a rape, some internal injuries could have possible.

22. Hence, in view of the matter & on the contours of the judgment of the Apex Court, we have no other option but to concur with the learned Sessions Judge. The appeal sans merits and is dismissed. The record and proceedings be sent back to the Tribunal.

23. We are thankful to Sri N.K. Srivastva, learned A.G.A. for ably assisting the Court.

(2021)11ILR A185
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 26.11.2021

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE MRS. SAROJ YADAV, J.

Misc. Single No. 4531 of 2019

Krishna Dutt Sharma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
.....

Counsel for the Respondents:
A.G.A.

A. Civil Law - The appeal is not an inherent right rather it is a creation of statute. Neither the Court nor the petitioner was able to find any provision in the policy which provides for appeal against the order passed by District Level Security Committee to any higher level committee. Therefore, no direction can be issued by this Court for decision of any such appeal. (Para 20)

Writ Petition Disposed of. (E-10)

List of Cases cited:-

1. Zufiqar Ahmad Bhuttoo Vs St. of U.P. & ors. Writ C No. 52652 of 2016

2. Akalu Ahir & ors. Vs Ramdeo Ram AIR 1973 SC 2145 *(followed)*

3. Ganga Bai Vs Vijay kumar & ors. (1974) 2 SCC 393 *(followed)*

4. Shyam Kishore & ors. Vs Municipal Corporation of Delhi AIR 1992 SC 2279 *(followed)*

5. BGS SGS Soma JV Vs NHPC Ltd. (2020) 4 SCC 234 *(followed)*

6. Manish Kumar Vs U.O.I. & ors. (2021) 5 SCC 1 *(followed)*

(Delivered by Hon'ble Rajesh Bindal, C.J.)

01. The petitioner has filed the present writ petition seeking the following reliefs:

"i) To issue order or direction thereby directing the opposite parties no. 3 to 5 to continue the police protection to the petitioner for the security of his life and property as has been provided earlier to the petitioner by the Principal Secretary, Home, U.P. Government Lucknow till the disposal of the appeal filed by the petitioner before the opposite party no. 2;

ii) To issue order or direction thereby directing the opposite party no. 2 to dispose of the petitioner's appeal which is contained in Annexure-21 to the petition."

02. When the petition was taken up for hearing on February 15, 2019, the learned counsel for the petitioner had referred to judgment of this Court in **Zulfiqar Ahmad Bhuttoo Vs. State of U.P and others (Writ-C No. 52652 of 2016)** decided on 04.11.2016 in support of his argument that his appeal filed against order passed by the District Level Committee to the Divisional Level Committee be directed to be decided. The learned Single Judge, while referring to number of judgments of Hon'ble Supreme Court, was of the opinion that the judgment in **Zulfiqar Ahmad Bhuttoo Vs. State of U.P and others' case (supra)** requires re-consideration. The following questions were framed:

"(i) Whether in terms of the Government order dated 09.05.2014, a person aggrieved by the decision of the District Level Committee has an efficacious and alternative remedy to approach the Division Level

Committee as constituted in terms of the Government order dated 09.05.2014?

(ii) Whether judgment of the Division Bench in Zulfiqar Ahmad Bhuttoo (supra) decided on 04.11.2016 can be recorded as laying down the correct principle of law as regards the Government order dated 09.05.2014?"

03. That is how the matter is listed before us.

04. The learned counsel for the petitioner submitted that when the prayer for grant of security on account of threat to his life was rejected by the District Level Security Committee on December 14, 2018, against the aforesaid rejection of his prayer, he filed appeal before Divisional Level Security Committee. However, the same is not being decided.

05. It is claimed that petitioner is a social worker assisting weaker sections of the society and is also carrying on business in the name and style of M/s M.K. Enterprises. He also contested the assembly election in the year 2012 as an independent candidate from Lucknow West constituency. On account of continuous threats received by him, he moved application for grant of security. As the request was not being considered, the petitioner filed Writ Petition (M/B) No. 16850 of 2016 wherein direction was issued for consideration of his claim. However, the same having been rejected by District Level Security Committee, he preferred appeal before the Divisional Level Security Committee. However, the same is not being considered. In support of the argument that a direction deserves to be issued to the Divisional Level Security Committee for deciding the appeal pending before it, reliance was placed upon the order passed by this Court in **Zulfiqar Ahmad Bhuttoo's case (supra)**.

06. The primary argument raised by the learned counsel for the petitioner is that once there is a hierarchy of committees provided in the policy in terms of which threat perception to a person is to be assessed, the order passed by the authority at District Level shall certainly be appealable before the higher authorities at Divisional Level and thereafter at State Level. Hence, the order earlier passed by this Court in **Zulfiqar Ahmad Bhuttoo's case (supra)** does not require reconsideration and a direction be issued to the Divisional Level Security Committee to hear and decide the appeal filed by him.

07. On the other hand, learned counsel appearing for the State submitted that the order passed by this Court in **Zulfiqar Ahmad Bhuttoo's case (supra)** does not lay down good law. The policy has been framed by Government for examining threat perception to the person seeking security at the state expense. It provides authorities at different levels for consideration of request for providing the security for different periods, namely, if the security cover is to be provided for one month, the request is to be considered at District Level. Considering the need security cover can be extended twice for a period of one month each. In case in the opinion of District Level Security Committee, the need of security still continues even after expiry of the aforesaid period of three months, the matter shall be referred to the Divisional Level Security Committee which can extend the period of security cover for a further period of three months. In case, the security cover has to be provided beyond the aforesaid period of six months, the issue has to be considered by State Level Committee. Entire policy no where provides for an appeal from an order passed by District Level Security Committee to the Divisional Level Committee or to State Level Security Committee. Right to appeal is not inherent. It is a creation of the statute. Unless it is provided in the statute, no appeal would lie.

08. Heard learned counsel for the parties and perused the paper book.

09. The matter has been referred to Larger Bench for considering the following questions:

"(i) Whether in terms of the Government order dated 09.05.2014, a person aggrieved by the decision of the District Level Committee has an efficacious and alternative remedy to approach the Division Level Committee as constituted in terms of the Government order dated 09.05.2014?

(ii) Whether judgment of the Division Bench in Zulfiqar Ahmad Bhuttoo (supra) decided on 04.11.2016 can be recorded as laying down the correct principle of law as regards the Government order dated 09.05.2014?"

10. Whether the order passed by this Court in **Zulfiqar Ahmad Bhuttoo's case (supra)** requires reconsideration is one of the prime issue. A perusal of the aforesaid order shows that the petitioner in that case approached this Court seeking quashing of an order/letter dated May 12, 2016 passed by District Level Security Committee rejecting his representation for providing security cover. One of the argument raised by learned counsel for the State was that the petitioner therein has two other forums for redressal of his grievance, i.e. Divisional Level Committee and State Level Committee. In turn, while recording the aforesaid argument, this Court directed that the petitioner, having efficacious and alternative remedy to approach Divisional Level Committee, should avail the said remedy. The relevant part of the order is extracted below:

"The State Government has issued a Government order dated 9th May, 2014 for providing security, which provides that actual threat perception should exist and that on a mere apprehension security could not be provided. Further, the background, antecedent, criminal history and misuse of security are also relevant considerations to be examined objectively while considering the application for grant of security cover and 3 tier system i.e. District level, Regional level and State level is provided for redressal of such dispute.

In view of above, we find that the petitioner has got efficacious and alternative remedy to approach Divisional Level Committee but instead of availing the said remedy the petitioner has again approached this Court by way of present writ petition. We accordingly dismiss the writ petition on the ground of alternative remedy to approach the Divisional Level Committee. "

11. The question which arises and has been referred to be considered by Larger Bench is whether the petitioner has a right of appeal in terms of the policy framed for providing security cover to any person on account of threat perception. The relevant clauses of the policy dated May 9, 2014 are reproduced hereinbelow:

"विषयः विशिष्ट महानुभावों की सुरक्षा हेतु गनर, शैड़ो एवं गार्द उपलब्ध कराये जाने के लिये प्रचलित नीति के स्थान पर नीति निर्धारित किये जाने के सम्बन्ध में।

महोदय,

उपर्युक्त विषय के सम्बन्ध में मुझे यह कहने का निर्देश हुआ है कि रिट याचिका संख्या 6509 (एमबी)/2013 (पीआईएल) डा० नूतन ठाकुर बनाम उ०प्र० राज्य व अन्य में मा० न्यायालय द्वारा पारित अन्तरिम आदेश दिनांक 02.12.2013 में मा० उच्च न्यायालय द्वारा व्यक्तियों को सुरक्षा प्रदान किये जाने के सम्बन्ध में कतिपय संवीक्षण करते हुए सुरक्षा सम्बन्धी नीति प्रतिपादित करने के आदेश पारित किये हैं। मा० उच्च न्यायालय द्वारा पारित आदेशों के परिप्रेक्ष्य में सम्यक विचारोपरान्त प्रदेश के महानुभावों को सुरक्षा प्रदान किये जाने हेतु वर्तमान में प्रचलित समस्त शासनादेशों एवं नियमों को अवक्रमित करते हुए महानुभावों को सुरक्षा प्रदान किये जाने हेतु निम्नलिखित नीति निर्धारित की जाती हैः-

(1) सुरक्षा प्रदान किये जाने के सम्बन्ध में सभी आवेदक प्रपत्र-1 पर अपना प्रार्थना पत्र सम्बन्धित जिलाधिकारी/वरिष्ठ पुलिस अधीक्षक को प्रस्तुत करेंगे।

(2) सुरक्षा प्रदान किये जाने के सम्बन्ध में आवेदकों की जीवनभय आख्या प्रपत्र-2 के अनुसार जनपदीय/मण्डलीय सुरक्षा समिति शासन को उपलब्ध करायेगी।

(3) सुरक्षा हेतु आवेदन करने पर आवेदक के जीवनभय का सही आंकलन कर जिला मजिस्ट्रेट की अध्यक्षता में गठित जनपदीय सुरक्षा समिति द्वारा सुरक्षा व्यवस्था उपलब्ध कराये जाने के सम्बन्ध में निर्णय लिया जायेगा। जिला सुरक्षा समिति में जिलाधिकारी के अतिरिक्त वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक एवं स्थानीय अभिसूचना इकाई के प्रभारी, सदस्य होंगे। जीवनभय पर आधारित सुरक्षा का औचित्य पाये जाने पर आवेदक को एक माह के लिए सुरक्षा व्यवस्था उपलब्ध करायी जायेगी। जिसे आवश्यकता पड़ने पर एक-एक माह कर दो बार बढ़ाया जा सकेगा। अर्थात कुल तीन माह तक सुरक्षा प्रदान की जा सकेगी।

(4) तीन माह से अधिक अवधि अर्थात आगामी तीन माह के लिए सुरक्षा की आवश्यकता होने पर जनपदीय सुरक्षा समिति द्वारा संबंधित व्यक्ति के जीवनभय का पुनर्मूल्याकंन, भय के स्रोतों को चिन्हित कर, जीवनभय को समाप्त किये जाने के संबंध में जनपद स्तर से की गयी कार्यवाही एवं उसके उपरान्त विद्यमान जीवनभय को दृष्टिगत रखते हुए यथोचित प्रस्ताव अपनी स्पष्ट संस्तुति सहित मण्डलीय सुरक्षा समिति के समक्ष प्रस्तुत किया जायेगा। मण्डल स्तरीय सुरक्षा समिति का गठन निम्नवित होगा-

"मण्डल स्तरीय सुरक्षा समिति"

1- मण्डलायुक्त अध्यक्ष

2- पुलिस उपमहानिरीक्षक, परिक्षेत्र सदस्य

3- पुलिस अधीक्षक, क्षेत्रीय/मण्डलाधिकारी सदस्य

विशेष शाखा, अभिसूचना विभाग

मण्डलीय सुरक्षा समिति, सम्पूर्ण तथ्यों का गहनता से आंकलन कर औचित्य पाये जाने पर संबंधित व्यक्ति को तीन माह तक सुरक्षा प्रदान कर सकेगी।

(5) जनपदीय/मण्डलीय सुरक्षा समिति द्वारा सुरक्षा दिये जाने हेतु अपने आदेश में निम्नलिखित बिन्दुओं का उल्लेख अवश्य किया जायेगाः-

- सुरक्षा कर्मियों की संख्या
- सुरक्षा प्रदत्त कराये जाने की अवधि
- सुरक्षा का व्ययभार

(6) जनपदीय सुरक्षा समिति द्वारा जिस जीवनभय के आधार पर प्रथम तीन माह हेतु सुरक्षा प्रदान की गयी है, उस जीवनभय को कम करने/अपास्त करने के लिए स्थानीय प्रशासन द्वारा प्रयास किया जायेगा।

(7) जनपद एवं मण्डल स्तर पर कुल छः माह की सुरक्षा अवधि समाप्त होने के 15 दिन पूर्व मण्डलीय सुरक्षा समिति द्वारा सम्बन्धित महानुभाव के जीवनभय का पुनर्मूल्यांकन किया जायेगा एवं जीवनभय विद्यमान होने की दशा में अपनी स्पष्ट संस्तुति सहित सुविचारित प्रस्ताव/जीवनभय आख्या शासन को विचारार्थ प्रस्तुत की जायेगी।

(8) मण्डलीय सुरक्षा समिति महानुभावों को सुरक्षा प्रदत्त कराये जाने हेतु जीवनभय आख्या, निर्धारित प्रारुप में शासन को उपलब्ध करायेगी जिस पर शासन स्तर पर निम्नवत गठित उच्च स्तरीय समिति द्वारा निर्णय लिया जायेगाः-

(अ) प्रमुख सचिव, गृह अध्यक्ष

(ब) पुलिस महानिदेशक, उ०प्र० सदस्य

(स) अपर पुलिस महानिदेशक (सुरक्षा) सदस्य

(9) प्रमुख सचिव गृह की अध्यक्षता में गठित उच्च स्तरीय समिति द्वारा मण्डल स्तरीय सुरक्षा समिति की आख्याओं का परीक्षण कर सुरक्षा दिये जाने के सम्बन्ध में निर्णय लिया जायेगा।

(10) उच्च स्तरीय समिति द्वारा मण्डलीय सुरक्षा समिति के प्रस्ताव/ जीवनभय आख्या पर विचार करते हुए अधिकतम एक बार में 6 माह की अवधि तक सुरक्षा दिये जाने पर विचार किया जायेगा। शासन स्तर से 6 माह हेतु प्रदत्त सुरक्षा अवधि पूर्ण होने पर सम्बन्धित जिलों से महानुभावों की जीवनभय आख्या

मण्डलीय सुरक्षा समिति के माध्यम से प्राप्त होने पर सुरक्षा अवधि बढ़ाये जाने का निर्णय लिया जायेगा। उच्च स्तरीय समिति द्वारा केवल उन आवेदकों को सुरक्षा देने पर विचार किया जायेगा जिनको जनपदीय व मण्डलीय स्तर पर 06 माह हेतु सुरक्षा दी जा चुकी है एवं सुरक्षा बनाये रखने हेतु मण्डलीय सुरक्षा समिति द्वारा संस्तुति की गयी हो।"

12. A perusal of various clauses of the aforesaid policy shows that any request for providing security on account of threat to life is to be considered by District Level Security Committee. It can grant security cover for a period of one month. This can be extended twice for a period of one month each. The maximum period for which the District Level Security Committee can provide security cover is three months. In case the security cover is to be provided for a period exceeding three months, the matter has to be referred to the Divisional Level Security Committee. In case the claim is found to be genuine, initially the security is to be provided for a period of three months. Fifteen days before expiry of period of six months, the threat perception to the applicant is to be assessed again by the State Level Committee on the basis of inputs received from various agencies/ authorities and at one time security cover shall be provided for a period of six months.

13. From the aforesaid clauses of the policy, it clearly emerges that the committees have been formed at different levels for providing security cover for different periods. The authorities/ committees have not been constituted in hierarchy to be appellate authority over the decision taken by lower authority. Neither we could find nor could learned counsel for the petitioner show any provision conferring right upon the petitioner to prefer an appeal against an order passed by lower level committee to a higher level committee.

14. The issue as to whether right of appeal is inherent or creation of statute is no more res integra. The issue has been resolved and set at rest by the Hon'ble Supreme Court in a catena of cases.

15. As long back as in 1973, Hon'ble the Supreme Court in **Akalu Ahir and others Vs. Ramdeo Ram AIR 1973 SC 2145** held:

"... it is necessary to bear in mind that an appeal is a creature of statute and there is no inherent right of appeal."

16. In **Ganga Bai Vs. Vijay Kumar and others (1974) 2 SCC 393,** the Court in para-15 held:

"15. It is thus clear that the appeal filed by defendants 2 and 3 in the High Court was directed originally not against any part of the preliminary decree but against mere finding recorded by the trial court that the partition was not genuine. The main controversy before us centers round the question whether that appeal was maintainable on this question the position seems to us well-established. There is a basic distinction between the right of suit and the right of appeal. There is an inherent right in every person to bring suit of a civil nature and unless the suit is barred by statute one may, at one's peril, bring a suit of one's choice. ... A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit. But the position in regard to appeals is quite the opposite. The right of appeal inheres in no one and therefore an appeal for its maintainability must have the clear authority of law. That explains why the right of appeal is described as a creature of statute." *(emphasis added)*

17. In **Shyam Kishore and others Vs. Municipal Corporation of Delhi AIR 1992 SC 2279** the Court referring to its earlier judgment

in **Ganga Bai's case (supra)**, in para 28, observed as under:

"28. In **Ganga Bai v. Vijay Kumar, (1974) 3 SCR 883: (AIR 1974 SC 1126)** Chandrachud, J. (as His Lordship then was) held that "there is a basic distinction between the right of suit and the right of appeal. There is an inherent right in every person to bring a suit of a civil nature, but the right of appeal inheres in no one and therefore an appeal for its maintainability must have the clear authority of law."

18. In **BGS SGS Soma JV Vs. NHPC Limited (2020) 4 SCC 234**, in para 15, it was observed as under:

"15. ... an appeal is a creature of statute, and must either be found within the four corners of the statute, or not be there be at all."

19. In **Manish Kumar Vs. Union of India and others (2021) 5 SCC 1** referring to its earlier decision in the Court said:

"386. In **Mardia Chemicals Ltd. and others Vs. Union of India and others (2004) 4 SCC 311** the validity of certain provisions of the SARFAESI Act, 2002, was questioned. ... this court also noted the distinction between a civil suit and an appeal ..., it is apposite that we notice the following:

"59. ... We may refer to a decision of this Court in **Ganga Bai v. Vijay Kumar (1974) 2 SCC 393** where in respect of original and appellate proceedings a distinction has been drawn as follows:

"15. ...There is a basic distinction between the right of suit and the right of appeal. There is an inherent right in every person to bring a suit of civil nature and unless the suit is barred by statute one may, at one's peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous to claim, that the law confers no such right to sue. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit. But the position in regard to appeals is quite the opposite. The right of appeal inheres in no one and therefore an appeal for its maintainability must have the clear authority of law. That explains why the right of appeal is described as a creature of statute."

20. In view of the aforesaid authoritative enunciation of law by Hon'ble the Supreme Court that the appeal is not an inherent right rather it is a creature of statute, in our opinion there being no provision in the policy for appeal against the order passed by District Level Security Committee to any higher level committee, no appeal will be maintainable and no direction can be issued for decision of any such appeal filed by the petitioner.

21. The questions referred for decision to Larger Bench, thus, are answered:

Question (i) is answered in negative holding that there is no right of appeal to any person to approach the Divisional Level Committee from any order passed by the District Level Security Committee, rejecting his request for grant of security cover.

Question (ii) is also answered in negative holding that the order passed by this Court in **Zulfiqar Ahmad Bhuttoo's (supra)** does not lay down correct law and cannot be referred to as a precedent for seeking a direction for decision of appeal with reference to the Government Order dated May 9, 2014.

22. So far as the merits of the controversy is concerned, the prayer made by the petitioner is that he may be provided security cover on account of alleged threat perception in his opinion. Once the competent authority in the Government has already examined the issue and found that there is no threat to the petitioner and

no security is required to be given at State expenses, we do not find any reason to take a different view for the reason that this Court does not have any expertise to assess the threat perception to any person. Hence, even the relief prayed for on merits is also misconceived.

23. The petition is, accordingly, disposed of.

(2021)11ILR A191
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.10.2021

BEFORE

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

Misc. Single No. 4671 of 2005

Nand Ram & Anr. ...Petitioners
Versus
District Registrar/Additional Collector, Gonda & Anr. ...Respondents

Counsel for the Petitioners:
U.S. Sahai, Indrajeet Shukla

Counsel for the Respondents:
C.S.C., Maya Ram Yadav, Ram Janak Yadav, Rishabh Tripathi, S.P. Tripathi, Shastri Prasad Tripathi

A. Civil Law - Registration Act, 1908 - Section 72 - The Court held that the Section 72 does not envisage any appeal from an order admitting a document to registration, whether the document is compulsorily registerable or optionally. There is no inherent right of appeal available to a party, merely because an Officer otherwise superior in rank to the one, who has passed the original order is available. (Para 11)

Petition Allowed. (E-10)

List of Cases cited:-

1. Binod Chandra Panigrahi @ Binod Panigrahi Vs Laxmi Narayan Panigrai & ors. 2015 SCC Online Ori 319 *(followed)*

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

Order on C.M. Application No.84166 of 2019

1. Heard learned counsel for the parties.

2. The application for impleadment is allowed.

3. Let the applicant Nos.1, 2, 3 and 4, as per particulars shown in the application be impleaded as party respondent Nos. 3, 4, 5 and 6 to the writ petition during the course of the day.

Order on the memo of petition

4. Supplementary affidavit filed today is taken on record.

5. Heard Mr. Indrajeet Shukla, learned counsel for the petitioners, Mr. Anant Pratap Singh, learned State Law Officer, appearing on behalf of respondent No.1. No one appears on behalf of respondent Nos.2/1 and 2/2. Mr. Rishab Tripathi, appears on behalf of the newly impleaded respondent Nos. 3, 4, 5 and 6. No counter affidavit has been filed by the State.

6. The short point involved in this petition is whether an order admitting a document to registration passed by the Sub-Registrar under Section 40 of the Registration Act, is amenable to appeal under Section 72(1) of the Act, last mentioned, before the Registrar. Here an order directing registration of a Will dated 02.09.1997 executed by one Babulal in favour of Nand Ram and Sant Ram, sons of Bachchu Lal, was directed to be admitted to registration vide order dated 02.09.1997, passed by the Sub-Registrar, Tarabganj, District Gonda. An appeal from the

said order was filed by respondent No.2 Smt. Birja Devi (since deceased) to the Registrar, that is to say, the Additional Collector, Gonda. The appeal preferred under Section 72 of the Registration Act was registered as Case No.58 of 2004. The appeal was heard and allowed by the impugned judgment dated 25.07.2005 setting aside the order dated 02.09.1997 passed by the Sub-Registrar. This writ petition has been preferred by the two legatees under the Will of Babulal, to wit, Nand Ram and Sant Ram, who say that the Registrar/Additional Collector, Banda had no jurisdiction to entertain an appeal under Section 72 of the Registration Act from the order of the Sub-Registrar, admitting the Will to registration.

7. It is not in dispute that the order directing the document to be admitted to registration was passed by the Sub-Registrar under Section 40 of the Registration Act.

8. Section 72 of the Registration Act reads:

"72. Appeal to Registrar from orders of Sub-Registrar refusing registration on ground other than denial of execution.--

(1) Except where the refusal is made on the ground of denial of execution, an appeal shall lie against an order of a Sub-Registrar refusing to admit a document to registration (whether the registration of such document is compulsory or optional) to the Registrar to whom such Sub-Registrar is subordinate, if presented to such Registrar within thirty days from the date of the order; and the Registrar may reverse or alter such order.

(2) If the order of the Registrar directs the document to be registered and the document is duly presented for registration within thirty days after the making of such order, the Sub-Registrar shall obey the same, and thereupon shall, so far as may be practicable, follow the procedure prescribed in sections 58, 59 and 60; and such registration shall take effect as if the document had been registered when it was first duly presented for registration."

9. Learned counsel appearing for respondent Nos. 3 to 6 has submitted that the Registrar is an Officer superior to the Sub-Registrar and if he has, on facts and evidence, found the order admitting the Will to registration to be manifestly illegal, he was within his rights to set aside the same. It is further submitted that the order impugned being substantially just should not be interfered with by this Court under Article 226 of the Constitution.

10. I have considered the rival submissions advanced by learned counsel for the parties.

11. A perusal of the provisions of Section 72(1) of the Registration Act, extracted hereinbefore shows that the appeal envisaged under the said provision is from an order of the Sub-Registrar refusing to admit a document to registration; by no means, from an order admitting a document to registration. It is well known that an appeal is a creature of Statute and if the Statute envisages an appeal from the order of an Authority, the order being of a particular nature, an appeal lies to the Appellate Authority as provided by the Statute. There is no inherent right of appeal available to a party, merely because an Officer otherwise superior in rank to the one, who has passed the original order is available. Clearly, Section 72 does not envisage any appeal from an order admitting a document to registration, whether the document is compulsorily registerable or optionally.

12. This point fell for consideration before the Orissa High Court in Binod Chandra Panigrahi @ Binod Panigrahi Vs. Laxmi Narayan Panigrahi & Others, 2015 SCC Online Ori 319 where it has been held:

"Similarly Section 72(1) provides for appeal only against order refusing registration. It

does not contemplate an appeal against an order allowing registration. Therefore, the appellate order under Annexure-6 passed by the Additional District Magistrate holding that the petitioner's appeal was not maintainable is legally justified."

13. In this view of the matter, the order passed by the Registrar/Additional Collector, Gonda is clearly without jurisdiction.

14. In the result, this petition **succeeds and is allowed**. The impugned order dated 25.07.2005 passed by the District Registrar/Additional Collector, Gonda, in Case No.58 of 2004, Birja Devi Vs. Nand Ram and Others, is hereby **quashed.** It is, however, left open to the respondents or anyone else to question the validity of the Will in such proceedings as may be advised, and nothing said in this order shall be construed as expression of opinion on the merits of the case of either party, that may be suited before a Court of competent jurisdiction.

15. There shall be no order as to costs.

(2021)11ILR A193
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.10.2021

BEFORE

THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Misc. Single No. 5045 of 2006

Mahesh Chandra Dwivedi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
M.A. Siddiqui

Counsel for the Respondents:
Govt. Advocate

A. Criminal Law - Criminal Procedure Code, 1973 - Section 182 - A theft has taken place in the tent of the petitioner and almost all the articles of the Shamiana valued of approx. sum of Rs. 1,00,000/- was stolen. First Information Report was filed. Investigation started and final report was submitted before the court. The lower court accepted the final report despite a protest petition against the said report and summoned the complainant under Section 182 Cr.P.C. for criminal prosecution. This Court observed that the lower courts rejected the protest application of the petitioner without examining the truthness or falsity of the F.I.R. on evidence and proceeded to prosecute under Section 182 Cr.P.C. for lodging false report. The proper course of action was to read the protest petition as complaint so that the informant could have been given opportunity to produce evidences and witnesses in support of complaint made to the police with regard to the theft in the shop. Therefore, both the impugned orders are not tenable in the eyes of law.

Writ Petition Allowed. (E-10)

List of Cases cited:-

1. Vishnu Kumar Tiwari Vs. St. of U.P. & anr. (2019) 8 SCC 27 *(followed)*

(Delivered by Hon'ble Vikas Kunvar Srivastav, J.)

1. Case is called out.

2. Learned counsel for the petitioner, Sri M.A. Siddiqui, Advocate and learned A.G.A. for the State, Sri Balkeshwar Srivastava, Advocate are present.

3. The instant writ petition is moved under Article 227 of the Constitution of India invoking the supervisory jurisdiction of the High Court over its subordinate court against the impugned order dated 12.9.2006 passed by the Additional Session Judge/Fast Track Court No.12, Sultanpur in the capacity of the revisional court. The said revision was moved by the petitioner against the order dated 20.4.2006 passed by IIIrd, Additional Chief Judicial Magistrate in

Criminal Case No.386 of 2006 (Mahesh Chandra Dwivedi Vs. State of U.P.).

4. Before going through the aforesaid two impugned orders of the learned courts below namely the revisional court of Additional Session Judge/F.T.C. Sultanpur as well the court of Additional Chief Judicial Magistrate, Sultanpur so as to look into the vices crept into the impugned orders giving cause of action to file this petition.

5. It would be relevant to give a brief account of the matter. Petitioner was carrying on the business of Tent and Shamiana at Jamo Bazar, Sultanpur in the name and style 'Sambal Tent House'. In the intervening night of 7/8.05.2005, a theft took place in his tent house by breaking the locks and doors of the back side, the thieves carried away almost all the articles of Shamiana valued of approximately sum of Rs.1,00,000/-. On coming into the knowledge of theft on the next morning, petitioner rushed to the police station and immediately given a written complaint which was not registered by the local police as First Information Report. On 19.05.2005 after a considerable delay of 11 days the police registered the F.I.R. bearing Case Crime No.125/2005 under Section 379 I.P.C., Police Station- Jamo, Sultanpur. The investigation started and ultimately a final report was submitted before the court on 20.04.2006. The final report states that report as to the incident of theft was false and lodged with malafide motive of claiming insurance amount, there is no reason to proceed with the case. Learned court below accepted the final report despite a protest petition against the said report was there and summoned the complainant (petitioner) under Section 182 Cr.P.C. for criminal prosecution.

6. It is the aforesaid order aggrieved from which the petitioner firstly moved a criminal revision which was heard by Additional Session Judge/F.T.C. Court No.12, Sultanpur who rejected the same. The petitioner then came to the High Court with petition stating illegality and irregularity in the impugned orders passed by the court below which are given hereunder.

(i) The theft was committed by unknown thieves, therefore, police was to investigate the matter and burdened to find out the culprits.

(ii) The report was made on morning of 8.5.2005 promptly within reasonably possible time from the commission of offence in the night of 7/8.05.2005 but police itself delayed in registering the F.I.R. for 11 days on 19.05.2005. Meanwhile, no investigation could be started for want of registration of F.I.R.

(iii) The statement of natives of the locality was not recorded.

(iv) The police submitted final report before the court without investigating the matter seriously, simply on speculation that the FIR of theft might have been lodged for claiming insurance falsely.

7. Learned counsel for the petitioner argued that now more than 15 years has already been elapsed from the date of incident and the witnesses of the incident who were native of the locality are not available so as to depose before the court with regard to the incident.

8. Learned counsel for the petitioner further argued that the impugned order was passed only on consideration of the case diary submitted by the police station and the final report was accepted on the basis of materials on case diary, however, case diary in itself have no material except a speculation as to the lodging of FIR for false claim of insurance.

9. Learned A.G.A. for the State argued that the learned counsel always tried to linger the case and as such period of 15 years elapsed without proceeding with the petition, therefore, petition has become infructuous.

10. The argument of learned A.G.A. is not tenable as the impugned order passed by Additional Chief Judicial Magistrate, Sultanpur on 20.04.2006 is consisting of order of summoning to the complainant for prosecution with regard to false information of theft given to the police and the court.

11. Both the courts below erred in acting in accordance with the procedure on receiving the police report over a registered criminal case. On examining the impugned order dated 20.04.2006, concluding para of the order of Additional Chief Judicial Magistrate, Sultanpur shows a conclusion "the goods stolen in the incident of theft are worth Rs.97,200/- including mats, pillow and several other goods. Had the police been sincere for prompt action the stolen goods could have been recovered. The said sincerity and promptness undoubtedly justifies the conclusion of the Investigating Officer."

12. Amazing enough the court of Magistrate on the one hand reached at the conclusions that investigating officer was under fault to commit delay that's why stolen goods could not be recovered, the consequence of such conclusion could be that the police who submitted final report as to the falsity of the First Information Report as to the theft in the shop of the petitioner was wrong. The protest application could have been treated as complaint. The speculation of police that the information as to the theft might have been lodged for the purpose of claiming insurance amount falsely could not be given weight by the Magistrate legally for holding the First Information Report lodged falsely. As such proceeding for action under Section 182 Cr.P.C. vide the impugned order of Magistrate dated 20.4.2006 is not tenable in the eyes of law.

13. In the case of ***Vishnu Kumar Tiwari Vs. State of Uttar Pradesh and Anr.*** reported in ***(2019) 8 SCC 27,*** it is held, *"before a Magistrate proceeds to accept a final report under S.173 and exonerate the accused, it is incumbent upon the Magistrate to apply his mind to the contents of protest petition and arrive at a conclusion thereafter - While the investigating officer may rest content by producing the final report, which, according to him, is the culmination of his efforts, the duty of the Magistrate is not one limited to readily accepting the final report - It is incumbent upon Magistrate to go through the materials, and after hearing the complainant and considering the contents of protest petition, finally decide the future course of action to be, whether to continue with the matter or to close the case."*

14. The protest application of the petitioner was not only rejected but also, without examining the truthness or falsity of the F.I.R. on evidence, the learned court of Additional Chief Judicial Magistrate proceeded under Section 182 Cr.P.C. for the prosecution of complainant (petitioner) for lodging false report.

15 Section 182 Cr.P.C. is quoted hereunder for easy reference:-

"182. Offences committed by letters, etc.

(1) Any offence which includes cheating may, if the deception is practised by means of letters or telecommunication messages, be inquired into or tried by any Court within whose local jurisdiction such letters or messages were sent or were received; and any offence of cheating and dishonestly inducing delivery of property may be inquired into or tried by a Court within whose local jurisdiction the property was delivered by the person deceived or was received by the accused person.

(2) Any offence punishable under section 494 or section 495 of the Indian Penal Code (45 of 1860) may be inquired into or tried by a Court within whose local jurisdiction the offence was committed or the offender last

resided with his or her spouse by the first marriage 1 or the wife by the first marriage has taken up permanent residence after the commission of the offence."

16. If the learned court of Additional Chief Judicial Magistrate was not in agreement with the protest application lodged by the complainant against the report of Investigating Officer submitted before the court, the just and proper action needed on the part of the court was to read the protest petition as complaint, so that the informant (petitioner) could have been given opportunity to produce evidences and witnesses in support of complaint made to the police with regard to the theft in his shop. As such, the order of the Additional Chief Judicial Magistrate, Sultanpur dated 20.4.2006 having been passed without affording opportunity to the petitioner for leading evidences in support of his claim. The court has not properly examined on evidences judicially whether the report was false with regard to the theft, as lodged in the local police station on 19.05.2005, therefore, the order is not tenable in the eyes of law.

17. On the basis of above discussions, it is held that the order dated 20.04.2006 of Chief Judicial Magistrate, Sultanpur is suffering from illegality and the Additional Session Judge/Fast Track Court No.12, Sultanpur was also wrong in confirming the order of the Magistrate vide his judgment 12.09.2006.

18 Concluding the discussions, both the impugned orders i.e., order dated 12.9.2006 passed by the Additional Session Judge/Fast Track Court No.12, Sultanpur and the order dated 20.4.2006 passed by IIIrd, Additional Chief Judicial Magistrate in Criminal Case No.386 of 2006 (Mahesh Chandra Dwivedi Vs. State of U.P.) are set aside and writ petition is allowed.

19. The order be communicated to the court concerned. Process issued, if any, shall remain ineffective and unenforceable.

(2021)11ILR A196
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.11.2021

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.

Misc. Single No. 16212 of 2021

Smt. Khushboo Shukla ...Petitioner
Versus
D.M., Lucknow & Ors. ...Respondents

Counsel for the Petitioner:
Shailendra Singh Rajawat, Devesh Deo Bhatt, Mohd. Shahanshah Newaz Kh

Counsel for the Respondents:
C.S.C., Sunil Dixit, Umesh Chandra Dixit

A. Civil Law - U.P. Maintenance & Welfare of Parents and Citizens Rules, 2014 - Rule 21 - Senior Citizens Act, 2007 - Section 22 - Protection of Women from Domestic Violence Act, 2005 - It is a settled law that Senior Citizens Act, 2007 and PWDV Act, 2005 are to be read simultaneously and a wife cannot be ousted from her matrimonial home on the basis of the summary proceedings under the Senior Citizen Act, 2007. (Para 12)

Writ Petition Allowed. (E-10)

List of Cases cited:-

1. S. Vanitha Vs. Deputy Commissioner, Bengaluru Urban District & ors. 2020 OnLine SC 1023 *(followed)*

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

1. Present is an unfortunate litigation between the petitioner widow and her only son with her in-laws (private respondents).

2. The writ petition is filed challenging the order dated 14.07.2021 passed by the Sub

Divisional Magistrate, Sadar, Lucknow in Case No.75 of 2019, filed under the U.P. Maintenance and Welfare of Parents and Senior Citizens Rules, 2014 (hereinafter referred to as 'Senior Citizens Rules, 2014') whereby direction for eviction of petitioner from the House No.3/347, Vishal Khand, Gomti Nagar, Lucknow (house at Gomti Nagar, Lucknow) within 15 days of receiving of the order has been issued.

3. Facts of the case are that petitioner Smt. Khushboo Shukla and Sri Gaurav Shukla got married on 04.02.2013. Initially, they were living with the parents of Sri Gaurav Shukla in House No.54/4, Veer Nagar, Udaiganj, Lucknow (house at Udaiganj, Lucknow). However, soon thereafter certain family disputes arose and, therefore, petitioner and her husband started living separately on the ground floor of the house at Gomti Nagar, Lucknow. On 21.07.2015, a son Shikhar Salil Shukla was born out of the wedlock. Husband of petitioner Sri Gaurva Shukla expired on 15.07.2019 leaving behind his minor son, wife and his parents. Petitioner alleges that after the death of her husband, private respondents started harassing her, including for dowry. In the said background, she lodged several F.I.Rs. She also filed a Complaint Case No.1136 of 2019; 'Khushboo Shukla & another Vs. Kavita Shukla & others' on 06.11.2019 before the Court of Special Chief Judicial Magistrate (A.P.), Lucknow, under Section 12 and 13 of the Protection of Women from Domestic Violence Act, 2005 (PWDV Act, 2005). By the said complaint case, she sought maintenance for herself and her son and also prayed for restraining the private respondents from dispossessing the petitioner and her son from the house at Gomti Nagar, Lucknow, wherein she was residing since before the death of her husband. Meanwhile, private respondents also filed a Case No.75 of 2019 on 25.10.2019 under Rule 21 and 22 of the Senior Citizens Rules, 2014. By the said case, the private respondents asked for possession of house at Gomti Nagar, Lucknow by evicting the petitioner from the same. By order dated 17.02.2020, Special Additional Chief Judicial Magistrate (A.P.), Lucknow in Complaint Case No.1136 of 2019 filed by petitioner granted maintenance of Rs.3000/- per month to petitioner and Rs. 2000/- per month to her son and further restricted the private respondents from evicting the petitioner from the house at Gomti Nagar, Lucknow. The private respondents have not challenged the said order. Soon thereafter, the Sub-Divisional Magistrate, Sadar, Lucknow in Case No. 75 of 2019 filed by private respondents passed the impugned order dated 14.07.2021 directing eviction of the petitioner from the house at Gomti Nagar, Lucknow within 15 days of receiving the award. Thus, the present writ petition is filed challenging the order dated 14.07.2021.

4. Learned counsel for petitioner submits that though initially petitioner was granted an interim protection by this Court but the same could not be extended and her belongings were thrown on the road and she was forcefully evicted from the house at Gomti Nagar, Lucknow on 08.09.2021.

5. This court passed an order on 17.09.2021 and tried for an amicable solution between the parties as both counsels for the parties agreed for mediation. However, the parties could not come up with a settlement suitable for both the parties.

6. I have heard Sri S.S. Rajawat, learned counsel for the petitioner and Sri Sunil Dixit, learned counsel for opposite parties no. 3 and 4 and learned Standing Counsel has appeared on behalf of opposite parties no. 1 and 2.

7. Learned counsel for private respondents, raised a preliminary objection as to the maintainability of the writ petition under Article

226 of the Constitution of India on the ground that the order impugned in this writ petition is appealable under Section 16 of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007.

8. Learned counsel for petitioner opposed the submission of learned counsel for private respondents and submits that there is no remedy of appeal available to the petitioner against the impugned order under the Senior Citizens, Act, 2007.

9. The Senior Citizens Act, 2007 is divided in the separate chapters. Chapter-II runs from Section 2 to 18. Chapter-II of the Senior Citizens, Act, 2007 provides for "Maintenance of Parents and Senior Citizens". Under Section 4 it provides that senior citizens including parents who are unable to maintain themselves from their own earning or property shall be entitled to make application under Section 5 before the Tribunal. Section 6 provides for jurisdiction and procedure of the Tribunal. Section 7 provides for constitution of Maintenance Tribunal. Section 8 provides for summary procedure of inquiry to be conducted by the Tribunal. Section 9 provides for order for maintenance in the given cases. Section 10 provides for alteration of order of maintenance and further directions. Section 15 and 16 provide for constitution of Appellate Tribunal and appeals. Section 17 and 18 prescribe with regard to legal representation and maintenance officer. Thus, Chapter-II is a complete code in itself with regard to claim of maintenance by senior citizens and its disposal by the Tribunal, appeal against such an order before the Appellate Tribunal and execution of the same. Therefore, Section 16 relates to appeal against the order passed by the Maintenance Tribunal and no further. Chapter-V of the Senior Citizens, Act, 2007 provides for "Protection of Life and Property of Senior Citizen". Section 22 of the same reads as:-

"Section 22-Authorities who may be specified for implementing the provisions of this Act:- (1) The State Government may, confer such powers and impose such duties on a District Magistrate as may be necessary, to ensure that the provisions of this Act are properly carried out and the District Magistrate may specify the officer, subordinate to him, who shall exercise all or any of the powers, and perform all or any of the duties, so conferred or imposed and the local limits within which such powers or duties shall be carried out by the officer as may be prescribed.

(2) The State Government shall prescribe a comprehensive action plan for providing protection of life and property of senior citizens."

Under the said Section, the State Government may confer power and impose duties upon the District Magistrate as may be necessary for implementing the provisions of the Senior Citizens, Act, 2007. In exercise of the said power under Rule 21 of the Senior Citizens, Rules, 2014, the duties and powers of District Magistrate is prescribed as follows:-

"21. Duties and Power of the District Magistrate.-(1) The District Magistrate shall perform the duties and exercise the powers mentioned in sub-rules (2) and (3) so as to ensure that the provisions of the Act are properly carried out in his district.

(2) It shall be the duty of the District Magistrate to:

(i) ensure that life and property of senior citizens of the district are protected and they are able to live with security and dignity,

(ii) oversee and monitor the work of Maintenance Tribunals Maintenance Officers of the district with a view to ensuring timely and fair disposal of applications for maintenance, and execution Tribunals' orders;

(iii) oversee and monitor the working of old age homes in the district so as to ensure that they conform to the standards laid down in

these rules and any other guidelines and orders of the Government;

(iv) ensure regular and wide publicity of the provisions of the Act, Central and State Governments, programmes for the welfare of senior citizens;

(v) encourage and co-ordinate with panchayats, municipalities, Nehru Yuva Kendras, educational institutions and especially their National Service Scheme Units, Organisations, specialists, experts activists, etc. working in the district so that their resources efforts are effectively pooled for the welfare district; senior citizens of the district;

(vi) ensure provision of timely assistance and relief to senior citizens in the event of natural calamities and other emergencies:

vii) ensure periodic sensitisation of officers of various Departments and Local Bodies concerned with welfare of senior citizens, towards the needs of such citizens, and the duty of the officers towards the latter,

(viii) review the progress of investigation and trial of cases relating to senior citizens in the district, except in cities having a Divisional Inspector General of Police.

(ix) ensure that adequate number of prescribed application forms for maintenance are available in officers of common contact for citizens like Panchayats, Block Development Offices, Tahsildar Offices, District Social Welfare Offices, Collectorate, Police Station etc.;

(x) promote establishment of dedicated helplines for senior citizens at district headquarters, to begin with; and

(xi) perform such other functions as the Government, may by order, assign to the District Magistrate in this behalf, from time to time.

(3) With a view to performing the duties mentioned in sub-rule (2), the District Magistrate shall be competent to issue such directions, not inconsistent with the Act; these rules, and general guidelines of the Government, as may be necessary, to any concerned Government or statutory agency or body working in the district, and especially to the following:

(a) Officers of the State Government in the Police, Health and Publicity Departments, and the Department dealing with welfare of senior citizens;

(b) Maintenance Tribunals and Conciliation Officers;

(c) Panchayats and Municipalities; and

(d) Educational Institution."

Under Rule 21(2)(i), the District Magistrate is to ensure that life and property of senior citizens are protected and they are able to live with security and dignity. In exercise of the said powers, the proceedings are held by the Sub Divisional Magistrate, Sadar, Lucknow and impugned order of eviction is passed. There is no appeal provided against an order passed under Rule 22 of the Senior Citizens, Rules, 2014 and the rules are silent in this regard. The power of appeal provided under Section 16 of the Senior Citizens Act, 2007 with regard to Appellate Tribunal constituted under Section 15 is only relating to any order passed under Chapter-II which relates to maintenance of senior citizens and parents. Neither the Maintenance Tribunal constituted under Section 7 has any power to direct eviction nor such power is vested in the Appellate Tribunal. They both can only pass order with regard to maintenance of senior citizens and parents. The power of eviction is exercised under Rule 21 which is framed for giving effect to powers under Section 22 of the Senior Citizens Act, 2007 which falls under Chapter-V of the Act. There is no provision of appeal against any of these orders either under Chapter-V of the Senior Citizens Act, 2007 or under the Senior Citizens Rules, 2014. Therefore, submission of counsel for private respondents that appeal would lie before the Appellate Tribunal

constituted under Section 15 read with Section 16 of the Senior Citizens Act, 2007 before the Appellate Tribunal constituted for the purposes of maintenance is incorrect and is rejected.

10. Coming to the merits of the case, learned counsel for petitioner submits that the impugned order is illegal and directly in teeth of the apex court judgement reported in ***2020 SCC OnLine SC 1023 (S. Vanitha vs. Deputy Commissioner, Bengaluru Urban District and Other)*** which is opposed by the private respondents.

11. In the present case, the impugned order is passed by the Sub-Divisional Magistrate, Sadar, Lucknow ignoring the law settled by the apex Court in case of ***S. Vanitha (supra)***. Paragraph-38 and 39 of the said judgment reads:-

"38. The above extract indicates that a significant object of the legislation is to provide for and recognize the rights of women to secure housing and to recognize the right of a woman to reside in a matrimonial home or a shared household, whether or not she has any title or right in the shared household. Allowing the Senior Citizens Act 2007 to have an overriding force and effect in all situations, irrespective of competing entitlements of a woman to a right in a shared household within the meaning of the PWDV Act 2005, would defeat the object and purpose which the Parliament sought to achieve in enacting the latter legislation. The law protecting the interest of senior citizens is intended to ensure that they are not left destitute, or at the mercy of their children or relatives. Equally, the purpose of the PWDV Act 2005 cannot be ignored by a sleight of statutory interpretation. Both sets of legislations have to be harmoniously construed. Hence the right of a woman to secure a residence order in respect of a shared household cannot be defeated by the simple expedient of securing an order of eviction by adopting the summary procedure under the Senior Citizens Act 2007.

39. This Court is cognizant that the Senior Citizens Act 2007 was promulgated with a view to provide a speedy and inexpensive remedy to senior citizens. Accordingly, Tribunals were constituted under Section 7. These Tribunals have the power to conduct summary procedures for inquiry, with all powers of the Civil Courts, under Section 8. The jurisdiction of the Civil Courts has been explicitly barred under Section 27 of the Senior Citizens Act 2007. However, the over-riding effect for remedies sought by the applicants under the Senior Citizens Act 2007 under Section 3, cannot be interpreted to preclude all other competing remedies and protections that are sought to be conferred by the PWDV Act 2005. The PWDV Act 2005 is also in the nature of a special legislation, that is enacted with the purpose of correcting gender discrimination that pans out in the form of social and economic inequities in a largely patriarchal society. In deference to the dominant purpose of both the legislations, it would be appropriate for a Tribunal under the Senior Citizens Act, 2007 to grant such remedies of maintenance, as envisaged under S.2(b) of the Senior Citizens Act 2007 that do not result in obviating competing remedies under other special statutes, such as the PWDV Act 2005. Section 26 of the PWDV Act empowers certain reliefs, including relief for a residence order, to be obtained from any civil court in any legal proceedings. Therefore, in the event that a composite dispute is alleged, such as in the present case where the suit premises are a site of contestation between two groups protected by the law, it would be appropriate for the Tribunal constituted under the Senior Citizens Act 2007 to appropriately mould reliefs, after noticing the competing claims of the parties claiming under the PWDV Act 2005 and Senior Citizens Act 2007. Section 3 of the Senior Citizens Act, 2007 cannot be

deployed to over-ride and nullify other protections in law, particularly that of a woman's right to a 'shared household' under Section 17 of the PWDV Act 2005. In the event that the ?aggrieved woman? obtains a relief from a Tribunal constituted under the Senior Citizens Act 2007, she shall duty-bound to inform the Magistrate under the PWDV Act 2005, as per Sub-section (3) of Section 26 of the PWDV Act 2005. This course of action would ensure that the common intent of the Senior Citizens Act 2007 and the PWDV Act 2005 of ensuring speedy relief to its protected groups who are both vulnerable members of the society, is effectively realized. Rights in law can translate to rights in life, only if there is an equitable ease in obtaining their realization."

12. From the aforesaid judgment of the Supreme Court, it stands settled that both the Acts i.e. Senior Citizens, Act, 2007 and PWDV Act, 2005 are to be read simultaneously and a wife cannot be ousted from her matrimonial home on the basis of the summary proceedings under the Senior Citizens Act, 2007. In the present case, the Sub-Divisional Magistrate, Sadar, Lucknow has passed the order in violation of the law settled by the Supreme Court by directing eviction of the petitioner under the provisions of Senior Citizens Act, 2007.

13. Learned counsel for private respondents further submits that even otherwise, there is no illegality in the impugned order the same should not be set aside. He submits that the impugned order is passed for protection of life and property of senior citizens i.e. private respondents. Learned counsel for private respondents submits that the Court should not go into the technicality and should see that property of the private respondents i.e. senior citizens need protection as petitioner is causing damage to the same. He submits that though initially petitioner was living on the ground floor of the house at Gomti Nagar, Lucknow but now has also planted tenants on the floors above the ground floor and is also interfering in the possession of the private respondents. He further submits that private respondents have no objection in case petitioner with her son come and live with them in the house at Udaiganj, Lucknow.

14. Learned counsel for petitioner strongly denied the statements of learned counsel for private respondents. He submits that petitioner was living only on the ground floor of the house at Gomti Nagar, Lucknow and has no concern of any kind with any of the floors above the ground floor. It is false to suggest that petitioner has put any tenant on such floors or petitioner is causing any hindrance in movement of any person from the floors above. It is also stated that floors above the ground floor have separate entry and exist and has no concern with the ground floor where petitioner was living.

15. This Court does not find any force in the submissions of the private respondents. Conflicting submissions without any supportive cogent evidence are being made with regard to the tenants on the floors above. On one hand it is stated that tenants are planted by the petitioner and on the other hand it is claimed that petitioner is disturbing their movements. A categorical statement is given by the petitioner that she is neither interfering in lives or movements of the persons living above the ground floor nor any of them is a tenant of the petitioner or planted by her. There is nothing specifically stated by the private respondents as to how the petitioner is damaging the property. There is no finding given in the impugned order that petitioner has occupied any of the floors other than the ground floor in an illegal manner or that she has obstructed the movements of any person of floors above the ground floor. There is no finding that petitioner has caused any damage to the property in any manner whatsoever. In

absence of any such finding, the impugned order could not have been passed. Further, admittedly, the private respondents are having number of properties. They are living in their own house at Udaiganj, Lucknow. Petitioner with her son was living on the ground floor of the multi-story house at Gomti Nagar, Lucknow. Petitioner and her son have no concern with any of the floors above the ground floor of the said house from which they have been evicted in furtherance of the impugned order. I do not find any circumstance under which it can be stated that they were causing any damage or interfering in any manner with the lives of the private respondents. On the contrary, by their ousting they have been left roofless and to put great inconvenience.

16. In the given facts and circumstances of the case, the impugned order dated 14.07.2021 cannot stand and is aside. Respondents are directed to hand over the possession of the ground floor of the House No.3/347, Vishal Khand, Gomti Nagar, Lucknow to the petitioner and her son forthwith. Petitioner shall not in any manner interfere with the ingress and egress of the occupants of the floors above the ground floor. Private respondents also shall not disturb or interfere in any manner with the living of the petitioner and her son in the said property.

17. With the aforesaid, present writ petition stands ***allowed.***

(2021)11ILR A202
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.10.2021

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MRS. SAROJ YADAV, J.

Misc. Bench No. 23080 of 2021

Ram Parvesh Yadav ...Petitioner

Versus

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

Counsel for the Petitioner:
Kaushtubh Singh, Illegible, Kamal Kishore Sharma

Counsel for the Respondents:
G.A.

A. Criminal Law -Code of Criminal Procedure, 1973 -Section 154 - The Constitution of India, 1950 - Article 19, 21 - Successive FIRs - Test of Sameness or test of consequence - Subsequent FIRs for different offences committed in the course of same transaction or offences arising as a consequence of prior offence is not permissible but the second complaint in regard to the same incident filed as a counter complaint as also the second FIR for the same nature of offence against same accused persons lodged by different persons or containing the different allegation is permissible. (Para 19)

Where two incidents took place at different point of time or involve different person or there is commonality and the purpose thereof is different and the circumstances are also different then there can be more than one FIR. The Court is required to see the circumstances of a given case indicating proximity of time, unity or proximity of case, continuity of action, commonality of purpose of the crime to ascertain if more than one FIR can be allowed to stand or not. (Para 9)

The Court held that filing of multiple FIRs causes intervention into petitioner's right as a citizen to fair treatment under Article 14 and freedom to conduct independent portrayal of views under Article 19(1)(a) of the Constitution of India, but that is not so in the present case because in this case involvement of different category of person(s) holding the post in U.P. Co-operative Bank in respect of irregularity in recruitment of different posts has given separate cause of action. (Para 18)

Writ Petition Rejected. (E-10)

List of Cases cited:-

1. Arnab Ranjan Goswami Vs U.O.I. & ors. (2020) 14 SCC 51 *(distinguished)*

2. T.T. Antony Vs St. of Kerala & ors. (2001) 6 SCC 181

3. Upkar Singh Vs Ved Prakash & ors. (2004) 13 SCC 292

4. Rameshchandra Nandlal Parikh Vs St. of Guj. & anr. (2006) 1 SCC 732

5. Nirmal Singh Kahlon Vs St. of Punj. & ors. (2009) 1 SCC 441

6. Babubhai Vs St.of Guaj. & Ors. (2010) 12 SCC 254

7. Awadesh Kumar Jha @ Akhilesh Kumar Jha Vs St. of Bihar (2016) 3 SCC 8

8. Chirag M. Pathak & ors. Vs Dollyben Kantilal Patel & ors. (2018) 1 SCC 330

9. St. of Jharkhand Vs Lalu Prasad Yadav (2017) 8 SCC 1

(Delivered by Hon'ble Ramesh Sinha, J.)

(1) In this petition, the petitioner, **Ram Pravesh Yadav**, is seeking a writ of mandamus directing the respondents to consolidate all First Information Reports registered against him for the purposes of investigation, enquiry and trial. The details of cases pending against the writ petitioner are as under :-

Sr. No	FIR & Date of Registration of FIR	Place of Registration of FIR	Section	Date of Offence	Name of Complainant	Accused
01.	FIR No. 0013 of 2020 27.10.2020	P.S. S.I.T. District Lucknow	420, 467, 468, 471, 120-B I.P.C.	From 01.04.12 to 31.03.17	Inspector Sri Rajul Garg	(1) Hira Lal Yadav (2) Ravi Kant Singh (3) Ramjatan Yadav (4) Rakesh Kumar Mishra (5) Santosh Kumar Srivastava (6) **Ram Pravesh Yadav** (7) Other officer and employees of UP Co-operative Institution Service Mandal Lucknow (8) Other officer and employees of the Managing Committee and Bank of U.P. Co-operative Bank
02.	0021 of 2021	P.S. S.I.T. District Lucknow	420, 467, 468, 471, 201, 204, 120-B I.P.C.	From 01.04.2012 to 31.03.2017	Inspector Kunwar Brahm Prakash Singh	(1) Ram Jatan Yadav (2) Rakesh Kumar Mishra (3) Santosh Kumar Srivastava (4) **Ram Pravesh Yadav** (5) Other officer and employees of UP Co-operative Institution Service Mandal Lucknow
3.	022 of	21.05.20	420,	From	Inspec	(1) Ram

	2021	21 P.S. S.I.T. District Lucknow	467, 468, 471, 201, 204, 120-B I.P.C.	01.04.2012 to 31.03.2017	tor Kunwar Brahm Prakash Singh	Jatan Yadav (2) Rakesh Kumar Mishra (3) Santosh Kumar Srivastava (4) **Ram Pravesh Yadav** (5) Narad Yadav (6) Sudish Kumar (7) the then officer of the Managing Committee of U.P. Co-operative Village Development Bank Ltd. Lucknow. (8) the officer and employees of the U.P. Co-operative Village Development Bank Ltd. Lucknow and U.P. Co-operative Institution Service Board, Lucknow.
04.	0023 of 2021	P.S. S.I.T.	420, 467,	From 01.1.2	Inspec	(1) Ram
	21.05.2021	District Lucknow	468, 471, 201, 204, 120-B I.P.C.	015 to 31.12.2016	Kunwar Brahm Prakash Singh	Yadav (2) Rakesh Kumar Mishra (3) Santosh Kumar Srivastava (4) **Ram Pravesh Yadav** (5) the officer and employees of the U.P. Co-operative Institution Service Board, Lucknow.
05.	0024 of 2021 21.05.2021	P.S. S.I.T. District Lucknow	420, 467, 468, 471, 201, 204, 120-B I.P.C.	From 01.04.2012 to 31.03.2017	Inspector Kunwar Brahm Prakash Singh	(1) Ram Jatan Yadav (2) Rakesh Kumar Mishra (3) Santosh Kumar Srivastava (4) **Ram Pravesh Yadav** (5) the officer and employees of the U.P. Co-operative Institution Service Board, Lucknow.
07.	0025 of 2021 21.05.2021	P.S. S.I.T. District Lucknow	420, 467, 468, 471, 201, 204,	From 01.01.2016 to 31.12.2017	Inspector Kunwar Brahm	(1) Ram Jatan Yadav (2) Rakesh Kumar

			120-B I.P.C.		Prakash Singh	Mishra (3) Santosh Kumar Srivastava (4) **Ram Pravesh Yadav** (5) the officer and employees of the U.P. Co-operative Institution Service Board, Lucknow.

(2) In addition, the petitioner is also seeking a writ of Mandamus directing the respondents that if the petitioner is arrested in connection with any criminal case, arising out of the First Information Reports, involved in the present cases, the arresting officer shall release him on bail on executing a Bail Bond to the satisfaction of the Investigating Officer.

(3) It transpires from the record that vide Government Order dated 27.04.2018 (Annexure No.7), the Secretary (Home), Government of U.P., Lucknow, had entrusted the enquiry to the Special Investigating Team (S.I.T.) in respect of the recruitment made between 01.04.2012 to 31.03.2017 in Co-operative Department and its subordinate institutions. In pursuance thereof, the Secretary, State of U.P., Lucknow, vide order dated 20.06.2018, limited the scope of enquiry in relation to the recruitment made between 01.04.2012 to 31.03.2017 through U.P. Co-operative Institutions Service Mandal and issued direction to S.I.T. accordingly. The S.I.T., after due enquiry, found that the officers and employees of the U.P. Co-operative Bank and its Managing Committee were involved in criminal conspiracy by changing the compulsory educational qualification for different posts contrary to U.P. Co-operative Societies Employees' Service Regulations, 1975. In these backgrounds, aforesaid F.I.Rs. have been lodged against the accused persons including the writ petitioner.

(4) Heard Mr. Kamal Kishore Sharma, learned Counsel for the petitioner, Mr. D.S. Rana, learned Additional Government Advocate for the State and perused the material brought on record.

(5) The contention of the learned counsel for the petitioner is that all the aforesaid six First Information Reports are based on the same cause of action arising out of the order dated 27.04.2018, which was issued by political vendetta by the present Government. He argued that in order to ensure fair administration of criminal justice and further to ensure that criminal process does not assume the character vexatious exercise by the institution of miserable First Information Report, founded on the same cause of action, all the First Information Reports be consolidated. He argued that the Scheme of the Code of Criminal Procedure is that an Officer Incharge of the Police Station has to commence an investigation as provided under Section 156/157 Cr.P.C. on the basis of the entry of the First Information Report. On completion of the investigation and on the basis of the evidence collected by the Investigating Officer, he has to form an opinion under Section 169/170 Cr.P.C. as the case may be and forward his report to the concerned Magistrate under Section 173 (2) Cr.P.C. He further argued that even after filing of such a report, if the Investigating Officer comes across further investigation or material, he need not register a fresh First Information Report, because, he is empowered to make further investigation, normally, with the leave of the Court and where during further investigation, he collects further evidence, orally or documentary, he is obliged to forward the

same with one or further reports and this is an import of sub-Section (8) of Section 173 Cr.P.C.

(6) It is also contended by the learned Counsel for the petitioner that the right of fair investigation, arising out of the registration of an F.I.R., is a fundamental right of a person or accused, guaranteed and enshrined under Articles 19 and 21 of the Constitution of India. He submits that the case of the present writ petitioner is similar and identical to that of the case of **Arnab Ranjan Goswami Vs. Union of India and others :** (2020) 14 SCC 51, wherein the Apex Court, in the interest of fair administration of criminal justice, has drawn up a balance between governing principles set-forth therein and on the basis of the same, interim reliefs were granted in favour of Arnab Ranjan Goswami, Editor-in-Chief of the Republic T.V., hence the petitioner is entitled to be granted similar relief as has been granted to Arnab Ranjan Goswami (supra) by the Apex Court on the ground of parity.

(7) *Per contra*, learned Standing Counsel has submitted that separate FIRs have been registered against the writ petitioner and other co-accused persons on different allegations and further the witnesses in each case are different, therefore, the prayer of the petitioner for consolidating all six F.I.Rs. registered against the petitioner and other co-accused persons, is not sustainable. He argued that the case of the writ petitioner is distinguishable with Arnab Ranjan Goswami (supra).

(8) Having heard rival submissions of the learned Counsel for the parties and going through the record, we deem it proper to examine the law relating to the clubbing or consolidation of the FIRs. Section 154 of the Cr.P.C. provides for registration of the FIR on the basis of the information relating to the commission of cognizable offences. Section 155 of Cr.P.C. provides for recording of such information in respect of non-cognizable offences. Section 169 and 170 of the Cr.P.C. provide for the course of action on completion of investigation i.e. to release the accused when evidence is deficient or to send the case to Magistrate when evidence is sufficient. Section 173 of the Cr.P.C. requires the police officer to submit the final report before the Magistrate on completion of investigation containing requisite details. Sub-section (8) of Section 173 permits further investigation after submission of report to the Magistrate. Section 220 of the Cr.P.C. deals with trial for more than one offences and provides that if in one series of act so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with and tried at one trial for every such offence. Similarly, Section 219 of the Cr.P.C. provides that three offences of the same crime within one year may be charged together.

Arnab Ranjan Goswami vs. Union of India and othersArnab Ranjan Goswami Vs. Union of India and others

(9) Considering the above statutory provisions by various judicial pronouncements, it is settled that there can be no straightjacket formula for consolidating or clubbing the FIR and Courts are required to examine the facts of each case. A second FIR in respect of same offence or different offences committed in the course of same transaction is not permissible. The second FIR on the basis of receipt of information in respect of same cognizable offence or the same occurrence or incident giving rise one or more cognizable offences is not permissible. It is also settled that the Courts are required to draw a balance between the fundamental rights of the citizens under Article 19 & 21 of the Constitution and expansive power of the police to investigate a cognizable offence. In a given case, second or successive FIR for same or connected cognizable offence alleged to have been committed in the course of same transaction in respect of which earlier FIR

is already registered, may furnish a ground for interference by the Court but where the FIRs are based upon the separate incident or similar or different offences or the subsequent crime is of such magnitude that it does not fall within the ambit and scope of the earlier FIR then the second FIR can be registered. Where two incidents took place at different point of time or involve different person or there is no commonality and the purpose thereof is different and the circumstances are also different then there can be more than one FIR. The Court is required to see the circumstances of a given case indicating proximity of time, unity or proximity of case, continuity of action, commonality of purpose of the crime to ascertain if more than one FIR can be allowed to stand.

(10) The Apex Court in the case of **T.T. Antony Vs. State of Kerala and others : (2001) 6 SCC 181,** after taking note of the provisions of Section 154 to 157, 162, 169, 170 and 173 of the Cr.P.C. and considering the issue of striking a balance between citizen's right under Article 19 and 21 of the Constitution and expansive power of police to make investigation, has held that there can be no second FIR and no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or same occurrence giving rise to one or more cognizable offences. It has further been held that after registration of the FIR under Section 154 of the Cr.P.C. in respect of commission of the cognizable offence, all such subsequent information is covered by Section 162 of the Cr.P.C. and that Officer Incharge of the Police Station has to investigate not merely the cognizable offence reported in the FIR but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and file one or more reports provided in Section 173 of Cr.P.C.

(11) The Apex Court in the case of **Upkar Singh vs. Ved Prakash & Others :** (2004) 13 SCC 292 has clarified and explained the judgments rendered in the case of **T.T. Antony (supra)** and has held that the second complaint in regard to the same incident filed as a counter complaint is not prohibited under the Cr.P.C. It has been held that in **T.T. Antony's case**, the legal right of an aggrieved person to file counter complaint has not been considered.

(12) In **Rameshchandra Nandlal Parikh vs. State of Gujarat & Another** : (2006) 1 SCC 732, the Apex Court has held that if subsequent complaints were not in relation to same offence or occurrence or did not pertain to same party as alleged in the first report then on that ground the subsequent complaint need not be quashed.

(13) In **Nirmal Singh Kahlon vs. State of Punjab & others** : (2009) 1 SCC 441, where the C.B.I. registered the second FIR considering the nature and extent of crime, the Apex Court has held that the C.B.I. detecting larger conspiracy not detected by local police is not precluded from lodging the second FIR.

(14) In the case of **Babubhai vs. State of Gujarat & others** : (2010) 12 SCC 254, the Apex Court has further clarified that if two FIRs pertains to two different incidents/crimes, second FIR is permissible. Applying the test of sameness, it has been held by the Apex Court that subsequent to registration of an FIR any further complaint in connection with the same or connected offence relating to the incident or incidents which are part of the same transaction is not permissible. Taking note of the earlier pronouncements on the issue, it has been held by the Apex Court that:

Arnab Ranjan Goswami vs. Union of India and othersArnab Ranjan Goswami Vs. Union of India and others

"20. Thus, in view of the above, the law on the subject emerges to the effect that an FIR under Section 154 Cr.P.C. is a very important document. It is the first information of a cognizable offence recorded by the Officer In-

Charge of the Police Station. It sets the machinery of criminal law in motion and marks the commencement of the investigation which ends with the formation of an opinion under Section 169 or 170 Cr.P.C., as the case may be, and forwarding of a police report under Section 173 Cr.P.C. Thus, it is quite possible that more than one piece of information be given to the Police Officer In- charge of the Police Station in respect of the same incident involving one or more than one cognizable offences. In such a case, he need not enter each piece of information in the Diary. All other information given orally or in writing after the commencement of the investigation into the facts mentioned in the First Information Report will be statements falling under Section 162 Cr.P.C.

21. In such a case the court has to examine the facts and cir- cumstances giving rise to both the FIRs and the test of sameness is to be applied to find out whether both the FIRs relate to the same incident in respect of the same occurrence or are in regard to the incidents which are two or more parts of the same transaction. If the answer is affirmative, the second FIR is liable to be quashed. However, in case, the contrary is proved, where the version in the second FIR is different and they are in respect of the two different incidents/crimes, the second FIR is permissible. In case in respect of the same incident the accused in the first FIR comes forward with a different version or counter claim, investigation on both the FIRs has to be conducted."

(15) In the case of **Awadesh Kumar Jha @ Akhilesh Kumar Jha vs. State of Bihar** : (2016) 3 SCC 8, the Apex Court has held that if the substance of allegation in the second FIR is different from the first FIR and the second FIR relates to different transaction then the second FIR can be maintained.

(16) In the case of **Chirag M. Pathak & others vs. Dollyben Kantilal Patel & others** (2018) 1 SCC 330, wherein six FIRs were registered in different police stations and the ground was raised that all the FIRs are based on identical facts, the Apex Court held that the six cooperative societies were different, their members were different, their area of operation was different, the lands which were sold/transferred were also different in different area, the party to whom the land was sold was different. The totality of factual allegations constitutes commission of several offences in relation to every cooperative society, hence, the FIRs were not overlapping and no case for quashing the FIR was made out.

(17) In the case of **State of Jharkhand vs. Lalu Prasad Yadav** : (2017) 8 SCC 1, the defalcations were from different treasury for different financial year, amount involved was different, fake vouchers/ allotment letters/supply orders were prepared with the help of different sets of accused persons, the Apex Court has held that the separate trials are required to be conducted. It has further been clarified that 'same offence' is different from 'same kind of offence' and has held that if 'same kind of offence' was committed multiple times then each time it constitutes a separate offence and therefore accused can be tried in different trials. It has also been clarified that even if the modus operandi was same that would not make it a single offence when offences were different. The Apex Court in the said case has held as under:

"42. We are unable to accept the submissions raised by learned senior counsel. Though there was one general charge of conspiracy, which was allied in nature, the charge was qualified with the substantive charge of defalcation of a particular sum from a particular treasury in particular time period. The charge has to be taken in substance for the purpose of defalcation from a particular treasury in a particular financial year exceeding the allocation made for the purpose of animal

husbandry on the basis of fake vouchers, fake supply orders etc. The sanctions made in Budget were separate for each and every year. This Court has already dealt with this matter when the prayers for amalgamation and joint trial had been made and in view of the position of law and various provisions discussed above, we are of the opinion that separate trials which are being made are in accordance with provisions of law otherwise it would have prejudiced the accused persons considering the different defalcations from different treasuries at different times with different documents. Whatever could be combined has already been done. Each defalcation would constitute an independent offence. Thus, by no stretch, it can be held to be in violation of Article 20(2) of the Constitution or Section 300 Cr.P.C. Separate trials in such cases is the very intendment of law. There is no room to raise such a grievance. Though evidence of general conspiracy has been adduced in cases which have been concluded, it may be common to all the cases but at the same time offences are different at different places, by different accused persons. As and when a separate offence is committed, it becomes punishable and the substantive charge which has to be taken is that of the offence under the P.C. Act etc. There was conspiracy hatched which was continuing one and has resulted into various offences. It was joined from time to time by different accused persons, so whenever an offence is committed in continuation of the conspiracy, it would be punishable separately for different periods as envisaged in section 212(2), obviously, there have to be separate trials. Thus it cannot be said to be a case of double jeopardy at all. It cannot be said that for the same offence the accused persons are being tried again.

50. The *modus operandi* being the same would not make it a single offence when the offences are separate. Commission of offence pursuant to a conspiracy has to be punished. If conspiracy is furthered into several distinct offences there have to be sepa- rate trials. There may be a situation where in furtherance of gen- eral conspiracy, offences take place in various parts of India and several persons are killed at different times. Each trial has to be separately held and the accused to be punished separately for the offence committed in furtherance of conspiracy. In case there is only one trial for such conspiracy for separate offences, it would enable the accused person to go scotfree and commit number of offences which is not the intendment of law. The concept is of 'same offence' under Article 20(2) and section 300 Cr.PC. In case distinct offences are being committed there has to be inde- pendent trial for each of such offence based on such conspiracy and in the case of misappropriation as statutorily mandated, there should not be joinder of charges in one trial for more than one year except as provided in section 219. One general conspiracy from 1988 to 1996 has led to various offences as such there have to be different trials for each of such offence based upon conspiracy in which different persons have participated at different times at different places for completion of the offence. What- ever could be combined has already been done. Thus we find no merit in the submissions made by learned senior counsel appearing on behalf of accused persons."

(18) Much emphasis has been laid down by the learned Counsel for the petitioner upon the case of **Arnab Ranjan Goswami vs. Union of India and others** (supra) but that was a case where multiple FIRs were registered arising out of the same cause of action in different States. Hence, it was held that filing of such multiple FIRs causes intervention into petitioner's right as a citizen to fair treatment under Article 14 and freedom to conduct independent portryal of views under Article 19 (1)(a) of the Constitution of India, but that is not so in the present case because in the present case involvement of different category of person(s) holding the post in U.P. Co-operative Bank in respect of

irregularity in recruitment of different posts has given separate cause of action. Moreso, it is relevant to add here that co-accused Hira Lal Yadav has approached this Court by filing Misc. Bench No. - 13252 of 2021 : *Hira Lal Yadav Vs. State of U.P. and others*, seeking to quash Case Crime No. 0013 of 2020, under Sections 120-B, 471, 468, 467 and 420 I.P.C., Police Station S.I.T., Lucknow. This Court, after hearing learned Counsel for the parties, dismissed the aforesaid writ petition by means of order dated 30.06.2021. The writ petitioner-**Ram Pravesh Yadav** has also approached this Court by filing writ petition No. 26021 of 2020 (M/B), challenging Case Crime No. 0013 of 2020, under Sections 120-B, 471, 468, 467 and 420 I.P.C., Police Station S.I.T., Lucknow, which was dismissed by a Co-ordinate Bench of this Court vide order dated 05.01.2021.

(19) It is pertinent to mention here that had the separate FIRs been registered in respect of same category then it could be said to be a case of multiple FIRs for same offence but that is not so in the present case as the different FIRs are for different category of employees and for different occasions and there is no repetition of FIR for same occasion. Thus, it is settled that subsequent FIRs for different offences committed in the course of same transaction or offences arising as a consequence of prior offence is not permissible but the second complaint in regard to the same incident filed as a counter complaint as also the second FIR for the same nature of offence against same accused persons lodged by different persons or containing the different allegations is permissible.

(20) In the instant case, (1) Case Crime No. 0013 of 2020 is relating to irregularity in recruitment of thirty different posts in U.P. Co-operative Bank Ltd.; (2) Case Crime No. 0021 of 2021 is in respect irregularity in recruitment of the post of Deputy Manager, Manager, Cashier in the U.P. Co-operative Federation, Lucknow; (3) Crime No. 022 of 2021 is relating to irregularity in recruitment of Field Officers and Assistant Branch Accountant in the U.P. Gram Vikas Bank Ltd.; (4) Crime No. 0023 of 2021 is relating to irregularity in recruitment of 313 posts of Co-operative Supervisor in Uttar Pradesh Co-operative Union through the recruitment agency Uttar Pradesh Co-operative Institutional Service Mandal; (5) Crime No. 0024 of 2021 is relating to irregularity in recruitment of Senior Branch Manager, Junior Branch Manager and Programmer-cum-Data Entry Operator and others; (6) Crime No. 0025 of 2021 is relating to irregularity in recruitment of 16 posts of Assistant Engineer (Civil) and two posts of Deputy Manager (Accounts). This shows that each F.I.R. has been registered on account of irregularities in recruitment of different posts.

(21) It is relevant to add here that nothing has been pointed out to refute the submission of counsel for the State that even the witnesses in each of case are different. Though different FIRs reveal that the same kind of offence has been registered against the petitioner but they are for the irregularities in the recruitment of different posts. The subsequent FIRs do not arise as a consequence of allegations made in the first FIR. Hence, the test of 'sameness' and the test of 'consequence' is not satisfied in the present case.

(22) Even otherwise, it is also noticed that the first FIR i.e. Crime No.0013/2020 was registered against the petitioner on 27.10.2020 and other five F.I.Rs i.e. 0021 of 2021, 022 of 2021, 0023 of 2021, 0024 of 2021 and 0025 of 2021, were registered against the petitioner on 21.05.2021. The investigation had continued but at no point of time the petitioner had raised any objection or had taken any action for clubbing of these FIRs. According to the Counsel for the State, the investigation of the aforesaid F.I.Rs. is at the stage of completion and the appropriate

police report will be filed in shortwhile. The petitioner has approached at a belated stage by filing the present petition on 05.10.2021, therefore, at this stage no such relief can be granted. Now, the petitioner will have remedy to make a prayer before the Trial Court for one trial under Section 220 of the Cr.P.C., if the petitioner establishes a case for the same.

(23) Considering the aforesaid, we are not inclined to interfere in the instant writ petition.

(24) The writ petition is, accordingly, **dismissed.**

(25) Costs easy.

(2021)11ILR A211
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.10.2021

BEFORE

THE HON'BLE MANISH MATHUR, J.

Misc. Single No. 23934 of 2021

Rajesh Yadav & Anr. ...Petitioners
Versus
S.D.M., Teh. Milkipur, Ayodhya & Anr. ...Respondents

Counsel for the Petitioners:
Ajay Kumar Pandey

Counsel for the Respondents:
C.S.C.

A. Civil Law - U.P. Revenue Court Manual - The Indian Constitution, 1950 - Article 226 & 227 - The High Courts cannot, on the drop of a hat, exercise its power of superintendence under Article 227 of the Constitution but at the same time has indicated the scope of interference particularly in such cases where directions are required to ensure that law is followed by tribunals and courts or other authorities.(Para 8)

In the present case it is apparent that there is statutory mandate that the authorities are required to decide suit, appeal, revision etc. within statutory period provided. Non adherence to the aforesaid principles are clearly violative of the Statute which would require this Court to step in and ensure that statutory provisions are adhered to and followed by the State authorities. Therefore this Court cannot abdicate its duties and powers in such circumstances merely on account of availability of alternative and equally efficacious remedy as provided in paragraph 494 (1) of the U.P. Revenue Court Manual. (Para 13)

Writ Petition Disposed of. (E-10)

List of Cases cited:-

1. Vinod kumar Shukla Vs U.P. Ziladhikari Mankapur Gonda & ors. Writ Petition No. 4064 (M/S) of 2021

2. Moni Singh Vs Nayab Tehsildar, Barausa, Tehsi Jaisinghpur, Sultanpur

3. Shalini Shyam Shetty & anr. Vs Rajendra Shankar Patil A.I.R. 2010 SCW 6387

4. L. Chandra kumar Vs U.O.I. (1997) 3 SCC 261

5. Waman Rao Vs U.O.I. (1981) 2 SCC 362

6. Krishena Kumar Vs U.O.I. (1990) 4 SCC 207

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

1. Heard Mr. Ajay Kumar Pandey learned counsel for petitioner and Mr. Pradeep Kumar Singh learned Additional Chief Standing Counsel appearing on behalf of opposite party No.1. In view of order being passed, notices to opposite party No.2 stand dispensed with.

2. Petition has been filed seeking following reliefs:-

" a. Direct the opposite party no.1 to decide the appeal under section 35(2) of U.P. Revenue Code, 2006 bearing Appeal No.0824/2020, Computerized case No. T-202004230400824, Ram Chandar versus Rakesh Kumar and others, expeditiously, within a

period, as fixed by this Hon'ble court, in the interest of justice. ...."

3. Learned State Counsel appearing on behalf of opposite party No.1 has raised a preliminary objection regarding maintainability of the petition under Article 227 of the Constitution of India in view of Chapter L, paragraph 494(1) of the U.P. Revenue Court Manual. It is submitted that the aforesaid chapter is comprised in part V of the U.P. Revenue Court Manual (Amendment) Regulations 2016 and specifically provides that the Board of Revenue may suo moto or on the application of a party to the suit, appeal, revision or other proceeding pass general or specific order directing the court below to decide the suit, appeal, revision or other proceeding within the period enumerated in the order. It has thus been submitted that in view of availability of alternative remedy as indicated herein above, it would not be appropriate for the petitioner to directly approach this court in petition under Article 227 of the Constitution of India. It has also been submitted that alternative remedy has been incorporated by means of U.P. Revenue Court Manual (Amendment) Regulations 2016 and now provides an effective and efficacious alternative remedy to the petitioner.

4. Learned State Counsel has also relied upon the order dated 17th February, 2021 passed in **writ petition No. 4064 (M/S) of 2021 (Vinod Kumar Shukla versus Up Ziladhikari Mankapur Gonda and others)** and order dated 6.9.2021 passed in **writ petition No. 19692 (M/S) of 2021 (Moni Singh versus Nayab Tehsildar, Barausa, Tehsil Jaisinghpur, Sultanpur)** to substantiate that in such matters this Court has relegated petitioner to the alternative remedy of approaching the Board of Revenue.

5. Learned counsel appearing on behalf of the petitioner has refuted the submissions advanced by learned State Counsel pertaining to the preliminary objection with the submission that the provision of supervisory control of this Court under Article 227 of the Constitution of India is a constitutional provision which can not be fettered by any statutory provision. It is submitted that provision under Article 227 of the Constitution of India is in the nature of an extraordinary power and would not be subject to any direction or provision of statute. It is submitted that it is settled law that availability of alternative and equally efficacious remedy would not bar a petition either under Article 226 or 227 of the Constitution of India. Learned counsel for petitioner has relied upon certain judgments to substantiate his submissions.

6. Considering the submissions advanced by learned counsel for parties, it is apparent that part V has been incorporated in the U.P. Revenue Court Manual with effect from 2016 with Chapter L containing paragraph 494(1) giving jurisdiction to Board of Revenue to issue directions for expediting suits, appeals, revisions and other proceedings pending before revenue authorities. It is on the basis of Chapter 494(1) of the aforesaid manual that the order has been passed in the case of Vinod Kumar Shukla (supra).

7. With regard to entertainability of a petition under Article 227 of the Constitution of India particularly in view of availability of an alternative and equally efficacious remedy, Hon'ble the Supreme Court in the case of **Shalini Shyam Shetty and another versus Rajendra Shankar Patil reported in A.I.R. 2010 SCW 6387** has enunciated the extent and scope of this Court while exercising powers under Article 226 and 227 of the Constitution of India. Hon'ble the Supreme Court has in the said judgment clearly indicated the demarcation between exercise of power under Article 226 and 227 of the Constitution of India. It has been held that exercise of power under Article 227 of

the Constitution of India is a discretionary power to be exercised by court which can not be claimed as a matter of right by party. At the same time Hon'ble the Supreme Court has indicated the principles for exercise of High Court's jurisdiction under Article 227 of the Constitution of India which is as follows:-

" 62. On an analysis of the aforesaid decisions of this Court, the following principles on the exercise of High Court's jurisdiction under Article 227 of the Constitution may be formulated:

(a) A petition under Article 226 of the Constitution is different from a petition under Article 227. The mode of exercise of power by High Court under these two Articles is also different.

(b) In any event, a petition under Article 227 cannot be called a writ petition. The history of the conferment of writ jurisdiction on High Courts is substantially different from the history of conferment of the power of Superintendence on the High Courts under Article 227 and have been discussed above.

(c) High Courts cannot, on the drop of a hat, in exercise of its power of superintendence under Article 227 of the Constitution, interfere with the orders of tribunals or Courts inferior to it. Nor can it, in exercise of this power, act as a Court of appeal over the orders of Court or tribunal subordinate to it. In cases where an alternative statutory mode of redressal has been provided, that would also operate as a restrain on the exercise of this power by the High Court.

(d) The parameters of interference by High Courts in exercise of its power of superintendence have been repeatedly laid down by this Court. In this regard the High Court must be guided by the principles laid down by the Constitution Bench of this Court in Waryam Singh (supra) and the principles in Waryam Singh (supra) have been repeatedly followed by subsequent Constitution Benches and various other decisions of this Court.

(e) According to the ratio in Waryam Singh (supra), followed in subsequent cases, the High Court in exercise of its jurisdiction of superintendence can interfere in order only to keep the tribunals and Courts subordinate to it, `within the bounds of their authority'.

(f) In order to ensure that law is followed by such tribunals and Courts by exercising jurisdiction which is vested in them and by not declining to exercise the jurisdiction which is vested in them.

(g) Apart from the situations pointed in (e) and (f), High Court can interfere in exercise of its power of superintendence when there has been a patent perversity in the orders of tribunals and Courts subordinate to it or where there has been a gross and manifest failure of justice or the basic principles of natural justice have been flouted.

(h) In exercise of its power of superintendence High Court cannot interfere to correct mere errors of law or fact or just because another view than the one taken by the tribunals or Courts subordinate to it, is a possible view. In other words the jurisdiction has to be very sparingly exercised.

(i) High Court's power of superintendence under Article 227 cannot be curtailed by any statute. It has been declared a part of the basic structure of the Constitution by the Constitution Bench of this Court in the case of L. Chndra Kumar vs. Union of India & others, reported in (1997) 3 SCC 261 and therefore abridgement by a Constitutional amendment is also very doubtful.

(j) It may be true that a statutory amendment of a rather cognate provision, like Section 115 of the Civil Procedure Code by the Civil Procedure Code (Amendment Act), 1999 does not and cannot cut down the ambit of High Court's power under Article 227. At the same time, it must be remembered that such statutory amendment does not correspondingly expand the High Court's jurisdiction of superintendence under Article 227.

(k) The power is discretionary and has to be exercised on equitable principle. In an appropriate case, the power can be exercised suo motu.

(l) On a proper appreciation of the wide and unfettered power of the High Court under Article 227, it transpires that the main object of this Article is to keep strict administrative and judicial control by the High Court on the administration of justice within its territory.

(m) The object of superintendence, both administrative and judicial, is to maintain efficiency, smooth and orderly functioning of the entire machinery of justice in such a way as it does not bring it into any disrepute. The power of interference under this Article is to be kept to the minimum to ensure that the wheel of justice does not come to a halt and the fountain of justice remains pure and unpolluted in order to maintain public confidence in the functioning of the tribunals and Courts subordinate to High Court.

(n) This reserve and exceptional power of judicial intervention is not to be exercised just for grant of relief in individual cases but should be directed for promotion of public confidence in the administration of justice in the larger public interest whereas Article 226 is meant for protection of individual grievance. Therefore, the power under Article 227 may be unfettered but its exercise is subject to high degree of judicial discipline pointed out above.

(o) An improper and a frequent exercise of this power will be counter-productive and will divest this extraordinary power of its strength and vitality."

8. A perusal of the aforesaid principles clearly indicates the dichotomy between Articles 226 and 227 of the Constitution of India and while it has been held that the High Courts can not, on the drop of a hat, exercise its power of superintendence under Article 227 of the Constitution but at the same time has indicated the scope of interference particularly in such cases where directions are required to ensure that law is followed by tribunals and courts and other authorities to ensure exercise of jurisdiction which is vested in them and by not declining to exercise the jurisdiction. It has been further held that High Court's power of superintendence under Article 227 can not be curtailed by any statute as it has been declared a part of the basic structure of Constitution in the constitutional bench judgment of L. Chandra Kumar versus Union of India reported in (1997) 3 SCC 261.

9. Hon'ble the Supreme Court has also held that powers exercisable by the High Court under Article 227 of the Constitution are wide and unfettered and require issuance of necessary directions in order to keep a strict administrative and judicial control on the administration of justice within its territory since the very object of superintendence both administrative and judicial is to maintain efficiency and smooth and orderly functioning of the entire machinery of justice in such a way that it does not bring any disrepute. However a note of caution has also been added that this reserved and exceptional power of judicial intervention is not to be exercised just for grant of relief in individual cases but is to be directed for promotion of public confidence in the administration of justice in larger public interest.

10. Upon applicability of the aforesaid judgment, it is clear that Rule 34(7) of the U.P. Revenue Court Rules 2016 specifically provides that the Tehsildar shall make an endeavour to decide the undisputed cases of mutation within a period of 45 days from the date of registration of the case while disputed cases of mutation are to be decided within a period of 90 days. A further stipulation has been made that in case the proceedings are not concluded within the said time period, reasons for the same are required to be recorded.

11. Similar provisions have been indicated in Rule 183 of the aforesaid Rules of 2016 with regard to appellate and revisional court. Rule 183 (4) of the aforesaid Rules of 2016 specifically provides that the appellate or revisional court shall endeavour to finally decide the appeal or revision within a period of six months from the date of filing the appeal or revision and in case they are not being decided within the said time period, reasons for same are required to be recorded.

12. The U.P. Revenue Court Rules have been framed in exercise of powers under Section 233 of U.P. Revenue Court 2006 read with Section 21 of General Clauses Act 1904 and as such have statutory force. A reading of Sections 34(7) and 183(4) of the Rules of 2016 make it apparent that the limitation period prescribed for deciding revenue matters are not to be treated lightly and are not at the discretion of the authorities concerned. There is in fact a mandate of the statute to decide the applications, suits, revisions, apeals within the time frame provided or to record reasons in case the said time period is not adhered to. As such it can not be said that the time frame as required to be followed by the authorities in terms of the aforesaid provisions are merely directory.

13. Upon applicability of the judgment rendered in the case of **Shalini Shyam Shetty and another (supra)** and the principles enunciated therein, it is apparent that power under Article 227 of the Constitution of India is required to be exercised by this Court in case the authorities are not adhering to the statutory stipulations. In the present case, it is apparent that there is statutory mandate that the authorities are required to decide suit, appeal, revision etc. within the statutory period provided. Non adherence to the aforesaid principles are clearly violative of the Statute which would require this Court to step in and ensure that statutory provisions are adhered to and followed by the State authorities. This Court can not abdicate its duties and powers in such circumstances merely on account of availability of alternative and equally efficacious remedy as provided in paragraph 494(1) of the U.P. Revenue Court Manual.

14. So far as the judgment cited by learned State Counsel in the case of Vinod Kumar Shukla versus Up Ziladhikari Mankapur Gonda and others and Moni Singh versus Nayab Tehsildar, Barausa, Tehsil Jaisinghpur, Sultanpur (supra) are concerned, it can be seen that the petitioner therein has been relegated to the alternative remedy merely on the basis of submission advanced by learned State Counsel and the aspect of maintainability of petition under Article 227 of the Constitution of India viz-a-viz paragraph 494(1) of the Manual has not been adverted to. As such the said order would clearly not operate as a precedent.

15. The doctrine of precedent or Stare Decisis is a settled principle of law that a judgment, which has held the field for a long time, should not be unsettled. The doctrine of ' Stare Decisis et non quieta movere' means stand by decisions and not to disturb what is settled. The aforesaid English principle has been followed by Hon'ble the Supreme Court in the case of **Waman Rao versus Union of India reported in (1981) 2 SCC 362** and subsequently in the case of **Krishena Kumar versus Union of India (1990) 4 SCC 207** in the following manner:-

" 33.*Stare decisis et non quieta movere*. To adhere to precedent and not to unsettle things which are settled. But it applies to litigated facts and necessarily decided questions. Apart from Article 14 of the Constitution of India, the policy of courts is to stand by precedent and not to disturb settled point. When court has once laid down a principle of law as applicable to certain state of

facts, it will adhere to that principle, and apply it to all future cases where facts are substantially the same. A deliberate and solemn decision of court made after argument on question of law fairly arising in the case, and necessary to its determination, is an authority, or binding precedent in the same court, or in other courts of equal or lower rank in subsequent cases where the very point is again in controversy unless there are occasions when departure is rendered necessary to vindicate plain, obvious principles of law and remedy continued injustice. It should be invariably applied and should not ordinarily be departed from where decision is of long standing and rights have been acquired under it, unless considerations of public policy demand it. But in Nakara [(1983) 1 SCC 305 : 1983 SCC (L&S) 145 : (1983) 2 SCR 165] it was never required to be decided that all the retirees formed a class and no further classification was permissible."

16. Considering the aforesaid facts, it is apparent that for a decision to operate as Stare Decisis, a deliberate and Solemn decision determining a question of law is an authority or a binding precedent in the same court or in other courts of equal or lower rank in subsequent cases where the very point is again in controversy. Since in the orders cited by learned State Counsel, the matters have been relegated to the alternative remedy only on the basis of statement made by the State Counsel without adjudicating the question of maintainability of petition under Article 227 of the Constitution of India, the same would in the considered opinion of this Court not operate as a binding precedent in the present matter.

17. In such circumstances, it is held that this Court would be well within its rights and limitations to exercise power under Article 227 of the Constitution of India to issue directions to the authorities concerned to adhere to the time limitation provided under Rule 34 and 183 as indicated herein above. As such the petition under Article 227 of the Constitution of India for the purposes of issuance of directions to the authorities as made in the prayer is held to be maintainable.

18. Considering the facts and circumstances of the case, particularly the fact that Appeal No.0824/2020 is pending consideration before the authority concerned since 2020, a direction is issued to the opposite party no.1 i.e. Sub-Divisional Officer, Tehsil-Milkipur, District Ayodhya to decide the appeal under section 35(2) of U.P. Revenue Code, 2006 bearing Appeal No.0824/2020, Computerized case No. T-202004230400824, Ram Chandar versus Rakesh Kumar and others expeditiously keeping adherence to the time limit indicated in Rule 183 of the Rules of 2016 or to indicate reason for not adhering to the same.

19. In view of aforesaid, the writ petition stands disposed of.

(2021)11ILR A216
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.10.2021

BEFORE

THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Misc. Single No. 24785 of 2021

Sharvan Kumar Kaushal ...Petitioner
Versus
S.D.M., Tehsil Utraula, Balrampur & Ors. ...Respondents

Counsel for the Petitioner:
Mohd. Waris Farooqui

Counsel for the Respondents:
G.A.

A. Civil Law – Code of Criminal Procedure, 1973 - Section 145 - The order of Civil Court not only

binds the parties to the suit or proceeding but also to others who cause to disturb the status already existing when order is passed by the court. (Para 16)

Civil Court , is the only Court to decide the right, title and interest of the parties to have rightful possession over the property so far as Sub Divisional Magistrate's Court (Criminal Court) working under Section 145 Cr.P.C. is concerned. During pendency of the civil suit with regard to the right, title and interest to possession over the property is pending, Criminal proceeding neither can be initiated nor decided prior to the decision of the Civil Court. (Para 19)

Writ Petition Rejected. (E-10)

List of Cases cited:-

1. Ram Sumer Puri Mahant Vs St of U.P. & ors. (1985) 1 SCC 427 *(followed)*

(Delivered by Hon'ble Vikas Kunvar Srivastav, J.)

1. The case is called out.

2. Learned counsel for the petitioner Mohd. Waris Farooqui, Advocate and learned A.G.A. for the State Sri Balkeshwar Srivastav, Advocate are present in the Court.

3. The present writ petition is filed for seeking following relief:-

"Issue a writ, order or direction in the nature of mandamus commanding the Sub Divisional Magistrate (opposite party no.1) to decide the application moved by the private respondents under Section 145 (1) Cr.P.C. (Case No.1916 of 2021, Narsingh Narayan Mishra and another Vs. Shrawan Kumar Kaushal) within a time specified by this Hon'ble Court in the light of the report submitted by the police concerned and tehsil authorities (Annexure No.3 and 4 to the writ petition).

4. The Said relief is sought in the circumstance as stated in the pleading itself by the petitioner, as the Opposite Party No.1-Sub Divisional Magistrate, Tehsil Utraula, District Balrampur is not taking any decision upon the application moved by the private respondent (opposite party nos.2 & 3) namely Narsingh Narayan Mishra and Upendra Narayan Mishra under Section 145 Cr.P.C.

5. The petitioner has not stated the detailed description of the property under dispute between the contesting parties to the petition namely the petitioner and the private opposite party nos.2 & 3 nor has described the nature of the dispute, however, it is referred in para 3 of the petition that on 05.02.2021, an application was moved under Section 145 Cr.P.C. before the Court of Sub Divisional Magistrate, Tehsil Utraula, District Balrampur which is annexed as annexure no.1 to the petition. The application which is moved by the private opposite party nos.2 & 3 reveals a dispute with regard to the land property being part and parcel of the gata no.711 recorded in the revenue records as *abadi*. A map is drawn at the bottom of the application showing the possession on the spot of the disputed property abutted on the northern boundary, the house of opposite parties is situated, the southern boundary of the disputed property is abutting the house of one Ram Gopal. The opposite parties claimed themselves in possession of the said disputed land since before 78 years from the time of their ancestors.

6. It is further claimed by the opposite parties that the present petitioner (opposite party in application under Section 145 Cr.P.C. aforesaid) have illegally occupied and possessed forcibly the land without having any delay.

7. It is pertinent to state here that even the petition has not pleaded the title over the disputed land if belongs to the petitioner. An order of status quo was passed by the learned Sub Divisional Magistrate with the registration

of application directing the parties to maintain status quo.

8. It is further stated in para 6 of the petition that Revenue Inspector/Tehsildar on the direction of Sub Divisional Magistrate conducted an inquiry and submitted it's report on 12.04.2021 alongwith statement recorded during the course of inquiry and an objection against the proceeding was filed by the petitioner on 09.03.2021 before the Sub Divisional Magistrate.

9. On 24.03.2021, a Civil Suit was filed before the Court of Civil Judge, Senior Division, Balrampur bearing Original Suit No.66 of 2021 (Virendra Prasad Vs. Santosh Mishra). The said defendant namely Santosh Mishra in civil suit is stated to be real uncle and cousin of the petitioner. The plaintiff has not impleaded the petitioner as party, therefore, he moved an application under Order 1 Rule 10 (2) C.P.C. to implead him as party-defendant. Accordingly, the Court passed the order directing the plaintiff for impleadment of petitioner-opposite party in the said suit on 09.08.2021. Copy of the said order alongwith copy of the application under Order 1 Rule 10 (2) C.P.C. is also made annexure to the petition.

10. Copy of the order dated 24.03.2021 passed by the trial court shows that on the consensus of the plaintiff of the Original Suit No.66 of 2021 and then existing defendant, Santosh Kumar, the Court finding sufficient ground to issue an interim injunction order, directed the parties to maintain status quo on the property detailed and described as a part of land having area 16 X 85 feet abutting at northern boundary of the house of Narsingh Narayan Mishra and Upendra Narayan Mishra, the present private respondent nos.2 & 3 and at southern boundary, the house of Ram Gopal exists.

11. It is thus clear that the disputed property in proceeding under Section 145 Cr.P.C. as well as in civil suit bearing Original Suit No.66 of 2021 pending in the Court of Civil Judge, Senior Division, Balrampur is the same and status quo order is passed by both the Courts with regard to the property.

12. The proceeding under Section 145 Cr.P.C. pending in the Court of Sub Divisional Magistrate, Tehsil Utraula, Balrampur binds from the status quo order, the present private respondent, Narsingh Narayan Mishra and Upendra Narayan Mishra (applicants) and Sharvan Kumar Kaushal. The status quo order passed by the Civil Court binds the plaintiff (Virendra Prasad Vs. Santosh Mishra) as well as Sharvan Kumar Kaushal who got impleaded himself in the suit with regard to the same property, which is subject matter of the proceeding under Section 145 Cr.P.C. referred above.

13. In the light of the aforesaid facts as pleaded in the petition and as evident from the copy of the documents made annexures thereto, the moot question is that whether a direction to the Sub Divisional Magistrate, Tehsil Utraula, District Balrampur may be passed to proceed under Section 145 Cr.P.C. expeditiously and to decide the case, during the pendency of the civil suit pending for decision over the right, title and interest of the parties in the same property.

14. For the purpose of easy reference, Section 145 Cr.P.C. is quoted hereunder, of which scope and application is to preserve the possession of the party on the date of dispute reported to the Sub Divisional Magistrate.

145. Procedure where dispute concerning land or water is likely to cause breach of peace.

(1) Whenever an Executive Magistrate is satisfied from a report of a police officer or upon other information that a dispute likely to cause a breach of the peace exists concerning

any land or water or the boundaries thereof, within his local jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court in person or by pleader, on a specified date and time, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute.

(2) For the purposes of this section, the expression" land or water" includes buildings, markets, fisheries, crops or other produce of land, and the rents or profits of any such property.

(3) A copy of the order shall be served in the manner provided by this Code for the service of a summons upon such person or persons as the Magistrate may direct, and at least one copy shall be published by being affixed to some conspicuous place at or near the subject of dispute,

(4) The Magistrate shall then, without, reference to the merits or the claims of any of the parties to a right to possess the subject of dispute, peruse the statements so put in, hear the parties, receive all such evidence as may be produced by them, take such further evidence, if any, as he thinks necessary, and, if possible, decide whether any and which of the parties was, at the date of the order made by him under sub- section (1), in possession of the subject of dispute: Provided that if it appears to the Magistrate that any party has been forcibly and wrongfully dispossessed within two months next before the date on which the report of a police officer or other information was received by the Magistrate, or after that date and before the date of his order under sub- section (1), he may treat the party so dispossessed as if that party had been in possession on the date of his order under sub- section (1).

(5) Nothing in this section' shall preclude any party so required to attend, or any other person interested, from showing that no such dispute as aforesaid exists or has existed; and in such case the Magistrate shall cancel his said order, and all further proceedings thereon shall be stayed, but, subject to such cancellation, the order of the Magistrate under subsection (1) shall be final.

(6) (a) If the Magistrate decides that one of the parties was, or should under the proviso to sub- section (4) be treated as being, in such possession of the said subject, he shall issue an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law, and forbidding all disturbance of such possession until such eviction; and when he proceeds under the proviso to sub- section (4), may restore to possession the party forcibly and wrongfully dispossessed.

(b) The order made under this sub-section shall be served and published in the manner laid down in sub- section (3).

(7) When any party to any such proceeding dies, the Magistrate may cause the legal representative of the deceased party to be made a party to the proceeding and shall thereupon continue the inquiry, and if any question arises as to who the legal representative of a deceased party for the purposes of such proceeding is, all persons claiming to be representatives of the deceased party shall be made parties thereto.

(8) If the Magistrate is of opinion that any crop or other produce of the property, the subject of dispute in a proceeding under this section pending before him, is subject to speedy and natural decay, he may make an order for the proper custody or sale of. such property, and, upon the completion of the inquiry, shall make such order for the disposal of such property, or the sale- proceeds thereof, as he thinks fit.

(9) The Magistrate may, if he thinks fit, at any stage of the proceedings under this section, on the application of either party, issue a summons to any witness directing him to attend or to produce any document or thing.

(10) Nothing in this section shall be deemed to be in derogation of the powers of the Magistrate to proceed under section 107."

15. According to the Sub Section 6(a) of the Section 145 Cr.P.C., if the Sub Divisional Magistrate is directed as sought by the petitioner in relief no.1, to decide and conclude the case under Section 145 Cr.P.C. pending before him then he would have a duty under order of this Court to decide one of the parties was or should under the proviso to sub- section (4) be treated as being, in such possession of the said subject, he shall issue an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law, and forbidding all disturbance of such possession until such eviction; and when he proceeds under the proviso to sub- section (4), may restore to possession the party forcibly and wrongfully dispossessed. It clearly means and purport causing disturbances in the status-quo of the property.

16. The order of status quo passed by the Civil Court not only binds the parties to the suit or proceeding but also to others who cause to disturb the status already existing when the order is passed by the Court.

17. Until the order of status quo passed by the Civil Judge, Senior Division, Balrampur in Original Suit No.66 of 2021 is in effect and continuing, the status with regard to the possession cannot be disturbed or altered.

18. It would be lawful for the petitioner to seek remedy before the Civil Court itself as he himself is party to the Original Suit No.66 of 2021 pending in the Court of Civil Judge, Senior Division, Balrampur. The Sub Divisional Magistrate, Tehsil Utraula, Balrampur cannot be directed as sought in the petition to proceed under Section 145 Cr.P.C. and conclude it this way or that way.

19. Civil Court, is the only Court to decide the right, title and interest of the parties to have rightful possession over the property so far as Sub Divisional Magistrate's Court (Criminal Court) working under Section 145 Cr.P.C. is concerned, it can only decide possession of the party on the date of dispute. During the pendency of the civil suit with regard to the right, title and interest and right to possession over the property is pending, Criminal proceeding neither can be initiated nor decided prior to the decision of the Civil Court.

20. In ***Ram Sumer Puri Mahant Vs. State of U.P. and Others*** reported in ***(1985) 1 SCC 427,*** it is held:-

"When a civil litigation is pending for the same property wherein the question of possession is involved and the parties are in a position to approach the civil court for interim orders such as injunction or appointment of receiver for adequate protection of the property during pendency of the dispute, there is no justification for initiating a parallel criminal proceeding under Section 145 Cr.P.C. Multiplicity of litigation is not in the interest of the parties nor should pubic time be allowed to be wasted over meaningless litigation. Therefore, the parallel proceeding should not continue and the order of the Magistrate directing initiation of such a proceeding under Section 145 Cr.P.C. must be quashed."

21. With the aforesaid observations, the present writ petition is ***dismissed.***

(2021)11ILR A220
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 26.11.2021

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.

Misc. Single No. 26611 of 2017

Shivanya Pandey ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Shubham Tripathi, Ali Jibran, Aman Khan, Suyash Manjul

Counsel for the Respondents:
C.S.C., Kirti Srivastava

A. Interpretation of Statute - Transgender Persons (Protection of Rights) Act, 2019- Section 7 - Transgender Persons (Protection of Rights) Rules, 2020 - Section 7 is required to be interpreted in a manner that the transgender persons who are issued a certificate under Section 6 or persons like petitioner who had undergone the gender re-assignment procedure prior to coming into force of the Act, both are held entitled to apply before the District Magistrate for issuance of a certificate indicating change in gender. Only on the basis of certificate issued by the District Magistrate the transgender person can apply for change of their birth certificate and other official documents relating their identity. (Para 9)

Writ Petition Allowed. (E-10)

List of Cases cited:-

1. National Legal Service Authority Vs U.O.I. & ors. (2014) 5 SCC 438 *(followed)*

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

1. Heard Sri Mohd. Aman Khan, learned counsel for petitioner and learned Standing Counsel for the State.

2. Present writ petition is filed by the petitioner Shivanya Pandey praying that respondent no.2 Board of High School and Intermediate Education, Allahabad (U.P.) (U.P. Board) may be directed by this Court to change name and gender of the petitioner in her matriculation mark-sheet and thereafter, respondent no.3 Council for the Indian Schools Examination, New Delhi (CISE Board) may also change the name and gender in the mark-sheet of intermediate of the petitioner. Further a mandamus is also sought commanding the respondent no. 2 and 3 respectively to amend their regulations and guidelines with regard to change of gender and names.

3. Facts of the case are that petitioner with her earlier name as Vikas Pandey and gender as male appeared and passed High School on 10.06.2011 from the Children Academy Public School, Lucknow affiliated to the U.P. Board and Intermediate in the year 2013 from the Lucknow Public Collegiate, Lucknow affiliated to the CISE Board. Petitioner was suffering from gender dysphoria and, therefore, underwent gender reassignment surgery on 23.10.2017 from male to female at Fortis Hospital, New Delhi. On 27.05.2017, petitioner got published a gazette notification in respect of change of her name from 'Vikas Pandey' to 'Shivanya Pandey' and gender from 'male' to 'female'. Petitioner also got an adhar card and pan card issued in her new name and gender i.e. Shivanya Pandey, female. With the change of name and gender, petitioner now required change of the same in her school certificates also. For the said purposes, on 04.06.2017, petitioner applied for the change in her High School mark-sheet and certificates. The form required to be filled up for the said purposes had columns for change of name and other details but was silent about the change in gender. Petitioner approached different authorities and Director, Ministry of Social Justice and Empowerment, New Delhi also sent a letter dated 22.06.2017 to the Secretary, U.P. Board requesting them to change petitioner's name and gender. Since, all the required documents were provided by the petitioner, the principal of Children Academy Public School also wrote a letter dated 03.07.2017 to the Secretary, U.P. Board requesting for a change in petitioner's name and gender. The Secretary, U.P. Board by a letter dated 14.07.2017 sought a clarification from the State Government as neither the rules nor the Intermediate Education Act, 1921 had any provisions with regard to these new circumstances. On a reminder of the Director,

Ministry of Social Justice and Empowerment, New Delhi, Director of Secondary Education, U.P. also issued a letter dated 17.08.2017 to the State Government requesting it for taking appropriate measures in the matter. Meanwhile, the Secretary, U.P. Board by letter dated 07.09.2017 also required the petitioner to submit her medical certificate with regard to the gender change issued by the Chief Medical Officer. The State Government vide letter dated 15.07.2017 also communicated its decision and required the Secretary, U.P. Board to consider the case of petitioner. The matter in the aforesaid background was placed before the Examination Committee of the U.P. Board. The Examination Committee in its meeting dated 10.01.2018 decided that changes of name and gender as requested by the petitioner cannot be made as neither the Intermediate Education Act, 1921 nor regulations framed there under contain any such provision. The decision of the Examination Committee was communicated to the petitioner by letter dated 27.01.2018. By letter dated 02.02.2018 original mark-sheet of the petitioner was also returned to her without affecting any changes. In the said background petitioner has approached this Court with the prayers aforesaid.

4. Learned counsel for the petitioner submits that with the development of medical science this challenges of conflict in personality and body stands resolved and in the given circumstances it is incumbent upon different authorities to make provisions for change of older records. He relies upon the judgment passed in case of ***National Legal Services Authority Vs. Union of India & Others;*** reported in ***[(2014) 5 SCC 438]*** (hereinafter referred to as '***NALSA***' case). He submits that right to decide self identity and gender is recognized by the Supreme Court in ***NALSA*** case and directions were also issued to the State Governments to grant legal recognition of gender identity and further directions were also issued. Petitioner identities herself as a female and has also gone a psychological treatment and gender reassignment surgery. Thus, appropriate Governments as well as the Boards are obliged to give effect to the changes required in her educational records. This new development in medical science is also addressed by the Central Government by enacting The Transgender Persons (Protection of Rights) Act, 2019 (hereinafter referred to as 'the Act') and by framing rules under the same. Section 2(k) of the aforesaid Act reads:-

"2(k) "transgender person" means a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta."

5. Section 3 of the Act prohibits discrimination against any transgender person on the grounds mentioned in the said section which includes:-

"(a) denial, or discontinuation of, or unfair treatment in, educational establishments and services thereof;

(e) denial or discontinuation of, or unfair treatment with regard to, access to, or provision or enjoyment or use of any goods, accommodation, service, facility, benefit, privilege or opportunity dedicated to the use of the general public or customarily available to the public.

(i) the denial of access to, removal from, or unfair treatment in, Government or private establishment in whose care or custody a transgender person may be."

6. Section 4 of the Act provides a transgender person to have a right to be recognized as such and a transgender person

under Section 4(2) of the Transgender Protection Act, 2019 is also given a right to self perceived gender identity. Section 5 provides right to transgender person to apply before the District Magistrate by way of an application for issuance of certificate of identity as transgender person in the manner prescribed. Under Section 6, the District Magistrate is required to issue a certificate upon an under Section 5 as per the procedure prescribed. The gender in all official documents is recorded as per certificate issued under Section 6(1). Section 7 provides that in case after issuance of a certificate under Section 6(1) the transgender person undergoes surgery to change gender, such person may make an application, along with a certificate issued to that effect by the Superintendent or Chief Medical Officer of the medical institution in which that person has undergone surgery, to the District Magistrate for revised certificate in the prescribed manner. On such an application, the District Magistrate, on being satisfied is required to issue a certificate indicating change in gender and such change would entitle a person to get the required changes made in the birth certificate and other official documents relating their identity.

7. Learned counsel for petitioner submits that as per the judgment of Supreme Court passed in ***NALSA*** case(supra) as well as procedure of the Act, petitioner is entitled for issuance of appropriate certificate with regard to change of gender.

8. Opposing the same, learned Standing Counsel submits that with regard to change of gender, the certificate can only be issued under Section 7 of the Act to a person who is having a certificate under Section 6 of the Act. Since, petitioner is not having a certificate under Section 6 and had changed his gender before coming into the force of the Act, petitioner is not entitled to apply under Section 7 of the Act.

9. The very purpose of bringing in force the Act is to provide equality and respect to the transgender persons. The Act is a socially beneficial legislation and therefore, this Act cannot be given an interpretation which would defeat the very purpose for which the same is brought in force. It has to be interpreted in a manner that solemn purpose for which it is legislated is achieved. The purpose is to give recognition to transgender persons as they perceived themselves and, in case, they undergo a gender reassignment procedure, to provide them appropriate changed certificates and identity documents. Therefore, Section 7 of the Act cannot be given a meaning confined in the manner argued by learned Standing Counsel. Section 7 is required to be interpreted in a manner that the transgender persons who are issued a certificate under Section 6 or persons like petitioner who had undergone the gender re-assignment procedure prior to coming into force of the Act, both are held entitled to apply before the District Magistrate for issuance of a certificate indicating change in gender. Only on the basis of such a certificate issued by the District Magistrate under Section 7 of the Act the transgender person can apply for change of their birth certificate and other official documents relating to their identity. Denying such a right to persons who had already undergone the gender re-assignment procedure would frustrate the very purpose of the Act, as large number of persons would be left out discriminated in the society.

10. In view of the aforesaid, petitioner is permitted to submit an application under Section 7 of the Act before the District Magistrate. The District Magistrate shall broadly following the procedure under the Transgender Persons (Protection of Rights) Act, 2019 and Transgender Persons (Protection of Rights) Rules, 2020 get the fact of the gender re-assignment verified and on being satisfied issue the required certificate to the petitioner. Such a

procedure shall be completed by the District Magistrate within a period of 60 days from the date petitioner applies before him along with a certified copy of this order. On the basis of the certificate issued by the District Magistrate, petitioner shall be at liberty to approach the authorities concerned i.e. Respondent no.2 Secretary, Board of High School and Intermediate Education, Allahabad (U.P.) and respondent no.3 Chairman, Council for the Indian Schools Examination, New Delhi (CISE Board) for changing her educational records and issue her fresh changed mark-sheets and certificates. Respondent no.2 and 3 shall also take immediate steps for change of name and gender in educational mark-sheets and certificates of the petitioner and issue fresh changed mark-sheets and certificates to her, as per the certificate issued by the District Magistrate to the petitioner. Such an exercise would be completed within a period of four weeks from the date petitioner approaches the Boards along with a certified copy of this order and the certificate issued to her by the District Magistrate.

11. With the aforesaid, present writ petition stands ***allowed.***

(2021)11ILR A224
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 26.11.2021

BEFORE

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

Misc. Single No. 32710 of 2018

Ram Narayan ...Petitioner
Versus
Civil Judge(Sr. Div.) Ambedkar Nagar & Ors. ...Respondents

Counsel for the Petitioner:
Shobh Nath Pandey

Counsel for the Respondents:
Badrish Kr. Tripathi

A. Civil Law - Civil Procedure Code, 1908 - Section 42 - The law is clear that the Court to which decree is transferred under Section 42 has all the powers and jurisdiction of the Court that originally had jurisdiction to execute the decree and which as been transferred to forum for execution. Therefore, the Civil Judge, Ambedkarnagar erred in charging Court to whom a decree is transferred for execution to assign the task of execution alone, and not assigning the other duties of the court of execution. **(Para 7)**

Writ Petition Disposed of. (E-10)

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

1. The petitioner has applied under Article 227 of the Constitution to set aside the proceedings of Execution Case No. 9 of 2017, Ram Ujagir v. Vinod, pending on the file of the learned Civil Judge (Senior Division), Ambedkarnagar. The decree, whereof execution is now sought, was passed in a partition suit that is dreadfully ancient. The suit is Original Suit No. 138 of 1925. The preliminary decree in the suit was passed on 07.12.1926. The petitioner, who appears to be a successor of one of the defendants to the suit and a judgment-debtor, is at issue with the respondents, who are the successors or assigns of the plaintiff or the decree holders. The issue is about the bar of limitation to the execution of the final decree. According to the petitioner, the final decree was passed on 18.01.1988, whereas, according to the respondents, it was passed on 04.01.1996. It appears that this wide variation in dates comes about on account of the time spent in depositing the requisite court fee payable on the shares of parties. This Court does not wish to express any opinion about the date on which executable final decree for partition came into existence.

2. The proceedings for execution were instituted on 12.01.2011 before the Court of

Civil Judge (Senior Division), Faizabad. On 12.01.2011, the execution case was registered on the file of the learned Civil Judge (Senior Division) Faizabad as Execution Case No. 13 of 2011. Later on, considering the fact that the property to be partitioned was located within the territorial jurisdiction of the Court at Ambedkarnagar, a district that was carved out later from the area of Faizabad, the decree was sent for execution by the Civil Judge (Senior Division), Faizabad to the District Judge, Ambedkarnagar through a memo dated 16.05.2017. The case was assigned by the District Judge to the Civil Judge (Senior Division), Ambedkarnagar, where it was registered as Execution Case No. 9 of 2017. In this execution, the petitioner filed objections under Section 47 CPC, raising a plea about the bar of limitation. The Civil Judge (Senior Division), Ambedkarnagar declined to entertain this objection on ground that the Court at Ambedkarnagar is in seisin of the execution that has been sent to it merely for execution of the decree by the Court at Faizabad. As such, in the opinion of the Civil Judge (Senior Division), Ambedkarnagar, he had no jurisdiction to stay or defer execution. The objection under Section 47 was not entertained, and the application for stay was rejected vide order dated 01.09.2018.

3. The petitioner thereupon moved an application before the the Civil Judge (Senior Division), Faizabad in Execution Case No. 13 of 2021, seeking to summon the records of Original Suit No. 138 of 1925 on the basis of whatever legal advice he received. The Court declined to entertain any application in Execution Case No. 13 of 2011, inasmuch as in the opinion of the the Civil Judge (Senior Division), Faizabad, the execution had already been transferred to the Court at Ambedkarnagar, leaving the Court at Faizabad with no jurisdiction to pass any orders in relation to it.

4. The substance of the petitioner's grievance is that his plea about the bar of limitation to execution has not been examined by the Court either at Ambedkarnagar or Faizabad, when, according to him, he has a substantial case to resist execution on that ground. It is in those circumstances that he has applied to this Court to judge his plea about the bar of limitation on merits, going by the apparent calendar of dates and the way the law of limitation would apply.

5. I have heard Mr. Shobh Nath Pandey, learned Counsel for the petitioner and Mr. Badrish Tripathi, learned Counsel for the respondents.

6. Section 42 Code of Civil Procedure, 1908 that deals with powers of the Court in executing a transferred decree in its application to the State of U.P. vide U.P. Civil Laws Amendment Act, 1970 reads :

42. Power of Court in executing transferred decree-(1) The Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself. All persons disobeying or obstructing the decree shall be punishable by such Court in the same manner as if it had passed the decree, and its order in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself.

(2) Without prejudice to the generality of the provisions of sub-section (1), the powers of the Court under that sub-section shall include the following powers of the Court which passed the decree namely : -

(a) power to send the decree for execution to another Court under Section 39;

(b) power to execute the decree against the legal representative of the deceased judgment-debtor under section 50;

(c) power to order attachment of a decree.

(d) power to decide any question relating to the bar of limitation to the executability of the decree;

(e) power to record payment or adjustment under Rule 2 of Order XXI;

(f) power to order stay of execution under Rule 29 of Order XXI;

(g) in the case of a decree passed against a firm, power to grant leave to execute suchdecree against any person other than a person as is referred to clause (b) or clause (c) of sub-rule (1) of Rule 50 of Order XXI.

(3) A Court passing an order in exercise of the powers specified in sub-section (2) shall send a copy thereof to the Court which passed the decree.

(4) Nothing in this section shall be deemed to confer on the Court to which a decree is sent for execution, the power to order execution at the instance of the transferee of a decree.

7. A perusal of the provisions of Section 42 CPC makes it pellucid that an Executing Court to which the decree is transferred for execution has all the powers of the Court originally possessed of the jurisdiction to execute it. The Court to which a decree is sent for execution under Section 42 would a *fortiori* have the power to entertain objections to execution, which the Court originally possessed of jurisdiction would have. Here, the objections raised by the petitioner is about the bar of limitation to execution, which is a question that *prima facie* relates to execution, discharge or satisfaction of the decree and by virtue of the terms of Section 47 is required to be decided between parties to the suit by the Court executing the decree and not by a separate suit. There is no reason to hold as the learned Civil Judge (Senior Division), Ambedkarnagar appears to have done that the Court, to which a decree is transferred for execution, is charged with the task alone of executing it, and not performing the other duties of the court of execution. The law appears to be clear that the Court to which a decree is transferred under Section 42 has all the powers and jurisdiction of the Court that originally had jurisdiction to execute the decree and which has been transferred to forum for execution. The approach of the Civil Judge (Senior Division), Ambedkarnagar reflected from his order dated 01.09.2018 cannot be countenanced.

8. The order dated 01.09.2018 has not formally been challenged by the petitioner in the present petition. The petition here before us is one under Article 227 of the Constitution and invests this Court with powers of the widest amplitude to superintend the functioning as well as orders made by the Subordinate Courts or Tribunals. This Court, therefore, is of opinion that the order dated 01.09.2018 passed by the Civil Judge (Senior Division), Ambedkarnagar is one that deserves to be ignored. The relief that the petitioner has sought here, however, cannot be granted. The reason is that it is for the Executing Court in the first instance to go into the question of the executability of the decree, which includes a plea of limitation raised by the judgment debtor. Seen in this perspective, we are of opinion that while the prayer to set aside the proceedings of Execution Case No. 9 of 2017, Ram Ujagir v. Vinod pending before the Civil Judge (Senior Division), Ambedkarnagar have to be declined, the Civil Judge (Senior Division), Ambedkarnagar should be directed to entertain the petitioner's objection to the pending execution that he may now prefer under Section 47 CPC or to proceed with an already pending objection and decide the same in the same manner as any other court of execution. It is ordered accordingly.

9. It is of utmost necessity, in the peculiar circumstances of this case, that this almost century old litigation should now come to an end. The Executing Court will proceed to adjudicate whatever objections are raised to the execution and decide the same within a period of six months, in accordance with law.

10. It is made clear that this Court has not expressed any opinion on merits whether the

execution is barred by limitation or not. It is for the Executing Court to examine this question, uninfluenced by anything said in this order on that count.

11. This petition is ***disposed of*** in terms of the orders aforesaid.

(2021)11ILR A227
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 26.11.2021

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE VIVEK VARMA, J.

P.I.L. Civil No. 27598 of 2021

Ajay Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Applicant:
Vinod Kumar Singh, Anu Pratap Singh

Counsel for the Respondents:
C.S.C., Satish Chandra Kashish

(A) Civil Law - Public interest litigation - Public interest litigation is not a pill or panacea for all wrongs - It is essentially meant to protect basic human rights of the weak and disadvantaged - The Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 - Section 122-B - Allahabad High Court Rules - Chapter XXII Rule 1(3-A) - Disclosure of credentials and the public purpose sought to be espoused are also essential elements to be stated in initiating proceedings in public interest - Court must maintain social balance by interfering for the sake of justice and refuse to entertain where it is against the social justice and public good.(Para - 9,10,17)

Instant Public Interest Litigation - claim - private respondent no.7, in connivance with revenue officials - unauthorizedly occupied large land of State - recorded in old revenue record as State land in the name of "Registry Aspatal' and "Kanzi House', - petitioner having criminal history as twenty-nine criminal cases in heinous offences - no disclosure of credentials.

HELD:- The petitioner is not a person, who has any credentials to move in Public Interest. Simply on the averment/submission that petitioner is a person involved in social work without disclosing his credentials and in the absence of the fact that the petition has been preferred in the interest of justice for large number of downtrodden persons who are unable to approach the Courts of Law, the petitioner is not entitled to maintain this petition in public interest that too in a matter which does not involve basic human rights. (Para - 26)

Petition dismissed. (E-7)

List of Cases cited:-

1. Gurpal Singh Vs St. of Punj., JT 2005 (5) SC 389

2. Kushum Lata Vs U.O.I. & ors., (2006) 6 SCC 180

3. St.of Uttaranchal Vs Balwant Singh Chaufal & ors. ,(2010) 3 SCC 402

4. Jaipur Shahar Hindu Vikas Samiti Vs St.of Raj. & ors., (2014) 5 SCC 530

5. Tehseen Poonawalla Vs U.O.I. & anr., (2018) 6 SCC 72

6. Jaipur Shahar Hindu Vikas Samiti v. St. of Raj. & ors., (2014) 5 SCC 530

(Delivered by Hon'ble Ramesh Sinha, J.)

(1) Vakalatnama filed on behalf of respondent no.7 by Shri Hemant Kumar Misra, Advocate, is taken on record.

(2) The petitioner, **Ajay Singh**, in the present Public Interest Litigation seeks following reliefs :-

"i. Issue a writ, order or direction in the nature of Mandamus commanding the opposite party no.1 to constitute a State Level

Committee for conducting a deep enquiry with regard to manipulation, and forgery in revenue records, and nexus of revenue officials with opposite party no.7 resulting into unauthorized occupation of large area of State land over Khasra Plot Nos. 471, 472, 473 and 474 situated in Tehsil Mankapur, District-Gonda which are recorded in the old revenue record as State land in the name of 'Registry Aspatal, and kanzi house'.

ii. Issue a writ, order or direction in the nature of Mandamus commanding the opposite parties 2, 4 and 5 to issue a public notice in widely circulated newspapers notifying therein about land bearing Khasra Plot Nos. 471, 472, 473, 474 and 475 situated at Mankapur Town, Tehsil Mankapur, District-Gonda to be State land/public utility land

iii. Issue a writ, order or direction in the nature of Mandamus commanding the opposite party no. 2 to take immediate action to dispossess unauthorized occupant from the State land as requested by opposite party no. 6 by letter dated 01.08.2019 as contained in Annexure no.5 to this petition."

(3) It appears that the petitioner, in the instant Public Interest Litigation, is claiming that private respondent no.7, in connivance with revenue officials, has unauthorizedly occupied large land of the State, bearing Gata Nos. 471, 472, 473 and 474 situate in Tehsil Mankapur, District Gonda, which are recorded in the old revenue record as State land in the name of "Registry Aspatal' and "Kanzi House', hence respondent no.2 may be directed to take immediate action to dispossess unauthorized occupant from the land in question.

(4) Learned Counsel for the respondent no.7, on the other hand, submitted that the petitioner is having criminal history as twenty-nine criminal cases in heinous offences have been registered against him. In support of his submission, he has filed a list of pending criminal cases against the petitioner, which are reproduced as under :-

"(1) Case Crime No. 140 of 2001, under Sections 323, 504, 506 IPC, Police Station Mankapur, District Gonda.

(2) Case Crime No. 112 of 2004, under Section 110 G Cr.P.C., Police Station Mankapur, District Gonda.

(3) Case Crime No. 262 of 2005, under Section 3(1) of the U.P. Goondas Act, Police Station Mankapur, District Gonda.

(4) Case Crime No. 221 of 2005, under Sections 143, 336, 352, 188 IPC, Police Station Mankapur, District Gonda.

(5) Case Crime No. 194 of 2006, under Sections 4/10 of Forest Act, Police Station Mankapur, District Gonda.

(6) Case Crime No. 224 of 2001, under Section 406 IPC, Police Station Mankapur, District Gonda.

(7) Case Crime No. 242 of 2007, under Section 3(1) of the U.P. Goondas Act, Police Station Mankapur, District Gonda.

(8) Case Crime No.208 of 2008, under Section 420 IPC, Sections 4/10 Forest Act and Sections 3/28 of U.P. Transit of Timber and other under Forest Act, Police Station Mankapur, District Gonda.

(9) Case Crime No. 207 of 2008, under Sections 379 and 411 IPC, Sections 4/10 Forest Act, Police Station Mankapur, District Gonda.

(10) Case Crime No. 11 of 2009, under Sections 147, 323, 352 IPC, Police Station Mankapur, District Gonda.

(11) Case Crime No. 53 of 2009, under Sections 395, 447, 506 IPC, Police Station Mankapur, District Gonda.

(12) Case Crime No. 78 of 2009, under Section 110 G Cr.P.C., Police Station Mankapur, District Gonda.

(13) Case Crime No. 221 of 2009, under Sections 4/10 of Forest Act, Police Station Mankapur, District Gonda.

(14) Case Crime No. 542 of 2009, under Sections 4/10 of Forest Act, Police Station Mankapur, District Gonda.

(15) Case Crime No. 192 of 2011, under Sections 4/10 of Forest Act, Police Station Mankapur, District Gonda.

(16) Case Crime No. 395 of 2015, under Section 110 G of Cr.P.C., Police Station Mankapur, District Gonda.

(17) Case Crime No. 90 of 2017, under Sections 147, 148, 323, 506, 325, 354 kha, 452 IPC, Police Station Mankapur, District Gonda.

(18) Case Crime No. 314 of 2018, under Sections 352, 504, 506 IPC, Police Station Mankapur, District Gonda.

(19) Case Crime No. 205 of 2020, under Sections 379, 411 IPC and Sections 4/10 Forest Act, Police Station Mankapur, District Gonda.

(20) NCR 243 of 2005, under Sections 323, 504, 506 IPC, Police Station Mankapur, District Gonda.

(21) NCR 107 of 2007, under Sections 323, 504, 506 IPC, Police Station Mankapur, District Gonda.

(22) Range Case No.26 of 2006-2007, under Section Van Vibhag Tikri Range Mankapur Gonda fine Rs.6000/-

(23) Range Case No.34 of 2008-2009, under Section 4/10 Van Vibhag Tikri Range Mankapur Gonda.

(24) Range Case No.01 of 2010-2011, under Section 4/10 Van Vibhag Tikri Range Mankapur Gonda.

(25) Range Case No.29 of 2013-2014, under Section 33 Van Vibhag Tikri Range Mankapur Gonda fine Rs.14,000/-.

(26) Range Case No.40 of 2015-2016, under Section 4/10 and 3/28 Van Vibhag Tikri Range Mankapur Gonda.

(27) Range Case No.42 of 2016-2017, under Section 4/10 Van Vibhag Tikri Range Mankapur Gonda fine Rs. 4,000/-.

(28) Case Crime No.23 of 1996 under Sections 379/411 IPC and Section 26 of Forest Act, Police Station Baundi, Janpad Bahraich.

(29) Case Crime No.3 of 1997 under Sections 342/427 IPC, Police Station Baundi, Janpad Bahraich."

(5) Learned Counsel for the respondent no.7 has further pointed out that in respect of Gata No. 470, 473, 536, 437, 544, 545, 546, 577, 576Ga, 580 ka, 580 Kha situated at Nagar Panchayat Mankapur, District Gonda, one Satish Kumar has approached this Court by filing Public Interest Litigation No. 31154 of 2019, seeking therein to issue a writ of mandamus directing the State to conduct a detailed inquiry into the illegal and unlawful act of grabbing government land situated over the aforesaid land. A Co-ordinate Bench of this Court, vide order 16.11.2019, dismissed the aforesaid Public Interest Litigation, against which, SLP (Civil) No. 014986 of 2021 has been preferred by said Satish Kumar and the same is still pending before the Apex Court. He argued that the Apex Court, vide order dated 22.10.2021, has fixed the aforesaid SLP for 08.02.2022.

(6) Learned Counsel for the respondent no.7 has drawn our attention to the proceeding initiated under Section 122-B of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (hereinafter referred to as "Act, 1950") by the Gaon Sabha against the instant writ petitioner (Ajay Singh) and has submitted that the writ petitioner himself is a land grabber. In respect of Gata No. 1427 M/area 0.004 hectare situate at Village Bhitauri, Pargana & Tehsil Mankapur, District Gonda, the Gaon Sabha has approached the Assistant Collector/Tehsildar (Judicial), Mankapur by filing a case, bearing No. 276/2013-14 and the Assistant Collector/Tehsildar, Mankapur, vide order dated 25.04.2014, directed to dispossess the writ petitioner from land, bearing no. 1427/0.053 hectare and further directed to recover the amount of Rs.1,80,000/- towards compensation and Rs.7/- towards execution cost under Sections 49 (b) and 49 (c) of the Act, 1950

from the writ petitioner. Against the aforesaid order dated 25.04.2014, writ petitioner has filed revision, bearing no. 1257 of 2014, before the Collector, Devi Patan Mandal, Gonda, who, vide order dated 09.09.2019, dismissed the aforesaid revision. Feeling aggrieved, the writ petitioner has approached this Court by filing writ petition no. 27138 (M/S) of 2019 : *Ajay Singh Vs. State of U.P. and others*, in which, learned Single Judge, vide interim order dated 27.09.2019, directed the parties to maintain *status quo* as existed on the date of passing of the order. It was also observed by the learned Single Judge that in the event of deciding the writ petition against the writ petitioner, penalty would be imposed upon him along with interest @ 12% payable to the Gaon Sabha for encroaching upon the land of the Gaon Sabha. He also argued that in respect of Gata No. 471, Zila Panchayat Gonda through its Chairman has filed Second Appeal No. 89 of 2020 and the same is pending before this Court. In these backgrounds, his submission is that the instant petition though styled as a PIL is nothing but an attempt to misguide the Court and it has been filed with an oblique motive. There was no public interest involved and in fact when the writ petitioner is having criminal history and part of the dispute raised by the writ petitioner is pending adjudication before the Courts as well as Apex Court, hence the instant public interest petition could not have been maintained and the same is liable to be dismissed with heavy costs.

(7) In response, learned Counsel for the writ petitioner does not dispute the criminal antecedents against the writ petitioner as pointed out by the learned Counsel for the respondent no.7 but he contended that in some of the cases, trial is still pending. He further argued that mere involvment of the writ petitioner in criminal cases does not debar the writ petitioner to file the public interest litigation.

(8) We have minutely examined the submissions advanced by the learned Counsel for the parties and gone through the record.

(9) The petitioner has filed this petition as Pro *Bono Publico*, therefore, this Court is required to first satisfy itself regarding the credentials of the petitioner and secondly, the *prima facie* correctness of the information given by him because after all the name of public interest litigation cannot be used for suspicious products of mischief. It has to be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta or private motive. The process of the Court cannot be abused for oblique considerations by masked phantoms who monitor at times from behind. The common rule of *locus standi* in such cases is relaxed so as to enable the Court to look into the grievances complained of on behalf of the poor, deprive, deprivation, illiterate and the disabled and who cannot vindicate the legal wrong or legal injury caused to them for any violation of any constitutional or legal right. But, then while protecting the rights of the people from being violated in any manner, utmost care has to be taken that the Court does not transgress its jurisdiction nor does it entertain petitions which are motivated. After all, public interest litigation is not a pill or panacea for all wrongs. It is essentially meant to protect basic human rights of the weak and disadvantaged.

(10) It is true that Public Interest Litigation is a weapon which has to be used with great care and circumspection and the Judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or public interest seeking is not lurking. It is to be used as an effective weapon in the armoury of law for delivering justice to the citizens. Courts must do justice by promotion of good faith and prevent law from crafty invasions. It is for this reason that the Court must maintain social balance by interfering for the sake of justice and refuse to entertain where it is against the social justice and public good.

(11) In **Gurpal Singh vs. State of Punjab, JT 2005 (5) SC 389**, the Apex Court has held as under :-

"The Court has to be satisfied about (a) the credentials of the applicant; (b) the *prima facie* correctness or nature of information given by him; (c) the information being not vague and indefinite. The information should show gravity and seriousness involved. Court has to strike balance between two conflicting interests; (i) nobody should be allowed to indulge in wild and reckless allegations besmirching the character of others; and (ii) avoidance of public mischief and to avoid mischievous petitions seeking to assail, for oblique motives, justifiable executive actions. In such case, however, the Court cannot afford to be liberal. It has to be extremely careful to see that under the guise of redressing a public grievance, it does not encroach upon the sphere reserved by the Constitution to the Executive and the Legislature. The Court has to act ruthlessly while dealing with imposters and busy bodies or meddlesome interlopers impersonating as public-spirited holy men. They masquerade as crusaders of justice. They pretend to act in the name of Pro *Bono Publico*, though they have no interest of the public or even of their own to protect.

Courts must do justice by promotion of good faith, and prevent law from crafty invasions. Courts must maintain the social balance by interfering where necessary for the sake of justice and refuse to interfere where it is against the social interest and public good. (See State of Maharashtra vs. Prabhu, (1994 (2) SCC 481), and Andhra Pradesh State Financial Corporation vs. M/s GAR Re-Rolling Mills and Anr., (AIR 1994 SC 2151). No litigant has a right to unlimited draught on the Court time and public money in order to get his affairs settled in the manner as he wishes. Easy access to justice should not be misused as a licence to file misconceived and frivolous petitions. (See Dr. B.K. Subbarao vs. Mr. K. Parasaran, (1996 (7) JT 265). Today people rush to Courts to file cases in profusion under this attractive name of public interest. They must inspire confidence in Courts and among the public.

(12) In **Kushum Lata versus Union of India and others** : (2006) 6 SCC 180**,** the Hon'ble Supreme Court held thus:

"5. When there is material to show that a petition styled as a public interest litigation is nothing but a camouflage to foster personal disputes, said petition is to be thrown out. Before we grapple with the issue involved in the present case, we feel it necessary to consider the issue regarding public interest aspect. Public Interest Litigation which has now come to occupy an important field in the administration of law should not be "publicity interest litigation" or "private interest litigation" or "politics interest litigation" or the latest trend "paise income litigation". The High Court has found that the case at hand belongs to the second category. If not properly regulated and abuse averted, it becomes also a tool in unscrupulous hands to release vendetta and wreck vengeance, as well. There must be real and genuine public interest involved in the litigation and not merely an adventure of knight errant borne out of wishful thinking. It cannot also be invoked by a person or a body of persons to further his or their personal causes or satisfy his or their personal grudge and enmity. The Courts of justice should not be allowed to be polluted by unscrupulous litigants by resorting to the extraordinary jurisdiction. A person acting bona fide and having sufficient interest in the proceeding of public interest litigation will alone have a *locus standi* and can approach the Court to wipe out violation of fundamental rights and genuine infraction of statutory provisions, but not for personal gain or private profit or political motive or any oblique consideration. These aspects were highlighted by this Court in The Janta Dal v. H.S. Chowdhary (1992 (4) SCC

305) and Kazi Lhendup Dorji vs. Central Bureau of Investigation, (1994 Supp (2) SCC 116). A writ petitioner who comes to the Court for relief in public interest must come not only with clean hands like any other writ petitioner but also with a clean heart, clean mind and clean objective. (See Ramjas Foundation vs. Union of India, (AIR 1993 SC 852) and K.R. Srinivas v. R.M. Premchand, (1994 (6) SCC 620)."

(13) The Apex Court in the case of **State of Uttaranchal versus Balwant Singh Chaufal and Ors.** : (2010) 3 SCC 402, in paragraphs 178, 179, 180 and 181, laid down the following guidelines relating to Public Interest Litigation:

"178.We must abundantly make it clear that we are not discouraging the Public Interest Litigation in any manner, what we are trying to curb is its misuse and abuse. According to us, this is a very important branch and, in a large number of PIL petitions, significant directions have been given by the Courts for improving ecology and environment, and the directions helped in preservation of forests, wildlife, marine life etc. etc. It is the bounden duty and obligation of the Courts to encourage genuine bonafide PIL petitions and pass directions and orders in the public interest which are in consonance with the Constitution and the laws.

179. The Public Interest Litigation, which has been in existence in our country for more than four decades, has a glorious record. This Court and the High Courts by their judicial creativity and craftsmanship have passed a number of directions in the larger public interest in consonance with the inherent spirits of the Constitution. The conditions of marginalized and vulnerable section of society have significantly improved on account of Court's directions in PIL.

180. In our considered view, now it has become imperative to streamline the PIL.

181.We have carefully considered the facts of the present case. We have also examined the law declared by this Court and other Courts in a number of judgments. In order to preserve the purity and sanctity of the PIL, it has become imperative to issue the following directions:

(1) The Courts must encourage genuine and bona fide PIL and effectively discourage and curb the PIL filed for extraneous considerations.

(2) Instead of every individual judge devising his own procedure for dealing with the public interest litigation, it would be appropriate for each High Court to properly formulate rules for encouraging the genuine PIL and discouraging the PIL filed with oblique motives. Consequently, we request that the High Courts who have not yet framed the rules, should frame the rules within three months. The Registrar General of each High Court is directed to ensure that a copy of the Rules prepared by the High Court is sent to the Secretary General of this court immediately thereafter.

(3) The Courts should *prima facie* verify the credentials of the petitioner before entertaining a PIL.

(4) The Court should be *prima facie* satisfied regarding the correctness of the contents of the petition before entertaining a PIL.

(5) The Courts should be fully satisfied that substantial public interest is involved before entertaining the petition.

(6) The Courts should ensure that the petition which involves larger public interest, gravity and urgency must be given priority over other petitions.

(7) The Courts before entertaining the PIL should ensure that the PIL is aimed at redressal of genuine public harm or public injury. The Court should also ensure that there is no personal gain, private motive or oblique motive behind filing the public interest litigation.

(8) The Courts should also ensure that the petitions filed by busybodies for extraneous and ulterior motives must be discouraged by imposing exemplary costs or by adopting similar novel methods to curb frivolous petitions and the petitions filed for extraneous considerations."

(14) In **Jaipur Shahar Hindu Vikas Samiti versus State of Rajasthan and others :** (2014) 5 SCC 530, the Apex Court has observed as under :-

"49.The concept of public interest litigation is a phenomenon which is evolved to bring justice to the reach of people who are handicapped by ignorance, indigence, illiteracy and other downtrodden people. Through the public interest litigation, the cause of several people who are not able to approach the court is espoused. In the guise of public interest litigation, we are coming across several cases where it is exploited for the benefit of certain individuals. The courts have to be very cautious and careful while entertaining public interest litigation. The judiciary should deal with the misuse of public interest litigation with iron hand. If the public interest litigation is permitted to be misused the very purpose for which it is conceived, namely, to come to the rescue of the poor and downtrodden will be defeated. The courts should discourage the unjustified litigants at the initial stage itself and the person who misuses the forum should be made accountable for it. In the realm of public interest litigation, the courts while protecting the larger public interest involved, should at the same time have to look at the effective way in which the relief can be granted to the people whose rights are adversely affected or are at stake. When their interest can be protected and the controversy or the dispute can be adjudicated by a mechanism created under the particular statute, the parties should be relegated to the appropriate forum instead of entertaining the writ petition filed as public interest litigation."

(15) In **Tehseen Poonawalla vs. Union of India and another** (2018) 6 SCC 72, the Hon'ble Supreme Court while dealing with the issue of object of a public interest litigation and its misutilization by persons with personal agenda observed as under:

"96. Public Interest Litigation has developed as a powerful tool to espouse the cause of the marginalised and oppressed. Indeed, that was the foundation on which public interest jurisdiction was judicially recognised in situations such as those in Bandhua Mukti Morcha v Union of India (1984) 3 SCC 161. Persons who were unable to seek access to the judicial process by reason of their poverty, ignorance or illiteracy are faced with a deprivation of fundamental human rights. Bonded labour and under trials (among others) belong to that category. The hallmark of a public interest petition is that a citizen may approach the court to ventilate the grievance of a person or class of persons who are unable to pursue their rights. Public interest litigation has been entertained by relaxing the rules of standing. The essential aspect of the procedure is that the person who moves the court has no personal interest in the outcome of the proceedings apart from a general standing as a citizen before the court. This ensures the objectivity of those who pursue the grievance before the court. Environmental jurisprudence has developed around the rubric of public interest petitions. Environmental concerns affect the present generation and the future. Principles such as the polluter pays and the public trust doctrine have evolved during the adjudication of public interest petitions. Over time, public interest litigation has become a powerful instrument to preserve the rule of law and to ensure the accountability of and transparency within structures of governance. Public interest litigation is in that sense a valuable instrument and jurisdictional tool to promote structural due process.

97. Yet over time, it has been realised that this jurisdiction is capable of being and has been brazenly misutilised by persons with a personal agenda. At one end of that spectrum are those cases where public interest petitions are motivated by a desire to seek publicity. At the other end of the spectrum are petitions which have been instituted at the behest of business or political rivals to settle scores behind the facade of a public interest litigation. The true face of the litigant behind the façade is seldom unravelled. These concerns are indeed reflected in the judgment of this court in State of Uttaranchal v Balwant Singh Chaufal (2010) 3 SCC 402. Underlining these concerns, this court held thus: (SCC p.453, para 143).

"143. Unfortunately, of late, it has been noticed that such an important jurisdiction which has been carefully carved out, created and nurtured with great care and caution by the courts, is being blatantly abused by filing some petitions with oblique motives. We think time has come when genuine and bona fide public interest litigation must be encouraged whereas frivolous public interest litigation should be discouraged. In our considered opinion, we have to protect and preserve this important jurisdiction in the larger interest of the people of this country but we must take effective steps to prevent and cure its abuse on the basis of monetary and nonmonetary directions by the courts."

98. The misuse of public interest litigation is a serious matter of concern for the judicial process. Both this court and the High Courts are flooded with litigation and are burdened by arrears. Frivolous or motivated petitions, ostensibly invoking the public interest detract from the time and attention which courts must devote to genuine causes. This court has a long list of pending cases where the personal liberty of citizens is involved. Those who await trial or the resolution of appeals against orders of conviction have a legitimate expectation of early justice. It is a travesty of justice for the resources of the legal system to be consumed by an avalanche of misdirected petitions purportedly filed in the public interest which, upon due scrutiny, are found to promote a personal, business or political agenda. This has spawned an industry of vested interests in litigation. There is a grave danger that if this state of affairs is allowed to continue, it would seriously denude the efficacy of the judicial system by detracting from the ability of the court to devote its time and resources to cases which legitimately require attention. Worse still, such petitions pose a grave danger to the credibility of the judicial process. This has the propensity of endangering the credibility of other institutions and undermining public faith in democracy and the rule of law. This will happen when the agency of the court is utilised to settle extra-judicial scores. Business rivalries have to be resolved in a competitive market for goods and services. Political rivalries have to be resolved in the great hall of democracy when the electorate votes its representatives in and out of office. Courts resolve disputes about legal rights and entitlements. Courts protect the rule of law. There is a danger that the judicial process will be reduced to a charade, if disputes beyond the ken of legal parameters occupy the judicial space."

(16) In compliance with the directions of the Supreme Court in **State of Uttaranchal v. Balwant Singh Chaufal (supra),** the Allahabad High Court Rules were also amended and Sub-Rule (3-A) was added under Chapter XXII Rule 1 w.e.f. 1.5.2010. The aforesaid Rule reads as under:-

"(3-A) In addition to satisfying the requirements of the other rules in this chapter, the petitioner seeking to file a Public Interest Litigation, should precisely and specifically state, in the affidavit to be sworn by him giving his credentials, the public cause he is seeking to espouse; that he has no personal or private interest in the matter; that there is no

authoritative pronouncement by the Supreme Court or High Court on the question raised; and that the result of the litigation will not lead to any undue gain to himself or anyone associated with him, or any undue loss to any person, body of persons or the State."

(17) A simple reading of the aforesaid Rule reveals that in addition to the other requirements mentioned under Chapter for filing a writ petition, the person filing the petition in Public Interest should precisely and specifically, apart from other things, state his credentials and the public cause for which he is seeking to espouse. Therefore, disclosure of credentials and the public purpose sought to be espoused are also essential elements to be stated in initiating proceedings in public interest.

(18) Tested on the angle of the aforesaid exposition of law, it would be noticed that in paragraph-3 of the writ petition, the writ petitioner has made his credential. Paragraph-3 of the writ petition is reproduced as under :-

"3. That the petitioner in compliance to Chapter-XXII, Rule-1 (3-A) of the Allahabad High Court Rules submits that the petitioner is a local resident of the area and responsible citizen of country and is always helpful and social by nature and helps poor persons and children and helps needy persons."

(19) It appears that the petitioner, in the writ petition, except for mentioning that he is a local resident of the area and responsible citizen of Country and is always helpful and social by nature and helps poor persons and children and helps needy persons, has not stated anything covering any of the above essential requirements. In short, he has not disclosed his credentials.

(20) The dictionary meaning of the word 'credentials' is the qualities and the experience of a person that make him suitable for doing a particular job. The Oxford English-English-Hindi Dictionary, 2nd Edition, explains credentials as the quality which makes a person perfect for the job or a document that is a proof that he has the training and education necessary to prove that he is a person qualified for doing the particular job.

(21) The petitioner herein claims to be a Social Worker, but in order to substantiate the nature of the social work he is doing or seeks to do, he has not disclosed any experience that makes him suitable or perfect for doing the said job and no document in proof has been furnished.

(22) Black's Law Dictionary, 10th edition, defines 'credential' a document or other evidence that proves one's authority or expertise; a testimonial that a person is entitled to credit or to the right to exercise official power.

(23) The petitioner, in the absence of any documentary proof to establish his authority or expertise in doing social work, does not have the requisite credentials to initiate petition in Public Interest.

(24) Considering the aforesaid definition(s) of the term 'credential' and the law on entertaining the PIL what we feel is that for maintaining the PIL the petitioner in the writ petition, in brief, should state, with proof, that what he has done and what expertise he has on the subject matter of PIL as also that what exercise (sufficient) has been carried out by the petitioner before the administration prior to knocking the door of the Court and that what injury would be caused to the downtrodden of the society or public at large if cause under PIL is not espoused by the Court.

(25) The petitioner in filing this petition in Public Interest has not even disclosed that he is

filing this petition on behalf of such disadvantageous persons or that injustice is meted out to a large number of people and therefore it has become necessary for him to come forward on their behalf.

(26) In view of the aforesaid reasons and the law as laid down by the Apex Court, the petitioner is not a person, who has any credentials to move in Public Interest. Simply on the averment/submission that he is a person involved in social work without disclosing his credentials and in the absence of the fact that the petition has been preferred in the interest of justice for large number of downtrodden persons who are unable to approach the Courts of Law, the petitioner is not entitled to maintain this petition in public interest that too in a matter which does not involve basic human rights.

(27) Moreover, it also transpires that twenty-nine criminal cases, as referred here-in-above, has been registered against the petitioner for the heinous offences including Goondas Act and this fact has not been mentioned in the writ petition, rather in paragraph-3 of the memo of the writ petition, the petitioner is stated on oath that he is responsible citizen and social worker. Thus, looking to the offences made in the twenty-nine criminal cases, which have been lodged against the petitioner, it cannot be said that the petitioner is a responsible citizen.

(28) Here, it would be necessary to notice that in a proceeding initiated under Section 122-B of the Act, 1950, the Assistant Collector has specifically observed that the writ petitioner has illegally encroached the land of the Gaon Sabha and as such, imposed penalty upon the petitioner. Moreso, the Zila Panchayat Gonda has filed second appeal no. 89 of 2020 in respect of land, bearing No. 471, which the petitioner herein claims to be encroached by the respondent no.7, before this Court and the same is pending. Furthermore, one Satish Kumar has filed P.I.L. No. 31154 of 2019, seeking a writ of mandamus directing the respondents no. 1 and 2 to conduct a detailed enquiry into the illegal and unlawful act of grabbing government land situated on Gata No. 470, 473, 536, 537, 544, 545, 546, 577, 576 ga, 580 ka, 580 kha situate at Nagar Panchayat Mankapur, District Gonda. A Co-ordinate Bench of this Court, vide order dated 16.11.2019, dismissed the aforesaid public interest litigation.

(29) During the course of the arguments, learned Counsel for the petitioner have not disputed the fact that the aforesaid proceedings are not in the knowledge of the writ petitioner. Learned Counsel for the petitioner has also failed to show as to why he has not mentioned the criminal antecedents lodged against the writ petitioner, rather accepted the fact that twenty-nine criminal cases, as referred to hereinabove, have been registered against the petitioner. This itself shows the conduct of the writ petitioner while filing the instant writ petition in the form of Public Interest of Litigation.

(30) In **Jaipur Shahar Hindu Vikas Samiti v. State of Rajasthan and others :** (2014) 5 SCC 530, the Apex Court has cautioned about frivolous Public Interest Litigation in following words:-

"The concept of Public Interest Litigation is a phenomenon which is evolved to bring justice to the reach of people who are handicapped by ignorance, indigence, illiteracy and other down trodden people. Through the Public Interest Litigation, the cause of several people who are not able to approach the Court is espoused. In the guise of Public Interest Litigation, we are coming across several cases where it is exploited for the benefit of certain individuals. The Courts have to be very cautious and careful while entertaining Public Interest Litigation. The Judiciary should deal with the misuse of Public Interest Litigation with iron

hand. If the Public Interest Litigation is permitted to be misused the very purpose for which it is conceived, namely to come to the rescue of the poor and down trodden will be defeated. The Courts should discourage the unjustified litigants at the initial stage itself and the person who misuses the forum should be made accountable for it. In the realm of Public Interest Litigation, the Courts while protecting the larger public interest involved, should at the same time have to look at the effective way in which the relief can be granted to the people, whose rights are adversely affected or at stake. When their interest can be protected and the controversy or the dispute can be adjudicated by a mechanism created under a particular statute, the parties should be relegated to the appropriate forum, instead of entertaining the writ petition filed as Public Interest Litigation."

(31) In view of aforesaid discussions, not only there is no merit in this petition, but the same is also mischievous and has only resulted in wastage of precious Court's time, which could have been better utilized for disposal of the cases for genuine litigant(s).

(32) Accordingly, the instant petition is dismissed with costs of Rs.5,00,000/- (Rupees Five Lacs) to be paid/deposited by the petitioner before the Senior Registrar of this Court within three months, failing which, the learned Senior Registrar of this Court shall initiate proceedings for recovery of the aforesaid costs, in accordance with law, from the petitioner as arrears of land revenue. On receipt of the aforesaid cost/amount, the Senior Registrar of this Court shall transmit it to the account of Uttar Pradesh Rani Lakshmi Bai Mahila Samman Kosh, which has been notified as Juvenile Justice Fund w.e.f. 4th January, 2017 under the Department of Women and Child Development, Government of Uttar Pradesh in pursuance of the provisions of Section 105 of Juvenile Justice (Care & Protection of Children), Act 2015 and a receipt showing that the amount has actually been transmitted to the aforesaid account shall be brought in the instant writ petition. It is further provided that the amount of the said cost shall be utilized for the welfare of poor children.

(2021)11ILR A237
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 16.11.2021

BEFORE

THE HON'BLE SHAMIM AHMED, J.

U/S 482/378/407 No. 759 of 2013

Manohar Lal ...Applicant
Versus
The State of U.P. & Anr. ...Opposite Party

Counsel for the Applicant:
R.P. Shukla, A.K. Pandey

Counsel for the Opposite Party:
G.A.

Cognizance taken by Magistrate-on printed proforma without assigning any reason-without application of mind-against the settled judicial norms-summoning order quashed-Application allowed.

List of Cases cited:

1. Dilawar Vs St. of Har., (2018) 16 SCC 521

2. Menka Gandhi Vs U.O.I., AIR 1978 SC 597

3. Hussainara Khatoon (I) Vs St. of Bihar, (1980)1 SCC 81

4. Abdul Rehman Antulay Vs R.S. Nayak, (1992) 1 SCC 225

5. P. Ramchandra Rao Vs St. of Karn., (2002) 4 SCC 578

6.H.N. Rishbud Vs St. of Delhi, AIR 1955 SC 196.

7. Bhushan Kumar & anr. Vs St. (NCT of Delhi) & anr., AIR 2012 SC 1747

8. Basaruddin & ors. Vs St. of U.P. & ors., 2011 (1) JIC 335 (All)(LB)

9. Sunil Bharti Mittal Vs C.B.I., AIR 2015 SC 923

10. Darshan Singh Ram Kishan Vs St. of Mah. , (1971) 2 SCC 654

11. Ankit Vs St. of U.P. & anr. passed in Application U/S 482 No.19647 of 2009 decided on 15.10.2009

12. Kavi Ahmad Vs St. of U.P. & anr. passed in Criminal Revision No. 3209 of 2010

13. Abdul Rasheed & ors. Vs St. of U.P. & anr. 2010 (3) JIC 761 (All)

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard Sri R.P. Shukla, learned counsel for the applicant, learned AGA for the State and perused the record.

2. In this case notice was issued to opposite party no.2 vide order dated 21.2.2013 but till date nobody has filed Vakalatnama on behalf of opposite party no.2 nor counter affidavit has been filed on his behalf and State.

3. This application under Section 482 Cr.P.C. has been filed for quashing of the impugned cognizance and summoning order dated 11.9.2012 and criminal proceedings of Criminal Case No. 486 of 2012 (State Vs. Kallu Ram and Manohar), initiated on the basis of charge-sheet No. 62 of 2012 dated 13.7.2012, arising out of Case Crime No.112 of 2012, under Section 447 IPC and section 2/3 of Public Property Act, Police Station Machharehta, District Sitapur, pending in the Court of 1st Additional Civil Judge (Junior Division)/Judicial Magistrate, Sitapur. A further prayer has also been made to stay the further proceedings of the aforesaid case.

4. Learned counsel for the applicant submits that on 21.06.2012, respondent no.2 lodged an F.I.R. against the applicant and one Kallu Ram, which was registered as case crime no.112/2012, under Section 447 I.P.C and section 2/3 Public Property Act, Police Station Machharehta District Sitapur.

5. As per the prosecution version of the F.I.R, Gata No. 747 measuring area 0.065 Hectare is entered in revenue record as Chak Road and the applicant and one Kallu Ram encroached the Chak Road by planting the trees of Eucalyptus thereon. The demarcation was done several times but they are not removing their possession from the land in question while their 17 Eucalyptus trees have been demarcated on the Chak Road.

6. Learned counsel for the applicant further submits that the entire prosecution story is false. No such incident took place and the applicant has been falsely implicated in the present case owing to annoyance of opposite party no.2, who is Lekhpal of the area.

7. Learned counsel for the applicant further submits that before arguing the case on merits, he wants to draw the attention of the Court on the charge-sheet submitted by the Investigating Officer and submitted that the Investigating Officer had submitted the charge-sheet dated 13.07.2012 against the applicant and one Kallu Ram under Section 447 IPC and section 2/3 of Public Property Act; whereas he further submits that on the charge-sheet submitted, the learned Magistrate had taken cognizance on 11.09.2012 and the case was numbered as Criminal Case No. 486 of 2012. The cognizance was taken on the printed proforma by filling the accused names, sections of IPC and Public Property Act and date and in the said proforma, the learned Magistrate without assigning any reason has summoned the applicant for facing trial.

8. Learned counsel for the applicant further submits that by the order dated 11.09.2012 cognizance taken by the learned Magistrate on printed proforma without assigning any reason is abuse of process of law.

9. Learned counsel for the applicant further submits that after submission of charge sheet the applicant has been summoned mechanically by order dated 11.09.2012 and the court below while summoning the applicant has materially erred and did not follow the dictum of law as propounded by the Hon'ble Supreme Court in various cases that summoning in criminal case is a serious matter and the court below without dwelling into material and visualizing the case on the touch stone of probability should not summon accused person to face criminal trial. It is further submitted that the court below has not taken into consideration the material placed before the trial court along with charge sheet and, therefore, the trial court has materially erred in summoning the applicant. The court below has summoned the applicant through a printed order, which is wholly illegal.

10. It is vehemently urged by learned counsel for the applicant that the impugned cognizance and summoning order dated 11.09.2012 is not sustainable in the eye of law, as the same has been passed in mechanical manner without applying the judicial mind, because on the face of record itself it is apparent that impugned cognizance and summoning order dated 11.09.2012 has been passed by the Magistrate concerned on printed proforma by filling up the gaps, therefore the same is liable to be quashed by this Court.

11. Learned counsel for the applicant has given much emphasis that if the cognizance has been taken on the printed proforma, the same is not sustainable.

12. Per contra, learned A.G.A. for the State submitted that considering the material evidences and allegations against the applicant on record, as on date, as per prosecution case, the cognizable offence against the applicants is made out, therefore, application is liable to be dismissed but has not denied that the learned Magistrate has taken cognizance on the printed proforma. This case is being finally decided at this stage without filing counter affidavit.

13. The main issue for consideration before this Court is that whether the learned Magistrate may summon the accused person on a printed proforma without assigning any reason and take cognizance on police report filed under Section 173 of Cr.P.C. In this regard, it is relevant to mention here that a Court can take cognizance of an offence only when condition requisite for initiation of proceedings before it as set out in Chapter XIV of the Code are fulfilled. Otherwise, the Court does not obtain jurisdiction to try the offences under section 190 (1) of the Cr.P.C. provided that "subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence-

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

(b) upon a police report of such facts;

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

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try."

14. At this juncture, it is fruitful to have a look so far as the law pertaining to summoning

of the accused persons, by taking cognizance on a police report filed under section 173 of the Cr.P.C., is concerned and the perusal of the case law mentioned herein below would clearly reveal that cognizance of an offence on complaint is taken for the purpose of issuing process to the accused. Since, it is a process of taking judicial notice of certain facts which constitute an offence, there has to be application of mind as to whether the material collected by the Investigating Officer results in sufficient grounds to proceed further and would constitute violation of law so as to call a person to appear before the criminal court to face trial. This discretion puts a responsibility on the magistrate concerned to act judiciously keeping in view the facts of the particular case as well as the law on the subject and the orders of Magistrate does not suffers from non-application of judicial mind while taking cognizance of the offence.

15. Fair and proper investigation is the primary duty of the Investigating Officer. No investigating agency can take unduly long time in completing investigation. There is implicit right under Article 21 for speedy trial which in turn encompasses speedy investigation, inquiry, appeal, revision and retrial. There is clear need of a time line in completing investigation for having in-house oversight mechanism wherein accountability for adhering to lay down timeline, can be fixed at different levels in the hierarchy, vide **Dilawar vs. State of Haryana, (2018) 16 SCC 521, Menka Gandhi vs. Union of India, AIR 1978 SC 597, Hussainara Khatoon (I) vs. State of Bihar, (1980)1 SCC 81, Abdul Rehman Antulay vs. R.S. Nayak, (1992) 1 SCC 225 and P. Ramchandra Rao vs. State of Karnatka, (2002) 4 SCC 578.**

16. For the purposes of investigation, offences are divided into two categories "cognizable" and "non-cognizable". When information of a cognizable offence is received or such commission is suspected, the proper police officer has the authority to enter in the investigation of the same but where the information relates to a non-cognizable offence, he shall not investigate it without the order of the competent Magistrate. Investigation includes all the proceedings under the Cr.P.C. for the collection of evidence conducted by a police officer or by any person other than a Magistrate (who is authorised by a Magistrate in his behalf). Investigation consists of steps, namely (i) proceeding to spot, (ii) ascertainment of the facts and circumstances of the case, (iii) discovery and arrest of the suspected offender, (iv) collection of evidence relating to the commission of the offence and (v) formation of opinion as to whether on the material collected therein to place the accused before a Magistrate for trial and if so to take necessary steps for the same by filing a charge sheet under Section 173, Cr.P.C., vide H**.N. Rishbud vs. State of Delhi, AIR 1955 SC 196.** Thereafter, the learned Magistrate has to take cognizance after application of judicial mind and by reasoned order and not in mechanical manner.

17. In the case of **Bhushan Kumar and Anr. v. State (NCT of Delhi) and Anr., AIR 2012 SC 1747**, the Hon'ble Apex Court was pleased to observe that section 204 of the Code does not mandate the Magistrate to explicitly state the reasons for issuance of summons. It clearly states that if in the opinion of a Magistrate taking cognizance of an offence, there is sufficient ground for proceeding.

18. In the case of **Basaruddin & others Vs. State of U.P. and others, 2011 (1) JIC 335 (All)(LB), t**he Hon'ble Court was pleased to observed as under:-

"From a perusal of the impugned order, it appears that the learned Magistrate on the complaint filed by the complainant has summoned the accused in a mechanical way filling the date in the typed proforma. Learned

*Magistrate while taking cognizance of the offence on complaint was expected to go through the allegations made in the complaint and to satisfy himself as to which offences were prima facies, being made out against the accused on basis of allegations made in the complaint. It appears that the learned Magistrate did not bother to go through the allegations made in the complaint and ascertain as to what offences were, prima facie, being made out against the accused on the basis of allegations made in the complaint. Apparently, the impugned order passed by the learned Magistrate suffers from non-application of mind while taking cognizance of the offence. The impugned order is not well reasoned order, therefore, the same is liable to be quashed and the petition deserves to be allowed and the matter may be remanded back to the learned Chief Judicial Magistrate, Lakhimpur Kheri with direction to him to go through the allegations made in the complaint and ascertain as to what offences against the accused were prima facie being made out against the accused on the basis of allegations mad*e in the complaint and pass fresh order, thereafter, he will proceed according to law."

19. In the case of **Bhushan Kumar and Anr. v. State (NCT of Delhi) and Anr., AIR 2012 SC 1747,** the Hon'ble Apex Court was pleased to observe that section 204 of the Code does not mandate the Magistrate to explicitly state the reasons for issuance of summons. It clearly states that if in the opinion of a Magistrate taking cognizance of an offence, there is sufficient ground for proceeding, then the summons may be issued. This section mandates the Magistrate to form an opinion as to whether there exists a sufficient ground for summons to be issued but it is nowhere mentioned in the section that the explicit narration of the same is mandatory, meaning thereby that it is not a pre-requisite for deciding the validity of the summons issued.

20. In the case of **Sunil Bharti Mittal v. Central Bureau of Investigation, AIR 2015 SC 923,** the Hon,ble Apex Court was pleased to observe in paragraph no.47 of the judgment as under:

"47. However, the words "sufficient grounds for proceeding" appearing in the Section are of immense importance. It is these words which amply suggest that an opinion is to be formed only after due application of mind that there is sufficient basis for proceeding against the said accused and formation of such an opinion is to be stated in the order itself.."

21. In the case of **Darshan Singh Ram Kishan v. State of Maharashtra , (1971) 2 SCC 654**, the Hon'ble Court was pleased to observe that the process of taking cognizance does not involve any formal action, but it occurs as soon as the Magistrate applies his mind to the allegations and, thereafter, takes judicial notice of the offence. As provided by Section 190 of the Code of Criminal Procedure, a Magistrate may take cognizance of an offence either, (a) upon receiving a complaint, or (b) upon a police report, or (c) upon information received from a person other than a police officer or even upon his own information or suspicion that such an offence has been committed. As has often been held, taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance, therefore, takes place at a point when a Magistrate first takes judicial notice of an offence. This is the position whether the Magistrate takes cognizance of an offence on a complaint, or on a police report, or upon information of a person other than a police officer. Therefore, when a Magistrate takes cognizance of an offence upon a police report, prima facie he does so of the offence or offences disclosed in such report."

22. In the case of A**nkit Vs. State of U.P. And another** passed in Application U/S 482 No.19647 of 2009 decided on 15.10.2009, this Court was pleased to observe in paragraph No.8 of the judgment as under:-

"8. In the beginning, the name of the court, case number, state vs. ..... under section ..... P.S. ..... District ..... case crime No. ..... /2009 also have been printed and blanks have been filled up by mentioning the case number, name of the accused, section, P.S. District etc. by some employee. Below afore cited printed matter, the following sentence has been mentioned in handwriting "अभियुक्त अंकित की गिरफ्तारी मा0 उच्च न्यायायल द्वारा Crl. Writ No. 19559/08 अंकित बनाम राज्य में पारित आदेश दिनांक 5.11.08 द्वारा आरोप पत्र प्राप्त होने तक स्थगित थी।"

Below aforesaid sentence, the seal of the court containing name of Sri Talevar Singh, the then Judicial Magistrate-III, has been affixed and the learned magistrate has put his short signature (initial) over his name. The manner in which the impugned order has been prepared shows that the learned magistrate did not at all apply his judicial mind at the time of passing this order and after the blanks were filled up by some employee of the court, he has put his initial on the seal of the court. This method of passing judicial order is wholly illegal. If for the shake of argument, it is assumed that the blanks on the printed proforma were filled up in the handwriting of learned magistrate, even then the impugned order would be illegal and invalid, because order of taking cognizance of any other judicial order cannot be passed by filling up blanks on the printed proforma. Although as held by this Court in the case of ***Megh Nath Guptas & Anr V State of U.P. And Anr, 2008 (62) ACC 826****, in which reference has been made to the cases of* ***Deputy Chief Controller Import and Export Vs Roshan Lal Agarwal, 2003 (4) ACC 686 (SC), UP Pollution Control Board Vs Mohan Meakins, 2000 (2) JIC 159 (SC): AIR 2000 SC 1456 and Kanti Bhadra Vs State of West Bengal, 2000 (1) JIC 751 (SC): 2000 (40) ACC 441 (SC),*** *the Magistrate is not required to pass detailed reasoned order at the time of taking cognizance on the charge sheet, but it does not mean that order of taking cognizance can be passed by filling up the blanks on printed proforma. At the time of passing any judicial order including the order taking cognizance on the charge sheet, the Court is required to apply judicial mind and even the order of taking cognizance cannot be passed in mechanical manner. Therefore, the impugned order is liable to be quashed and the matter has to be sent back to the Court below for passing fresh order on the charge sheet after applying judicial mind."*

23. In the case of **Kavi Ahmad Vs. State of U.P. and another passed in Criminal Revision No. 3209 of 2010,** wherein order taking cognizance of offence by the Magistrate under Section 190(1)(b) on printed proforma without applying his judicial mind towards the material collected by the Investigating Officer has been held illegal.

24. In the case of **Abdul Rasheed and others Vs. State of U.P. and another 2010 (3) JIC 761 (All).** The relevant observations and findings recorded in the said case are quoted below:-

"6. Whenever any police report or complaint is filed before the Magistrate, he has to apply his mind to the facts stated in the report or complaint before taking cognizance. If after applying his mind to the facts of the case, the Magistrate comes to the conclusion that there is sufficient material to proceed with the matter, he may take cognizance. In the present case, the summoning order has been passed by affixing a ready made seal of the summoning order on a

plain paper and the learned Chief Judicial Magistrate had merely entered the next date fixed in the case in the blank portion of the ready made order. Apparently the learned Magistrate had not applied his mind to the facts of the case before passing the order dated 20.12.2018, therefore, the impugned order cannot be upheld.

7. Judicial orders cannot be allowed to be passed in a mechanical manner either by filling in blank on a printed proforma or by affixing a ready made seal etc. of the order on a plain paper. Such tendency must be deprecated and cannot be allowed to perpetuate. This reflects not only lack of application of mind to the facts of the case but is also against the settled judicial norms. Therefore, this practice must be stopped forthwith."

25. In view of the above, this Court finds and observes that the conduct of the judicial officers concerned in passing orders on printed proforma by filling up the blanks without application of judicial mind is objectionable and deserves to be deprecated. The summoning of an accused in a criminal case is a serious matter and the order must reflect that Magistrate had applied his mind to the facts as well as law applicable thereto, whereas the impugned cognizance and summoning order was passed in mechanical manner without application of judicial mind and without satisfying himself as to which offence were prima-facie being made out against the applicant on the basis of the allegations made by the opposite party no.2, the impugned cognizance and summoning order passed by the learned Magistrate is against the settled judicial norms.

26. In light of the judgments referred to above, it is explicitly clear that the impugned cognizance and summoning order dated 11.09.2012 passed by the 1st Additional Civil Judge (Junior Division)/Judicial Magistrate, Sitapur is cryptic and does not stand the test of the law laid down by the Hon'ble Apex Court. Consequently, the cognizance and summoning order dated 11.09.2012 cannot be legally sustained, as the Magistrate failed to exercise the jurisdiction vested in him resulting in miscarriage of justice.

27. Accordingly, the present Criminal Misc. Application U/S 482 Cr.P.C **succeeds and is allowed.** The impugned cognizance and summoning order dated 11.09.2012 passed by the 1st Additional Civil Judge (Junior Division)/ Judicial Magistrate, Sitapur, is hereby **quashed** in Criminal Case No. 486 of 2012 (State Vs. Kallu Ram and Manohar) arising out of Case Crime No.112 of 2012, under Section 447 IPC and section 2/3, Public Property Act, Police Station Machharehta, District Sitapur.

28. The 1st Additional Civil Judge (Junior Division)/Judicial Magistrate, Sitapur, is directed to decide afresh the issue for taking cognizance and summoning the applicant and pass appropriate orders in accordance with law keeping in view the observations made by this Court as well as the direction contained in the judgments referred to above within a period of two months from the date of production of a copy of this order.

(2021)11ILR A243
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 16.11.2021

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

U/S 482/378/407 No. 3465 of 2021

Abhishek Srivastava ...Applicant
Versus
U.O.I. ...Opposite Party

Counsel for the Applicant:

Sudhanshu S. Tripathi, Abdul Ahad, Aishwarya Saxena, Shagun Srivastava

Counsel for the Opposite Party:
Anurag Kumar Singh

Criminal Law – Code of Criminal Procedure,1973 – Section 313 - One accused public servant-rest accused are private individuals-Special judge , Anti corruption has no jurisdiction as sole public servant died before cognizance-Trial at the stage of section 313 Cr.P.C.-prosecution evidence is over-Special Judge has no occasion to try any case under the PC Act against the present accused Applicant-Impugned order set aside.

Petition allowed. (E-9)

List of Cases cited:

1.St. Through CBI Vs Jitendra Kumar Singh (2014) 11 SCC 724

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

1. Heard Ms. Shagun Srivastava and Mr. Sudhanshu Shekhar Tripathi, learned counsel for the petitioner and Shri Anurag Kumar Singh, learned counsel for the Central Bureau of Investigation.

2. Brief facts of the case are that the First Information Report was lodged on 23.03.2010 against the co-accused persons under sections 120B, 420, 467, 468, 471 Indian Penal Code, who are private individuals and non-public servants. During the course of investigation, a public servant was arrayed as an accused and subsequently Sections 13(1)(d) and 13 (2) of the Prevention of Corruption Act 1988 (hereinafter referred as 'PC Act') was added against all the accused persons with the aid of section 120-B Indian Penal Code. Charge-sheet was filed on 23.10.2010, however, the sole public servant died on 15.04.2011, which is admitted fact between the parties. Thereafter, cognizance was taken on 10.05.2011 of the offence. An application was filed on 16.03.2021 for the transfer of the case to the appropriate court on the ground that the sole public servant had died before cognizance can be taken and therefore, the Special Judge, Anti-Corruption has no jurisdiction to try this case. The application was rejected vide order dated 26.08.2021, which is impugned in this petition.

3. Learned counsel for the applicant submits that learned Special Judge, Anti-Corruption at the time of taking cognizance on 10.5.2011 failed to consider the fact that the sole public servant had died and even later when the case was abated against the sole public servant on 7.6.2011. It is submitted that the learned Special Judge, Anti-Corruption at the time of framing of the charges should have considered whether it could exercise jurisdiction under the PC Act or whether he was required to frame charges as per the applicable sections of the Indian Penal Code and remand the matter to the concerned court.

4. It is submitted that in the facts and circumstances of the present case, cognizance could not have been taken and charges framed by the Special Judge, Anti-Corruption merely on the basis of invocation of Section 120-B, as the same could not be read with any section of the PC Act in absence of the sole public servant.

5. Learned counsel for the applicant has placed reliance on the judgment of Hon'ble Supreme Court in **State Through CBI Vs. Jitendra Kumar Singh (2014) 11 SCC 724.** It is submitted that in this case the applicant is totally unconnected as he did not act as a public servant or was holding any profile as a public servant or bribed any public servant which are the cases where PC Act becomes applicable against a non-public servant. In the instant case the law is settled by aforesaid judgment of Hon'ble Supreme Court the trial court could not have been proceeded against the applicant in the

absence of sole public servant at the time of framing of charges.

6. It is also contended that this irregularity has caused grave injustice and irreparable loss to the applicant whereby hampering his right to fair trial, quantum of punishment, right to appeal before the appropriate court and in consequence thereto hampering the delivery of justice.

7. Per contra, learned counsel for the Central Bureau Of Investigation submits that in view of the Section 3 (1)(b) of the PC Act a conspiracy to commit an offence under the PC Act can only be tried by a Special Judge appointed under the PC Act and he can try a case for conspiracy to commit an offence under the PC Act against the applicant who is a private person, independently and it is not necessary that a public servant should also be there for the trial to be conducted by the Special Judge under the PC Act.

8. He has further submitted that as per paragraphs 37 and 38 of the judgment rendered by the Hon'ble Supreme Court in the case of **Jitender Kumar Singh** (supra), it is not obligatory on the part of the Special Judge to try non-PC offences. The expression "may also try" gives an element of discretion on the part of the Special Judge which will depend on the facts of each case and the inter-relation between the PC offences and the non-PC offences. The Special Judge is not expected to try non-PC offences totally unconnected with any PC offences but in the present case the offence committed by the applicant cannot be termed as 'totally unconnected with any PC offences.

9. Learned counsel for the C.B.I. has next submitted that as mentioned in paragraph 44 of the judgment in the case of **Jitender Kumar Singh** (supra), the purpose of the PC Act is to make Anti-Corruption Laws more effective in order to expedite the proceedings, thus in case the applicant succeeds in his illegal design, the trial of the present case would be delayed, and the purpose of the Act would be frustrated.

10. Learned Special Judge while considering the application moved by the accused for transfer of the case and while considering the judgment of Jitendra Kumar Singh (supra) was of the view that since the accused applicant is charged with the offence which is totally unconnected with any PC offence under Section 3(1) of the PC Act and therefore has jurisdiction to try the offence. The operative part of the impugned order is extracted below:-

"वर्तमान प्रकरण में यद्यपि कि एक मात्र लोक सेवक के विरूद्ध सज्ञान के पूर्व मृत्यु हो जाना एक स्वीकृत तथ्य है परन्तु उक्त सूचना न्यायालय को प्रसंज्ञान के स्तर पर प्राप्त न होने के कारण विशेष.न्यायालय द्वारा सम्बन्धित प्रकरण में संज्ञान लिया गया तथा पत्रावली यद्यपि कि लोक सेवक के विरुद्ध आरोप विरवन नहीं किया गया परन्तु पत्रावली में सम्पूर्ण साक्ष्य इसी न्यायालय के समक्ष किया गया। यह भी उल्लेखनीय है कि सम्बन्धित विचारण के अन्य शह अभियुक्त का विचारण करते हुए इसी न्यायालय द्वारा निर्णय भी किया जा चुका है। चूंकि प्रस्तुत प्रकरण में एक मात्र अभियका अभिषेक श्रीवास्तव विचार हेतु शेष है क्योंकि अभियुक्त अभिषेक श्रीवास्तव फरार हो गया था और जिस कारण अभियुक्त अभिषेक श्रीवास्तव की पत्रावली मूल पत्रावली से प्रथक कर दी गई थी तथा अन्य सह अभियुक्त नईम खा की पत्रावली दिनांक 15.5. 2019 को इसी न्यायालय द्वारा निर्णीत की जा चुकी है। इस पत्रावली में अभियुक्त अभिषेक श्रीवास्तव के विरूद्ध अभियोजन का साक्ष्य पूर्ण हो चुका है तथा पत्रावली अभियुक्त के बयान धारा 313 द०प्र०सं० में नियत है। इसके पूर्व कभी भी सम्बन्धित अभियुक्त ने इस न्यायालय में क्षेत्राधिकार न तो प्रश्नगत किया और ल ही इस प्रकृति का पूर्व में कोई प्रार्थना पत्र ही प्रस्तुत किया। माननीय उच्चतम न्यायालय द्वारा भ्रष्टाचार के

अपराध के मामलों का निस्तारण यथाशीघ्र किये जाने का दिशा निर्देश समय समय पर दिया जाता है और उनका प्रर्यवेक्षण भी किया जाता है। पत्रावली न्यायनिर्णय के अंतिम स्तर पर लम्बित है। यद्यपि कि सम्बंधित प्रकरण सह अभियुक्त लोक सेवक की मृत्यु हो चुकी है परन्तु लोक सेवक की सम्बन्धित अपराध में सलिशता रही है। जबकि (2014) - 11 एस सी सी 724 के मामले में माननीय उच्चतम न्यायालय ने पैरा-38 में यह मत व्यक्त किया गया है कि A Speial Judge exercising powers under the PC Act is not expected to try non-PC offnces totally unconnected with any PC offences under Section 3(1) of the PC Act, the question of the Special Judge not trying any offence does not arise. परन्तु सम्बन्धित प्रकरण में विवचनापरात अभियुक्त अभिषेक श्रीवास्तव पर मृतक लोक सेवक सुशील कुमार मिश्रा के साथ अपराधिक षडयंत्र में सम्मिलित होकर सम्बन्धित अपराध को कारित किये जाने का आरोप है। ऐसे में यह प्रकरण totally unconnected विचारण की श्रेणी में नहीं आता है। ऐसे में उपरोक्त विधि व्यवस्था से सम्बन्धित प्रकरण के तथ्य इस प्रकरण से भिन्न होने के कारण इस मामले में अनुकरणीय नहीं है क्योंकि पूर्व में अभियुक्त द्वारा क्षेत्राधिकार को कभी भी किसी भी स्तर पर चुनौती नहीं दी गई थी। वर्तमान में प्रकरण साक्ष्य समाप्त होने के उपरांत बयान धारा-313 द०प्र०सं० के स्तर पर लम्बित होने पर अभियुक्त ने न्यायालय के क्षेत्राधिकार को प्रश्नगत किया है, पूर्व में भी अभियुक्त विचारण के समय फरार हो गया था तथा लम्बे समय उपरांत गिरफ्तार होकर न्यायालय के समक्ष प्रस्तुत किया गया था। ऐसे में सी०बी०आई० द्वारा दिये गये इस तर्क में बल प्रतीत होता है कि अभियुक्त द्वारा विचारण को लम्बित करने के दुराशय से इस स्तर पर न्यायालय के क्षेत्राधिकार को प्रश्नगत करते हुए स्थानान्तरण प्रार्थना पत्र प्रस्तुत किया है। चूंकि प्रस्तुत मामले में अन्य सह अभियुक्त का विचारण इसी न्यायालय द्वारा पूर्व में किया जा चुका है। ऐसे में भ्रष्टाचार के मामलों के अपराधों का शीघ्र निस्तारण की विद्यायिका की अशा तथा माननीय उच्चतम न्यायालय द्वारा इस संदर्भ में दिये गये "दशा निर्देशों के अनुपालन में यह उचित प्रतीत होता है कि इस न्यायालय द्वारा सम्बन्धित मामले का निस्तारण अति शीघ्रता से किया जाय। अतः उपरोक्त विधि व्यवस्था समग्र विवेचना तथा प्रकरण के विशेष तथ्य परिस्थितियों एवं शीघ्र निस्तारण के मंशा को दृष्टिगत रखते हुए अभियुक्त द्वारा प्रस्तुत प्रार्थना पत्र इस स्तर पर स्वीकार किये जाने योग्य नहीं है।

आदेश

अभियुक्त अभिषेक श्रीवास्तव द्वारा प्रस्तुत प्रार्थना पत्र बी-33 निरस्त किया जाता है। पत्रावली वास्ते बयान धारा 313 द०प्र०स० हेतु दिनांक 10-09-2021 को पेश हो।"

11. On due consideration to the arguments advanced by the parties' counsel and perusal of the record, it is evident that the applicant is accused in Criminal Case No.1113 of 2018 under Section 120B, 406, 419, 420, 467, 468, 471 Indian Penal Code and Section 13(2) read with 13 (1)(d) of the PC Act arising out of RC No.4 (S) of 2010 at Police Station C.B.I./SCB Lucknow and the trial is pending before the Court of Special Judge, Anti Corruption, C.B.I. (West) Lucknow whereas it is alleged that the accused applicant along with co-accused persons out of one who was a public servant hatched the criminal conspiracy with each other cheated Allahabad Bank, Hussainganj Branch, Lucknow by obtaining various loans totaling Rs. 71.03 lacs by preparing forged Kisan Vikas Patras (KVP) for the purpose of cheating and using them as genuine to get the monetary benefit in their favour. It is not disputed that the sole public servant involved in the aforesaid case has died before the cognizance could be taken in the matter. Consequently, the charges have also been framed against the accused persons after the death of the sole public servant. The trial is at the stage of Section 313 Cr.P.C.. Prosecution evidence is over.

12. Hon'ble Supreme Court in the case of **Jitender Kumar Singh (supra)** was engaged

with two conflicting judgments. One rendered by Delhi High Court which was impugned Criminal Appeal No.943 of 2008 filed by CBI New Delhi and other rendered by Bombay High Court which was challenged by a private person in Criminal Appeal No.161 of 2011. After interpreting various provisions of Prevention of Corruption Act, particularly Sections 3,4 and 5 and other related provisions dealing with offence and penalties under PC Act, in Criminal Appeal No.943 of 2008 the Special Judge had framed charges against the public servant as well as against the non-public servant for the offences punishable under Section 3(1) of the PC Act as well as for the offences punishable under Section 120B read with Section 467, 471 and 420 Indian Penal Code and therefore held that existence of the jurisdictional fact i.e. "trying a case" under the PC Act was satisfied. In the aforesaid case, Special Judge after framing of charges for PC and non PC offence posted the case for cross examination and after that sole public servant died on 2.6.2003 and therefore held that on death the charge against the public servant alone abates and since the Special Judge has already exercised his jurisdiction under Sub-Section 3 of Section 4 of the PC Act that jurisdiction cannot be divested due to the death of the sole public servant whereas in Crime No.161 of 2011, where accused 9 and 10 died even before the charge-sheet was sent to the Special Judge. The charge against the sole public servant under the PC Act could not be framed since he died before taking of the cognizance. The special Judge could not frame any charge against non-public servants. It is held that Special Judge could try non-PC offences only when "trying any case" relating to PC offences. In Crime No. 161 of 2011 no PC offence was committed by any of the non-public servants so as to fall under Section 3(1) of the PC Act. Consequently, there was no occasion for the special Judge to try any case relating to offences under the PC Act against the accused persons. It was held that trying of any case under the PC Act against a public servant or a non-public servant, as already indicated, is a sine-qua-non for exercising powers under sub-section (3) of Section 4 of PC Act. In the instant case, since no PC offence has been committed by any of the non- public servants and no charges have been framed against the public servant, while he was alive, the Special Judge had no occasion to try any case against any of them under the PC Act, since no charge has been framed prior to the death of the public servant. In Criminal Appeal No. 161 of 2011 no PC offence has been committed by any of the non-public servants so as to fall under Section 3(1) of the PC Act and therefore held that there was no occasion for the Special Judge to try any case relating to the case under PC Act against the accused persons. It was held that the trying of any case under the PC Act against a public servant or a non-public servant, as already indicated, is a sine-qua-non for exercising powers under sub-section (3) of Section 4 of PC Act. Since, in this case no PC offence was committed by any of the non-public servants and no charges have been framed against the public servant, while he was alive, it was held that the Special Judge could not try any case against any of them under the PC Act. In the present case also the sole public servant died before the cognizance could be taken.

13. In the present case, the Special Judge was not trying any offence under Section 3(1) of the PC Act. The question of trying non PC offence by Special Judge will also not arise. Trying of the PC offence is jurisdictional fact to exercise the duty under Sub-section 3 of Section 4 PC Act. The exercise of very jurisdiction of the Special Judge depends upon the jurisdictional fact of trying a PC offence. Jurisdictional fact and the existence of jurisdiction by the Special Judge are two different ends. Para 39 of the judgment of **Jitender Kumar Singh** (supra) is extracted below: -

"39.The meaning and content of the expression "jurisdictional fact" has been

considered by this Court in Carona Ltd.v.Parvathy Swaminathan & Sons[(2007) 8 SCC 559] , and noticed that where the jurisdiction of a court or a tribunal is dependent on the existence of a particular state of affairs, that state of affairs may be described as preliminary to, or collateral to the merits of the issue. The existence of a jurisdictional fact is thus a sine qua non or condition precedent to the assumption of jurisdiction by a court. InRamesh Chandra Sanklav.Vikram Cement[(2008) 14 SCC 58 : (2009) 1 SCC (L&S) 706] , this Court held that by erroneously assuming existence of the jurisdictional fact, a court cannot confer upon itself jurisdiction which otherwise it does not possess."

14. The trial in a warrant case starts with the framing of charge. Before framing of charge it cannot be said that Special Judge was trying of any offence under Section 3(1) of PC Act. The trial starts from framing of charges. Since, it is admitted fact in this case that the sole accused person died before the charges could be framed and even before taking of cognizance, therefore, the stage of trying any offence under Section 3(1) of the PC Act did not arise as has been held in the aforesaid judgement of Jitendra Kumar Singh. Trying of PC offence is a jurisdictional fact to the exercise of power under Sub section 3 of Section 4. Since, learned Special Judge was not trying any offence as the trial did not commence. The sole public servant in this case already died before framing of charges, therefore, the trial did not start. The Special Judge had no occasion to try any case against the present accused applicant under the PC Act as no charge was framed prior to the death of the public servant, hence, the jurisdictional fact did not exist so as to enable the Special Judge to exercise jurisdiction with regard to non-PC offence.

15. In view of the above, the petition succeeds. The impugned order dated 26.8.2021 passed by the Special Judge Anti-Corruption, CBI (West), Lucknow in the Case No.1113 of 2018 is set aside and learned Special Judge is directed to send the papers of the case to the competent court for trial of accused in accordance with law within a period of four weeks' from the date of receipt of a certified copy of this order. Office is directed to send copy of this order to learned Special Judge concerned for compliance.

(2021)11ILR A248
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 22.11.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

U/S 482/378/407 No. 3589 of 2018

Nitesh Kumar Verma ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sushil Kumar Singh

Counsel for the Opposite Parties:
Govt. Advocate, Priyanka Singh, Umesh Chandra

Trial and cognizance cannot be set aside unless illegality in investigation bring micarriage of justice-invalidity of investigation has no relevanceto the competence of Court.

Petition dismissed. (E-9)

List of Cases cited:

1. St. of Har. Vs Bhajan Lal & ors. 1992 Supp (1) Supreme Court Cases 335

2. R.A.H. Siguran Vs Shankara Gowda @Shankara reported in (2017) 16 SCC 126

3. H.N. Rishbud & anr. Vs St. of Delhi reported in 1955 Cr.L.J. 526

4. M/s Fertico Marketing & Investment Pvt. Ltd. and Ors. etc. Vs C.B.I. & anr. reported in 2020 SCC Online SC 395

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Sushil Kumar Singh, learned counsel for the applicant, Sri Anirudh Kumar Singh, learned AGA-I and Ms. Priyanka Singh, learned counsel for the opposite party no. 2.

2. By means of this petition the applicant has prayed for quashing of the Charge-sheet dated 10.3.2018 and the entire criminal proceedings in pursuance of charge-sheet pending in the court of IVth A.C.J.M., Court no. 22, Sultanpur arising out of Case Crime No. 163 of 2017 u/s 323, 504, 506, 354, 427, 376 IPC, P.S. Goshaiganj, District Sultanpur pending in Crl. Misc. Case No. 408 of 2018 (State vs. Pankaj & Others).

3. The precise question for consideration is whether the investigation carried out by the incompetent authority and charge-sheet filed by the same authority would make the investigation and charge-sheet as nullity in the eyes of law. Further as to whether the order of cognizance of the Magistrate taking cognizance of the same charge-sheet would also be nullity.

4. For addressing and replying the aforesaid question some brief facts of the case would be necessary to be considered.

5. In the present case a F.I.R. was registered on 6.11.2015 bearing N.C.R. No. 314 of 2015 u/s 323, 504, 427 IPC against four persons namely, Pankaj Verma s/o Ram Kumar Verma, Pradumma Verma s/o Keshavram Verma, Nitesh Kumar Verma s/o Keshavram Verma and Keshavram Verma s/o Sitaram Verma, Police Station Gosainganj, District Sultanpur. However, the bare narration of the F.I.R. revealed that the family members of the complainant namely, Smt. Rampatta Devi w/o Siyaram Verma had sustained injuries on the body and head.

6. Feeling aggrieved from the aforesaid inaction on the part of the police to register the case in N.C.R. instead of regular crime case the complainant of the F.I.R. namely, Smt. Rampatta Devi filed an application u/s 155(2) Cr.P.C. before the court of Magistrate on 8.1.2016. Learned Magistrate after perusing the allegation of the F.I.R. directed, vide order dated 25.1.2016, the S.H.O. concerned to register such case and investigate, therefore, the said case was registered under Crime No. 163 of 2017.

7. After completion of investigation the charge-sheet was filed on 10.9.2017 u/s 354, 323, 504, 506 and 427 I.P.C.

8. As per the material available on record the daughter of the complainant has recorded her statement under section 161 Cr.P.C. on 8.8.2017 and u/s 164 Cr.P.C. on 31.8.2017 making specific allegations against Pankaj Verma and Nitesh Kumar Verma (petitioner herein) regarding outraging of her modesty and attempt to rape. Therefore, it appears that the Circle Officer of the area while indicating his dissatisfaction regarding investigation and charge-sheet wherein the section relating to the attempt of rape was missing directed the S.H.O., Gosainganj, District Sultanpur to depute any other officer to conduct further investigation, returning back the charge-sheet with the complete case diary. Thereafter the S.H.O. concerned vide order dated 19.2.2018 has deputed one Sri Rana Pratap Singh, S.I., P.S. Gosainganj, Sultanpur to conduct further investigation and submit his report.

9. The aforesaid officer has further conducted the investigation and recorded the statement of complainant as well as other 12 witnesses including some independent witnesses

who were not related with the family of the complainant. However, the earlier charge-sheet which was filed on 10.9.2017 the statement of only seven witnesses were recorded. On the basis of statement of aforesaid 12 persons including the independent witnesses, the complainant and of the victim and after perusing the statement of the victim recorded u/s 161 and 164 Cr.P.C. submitted supplementary charge-sheet on 10.3.2018 u/s 376 and 511 I.P.C. against Pankaj Kumar Verma s/o Ram Kumar Verma and Nitesh Kumar Verma s/o Keshav Ram Verma bearing no. 1A/2017.

10. Learned counsel for the petitioner has assailed the charge-sheet dated 10.3.2018 on the ground that the investigation conducted by the incompetent officer Sri Rana Pratap Singh inasmuch as at the relevant point of time he was serving on the post of Head Constable (Promotional Pay Scale) whereas such investigation could not have been conducted by any officer lower in rank of Sub-Inspector.

11. So as to strengthen the aforesaid argument Sri Sushil Kumar Singh has drawn attention of this Court towards Annexure no. 13 which is a notification dated 15.9.1997 being issued by the Principal Secretary of the Department of Home, Police Services which was issued under the authority of Governor invoking the provisions of section 157 Cr.P.C. authorising the Head Constable (Promotional Pay-Scale) of the U.P. Police to conduct the investigation in minor case e.g. investigation relating to sections 160,323,324,504,506 IPC, pick-pocketing, theft of bicycle or electricity wire or cattle-car or theft at railway platform to the extent of Rs. 25,000/-, offence relating to the Motor Vehicle Act and relating to section 4(25) of Arms Act. He has further drawn attention of this Court towards Annexure - 14 which is a compliance order of the notification dated 15.9.1997 being issued by the Director General of Police, U.P. He has also drawn attention of this Court towards Annexure no. 13 which is an information provided to the father of the petitioner by the Nodal Officer, RTI / Addl. S.P., Sultanpur dated 28.4.2018 which says that the Investigating Officer concerned namely, Sri Rana Pratap Singh was serving on the post of Head Constable (Promotional Pay Scale) w.e.f. 20.2.2018 to 10.3.2019 at P.S. Gosainganj, District Sultanpur. On the basis of aforesaid documents Sri Sushil Kumar Singh has submitted that at the particular point of time when Sri Rana Pratap Singh had conducted the investigation was not the competent authority to conduct the investigation and to submit charge-sheet u/s 376 and 511 IPC.

12. He has drawn attention of this Court towards section 157 Cr.P.C. which categorically provides that only the competent authority shall be deputed to conduct the investigation and in the present case the competent authority has not been deputed to conduct the investigation and to file charge-sheet u/s 376 and 511 IPC.

13. He has also placed reliance of the dictum of Apex Court in re: ***State of Haryana vs. Bhajan Lal and others 1992 Supp (1) Supreme Court Cases 335*** referring para 113,119 and 120 to submit that the Apex Court has held that the investigation by the designated police officer is the rule of the investigation and by an officer of lower rank is an exception.

14. Per contra, Ms. Priyanka Singh has drawn attention of this Court towards the counter affidavit filed by the victim (Mamta Kumari) referring Annexure no. C.A.-1 thereof which is a final order dated 27.4.2018 passed by this Court in a petition of co-accused Pankaj Kumar Verma filed u/s 482 Cr.P.C. dismissing such petition on merits giving liberty to that petitioner to seek bail before the appropriate court of law. She has also submitted that the same charge-sheet which is impugned herein has been assailed and this Court after considering the arguments of rival parties dismissed such

petition, therefore, in the present petition such fact should have been indicated to follow the principles of fairness. As per Ms. Singh if any person does not approach the court with clean hands no benevolence should be shown by the Hon'ble Courts. Therefore, the instant petition may be dismissed on the aforesaid ground alone.

15. So far as the ground of the competence of an authority conducting investigation and filing charge-sheet is concerned she has firstly drawn attention of this court towards the dictum of Apex Court in re: ***R.A.H. Siguran v. Shankara Gowda alias Shankara reported in (2017) 16 SCC 126.*** In the aforesaid case the same question has been dealt by the Apex Court as indicated in para 2 thereof which is being reproduced herein below :

"2. The question for consideration is whether the High Court was justified in quashing the proceedings against Respondent No.1 on the ground that investigating Officer who conducted the investigation was not authorized to do so under the provisions of Immoral Traffic (Prevention) Act, 1956 (the Act)."

16. In the aforesaid judgment the Apex Court while considering the dictum of its own court in re: ***H.N. Rishbud and Another vs. State of Delhi reported in 1955 Cr.L.J. 526*** has held in para 13 that the High Court should have not quashed the proceedings merely on the ground that investigation was not conducted by the competent authority. Para 13 thereof reads as under :

"13. In View of the above, we are satisfied that the High Court was not justified in quashing the proceedings merely on the ground that the investigation was not valid. It is not necessary for this Court to go to the question raised by leaned counsel for the appellants that there was no infirmity in the Investigation."

17. The Hon'ble Apex Court in re: ***H.N. Rishbud and another (supra)*** vide para 9 and 10 has dealt the issue of competence and was of the opinion that the investigation should have been conducted by the authorized officer but it does not necessarily follow that an invalid investigation nullifies the cognizance or trial based thereon. Further, such defect, if any may be brought into the notice of learned trial court at the very inception or at a sufficiently early stage so that the appropriate order could be passed by the learned court-below but if the trial has proceeded and it reaches near to conclusion, on the basis of investigation being conducted by incompetent authority, the proceedings may not vitiate unless the person concerned suffers from manifest injustice on account of incompetence. Relevant portion of para 9 and 10 reads as under :

9.The question then requires to be considered whether and to what extent the trial which follows such investigation is vitiated. Now, trial follows cognizance and cognizance is preceded by investigation. This is undoubtedly the base scheme of the Code in respect of cognizable cases. But it does not necessarily follow that an invalid investigation nullifies the cognizance or trial based thereon. Here we are not concerned with the effect of the breach of a mandatory provision regulating the competence or procedure of the Court as regards cognizance or trial. It is only with reference to such a breach that the question as to whether it constitutes an illegality vitiating the proceedings or a mere irregularity arises.

A defect or illegality in investigation, however serious, has no direct bearing on the competence or the procedure relating to cognizance or trial. No doubt a police report which results from an investigation is provided in Section 190 Cr. P. C. as the material on which cognizance is taken. But it cannot be maintained that a valid and legal police report is the foundation of the jurisdiction of the Court

to take cognizance. Section 190 Cr. P. C. is one out of a group of sections under the heading "Conditions requisite for initiation of proceedings". The language of this section is in marked contrast with that of the other sections of the group under the same heading, i.e., Sections 193 and 195 to 199.

These latter sections regulate the competence of the Court and bar its jurisdiction in certain cases excepting in compliance therewith. But Section 190 does not. While no doubt, in one sense, Clauses (a),(b) and (2) of Section 190(1) are conditions requisite for taking of cognizance, it is not possible to say that cognizance on an invalid police report is prohibited and therefore a nullity. Such an invalid report may still fall either under Clause (a) or (b) of Section 190(1), (whether is the one or the other we need not pause to consider) and in any case cognizance so taken is only in the nature of error in a proceeding antecedent to the trial. To such a situation Section 537 Cr. P. C. which is in the following terms is attached :

"Subject to the provisions herein before contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, Judgment or other proceedings before or during trial or in any enquiry or other proceedings under the Code, unless such error, omission or irregularity, has in act occasioned a failure of justice.

If, therefore, cognizance is in fact taken, on a police report vitiated by the breach of a mandatory provision relating to investigation, there can be no doubt that the result of the trial which follows it cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice. That an illegality committed in the course of investigation does not affect the competence and the jurisdiction of the Court for trial is well settled as appears from the cases in - 'Prabhu v. Emperor', AIR 1944 PC 73 (C) and-Lumbhardar Zutshi v. The King', AIR 1950 PC 26 (D)

These no doubt relate to the illegality of arrest in the course of investigation while we are concerned in the present cases with the illegality with reference to the machinery for the collection of the evidence. This distinction may have a bearing on the question of prejudice or miscarriage of justice, but both the cases clearly show that invalidity of the investigation has no relation to the competence of the Court. We are, therefore, clrarly, also, of the opinion that where the cognizance of the case has in fact been taken and the case has proceeded to termination, the invalidity of the precedent Investigation does not vitiate the result, unless miscarriage of justice has been caused thereby.

10. It does not follow, however, that the invalidity of the investigation is to be completely ignored by the Court during trial. When the breach of such a mandatory provision is brought to the knowledge of the Court at a sufficiently early stage, the Court, while not declining cognizance, will have to take the necessary steps to get the illegality cured and the defect rectified, by ordering such re-investigation as the circumstances of an individual case may call for.

Such a course is not altogether outside the contemplation of the scheme of the Code as appears from section 202 under which a Magistrate taking cognizance on a complaint can order investigation by the police. Nor can it be said that the adoption of such a course is outside the scope of the inherent powers of the Special Judge, who for purposes of procedure at the trial is virtually in the position of a Magistrate trying a warrant case. When the attention of the Court is called to such an illegality at a very early stage it would not be fair to the accused not to obviate the prejudice that may have been caused thereby, by appropriate orders, at that stage but to leave him to the ultimate remedy of waiting till the

conclusion of the trial and of discharging the somewhat difficult burden under section 537 Cr P. C. of making out that such an error has in fact occasioned a failure of justice.

It is relevant in this context to observe that even if the trial had proceeded to conclusion and the accused had to make out that there was in fact a failure of justice as the result of such an error, explanation to section 537 Cr. P. C. indicates that the fact of the objection having been raised at an early stage of the proceeding is a pertinent factor. To ignore the breach in such a situation when brought to the notice of the Court would be virtually to make a dead letter of the peremptory provision which has been enacted on grounds of public policy for the benefit of such an accused. It is true that the peremptory provision itself allows an officer of a lower rank to make the investigation if permitted by the Magistrate. But this is not any indication by the Legislature that an investigation by an officer of a lower rank without such permission cannot be said to cause prejudice. When a Magistrate a approached for granting such permission he is expected to satisfy himself that there are good and sufficient reasons for authorizing an officer of a lower rank to conduct the investigation. The granting of such permission is not to be treated by a Magistrate as a mere matter of routine but it is an exercise of his judicial discretion having regard to the policy underlying it.

In our opinion, therefore, when such a breach is brought to the notice of the Court at an early stage of the trial the Court will have to consider the nature and extent of the violation and pass appropriate orders for such re-investigation as may be called for, wholly or partly, and by such officer as it considers appropriate with reference to the requirements of section 5-A of the Act. It is in the light of the above considerations that the validity or otherwise of the objection as to the violation of section 5(4) of the Act has to be decided and the course to be adopted in these proceedings, determined.

Emphasis Added

18. The Apex Court while considering ***H.N. Rishbud and another (supra)*** in re: ***M/s Fertico Marketing and Investment Pvt. Ltd. and Ors. etc. vs. Central Bureau of Investigation and another reported in 2020 SCC Online SC 395*** has held, that the cognizance and trial cannot be set aside unless the illegality in the investigation can be shown to have brought about mis-carriage of justice.

19. Therefore, in view of the above she has submitted that since the further investigation which was conducted by an officer who was not competent as per notification issued on 15.9.1997 even then such investigation and charge-sheet may not be declared as nullity in the eyes of law inasmuch as such investigation was completed after recording the statement of relevant witnesses and charge-sheet was filed accordingly. Not only the above the learned court-below has taken cognizance on 24.3.2018 and trial is going on since then, therefore, this petition may be dismissed.

20. Learned AGA has also submitted on the basis of instructions that initially the investigation was conducted by the Sub-Inspector but further investigation was conducted by the Head Constable (Promotional Pay Scale) and on the basis of such investigation charge-sheet was filed and the cognizance has been taken on 24.3.2018 and the trial is in progress.

21. Having heard learned counsel for the parties and having perused the material available on record, at the very outset this Court shows his displeasure regarding the conduct of the present petitioner by not coming fairly apprising the Court that the petition of co-accused namely, Pankaj Kumar Verma challenging the same charge-sheet has already been dismissed on merits. However, learned counsel for the present petitioner has submitted that the legal grounds to challenge the impugned charge-sheet in both the

petitions are different, therefore, such fact may not be treated as concealment.

22. It has been noted that no interim order has been granted by this Court in favour of the petitioner. However, vide order dated 3.9.2021 this much has been provided that till the next date of listing, the trial court before passing any order in the case pending before it, shall have due regard to the fact that the matter is sub-judice before this Court.

23. So far as the argument of the competence is concerned, I am in full agreement with the decisions so cited by the learned counsel for the petitioner as well as Ms. Priyanka Singh to the extent that the investigation should be carried out by the authorized officer if such authority has been vested by the competent authority. But at the same time I am also in agreement with the view of Hon'ble Apex Court in re: ***M/s Fertico Marketing and Investment Pvt. Ltd (supra), R.A.H. Siguran (supra)*** and H.N. Rishbud (supra) that the cognizance and trial cannot be set aside unless the illegality in the investigation can be shown to have brought about miscarriage of justice. Further, the illegality may have a bearing on the question of prejudice or miscarriage of justice but the invalidity of investigation has no relevance to the competence of the court.

24. The material available on record clearly indicates that the victim had alleged the specific allegation against the present petitioner as well as his co-accused namely, Pankaj Kumar Verma while recording her statement u/s 161 and 164 Cr.P.C. that both have outraged her modesty and attempted to rape by torning her clothes, pushing her sensitive body parts etc. As a matter of fact both the accused have committed such act to tarnish the modesty of the victim. Further, the police officer has recorded statement of independent witnesses as well as other witnesses whose statements were not recorded earlier. Further, on the basis of such statements and the statement earlier recorded u/s 161 and 164 Cr.P.C. he filed chargesheet u/s 376 and 511 IPC.

25. To me, on the basis of aforesaid material at least a chargesheet u/s 376 and 511 IPC should have been filed earlier and if such material was not sufficient to file chargesheet under such section, the accused person might very well raise objection before the learned court-below at the various stages available under the law. It is needless to say that while framing the charges the opportunity is provided to the accused person and after considering the objection of the accused person the charges are famed. Even the accused person may file discharge application before the appropriate learned court below but on the basis of allegations, statements of family members, independent persons and statement u/s 161 and 164 Cr.P.C. of the victim, I am afraid why chargesheet was not filed earlier u/s 376 and 511 IPC. However, this observation may not create any hindrance to the accused person opposing against the charge of section 376 and 511 IPC and learned court-below would be at liberty to frame charges against the accused person independently without being influenced from these findings.

26. Therefore, in view of the facts and the case law cited herein above, I do not find any infirmity or illegality in the chargesheet dated 10.3.2018 and the cognizance order dated 24.3.2018 passed by the learned court-below.

27. Hence, the present petition is ***dismissed*** being devoid of merits.

28. However, it is needless to say that the petitioner may ventilate his grievances or prejudice or miscarriage of justice on account of impugned chargesheet by filing appropriate

application at the various stages available under the law, if he is so advised, but the invalidity of the investigation, if any, has no relevance to the competence of the court concerned. The question so formulated in this case has been answered accordingly.

29. No order as to costs.

(2021)11ILR A255
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 09.11.2021

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

U/S 482/378/407 No. 4406 of 2021

Dinesh Kumar Yadav ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Gaurav Gupta

Counsel for the Opposite Parties:
G.A.

FIR by the complainant who borrowed money from Petitioner but instead of refunding lodged FIR to implicate-IO did not took on record the evidence of video and photographs which shows that money given to the servant of the complainant-Petitioner filed an application before the Magistrate for direction to the investigating officer to take his (accused) evidence on record-rejected-no direction can be issued to the I.O. on apprehension of unfair practice.

Petition dismissed. (E-9)

List of Cases cited:

1.Sakiri Vasu Vs St. of U.P. reported in (2008) 2 SCC 409,

2. Vinubhai Haribhai Malaviya & ors. Vs St. of Guj. & anr. reported in (2019) 17 SCC 1

3. Neeharika Infrastructure Pvt. Ltd. Vs St. of Mah. & ors. reported in AIR 2021 SC 1918

4. King Emperor Vs Khwaja Nazir Ahmad reported in AIR 1945 PC 18

5. Union of India Vs Prakash P. Hinduja, reported in (2003) 6 SCC 195

6. St. of Orissa & ors. Vs Ujjal Kumr Burdhan reported in (2012) 4 SCC 547

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.)

(1) Heard the learned counsel for the petitioner and Shri S.P. Tiwari, who appears for the State respondents.

(2) It is the case of the petitioner that he is an accused in F.I.R. dated 10.04.2021 where the complainant Chandra Shekhar had borrowed Rs.20 lacs in the form of Recurring Deposit from the petitioner for the purpose of investment in real estate. The load had also been admitted by him. The complainant instead of refunding the amount has falsely implicated the petitioner.

(3) The petitioner filed a cross F.I.R.

(4) The complainant had approached this Court in a petition No.4300 of 2021 which was dismissed by this Court on 11.02.2021 refusing to interfere in the F.I.R.

(5) The petitioner approached the Investigating Officer annexing all evidence with regard to Video and Photographs taken on 29.07.2019 saying that money had been given to the servant of the complainant. The Investigating Officer did not take the same on record.

(6) It has been argued that in **Sakiri Vasu Vs. State of U.P. reported in (2008) 2 SCC 409**, and **Vinubhai Haribhai Malaviya and Others Vs. State of Gujarat and Another reported in (2019) 17 SCC 1.** The Supreme

Court has observed that a fair and just investigation is a fundamental right of the accused, and that the Magistrate can direct the Investigating Officer to take the evidence produced by the accused on record while submitting his report. The petitioner, therefore, filed an application before the Additional Chief Judicial Magistrate-1, Lucknow namely CM Application No.4377/2021 under Section 156 (3) Cr.P.C. and prayed for a direction to the concerned Investigating Officer to take the above said evidence of the accused on record. This application was rejected on 20.09.2021 on the ground that the concerned Investigating Officer had filed a report on 19.08.2021 wherein it was stated that the accused had denied to give any statement to him.

(7) Even after rejection of his application by the concerned Magistrate on 20.09.2021, the petitioner approached the Commissioner by filing application on 24.09.2021 mentioning that he wished to give evidence to the concerned Investigating Officer and the same be directed to be taken on record. On failure to pay heed to such application, the petitioner was left with no other remedy but to approach this Court by filing Writ Petition No.22926 (M/B) of 2021 **(Dinesh Kumar Yadav Vs. State of U.P. and others)** wherein this Court dismissed the petition observing that since the Investigation was under way, it is the prerogative of the Investigating Officer to record the statement/evidence of the petitioner as and when required and necessary and that no interference was called for by the Court in its extraordinary power under Article 226 of the Constitution of India.

(8) After his petition was rejected on 07.10.2021, the petitioner sent a representation to the concerned Investigating Officer as well as to the Police Commissioner and the concerned Station House Officer on 18.10.2021 but no heed was paid. Apprehending that the concerned Investigating Officer shall file a report without taking into account the evidence produced by the petitioner, this petition has been filed praying for quashing of the order dated 20.09.2021 and for directing the Investigating Officer to conduct fair investigation in F.I.R. No.297/2021.

(9) Learned counsel for the petitioner has placed reliance upon judgment rendered in **Vinubhai Haribhai Malaviya and Others Vs. State of Gujarat and Another (Supra)** and has read out the Paragraph-42 of the said judgment to argue that the concerned Trial Court has power to direct the police to conduct further investigation as per law settled already by Hon'ble the Supreme Court in its earlier judgments.

(10) Paragraph-42 of the said judgment rendered in **Vinubhai Haribhai Malaviya and Others Vs. State of Gujarat and Another (Supra)** as read out by the learned counsel for the petitioner is being quoted hereinbelow:-

"There is no good reason given by the Court in these decisions as to why a Magistrate's powers to order further investigation would suddenly cease upon process being issued, and an accused appearing before the Magistrate, while concomitantly, the power of the police to further investigate the offence continues right till the stage the trial commences. Such a view would not accord with the earlier judgments of this Court, in particular, Sakiri (supra), Samaj Parivartan Samudaya (supra), Vinay Tyagi (supra), and Hardeep Singh (supra); Hardeep Singh (supra) having clearly held that a criminal trial does not begin after cognizance is taken, but only after charges are framed. What is not given any importance at all in the recent judgments of this Court is Article 21 of the Constitution and the fact that the Article demands no less than a fair and just investigation. To say that a fair and just investigation would lead to the conclusion that

the police retain the power, subject, of course, to the Magistrate's nod under Section 173 (8) to further investigate an offence till charges are framed, but that the supervisory jurisdiction of the Magistrate suddenly ceases midway through the pre-trial proceedings, would amount to a travesty of justice, as certain cases may cry out for further investigation so that an innocent person is not wrongly arraigned as an accused or that a prima facie guilty person is not so left out. There is no warrant for such a narrow and restrictive view of the powers of the Magistrate, particularly when such powers are traceable to Section 156 (3) read with Section 156 (1) Section 2(h), and Section 173 (8) of the Cr.P.C., as has been noticed hereinabove, and would be available at all stages of the progress of a criminal case before the trial actually commences. It would also be in the interest of justice that this power be exercised suo motu by the Magistrate himself, depending on the facts of each case. Whether further investigation should or should not be ordered is within the discretion of the learned Magistrate who will exercise such discretion on the facts of each case and in accordance with law. If, for example, fresh facts come to light which would lead to inculpating or exculpating certain persons, arriving at the truth and doing substantial justice in a criminal case are more important than avoiding further delay being caused in concluding the criminal proceeding, as was held in Hasanbhai Valibhai Qureshi (supra). Therefore, to the extent that the judgments in Amrutbhai Shambubhai Patel (supra), Athul Rao (supra) and Bikash Ranjan Rout (supra) have held to the contrary, they stand overruled. Needless to add, Randhir Singh Rana Vs. State (Delhi Administration) (1997) 1 SCC 361 and Reeta Nag V. State of West Bengal and Others (2009) 9 SCC 129 also stand overruled."

(11) Shri S.P. Tiwari, learned Additional Government Advocate has pointed out from the facts mentioned in the judgment rendered in **Vinubhai Haribhai Malaviya and Others Vs. State of Gujarat and Another (Supra)** that the case of the appellants therein was in a different fact situation and the observations made in Paragraph-42 have to be read in context of the facts in the case of **Vinubhai Haribhai Malaviya and Others Vs. State of Gujarat and Another (Supra)**.

(12) This Court has carefully perused the judgment rendered by three Judges of Hon'ble the Supreme Court cited before this Court by the learned counsel for the petitioner. It appears from a perusal of the said judgment that F.I.R. was lodged on 22.12.2009 by one Nitinbhai Patel on behalf of Ramanbhai Patel and Shankerbhai Patel that they are absolutely independent owners of the disputed land situated in Surat, Gujarat since 1975. Because of recent price hike of lands situated at Surat, the accused had hatched a conspiracy in collusion with the heirs of the original tenure holder and tried to extort more money from the complainant. Pursuant to the filing of the F.I.R. the investigation was conducted by the police which resulted in report dated 22.04.2010 being submitted to the Judicial Magistrate. The Magistrate took cognizance and issued summons to the accused on 23.04.2010 under Sections 420, 465, 467, 471, 384 and 511 of the IPC. Pursuant to the summons the accused appeared before the Magistrate and filed an application for further investigation under Section 173 (8) of the Cr.P.C. and another application for discharge. Similar applications were filed by the other accused. By order dated 24.08.2011 the Magistrate rejected the applications that were filed for further investigation, stating that the fact sought to be placed by the applicants were in the nature of evidence of the defence and would be taken into account in the Trial. The Magistrate also rejected the discharge application.

(13) Another application in the meanwhile, had been filed by the applicant Manubhai Heerabhai and other accused before the Magistrate under Section 156 (3) Cr.P.C. to

order for investigation and to register an F.I.R. against the complainant. This application was rejected by the learned Magistrate by an order dated 09.09.2011.

(14) The Criminal Revisions were filed thereafter which were decided by the Second Additional Sessions Judge, Surat, by a common order dated 10.09.2012. The Additional Sessions Judge went in detail into the facts that were alleged in the application under Section 173 (8) Cr.P.C. and found that the case has been made out for further investigation. He, therefore, directed for further investigation to be conducted. The investigation was handed over to the another Investigating Officer. Two further investigation reports were submitted thereafter by the police.

(15) A Special Criminal Application No.727/2012 was filed before the High Court challenging the order passed by the Revisional Court. The Court observed that the Investigating Officer furnished an interim investigation report not to the Magistrate but to the learned Additional Sessions Judge, which smacked of malafides as if the Investigating Officer wanted to favour the accused persons. The High Court further observed that for an interim investigation the reports which were submitted by the Investigating Officer virtually acquitted the accused persons. The High Court set aside the order passed by the learned Additional Sessions Judge, and remanded the same for a fresh consideration to the learned Additional Sessions Judge who would then decide as to whether the F.I.R. should be registered in so far as allegations contained in the application for further investigation are concerned.

(16) The Supreme Court after recording the submissions made by the learned Senior Advocate appearing on behalf of the appellant observed in Paragraph-10 that the question of law that arose in the case of was :- *"Whether after a Charge-sheet is filed by the police, the Magistrate has power to order further investigation and if so upto what stage of a criminal procedure."*

(17) The Court thereafter considered the entire gamut of sections in the Cr.P.C. relating to the power of Police Officer to investigation the cognizable offence and also considered the definition of "Complaint" "Enquiry" and "Investigation", as given in the Cr.P.C. The Supreme Court thereafter discussed in detail the observations of the Court made in earlier cases relating to Section 173 (8) of the Cr.P.C. as also Section 156 (3) Cr.P.C. The Supreme Court observed that the Magistrate's power under Section 156 (3) Cr.P.C. is very wide for which his judicial authority must be satisfied that a proper investigation by the police had taken place. After a report is submitted under Section 173 (2) Cr.P.C. this power would continue to enure and would be available at all stages of the progress of a criminal proceeding until the Trial itself commences. The Supreme Court, therefore, made such observations in Paragraph-42, which paragraph has been read out by the learned counsel for the petitioner.

(18) In the case of the petitioner, however, it is evident that the police has not yet submitted any report under Section 173 (2) of the Cr.P.C. The Investigation in the two F.I.Rs. is still going on. The judgment as cited by the learned counsel for the petitioner is inapplicable to the case of the petitioner.

(19) This Court has also perused the order impugned dated 20.09.2021. The learned Trial Court has observed that an application has been submitted by the accused Dinesh Kumar Yadav saying that a direction be issued to the Investigating Officer to record his statement. The concerned police station had reported that on 08.08.2021 the statement of the accused was recorded and that he had denied any offence,

having been committed by him, and said that he would produce the evidence in Court through his counsel. The Court, therefore, observed that since the investigation was in progress, there was no presumption that the Investigating Officer shall not record the evidence produced by either side. The application of the petitioner was hence rejected.

(20) This Court finds no legal and factual infirmity in such order. The petitioner has approached this Court prematurely. This Court cannot also issue any direction to the Investigating Officer on mere apprehension of unfair practice on the part of the Investigating Officer as alleged in this petition.

(21) The Supreme Court in the case of **Neeharika Infrastructure Pvt. Ltd. Vs. State of Maharashtra and Others reported in AIR 2021 SC 1918,** has observed in Paragraph 8 onwards, the rights and duties of the police to investigate into cognizable offences. The Court has placed reliance upon the judgment rendered by the Privy Council in the case of **King Emperor V. Khwaja Nazir Ahmad reported in AIR 1945 PC 18,** to say that in India, there is a statutory right on the part of the police to investigate the circumstances of alleged cognizable crime without requiring any Authority from the judicial authorities. It is further observed that it would be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of inherent jurisdiction of the Court. It was observed that the functions of the judiciary and the police are complementary not overlapping, combination of investigating an offence with a duty for observance of law and order. It shall be appropriate to leave each to exercise its own function. The Court consider the question whether the High Court would be justified in interfering with the investigation by the police while exercising the inherent powers under Section 482 of the Criminal Procedure Code and /or Article 226 of the Constitution of India. It observed that there is a clear cut and well demarcated spheres of activity in the field of crime detection and crime punishment. Investigation of an offence is the field exclusively reserved for the Executive through the Police Department, the Superintendence over which is based in the State Government. The Executive which is charged with a duty to keep vigilance over the law and order situation is obliged to prevent crime and if an offence as alleged to have been committed, it is its moral duty to investigate into the offence and borne the offender to book. Once it investigates and finds offence having been committed it its duty to collect evidence for the purpose of proving the offence.

There is thus, a well and definitely demarcated field of crime detection and its subsequent adjudication between the police and the Magistrate.

(22) In the case of **Union of India Vs. Prakash P. Hinduja, reported in (2003) 6 SCC 195,** the Supreme Court observed in Paragraph-20 as under:-

"Thus, the legal position is absolutely clear and also settled by judicial authorities that the court would not interfere with the investigation or during the course of investigation, which would mean from the time of the lodging of the first information report till the submission of the report by the officer in charge of the police station in court under Section 173 (2) Code of Criminal Procedure, this field being exclusively reserved for the Investigating Agency".

(23) In **State of Orissa & Others Vs. Ujjal Kumr Burdhan reported in (2012) 4 SCC 547,** the Supreme Court observed that unless a case of gross abuse of power is made out against those incharge of investigation, the

High Court should be loathe to interfere at early/premature stage of investigation.

(24) The petition is **dismissed as misconceived.** No order as to costs.

(2021)11ILR A260
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 22.11.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

U/S 482/378/407 No. 4658 of 2021

Satyam Tewari & Anr. ...Applicants
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicants:
Rajiva Dubey

Counsel for the Opposite Parties:
G.A.

Criminal Law – Code of Criminal Procedure,1973 – Section 207 - Application application for supplying of extracts of the C.D. of footage of CCTV camera producd by informant-which is part of charge sheet-Section 207 Cr.P.C. may not be ignored-mandatory condition -if application is filed by accused-it should be considered and decided by speaking and reasoned order-impugned order not speaking-set aside.

Petition allowed. (E-9)

List of Cases cited:

1. Shafi Mohammad Vs St. of H.P. reported in (2018) Crl.L.J 1714

2. P. Gopalkrishnan Alias Dileep Vs St. of Kerala & anr., (2020) 9 SCC 161

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Rajiva Dubey, learned counsel for the petitioners and Sri Ran Vijay Singh, learned Additional Government Advocate for the State.

2. In view of the proposed order, the notice to opposite party No.3 is hereby dispensed with.

3. By means of this petition, the petitioners have prayed for the following relief:-

"Wherefore, it is most respectfully prayed in the interest of justice that this Hon'ble Court may kindly be pleased to allow this petition under Section 482 Cr.P.C. and quash the impugned order dated 06.10.2021 passed by the learned III Additional Sessions Judge, District-Lakhimpur Kheri in Sessions Trial No.181 of 2020, Crime No.853 of 2020, under Section 302 I.P.C., Police Station-Kotwali Sadar, District-Lakhimpur Kheri and also issue direction commanding the learned Trial Court to immediately supply to the petitioners the extract of the C.D. of the footage of C.C.T.V. Camera produced by the information, which is part of charge-sheet.

The petitioners have further prayed for stay the criminal proceedings pending against the petitioners before the learned Trial Court i.e. learned III Additional Sessions Judge, District-Lakhimpur Kheri in Sessions Trial No.181 of 2020, Crime No.853 of 2020, under Section 302 I.P.C., Police Station-Kotwali Sadar, District-Lakhimpur Kheri."

4. At the very outset, learned counsel for the petitioners has drawn attention of this Court towards Annexure No.2 of the petition, which is an application dated 16.10.2021 filed before the learned trial court for getting the Compact Disk (C.D.), which has been made part of the case diary with the request that for submitting the defence by the petitioners such C.D. would be relevant and required in the interest of justice.

5. The attention has also been drawn towards Section 207 Cr.P.C., which clearly provides about supply to the accused of copy of police report and other documents. The exception to Section 207 Cr.P.C. is that if the documents demanded is voluminous in nature, instead of providing such documents the accused person may be permitted to peruse such documents or to inspect either personally or through Pleader of the Court.

6. While disposing of the aforesaid application vide order dated 06.10.2021 (Annexure No.1), the learned court below rejected such application giving reference of the judgment of Hon'ble Apex Court rendered in re: ***Shafi Mohammad vs. State of Himanchal Pradesh reported in (2018) Crl.L.J 1714*** indicating therein the portion of that judgment which deals with the provisions of Section 65-B (4) of the Indian Evidence Act.

7. Sri Dubey has submitted that in the application of the petitioners (Annexure No.2) the specific prayer for supply of C.D. was made in terms of provisions of Section 207 Cr.P.C. assigning the reason as to why such C.D. would be necessary and required for the petitioners but while disposing of such application learned court below has not dealt with such provisions of law and the provision so indicated in such order while rejecting the application was not relevant in the present case.

8. So as to strengthen the aforesaid arguments, Sri Dubey has drawn attention of this Court towards the judgment of Hon'ble Apex Court rendered in re: ***(2020) 9 SCC 161 P. Gopalkrishnan Alias Dileep vs. State of Kerala and another,*** whereby the Hon'ble Apex Court has held that furnishing of documents to accused under Section 207 Cr.P.C. is a facet of right of accused to a fair trial enshrined in Article 21 of the Constitution of India and it is duty of Magistrate to pass appropriate orders providing such documents. Some relevant portion of para-10 of the judgment is being reproduced here-in-below:-

"10. Be that as it may, the prosecution was obviously relying on the contents of the memory card which have been copied on the pen-drive by the State FSL during the analysis thereof and has been so adverted to in the police report. The contents of the memory card, which are replicated in the pen-drive created by the State FSL would be nothing but a "document" within the meaning of the 1973 Code and the provisions of the 1872 Act. And since the prosecution was relying on the same and proposes to use it against the appellant-accused, it was incumbent to furnish a cloned copy of the contents thereof to the appellant-accused, not only in terms of Section 207 read with Section 173 (5) of the 1973 Code, but also to uphold the right of the accused to a fair trial guaranteed under Article 21 of the Constitution of India...."

9. Per contra, learned Additional Government Advocate has submitted that there is likelihood that the petitioners would have been provided copy of such C.D. inasmuch as before committal of case the mandatory condition of Section 207 Cr.P.C. is fulfilled. However, he has submitted that if the said required piece of evidence which is a part of case diary has not been provided to the petitioners, they have however right to ask such documents under Section 207 Cr.P.C..

10. Learned Additional Government Advocate has further submitted that if at all such mistake has been committed by the learned court below, he may be directed to provide such demanded documents if it is not provided to accused.

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

12. I am of the considered opinion that the mandatory condition of Section 207 Cr.P.C. may not be ignored and if such application is filed by or on behalf of accused person, it should have been considered and decided by speaking and reasoned order and if such application has been rejected by the learned court below, the specific reason to that effect should have been given. The learned court below should have specifically stated that such documents have already been provided to the accused persons or the documents are so voluminous and opportunity of inspection has already been provided. But in the impugned order dated 06.10.2021, the learned court below has not even whispered to the effect as to whether the demanded document (C.D.) has already been provided to the petitioner or he was provided any appropriate opportunity to inspect such C.D. if it is voluminous but instead of dealing such aspects he has dealt with the aspect of Section 65-B (4) of Indian Evidence Act, which was not relevant at that point of time. Therefore, it appears that the impugned order dated 06.10.2021 (Annexure No.1) passed by the learned court below i.e. Additional Sessions Judge-III, District-Lakhimpur Kheri has been passed without application of mind and without considering the relevant facts and circumstances viz-a-viz the legal provisions of Section 207 Cr.P.C. in proper perspective.

13. Accordingly, I do not find any good reason to keep this petition pending any longer. So I hereby set-aside the impugned order dated 06.10.2021 (Annexure No.1) passed by the learned court below i.e. Additional Sessions Judge-III, District-Lakhimpur Kheri in Sessions Trial No.181 of 2020, Crime No.853 of 2020, under Section 302 I.P.C., Police Station-Kotwali Sadar, District-Lakhimpur Kher. However, liberty is given to the learned court below to pass appropriate order on the application of the petitioner dated 16.03.2021 (Annexure No.2) strictly in accordance with law, within a period of fifteen days after receipt of a certified copy of this order. The petitioners are given liberty to produce the certified copy of this order along with fresh application enclosing therewith their earlier application, which has been annexed as Annexure No.2 to this petition, within a period of seven working days.

14. Hence, the instant petition is ***allowed.***

15. No order as to costs.

(2021)11ILR A262
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 11.11.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

U/S 482/378/407 No. 5095 of 2013
connected with
U/S 482/378/407 No. 5094 of 2013

Kamlesh Chauhan ...Applicant
Versus
The State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Anuradha Singh

Counsel for the Opposite Parties:
Govt. Advocate

Criminal Law – Indian Penal Code, 1860 – Sections 363 & 366 - Prosecutrix have married the Petitioner and they have a minor child -she admit that she is living with the Petitioner out of her free will and her parents were torturing her-prima facie no offence u/s 363 and 366 IPC is made out-proceedings of the case quashed. Petition allowed.

List of Cases cited:

1. Vishwas Bhandari Vs St. of Pun. & anr., Criminal Appeal No.105 of 2021 (arising out of SLP (Criminal) No.6289 of 2020

2. St. of Har. & ors. Vs Ch. Bhajan Lal & ors., 1992 AIR 604

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. List revised. None appears for the petitioners nor any request for adjournment of the case has been made. However, Sri Aniruddh Kumar Singh, learned AGA-I for the State is present.

2. Since both the petitions are relating to one and the same incident, therefore, they are being decided by a common order.

3. In the petition bearing U/S 482/378/407 No.5095 of 2013 this Court vide order dated 11.10.2013 granted interim order admitting the petition, which reads as under:-

"Kamlesh Chauhan and Kavita Devi are present along with their minor child. They have been identified by Anuradha Singh, Advocate.

Admit.

Issue notice to opposite-party no.2 to file counter-affidavit, if any, within two months.

List thereafter.

Till then, further proceedings of Criminal Case No. 33 of 2011, Case Crime No. 808 of 2010, pending in the court of Judicial Magistrate, Bahraich, shall remain stayed."

4. In the petition bearing U/S 482/378/407 No.5094 of 2013 this Court vide order dated 11.10.2013 granted interim order admitting the petition, which reads as under:-

"Kamlesh Chauhan and Kavita Devi are present along with their minor child. They have been identified by Anuradha Singh, Advocate.

Admit.

Issue notice to opposite-party no.2 to file counter-affidavit, if any, within two months.

List thereafter along with Petition No. 5095 of 2013 (u/s 482 Cr.P.C.).

Till then, further proceedings of S.T.No. 257 of 2013, Case Crime No. 1035 of 2010, pending in the court of Sessions Judge, Bahraich, shall remain stayed."

5. While granting interim order, this Court took cognizance that petitioner-Kamlesh Chauhan appeared before the Court along with his wife Kavita Devi and their minor child and those persons were identified by their advocate. Even as per the statement of the prosecutrix under Section 164 Cr.P.C. (Annexure No.6 to the leading petition), she has categorically submitted that she is living with the present petitioner Kamlesh Chauhan and her parents were torturing her. On account of torture, she consumed poison once. She has further stated that she got married with petitioner Kamlesh Chauhan in the month of April by means of court marriage.

6. Therefore, *prima facie*, it appears that no offence under Sections 363 & 366 IPC is made out.

7. It would be not out of place to indicate here that Section 363 IPC would be attracted if kidnapping is made either from outside India or from the lawful guardianship and Section 366 IPC would be attracted if a woman is abducted to compel her for marriage. In the present case, statement of Smt. Kavita Devi makes it clear that she was very afraid from the behaviour of her parents as her parents were torturing her and with the free consent and free-will, she had gone with petitioner Kamlesh Chauhan and got married and were living as husband and wife with their child. Therefore, the happily wedded couple should not be compelled to face the prosecution. In her statement dated 18.9.2010, Smt. Kavita Devi has stated that she is major aged about 18 years. No one has put in

appearance on behalf of opposite party no.2 till date.

8. The Hon'ble Apex Court in a recent judgment dated 3.2.2021 in re; **Vishwas Bhandari vs. State of Punjab & Anr., Criminal Appeal No.105 of 2021** (arising out of SLP (Criminal) No.6289 of 2020, has considered almost similar issue wherein the order of High Court of Punjab and Haryana was under challenge. The High Court of Punjab and Haryana had dismissed the similar petition filed under Section 482 Cr.P.C. The Hon'ble Apex Court while considering the factual and legal matrix of the issue was of the view that the High Court was not justified in dismissing the petition against the appellant. Relevant paragraphs no.7, 9, 10 & 11 of the aforesaid judgment are being reproduced herein below:-

"7. It is thereafter, the appellant invoked the jurisdiction of the High Court for quashing of the FIR and subsequent proceedings, inter alia, on the ground that neither the prosecutrix nor the complainant have levelled an iota of allegation against the appellant in respect of abduction of the prosecutrix. In fact, the prosecutrix married Vikram Roop Rai, the main accused and had two children with him. Such marriage was with the consent of their families. Since there is no shred of evidence against the appellant, therefore, continuation of proceedings against the appellant would amount to abuse of process of law.

9. We find that the evidence of the prosecutrix and the complainant before the Court shows that there is no allegation whatsoever against the appellant. The main allegation was against Vikram Roop Rai but the prosecutrix married him on 4.8.2013 and had given birth to two children out of that wedlock. In the absence of any allegation against the appellant, we find that the continuation of proceedings against him is nothing but an abuse of process of law.

10. Since there is no evidence against the appellant, the proceedings initiated against him on the basis of FIR would be untenable. The High Court was, thus, not justified in dismissing the petition against the appellant.

11. Hence, the present appeal is allowed. The order passed by the High Court is set aside and the entire proceedings consequent to FIR No. 31 of 2013 and charge sheet stand quashed."

9. Besides, as per proposition of law laid down in ***State of Haryana and others vs. Ch. Bhajan Lal and others, 1992 AIR 604,*** powers under Section 482 Cr.P.C. can be exercised in exceptional circumstances.

10. Considering the entirety of the facts and circumstances of the issue in question, I do not find any fruitful purpose to permit the proceedings of Criminal Case No.33 of 2011 and Sessions Trial No.257 of 2013 to continue any longer against the present petitioners. Therefore, invoking my inherent powers conferred under Section 482 Cr.P.C., I hereby quash the entire proceedings of Criminal Case No.33 of 2011, State Vs. Kamlesh, arising out of Case Crime No.808 of 2010, under Sections 363 and 366 IPC, Police Station Motipur, District Bahraich, pending in the court of Judicial Magistrate, Bahraich including charge sheet no.193 of 2010 dated 11.11.2010 as well as the entire proceedings of Sessions Trial No.257 of 2013, State Vs. Kamlesh and another, arising out of Case Crime No.1035 of 2010, under Sections 147, 148, 149, 452, 506, 363 & 366 IPC, Police Station Motipur, District Bahraich pending in the court of learned Sessions Judge, Bahraich including the impugned charge sheet no.5 of 2011 dated 11.11.2011 and the summoning order dated 2.9.2013.

11. Accordingly, both the petitions are **allowed.**

12. Before parting, I appreciate the useful assistance of Ms. Shama Parveen, Law Clerk/ Trainee and Sri Vaibhav Srivastava, Law Intern.

(2021)11ILR A265
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.10.2021

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE JAYANT BANERJI, J.

Special Appeal Defective No. 651 of 2021

District Basic Education Officer & Anr. **...Appellants**

Versus

Shivkali & Ors. **...Respondents**

Counsel for the Appellants:
Sri Awadhesh Kumar

Counsel for the Respondents:
Sri Kamal Kumar Kesherwani

A. Service Law - Government Order Clause 5-seeking for release the amount of death-cum retirement gratuity-respondent's husband died in harness, she was denied the death-cum retirement gratuity-respondent's husband did not exercise the option to retire the age of 58 years-the age of superannuation was enhanced from 60 to 62 years-but he could not opted as he died before completing 60 years, and he had to opt on first day of July 2010, which never came in the life time of the first respondent's husband because of his death a day before, he could not exercise the option, the claim for death gratuity could not be denied-Learned Single Judge rightly passed the order.(Para 1 to 15)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Smt. Ranjana Kakkar Vs St. of U.P. & ors. (2008) 10 ADJ 63

2. Noor Jahan Vs St. of U.P. & 4 ors. Writ-A No.40568 of 2016

3. Usha Vs St. of U.P. & ors. Writ-A No. 17399 of 2019

4. Savitri Vs St. of U.P. & ors. Writ-A No. 11474 of 2020

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

1. This intra-court appeal arises from a judgment and order of a Single Judge dated 02.02.2021 in Writ-A No.11578 of 2020 whereby, the writ petition of the first respondent was allowed with a direction upon the District Basic Education Officer, Basti (first appellant) and the Finance and Account Officer (Basic Education), Basti (second appellant) to compute the amount payable to the petitioner towards gratuity in terms of the scheme formulated by the Government Order dated September 16, 2009 and release the same along with interest at the rate of 8% per annum from the date of filing the application for gratuity till the amount is actually disbursed.

2. In brief, the facts giving rise to the appeal are as follows:-

2 (i). The husband of the first respondent was appointed as Assistant Teacher on 11.03.1974 in a basic school under the Basic Shiksha Parishad, Uttar Pradesh. Later, he was promoted on the post of Headmaster. Initially, the age of superannuation was 58 years which was enhanced to 60 years and, later, to 62 years. Before enhancement of the age of superannuation to 62 years, by Government Order No.6369/15-5-93-55/89, dated 23.11.1994, the benefit of gratuity was introduced to teaching and non teaching staff of

basic education institutions for those who opt to retire on attaining the age of 58 years. Such option, as per Clause 2 of the Government Order, dated 23.11.1994, was to be exercised within 90 days from the issuance of the Government Order. This period, however, was extended by Government Order No.5491/15-5-2002-212/2001, dated 10.06.2002, extracted below:-

"शिक्षा अनुभाग–5 संख्या– 5491/15 – 5–2002– 212/2001, दिनांक 10 जून, 2002

प्रेषक,

दिनेश चन्द्र कनौजिया,
विशेष सचिव,
उत्तर प्रदेश शासन,
इलाहाबाद।

सेवा में,

शिक्षा निदेशक, (बेसिक) एवं अध्यक्ष,
उत्तर प्रदेश बेसिक शिक्षा परिषद्,
इलाहाबाद।

विषयः उत्तर प्रदेश बेसिक शिक्षा परिषदीय शिक्षक/शिक्षणेत्तर कर्मचारियों के सेवानिवृतिक लाभों में परिवर्तन हेतु विकल्प की सुविधा दिये जाने के संबंध में नीति निर्धारण।

महोदय,

उपर्युक्त विषयक शासनादेश संख्या– 6369/15–5–93–55/89, दिनांक 23.11.1994 के अनुक्रम में मुझे यह कहने का निदेश हुआ है कि उक्त शासनादेश द्वारा प्रदत्त विकल्प को सुविधा के लाभ से वंचित रह गये बेसिक शिक्षा परिषद शिक्षक/शिक्षणेत्तर कर्मचारियों के संबंध में विकल्प परिवर्तन की सुविधा प्रदान किये जाने की मांग पर सम्यक् विचारोपरान्त श्री राज्यपाल यह आदेश प्रदान करते हैं कि उ0 प्र0 बेसिक शिक्षा परिषदीय शिक्षको/शिक्षणेत्तर कर्मचारियों द्वारा सेवानिवृत्ति के एक वर्ष अर्थात् जिस शैक्षिक सत्र में उनकी सेवानिवृत्ति होगी, उसको पहली जुलाई तक विकल्प परिवर्तन कर सकते हैं। किन्तु ऐसे कर्मचारी जो 58 वर्ष की आयु पर सेवानिवृत्ति का विकल्प देते हैं, को सेवानिवृत्ति के पूर्व तक विकल्प परिवर्तन की सुविधा अनुमन्य होगी। यह व्यवस्था इस शासनादेश के जारी होने की तिथि से लागू होगी।

2. यह आदेश वित्त विभाग के अशासकीय संख्या–ई–11/753 दस–2002, दिनांक 4.6.2002 में प्राप्त उनकी सहमति से जारी किये जा रहे हैं।

भवदीय
(दिनेश चन्द्र कनौजिया)
विशेष सचिव।

2 (ii). Thereafter, on February 4, 2004, Government Order No.289/79-6-04-28(5)/2004 was issued enhancing the age of superannuation from 60 years to 62 years and, further, clarifying that the retiral dues that were to be available on attaining the age of 58 years would now be available at the age of 60 years; and those retiral dues that were to be available at the age of 60 years would now be available at the age of 62 years. The said Government Order is extracted below:-

"बेसिक एवं सहायता प्राप्त उच्च प्राथमिक विद्यालयों के शिक्षकों की सेवा निवृत्ति

आयु 60/62 वर्ष
संख्या 289/79–6–04–28(5)/2004
प्रेषक,
सेवा में,
श्री हरिराज किशोर
शिक्षा निदेशक (बेसिक) सचिव,
उत्तर प्रदेश लखनऊ
उत्तर प्रदेश शासन।
शिक्षा अनुभाग–6 लखनऊः
दिनांक : 4 फरवरी, 2004

विषय : परिषदीय प्राथमिक विद्यालय, परिषदीय उच्च प्राथमिक विद्यालय तथा उच्च प्राथमिक विद्यालयों के अध्यापकों की अधिवर्षता आयु वर्तमान 60 वर्ष से 62 वर्ष किये जाने के सम्बन्ध में।

महोदय,

शासन द्वारा सम्यक विचारोपरान्त यह निर्णय लिया गया है कि परिषदीय प्राथमिक विद्यालय, परिषदीय उच्च प्राथमिक विद्यालय तथा सहायता प्राप्त उच्च प्राथमिक विद्यालयों में शासन द्वारा सृजित पदों पर नियमानुसार कार्यरत अध्यापकों की वर्तमान अधिवर्षता आयु में वृद्धि कर दी जाये।

अतः श्री राज्यपाल महोदय तात्कालिक प्रभाव से परिषदीय प्राथमिक विद्यालय, परिषदीय उच्च प्राथमिक विद्यालय तथा सहायता प्राप्त उच्च प्राथमिक विद्यालयों में शासन द्वारा सृजित पदों पर नियमानुसार कार्यरत अध्यापकों की वर्तमान अधिवर्षता आयु को 60 वर्ष से ब

इस सम्बन्ध में पूर्व में निर्गत समस्त शासनादेश उक्त सीमा तक संशोधित समझे जायेंगे तथा उनकी शेष शर्तें यथावत् रहेगी।

उत्तर प्रदेश बेसिक शिक्षा (अध्यापक) सेवा नियमावली, 1981 के संगत नियमों में आवश्यक संशोधन की कार्यवाही शासनादेश जारी होने के तीस दिन के अन्दर सुनिश्चित कर ली जायेगी।

यह आदेश वित्त विभाग के अशासकीय पत्र संख्या यू0 ओ0 ई0–11–207/2004 दिनांक 04.2.2004 में प्राप्त सहमति के अन्तर्गत निर्गत किये जा रहे हैं।

भवदीय,
ह0/–
हरिराज किशोर,
सचिव।

2 (iii). After the age of superannuation was enhanced from 60 to 62 years, the State Government issued yet another Government Order No.1754/79-5-09-02/2009, dated 16.09.2009, inter alia, providing Death-Cum-Retirement Gratuity up to a maximum of Rs.10 lacs to those who opted to retire at the age of 60 years. Clause 5 of the said Government Order is relevant and is extracted below:-

"5- सेवानिवृत्तिक ग्रेच्युटी

60 वर्ष की आयु का विकल्प दिये जाने पर सेवानिवृत्तिक ग्रेच्युटी/मृत्यु ग्रेच्युटी की अधिकतम धनराशि रु0 10.00 लाख (रुपये दस लाख मात्र) तक सीमित होगी।

2 (iv). The first respondent's husband, whose date of birth was 01.07.1951, died in harness on 30.06.2010, that is even before he could attain the age of 60 years. Before his death, first respondent's husband had not exercised his option to retire at the age of 60 years. Consequently, the claim of the first respondent for release of death gratuity was not acknowledged. As a result, the first respondent filed Writ-A No.11578 of 2020 for a direction upon the respondents to release the amount of death-cum retirement gratuity otherwise payable under Government Order dated 16.09.2009 with interest at the rate of 18% per annum.

2 (v). The appellants contested the claim of the first respondent on the ground that under the Government Order dated 23.11.1994 gratuity was payable upon exercise of option to retire at the age of 58 years, that too, within three months from the date of issuance of Government Order. Later, the period to exercise the option was extended, vide Government Order dated 10.06.2002 (supra), up to the first day of July of the year at the end of which the incumbent would have attained the age of superannuation, which means that the option could be exercised up to the first day of July of the year in which the incumbent would have attained the age of 58 years and not later. According to the appellants, the first respondent's husband had crossed the age of 58 years without exercising the option therefore, it would be deemed that he had not opted for the benefit of death cum retirement gratuity and as such the same was not payable to the first respondent.

2 (vi). The case of the first respondent had been that the purpose of the Government Order dated 23.11.1994 was to provide the benefit of gratuity to those who opted to retire at the age of 58 years i.e. two years before attaining the age of superannuation. This age of superannuation was enhanced by Government Order dated February 4, 2004 from 60 years to 62 years. Thereafter, by Government Order dated September 16, 2009 the benefit of death-cum-retirement gratuity up to a maximum of Rs.10 lacs was available to those who opted to retire at the age of 60 years. The time period to exercise the option, under the Government Order dated 23.11.1994, was upto three months from the date of issuance of the said Government Order but this period was extended by the Government Order dated June 10, 2002 up to the first day of July of the year in which the incumbent would have attained the age of superannuation. Since the age of superannuation was increased from 60 years to 62 years and the retirement benefits that were to be available on completion of 58 years and 60 years, respectively, were to be made available on completion of 60 years and 62 years,

respectively, vide Government Order dated 04.02.2004 (supra), by necessary implication, this option became exercisable up to the first day of July of the year in which the incumbent would have completed the age of 60 years. And since in terms of clause 5 of the Government Order dated September 16, 2009 the benefit of death-cum-retirement gratuity was available either on death before completion of 60 years or on retirement at the age of 60 years, the first respondent was entitled to it. Thus, the case of the first respondent is that as her husband could have exercised his option to retire at the age of 60 years till the first day of July 2010 and, because of his death a day before, he could not exercise the option, the claim for death gratuity could not be denied.

2 (vii). The learned Single Judge accepted the contentions made on behalf of the writ petitioner (i.e. first respondent herein) and by placing reliance on certain decisions, which we shall refer to later, allowed the writ petition by issuing a direction upon the appellants to compute the gratuity payable to the writ petitioner in terms of the scheme formulated by Government Order dated September 16, 2009 with interest etc.

3. We have heard Sri K. Sahi along with Sri Awadhesh Kumar for the appellants; Sri Kamal Krishna Kesharwani for the contesting respondent no.1; and the learned Standing Counsel for the respondents 2 to 5.

4. Sri K. Sahi, who led the arguments for the appellants, submitted that the decisions on which the learned Single Judge has placed reliance have not taken into consideration that the benefit of option to retire at the age of 58 years, which was later enhanced to 60 years, for availing the benefit of gratuity had to be exercised, under the Government Order dated 23.11.1994, within 90 days of the issuance of that Government Order, and, under Government Order dated June 10, 2002, up to first day of July of the year in which the incumbent would have completed the age of 58 years. But as this option was never exercised by the husband of the first respondent up to the first day of July, 2008, the first respondent was not entitled to the benefit of death gratuity. It has been contended that the learned Single Judge has failed to consider the true import of the Government Order dated June 10, 2002.

5. **Per contra**, learned counsel for the contesting respondents submitted that the Government Order dated June 10, 2002 has to be read not in isolation but with the subsequent Government Orders dated February 4, 2004 and September 16, 2009. By Government Order dated February 4, 2004, the age of superannuation was enhanced from 60 years to 62 years and it was clearly specified that those benefits that were available on completion of the age of 58 years would now be available on completion of the age of 60 years. Following that, clause 5 of the Government Order dated September 16, 2009 clearly provided that the death - cum -retirement gratuity would be available to those who opt to retire at the age of 60 years. It was urged that a combined reading of the three Government Orders would suggest that the last day to exercise the option for the benefit of retirement at the age of 60 years on enhancement of the age of retirement from 60 years to 62 years got extended up to the first day of July in which the incumbent would attain the age of 60 years. Consequently, as the date of birth of the husband of the first respondent was 01.07.1951, he would have completed 60 years on June 30, 2011 and, therefore, the last date for exercise of option by her husband would be deemed to be the first day of July, 2010. But since he died on June 30, 2010 i.e. a day before, he could not exercise his option to retire at the age of 60 years hence the benefit of death gratuity as payable under the Government Order dated 16.09.2009 could not be denied. It was

thus submitted that the view taken by the learned Single Judge suffers from no infirmity.

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

7. Before we deal with the rival submissions it would be apposite to notice a few decisions that have been consistently followed in connection with grant of relief to such claimants as the first respondent. The earliest decision on the issue was a Division Bench decision in the case of ***Smt. Ranjana Kakkar Vs. State of U.P. and others: 2008 (10) ADJ 63***. The controversy involved in that case was that the Government had taken a decision to raise the retirement age of the employees from 58 years to 60 years. Those who did not want to continue up to the age of 60 years, were given an option to retire at the age of 58 years with the benefits of Death-cum-Retirement Gratuity, pension, family pension and general provident fund. The employees who did not opt to retire at the age of 58 years and wanted to avail two years of additional service upto the age of 60 years, were not to be provided with the benefit of Death-cum-Retirement Gratuity. The other benefits namely pension, family pension and general provident fund were to be made available to both categories of employees. In that case, the employee concerned had opted to retire at the age of 60 years but as providence would have it he died in an accident at the age of 45 years. The widow of that employee made a representation to the employer stating that though her husband had opted to continue in service upto the age of 60 years thereby foregoing the benefit of Death-cum-Retirement Gratuity but as he died much before attaining that age, he could not be deprived of the benefit of Death-cum-Retirement Gratuity which would have, otherwise, been available to him if he had not given an option to retire at the age of 60 years. The claim of the widow was rejected by the employer. The widow invoked the writ jurisdiction of this Court. After considering the true import of the beneficial provisions of the various Government Orders, the Division Bench of this Court, in paragraphs 10, 11, 12 and 13 of the judgment, observed as follows:-

"10. The scheme of the Government Orders dated 24.12.1983 and 21.08.1990 was to give the benefit of the extended age of retirement from 58 years to 60 years subject to the conditions that those teachers, who will retire at the age of 58 years, will not be given benefit of D.C.R.G and those, who want to take benefit of two years additional service, will get the calculation of pension only upto age of 58 years. These benefits, as it is stated in the opening paragraph of the Government Order dated 24.12.1983, were given for the purposes of providing social security to the teachers. These benefits were available to only those who could live up to the date of their superannuation to avail these benefits. For those, who unfortunately could not reach the age of 58 years, could not be taken to be covered by the scheme.

11. The providence to survive upto the age of 58 years could not be known to the teachers exercising options. The God has not yet bestowed the man with the powers to foresee or to predict death. The man arranges his affairs in accordance with the wisdom given to him by God. The Almighty has reserved the powers of sustaining and guiding human destiny. No one, who was required to give an option under the scheme, could have predicted, whether he would survive to claim the benefits.

12. Where an event cannot be foreseen and a person is invited to give options with the understanding to arrange his affairs according to his own wisdom, his choice should not be allowed to work to his disadvantage after his death. He should be provided with the maximum of the benefits and social security after his death. Late Prof. Amarnath Kakkar did not live

beyond the age of 45 years. He may have planned for his affairs upto the age of 60 years, both for himself and and his family. The God however willed otherwise. His untimely death made his option unworkable. In order to give him maximum benefits of the social security, which was the intention of the Government Order dated 24.12.1983, he could not be denied the D.C.R.G payable to him and calculated upto his death, for the completed years of service rendered by him to the University. His life was cut short and thus his option became unworkable and futile, on his death at the age of 45 years. He could not be pinned down to his option by the University, to deprive his family of the gratuity earned by him and payable to his family.

13. The "gratuity' is defined in Webster's New Collegiate Dictionary as something given voluntarily, or beyond obligation usually in return for, or in anticipation of some service. The Black's Law Dictionary defined gratuity as a recompense or reward of service or benefits given voluntarily without solicitation or promise. Late Amarnath Kakkar could have given up gratuity voluntarily on his option, if he had the occasion to avail the benefit of two years additional service. When he could not avail the benefit and was not in a position to change his option, he cannot be denied the reward by way of gratuity payable to him on completing 58 years of service. The event provided in his option i.e. the extended service up to the age of 60 years, became an impossibility to be performed by him and thus his option would be deemed to be revoked in law, on principles of frustration of contract."

8. In the case of ***Noor Jahan Vs. State of U.P. and 4 others (Writ-A No.40568 of 2016, decided on 04.01.2018)***, the writ petitioner's husband died at the age of 57 years and before his death, he could not exercise the option to retire at the age of 60 years and therefore the benefit of death gratuity available otherwise under the Government Order dated September 16, 2009 was denied. Aggrieved by such denial, the widow of the incumbent filed writ petition. A Single Judge Bench of this Court held as under:-

"Government Order dated 16th September, 2009 provides for revision of pension and other retiral benefits to the retired employees of the department of basic education. This Government Order grants higher benefits w.e.f. 1.1.2006. Clause 4(1) of the Government Order provides that pension would not be payable to those employees, who have not completed 10 years of qualifying service, but the employees who retire upon attaining the age of superannuation of 60 years would be entitled to gratuity and other service benefits. The Government Order does not restrict payment of gratuity to an employee, who is otherwise covered under the scheme just because he has not attained the age of 60 years. Reference to age of 60 years is due to fact that age of superannuation under the rule is otherwise 60 years. Position has otherwise been clarified by Clause 5 of the Government Order, which provides that gratuity would be payable at the age of 60 years or upon death. The respondents, therefore, were not justified in rejecting petitioner's claim for payment of gratuity, in terms of Government Order dated 16.9.2009. The impugned action, therefore, cannot be sustained. Order dated 8.7.2016 is, accordingly, quashed.

A direction is issued to the respondents to compute the amount payable to petitioner's husband towards gratuity in terms of the scheme and release the same, within a period of three months from the date of production of certified copy of this order. The petitioner shall also be entitled to interest at the rate of 8% per annum, from the date of filing of the application till the amount is actually disbursed.

Writ petition is, accordingly, allowed."

9. Following the above decision as well as other decisions, in Writ-A No.17399 of 2019 (Usha Rani Vs. State of U.P. and others), decided on 07.11.2019, it was held as follows:-

"Following the decision rendered in the judgment of Noor Jahan (Supra) as well as Smt. Omwati (Supra), matter of Smt. Brijesh (Supra) for payment of gratuity was allowed by this Court by quashing the impugned orders by which gratuity was denied.

Similar controversy was also decided by Lucknow Bench of this Court vide order dated 5.8.2019 passed in the matter of Smt. Mala Tripathi (Supra) in which Court has taken a similar view and held that if husband of petitioner died before attaining the age of 60 years and has not given option for retirement at the age of 60 years, gratuity cannot be denied only on this ground. Relevant paragraph of the said judgment is quoted below:-

"Heard learned counsel for the contesting parties and perused the records.

From perusal of the records, it clearly comes out that the petitioner's husband died in harness on 26.08.2012 while working as Assistant Teacher in an aided and recognized institution. It is also admitted that the family pension has been paid to the petitioner. The only dispute revolves around the payment of gratuity to the petitioner. The ground taken by the respondents of the petitioner's husband not having opted for retiring at the age of 60 years which thus entails non-payment of gratuity to her at the very out set does not stand to legal scrutiny inasmuch as it is an admitted case by the respondents also that the petitioner's husband died in harness on 26.08.2012 despite his actual date of superannuation being November 2019. Thus, an employee is only expected to submit an option prior to his retirement and not decades prior to his retirement. However, this aspect of the matter has not been considered by the respondents and even the letter of the Institution dated 19.03.2014, a copy of which has been filed as Annexure-3 to the petition, does not address the aforesaid issue.

Accordingly, keeping in view the aforesaid discussions, the order dated 19.03.2014 (Annexure-3 to the petition) cannot be said to be valid in the eyes of law. As such, the writ petition deserves to be partly allowed and is hereby partly allowed. A writ of certiorari is issued quashing the order dated 19.03.2014. A writ of mandamus is issued directing the respondents to consider the case of the petitioner for payment of gratuity in accordance with law and relevant rules within a period of three months from the date of receipt of a certified copy of this order."

Facts of the case and dispute involved in the present case is squarely covered by the pronouncements made by this Court which are referred herein above, therefore, under such facts and circumstances, impugned order dated 30.7.2019 passed by respondent No. 7- Block Education Officer Block Kadarchauk, Distruict Badaun is hereby quashed.

Respondents are directed to compute the amount payable to the petitioner's husband towards gratuity in terms of the scheme and release the same, maximum within a period of three months from the date of production of certified copy of this order....."

10. Following the above decisions, similar orders have been passed in Writ-A No.11474 of 2020 (Savitri Vs. State of U.P. and others), decided on 28.07.2021, and several other matters.

11. The issue that arises for our consideration is whether an employee who, by a certain a date, could exercise an option to retire early to avail the benefit of gratuity, dies before that date, and prior to his death had not exercised that option, should his heirs be denied the benefit of death gratuity which, otherwise, would have been available to them had that

employee died at that age after exercising the option.

12. To have an answer to the issue we would have to examine as to- (a) what had been the purpose of conferment of such benefit on exercise of the option; and (b) whether the Government Orders that conferred the benefit had fixed a time period by which that option was to be exercised, if so, whether the incumbent i.e. first respondent's husband had crossed the time limit by which he could have exercised that option. In so far as the purpose of conferring such benefit is concerned the same is obvious, which is to provide social security to those who forego two years of additional service. There could be a latent purpose as well, which is to encourage people to seek early retirement may be to streamline the organization. Be that as it may, it is a beneficial provision to accord social security to the employee and his or her dependents therefore, an interpretation that promotes and serves the purpose for which it is crafted must be preferred. Under the circumstances, whatever the purpose might be, the same is subserved where the nature exercises the option on behalf of the incumbent by letting him not survive even upto the last day by which he could have exercised the option. Therefore, denying the heirs/dependents of such an incumbent the benefit of social security that, otherwise, would have been available to them had the incumbent exercised his option would defeat the very purpose for which the policy was made. Thus, to ensure that the policy serves its purpose fully, in our view, where a last date for exercise of the option is yet to arrive and before that date the incumbent dies, without exercising his option, his dependents should not be deprived of the benefit which they would have been otherwise entitled to had the incumbent exercised his option.

13. In so far as the contention of the learned counsel for the appellants that by Government Order dated June 10, 2002 the option could have been exercised only upto first day of July in which the incumbent was to attain the age of 58 years is concerned, the same is not acceptable. Because a plain reading of the Government Order dated June 10, 2002 would reflect that it is in two parts. The first part is in respect of fixing the last date for exercise of option to retire early to avail the benefits of early retirement whereas the second relates to the last date for change of the option submitted earlier. In the first part, the age of retirement is not mentioned. What is stated in the first part is that those who could not exercise their option to avail the benefits under the earlier Government Order dated 23.11.1994 may exercise their option by the first day of July of the year in which they attain the age of superannuation. The second part gives option to those, who had already opted to retire at the age of 58 years, to change their option before they retire. Meaning thereby that if suppose a person has given an option to retire at the age of 58 years, before he attains the age of 58 years, he can change the option. Thus, as by Government Order dated February 4, 2004 the age of superannuation was enhanced from 60 years to 62 years by specifically providing that the benefits that were available on retirement at the age of 58 years would now be available upon completion of the age of 60 years and those that were to be available at the age of 60 years, would now be available on completion of the age of 62 years, by necessary implication, the option that could earlier be exercised upto the first day of July in which the incumbent was to attain the age of 58 years became exercisable upto the first day of July in which the incumbent would attain the age of 60 years.

14. In the instant case, since the date of birth of the first respondent's husband was 01.07.1951, he would have completed 60 years on June 30, 2011. Thus, the last day by which he could have opted to retire at the age of 60 years

would be the first day of July, 2010, which never came in the life time of the first respondent's husband. Thus, for all the reasons given above, the benefit of death gratuity that would have been available to the incumbent's dependents/ heirs on incumbent's death, before attaining the age of 60 years, under the Government Order dated September 10, 2009, would be available to his heirs/dependents.

15. For all the reasons above, we find ourselves in agreement with the view taken by the learned Single Judge. Consequently, the appeal fails and is **dismissed.**

(2021)11ILR A273
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.09.2021

BEFORE

THE HON'BLE YASHWANT VARMA, J.

Writ A No. 656 of 2020
with others

Vikas & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellants:
Sri Tarun Agrawal, Sri Prashant Mishra, Sri Tarun Agrawal

Counsel for the Respondents:
Sri F.A. Ansari, Sri G.K. Singh, Sri Ashish Kumar Singh, Sri Avneesh Triapthi, C.S.C., Sri Greesh Kumar Malviya, Sri Hritudhwaj Pratap Sahi, Sri M.N. Singh, Sri Shailendra Srivastava

A. Service matter-challenge to-selection process of Appointment of Assistant Review Officers and Review Officers-petitioners had not permitted to participate in typing test on the ground that they did not possess the 'O' Level Certificate-merely because a candidate perceives that a qualification held by him is superior or better, that alone would not entitle him to be considered as eligible unless the rules of selection so ordain or provide for a higher qualification being accepted-issue of equivalence must necessarily be determined-The court finds no justification to expand the field of eligibility in the exercise of its powers of judicial review.(Para 1 to 62)

The writ petition is dismissed. (E-6)

List of Cases cited:

1. Dr. Krushna Chand Sahu Vs St. of Ori. (1995) 6 SCC 1

2. Chandrakala Trivedi Vs St. of Raj. & ors. (2012) 3 SCC 129

3. Parvaiz Ahmad Parry Vs St. of J.& K. & ors. (2015) 17 SCC 709

4. St. of U.K. & ors. Vs Deep Chandra Tewari & anr. (2013) 15 SCC 557

5. Praveen Kumar C.P. Vs Ker. Public Service Commission(2021) SCC OnLine SC 612

6. Aakash Verma & ors. Vs St. of U.P & ors., Service Single No. 20385 of 2019

7. Deepak Singh & ors. Vs St. of U.P & ors. (2019) 7 ADJ 453

8. St. of U.P. Vs Aakash Verma,Special Appl Def. No. 244 of 2021

9. Prashant Kumar Jaiswal Vs St. of U.P.(2018) 2 ADJ 633

10. Mukul Kumar Tyagi Vs. St. of U.P.(2020) 4 SCC 86

11. Asheesh Kumar & 6 ors. Vs St. of U.P. & 2 ors. (2020) 11 ADJ 652

12. Zahoor Ahmad Rather Vs. Imtiyaz Ahmad.(2019) 2 SCC 404

13. Mah. Public Service Commission Vs Sandeep Shriram Warade,(2019) 6 SCC 362.

14. PNB Vs Anit Kumar Das (2020) SCC Online SC 897

15. Joyti K.K. Vs Ker. Public service Commission(2010) 15 SCC 596

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

1. Heard Sri Shashi Nandan, learned Senior Counsel assisted by Sri Tarun Agarwal, and Prashant Mishra, learned counsels in Writ - A No. - 656 of 2020 [Vikas And 80 Others Vs. State Of U.P. And 2 Others], Sri R.K. Ojha, learned Senior Counsel in Writ - A No. -945 of 2020 [Jai Shankar Chaubey And 60 Others Vs. State Of U.P. And 2 Others], Sri Y.S. Bohra, learned counsel who appears in Writ - A No. - 693 of 2020 [Kavita Singh Vs. State of U.P. And 2 Others]. All other learned counsels appearing for the petitioners have adopted the submissions advanced by learned Senior Counsels noticed above. Sri Neeraj Tripathi, the learned Additional Advocate General assisted by Sri Shashank Shekhar Singh, learned Additional Chief Standing Counsel has addressed submissions for the State-respondents, Sri G.K. Singh, learned Senior Counsel assisted by Sri Avneesh Tripathi has been heard on behalf of the Commission while Sri M.D. Singh, 'Shekhar' and Sri V.K. Singh, learned Senior Counsels assisted by Sri G.K. Malviya, have appeared for the impleaded parties.

A. INTRODUCTION

2. This batch of writ petitions challenge a selection process undertaken by the **U.P. Public Service Commission1** for appointment of Assistant Review Officers and Review Officers in different departments of the State Government. Admittedly, all the writ petitioners had successfully cleared the written examination. They were, however, not permitted to participate in the typing test leading to the filing of the present writ petitions. The writ petitioners approached this Court stating that the respondents had not permitted them to participate further in the selection process on the ground that they did not possess the "O' Level certificate as prescribed by NIELIT. The writ petitioners appearing in the lead matter being Writ A No. 656 of 2020 have classified the various petitioners as falling in the following groups: -

Group	Petitioners	Academic Qualification
Group 1	Petitioner Nos. 1 to 14	B. Tech. (IT)
Group 2	Petitioner Nos. 15 to 44	B. Tech. (CS)
Group 3	Petitioner Nos. 45 to 48	B.Sc. (CS)
Group 4	Petitioner Nos. 49 to 52	B.Sc. (CA)
Group 5	Petitioner Nos. 53	M.Sc. (CS)
Group 6	Petitioner Nos. 54-63	BCA
Group 7	Petitioner Nos. 64 to 71	MCA
Group 8	Petitioner Nos. 72 to 77	B.A./M.A. + "O" Level Course from Kanpur University
Group 9	Petitioner Nos. 78	Electronics & Communication Engg.
Group 10	Petitioner Nos. 79	Diploma in Computer Application from NIELIT
Group 11	Petitioner Nos. 80	Diploma in Computer Science
Group 12	Petitioner Nos. 81	PGDCA

3. Undisputedly, the rules which govern the appointment of Review Officers and Assistant Review Officers prescribed the following qualifications: -

(A) Bachelor's degree from a University established by law in India or a qualification recognized by the Government as equivalent thereto;

(B) "O" Level certificate awarded by the DOEACC Society or a qualification equivalent thereto;

(C) Must possess a minimum typing speed of 25 words per minute in Hindi typing;

4. All the writ petitioners contend that they hold degrees and diplomas which are either equivalent to an "O' Level certificate or are liable to be viewed as a higher or superior qualification to that of an "O' Level certificate. It was also their contention that in the previous recruitment exercises which had been undertaken, candidates holding qualifications identical to that of the petitioners, had been permitted to participate in the selection process and had also been appointed subsequently. In view of the aforesaid, it was contended that the exclusion of the petitioners was clearly arbitrary and illegal. When the leading writ petition came up for consideration before a learned Judge on 17 January 2020, rival submissions were noted and upon consideration thereof and as an interim measure it was provided that in case the petitioners here ultimately succeed, the Commission would hold a special typing rest for them and appointments if any made would be subject to the result of the writ petition. On 29 July 2020, the Court took note of a supplementary affidavit filed in connected petition being Writ-A No.945 of 2020 and the reliance placed on behalf of the petitioners on a Government Order of 09 June 2020. The State respondents as well as the Commission were directed to file their counter affidavits. Pursuant to those directions, affidavits have since been exchanged between parties. The Commission along with its counter affidavit of 17 February 2020 placed on the record a decision taken by a 3 member Expert Committee dealing with the question of equivalence of degrees and diplomas submitted by candidates to the "O' Level certificate as issued by NIELIT. Taking note of the course content of the "O' Level certificate, the Committee held that certificates of higher levels would not be considered. It further decided that certificates issued by Institutes, Centers and Schools accredited by NIELIT for running courses other than the "O' Level would also not be considered. The Committee further resolved that higher degrees/diplomas certificates in IT/Computer Science submitted in lieu of the "O' Level Certificate would also not be considered. It also excluded from consideration any certificate issued by a private school, training center, institution or a body. It lastly decided that a Post Graduate Diploma in Computer Application (PGDCA) as well as a Diploma in Computer Application (DCA) awarded by universities or other organizations would also not be considered as equivalent to the "O' Level certificate.

5. Upon that disclosure being made, the petitioners amended the writ petitions laying challenge to the decision of the Expert Committee. Those amendments as proposed were allowed by the Court on 17 November 2020. On 16 July 2021, the Court was apprised by the learned Additional Advocate General that during the pendency of the writ petitions various appointments had come to be made and such appointees had not been impleaded as party to these proceedings. The Court, in view of the aforesaid, directed the State respondents to serve notices upon all selected candidates informing them of the pendency of these petitions. Pursuant to the aforesaid direction, the State took requisite steps and various impleadment applications on behalf of the appointed candidates came to be filed. The batch came to be placed before this Court on 11 August 2021 pursuant to an order of nomination made by the Hon'ble Chief Justice. When this batch was taken up on 31 August 2021, Sri Shashi Nandan, learned Senior Counsel appearing in the lead writ petition, drew the attention of the Court to what was described to be a Government Order of 22 April 2021. A copy of that document was provided to the learned Additional Advocate General to enable him to verify the same and obtain necessary instructions. The petitioners by way of a supplementary affidavit of 01 September 2021 placed on the record the document which had been referred to the Court during the course of proceedings taken on 31

August 2021. The document which stands appended with that supplementary affidavit is concededly not a Government Order but merely a communication by the Special Secretary to the Commission. Along with the aforesaid affidavit, the petitioners also brought on record the communication dated 09 June 2020 addressed by the Joint Secretary in the Government of U.P. to the Deputy Director General of Police (Personnel).

6. Learned counsels for parties were thereafter heard at length by the Court on 02 September 2021. All the impleadment applications were allowed and learned Senior Counsels appearing on their behalf were also heard. During hearing, the parties prayed for time to place on the record a chart indicating the categories in which the degrees and other testimonials held by various petitioners would fall in terms of the communication of 09 June 2020. Those charts were thereafter placed on the record on 03 September 2021. The Court in the course of hearing of this batch on 02 September 2021 placed the learned Additional Advocate General as well as Sri G.K. Singh learned Senior Counsel appearing for the Commission on notice of a perceived need to ensure that in future recruitments the employer as well as the selecting body predetermine the issue of equivalence in order to ensure a fair and transparent selection being undertaken and unnecessary litigation which may derail the recruitment exercise itself being avoided. The learned Additional Advocate General on instructions of the Additional Chief Secretary (Personnel) has stated that henceforth the said Department of the State would ensure that the issue of which qualifications would be liable to be treated as equivalent would be settled before the commencement of the selection process. Insofar as the Commission is concerned, although learned Senior Counsel was requested to obtain instructions and apprise the Court of its stand on the aforesaid aspect, it was stated that the Commission needed further time for consideration. The matter was thereafter closed for judgment.

B. PRINCIPAL CHALLENGE

7. The writ petition as originally framed essentially challenged the exclusion of the petitioners on the ground that all of them held degrees and testimonials which were either equivalent or superior to the 'O' Level certificate as issued by the NIELIT. The challenge in this batch essentially rests on this plank with the petitioners contending that they have been wrongly excluded from the selection process. The core question which therefore stands posited is whether the qualifications possessed by the petitioners renders them eligible to participate in the selection process which restricted the zone of consideration to those who held either an O level certificate issued by NEILIT or any other qualification equivalent thereto.

8. It was also contended that since in the past the respondents had accepted those degrees and diplomas as being in compliance with the essential qualifications prescribed for appointment of Assistant Review Officers, it was not open for them to deny the right to participate in the present recruitment exercise. Although in the writ petition it was also asserted that the syllabus and course content of the degrees and diplomas held by the petitioners would establish that the petitioners had been sufficiently instructed in all topics which form part of the 'O' Level course, that issue was neither pressed nor argued by learned counsels appearing for the petitioners. The two principal submissions which were ultimately urged for the consideration of the Court are noted hereinafter.

9. Elaborating upon the aforesaid contentions learned senior counsels submitted that the degree and diploma courses which the petitioners had undergone were liable to be

considered as being in sufficient compliance with the requirements of the rules. According to the petitioners, the degrees held by them were clearly liable to be viewed as qualifications which were higher and superior to the 'O' Level certificate which was an elementary course administered by NIELIT. It was further contended that since the degrees and diplomas held by them included the study of Computers and Computer Applications, those were liable to be treated as superior and higher qualifications in the same line of progression. Learned Senior Counsels then assailing the decision of the Expert Committee as constituted by the Commission, submitted that the aforesaid decision was clearly without jurisdiction since the issue of equivalence was liable to be decided by the appointing authority and in any case was not an issue which could have been left for the determination of the Commission which was merely a selecting body. In support of the aforesaid contention, Sri Nandan, learned Senior Counsel placed reliance upon the following passages from the judgment of the Supreme Court in **Dr. Krushna Chand Sahu Vs. State of Orissa2**:

"31. Now, power to make rules regulating the conditions of service of persons appointed on Govt. Posts is available to the Governor of the State under the Proviso to Article 309 and it was in exercise of this power that the present rules were made. If the statutory Rules, in a given case, have not been made, either by the Parliament or the State Legislature, or, for that matter, by the Governor of the State, it would be open to the appropriate Government (the Central Government) under Article 73 and the State Government under Article 162) to issue executive instructions. However, if the Rules have been made but they are silent on any subject or point in issue, the omission can be supplied and the rules can be supplemented by executive instructions. (See: *Sant Ram Sharma v. State of Rajasthan* [AIR 1967 SC 1910: (1968)1 SCR 111: (1968) 2 LLJ 830]).

32. In the instant case, the Government did neither issue any administrative instruction nor did it supply the omission with regard to the criteria on the basis of which suitability of the candidates was to be determined. The members of the Selection Board, of their own, decided to adopt the confidential character rolls of the candidates who were already employed as Homoeopathic Medical Officers, as the basis for determining their suitability.

33. The members of the Selection Board or for that matter, any other Selection Committee, do not have the jurisdiction to lay down the criteria for selection unless they are authorised specifically in that regard by the Rules made under Article 309. It is basically the function of the rule-making authority to provide the basis for selection. This Court in *State of A.P. v. V. Sadanandam*: [1989 Supp (1) SCC 574 : 1989 SCC (L&S) 511: (1989)11 ATC 391] observed as under : (SCC pp. 583-84, para 17)

"We are now only left with the reasoning of the Tribunal that there is no justification for the continuance of the old rule and for personnel belonging to other zones being transferred on promotion to offices in other zones. In drawing such conclusion, the Tribunal has travelled beyond the limits of its jurisdiction. We need only point out that *the mode of recruitment and the category from which the recruitment to a service should be made* are all matters which are exclusively within the domain of the executive. It is not for judicial bodies to sit in judgment over the wisdom of the executive *in choosing the mode of recruitment of the categories from which the recruitment should be made* as they are matters of policy decision *falling exclusively within the purview of the executive."* (Emphasis supplied)

10. Dealing with the question of a higher or superior qualification being liable to be

viewed as being in compliance with the essential qualifications prescribed under the relevant rules, Sri Nandan, firstly drew the attention of the Court to the judgment of the Supreme Court in **Chandrakala Trivedi Vs. State of Rajasthan and others3** which interpreting the word *"equivalent"* held thus:

"8. The word *"equivalent"* must be given a reasonable meaning. By using the expression *"equivalent"* one means that there are some degrees of flexibility or adjustment which do not lower the stated requirement. There has to be some difference between what is equivalent and what is exact. Apart from that, after a person is provisionally selected, a certain degree of reasonable expectation of the selection being continued also comes into existence."

11. Sri Nandan then placed reliance upon the judgment of the Supreme Court in **Parvaiz Ahmad Parry Vs. State of Jammu and Kashmir and others4** and more particularly paragraphs 15 and 16 of the report which are extracted hereunder:

"15. In our considered view, firstly, if there was any ambiguity or vagueness noticed in prescribing the qualification in the advertisement, then it should have been clarified by the authority concerned in the advertisement itself. Secondly, if it was not clarified, then benefit should have been given to the candidate rather than to the respondents. Thirdly, even assuming that there was no ambiguity or/and any vagueness yet we find that the appellant was admittedly having B.Sc. degree with Forestry as one of the major subjects in his graduation and further he was also having Masters degree in Forestry i.e. M.Sc.(Forestry). In the light of these facts, we are of the view that the appellant was possessed of the prescribed qualification to apply for the post in question and his application could not have been rejected treating him to be an ineligible candidate for not possessing prescribed qualification.

16. In our view, if a candidate has done B.Sc. in Forestry as one of the major subjects and has also done Masters in the Forestry i.e. M.Sc.(Forestry) then in the absence of any clarification on such issue, the candidate possessing such higher qualification has to be held to possess the required qualification to apply for the post. In fact, acquiring higher qualification in the prescribed subject i.e. Forestry was sufficient to hold that the appellant had possessed the prescribed qualification. It was coupled with the fact that Forestry was one of the appellant's major subjects in graduation, due to which he was able to do his Masters in Forestry."

12. Reliance was placed by learned Senior Counsel also on the decision of the Supreme Court in **State of Uttarakhand and Others Vs. Deep Chandra Tewari and Another5** to submit that the candidature of a candidate possessing a higher qualification cannot be rejected on that basis. Reliance was placed on the following observations as made by the Court in that decision:

"11. We are conscious of the principle that when particular qualifications are prescribed for a post, the candidature of a candidate possessing higher qualification cannot be rejected on that basis. No doubt, normal rule would be that candidate with higher qualification is deemed to fulfill the lower qualification prescribed for a post. But that higher qualification has to be in the same channel. Further, this rule will be subject to an exception. Where the prescription of a particular qualification is found to be relevant for discharging the functions of that post and at the same time, the Government is able to demonstrate that for want of said qualification a candidate may not be suitable for the post, even

if he possesses a "better" qualification but that "better" qualification has no relevance with the functions attached with the post."

13. It was then urged that the communication of 22 July 2021 read along with the letter of 09 June 2020 established beyond a measure of doubt that the qualifications possessed by all the petitioners had been duly accepted by the State as being equivalent to the 'O' Level Certificate and that consequently the objections as taken by the respondents here clearly pale into insignificance. Sri Nandan submitted that the comparative chart submitted on behalf of the writ petitioners establishes that all their testimonials have been accepted by the State respondents as being in compliance with the requirement of the rules and in any case being sufficient evidence of being equivalent to the 'O' Level certificate issued by NIELIT. In view of the aforesaid it was submitted that the candidature of the petitioners has been wrongly rejected by the respondents.

The communication of 22 July 2021 is in the following terms:-

"अवगत कराना है कि वर्तमान में अधिकांश सेवा नियमावलियों में कम्प्यूटर ''ओ'' लेवल अथवा समकक्ष अर्हता भर्ती के लिए न्यूनतम शैक्षिक अर्हता के निर्धारित की गई है। किन्तु ''ओ'' लेवल के समकक्ष अर्हता कौन–कौन सी होगी यह स्पष्ट नहीं है।

2– उल्लेखनीय है कि गृह विभाग द्वारा पुलिस विभाग में लिपिक, लेखा एवं गोपनीय सहायक संवर्ग में भर्ती के लिए ''ओ'' लेवल की समकक्ष अर्हता के निर्धारण हेतु श्री डी0एस0यादव, प्रो0 वाई चांसलर/प्रो0 कम्प्यूटर साइंस, यू0पी0टी0यू0 की अध्यक्षता में एक समिति का गठन किया गया था, जिसमें डा0 रघुराज सिंह प्रो0 एवं विभागाध्यक्ष, एच0बी0टी0आई0कानपुर तथा श्री अशरफ अली प्रधानाचार्य राजकीय पालीटेक्निक आदमपुर गोंडा सम्मिलित थे। उक्त समिति की संस्तुतियों के आधार पर गृह विभाग के शासनाादेश संख्या–889/6 पु–1–20–650–59/2002 टी0सी0 दिनांक 09–06–2020 (प्रति संलग्न), द्वारा ''ओ'' लेवल की समकक्षता के सम्बन्ध में आदेश निर्गत किये गये हैं जो गृह विभाग पर लागू है।

3– अतः सम्यक विचारोपरान्त गृह विभाग द्वारा ''ओ'' लेवल के समकक्ष निर्धारित अर्हताओं पर आई0टी0विभाग का अभिमत प्राप्त किया गया। आई0टी0 विभाग के परामर्शनुसार गृह विभाग द्वारा ''ओ'' लेवल के समकक्ष निर्धारित की गई अर्हताओं पर आई0टी0विभाग द्वारा सहमति व्यक्त की गई है। इस प्रकार गृह विभाग के शासनादेश एवं आई0टी0विभाग के परामर्श के अनुसार निम्नलिखित अर्हताएं ''ओ'' लेवल के समकक्ष निर्धारित किये जाने योग्य हैः–

....

4. अतः इस सम्बन्ध में मुझे कहने का निदेश हुआ है कि कृप्या उपर्युक्त प्रस्तर–3 में वर्णित अर्हताओं को ''ओ'' लेवल के समकक्ष निर्धारित किये जाने के सम्बन्ध में आयोग का अभिमत/सुझाव शीघ्र उपलब्ध कराने का कष्ट करें।"

14. The relevant parts of the order of 9 June 2020 are extracted hereinbelow:-

"गृह (पुलिस), अनुभाग–1 लखनऊः दिनांकः 09 जून, 2020

विषय :– उ0प्र0 पुलिस लिपिक, लेखा एवं गोपनीय सहायक संवर्ग (तृतीय संशोधन) नियमावली, 2020 के प्रख्यापन कराये जाने के क्रम में कम्प्यूटर में ''ओ'' स्तर प्रमाण पत्र की समकक्षता का निर्धारण के सम्बन्ध में।

महोदय,

उपर्युक्त विषयक अपने पत्र संख्याः डीजी–चार–115 (172)/98 (अ) दिनांक 19.05.2020 का कृप्या संदर्भ ग्रहण करने का कष्ट करें, जिसके द्वारा उत्तर प्रदेश पुलिस लिपिक, लेखा एवं गोपनीय सहायक संवर्ग (तृतीय संशोधन) नियमावली, 2020 में दी गयी व्यवस्था के परिप्रेक्ष्य में कम्प्यूटर में ''ओ'' स्तर प्रमाण पत्र की समकक्षता का निर्धारण, कम्प्यूटर आपरेटर ग्रेड–ए के पदों पर सीधी भर्ती, 2013 की शैक्षिक अर्हता में तकनीकी शिक्षा की समकक्षता हेतु दिनांक 03.03.2014 को आयोजित बैठक की कमेटी में सदस्य (1) श्री डी0एस0यादव, प्रो0 वाइस चांसलर/प्रो0 कम्प्यूटर सांइस, यू0पी0टी0यू0 लखनऊ, (2) डा0 रघुराज सिंह, प्रो0 एवं विभागाध्यक्ष कम्प्यूटर सांइस एच0बी0टी0आई0 कानपुर उ0प्र0 तथा (3) श्री असरफ अली, प्रधानाचार्य, राजकीय पालीटेक्निक, आदमपुर गोण्डा द्वारा किये गये निर्धारण के अनुसार पुलिस लिपिक, लेखा एवं गोपनीय सहायक संवर्ग में ''ओ'' स्तर प्रमाण पत्र की समकक्षता का निर्धारण का प्रस्ताव किया गया है, जो निम्नवत् हैः–

.....

3– इस सम्बन्ध में मुझे यह कहने का निदेश हुआ है कि उत्तर प्रदेश पुलिस लिपिक, लेखा एवं गोपनीय सहायक संवर्ग सेवा (तृतीय संशोधन) नियमावली, 2020 के क्रम में उरोक्तानुसार ''ओ'' लेवेल की समकक्षता निर्धारण किये जाने हेतु उपलब्ध कराये गये प्रस्ताव पर सहमति प्रदान की जाती है, साथ ही यह भी सुनिश्चित किया जाये कि अन्य कोई कोर्स/सर्टीफिकेट उक्त अर्हता हेतु छूट तो नहीं रहा है।"

15. Sri Nandan lastly submitted that the benefit of the decision as embodied in the communications of 9 July 2021 and 9 June 2020 must stand extended to the petitioners also since they were merely clarificatory. In support of this submission Sri Nandan placed reliance upon the following passage from the decision of the Supreme Court in **Praveen Kumar C.P. Vs. Kerala Public Service Commission6: -**

"26. Note (v) of Clause 7 of the employment notification in the case PK and Note (vi) of Clause 7 of the employment notification in the case of AD required disclosure of the equivalency orders. A plain reading of the two GOs clearly reflect that their degrees were equivalent to the requisite qualifications contained in the eligibility criteria. In the case of *Aarya K. Babu* (supra), the disputed subject was recognized subsequently and introduced as part of the eligibility criteria. The principle of equivalency was not the main reasoning on the basis of which the said case was decided. The word *"equivalence"* in its plain meaning implies something which is equal to another. In the field of academics, application of the principle of equivalency in relation to degrees in two subjects would mean that they had the same standing or status all along, unless the official instrument according equivalency specifies a date from which the respective subjects would be treated as such, in express terms or by implication.

27. Whether a GO would have prospective effect or relate back to an earlier date is a question which would have to be decided on the basis of text and tenor of the respective orders. The GOs which declared appellants' degrees to be equivalent to those required as per the applicable notifications were not general orders but these two orders were person specific, relating to the two appellants. Once the GOs specifically declared that their B.Ed. degrees were equivalent to the designated subject which formed part of the employment notification, the GOs in substance have to be interpreted as clarificatory in nature and these cannot be construed to have had elevated the status or position of the degree they already had after the declaration was made in the GOs. The subject GOs only recognised an existing state of affairs so far as the nature of the degrees were concerned and did not create fresh value for the degrees which the appellants possessed. Though these equivalent orders were not in existence on the dates of issue of employment notifications, the GOs in substance recognize such status from the dates of obtaining such degrees. The GOs do not reveal any intervening circumstances which could be construed to imply that the respective degrees acquired the equivalent status because of such circumstances occurring subsequent to grant of their B.Ed. degrees. The aforesaid Notes to Clause 7 of the employment notifications postulated disclosure of the number and date of the orders on equivalence. But the GOs to which we have referred treat the equivalency to be operating on the dates of obtaining such degrees. Thus, the defect, if any, on disclosure requirement, shall stand cured on issue of the University orders followed by the GOs. The GOs also specify the context in which these were issued and refer to the appellants being included in the list of KPSC. This being the case, we do not think treating the appellants' degrees as equivalent to those required under the applicable notifications by the GOs issued in the year 2019 would result in change in the rules of the game midway. At best, it can be termed as interpreting the rules when the game was on, figuratively speaking. Such a course would, in

our opinion, be permissible. For this reason, we do not consider it necessary to deal with the different authorities cited on the principle of "change in the rule of the game midway". We have opined that the appellants' degrees in B.Ed. were equivalent to those required by the employment notifications and the equivalency orders were merely clarificatory in nature. For this reason, we do not think there was any fundamental breach of Notes (v) and (vi) of Clause 7 of the respective employment notifications in the cases of the appellants."

16. Learned senior counsel assailing the stand of the State in light of the aforesaid communications lastly submitted that in any case it would be wholly illegal and arbitrary for one Department of the State to accept the qualifications of the petitioners to be equivalent and the other taking a stand to the contrary. The writ petitioners also placed reliance upon the judgment rendered by a learned Judge of the Court at its Lucknow Bench in **Aakash Verma and others vs. State of U.P. and others7. Aakash Verma** was dealing with the recruitment of Sub Inspectors and Assistant Sub Inspectors. The rules which applied and governed that selection also prescribed the possession of an 'O' Level Certificate as an essential qualification. That writ petition too had been preferred by candidates who asserted that although they held qualifications which were superior and higher to the 'O' Level, they had been wrongly excluded from the selection process. The learned Judge proceeded to hold that upon the consideration of the comparative chart of all courses undergone by the petitioners there with the syllabus 'O' Level Courses, established that the topics and subject of study comprised in the 'O' Level Course stood included in the degrees and diplomas possessed by the petitioners. The learned Judge then proceeded to observe that the 'O' Level Certificate was a foundational course in Computers and that insistence of the respondents there on allowing only such candidates who have been appointed after training from a particular institute gives rise to the issue of "institutional exclusivity" which would be wholly unreasonable. The learned Judge further proceeded to observe that the insistence on candidates possessing an 'O' Level Certificate issued by NIELIT was wholly unreasonable.

C. SUBMISSIONS OF THE RESPONDENTS

17. Sri Neeraj Tripathi, the learned Additional Advocate General, on the other hand, submitted that the challenge raised in these writ petitions must necessarily fail in light of the judgment of the Full Bench of the Court in **Deepak Singh and Others Vs. State of U.P. And Others8.** It was contended that the issue of a higher qualification being accepted does not arise at all considering the rules governing the recruitment process. It was submitted that the State had taken a conscious decision to restrict the field of eligibility only to those who possessed the O level certificate. The learned Additional Advocate General contended that the said decision was based on a fair assessment by the State of the nature of duties assigned and functions to be performed by Assistant Review Officers. Sri Tripathi submitted that for an Assistant Review Officer to efficiently discharge his duties, elementary knowledge of computers as may be obtained upon completion of an O level course was found to be sufficient and that it is not open for the petitioners to compel the State to employ persons who may hold qualifications which may be asserted to be recognised as superior to or better than the O level certificate. The State in essence asserted that the prescription of a qualification fell within the exclusive domain of the employer and that the decision taken in respect of the present recruitment cannot be said to be arbitrary or unfair.

18. Turning then to the decision of the learned Judge in **Aakash Verma**, the learned

Additional Advocate General invited the attention of the Court to the judgment of the Division Bench of the Court in S**tate of U.P. Vs. Aakash Verma9** reversing that judgment and in light of which it was submitted that the submissions as urged were not liable to be accepted.

19. Sri Tripathi then proceeded to take the Court through the communication of 20 July 2021 to submit that the same did not represent or embody a principled decision taken by the respondents on the question of equivalence. In fact, Sri Tripathi contended that a careful perusal of that communication indicates that the respondents had merely sought the advice of the Commission in that respect. Insofar as the communication of 9 June 2020 is concerned, it was the submission of the learned Additional Advocate General that the same can have no application since the concerned Department in this batch has not adopted the decision embodied in that order. It was pointed out that the aforesaid communication related to the Police Ministerial, Accounts and Confidential cadre and cannot be applied to recruitment to the post of Assistant Review Officers.

20. Sri G.K. Singh learned senior counsel appearing for the Commission submitted that it was constrained and bound to undertake the exercise of evaluating equivalence since it had received numerous applications from candidates who did not possess the O level certificate and relied upon degrees and diplomas which were asserted to be either an equivalent or a better qualification. Learned senior counsel submitted that in the absence of any guidance or predetermined criteria formulated by the appointing authority, it was left to the Commission to undertake the aforesaid exercise. Sri Singh submitted that the decision of this Court in **Prashant Kumar Jaiswal Vs. State of U.P.10** since affirmed by the Supreme Court in **Mukul Kumar Tyagi Vs. State of U.P.11** recognise the right of the recruiting agency to undertake that evaluation.

D. THE CORE PRINCIPLES

21. Before embarking upon the exercise to answer the principal question which arises for determination and dealing with the rival submissions noticed above, it would be relevant to recognize the basic principles which must guide the Court while considering challenges like the present. The challenge raised in this batch of writ petitions of candidates asserting right of consideration by virtue of possessing a qualification liable to be treated as equivalent or higher is not novel. The question of whether a qualification is liable to be recognized as equivalent or one which is higher or superior to that stipulated, has fallen for consideration before the Court on numerous occasions in the past. However, from the body of precedent which has evolved around the subject, certain well accepted and recognised first principles can be culled out.

22. The first well recognized principle is that the prescription of a particular qualification must be recognized as being reserved for the employer who must be recognised to have the right to adjudge which qualifications would suitably equip an incumbent to discharge the duties and responsibilities attached to a particular post or office. The prescription of a qualification is a matter of recruitment policy which stands reserved for the employer to formulate bearing in mind the nature of functions and duties attached to a particular post. Courts must recognise the secondary function that they are expected to perform in this regard restricting the scrutiny of review to whether the qualifications as prescribed can be said to be arbitrary or irrational.

23. The second well settled precept which must be reiterated is that it is not the function of

the Court to adjudge or evaluate the suitability or desirability of a particular qualification that may be prescribed. Here too the Courts must exercise due restraint and desist from treading down this path since these issues must be left to the fair judgment and assessment of the employer and the experts in the field.

24. These principles as repeatedly enunciated by this Court as well as the Supreme Court were noticed in **Asheesh Kumar And 6 Others Vs. State of U.P. And 2 Others12** in the following terms:

"16. The correctness of the submission advanced would essentially have to be tested bearing in mind the following cardinal principles. The prescription of a qualification is essentially and primarily a role reserved for the employer. It is not for this Court while exercising its jurisdiction under Article 226 of the Constitution to arrogate to itself that function. Similarly, it is neither the function nor the role of the Court to adjudge or assess the suitability or desirability of a particular qualification that may be stipulated. Lastly, it is not for Courts to assume upon themselves the authority to delve into questions of equivalence of degrees and educational qualifications. That function must necessarily stand reserved for the experts in the field namely the academicians.

17. The Supreme Court in **Zahoor Ahmad Rather Vs. Imtiyaz Ahmad, (2019) 2 SCC 404,** reiterated these settled principles holding: -

"26. ..... The prescription of qualifications for a post is a matter of recruitment policy. The State as the employer is entitled to prescribe the qualifications as a condition of eligibility. It is no part of the role or function of judicial review to expand upon the ambit of the prescribed qualifications. Similarly, equivalence of a qualification is not a matter which can be determined in exercise of the power of judicial review. Whether a particular qualification should or should not be regarded as equivalent is a matter for the State, as the recruiting authority, to determine. The decision in **Jyoti K.K.** [**Jyoti K.K.** *v. Kerala Public Service Commission*, (2010) 15 SCC 596 : (2013) 3 SCC (L&S) 664] turned on a specific statutory rule under which the holding of a higher qualification could presuppose the acquisition of a lower qualification. The absence of such a rule in the present case makes a crucial difference to the ultimate outcome. In this view of the matter, the Division Bench [*Imtiyaz Ahmad v.* ***Zahoor Ahmad Rather***, LPA (SW) No. 135 of 2017, decided on 12-10-2017 (J&K)] of the High Court was justified in reversing the judgment [Zahoor Ahmad Rather v. State of J&K, 2017 SCC OnLine J&K 936] of the learned Single Judge and in coming to the conclusion that the appellants did not meet the prescribed qualifications. We find no error in the decision [*Imtiyaz Ahmad v.* ***Zahoor Ahmad Rather***, LPA (SW) No. 135 of 2017, decided on 12-10-2017 (J&K)] of the Division Bench."

A similar note of restraint was entered in **Maharashtra Public Service Commission Vs. Sandeep Shriram Warade, (2019) 6 SCC 362:**

9. The essential qualifications for appointment to a post are for the employer to decide. The employer may prescribe additional or desirable qualifications, including any grant of preference. It is the employer who is best suited to decide the requirements a candidate must possess according to the needs of the employer and the nature of work. The court cannot lay down the conditions of eligibility, much less can it delve into the issue with regard to desirable qualifications being on a par with the essential eligibility by an interpretive re-writing of the advertisement. Questions of equivalence will also fall outside the domain of judicial review. If the language of the advertisement and the rules are clear, the court cannot sit in judgment over the same. If there is an ambiguity in the advertisement or it is

contrary to any rules or law the matter has to go back to the appointing authority after appropriate orders, to proceed in accordance with law. In no case can the court, in the garb of judicial review, sit in the chair of the appointing authority to decide what is best for the employer and interpret the conditions of the advertisement contrary to the plain language of the same."

More recently three learned Judges of the Supreme Court in **Punjab National Bank Vs. Anit Kumar Das, 2020 SCC Online SC 897,** observed:-

"21. Thus, as held by this Court in the aforesaid decisions, it is for the employer to determine and decide the relevancy and suitability of the qualifications for any post and it is not for the Courts to consider and assess. A greater latitude is permitted by the Courts for the employer to prescribe qualifications for any post. There is a rationale behind it. Qualifications are prescribed keeping in view the need and interest of an Institution or an Industry or an establishment as the case may be. The Courts are not fit instruments to assess expediency or advisability or utility of such prescription of qualifications....."

25. This Court while deciding **Asheesh Kumar** also noticed the significant restraint which must be brought to bear with the precedents holding in unambiguous terms that it would be incorrect for Courts to assume the duty, function or authority to delve into questions of equivalence of degrees and educational qualifications. As this Court noted that functions must necessarily be recognized as being reserved for experts in the field. That well recognized restraint stands echoed in the judgment of the Supreme Court in **Zahoor Ahmad Rather and Others Vs. Sheikh Imtiyaz Ahmad and Others13** with the Court observing that equivalence of qualifications is not a matter which could be determined in exercise of the power of judicial review. The Supreme Court went on to observe that the question of whether a particular qualification is to be regarded as equivalent is a matter for the recruiting authority to determine. Significantly, in **Sandeep Shriram Warade** the Supreme Court in more categorical terms observed that questions of equivalence would fall outside the domain of judicial review. The principles and restraints noted above were reiterated and re-emphasized in the decision of the Supreme Court in **Anit Kumar Das.**

26. Dealing with the aforesaid aspect, this Court in **Prashant Kumar Jaiswal** observed: -

"39. While dealing with this issue, the Court before proceeding further notes and has to necessarily bear in mind that the power to prescribe a particular qualification vests exclusively in the employer. It is the employer who is the best judge to assess what qualifications must be necessarily possessed by an incumbent to a particular post. While exercising its powers of judicial review, this Court cannot step into the shoes of the employer and judge as to what would be an appropriate qualification. The narrow window within the contours of which the Court would interfere with such a decision is only where the qualifications prescribed are found to be ultra vires a legislative enactment or where it is demonstrated that the qualification prescribed is wholly extraneous to the duties and functions attached to a post. The Court under Article 226 of the Constitution also cannot determine the equivalence between two qualifications since such an exercise would clearly fall within the domain of experts. In view of the above, this Court comes to the conclusion that there was no inherent illegality when the respondents proceeded to prescribe the eligibility qualification to be the possession of a CCC Certificate or a certificate equivalent thereto. The Court also as noted above does not find any illegality attached to the ratification by the Board of Directors to the decision of the

Managing Director as embodied in his order dated 5 July 2013."

27. The Full Bench of the Court in **Deepak Singh** had an occasion to extensively review the decisions rendered on the question of prescription of a particular qualification and the oft-repeated claims by candidates asserting that their degrees or testimonials are liable to be treated as equivalent. The Full Bench proceeded to hold that the prescription of a qualification is a subject which must necessarily be left to the wisdom and discretion of the employer.

E. THE PIVOTAL ROLE OF RULES OF SELECTION

28. The other important aspect which must be borne in mind when Courts are faced with challenges like the present is of the pivotal impact which the rules governing selection have in order to answer the question which stands posited. Firstly, the issue of an equivalent qualification being accepted would only arise where the particular rules do envisage and provide that an equivalent qualification would also be liable to be considered. This Court in the decision of the **Asheesh Kumar** noticed the position of a rule which did not envisage an equivalent degree as being recognized to hold a candidate eligible for selection. Noticing the aforesaid aspect, the Court observed:

"13. At the very outset it becomes pertinent to note that the relevant stipulation in the advertisement extracted above, specifically required candidates to possess a degree in either English Literature or Language alone. It nowhere prescribed that any other degree equivalent thereto would also be acceptable. This the Court notices in addition to the admitted position that the respondents are not shown to have taken any decision holding a degree in General English to be equivalent to the qualifications prescribed in the advertisement. The advertisement viewed in that sense did not contemplate the inclusion of candidates who did not possess the twin essential qualifications stipulated or for the selecting body delving into the issue of *"equivalence"* of degrees."

29. The Court notes this particular aspect since the petitioners had initially placed heavy reliance upon the judgment rendered by a learned Judge at the Lucknow Bench of this Court in **Aakash Verma**. While the judgment of the learned Judge in **Aakash Verma** has since then come to be set aside by a Division Bench of the Court in an intra court appeal referred to above, the Court notes that the learned Judge there proceeded to delve into the question of equivalence even though the rules which applied did not provide for the same. Those rules as they stood at the relevant time required all candidates to possess a certificate of 'O' Level from DOEACC/NIELIT alone. In view of the aforesaid, the Court reiterates the position as enunciated in **Asheesh Kumar** that a contention with respect to equivalence can only arise where the rules in question do permit an equivalent degree as conferring eligibility upon a candidate to participate in the selection process.

F. A HIGHER OR SUPERIOR QUALIFICATION

30. The third aspect of significance which flows from the rival submissions which have been addressed is the issue of a "higher" or a "superior" qualification. Firstly, and on pure etymological principles, it may be noted that the words *"equivalence"* or *"equivalent"* are not synonymous with "higher" or "better". **The Oxford English Dictionary** [Second Edition] defines the word *"equivalence"* as under: -

"3.a Equal in value. Now only in more restricted uses:(a) of things regarded as mutually compensating each other or as exchangeable;

5.a That is virtually the same thing: identical in effect; tantamount;

6. Having the same relative position or function" corresponding;"

The word *"equivalent"* is defined as: -

"1.a Something equal in value or worth;

2. A word expression or sign etc. of equivalent meaning or import;"

31. Thus, judged purely on a grammatical plane, it is manifest that a higher or better qualification cannot be recognised as being synonymous with the expression "equivalent qualification". Undisputedly, the rules which govern the present recruitment do not make any provision for a higher or superior qualification being recognized as enabling a candidate to be held to be eligible. To put it in other words, those rules do not in any express terms provide for a higher or superior qualification being relevant for the purposes of adjudging the eligibility of a candidate.

32. It becomes relevant to note that the issue of higher or superior qualification essentially stems from the decisions of the Supreme Court in **Jyoti K.K. v. Kerala Public Service Commission14, Chandrakala Trivedi Vs. State of Rajasthan and others, State of Uttarakhand and Others Vs. Deep Chandra Tewari and Another and Parvaiz Ahmad Parry Vs. State of Jammu and Kashmir and others.** As was noticed by the Supreme Court in **Zahoor Ahmad Rather Vs. Imtiyaz Ahmad, Jyoti K.K.** was a decision which turned essentially on the language of Rule 10(a)(ii) of the **Kerala State and Subordinate Services Rules, 1958.** That rule specifically provided those higher qualifications which presupposed the acquisition of the lower qualification prescribed for the post to be sufficient. It was the specific and explicit inclusion of higher qualifications rendering a candidate eligible to apply for selection that formed the basis for the judgment in **Jyoti K.K.** It becomes apposite to note at the cost of repetition that undisputedly the rules which govern the present selection do not make any provision akin to that which was found as existing in Rule 10 noticed above. In **Zahoor Ahmad Rather**, the Supreme Court noticed and held that it was this distinguishing feature in the light of which the judgment of the Supreme Court in **Jyoti K.K.** is liable to be appreciated. Significantly, it was further observed that absent such a rule it would not be permissible to draw an inference that a higher qualification would either presuppose the acquisition of another or lower qualification or for that matter clothe the candidate with eligibility to apply and participate in the selection process. It would be pertinent to advert to the following observations as entered in paragraph 26 of the report:

"26. We are in respectful agreement with the interpretation which has been placed on the judgment in *Jyoti KK* in the subsequent decision in *Anit*a [(2015) 2 SCC 170]. The decision in *Jyoti KK* turned on the provisions of Rule 10(a)(ii). Absent such a rule, it would not be permissible to draw an inference that a higher qualification necessarily pre-supposes the acquisition of another, albeit lower, qualification. ...."

33. Turning then to the judgment of **Chandrakala Trivedi**, the Court notes upon a careful reading of that decision that the same turned significantly on the appellant there having been provisionally selected and appointed. While noticing that aspect the Supreme Court observed that the High Court had erred in not considering the higher qualification as equivalent to the Senior Secondary School Certificate Examination. The Court deems it apposite to extract the following observations as made in Chandrakala Trivedi:

"7. In the impugned judgment, the High Court has given a finding that the higher

qualification is not the substitute for the qualification of Senior Secondary or Intermediate. In the instant case, we fail to appreciate the reasoning of the High Court to the extent that it does not consider higher qualification as equivalent to the qualification of passing Senior Secondary examination even in respect of a candidate who was provisionally selected.

8. The word 'equivalent' must be given a reasonable meaning. By using the expression, 'equivalent' one means that there are some degrees of flexibility or adjustment which do not lower the stated requirement. There has to be some difference between what is equivalent and what is exact. Apart from that, after a person is provisionally selected, a certain degree of reasonable expectation of the selection being continued also comes into existence."

34. While **Deep Chandra Tewari** has been noticed and explained by the Full Bench of the Court in **Deepak Singh,** it may be noted that even there the Supreme Court observed and recognized an exception to the basic principle of a candidate possessing a higher qualification being eligible to apply. In paragraph 11 of the report, the Supreme Court held as follows:

"11. We are conscious of the principle that when particular qualifications are prescribed for a post, the candidature of a candidate possessing higher qualification cannot be rejected on that basis. No doubt, normal rule would be that candidate with higher qualification is deemed to fulfill the lower qualification prescribed for a post. But that higher qualification has to be in the same channel. Further, this rule will be subject to an exception. Where the prescription of a particular qualification is found to be relevant for discharging the functions of that post and at the same time, the Government is able to demonstrate that for want of said qualification a candidate may not be suitable for the post, even if he possession "better" qualification but that "better" qualification has no relevance with the functions attached with the post."

35. Explaining the exception which would operate even where a candidate asserts holding a better qualification, the Supreme Court held that the same would not suffice if the government or the recruiting agency were able to demonstrate that the better qualification may not be suitable or relevant for the post in question. The Court bears in mind the submission of the learned Additional Advocate General that the State Government has consciously restricted the field of eligibility to only those who possess an 'O' Level certificate cognizant of the fact that the recruitment was being made for appointment of Assistant Review Officers. Sri Tripathi had submitted that in light of the nature of duties and tasks which Assistant Review Officers are to perform, the State justifiably opined that a certificate of 'O' Level would sufficiently empower a candidate to discharge functions attached to that post.

36. The State as the employer undisputedly has the authority to rule on the prescription of qualifications. It discharges that obligation bearing in mind a variety of factors such as:

(A) Nature of the post to which an appointment is to be made;

(B) The duties and responsibilities attached to such a post; and

(C) the hierarchy of that post in the cadre structure.

37. Apart from the above, the employer must also bear in mind the factors of redundancy, office attrition and the creation of job opportunities for different sets of constituents of the State. The Court cannot shut its eyes to the limited opportunities of employment which are available under the State. It is thus imperative to recognize the burden and

obligation of the State as an employer to balance the interests of certificate, diploma and degree holders. The State would be acting within its authority as the author of a recruitment policy when it takes into consideration the nature of opportunities which may otherwise be available to diploma and degree holders and thus restricting the field of eligibility to those with an O level certificate. It was these "societal concerns" which were emphasized and underlined by the Supreme Court in **Zahoor Ahmad Rather** where while enunciating the factors which the State may possibly take into consideration while prescribing qualifications, it observed thus:

"27. While prescribing the qualifications for a post, the State, as employer, may legitimately bear in mind several features including the nature of the job, the aptitudes requisite for the efficient discharge of duties, the functionality of a qualification and the content of the course of studies which leads up to the acquisition of a qualification. The state is entrusted with the authority to assess the needs of its public services. Exigencies of administration, it is trite law, fall within the domain of administrative decision-making. The State as a public employer may well take into account social perspectives that require the creation of job opportunities across the societal structure. All these are essentially matters of policy. Judicial review must tread warily. That is why the decision in *Jyoti KK* must be understood in the context of a specific statutory rule under which the holding of a higher qualification which presupposes the acquisition of a lower qualification was considered to be sufficient for the post. It was in the context of specific rule that the decision in *Jyoti KK* turned."

38. **Parvaiz Ahmad Parry** rested on the Supreme Court finding that the candidate there had Forestry as one of the major subjects at the graduation level and one who had gone on to obtain a Master's Degree in the same field. It was in the aforesaid backdrop that the Supreme Court found that the appellant must be recognized as possessing the prescribed qualification.

39. The Full Bench of our Court in **Deepak Singh** while evaluating contentions urged on similar lines framed the following questions for consideration:

"5. .....

A. Whether a Degree in the field in question is entitled to be viewed as a higher qualification when compared to a Diploma in that field?

B. Whether the decisions in Alok Kumar Mishra and Kartikey lay down the correct position in law when they hold that a Degree holder is excluded from the zone of consideration for appointment as a Junior Engineer?

C. Whether a degree holder can be held to be ineligible to participate in a selection process for Junior Engineer in light of the relevant statutory rules?

D. Whether the exclusion of degree holders from the zone of consideration would meet the tests as propounded by the Supreme Court in State of Uttarakhand Vs. Deep Chandra Tewari?"

40. After noticing the judgments of the Supreme Court noted above and while answering question of whether a degree holder could be held to be entitled to be considered as eligible to apply for a post which stood restricted to diploma holders, observed thus:

"15. A diploma in engineering essentially is designed to impart practical aspect of the engineering and the mere perusal of the syllabus reveals that the Diploma in Engineering is aimed to equip the candidates, who can cater

to the practical requirement of engineering with emphasis on the practical works. In short, it aims to train persons for execution of the works and handling of equipments, etc. whereas the graduates in Engineering are taught with syllabus which provides theoretical training in the field of Engineering with low emphasis on the practical part of the engineering.

.....

19. We are afraid that the said Judgement has no application to the facts of the present case inasmuch as in the present case the specified required qualification was "Diploma in Engineering" and Degree Holders were specifically excluded.

...

24. The next case relied upon by Sri Ashok Khare in **Parvaiz Ahmad Parry** vs. State of Jammu & Kashmir and others, [2016 (1) ESC 54 (SC)]. In the said case, the matter related to appointment to the post of J & K Forest Service Range Officers, Grade-I, wherein the prescribed qualification was B.Sc. (Forestry) or its equivalent from any University recognised by the Indian Council of Agricultural Research (hereinafter referred to as the 'ICAR'). The appellants, in the said case, had a qualification of B.Sc. with Forestry as one of the major subjects and Master in Forestry i.e. M.Sc. (Forestry) on the date when he applied for the post in question, the Apex Court allowed the appeal holding as under:

"In our considered view, firstly, if there was any ambiguity or vagueness noticed in prescribing the qualification in the advertisement, then it should have been clarified by the authority concerned in the advertisement itself. Secondly, if it was not clarified, then benefit should have been given to the candidate rather than to the respondents. Thirdly, even assuming that there was no ambiguity or/and any vagueness yet we find that the appellant was admittedly having B.Sc. degree with Forestry as one of the major subjects in his graduation and further he was also having Masters degree in Forestry, i.e., M.Sc. (Forestry). In the light of these facts, we are of the view that the appellant was possessed of the prescribed qualification to apply for the post in question and his application could not have been rejected treating him to be an ineligible candidate for not possessing prescribed qualification.

In our view, if a candidate has done B.Sc. in Forestry as one of the major subjects and has also done Masters in the Forestry, i.e., M.Sc. (Forestry) then in the absence of any clarification on such issue, the candidate possessing such higher qualification has to be held to possess the required qualification to apply for the post. In fact, acquiring higher qualification in the prescribed subject i.e. Forestry was sufficient to hold that the appellant had possessed the prescribed qualification. It was coupled with the fact that Forestry was one of the appellant's major subjects in graduation, due to which he was able to do his Masters in Forestry."

The said case has no applicability to the facts of the present case inasmuch as Diploma in Engineering and B.Tech in Engineering are two different courses and thus the ratio of the judgement in the case of **Parvaiz Ahmad Parry** vs. State of Jammu & Kashmir and others has no applicability to the facts of the present case.

....

39. Sri Khare, in support of his submissions made earlier, has contended that in some of the statutory Rules, Diploma in Engineering is specified as the minimum qualification while with regard to some of the Departments, Diploma in Engineering is specified as required qualification. Be that as it may we have already held that Diploma in Engineering being distinct from Graduate in Engineering, no benefit flows from the advertisement whether the Diploma in Engineering is prescribed as a 'minimum qualification' or 'required qualification'.

40. Testing the said arguments as raised by Sri Khare although on record no Rules have been placed, however, in view of the finding recorded by us that Diploma in

Engineering is not the same as Bachelor in Engineering and also the finding recorded by us that the State is well equipped to prescribe the requisite required qualification keeping in view the requirement of posts for which the advertisements are issued, we hold that whether Diploma in Engineering is specified as a minimum qualification or a required qualification, Graduates in Engineering would not be entitled to be considered and will be out of zone of consideration unless a candidate possess both the qualifications to explain it further suppose a candidate after acquiring Diploma in Engineering also passes Graduation in Engineering he would be eligible, in view of the fact that he has Diploma in Engineering which is the required qualification for applying to the post and cannot be denied to participate only because he has any qualification additional to the prescribed qualification. However, the State Government is free to provide for equivalence as was done by the Kerala State while incorporating Rule 10(a)(ii). Since there is nothing on record in the present case to show that there was any Rule or Directive of the State Government to provide equivalence, it is only logical to conclude that degree holders are ineligible to participate in the selection process for Junior Engineer in the light of the specific provisions incorporated under the advertisement in question."

41. **Deepak Singh**, thus, lays emphasis on the fact that the qualifications which are specifically provided for alone would determine the eligibility of a particular candidate. It further held that where the rules do not envisage or permit candidates holding a better qualification specifically, they must be viewed as being excluded from consideration. The Court in **Deepak Singh** further pertinently observed that since a Diploma in Engineering is distinct from a Graduate degree in the same field, no benefit could flow to a candidate holding a higher or better qualification merely because the diploma in the subject was prescribed as a minimum or required qualification. **Deepak Singh** thus eloquently explains and clarifies the legal position that merely because a candidate perceives that a qualification held by him is superior or better that alone would not entitle him to be considered as eligible unless the rules of selection themselves permit and envisage the acceptance of such an assertion. In any case the decisions pressed in aid of the submission that a higher qualification must be accepted as conferring a right on a candidate to participate in the selection process must give way in light of the subsequent pronouncement by three learned Judges of the Supreme Court in **Punjab National Bank**. The Supreme Court in that decision in unequivocal terms upheld the exclusion of graduates from the field of eligibility and the restriction of the selection zone to those who had studied up to class XII.

42. Before closing this chapter, it would be relevant to also advert to the decision of the Division Bench of the Court in **Aakash Verma**. While reversing the decision rendered by the learned Judge and which was relied upon by the petitioner, the Court held: -

"29. Respondents have neither challenged the statutory rules i.e Rules, 2016 prescribing 'O' Level certificate in Computer Application from DOEACC/NIELIT as an essential qualification nor they had challenged the advertisement dated 26.12.2016 in pursuance of which the recruitment for three posts have been completed. In absence of challenge to the Rules and the advertisement and having applied in pursuance of the advertisement, it was not open for the respondents to come before the Court with the prayer to hold them eligible for the aforesaid three posts as they possessed the preferential qualification, but not the essential qualification. Prayers in the writ petitions would clearly show that there was no challenge to the statutory prescription and the advertisement. At

the threshold, the candidate must possess essential qualification and, if he/she possesses the essential qualification, then only the preferential qualification would be considered in case there are two or more candidates having essential qualification and have secured equal marks in examination/interview etc. When a candidate does not possess the essential qualification, but has only preferential qualification, it cannot be said that he/she is to be held eligible for appointment on the post for which a qualification is prescribed as an essential qualification. There is nothing in Rules, 2016 which stipulates that possession of higher qualification would presuppose acquisition of the essential qualification of possessing 'O' Level certificate from DOEACC/NIELIT. In absence of such a stipulation, the hypothesis that the higher qualification presupposes the acquisition of lower essential qualification cannot be accepted.

...

31. The prescription of qualification for a post, is a matter of recruitment policy. The State or the employer is empowered to prescribe the qualification as a condition of eligibility. The Court while exercising the function of judicial review, cannot expand upon ambit of prescribed qualification.

...

35. Once the statutory Rules prescribe for having 'O' Level certificate from this particular institute, by exercising judicial review, the Court cannot substitute its own view to hold that the higher qualification would certainly include the 'O' Level certificate issued by DOEACC/NIELIT. We, therefore, hold that the learned Single Judge has wrongly held that higher qualification held by the respondents would be inclusive of 'O' Level certificate and, therefore, the finding of the learned Single Judge that the respondents meet the essential eligibility condition, is not correct."

43. The aforesaid decision reiterates the settled limitations on the extent of judicial review in such matters with the Court emphasizing that it would neither be permissible to expand upon the prescribed qualification nor should the Court substitute its own view to hold a higher qualification to be equivalent to that which has been prescribed.

44. In view of the aforesaid discussion, the Court is of the considered view that in light of the provisions made in the Rules which govern the selection in question, it would be impermissible to recognise the petitioners as being eligible to apply or participate in the selection process. Those Rules do not envisage equivalence being accorded to what may be perceived to be a "higher" or "better" qualification. Absent such a stipulation being statutorily engrafted, the Court finds no justification to expand the field of eligibility in the exercise of its powers of judicial review.

45. Turning then to the challenge to the decision of the Expert Committee formed by the Commission, this Court is of the considered view that in light of the aforesaid conclusions, no occasion arises to evaluate the merits of the opinion formed by that Committee. Additionally, and for completeness of the record, it may be again noted that while the writ petition did append voluminous material on the strength of which the petitioners may have desired to establish that the fields and topics studied in the O level course stand subsumed in the programs that they have pursued, no submissions with respect to course content were addressed or urged. This perhaps since the petitioners placed heavy reliance upon the communications of 22 July 2021 and 9 June 2020 on the basis of which it was contended that once the State itself had accepted the qualifications held by the petitioners as being equivalent, the petitioners were entitled to succeed.

G. THE COMMUNICATIONS OF 22 JULY 2021 AND 9 JUNE 2020

46. In order to appreciate and evaluate the merits of that submission the Court firstly adverts to the order of 22 July 2021. As is manifest from a close reading of that communication, while it does refer to the consultations on the issue of equivalence between various departments, including the Department of Information Technology in the State Government, it does not represent a categorical or principled decision of the State since in essence, it merely communicates its views for the consideration of the Commission. In fact, as is evident from a careful reading of the concluding part of that communication the State had forwarded its views to elicit the "advise" and "suggestions" of the Commission only. That communication neither represents nor is it capable of being interpreted as constituting a definitive opinion of the State and its desire for the same being accepted and acted upon by the Commission.

47. The second communication of 9 June 2020 was sought to be explained by the learned Additional Advocate General as being the view of a particular Department of the State alone and thus not binding on the Department of Personnel which was overseeing the present recruitment. This submission was countered by the petitioners who submitted that departments of the State cannot be permitted to have individual views on the subject and that the acceptance of such a submission would be clearly discriminatory and violative of Articles 14 and 16 of the Constitution. The objection of the petitioners commends acceptance on first blush since departments of the State Government are merely sinews and strands created for the purposes of implementation of the policies of the Government covering myriad subjects and fields. Departments are merely individual facets of the State. However, that objection would not merit further evaluation for the following reasons.

48. What the State has failed to point out while dealing with the communication of 9 June 2020 is the statutory framework against which it is liable to be viewed. The Court deems it apposite to refer to Rule 11 of the **U.P. Police Ministerial, Accounts and Confidential Assistant Cadre Service Rules, 2015** which while dealing with the question of *"Preferential Qualifications"* provides as under: -

"11. Other things being equal, a candidate shall be given preference who has-

1. higher certification from the DOEACC@NIELIT Society or Bachelors Degree in Computer Application/Technology or higher recognized by the Government;

2. graduation in Law from any institute or college or University recognised by University Grants Commission;

3. has served in the Territorial Army for at least two years;

4. possesses "B" Certificate of the National Cadet Corps.

The exact modality for giving preference shall be decided by the Board in consultation with the Head of Department."

49. Rule 11 as is evident does envisage a qualification higher or superior to the O level certificate being considered relevant for the purposes of selection, albeit under the head of preferential qualifications. Those Rules while prescribing essential qualifications had originally provided for an O level certificate alone. However, in terms of the Third Amendment to those Rules published on 15 April 2020, Rule 10(1) has now been amended to provide for a qualification recognised as equivalent to the O level certificate also being considered for the purposes of adjudging eligibility of candidates. However, on a conjoint reading of Rules 10 and 11 of those Rules, it is manifest that the communication of 9 June 2020 must be understood in light of the fact that they did permit the inclusion of qualifications higher than the O level also being relevant for the purposes of selection. The Rules which apply to

the present recruitment, do not embody any provision akin to Rule 11. In view of the aforesaid, the Court is of the considered opinion that the aforesaid communication also does not advance the case of the petitioners here.

H. OBLIGATIONS OF THE RECRUITING BODY AND COMMISSION

50. In **Prashant Kumar Jaiswal**, this Court recognized the obligation of the recruiting body as well as the entity which is in charge of undertaking the selection process, to fairly disclose qualifications which are liable to be considered as equivalent where the rule so prescribes and permits. It was further held that a decision on this aspect must necessarily be taken at the outset in order to ensure fairness of the selection process. It must be stated that candidates must be made aware of the qualifications which would govern the zone of eligibility from the inception so as to eschew allegations of arbitrariness being levelled and selections being assailed on the pedestal of the *"rules of the game"* having been changed. The obligation to lay down an unambiguous selection criterion which flows from and forms the essence of the rights conferred by Articles 14 and 16 of the Constitution would necessarily include a duty being recognised as bearing upon the selecting and recruiting body the legal obligation to predetermine and formulate a well-defined criterion of eligibility. This facet which forms an integral part of any selection process cannot be postponed for determination after the selection process has commenced. If this procedural safeguard is not ordained to be mandatory, it may also lead to situations where various individuals who may not have initially applied raising the objection that the state of ambiguity which prevailed deprived them of the right to participate in the recruitment. The Court also bears in mind the imperatives of ensuring that large scale recruitment exercises which are undertaken do not come to be derailed on account of litigation which would necessarily ensue once such decisions are taken mid-way or after the selection process has commenced. This is a phenomenon which the Court has been compelled to face and grapple with on numerous occasions in the recent past.

51. Emphasizing the importance of this aspect, the Court in **Prashant Kumar Jaiswal** observed: -

"43. In essence, the "rules of the game" must be clearly defined and pre determined so as to eschew any allegation of a lack of fair and transparent procedure having been adopted in the selection process. When the advertisement prescribes or confers the authority upon the selecting body to recognise candidates as eligible to participate on the basis of an "equivalent" qualification, it necessarily presupposes the determination and formulation of criteria which would guide and govern the question of equivalence. It would entail the recognition of certain predetermined qualifications which would be treated or recognised as equivalent. At its lowest, at least the criteria to confer or recognise equivalence would have to be formulated in advance.

44. The series of decisions taken by the Board of Directors can only be described as evidence of their vacillating views on the subject. This Court deems it appropriate to enter a note of caution that in matters pertaining to the prescription of an eligibility qualification, it is not only appropriate but also imperative that the employer exercises its powers so as to confer a degree of certainty with respect to the eligibility criteria as also to ensure that such conflicting decisions do not result in the creation of doubts and uncertainty with respect to the qualification required for a post in a public service."

52. The decision of the Court in **Prashant Kumar Jaiswal** was affirmed by the Supreme Court in **Mukul Kumar Tyagi**. Dealing with

this aspect, the Supreme Court in that decision held as follows:

"59. The equivalence of qualification as claimed by a candidate is matter of scrutiny by the recruiting agency/employer. It is the recruiting agency which has to be satisfied as to whether the claim of equivalence of qualification by a candidate is sustainable or not. The purpose and object of qualification is fixed by employer to suit or fulfil the objective of recruiting the best candidates for the job. It is the recruiting agency who is under obligation to scrutinise the qualifications of a candidate as to whether a candidate is eligible and entitled to participate in the selection. More so when the advertisement clearly contemplates that certificate concerning the qualification shall be scrutinised, it was the duty and obligation of the recruiting agency to scrutinise the qualification to find out the eligibility of the candidates. The self-certification or self-declaration by a candidate that his computer qualification is equivalent to CCC has neither been envisaged in the advertisement nor can be said to be fulfilling the eligibility condition.

....

61. We are unable to concur with the above view taken by the Division Bench. Scrutiny of Computer qualification claimed by candidate to be equivalent to CCC certificate is the obligation and duty of the recruiting agency/employer as per the advertisement itself as noted above. The recruiting agency or the employer cannot abdicate their obligation to scrutinise the eligibility of candidate pertaining to computer qualification and reliance on self-certification by the candidate is wholly inappropriate and may lead to participation of candidates who do not fulfil the mandatory qualification as per the advertisement.

.....

64. It is relevant to note that in the earlier recruitment, which was held in 2011 for the post of Technician Grade-II only CCC certificate issued by DOEACC was part of mandatory qualification and it was for the 2014 recruitment that CCC certificate or equivalent computer qualification was provided for. When equivalent qualification to CCC was provided for as a mandatory qualification, it was incumbent on the Corporation as well as on the recruitment agency to reflect on the said issue and to lay down criteria or guidelines to declare equivalence of the CCC certificate. It is, thus, clearly proved from the record that no criteria or guidelines were framed or determined either by the Corporation or the Commission before completion of the recruitment process. The employer, who had issued advertisement and required fulfilling of qualification as prescribed ought to be keenly interested in selecting candidates, who fulfil the qualification and serve the post as per requirement of employer. Preparation of the select list without scrutiny of the computer qualification of the candidates, who do not possess CCC certificates is abdication of duty and obligation, both by Corporation and the Commission. It has been noted by learned Single Judge in his judgment that it was only after direction by the Court in the writ petition, the Corporation and Commission became alive to the obligation, which was on them to find out equivalence.

.....

66. When issue is of the equivalence of a qualification, which is mandatory qualification for a post, there should be yardsticks declaring equivalent or equivalence, which has to be declared by any body entrusted with such jurisdiction and who is competent to declare equivalence of a qualification. In absence of any such declaration, it is for the employer to provide for the methodology for determining the equivalent qualification. The CCC certificate is issued by DOEACC/NIELIT, which is on a particular syllabus. Syllabus of the CCC certificate is placed before us at pp. 225 to 230 of the paper book. For declaring any other certificate as equivalent to CCC, the syllabus on

which CCC certificate has been granted is most material factor, which has to be looked into. In the present case, no exercise has been done by the Corporation or the Commission to determine the equivalence of the qualification claimed by the candidates, who had not passed CCC certificate from DOEACC/NIELIT. Learned Single Judge has, after consideration of materials on record, made following observations:-

"As is evident from the above discussion, the question of equivalence was left to hinge solely upon a self-declaration of the candidate. Neither the Corporation nor the Commission had any list of recognised equivalent certificates to guide them on the subject. The policy on equivalence which came about on 27 January, 2015 was a decision taken not only too late but as noted above suffered from fundamental flaws. There was a complete and evident lack of enquiry on course content. Leaving these issues to be decided solely on the basis of a self-declaration of candidates is unequivocal evidence of a failure to exercise powers and an abject abdication of functions vesting in the Commission. More fundamentally, none of the certificates other than CCC were shown or established to be a legally recognised equivalent."

53. The aforesaid statement of the law in **Prashant Kumar Jaiswal** and **Mukul Tyagi** clearly warrants the recordal of the conclusion that the issue of equivalence must necessarily be predetermined and cannot be left to the vagaries of the recruiting or selecting body taking a decision in that regard either after the commencement of the selection or not taking a view on that question at all. A failure to rule on this issue may in fact be liable to be viewed as an abdication to discharge an obligation which is integral to a fair and transparent selection process. Permitting such a recourse would raise the specter of innumerable future recruitment exercises falling into a quagmire of litigation. The Court appreciates the positive stand as taken by the Department of Personnel in this regard and evidenced by the statement of the learned Additional Advocate General recorded above. The Commission, however, has remained non-committal on this aspect for reasons unknown and inscrutable. It becomes pertinent to note that learned senior counsel appearing on its behalf feebly submitted that the exercise to approach the question of equivalence was initiated only once the number of applicants came to be known. That cannot possibly constitute a constitutionally valid reason for not attempting to take up the aforesaid issue at the inception itself so as to ensure the selection process being recognised as fair and compliant with Articles 14 and 16 of the Constitution. This Court fails to discern any logic that may justify the issue of equivalence not being considered or predetermined at the conceptual stage of the selection process. Regard must also be had to the fact that it was always open to the Commission to have sought necessary clarification from the recruiting department even before commencing the recruitment process. In any case, the reasons recorded above clearly warrant directions being framed on the aforesaid lines which would bind both the State as well as the Commission in respect of future selection proceedings are concerned.

I. ANCILLARY ISSUES

54. The Court finds no compelling reason to deal with the submission of Sri Nandan based on the decision of the Supreme Court in **Praveen Kumar C.P.** in light of its conclusions recorded in respect of the communications of 21 July 2021 and 09 June 2020. The Court also finds no necessity to individually deal with the question of equivalence and acceptance of the various qualifications possessed by the petitioners and asserted to have been recognised in the two communications referred to above. The Court in the preceding parts of this decision

has already explained the ambit and operation of those two communications. It has also found that they do not aid or assist the case of the petitioners.

55. The Court also reiterates the findings recorded in **Prashant Kumar Jaiswal** that certificates of courses conducted by NEILIT or its accredited centers alone are liable to be recognised as having the authority to award the "CCC" or the "O" level certificates. It had clearly found in that decision that NEILIT had not authorised any other agency or entity to conduct such courses or issue certificates which are connected with courses that are specifically tailored and formulated by it. In view of the above, only such O level certificates are liable to be recognised as may have been issued either by NEILIT or its accredited center or agency. Consequently, certificates issued by other entities bearing similar titles or nomenclatures would also not enure to the benefit of the petitioners here.

56. The Court also notes that the contention of a Post Graduate Diploma in Computer Applications [PGDCA] being treated as equivalent to the O level certificate was specifically noticed and rejected by the Full Bench in **Deepak Singh**. In view of the aforesaid, candidates asserting eligibility on the strength of a PGDCA also cannot be accorded any relief.

57. The Court also fails to find any merit in the submission of the petitioners that the Commission had no authority to examine the issue of equivalence. As noted above, it became imperative for the Commission to visit this issue in light of the numerous applications received by it from applicants claiming either parity with the O level or asserting that they held superior or higher qualifications. It becomes pertinent to observe that attempting to ascertain a claim of parity with the qualifications prescribed or a situation where a candidate claims that he holds a qualification better than that prescribed, is not the same as evolving a criterion for selection. It also cannot be equated with the selecting agency formulating the "basis for selection". The decision in **Dr. Krushna Sahu** was dealing with a case where the selection committee proceeded to determine suitability based upon an assessment of character rolls. That decision is thus clearly distinguishable. In any case, both **Prashant Kumar Jaiswal** as well as **Mukul Kumar Tyagi** have recognised the right of the recruiting agency to rule on the question of equivalence.

J. SUMMATION

58. In view of the aforesaid discussion the Court records the following conclusions:-

A. The prescription of a qualification is a matter of recruitment policy which stands reserved for the employer to formulate bearing in mind the nature of functions and duties attached to a particular post. Courts must recognise the secondary function that they are expected to perform in this regard restricting the scrutiny of review to whether the qualifications as prescribed can be said to be arbitrary or irrational.

B. It is not the function of the Court to adjudge or evaluate the suitability or desirability of a particular qualification that may be prescribed. Here too, the Courts must exercise due restraint and desist from treading down this path since these issues must be left to the fair judgment and assessment of the employer and the experts in the field.

C. The issue of an equivalent qualification being accepted would only arise where the rules do envisage and provide that such a qualification would also be liable to be considered. In the absence of an express stipulation in that respect being provisioned for

in the relevant rules, no occasion would arise for the Court to examine that question.

D. The Court reiterates the position as enunciated in **Asheesh Kumar** that a contention with respect to equivalence can only arise where the rules in question do permit an equivalent degree as conferring eligibility upon a candidate to participate in the selection process.

E. **Zahoor Ahmad Rather** is a binding authority for the proposition that equivalence of qualifications is not a matter which should be determined in exercise of the power of judicial review. The Supreme Court went on to observe that the question of whether a particular qualification is to be regarded as equivalent is a matter for the recruiting authority to determine. The Court also bears in mind the decision in **Sandeep Shriram Warade** where the Supreme Court in more categorical terms held that questions of equivalence would fall outside the domain of judicial review.

F. **Deepak Singh** lays emphasis on the fact that the qualifications which are specifically provided for alone would determine the eligibility of a particular candidate. It further held that where the rules do not envisage or permit candidates holding a better qualification specifically, they must be viewed as being excluded from consideration. **Deepak Singh** thus clarifies the legal position that merely because a candidate perceives that a qualification held by him is superior or better, that alone would not entitle him to be considered as eligible unless the rules of selection so ordain or provide for a higher qualification being accepted.

G. It would neither be permissible to expand upon the prescribed qualification nor should the Court substitute its own view to hold a higher qualification to be equivalent to that which has been prescribed.

H. Absent a stipulation in the Rules which govern the selection in question, it would be impermissible to recognise the petitioners as being eligible to apply or participate in the selection process. Those Rules do not envisage equivalence being accorded to what may be perceived to be a "higher" or "better" qualification. Absent such a provision being statutorily engrafted, the Court finds no justification to expand the field of eligibility in the exercise of its powers of judicial review.

I. The letter of 20 July 2021 merely elicits the views of the respondents for the consideration of the Commission. In fact, as is evident from a careful reading of the concluding part of that communication, the State had forwarded its views solely for the purposes of inviting the "advise" and "suggestions" of the Commission. That communication neither represents nor is it capable of being interpreted as constituting a definitive opinion of the State and its desire for the same being accepted and acted upon by the Commission.

J. The communication of 9 June 2020 must be understood and appreciated in the backdrop of the relevant Rules which envisaged preference being accorded to qualifications higher or better than the O level certificate. The aforesaid position is evident from a conjoint reading of Rules 10 and 11 thereof. The Rules which apply to the present recruitment carry no provision like Rule 11. In view of the aforesaid, the Court is of the considered opinion that the aforesaid communication also does not advance the case of the petitioners here.

K. The obligation to lay down an unambiguous selection criterion which flows from and forms the essence of the rights conferred by Articles 14 and 16 of the Constitution, would necessarily include a duty being recognised as bearing upon the selecting and recruiting body to predetermine and formulate a well-defined criterion of eligibility. This facet which forms an integral part of any selection process cannot be postponed for determination after the selection process has commenced.

L. The statement of the law in **Prashant Kumar Jaiswal** and **Mukul Kumar**

Tyagi clearly warrants the recordal of the conclusion that the issue of equivalence must necessarily be predetermined and cannot be left to the vagaries of the recruiting or selecting body taking a decision in that regard either after the commencement of the selection or not taking a view on that question at all.

K. DIRECTIONS

59. Accordingly and for the reasons aforenoted all these writ petitions fail and shall stand **dismissed.**

60. In light of the conclusions recorded above, a direction is hereby issued to the respondent Department as well as the Commission that henceforth the issue of equivalence of qualifications, if sanctioned and envisaged under the relevant rules, shall be determined and made known prior to the commencement of the selection process.

61. The stand of the Department of Personnel has already been noticed and recorded in these proceedings. The Court finds no justification for other departments and constituents of the State not following and adopting an identical practice. In view of the above, let a copy of this judgment be placed before the Chief Secretary of the Government of U.P. to instruct all other departments, agencies and entities of the State to henceforth ensure that the question of equivalence of qualifications, where the rules of recruitment so envisage as conferring eligibility, shall be determined prior to the commencement of any recruitment exercise. The Chief Secretary shall place an affidavit of compliance in this respect on the record of this writ petition within a period of 1 month from today.

62. The U.P. Public Service Commission is also directed to ensure that where the recruitment rules contemplate the acceptance of a higher qualification for the purposes of determining eligibility, that issue shall be decided and settled in consultation with the recruiting agency before the commencement of any recruitment exercise that may be initiated henceforth. The Secretary of the Commission shall place an affidavit of compliance in this respect on the record of this writ petition within a period of 1 month from today.

(2021)11ILR A298
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.10.2021

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.

Service Single No. 28975 of 2019

Ram Sumer ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Mohd. Shujauddin Waris

Counsel for the Respondents:
C.S.C.

A. Service Law - U.P. Fundamental Rules 56(2)-challenge to- compulsory retirement-Petitioner was a Class-IV employee has an unblemished service record throughout-he was classified deadwood merely on the strength of a minor punishment inflicted in the distant past-solitary minor punishment inflicted upon the petitioner became irrelevant once the annual confidential rolls for the subsequent period have remained constantly satisfactory and integrity intact-solitary punishment awarded to the petitioner was not decisive of treating the petitioner as deadwood by any degree of prudence-petitioner shall be reinstated in service-order passed by the competent authority being illegal and arbitrary is set aside.(Para 1 to 28)

The writ petition is allowed. (E-6)

List of Cases cited:

1. Shyam Lal Vs St. of U.P. (1955) SCR 26: AIR 1954 SC 369 : (1954) 2 LLJ 139

2. St. of Guj. Vs Umedbhai M. Patel (2001) 3 SCC 314: 2001 SCC (L&S) 576: 2001 SCC OnLine SC 474

3. St. of Punj. Vs Gurdas Singh, St. of U.P. & ors. Vs Raj Kishore Goyal & Nawal Singh Vs St. of U.P. & ors. 1998(4) SCC 92 , 2001(10) SCC 183 and 2003(8) SCC 117

4. Baikuntha Nath Das Vs Chief District Medical Officer Baripada (1992) 2 SCC 299: 1993 SCC (L&S) 521:1992 21 ATC 649

5. H.G. Venkatachaliah Setty Vs U.O.I .(1997) 11 SCC 366

6. Nawal Singh Vs St. of U.P.(2003) 8 SCC 117 : 2003 SCC (L&S) 1212 : 2003 SCC OnLine SC 1064

7. Pyare Mohan Lal Vs St. of Jharkhand (2010) 10 SCC 693 : 2011 1 SCC (L&S) 550 : 2010 SCC OnLine SC 1010

8. Ram Murti Yadav Vs St. of U.P. (2020) 1 SCC 801 : 2020 1 SCC (L&S) 245 : 2019 SCC OnLine SC 1589

9. St. of U.P. Vs Vijay Kumar Jain (2002) 3 SCC 641 : 2002 SCC (L&S) 455 : 2002 SCC OnLine SC 341

10. Rajeev Kumar Khare Vs St. of U.P. thru the Princ. Secy. Youth Deptt. Govt. of U.P., Civil Secretariat & ors. (2019) SCC OnLine All 5670 : (2019) 6 All L.J 369

(Delivered by Hon'ble Attau Rahman Masoodi, J.)

1. Heard Sri Amit Bose learned Senior Counsel assisted by Sri Abhishek Bose learned counsel for the petitioner and Sri R.P.S. Chauhan learned Additional Chief Standing Counsel for the State.

2. This writ petition is directed against the order of compulsory retirement passed by the Superintendent of Police Railways, Lucknow on 9.7.2019 whereby the petitioner having been treated to be deadwood was retired compulsorily from service by invoking the power under Rule 56 of the fundamental rules contained in Financial Hand Book(Volume II, Part II to IV). The material relevant to be considered is prescribed under Rule 56(2) of the U.P. Fundamental Rules and the same for ready reference is extracted here under :-

"(2) In order to be satisfied whether it will be in the public interest to require a Government servant to retire under clause (c) the appointing authority may take into consideration any material relating to the Government servant and nothing herein contained shall be construed to exclude from consideration--

(a) any entries relating to any period before such Government servant was allowed to cross any efficiency bar or before he was promoted to any post in an officiating or substantive capacity or on an ad-hoc basis; or (b) any entry against which a representation is pending, provided that the representation is also taken into consideration along with the entry; or (c) any report of the Vigilance Establishment constituted under the Uttar Pradesh Vigilance Establishment Act, 1965."

3. The record reveals that the screening committee has considered the service record pertaining to the years from 2009 to 2018. The annual confidential rolls for the entire period mentioned above record as under :-

Sl No.	Year	Remarks
1.	2009	Satisfactory
2.	2010	Satisfactory
3.	2011	Good
4.	2012	Satisfactory
5.	2013	Satisfactory

6.	2014	Satisfactory
7.	2015	Satisfactory
8.	2016	Satisfactory
9.	2017	Satisfactory
10.	2018	Satisfactory

4. In the column under punishment, one minor punishment has been recorded which was inflicted upon the petitioner on 13.11.2010. This punishment is in the nature of censure punishment subsequent whereto the annual entries awarded to the petitioner was 'Good' for the year 2011 and consistently satisfactory thereafter.

5. Before coming to the assessment of factual position, it is necessary to note the position of law in respect of Compulsory Retirement and scope of Judicial Review. Inarguably, every premature termination of service is not dismissal or removal. Contrary to Dismisssal or Removal, Compulsory retirement is not a punishment, as an established legal principle, but a mechanism for the Employer State to maintain the efficiency of its administration, departments and agencies by putting an end to the services of the employees who have become and are proved to be deadwood to it and to put such mechanism in process is the prerogative of the Employer State ***[Shyam Lal v. State of U.P.,*** **(1955) 1 SCR 26 : AIR 1954 SC 369 : (1954) 2 LLJ 139].**

6. The wide principles relating to Compulsory Retirement were settled by a three-judges bench of the Supreme Court in ***Baikuntha Nath Das case*** **[(1992) 2 SCC 299 : 1993 SCC (L&S) 521 : (1992) 21 ATC 649]:**

"34. The following principles emerge from the above discussion:

(i) An order of compulsory retirement is not a punishment. It implies no stigma nor any suggestion of misbehaviour.

(ii) The order has to be passed by the government on forming the opinion that it is in the public interest to retire a government servant compulsorily. The order is passed on the subjective satisfaction of the government.

(iii) Principles of natural justice have no place in the context of an order of compulsory retirement. This does not mean that judicial scrutiny is excluded altogether. While the High Court or this Court would not examine the matter as an appellate court, they may interfere if they are satisfied that the order is passed (a) mala fide or (b) that it is based on no evidence or (c) that it is arbitrary -- in the sense that no reasonable person would form the requisite opinion on the given material; in short, if it is found to be a perverse order.

(iv) The government (or the Review Committee, as the case may be) shall have to consider the entire record of service before taking a decision in the matter -- of course attaching more importance to record of and performance during the later years. The record to be so considered would naturally include the entries in the confidential records/character rolls, both favourable and adverse. If a government servant is promoted to a higher post notwithstanding the adverse remarks, such remarks lose their sting, more so, if the promotion is based upon merit (selection) and not upon seniority.

(v) An order of compulsory retirement is not liable to be quashed by a Court merely on showing that, while passing it uncommunicated adverse remarks were also taken into consideration. That circumstance by itself cannot be a basis for interference."

7. The Principles were further reiterated in ***State of Gujarat v. Umedbhai M. Patel,*** **(2001) 3 SCC 314 : 2001 SCC (L&S) 576 : 2001 SCC OnLine SC 474**, as below:

"11.The law relating to compulsory retirement has now crystallised into definite

principles, which could be broadly summarised thus:

(i) Whenever the services of a public servant are no longer useful to the general administration, the officer can be compulsorily retired for the sake of public interest.

(ii) Ordinarily, the order of compulsory retirement is not to be treated as a punishment coming under Article 311 of the Constitution.

(iii) For better administration, it is necessary to chop off dead wood, but the order of compulsory retirement can be passed after having due regard to the entire service record of the officer.

(iv) Any adverse entries made in the confidential record shall be taken note of and be given due weightage in passing such order.

(v) Even uncommunicated entries in the confidential record can also be taken into consideration.

(vi) The order of compulsory retirement shall not be passed as a short cut to avoid departmental enquiry when such course is more desirable.

(vii) If the officer was given a promotion despite adverse entries made in the confidential record, that is a fact in favour of the officer.

(viii) Compulsory retirement shall not be imposed as a punitive measure".

8. The primary consideration for screening the public servant as deadwood is to sub-serve the public interest by maintaining administrative efficiency. Further, it is logically settled that the evaluation of efficiency, employability and performance of the employee is very subjective and can be best made by the employer itself.

9. Where a decision is taken in adherence to the procedure and having regard to the factors, prescribed by law, the judicial scrutiny of the same gets highly confined but not excluded altogether. The limited judicial review cannot allow courts to sit in appeal to the subjective satisfaction of the employer State, but it may examine: (1) the existence or non-existence of material to base such satisfaction; (2) the satisfaction standing on extraneous grounds i.e. Malafide and (3) the perversity of the order i.e. whether any reasonable person would form the requisite opinion on the basis of the material on record.

10. In the matter in hand, the petitioner has pressed on the latter two grounds, namely: (i) That the impugned order is passed malafide (ii) That the order is perverse insofar as it is based only on single censure entry.

11. Firstly, it is desirable to have a look on the aspect of mala fide which is stated to have influenced the action impugned herein this writ petition. The petitioner has traced the genesis of the impugned action to a point of time in the year 2009 when some members of Group-D proposed to form an Association of Group-D employees. It is evident from the pleadings on record that some of the Group-D employees who had played a front role for formation of the employees Association were dismissed from service and the orders so passed were set aside by this Court. Even the criminal proceedings were resorted to by the departmental authorities when a peaceful march was carried out by 40-50 employees on 12.7.2009 on the ground of threat to law and order situation. Although the petitioner was not a member of the Association but his role and participation was suspected. The impugned order has been passed after an elapse of 10 years from the said incident. Neither the letter dated 12-8-2009 by Director General of Police, Uttar Pradesh to Inspector General of Police (Telecommunication), Uttar Pradesh nor the FIR dated 12-7-2009 expressly named the petitioner. Connecting this incident of distant past to the impugned order of compulsory retirement passed on 9-7-2019 would be an extrapolation. This stretches the string of the

imputation of malafide to an extent that it breaks down itself. Therefore the ground of mala fide distance vitiated.

12. Now the claim of the Petitioner lies on the question whether an order of compulsory retirement can be justified on the basis of material present against the Petitioner i.e. single censure entry.

13. Learned Additional Chief Standing Counsel has argued that even a single punishment howsoever minor it may be, is a sufficient reason for classifying a public servant as deadwood, therefore, the impugned order does not suffer from any illegality. The exercise of power has been defended on the strength of the judgments passed by the Hon'ble Apex Court in the case of **State of Punjab versus Gurdas Singh, State of U.P. and others versus Raj Kishore Goyal and Nawal Singh versus State of U.P. and others** reported in **1998(4) SCC 92, 2001(10) SCC 183 and 2003(8) SCC 117 respectively.**

14. In ***State of Punjab v. Gurdas Singh (SUPRA)***, the apex Court, relying on the principles enunciated in ***Baikuntha Nath Das case (SUPRA),*** observed:

"....Before the decision to retire a government servant prematurely is taken the authorities are required to consider the whole record of service. Any adverse entry prior to earning of promotion or crossing of efficiency bar or picking up higher rank is not wiped out and can be taken into consideration while considering the overall performance of the employee during whole of his tenure of service whether it is in public interest to retain him in the service. The whole record of service of the employee will include any uncommunicated adverse entries as well."

15. In ***State of U.P. v. Raj Kishore Goel, (SUPRA),*** the order of Compulsory Retirement under Rule 56 of the Uttar Pradesh Fundamental Rules against the respondent employee was passed apparently on the basis of three warnings and one censure entry. The Supreme Court observed as below:

"2. From the proceedings of the Review Committee report, which examined the cases of several engineers including the case of the respondent to decide the question as to whether it would be in the public interest to compulsorily retire the employee concerned, it appears apart from the warnings and censure referred to earlier, there were some adverse entries also for the year 1995-96. That apart, the High Court committed a mistake by coming to the conclusion that an uncommunicated entry could not have been taken into consideration by the appropriate authority, the same being contrary to a three-Judge Bench decision in *Baikuntha Nath Das v. Chief District Medical Officer, Baripada* [(1992) 2 SCC 299 : 1993 SCC (L&S) 521 : (1992) 21 ATC 649] . The very Rule under which the respondent has been compulsorily retired came up for consideration recently in the case of *State of U.P. v. Lalsa Ram* [(2001) 3 SCC 389 : 2001 SCC (L&S) 593 : (2001) 2 Scale 221] . The entire case-law and parameters for exercise of power by the High Court under Article 226 against an order of compulsory retirement have been considered therein and applying the test laid therein to the facts and circumstances of the present case and on examining the impugned judgment, we are of the considered opinion that the High Court erred in law in interfering with the order of the compulsory retirement passed against the respondent. In our view, the conclusion arrived at by the appropriate authority on the materials concerned cannot be held to be a conclusion of an unreasonable man or arbitrary conclusion which could confer jurisdiction on a court to interfere with the same."

16. The issue of single censure entry was specifically considered in the case of ***H.G.***

***Venkatachaliah Setty v. Union of India,* (1997) 11 SCC 366.** The Bench constituting S.C. Agarwal and G.T. Nanavati JJ. observed:

"4. It has been further urged by Shri Sundaravardan that the order of compulsory retirement could not be passed on the basis of a solitary adverse entry contained in the annual confidential report because the earlier record of the appellant was clean. Merely because till his promotion to the post of Deputy Chief Mechanical Engineer on 20-11-1974, there was nothing adverse in the service record of the appellant, does not mean that the action for compulsory retirement of the appellant could not be taken after such promotion if it is found that after such promotion there has been deterioration in his performance and an adverse remark about his integrity has been made. The contention of Shri Sundaravardan that an order for compulsory retirement cannot be passed on the basis of a solitary adverse entry in the service record cannot be accepted. The question whether action for compulsory retirement should be taken on the basis of a solitary adverse entry has to be considered in the facts of each case. Having regard to the facts of the present case, it cannot be said that action for compulsory retirement could not be taken against the appellant."

17. The case of ***Nawal Singh v. State of U.P.*, (2003) 8 SCC 117 : 2003 SCC (L&S) 1212 : 2003 SCC OnLine SC 1064** particularly relates to Judicial Officers. The Apex Court has also taken note of the same:

"2. At the outset, it is to be reiterated that the judicial service is not a service in the sense of an employment. Judges are discharging their functions while exercising the sovereign judicial power of the State. Their honesty and integrity is expected to be beyond doubt. It should be reflected in their overall reputation. Further, the nature of judicial service is such that it cannot afford to suffer continuance in service of persons of doubtful integrity or who have lost their utility. If such evaluation is done by the Committee of the High Court Judges and is affirmed in the writ petition, except in very exceptional circumstances, this Court would not interfere with the same, particularly because the order of compulsory retirement is based on the subjective satisfaction of the authority."

With the above observation, the Supreme Court has shown degree of reluctance to sit in appeal to the subjective satisfaction of the High Court. The Supreme Court held:

"12. From the facts narrated above, even if we were to sit in appeal against the subjective satisfaction of the High Court, it cannot be said that the orders of compulsory retirement of the appellants are, in any way, erroneous or unjustified. Further, it is impossible to prove by positive evidence the basis for doubting the integrity of the judicial officer. In the present-day system, reliance is required to be placed on the opinion of the higher officer who had the opportunity to watch the performance of the officer concerned from close quarters and formation of his opinion with regard to the overall reputation enjoyed by the officer concerned would be the basis."

18. Similar to **Nawal Singh (Supra)**, the case of ***Pyare Mohan Lal v. State of Jharkhand,* (2010) 10 SCC 693 : (2011) 1 SCC (L&S) 550 : 2010 SCC OnLine SC 1010** relates to Judicial Officer. The impugned order, in the case, had relied on adverse entry relating to integrity of the officer. The Supreme Court upheld the impugned order in following terms:

"29. The law requires the authority to consider the "entire service record" of the employee while assessing whether he can be given compulsory retirement irrespective of the fact that the adverse entries had not been communicated to him and the officer had been promoted earlier in spite of those adverse

entries. More so, a single adverse entry regarding the integrity of an officer even in remote past is sufficient to award compulsory retirement. The case of a judicial officer is required to be examined, treating him to be different from other wings of the society, as he is serving the State in a different capacity. The case of a judicial officer is considered by a committee of Judges of the High Court duly constituted by the Hon'ble the Chief Justice and then the report of the Committee is placed before the Full Court. A decision is taken by the Full Court after due deliberation on the matter. Therefore, there is hardly any chance to make the allegations of non-application of mind or mala fides.

30. Be that as it may, the service record of the petitioner revealed that he had not been promoted in the regular cadre of the District Judge as he was not found fit for the same because of the adverse entries. The petitioner was promoted as Additional District Judge on ad hoc basis and posted in the Fast Track Court. It was definitely not a promotion on merit (selection). The High Court had objectively decided to recommend his compulsory retirement and the State authorities acted accordingly. No fault can be found with the decision-making process or with the decision."

Needless to reiterate that the case of Judicial Officers stands on different footing from the other services as Administration of Justice is not an ordinary service. *Justice should not only be done, but should manifestly and undoubtedly be seen to be done.* The special case of Judicial Officers has been explained at length in the case of ***Ram Murti Yadav v. State of U.P., (2020) 1 SCC 801 : (2020) 1 SCC (L&S) 245 : 2019 SCC OnLine SC 1589:***

"14. A person entering the judicial service no doubt has career aspirations including promotions. An order of compulsory retirement undoubtedly affects the career aspirations. Having said so, we must also sound a caution that judicial service is not like any other service. A person discharging judicial duties acts on behalf of the State in discharge of its sovereign functions. Dispensation of justice is not only an onerous duty but has been considered as akin to discharge of a pious duty, and therefore, is a very serious matter. The standards of probity, conduct, integrity that may be relevant for discharge of duties by a careerist in another job cannot be the same for a judicial officer. A Judge holds the office of a public trust. Impeccable integrity, unimpeachable independence with moral values embodied to the core are absolute imperatives which brooks no compromise. A Judge is the pillar of the entire justice system and the public has a right to demand virtually irreproachable conduct from anyone performing a judicial function. Judges must strive for the highest standards of integrity in both their professional and personal lives.

15. It has to be kept in mind that a person seeking justice, has the first exposure to the justice delivery system at the level of subordinate judiciary, and thus a sense of injustice can have serious repercussions not only on that individual but can have its fall out in the society as well. It is, therefore, absolutely necessary that the ordinary litigant must have complete faith at this level and no impression can be afforded to be given to a litigant which may even create a perception to the contrary as the consequences can be very damaging. The standard or yardstick for judging the conduct of the judicial officer, therefore, has necessarily to be strict. Having said so, we must also observe that it is not every inadvertent flaw or error that will make a judicial officer culpable. The State Judicial Academies undoubtedly has a stellar role to perform in this regard. A bona fide error may need correction and counselling. But a conduct which creates a perception beyond the ordinary cannot be countenanced. For a trained legal mind, a judicial order speaks for itself."

19. It is worthy to note that the services of a Grade D employee in State Police Department,

in the capacity of Cook, can certainly not be scaled with the same yardstick as that of the services of a Judicial Officer. The Service of Petitioner did not involve any public interaction, which could directly or indirectly bring any good or bad name to the concerned Department.

20.In ***State of U.P. v. Vijay Kumar Jain,*** **(2002) 3 SCC 641 : 2002 SCC (L&S) 455 : 2002 SCC OnLine SC 341,** the impugned order relied on four grounds. The Supreme Court, while upholding the impugned order has emphasized on the ground of integrity:

16. Withholding of integrity of a government employee is a serious matter. In the present case, what we find is that the integrity of the respondent was withheld by an order dated 13-6-1997 and the said entry in the character roll of the respondent was well within ten years of passing of the order of compulsory retirement. During pendency of the writ petition in the High Court, the U.P. Services Tribunal on a claim petition filed by the respondent, shifted the entry from 1997-98 to 1983-84. Shifting of the said entry to a different period or entry going beyond ten years of passing of the order of compulsory retirement does not mean that vigour and sting of the adverse entry is lost. Vigour or sting of an adverse entry is not wiped out, merely it is relatable to 11th or 12th year of passing of the order of compulsory retirement. The aforesaid adverse entry which could have been taken into account while considering the case of the respondent for his compulsory retirement from service, was duly considered by the State Government and the said single adverse entry in itself was sufficient to compulsorily retire the respondent from service. We are, therefore, of the view that entire service record or confidential report with emphasis on the later entries in the character roll can be taken into account by the Government while considering a case for compulsory retirement of a government servant.

21. The issue was also contested in the case of **Rajeev Kumar Khare v. State of U.P. through the Principal Secretary Youth Department, Government of U.P., Civil Secretariat and Others reported in 2019 SCC OnLine All 5670 : (2019) 6 All LJ 369,** where the Single Bench of this Court had refused to interfere with the impugned order. Again, that matter can also be similarly distinguished from the present case on the ground that the integrity of the Petitioner in the said case had been withheld:

"9. Impeaching the aforesaid order dated 10.8.2017, learned counsel for the petitioner has submitted that single order of punishment in more than 29 years of service cannot, under any circumstances, be made the basis of order for compulsory retirement and if such action is taken, such order of compulsory retirement would be patently illegal and arbitrary. Sri. Amit Bose has also submitted that other than said punishment, no other punishment has been imposed upon the petitioner, therefore, on the basis of single punishment, the petitioner may not be retired compulsorily.....

.....11. Per contra, Dr. Udai Veer Singh, learned Addl. Chief Standing Counsel has submitted that even if the entries for the aforesaid period were not available with the Screening Committee, even then the recommendation for compulsory retirement of the petitioner could have been issued only on the basis of punishment awarded to the petitioner on 29.6.2010 whereby not only the petitioner has been awarded the punishment of withholding of two increments of salary permanently and censure entry but also the integrity of the petitioner was found doubtful and the same was withheld. As per Dr. Udai Veer Singh, if the entries of the petitioner for that years i.e. for the years 2013-14 to 2016-17 are found satisfactory, for the argument's sake, even then the order of compulsory retirement could have been issued against the petitioner."

22. In the case of ***State of Gujarat v. Umedbhai M. Patel,*** **(2001) 3 SCC 314 : 2001 SCC (L&S) 576 : 2001 SCC OnLine SC 474,** the impugned order was not based on any material other than a pending enquiry. The apex court, having regard to particular facts of the case, dismissed the appeal of State against the order of the High Court setting aside the order of compulsory retirement:

"12. In the instant case, there were absolutely no adverse entries in the respondent's confidential record. In the rejoinder filed in this Court also, nothing has been averred that the respondent's service record revealed any adverse entries. The respondent had successfully crossed the efficiency bar at the age of 50 as well as at 55. He was placed under suspension on 22-5-1986 pending disciplinary proceedings. The State Government had sufficient time to complete the enquiry against him but the enquiry was not completed within a reasonable time. Even the Review Committee did not recommend the compulsory retirement of the respondent. The respondent had only less than two years to retire from service. If the impugned order is viewed in the light of these facts, it could be said that the order of compulsory retirement was passed for extraneous reasons. As the authorities did not wait for the conclusion of the enquiry and decided to dispense with the services of the respondent merely on the basis of the allegations which had not been proved and in the absence of any adverse entries in his service record to support the order of compulsory retirement, we are of the view that the Division Bench was right in holding that the impugned order was liable to be set aside. We find no merit in the appeal, which is dismissed accordingly. However, three months' time is given to the appellant State to comply with the directions of the Division Bench, failing which the respondent would be entitled to get interest at the rate of 18% for the delayed payment of the pecuniary benefits due to him."

23. The logical appreciation of the judgments discussed above shows that the Courts are required to observe judicial restraint in sitting in appeal with the subjective satisfaction of the authority. The Courts, however, have examined the existence and adequacy of the material forming the basis of such satisfaction. In none of the cases above, the Order of Compulsory Retirement is solely based on Single Censure Entry, it is supplemented by uncommunicated adverse entries or the special nature of service which cannot sustain any dent in its reputation.

24. Learned counsel for the petitioner in the backdrop of the aforementioned character roll has argued that the service record under consideration by the screening committee is not such which may be classified as adverse. According to him, it is the service record in the nature of adverse that may authorize the screening committee to recommend the public servant for having become deadwood and consequently he may be recommended for compulsory retirement within the scope of the Rule 56 extracted above.

25. It is further argued that the solitary minor punishment inflicted upon the petitioner became irrelevant once the annual confidential rolls for the subsequent period have remained constantly satisfactory and integrity intact. The petitioner who was a class-IV employee has an unblemished service record throughout; therefore, merely on the strength of a minor punishment inflicted in the distant past, the decision so arrived at is clearly illegal and arbitrary.

26. The petitioner was holding a Group-D post and was not vested with any administrative authority that may have led to any managerial consequences to the department. The duty discharged by the petitioner by and large was manual. It has also come on record that out of 53

Group-D employees who were subjected to screening alongwith the petitioner, only two persons including the petitioner were classified as deadwood and consequently retired compulsorily from service.

27. It is also not in dispute that the integrity of the petitioner for the period under consideration as well as for rest of his service tenure has remained beyond doubt, as such, the argument in nutshell is to the effect that the solitary minor punishment awarded to the petitioner was not decisive of treating the petitioner as deadwood by any degree of prudence.

28. The Court finds strength in Petitioner's case. The impugned order, being perverse, is liable to be set aside. Thus, in my considered opinion, the impugned order passed by the competent authority being illegal and arbitrary is hereby set aside, the petitioner shall be reinstated in service with all consequential benefits inclusive of past salary. The writ petition is allowed with no order as to cost.

(2021)11ILR A307
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.08.2021

BEFORE

THE HON'BLE DINESH PATHAK, J.

Writ B No. 8628 of 2003

Smt. Kiran Gupta ...Petitioner
Versus
The Commissioner, Kanpur Division, Kanpur & Ors. ...Respondents

Counsel for the Petitioner:
Sri Manoj Kumar, Sri Rajesh Kr. Srivastava, Sri Satyendra Nath Srivastava, Sri Chandra Shekhar Srivastava, Sri Sudhanshu Srivastava

Counsel for the Respondents:
C.S.C.

A. Revenue - Indian Stamp Act, 1899 - Section 47 A/33-challenge to-evasion of stamp duty-general power of attorney in question cannot be considered as irrevocable and cannot be treated as a conveyance for the purpose of imposing the stamp duty under Article 48(ee) of schedule 1-B of the stamp act-stamp authorities imposed the deficiency of stamp to the tune of Rs. 75000/- reconsider the deed in question and impose stamp fee in accordance with the provisions as under Article 48(c) of Schedule 1-B of the stamp act-stamp authorities misread and misinterpreted the recital in the deed and illegally dragged it into the clutches of the provisions as enshrined under Article 48(ee) schedule 1-B of the Stamp Act-from the recital of the power of attorney in question it is not inferred that it is irrevocable in the hands of donee-by virtue of the clause -8 and 9 of the power of attorney in question donee has been authorized to act on behalf of donor and deed has been made revocable and right to revoke is reserved with the donor.(Para 1 to 30)

The petition is allowed. (E-6)

List of Cases cited:

1. Suraj Lamp & Indus. Pvt. Ltd. Vs. St. of Har. (2011) Law Suit (SC) 1007

2. St. of Raj. Vs. Basant Nehata (2005) 12 SCC 77

3. Kasthuri Radhakrishnan & ors. Vs. M. Chinniyan & anr. (2016) 3 SCC 296

4. Shiv Kumar Saxena & ors. Vs. Manishchand Sinha & ors. (2004) 2 MPJR 269/(MANU/MP/0321/2004)

5. Joginder Kumar Goyal Vs. Govt. of NCT of Delhi & ors. Writ-C 3012 of 2016

6. Board of Revenue, Madras Vs. Annamalai & Co. (Pvt.) Ltd.(1968) AIR Mad 50

7. Asha M. Jain Vs. Canara Bank (2001) 94 DLT 841

(Delivered by Hon'ble Dinesh Pathak, J.)

1. Heard learned counsel for the petitioner, learned Standing Counsel who represents respondent nos.1, 2 & 3 on the admission of writ petition and perused the record.

2. Despite direction, till date no counter diffident has been filed. On 04.08.2021 this matter was adjourn on a request made on behalf of State to enable the brief holder to further prepare the case. In view of the peculiar facts and circumstances of case, where in only nature of the document in question is required to be interpreted for the purpose of stamp duty, this court proceed to finally decide this matter at the admission stage with the consent of the counsel for the parties.

3. Instant writ petition has been filed by petitioner challenging the order dated 17.12.2002, passed by Chief Controlling Revenue Authority/ Commissioner, Kanpur Division, Kanpur (Respondent No.1) and order dated 19.04.2002, passed by the Additional District Magistrate (Finance/Revenue), Kanpur Nagar (Respondent No.2).

4. Present writ petition is arising out of proceeding under section 47A/33 of Indian Stamp Act, 1899 (as amended by the State of U.P.) (in brevity 'Stamp Act'), in pursuance of the report dated 21.12.1994 submitted by Sub Registrar, Kanpur Nagar (respondent no.3) to initiate a proceeding of stamp evasion, considering the deficiency of stamp duty in execution of power of attorney dated 15.12.1994, which was executed on the stamp of Rs.56 by Sri Samar Mukherjee, Sri Santosh Kumar Mukharjee and Sri R.P.Yadav in favour of the present petitioner namely Smt. Kiran Gupta. Sub-Registrar has treated the aforesaid power of attorney as irrevocable authority give to the attorney (petitioner) to cell immovable property, accordingly, he has proposed imposition of stamp as enshrined under Article 48(ee) of Schedule 1-B of Stamp Act.

5. Facts giving rise to the present petition is that Sri Samar Mukherjee, Sri Santosh Kumar Mukharjee, sons of S. K. Mukherjee, Residence of House No.113/249, Swaroop Nagar, Kanpur and Sri R.P.Yadav son of M.L. Yadav, Residence of House No.307 faithfulganj, Kanpur Nagar, had executed a power of attorney dated 15.12.1994(Annexure No.1), in favour of the present petitioner namely Smt. Kiran Gupta wife of Ram Kishan Gupta, Residence of House No.33/107, Gaya Prasad Lane, Kanpur Nagar. Through aforesaid deed executant/donor has appointed the petitioner as an agent/donee, to take care of his property, namely Flat No.5, situated at third floor of House No.112/351, Swaroop Nagar, Kanpur Nagar and to take all the relevant steps for its maintenance, alteration, giving the property on rent and alienate the same on behalf of the donor. She has also been authorized to pursue the matter, in case of any legal complication or dispute, before the authority and court concerned. Under Clause-8 of the aforesaid deed donors have reserved their right to revoke the power of attorney in question.

6. Chief Controlling Revenue Authority, vide its order dated 18.06.2001(Annexure No.3), had quashed the previous order dated 01.10.1997, passed by Assistant Collector for want of jurisdiction and remitted the matter before the authority concerned to decide it afresh. In pursuance of the order dated 18.06.2001, matter of stamp evation has been re-examined by the Additional District Magistrate (Finance/Revenue), Kanpur Nagar(Respondent No.2), imposing deficiency of the stamp duty to the tune of Rs.72,444/- and penalty of Rs.2,556/- , total Rs.75,000/-, vide its order dated 19.04.2002(Annexure No.4). Feeling aggrieved, petitioner has preferred revision (Annexuure No.5) under section 56 of Stamp Act, against the order dated 19.04.2002, before Chief Controlling Revenue Authority/Commissioner, Kanpur, Division Kanpur who has dismissed the revision, vide impugned order dated 17.12.2002

(Annexure-6), confirming the order dated 19.04.2002 passed by Additional District Magistrate (Finance/Revenue), Kanpur Nagar, which are under challenge in the present writ petition.

7. Counsel for petitioner submits that stamp authorities have illegally determined the market value of the subject matter (house) of the power of attorney dated 15.12.1994 treating it as conveyance and imposed stamp duty under article 48(ee) of schedule 1-B of Stamp Act, whereas it is a revocable power of attorney. He has drawn attention of the Court towards the clause-8 of the power of attorney dated 15.12.1994 wherein right to revoke the power of attorney has been reserved by the executant. It is further submitted that through the deed in question neither the consideration has been received nor right, title and possession of the property in question has been transferred to the attorney/agent, who has been authorized to take care of the property, which is a flat measuring area 1106 square feet, and also complete all the legal formalities, if required, and to transfer the same in the nature of sale, lease etc. on behalf of the executant. It is further submitted that the stamp authorities have misread and misinterpreted the recital as made in the power of attorney and illegally treated it as a conveyance for the purpose of imposing the stamp duty. In support of his case, learned counsel for petitioner has cited Full Bench decision dated 11.10.2011 of Hon'ble Supreme Court, in the case of **'Suraj Lamp & Industries Private Limited Vs. State of Hariyana', reported in 2011 Law Suit (SC) 1007.**

8. Per contra, learned Standing Counsel representing the State has contended that the stamp authorities have rightly considered the deficiency of stamp in execution of the deed in question, which comes in the clutches of the Stamp Act. By way of power of attorney donee has been authorized to alienate the property, in favour of the third person, treating him as owner of the property, therefore, deed in question will be considered as conveyance, as defined under section-2(10) of the Act, and the petitioner is under obligation to furnish stamp duty in accordance with law as provided under Article 23(a), of schedule 1-B of Stamp Act. He has also emphasized the authority of the donee, who has been authorized to execute the lease deed, received the rent, deliver the possession of the property etc. It is further contended that recital made in clause-8 of the deed in question do not make it revocable. In fact, entire right of the owner/donor has been transfer in favour of the donee, who has been authorized to enjoy all the rights of the property being owner. There is no illegality or error in the order passed by the stamp authorities. Petitioner cannot escape from his legal duty to pay the required stamp in execution of power of attorney.

9. Considered the submissions advanced by learned counsel for the parties and perused the record on board.

10. Questions for consideration in the present matter is as to whether deed in question (power of attorney dated 15.12.1994) is irrevocable and can be treated as an conveyance for the purposes of imposing the stamp duty under Article 48(ee) of schedule 1-B of the Stamp Act. Power of attorney dated 15.12.1994 (Annexure No.1) succient the authority of the attorney who has been authorized not only to take care of the property in question but also to execute the lease deed and sale deed in favour of third person on behalf of principal. Subject matter of power of attorney is flat no.5 measuring area 1106 sq. feet consists of two bedroom, one drawing/dining room, two latrine bathroom, one kitchen & store, and verandah / balcony. Aforesaid flat is situated at the third floor of house no.112/351. Stamp authorities have assessed the market value of the aforesaid flat to be Rs.5 lakhs and, accordingly, imposed

the deficiency of stamp to the tune of Rs.72,444/- along with penalty amounting Rs.2,556/-, total amount of Rs.75,000/-. They have treated the aforesaid deed as an irrevocable deed by which donee has been authorized to transfer the immovable property, accordingly stamp duty has been imposed under the provisions of the Stamp Act.

11. As per submission made by counsel for the petitioner, by virtue of clause-8 and 9 of the power of Attorney dated 15/12/1994 donee has been authorized to act on behalf of donar and deed has been made revocable and right to revoke is reserved with the donor. Submissions as made by learned counsel for the petitioner has been contradicted by the learned Standing Counsel and contended that recital made in clause-8 will not frustrate the applicability of Stamp Act and the whole reading of the deed in question suggest that it is irrevocable authority given to the attorney to enjoy and transfer the subject matter of the deed in question. For the purpose to draw the intention of donors in the execution of power of attorney, recital made in clause-8 and 9 of the deed should be examined in the light of the provisions as enshrined under the Stamp Act. For the ready reference, averments made in clause-8 and 9 of the power of attorney dated 15/12/1994 is reproduced hereinunder;- (8)

''(8) यह कि मुख्तारआम के किसी कार्य से असंतुष्ट होने पर हम मुकिरान यह मुख्तार नामा आम निरस्त करने के अधिकार सुरक्षित रखते है''

;9द्ध यह कि मुख्तार आम द्वारा किये गये कुल कार्य जो कि उक्त फ्लैट की बावत किये गये होंगे वे समस्त कार्य हम मुकिरान द्वारा किये गये माने व समझे जावेंगे और जो कि हम मुकिरान को स्वीकार व मान्य होंगे।

12. Clause 8 and 9 of the power of attorney succincts that in case of dissatisfaction with any work of attorney, executents (donors) have posses the right to revoke the general power of attorney and all the acts done by attorney with respect to the flat will be understood and done on behalf of donors and will be accepted and admitted by them.

Relevant provisions of Article 48 of schedule 1-B of the Stamp Act, with U.P. amendment, is reproduced here under:-

48. Power-of-attorney [as defined by section 2(21)], not being a Proxy (No. 52)--	----------
(a) ----------	----------
(b) ----------	----------
(c) ----------	----------
(d) ----------	----------
(e) when given for consideration and authorizing the attorney to sell any immovable property.	The same duty as a Conveyance [No.23 clause (a)] for the amount of the consideration.
(ee) when irrevocable authority is given to the attorney to sell immovable property.	The same duty as a Conveyance [No.23 clause (a) on the market value of the property forming subject of such authority].
(f) ----------	----------

13. Before discussing the merits of the case, the nature and scope of the power of attorney is required to be discussed first. Section 1-A and section 2 of The Power Of Attorney Act 1982 evince the scope and nature of the power of attorney which enunciates that power of attorney includes an instruments authorizing a particular person to act for and in the name of a person who has executed it. A power of attorney

holder may, however, execute a deed of convenience in exercise of power granted under the power of attorney and convey title on behalf of granter and every such instrument and thing so executed and done, shall be as effectual in law as if it had been executed or done by the donee with the signature and seal of the donor. Thus it is clear, as held by Hon'ble Apex Court in the case of Suraj Lamp (Supra), that power of attorney is not an instrument of transfer qua any right, title or interest in an immovable property. It is a deed creating an agency whereby donor authorizes donee to do the act specified therein, on behalf of the donor, which when executed will be binding on the donor as if done by him. Generally, power of attorney are revocable or terminable at any time, unless it is made irrevocable in a manner known to law. Even an irrevocable attorney does not have the effect of transferring title to the donee. As such, power of attorney creates agency to do or not to do something on the authorization given by the principal on his behalf, which will be binding against him. It does not confer any right, title and possession in favour of the donee. In the case of **State of Rajasthan vs, Basant Nehata 2005 12 SCC 77**, Apex Court has expounded the nature and scope of power of attorney. Relevant para 13 and 52 of the aforesaid judgment are quoted here in under:-

"13. A grant of power of attorney is essentially governed by Chapter X of the contract Act. By reason of a deed of power of attorney, an agent is formally appointed to act for the principal in one transaction or a series of transactions or to manage the affairs of the principal generally conferring necessary authority upon another person. A deed of power of attorney is executed by the principal in favour of the agent. The agent derives a right to use his name and all acts. deeds and things done by him and subject to the limitations contained in the said deed, the same shall be read as if done by the donor. A power of attorney is , as is well known, a document of convenience.

52. Execution of a power of attorney in terms of the provisions of the Contract Act as also the power-of-Attorney Act is valid. A power of attorney, we have noticed hereinbefore, is executed by the donor so as to enable the donee to act on his behalf. Except in case where power of attorney is coupled with interest, it is revocable. The donee in exercise of his power under such power of attorney only acts in place of the donor subject of course to the powers granted to him by reason thereof. He cannot use the power of attorney for his own benefit. He acts in a fiduciary capacity. Any act of infidelity or breach of trust is a matter between the donor and the donee."

14. In case of **Suraj Lamp (Supra)** Apex Court has held that the power of attorney is not conveyance for valid transfer. Relevant paragraph 16 of the said judgment is quoted hereinunder:-

"16. We therefore reiterate that immovable property can be legally and lawfully transferred/conveyed only by a registered deed of conveyance. Transactions of the nature of `GPA sales' or `SA/GPA/WILL transfers' do not convey title and do not amount to transfer, nor can they be recognized or valid mode of transfer of immovable property. The courts will not treat such transactions as completed or concluded transfers or as conveyances as they neither convey title nor create any interest in an immovable property. They cannot be recognized as deeds of title, except to the limited extent of section 53A of the TP Act. Such transactions cannot be relied upon or made the basis for mutations in Municipal or Revenue Records. What is stated above will apply not only to deeds of conveyance in regard to freehold property but also to transfer of leasehold property. A lease can be validly transferred only

under a registered Assignment of Lease. It is time that an end is put to the pernicious practice of SA/GPA/WILL transactions known as GPA sales."

15. In the case of Kasthuri Radhakrishnan & Otheres Vs. M. Chinniyan & Anothers, (2016) 3 SCC 296, the Apex Court has reiterated the verdict of **Suraj Lamp (Supre)** and stated in para 36 as follows:-

""36. The Law relating to power of attorney is governed by the provisions of the Powers of Attorney Act, 1982. It is well settled therein that an agent acting under a power of attorney always acts, as a general rule, in the name of his principal. Any document executed or thing done by an agent on the strength of power of attorney is as effective as if executed or done in the name of principal i.e. by the principal himself. An agent, therefore, always acts on behalf of the principal and exercises only those powers, which are given to him in the power of attorney by the principal. Any act or thing done by the agent on the strength of power of attorney, is therefore, never construed or /and treated to have been done by the agent in his personal capacity so as to create any right in his favour but is always construed as having done by the principal himself. An agent, therefore, never gets any personal benefit of any nature..."

16. To ascertain the authenticity of the power of attorney its registration is must under the relevant provisions of law, otherwise any act or omission done by agent on behalf of his principal will not be binding on him. Registration provides safety and security to transactions relating to the immovable property, even if the document is lost or destroyed. In absence of registration of document it creates illegal consequences which has to be faced by the person concerned for the purposes to ascertain its legal sanctity.

17. Stamp Act provides procedure for payment of stamp fee in the nature of tax with the government. Execution of power of attorney are already regulated by law and subject to specific stamp duty. Section 2(21) of the Stamp Act defines the power of attorney which is quoted below:-

"(21) "Power-of-attorney". "Power-of-attorney" includes any instrument (not chargeable with a fee under the law relating to court-fees for the time being in force) empowering a specified person to act for and in the name of the person executing it;

18. For the purpose of determining the applicable entry of the schedule to the Stamp Act to the document for the purpose of assessing stamp duty payable, reference may be had to a Division Bench Judgment of the M.P. High Court in **'Shiv Kumar Saxena & Ors., v. Manishchand Sinha & Ors.',** 2004(2) MPJR 269/(MANU/MP/0321/2004). Relevant portion of the said judgment reads as follows:

".....The following cardinal principles laid down by Courts should always be kept in view, before considering any question relating to stamp duty:--

(i) Stamp duty is leviable on the instrument and not the transaction.

(ii) The substance of the transaction embodied in the instrument determines the stamp duty and not the form or title of the instrument.

(iii) In order to determine the nature of document and whether it is sufficiently stamped, the Court shall only look to the contents of the document as it stands and not any collateral circumstances which may be placed by way of evidence. In other words, for purposes of stamp duty, the intention of the parties is to be gathered only from the contents of the instrument and not any outside material. (But where the stamp duty depends on the market value, outside material

can be considered in the manner provided in the relevant stamp law).

(iv) To find out the true character of an instrument for purpose of stamp duty, the document should be read as a whole and the dominant purpose of the instrument should be identified.

(v) The instrument must be stamped according to its tenor though it cannot be given effect for some independent cause.

(vi) The Revenue cannot contend that the object of the transaction was to achieve a purpose not disclosed in the document and, therefore, the document should be stamped as per such deemed, but undisclosed purpose. Similarly, the party liable to pay stamp duty cannot contend that the purpose disclosed in the instrument is not the actual purpose and therefore, he is not liable to pay stamp duty on the apparent tenor of the instrument.

(vii) Once a document containing effective words of disposition is executed, it attracts stamp duty. The taxable event cannot be postponed by contending that it was intended to come into effect on a future date, on the happening of a particular contingency."

19. Power of Attorney, at the time of registration, is charged with the stamp duty. Article 48, schedule 1-B of Stamp Act enunciates several categories of power of attorney which are required to be stamped as per the nature of the document by which agency has been authorized to do the work. Article 48 of schedule 1-B of Stamp Act deals with the power of attorney basically of two kind namely specific power of attorney and general power of attorney. Needless to say that person who has been authorized by his principal to execute a particular deed or to sign a particular contract or to purchase a particular parcel or to any particular act, is considered as an special agent. On the other hand a person who is authorized by his principal to execute all deeds, sign all contracts, or to purchase all goods and do all things as required in particular business, trade or employment is treated as a general agent.

20. Article 48(e) of Scheduled 1-B of Stamp Act deals with the matter where power of attorney has been executed for consideration, authorizing the attorney to sale any immovable property. Article 48(ee) of Scheduled 1-B of Stamp Act enunciates levy of stamp on such power of attorney which are irrevocable in nature, intending to stop such transaction through power of attorney which are made for the purposes of evading stamp duty. U.P. Legislation has inserted 48(ee) of Scheduled 1-B of Stamp Act by virtue of U.P. Act No.11 of 1992. Nature of documents as to whether it is a revocable or irrevocable is depends on the construction of the documents and after going through the whole contents one can infer the nature of documents.

21. In the case of **Joginder Kumar Goyal Vs. Government of NCT of Delhi & others,** decided on 17.05.2016 in W.P.(C) 3012/2016, Division Bench of Delhi High Court expressed its view in para 12, which is as follows:-

"12. Clearly, the character/nature of the document for the purpose of stamp duty would vary on the facts of each case depending on the substance of the transactions as stated in the instrument itself. There can be no sweeping conclusion as sought to be argued by the petitioner, that every power of attorney executed in favour of a person other than a relative by a grantor to deal with immovable property is per se a conveyance deed and not a power of attorney. Merely because some clauses are introduced in some power of attorney holding it to be irrevocable or authorizing the attorney holder to effect sale of the immovable property on behalf of the grantor would ipso facto not change the character of the document transforming it into a conveyance deed."

22. Full Bench judgment of the Madras High Court in the case of **Board of Revenue, Madras, Vs. Annamalai And Co. (Pvt.) Ltd., AIR 1968 Mad 50**, succints the definition of irrevocable agency. Para 5 of the judgment is reproduced hereinunder:-

"..... It is represented by the learned Government pleader appearing for the Government that the principles set out in Article 48(e) are derived from the notion of irrevocable agency in the law of contracts, where the authority granted by the principal to the power agent is coupled with an interest held by the agent. Well-known commentaries have explained this principle thus:--

1. "If a borrower, in consideration of a loan, authorises the lender to receive the rents of Blackacres by way of security, the authority remains irrevocable until repayment of the loan in full has been effected... This doctrine applies only where the authority is created in order to protect the interest of the agent; it does not extend to a case where the authority has been given for some other reason and the interest of the agent arises later". (Cheshire on the Law of Contracts, 6th Edn. page 421.)

2. Where the authority of an agent is given by deed, or for valuable consideration, for the purpose of effectuating any security, or of protecting or securing any interest of the agent, it is irrevocable during the subsistence of such security or interest" (Bowstead on Agency, 12th Edn. p. 301).

3. Adopting the classical statement of the rule given by Wilde C. J. in Smart v. Sanders, (1848) 5 CB 895 at p. 917 (Sic), on the Law of Agency, 2nd Edn. page 302 states:

"In such cases the authority is given for valuable consideration as a security, or as part of a security, in respect of a liability of the principal to the agent. The agent has, as it were, bought his authority in order to ensure the payment of a debt due from the principal".

(6) The principles thus set out above have been embodied in Section 202 of the Indian Contract Act, and in particular illustration (a) therefor, which is in the following terms--

"A gives authority to B to sell A's land, and to pay himself, out of the proceeds, the debts due to him from A. A cannot revoke this authority, nor can it be terminated by his insanity or death". "

23. Perusal of the power of attorney in question as whole indicates that it is a general power of attorney executed in favour of the petitioner to take care and manage the subject matter of the deed including its rental and alienable right. In clause (1) and (2) of the deed in question attorney (petitioner) has been authorized to manage the subject matter of deed as if it is done by donor and given restricted power of alteration with caution not to cause harm to the walls, roof and floor of flat. Clause (8) and (9) of the deed further clarifies the intention of the donor. So far as the applicability of the provisions as enunciated under Article 48(ee) of schedule 1-B of the Stamp Act is concerned, in my opinion it is not attracted in the present matter. The recital made in clause-1, 2, 8 and 9 of power of attorney dated 15/12/1994, succincts the restricted authority granted to the attorney to renovate or reinvigorate the flat in question with caution and the principal has reserved all rights to revoke the power of attorney in case of dissatisfaction with the work of attorney appointed. Meaning thereby deed in question dated 15/12/1994 cannot be treated to be irrevocable. Language of general power of the attorney in question is immaculately clear that intention of the executant is to confer the approved power of agency under the condition of revocation of deed, in case, donor is not satisfied with the work of donee. In case, it is treated to be an irrevocable authority, petitioner will be liable to pay the stamp duty as per the provisions of Article 23(a) of Schedule 1-B of Stamp Act, which is applicable for the conveyance.

24. It would not be out of contest to quote the definition of conveyance and instrument as enshrined under section 2(10) and 2(14),

respectively, of the Indian Stamp Act as follows:-

"2(10) "Conveyance". "Conveyance" includes a conveyance on sale and every instrument by which property, whether movable or immovable, is transferred inter vivos and which is not otherwise specifically provided for by Schedule I, Schedule 1-A or Schedule 1-B], as the case may be

[Explanation.- An instrument whereby a co-owner of a property having defined share therein, transfers such share or part thereof to another co-owner of the property, is for the purposes of this clause an instrument by which property is transferred';"

"2(14) "Instrument".- "Instrument" includes every document and record created or maintained in or by an electronic storage and retrieval device or media by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded];"

25. After going through the recital in the deed in question dated 15/12/1994, I am of the view that it is a revocable authority given to the petitioner to do any transaction, whether it is sale or rent or taking care and manage the property etc. There is nothing in the deed in question to demonstrate that authority has been given to the donee for some consideration or, due to non irrevocable status of the deed, the property in question vested in the donee and he became full owner of the said property. Apart from that authority granted by the principal to the donee can not be said to be coupled with an interest held by the agent.

26. Stamp Authorities have misread and misinterpreted the recital in the deed and illegally dragged it into the clutches of the provisions as enshrined under Article 48(ee) of schedule 1-B of Stamp Act.

27. As such mere execution of general power of attorney by a person would not ipso facto imply that any transfer of property as defined in the Transfer of Property Act that in general power of attorney, even if it is provides for power of attorney holder to convey title on behalf of the guarantor or deemed to be irrevocable cannot be recognized as deed title. From the perusal of the power of attorney in question it would not be inferred that it is irrevocable in the hands of donee.

28. Case of **Suraj Lamp (Supra)** cited by counsel for the petitioner is not applicable in the present matter. Full Bench dictum of Hon'ble Supreme Court is with respect to the validity of sale agreement/ general power of attorney/will, which are executed for the purpose of Transfer of the Property. After considering the provisions of Transfer of Property Act, Registration Act and Power of Attorney Act, Hon'ble Supreme court has concluded that aforesaid documents/transactions neither convey any title nor create any interest in an immovable property. In the aforesaid cited case, Hon'ble Supreme Court has reversed the judgment of Delhi High Court in the case of **Asha M. Jain Vs. Canara Bank**, reported in 2001(94) DLT 841, whereby concept of power of attorney sales have been recognized as a mode of transactions. Matter in hand relates to the limited scope, qua imposition of Stamp, as to what stamp fee leviable in registration of the document in question.

29. In this conspectus, as above, in my opinion general power of attorney in question dated 15.12.1994 cannot be considered as irrevocable, therefore, it cannot be considered as a conveyance for the purposes of leaving stamp as enshrined under Article 48(ee) of Schedule 1-B of Stamp Act. It would be appropriate to consider the deed in question and impose stamp fee in accordance with the provisions as enshrined under Article 48(c) of Schedule 1-B of

the Stamp Act. Accordingly, Stamp Authorities are directed to consider levy of the Stamp Fee in the light of the aforesaid provision. Impugned orders under challenge passed by the respondent nos. 1 and 2 dated 17.12.2020 and 19.04.2020, respectively , are illegal, erroneous and against the very intention as recited in the power of attorney dated 15/12/1994. As such, present writ petition is succeeded and **allowed.**

30. It is made clear that any amount, in case, deposited by the petitioner in pursuance of the impugned orders passed by the authorities concerned shall be reimbursed to the petitioner with the simple interest as applicable presently.

(2021)11ILR A316
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.10.2021

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.

Writ C No. 3124 of 2019

Ashok Verma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Manish Singh, Sushma Singh

Counsel for the Respondents:
C.S.C.

A. Civil Law – Fire Arm license – Cancellation – Order passed without opportunity of hearing – Review against cancellation order – Maintainability of review – *Seri Infrastructure's case* followed – Every Tribunal has the power of review if there is a procedural defect – Held, when the petitioner was not heard definitely a Review was maintainable. (Para 6)

Writ petition allowed. (E-1)

Cases relied on :-

1. Seri Infrastructure Finance Limited Vs Tuff Drilling Pvt. Ltd.; 2018(11) SCC 470

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

1. Heard learned counsel for the parties.

2. Show cause notice was issued to the petitioner as to why his license for carrying the firearm be not cancelled. On 3.6.2015, the petitioner had appeared before the District Magistrate, Varanasi. However, even before a reply was filed the firearm license was cancelled on 27.06.2017. The petitioner filed a Review Application, which was also dismissed on 12.07.2017. When, however, the Review Application was also dismissed, the petitioner challenged the orders dated 27.06.2017 and 12.07.2017 before the Appellate Forum and the Appeal was ultimately allowed on 5.3.2015 and the matter was remanded back to the District Magistrate, Varanasi. When the District Magistrate, Varanasi refused to interfere in the matter, after the matter was remanded back, the instant writ petition has been filed against the order dated 13.08.2018 as also against the cancellation order dated 27.06.2015.

3. Submission of learned counsel for the petitioner is that after the District Magistrate had set-aside the order dated 12.07.2015 and had restored the Review Application, the Review/Recall Application ought to have been heard. He submits that it was incumbent upon the District Magistrate to have heard the Review Application, specially when the Appellate Court had returned a definite finding that the earlier order dated 27.06.2015 was passed without hearing the petitioner. Learned counsel for the petitioner relying upon a decision of the Supreme Court reported in 2018(11) SCC 470; (Seri Infrastructure Finance Limited vs. Tuff Drilling Private Limited) has observed that when a review was sought owing to the fact that the quasi judicial Authority had not afforded proper

opportunity of hearing then Review Application was definitely maintainable.

4. Since the learned counsel for the petitioner relied upon the paragraphs 22, 23 and 24 of the aforementioned judgement, the same is being reproduced here asunder :-

" 22. Learned amicus curiae has referred to judgment of this Court in Grindlays Bank Ltd. Vs. Central Government Industrial Tribunal & Ors., 1980 (Supp) SCC 420. In that case this Court was considering the power of industrial tribunal to set aside its ex-parte award on being satisfied that there was sufficient cause. The Court also noticed that there was no specific express provision in the Act or the Rules giving the tribunal jurisdiction to do so. In Para 6, following was held:-

"6. We are of the opinion that the Tribunal had the power to pass the impugned order if it thought fit in the interest of justice. It is true that there is no express provision in the Act or the rules framed thereunder giving the Tribunal jurisdiction to do so. But it is a well known rule of statutory construction that a Tribunal or body should be considered to be endowed with such ancillary or incidental powers as are necessary to discharge its functions effectively for the purpose of doing justice between the parties. In a case of this nature, we are of the view that the Tribunal should be considered as invested with such incidental or ancillary powers unless there is any indication in the statute to the contrary. We do not find any such statutory prohibition. On the other hand, there are indications to the contrary."

23. It is true that power of review has to be expressly conferred by a Statute. This Court in Paragraph 13 has also stated that the word review is used in two distinct senses. This Court further held that when a review is sought due to a procedural defect, such power inheres in every tribunal. In Paragraph 13, following was observed:-

13. .... The expression "review" is used in the two distinct senses, namely (1) a procedural review which is either inherent or implied in a court or Tribunal to set aside a palpably erroneous order passed under a misapprehension by it, and (2) a review on merits when the error sought to be corrected is one of law and is apparent on the face of the record. It is in the latter sense that the court in Patel Narshi Thakershi case held that no review lies on merits unless a statute specifically provides for it. Obviously when a review is sought due to a procedural defect, the inadvertent error committed by the Tribunal must be corrected ex debito justitiae to prevent the abuse of its process, and such power inheres in every court or Tribunal."

24. In Kapra Mazdoor Ekta Union Vs. Birla Cotton Spinning and Weaving Mills Ltd. & Anr., (2005) 13 SCC 777, this Court again held that a quasi-judicial authority is vested with the power to invoke procedural review. In Paragraph 19 of the judgment, following was laid down:-

"19. Applying these principles it is apparent that where a court or quasi-judicial authority having jurisdiction to adjudicate on merit proceeds to do so, its judgment or order can be reviewed on merit only if the court or the quasi-judicial authority is vested with power of review by express provision or by necessary implication. The procedural review belongs to a different category. In such a review, the court or quasi-judicial authority having jurisdiction to adjudicate proceeds to do so, but in doing so commits (sic ascertains whether it has committed) a procedural illegality which goes to the root of the matter and invalidates the proceeding itself, and consequently the order passed therein. Cases where a decision is rendered by the court or quasi-judicial authority without notice to the opposite party or under a mistaken impression that the notice had been served upon the opposite party, or where a matter is taken up for hearing and decision on a

date other than the date fixed for its hearing, are some illustrative cases in which the power of procedural review may be invoked. In such a case the party seeking review or recall of the order does not have to substantiate the ground that the order passed suffers from an error apparent on the face of the record or any other ground which may justify a review. He has to establish that the procedure followed by the court or the quasi-judicial authority suffered from such illegality that it vitiated the proceeding and invalidated the order made therein, inasmuch as the opposite party concerned was not heard for no fault of his, or that the matter was heard and decided on a date other than the one fixed for hearing of the matter which he could not attend for no fault of his. In such cases, therefore, the matter has to be reheard in accordance with law without going into the merit of the order passed. The order passed is liable to be recalled and reviewed not because it is found to be erroneous, but because it was passed in a proceeding which was itself vitiated by an error of procedure or mistake which went to the root of the matter and invalidated the entire proceeding. In Grindlays Bank Ltd. v. Central Govt. Industrial Tribunal it was held that once it is established that the respondents were prevented from appearing at the hearing due to sufficient cause, it followed that the matter must be reheard and decided again.""

5. Learned Standing Counsel, however, in reply submitted that review is a creation of a statute and until it is provided in the statute, review did not lie. Further, the learned Standing Counsel submitted that the petitioner should have filed an Appeal against the order dated 13.08.2018.

6. Having heard the learned counsel for the petitioner and the learned Standing Counsel, the Court is of the view that when the Appellate Court after returning a categorical finding that the petitioner was not heard before the order dated 27.06.2015 was passed had restored the Review Application then it was incumbent upon the District Magistrate to have heard the Review Petition. Further as it has been held by the Supreme Court in 2018(11) SCC 470, every Tribunal has the power of review if there is a procedural defect. In the instant case when the petitioner was not heard definitely a Review was maintainable.

7. Further the Court is of the view that when a pure question of law was involved it was not necessary for the petitioner to have approached the Appellate Court.

8. Under such circumstances, the order dated 13.08.2018 is set-aside, the Review Petition stands restored. The District Magistrate shall after affording an opportunity of hearing to the petitioner and also to the State, pass appropriate orders on the Review Petition within a period of two months from the production of a copy of this order. Copy of this order would be certified by the learned counsel.

9. With these observations the writ petition stands allowed.

(2021)11ILR A318
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.08.2021

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ C No. 6374 of 2021

U.P.S.R.T.C. ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sri Jagram Singh, Sri Rahul Agarwal

Counsel for the Respondents:
C.S.C., Sri Gopal Narain Srivastava

A. Labour Law – Industrial Dispute Act, 1947 – Sections 6(2) & 11-A – Termination from the post of Conductor – Domestic enquiry – Charges of absent from duty – Though impugned award upheld the enquiry report, reinstatement with 50% of the backwages also passed – Proportionality of the punishment – Held, the labour court while deciding the proportionality of punishment has to examine the relevant findings of the domestic enquiry on their merits. In case such findings are perverse or not tenable in law the labour court will have to reverse those findings and record reasons for the same – Labour court has not examined some relevant findings returned by the domestic enquiry, and has not reversed the said findings – This approach of the labour court does not satisfy the mandate of Ss. 6(2) (a) and 11-A of the Act – High Court set aside the award with conclusion that the finding of labour court are vitiated. (Para 31, 33, 37 and 47)

B. Constitution of India – Article 12 – State – Instrumentality – Definition – Held, UP State Road Transport Corporation is an instrumentality of the State within the meaning of Article 12 of the Constitution of India. (Para 44)

Writ petition allowed. (E-1)

Cases relied on :-

1. Workmen Vs Fire Stone; (1973) 1 SCC 813

2. Mavji C. Lakum Vs Central Bank of India; (2008) 12 Supreme Court Cases 726

3. Scooter India Ltd. Lucknow Vs Labour Court; 1989 (suppl) SCC 31

4. Chairman cum Managing Director Vs Mukul Kumar Chaudhuri; 2010 AIR SC 75

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

1. The petitioner has assailed the award dated 30.01.2020 rendered by the labour court in adjudication Case No. 16 of 2009 (Satish Kumar Vs. Regional Manager U.P.S.R.T.C, Saharanpur) deciding the reference against the employer and directing the respondent no. 3 workman to be reinstated in service with continuity of service. The labour court in the impugned award has held the workman entitled to 50% of the backwages for the period of his termination.

2. The reference before the labour court was as to whether the termination of services of the respondent No. 3 workman Satish Kumar on 07.05.2005 were valid and legal.

3. Shri Jagram Singh and Shri Rahul Agarwal, learned counsels for the petitioner pointing the fault lines in the award submit that the labour court neglected to consider the findings returned by the enquiry officer. The labour court did not return findings on relevant issues upon an independent enquiry while exercising powers under Section 11-A of the Industrial Disputes Act (Section 6(2) (a) of the U.P. Industrial Disputes Act). The absence of the workman was wilful and findings to the contrary in the impugned award are perverse. The punishment was proportionate to the nature of the misconduct and was not liable to be reversed.

4. Sri Gopal Naraian Srivastava, learned counsel for respondent No. 3 workman submits that the labour court had exercised its power under Section 6(2) (a) of the U.P. Industrial Disputes Act as consistent with the statutory mandate. The labour court was under an obligation of law to enquire into the proportionality of the punishment imposed upon the petitioner. The employer had erred in law by imposing a disproportionate punishment for the misconduct the respondent No. 3 was charged with.

5. Heard learned counsel for the parties.

6. The relevant and undisputed facts essential for just adjudication of the controversy can be prised out from the record of the writ petition. No useful purpose will be served by exchanging affidavits. With the consent of parties the writ petition is being decided finally.

7. The respondent No. 3 workman was a conductor in the U.P.S.R.T.C. Two charge sheets were drawn up against the respondent No.3 on 28.8.2003 and 27.04.2004 wherein various charges of departmental misconduct were laid out. In substance the charge against the respondent No. 3 workman was that he wilfully absented himself from duty for various periods. The periods of wilful absence which became the subject matter of the domestic enquiries are extracted below:

(I) 28.03.2003 to 27.11.2003.

(II) 19.12.2003 to 24.12.2003.

(III) 29.12.2003 to 14.01.2004.

(IV) Continuous absence with effect from 18.01.2004.

8. The domestic enquiries indicted the workman of all charges laid out against him. The disciplinary authority on the footing of the findings of guilt made by the domestic enquiry against the respondent No. 3 workman passed the punishment of dismissal from service.

9. The domestic enquiry reports into the two chargesheets were submitted on 11.07.2004 and 13.09.2004.

10. The labour court in the impugned award has found that the enquiries were conducted in adherence to law. No fault or illegality in the conduct of the enquiry could be established before the labour court. Accordingly the impugned award upheld the enquiry reports.

11. The challenge to the proportionality of the punishment for the misconduct the respondent No. 3 was charged with became the sole issue of consideration by the labour court.

12. The domestic enquiry report dated 11.07.2004 enquired into period of absence of the respondent No. 3 workman from 28.03.2003 to 27.11.2003. Before the enquiry officer the only defence tendered by the respondent No. 3 workman was that his absence for various period was not wilful and the same was caused by the terminal ill-health of his wife. The respondent No. 3 also claimed that he had sent leave applications alongwith medical certificates to the petitioner by U.P.C postal mode. The enquiry officer found the U.P.C receipts to be forged. The enquiry officer also noticed that proper mode of service of application which a reasonable person would adopt would be to send the same by registered post or submit the application personally. There was no good cause shown by the respondent No. 3 workman, to deviate from the said modes. The defence of the respondent No. 3 workman was hence disbelieved. On the back of the such reasoning and after appraisal of the aforesaid evidences the enquiry officer concluded that the absence of the workman was wilful and without authority of law.

13. The second domestic enquiry report dated 13.09.2004 enquired into the period of absence of respondent No. 3 from 19.12.2003 to 24.12.2003 as well as 29.12.2003 to 14.01.2004 and the continuous absence from 18.01.2004. The enquiry officer in the said enquiry report has noticed the leave application submitted by the respondent No. 3 workman wherein medical

leave was prayed for on account of the illness of his wife. The enquiry officer found that medical leave cannot be sanctioned to a workman on account of illness of his wife. The workman was entitled to medical leave had he himself suffered from illness. He could have then made an application for medical leave to be processed as per law. Further the enquiry officer found that the burden was upon the respondent No. 3 workman to establish the illness of his wife by adducing credible medical evidence and he ought to have applied before the competent authority for leave. He failed to do so and simply absented himself. The respondent No. 3 workman joined duties on 15.01.2004 and produced medical certificates of his wife. The respondent No. 3 workman had clearly flouted the leave rules applicable to him. He failed to submit timely application for leave and also did not tender medical certificates in support thereof. Post facto medical certificates were not accepted. The absence from 29.12.2003 to 14.01.2004 was found to be unauthorized and wilful.

14. The enquiry report dated 13.09.2004 concludes with the findings that the workman did not tender any defence to the charge of continuous absence with effect from 18.01.2004. The charge of continuous absence from duty w.e.f. 18.01.2004 was duly established against the workman/respondent no. 3.

15. The labour court after holding that the domestic enquiry was fair and lawful entered into consideration of the proportionality of the punishment for misconduct which stood proved in the departmental enquiry.

16. The labour court upon perusal of the material and evidences before it found that the respondent No. 3 workman was absent from duty without sanction of his leave on account of his ill-health as well as the medical condition of his wife.

17. The labour court in the impugned award records that the enquiry officer in his deposition had admitted to the effect that the medical report submitted by the respondent No. 3 workman was part of personal documents of the respondent No. 3. However the same was not referenced in the enquiry report.

18. The judgment of the labour court further records that the enquiry officer did not send the medical certificates for examination. But he returned a finding on the authenticity of the said medical certificates after perusing the same. On this footing the finding of the enquiry officer was invalidated.

19. The impugned award of the labour court found that the respondent No.3 workman had defended his absence on ground of his ill-health and the medical condition of his wife. He had submitted medical reports before the competent authority. The medical certificates submitted by the respondent No. 3 workman were in the record. The said certificates were never got examined for their authenticity by the employer. On this footing the labour court found that the absence of the respondent No. 3 for various periods, namely, 28.03.2003 to 27.11.2003, 19.12.2003 to 24.12.2003 and 29.12.2003 to 14.01.2004 was occasioned by his health condition and ill health of his wife. The absence was not wilful. The punishment of dismissal by order dated 07.05.2005 was held to be disproportionate to the misconduct and was accordingly reversed and substituted by a lesser punishment.

20. It is noteworthy that no findings has been made in the impugned award on the charge of continuous absence of the workman from duty with effect from 18.01.2004.

21. The narrative has the advantage of authorities in point which were cited at the Bar. The authorities extracted hereunder will form

the legal backdrop in which the impugned award will be examined.

22. The power of the labour court to enquire into the proportionality of punishment imposed upon the workman flows from Section 6(2) (a) of the U.P. Industrial Disputes Act which good authority has found to be in pari materia with Section 11-A of the Industrial Disputes Act. For ease of reference Section 11-A of the Industrial Disputes Act is extracted hereunder:

"[11-A. **Powers of Labour Courts, Tribunal and National Tribunals to give appropriate relief in case of discharge or dismissal of workmen**- Where an industrial dispute relating to the discharge or dismissal of a workman has been referred to a Labour Curt, Tribunal or National Tribnal or adjudication and, in the course of the adjudication proceedings, the Labour Court, Tribunal or National Tribunal, as the case may be is satisfied that the order of discharge or dismissal was not justified, it may, by its award, set aside the order of discharge or dismissal and direct reinstatement of the workman on such terms and conditions, if any, as it thinks fit, or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require:

Provided that in any proceeding under this section the Labour Court, Tribunal or National Tribunal, as the case may be, shall rely on the material on record and shall not take any fresh evidence in relation to the matter]"

"[(2-A) An award in an industrial dispute relating to the discharge or dismissal of a workman may direct the setting aside of the discharge or dismissal and re-instatement of the workman on such terms and conditions if any, as the authority making the award may think fit, or granting such other relief to the workman, including the substitution of any lesser punishment for discharge or dismissal, as the circumstances of the case may require.]"

23. The breadth of powers of the labour court under Section 11(a) of the Industrial Disputes Act was expounded by the Supreme Court in Workmen Vs. Fire Stone1. The statement of law entered in para 36 of Firestone (supra) is the locus classicus in point:

"We will first consider cases where an employer has held a proper and valid domestic enquiry before passing the order of punishment. Previously the Tribunal had no power to interfere with its finding of misconduct recorded in the domestic enquiry unless one or other infirmities pointed out by this Court in Indian Iron & Steel Co. Ltd. Case (supra), existed. The conduct of disciplinary proceedings and the punishment to be imposed where all considered to be a managerial function with which the Tribunal had no power to interfere unless the finding was perverse or the punishment was so harsh as to lead to an inference of victimisation or, unfair labour practice. This position, in our view, has now been changed by Section 11-A. The words "in the course of the adjudication proceeding, the Tribunal is satisfied that the order of discharge or dismissal was not justified" clearly indicate that the Tribunal is now clothed with the power to reappraise the evidence in the domestic enquiry and satisfy itself whether the said evidence relied on by an employer establishes the misconduct alleged against a workman. What was originally a plausible conclusion that could be drawn by an employer was originally a plausible conclusion that could be drawn by an employer from the evidence, has now given place to a sanctification being arrived at by the Tribunal that the finding of misconduct is correct. The limitations imposed on the powers of the Tribunal by the decision in Indian Iron & Steel Co. Ltd. Case (supra), can no longer be invoked by an employer. The Tribunal

is now at liberty to consider not only whether the finding of misconduct recorded by an employer is correct; but also to differ from the said finding if a proper case is made out. What was once largely in the realm of the satisfaction of the employer, has ceased to be so; and now it is the satisfaction of the Tribunal that finally decides the matter."

24. The need for the labour court to exercise powers under Section 11-A of the U.P. Industrial Disputes Act in a judicial manner was emphasized in **Mavji C. Lakum Vs. Central Bank of India2 :**

"23.There can be no dispute that power under Section 11-A has to be exercised judiciously and the interference is possible only when the Tribunal is not satisfied with the findings and further concludes that punishment imposed by the management is highly disproportionate to the degree of guilt of the workman concerned. Besides, the Tribunal has to given reasons as to why it is not satisfied either with the findings or with the quantum of punishment and that such reason should not be fanciful or whimsical but there should be good reasons."

25. Similarly the applicability of Wednesbury principles of reasonableness and the doctrine of proportionality in an enquiry under Section 11-A of the Industrial Disputes Act was also affirmed in **Mavji (supra):**

"25. Though the learned Judge had discussed all the principles regarding the exercise of powers under Section 11-A of the Industrial Disputes Act as also the doctrine of proportionality and the Wednesbury principles, we are afraid the learned Judge has not applied all these principles properly to the present case. The learned Judge has quoted extensively from the celebrated decision of Workmen V. firestone Tyre & Rubber Co. of India (P) Ltd. However, the learned Judge seems to have ignored the observations made in AIR para 32 of that decision where it is observed that : (SCC p. 830 para 36)

"36.... The words "in the course of the adjudication proceeding, the Tribunal is satisfied that the order of discharge or dismissal was not justified' clearly indicate that the Tribunal is now clothed with the power to reappraise the evidence in the domestic enquiry and satisfy itself whether the said evidence relied on by an employer establishes the misconduct alleged against a workman. What was originally a plausible conclusion that could be drawn by an employer from the evidence, has now given place to a satisfaction being arrived at by the Tribunal that the finding of misconduct is correct. ... The Tribunal is now at liberty to consider not only whether the finding of misconduct recorded by an employer is correct but also to differ from the said finding if a proper case is made out."

26. Section 6(2) (a) of the U.P. Industrial Disputes Act was held to be analogous to Section 11-A of the Industrial Disputes Act in S**cooter India Ltd. Lucknow Vs. Labour Court 3.**

27. The factors which will guide the exercise of broad discretion of the labour court while deciding the issue of proportionality of punishment shall now be discussed.

28. The Industrial Disputes Act was promulgated with a view to ameliorate the conditions of workman, to protect them against any unfair labour practices, and to ensure industrial peace. The intendment of the Act was to ensure better employer employee relationships, to prevent and resolve industrial disputes and thus maintain industrial peace.

29. While exercising powers under Section 11-A of the Industrial Disputes Act (or Section 6(2) (a) of the U.P. Industrial Disputes Act as in

this case) the labour court will have to co-relate and balance the rights of the workman with the imperatives of industrial peace and institutional efficiency. Liberal labour practices does not give licence for anarchic conduct. Good industrial relations have to be fostered to ensure better efficiency in the industry, a positive work culture which will promote industrial peace.

30. The doctrine of proportionality as propounded by various constitutional courts will have an important bearing on the decision making process to be followed by the labour court.

31. The labour court while deciding the proportionality of punishment has to examine the relevant findings of the domestic enquiry on their merits. In case such findings are perverse or not tenable in law the labour court will have to reverse those findings and record reasons for the same. The matter will not be left there. The labour court thereafter have to embark on an independent investigation into the facts and after receiving evidence if necessary shall return specific findings thereon.

32. The labour court in the impugned award has neglected to return a finding on the third charge namely continuous absence from duty with effect from 18.01.2004 onwards. This absence was proved and found to be wilful in the domestic enquiry proceedings. Since no contrary finding has been recorded in the impugned award, the domestic enquiry report in regard to the same has to be given effect to.

33. Secondly, the labour court has not examined some relevant findings returned by the domestic enquiry, and has not reversed the said findings. Domestic enquiries have a critical role to play in industrial relations. Domestic enquiries cannot be given a short shift or completely ignored by the labour court as was done in this case. This failure of the labour court is sufficient to vitiate the impugned award.

34. The labour court has baldly recorded that medical evidences attesting the illness of the respondent No. 3 workman were in the record and hence the absence was not wilful.

35. The labour court simply accepted the medical reports on their face value without examining their authenticity in an independent manner. This failure to exercise lawful jurisdiction vitiates the award since the said reports were categorically rejected by the enquiry officer.

36. Section 11-A of the Industrial Disputes Act/ Section 6 (2) (a) of the U.P. Industrial Disputes Act mandate that the labour court should make an independent consideration or cause an enquiry into the veracity of the stands of both parties and also the credibility of the evidence adduced before the labour court. Independent findings in that regard have to be returned by the labour court. In the impugned award the documentary and other evidences of the workman were accepted on their face value, and not tested for veracity by inviting evidence and independent application of judicial mind.

37. This approach of the labour court does not satisfy the mandate of Section 6(2) (a) of the U.P. Industrial Disputes Act and Section 11-A of Industrial Disputes Act.

38. The labour court placed exclusive reliance on certain parts of the testimony of the enquiry officer made before it. The aforesaid consideration is perverse, inasmuch as the testimony has to be considered as a composite whole and the credibility of the witness has to be examined accordingly. Parts of the deposition cannot be considered in isolation. In the instant case, the labour court has cherry picked parts of

the deposition to support the conclusions reached by it.

39. At the expense of increasing the length of this judgment, the testimony of the enquiry officer before the labour court which is in the record indicates that the enquiry officer had testified that the statement of the workman that he intimated the employer about his illness was incorrect. The workman did not produce any medical certificate before the enquiry officer. The enquiry officer examined the personal record of the workman during the enquiry which did not contain any application for leave. The enquiry officer had also noted that the workman had only submitted one medical certificate at the time of his joining.

40. It is equally noteworthy that before the enquiry officer the sole defence of the respondent No. 3 workman for his absence from duty was the illness of his wife. However post facto the workman improved his case before the labour court by adding his own ill-health as the additional cause of absence from duty. These aspects were integral to the deposition of the enquiry officer. Whether the respondent workman could use the proceedings before the labour court to supply defects in his defence before the domestic enquiry also went to the root of the matter. Failure to consider the same renders the findings of the labour court perverse.

41. In the wake of preceding discussions this Court concludes that the findings of the labour court are vitiated and the award is liable to be set aside and is set aside.

42. Before parting it would be apposite in the interest of justice to examine the doctrine of proportionality. The judgments cited at the Bar on behalf of respondent No. 3 workman were rendered in the context of absence from duty which was not wilful. (Ref: **Chairman cum Managing Director Vs. Mukul Kumar Chaudhuri4)**

43. The records and facts as stated in the preceding part of the judgment support and fortify the conclusion of the employer/domestic enquiry that the absence of the respondent No. 3 workman from duty was wilful. Moreover, the findings of the domestic enquiry that the respondent No. 3 workman was continuously absent from 18.01.2004 onwards has not been considered or referenced or reversed by the labour court. The said findings was not successfully challenged and has attained finality. The findings of the enquiry officer are based upon due consideration of the material produced during the enquiry and the conclusions are reasonable. The domestic enquiry officer reached the applicable standards of evidence while returning the said findings.

44. It would not be out of context to mention that the petitioner No.1 is an instrumentality of the State within the meaning of Article 12 of the Constitution of India. It is engaged in the high purpose of providing public transportation to the common man at reasonable cost. The service conditions are governed by regulations duly framed by the competent authorities. There are no oppressive conditions of work, at least nothing has been brought out in the record. Instrumentalities in public sector undertakings cannot have rights surplus and duty deficit environment. The same will be contrary to public interest.

45. In case absence from duty is found to be wilful, the employer may pass orders for dismissal from service in the facts of a case. This is what has happened in the instant case.

46. Consequently, this Court concludes that the punishment imposed upon the petitioner by the employer for wilful absence from duty for various periods is reasonable and just.

47. The impugned award dated 30.01.2020 is liable to be set aside and is set aside.

48. The writ petition is allowed.

49. The Court appreciates the assistance rendered by Sri Jagram Singh, learned counsel as well as Sri Rahul Agarwal, learned counsel for the petitioner. Sri Gopal Narayan Srivastava, learned counsel for respondent No. 3 has also assisted the Court with great effort.

(2021)11ILR A326
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.07.2021

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE MRS. SADHNA RANI (THAKUR), J.

Writ-C No. 14093 of 2021

Smt. Babita Devi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Gaurav Singh Chauhan, Sri R.P.S. Chauhan

Counsel for the Respondents:
C.S.C., Sri Tarun Agarwal

A. Election Law – UP Kshetra Panchayats and Zila Panchayats (Election of Members) Rules, 1994 – Rules 50(e), 53, 54 & 55 – Counting of votes – Votes of one polling booth were not added in the result declared – Mistake rectified after issuance of Certificate of elected candidate – Certificate cancelled and election result changed by the Returning Officer (R.O.) after issuing notice – Validity challenged – Jurisdiction of R.O. questioned – Duty of R.O. of removing mistake, explained – Held, till the Returning Officer was In-charge of his office under the order of the State Election Commission and the election result was not finalized by uploading the same on the portal of the State Election Commission, the Returning Officer cannot be denuded of his power to make correction of an error which was only clerical or arithmetical in nature, to put the record of his office straight – Returning Officer is duty bound to ensure that the declaration made by it of the election result is true; and when he had made correction of minor or formal nature for removing inadvertent error he cannot said to have become functus officio nor can it be said that it was outside the scope and jurisdiction of the Returning Officer under the authority given by the Election Commission. (Para 21)

B. Election Law – UP Kshetra Panchayats and Zila Panchayats (Election of Members) Rules, 1994 – Rules 54 & 56 – Declaration of result, when became final – Words 'to be elected' used in Rule 54 – It's impact – Declaration under Rule 56 – It's significance – *Smt. Tara Devi's case* followed – Held, Rule 54 only contemplates for the declaration of the candidate securing highest number of votes, 'to be duly elected' – The issuance of the certificate on the part of the authority was only an additional act which cannot by itself gives any independent cause of action to proceed – In case, the issuance of the certificate in contemplation of Rule 54 is held final, Rule 56 will be nugatory – Formal declaration of the result under Rule 54 by the R.O. will be abide by the Rule 56 of the Rules, 1994 – Suggestion to amend suitable amendment in Rule 54 and 56 was made in Tara Devi's case, but it could not be taken note by State Govt. – High Court requested for suitable amendment in the Rules 1994 in order to avoid future litigation and to bring stability in the Panchayat election process in future. (Para 10, 27 and 30)

C. Constitution of India – Article 226 – Equitable jurisdiction – Substantial Justice – Writ, when cannot be issued – Held, while exercising equitable discretionary jurisdiction under Article 226 of the Constitution of India, it must be keptp in mind that substantial justice is done in the matter and the High Court would not issue a writ which would revive any illegality. (Para 23)

Writ petition dismissed. (E-1)

Cases relied on :-

1. Smt. Tara Devi Vs St, of U.P. & ors.; 2011 (1) ADJ 287 (DB)

2. Smt. Sunita Patel Vs St.of U.P.; 2006 (2) AWC 1422

3. N.P. Punnuswami Vs Returning Officer; AIR 1952 SC 64

4. Mohinder Singh Gill Vs Chief Election Commissioner; AIR 1978 SC 851

5. Krishna Ballabh Prasad Singh Vs Sub-Divisional Officer Hilsa-cum-Returning Officer & ors.; 1985 (4) SCC 194

6. Kamlesh Vs Mukhya Nirwachan Ayukt & ors.; 2006 (2) AWC 1720 All

7. Grindlays Bank Ltd.Vs Central Government Industrial Tribunal; AIR 1981 SC 606

8. Maharaja Chintamani Saran Nath Shahdeo Vs St. of Bihar & ors.; (1999) 8 SCC 16

(Delivered by Hon'ble Mrs. Sunita Agarwal, J.
&
Hon'ble Mrs. Sadhna Rani (Thakur), J.)

1. Learned counsel for the petitioner remained absent though the matter has been date fixed with his consent. This is a matter arising out of the Election of Member, Kshetra Panchayat Lalai, Ward No. 42, Vikas Khand Hathwant, Firozabad. We have heard learned counsel for the petitioner on 14.7.2021 on the legal issues and postponed the matter only to obtain instructions from the State Election Commission to ascertain the date of the declaration of the result. We, therefore, do not deem it fit to adjourn the matter today.

The written instructions have been supplied by the learned counsel for the respondent-State Election Commission on 14.7.2021. Further instructions in compliance of the order dated 14.7.2021 have also been placed before us today.

The Office is directed to upload the scanned copy of the written instructions and the compilation of cases supplied by the learned counsel for the respondents.

2. Heard Sri Imran Syed learned Advocate holding brief of Sri Tarun Agrawal learned counsel for the respondent-State Election Commission, Sri Ajit Kumar Singh learned Additional Advocate General assisted by Sri Sudhansh Srivastava learned Additional Chief Standing Counsel appearing on behalf of the State respondents today.

3. Placing the above instructions before us, it is pointed out by the learned counsel for the respondents that for the election of Member, Kshetra Panchayat concerned, the polling was held on 26.4.2021 at two polling booth nos. 180 and 181. The ballot boxes of both the polling booths were opened under the supervision of the Assistant Returning Officer. On 2.5.2021 when the counting was made, the petitioner Smt. Babita Devi wife of Sri Vimal Kumar had secured 169 votes at polling booth no. 181 whereas Indrapal son of Sri Pati Ram resident of Village Lalai, Block Hathwant got 77 votes and the third candidate Sri Kushalpal son of Sri Hariom resident of the same village got 163 votes. Similarly at polling booth no. 180, the petitioner Smt. Babita Devi secured 114 votes whereas Indrapal received 305 votes and Kushalpal 95 votes. The Assistant Returning Officer had issued the certificate of the elected/returned candidate to Smt. Babita Devi on 3.5.2021 on the basis of the votes of one polling booth No. 181 only. After the counting was completed, on 4.5.2021, respondent no. 7, Sri Indrapal gave a written application raising objection about the result and sought for further verification of the same. Upon verification of the record, it was found that the votes cast at the polling booth no. 181 were not added in the final preparation of the result. By adding the votes of two polling booth nos. 180 & 181, it was found that the respondent no. 7 had received total 382 votes which was the highest whereas the

petitioner Smt. Babita Devi was placed at serial no. 2 having received 283 votes.

The mistake committed by the Assistant Returning Officer was corrected by the Returning Officer after issuing a notice to the petitioner herein. The order in this regard had been passed on 4.5.2021. The copies of the Election Return referable to Rules 50(e) and 53 of the U.P. Kshetra Panchayats and Zila Panchayats (Election of Members) Rules, 1994 (In short as "the Rules, 1994") in Form '43' and the counting sheet in Form '47' as per Chapter 9 of the Guide Book for the Panchayat Elections-2021 issued by the State Election Commission, of both the polling booth nos. 180 and 181 prepared on 3.5.2021 have been placed before us alongwith the written instructions to give the details of the votes cast, ballot papers rejected and the total votes cast in favour of each candidate.

Today, an extract of the entries uploaded on the portal of the State Election Commission has also been placed before the Court to demonstrate that the portal of the State Election Commission for declaration of the result was created on 18.4.2021 and the election result was uploaded on the same on 7.5.2021 at about 14:19:59.313 hours.

With the help of the said written instructions, it is submitted by the learned counsel for the State Election Commission that the compliance of Rule 56 of the Rules, 1994 had been made on 7.5.2021 after correction of the clerical/arithmetical mistake in the matter of declaration of the result. As regards the issue of cancellation of the certificate issued in the name of the petitioner, the stand of the Returning Officer is that an effort was made to intimate the petitioner personally about the mistake before the correction of the result. The Returning Officer alongwith the Assistant Returning Officer had personally gone to the house of the petitioner but no one met there. The notice was, therefore, pasted at a conspicuous place of the house of the petitioner, and, thereafter, while cancelling the certificate issued to the petitioner, a correct certificate was issued to the returned candidate/respondent no. 7. It is, then, submitted that after uploading the election result on 7.5.2021, the portal of the State Election Commission stood locked automatically and no changes, thereafter, could have been made. The correction made by the returning officer before the declaration of the election result by the State Election Commission with uploading on the same on its portal, was for removal of an arithmetical mistake. The principle of *functus officio* will not be attracted in such a situation.

4. Reliance has been placed on the decision of this Court in **Smt. Tara Devi vs. State of U.P. and others1** to submit that the opinion of the earlier Division Bench in **Smt. Sunita Patel vs. State of U.P.2**, relied by the learned counsel for the petitioner, had been held as *per incuriam*.

5. As regards the contention of the learned counsel for the petitioner in the argument dated 14.7.2021 that after issuance of the certificate of elected candidate to the petitioner, the Returning Officer had become *functus officio* and it was not open for him to make any changes in the election result, and hence the subsequent declaration of respondent no. 7 as elected candidate was beyond the jurisdiction of the Returning Officer, Rule 56 of Rules, 1994 has been pressed into service to contend that after the counting was completed, the result declared by the Returning Officer by issuance of the certificate in accordance with Rule 54 of the Rules, 1994 was only an intermediary stage. The Returning Officer made corrections before the communication of the result to the District Magistrate which was well within his jurisdiction.

6. Considering the above submissions, before we delve on the issues, the relevant provisions of the Rules, 1994 which govern the

Election of the Member Kshetra Panchayat are to be noted for ready reference:-

*"**53. Election return by the Nirvachan Adhikari.** -The Nirvachan Adhikari shall then prepare and certify an election return in the specified form setting forth-*

(a) the names of candidates for whom valid votes given have been;

(b) the number of valid votes given for each candidate;

(c) the total number of valid ballot papers;

(d) the number of rejected ballot papers;

(e) the number of tendered ballot papers; and

(f) the name of the candidate elected.

He shall then also permit any contesting candidate or his Nirvachan Abhikarta or Ganana Abhikarta to take a copy of or an extract from such return.

***54. Declaration of result.** - The Nirvachan Adhikari shall declare candidate securing the highest number of votes in their respective constituency to be duly elected.*

***55. Equality of votes.** - If after the counting of the votes Is completed, an equality of votes is found to exist between-any candidates and the addition of one vote will entitle any of those candidates to be declared elected, the Nirvachan Adhikari shall forthwith decide between these candidates by lot, and proceed as if the candidate on whom the lot falls had an additional vote.*

***56. Report of result.** - As soon as may be after the result of an election has been declared, the Nirvachan Adhikari shall report the result, to the District Magistrate and shall also inform the Block Development Officer of the Kshettra Panchayat or Chief Executive Officer of Zila Panchayat as the case may be. The District Magistrate shall report the result to the State Election Commission.*

***57. Custody of the return and of the ballot papers and other papers relating to election.** - (1) The Nirvachan Adhikari shall, after reporting the result of the election under Rule 56 forward the return to the District Panchayat Raj Officer for safe custody.*

(2) The Nirvachan Adhikari shall also forward to the District Panchayat Raj Officer for safe custody the packets of the ballot papers and all other papers relating to the election.

***58. Production and inspection of election papers.** - (1) While in the custody of the District Panchayat Raj Officer the packet of ballot papers, whether valid, rejected or tendered and of the marked copy of the electoral roll shall not be opened and their contents shall not be inspected by or produced before any person or authority except under the order of a competent court or of a District Judge hearing an election petition. The inspection when ordered shall be subject to the payment of a fee at the rate of rupees two per day on which the inspection is done.*

(2) All other papers relating to the election shall be open to public inspection subject to such condition, if any, as the State Government may specify and subject to the payment of a fee at the rate of rupees twenty per day on which inspection is done.

(3) Copies of the returns forwarded by the Nirvachan Adhikari under sub-rule (1) of Rule 57 shall be furnished by the District Panchayat Raj Officer on payment of a fee of rupees twenty for each copy.

(4) Copy of such papers are allowed to be inspected under sub-rule (2) shall be given to any person applying for the same on payment of a fee at the same rate as is charged in the State for a copy of any order by a Revenue Officer. Application for copies of papers may be preferred on plain paper and no judicial stamps need be affixed.

(5) Certified copy of any paper referred to in sub-rule (6) shall be attested by

the District Panchayat Raj Officer concerned and will be issued from his office."

7. As per the contention of the petitioner, the declaration of the result under Rule 54 by the Returning Officer marked culmination of the election and subsequent report of the result under Rule 56 was only a ministerial act. The Returning Officer lost his jurisdiction after the declaration of the result under Rule 54 by issuance of the certificate in the prescribed proforma to the winning candidate, the petitioner herein. For any dispute in the matter of election of the petitioner, only remedy before the respondent no. 7 was to approach the Election Tribunal.

It was, thus, contended that since the question in the writ petition is about the jurisdiction of the Returning Officer to change or cancel the election result, the bar of jurisdiction of the Court in the matter of the election of Panchayats under Article 243-O of the Constitution of India will not be attracted.

8. Before we delve on the issue of the interpretation of Rules 54 and 56 of Rules, 1994, it is pertinent to note that the Apex Court while deciding the cases under the Representation of the People Act had held that the election connotes the entire process culminating in a candidate being declared elected. The election commences from the initial notification and culminates in the declaration of the return of a candidate. The election process, thus, comes to an end on the final declaration of the returned candidates. After the election process has come to an end, the State Election Commission, the District Magistrate and the Election Officer lose their jurisdiction and only authority which can deal with and decide any complaint regarding the election is the Election Tribunal. **[Reference N.P. Punnuswami vs. Returning Officer3 and Mohinder Singh Gill vs. Chief Election Commissioner4]**

While dealing with a question regarding the jurisdiction of the Returning Officer, in **Krishna Ballabh Prasad Singh vs. Sub-Divisional Officer Hilsa-cum-Returning Officer and others5,** the Apex Court in the matter of conduct of election to the Bihar Legislative Assembly had examined the impact of Section 66 of the Representation of the People Act, 1951 and the Rules 64 of the Conduct of Election Rules, 1961 (In short as "the Rules, 1961") framed thereunder. It was held therein that Section 66 of the Act provides that when the counting of votes has been completed, the Returning Officer must declare forthwith the result of the election "in the manner provided in the Act or the Rules made thereunder." The Rule 64 of 1961 Rules expressly provides the manner in which the declaration of result of election and return of election has to be prepared. The declaration in Form 21-C referable to Rule 64 of the Rules, 1961 is the final step in the process of election. It was held therein that without declaration in Form 21-C in the manner as prescribed in Rule 64, the announcement of the result by the Returning Officer with the grant of the certificate in Form 22 to the candidate was meaningless and had no legal status. Under the Rules 1961, the grant of certificate of election to the elected candidate in Form 22 is provided under the Rule 66 which contemplates the grant of such certificate only after the candidate has been declared elected under Section 66, which refers back to Rule 66 and therefor to Form 21-C. It was, thus, held that the bar of clause (b) of Article 329 of the Constitution came into operation only after the declaration in Form 21-C was made and, thereafter, the election petition alone was maintainable.

9. The question raised before us is as to whether under the scheme of Rules, 1994, the issuance of the certificate to the winning candidate would amount to the final declaration of the result under Rule 54 by the Returning

Officer and, thus, marked the culmination of the election process.

The challenge by the petitioner to the jurisdiction of the returning officer to cancel the certificate and issue fresh certificate in favour of the returned candidate is based on the opinion of the two Division Benches of this Court in **Kamlesh vs. Mukhya Nirwachan Ayukt and others6 and Smt. Sunita Patel** (supra).

The same issue had been considered by a third Division Bench of this Court in **Smt. Tara Devi** (supra).

We would like to refer to them in a chronological manner.

The Division Bench of this Court in **Kamlesh** (supra) in the year 2006 had held that in the matter of election of Member, Kshetra Panchayat under the Rules, 1994, the election comes to an end with the issuance of the certificate to a candidate declaring him successful and all subsequent proceedings taken by the Returning Officer were without any authority/competence.

In **Smt. Sunita Patel** (supra), the Division Bench while considering the scope of Rules 54 and Rule 56 of the Rules, 1994, taking note of the decision of the Apex Court in **Krishna Ballabh Prasad Singh** (supra) had held that Rule 54 of the 1994 Rules does not prescribe the declaration to be made by the Returning Officer in any prescribed form before issuing the certificate, as prescribed in the Conduct of Election Rules, 1961, [subject matter of consideration in **Krishna Ballabh Prasad Singh** (supra)].

10. It was then held that though the Rule, 1994 does not prescribe for issuance of a victory certificate to the winning candidate but such a certificate can be used as an evidence of the declaration of the result under Rule 54 of 1994' Rules. The declaration of the result by the Returning Officer in such a manner, under Rule 54 of the Rules, 1994 concludes the election and communication of the result under Rule 56 is only a consequential formality (a ministerial act); and further communication to the State Election Commission under Rule 56 of the Rules, 1994 cannot be said to be an integral part of the election process. The Returning Officer after issuance of the victory certificate cannot review its decision to get a recounting or retallying the result. The contention of the respondent therein that Rule 56 is an integral part of the election process had been brushed aside giving the reason that the State Election Commission does not have the power to exercise superintendence in violation of the statutory rules, inasmuch as, the election can only be questioned by way of an election petition and not otherwise, by virtue of Article 243-O of the Constitution of India after declaration of the result by the Returning Officer.

The decision of the Division Bench in **Kamlesh** (supra) had been considered in **Smt. Tara Devi** (supra) and it was noted that in the said matter the Court had proceeded on the assumption that the issuance of the certificate is the final declaration of the result without even considering the import of Rules 54 and 56 of the Rules, 1994.

This opinion drawn by the Division Bench in **Smt. Sunita Patel** (supra) had been held to be *per incuriam* in **Smt. Tara Devi** (supra) while examining the scope of Rules 54 and 56 of the Rules, 1994. It was held therein that Rule 54 only contemplates for the declaration of the candidate securing highest number of votes, "to be duly elected". The words "to be duly elected" give two inputs; either he has to be elected at once or subject to the reporting of the result as contemplated under Rule 56 of the Rules. It was then noted that admittedly there is no provision for issuance of the victory certificate to the candidate under the Rules, 1994. The issuance of the certificate on the part of the authority was only an additional act which cannot by itself gives any independent

cause of action to proceed. In case, the issuance of the certificate in contemplation of Rule 54 is held final, Rule 56 will be nugatory. By reading Rules 54 and 56 of 1994 Rules, it was held that the harmonious reading of the Rules makes it clear that after the declaration of the result under Rule 54, as soon as may be, the Returning Officer has to report the result to the District Magistrate and also the Block Development Officer of the Kshetra Panchayat under Rule 56, who, in turn, shall report the result to the State Election Commission. It was, thus, held that the formal declaration of the result under Rule 54 by the Returning Officer will abide by the Rule 56 of the Rules, 1994 that means, the declaration of the result under Rule 54 becomes final subject to the declaration made under Rule 56.

It was observed in **Smt. Tara Devi** (supra) that as regards the authority of the State Election Commission, there cannot be a dispute that the Election Commission being creature of the Constitution has the power of superintendence to control and conduct the elections. With the commencement of the elections by the notification till the date of the de-notification with the final declaration of the result, the State Election Commission is the final authority to adjudicate any dispute, if it is called upon. After de-notification, it is open for an aggrieved person to approach the Election Tribunal. Further the Election Commission being the final authority during the continuance of the election process can call upon the Returning Officer to remove the defects which are either minor or formal or inadvertent. Any other officer or authority functioning under the directions of the Election Commission can also issue such direction to the Returning Officer. It was held that till the declaration of the result is made final under Rule 56, neither the Returning Officer can be said to be *functus officio* nor the jurisdiction of the State Election Commission can be said to have come to an end. Any calculation mistake or administrative lapses can be corrected before finality is attached to the election result under Rule 56. For correction of any inadvertent mistake or formal defect, the application of the aggrieved candidate was clearly maintainable as he cannot be compelled to file an election petition for correction of such mistake.

To deal with the arguments on the question of lack of jurisdiction of the Returning Officer to make correction after declaration made under Rule 54, the Division Bench in **Tara Devi** (supra) had also considered the law of review as propounded by the Supreme Court in **Grindlays Bank Limited vs. Central Government Industrial Tribunal7** to note that inadvertent error or arithmetical mistake must be corrected by the authority to prevent the abuse of its process as the same would amount to review of a procedural defect.

11. In the instant case, the Assistant Returning Officer had committed a mistake apparent on the face of the record in declaring the result on the basis of the votes cast on one polling booth (booth No. 181) only, and thereby in issuing the certificate of the elected candidate to the petitioner on 3.5.2021 on wrong calculation of the total votes.

As soon as the said mistake was brought to the knowledge of the Returning Officer, he after verification of the record of his office found that the votes of the polling booth no. 180 were not added in the result declared by the Assistant Returning Officer. For correction of the said mistake, notice was also sought to be served upon the petitioner but she did not receive the same nor responded to the notice pasted at her house. The writ petition is completely silent about the said notice.

12. So, by means of the memo dated 6.5.2021, the Returning Officer had cancelled the certificate of the petitioner and declared respondent no. 7 as the elected candidate by adding votes of both the polling booths i.e.

booth nos. 180 and 181, cast in favour of each candidate. This is not a case of elaborate counting or reopening of the result by any process which could be said to be prohibited after declaration of the result, rather it is a case of correction of the minor mistake or defect in the election result.

13. The procedure for holding election of Member Kshetra Panchayat is governed by 1994 Rules which provides the manner of conduct of election, preparation of the election papers, declaration of the result and maintaining the election record. Rule 53, relevant for our purpose, provides for preparation of the election return containing the details of the names of candidates; the number of valid votes for each candidate; the total number of valid ballot papers; the number of rejected ballot papers; the number of tendered ballot papers and the name of the candidate elected. The election return is to be prepared and certified by the Returning Officer. The copy of the certified election return can be taken by the contesting candidate or his representatives/Nirvachan Abhikarta and Ganana Abhikarta. The manner in which the result has to be declared by the Returning Officer is stated in Rule 54 which provides that the Returning Officer shall declare the candidate securing the highest number of votes to be duly elected. Rule 56 provides for the report of the result to be sent by the Returning Officer to the District Magistrate and the information of the result to the Block Development Officer of the Kshetra Panchayat. The District Magistrate in turn has to report the election result to the State Election Commission.

Under the scheme of the Act, no format is given for declaration of the result, i.e. for declaration of the result or reporting of the result to the State Election Commission.

14. However, in the instructions issued by the State Election Commission as contained in the Guide Book for Panchayat General Elections-2021 for the use of the Returning Officer/Employees, Chapter IX contains the description as to how the result would be declared by the Returning Officer and the prescribed format for the purpose.

15. Relevant extract of Chapter '9' of the Guide Book is to be quoted hereunder:-

*" **अध्याय-9***

मतगणना उपरान्त की प्रक्रिया

*निर्वाचन अधिकारी सदस्य ग्राम पंचायत तथा प्रधान ग्राम पंचायत के निर्वाचन परिणाम की घोषणा के पूर्व तुरन्त निर्धारित निर्वाचन परिणाम पंजिका **परिशिष्ट-14**(प्रपत्र-56) पर विवरण दर्ज करके निर्वाचित उम्मीदवार या उसके निर्वाचन अभिकर्ता के हस्ताक्षर लेगा ओर स्वंय या सहायक निर्वाचन अधिकारी द्वारा हस्ताक्षर किया जाएगा और वही अधिकारी तदन्तर तत्काल निर्वाचन परिणाम की घोषणा करेगा। निर्धारित निर्वाचन परिणाम पंजिका (प्रपत्र-56) में प्रत्येक ग्राम पंचायत के लिए अलग-अलग पृष्ठ निर्धारित रहेंगे जिसमें उस ग्राम पंचायत के सदस्य के निर्वाचन परिणाम के अन्त में प्रधान पद का निर्वाचन परिणाम का विवरण अंकित किया जाएगा और सदस्य ग्राम पंचायत के लिए सहायक निर्वाचन अधिकारी द्वारा प्रमाण पत्र परिशिष्ट-15(प्रपत्र-52) पर तथा प्रधान, क्षेत्र पंचायत सदस्य के लिए निर्वाचन अधिकारी द्वारा प्रमाण पत्र क्रमशः **परिशिष्ट-16 एंव 17** (प्रपत्र-53 एंव प्रपत्र-54) पर जारी किया जाएगा।"*

16. A careful reading of the instructions in clause '9' indicate that the Returning Officer before declaration of the result of the election would enter all details in the prescribed "Election Result Register" in परिशिष्ट-14 (Form-56) and get the signature of the elected candidate and/or his Nirvachan Abhikarta and also sign it by himself or by the Assistant Returning Officer. Thus, the election result has to be declared only

after preparation of Form-56. It further provides that the prescribed Form-56 (Election Result Register) shall contain separate pages for each Kshetra Panchayat and after preparation of the result in Form-56, the certificate in परिशिष्ट-17 (Form-54) shall be issued by the Assistant Returning Officer to the elected candidate. Form-56 in परिशिष्ट-14 and Form-54 in परिशिष्ट-17 prescribed in the Guide Book are relevant to be extracted under:-

"परिशिष्ट-14

प्रपत्र-56

निर्वाचन परिणाम पंजिका

जनपद..... विकास खण्ड .....

क्र० सं०	ग्राम पंचायत/ क्षेत्र पंचायत/ जिला पंचायत का नाम	पद/वार्ड का विवरण	**निर्वाचन परिणाम घोषणा का दिनांक व समय**	निर्वाचित उम्मीदवार का नाम एंव चुनाव चिह्न	निर्वाचित उम्मीदवार द्वारा प्राप्त मतों की संख्या	निर्वाचित उम्मीदवार के हस्ताक्षर	निर्वाचन अधिकारी / सहायक निर्वाचन अधिकारी के हस्ताक्षर
1	2	3	4	5	6	7	8

"परिशिष्ट-17

प्रपत्र-54

राज्य निर्वाचन आयोग, उत्तर प्रदेश

त्रिस्तरीय पंचायतों के सामान्य/उप निर्वाचन* (.....)

<u>प्रमाण-पत्र (सदस्य क्षेत्र पंचायत)</u>

मैं एतद्द्वारा प्रमाणित करता/करती* हूँ कि श्री/सुश्री* ..... पिता/पति*..... निवासी ग्राम पंचायत ..... विकास खण्ड ..... जनपद ..... क्षेत्र पंचायत..... के प्रादेशिक निर्वाचन क्षेत्र संख्या ..... से वर्ष ..... में सम्पन्न हुए सामान्य/उप निर्वाचन* में **सदस्य क्षेत्र पंचायत** निर्विरोध/सविरोध* निर्वाचित हुए/हुई* ।

दिनांकः .....

स्थानः .....

हस्ताक्षर.....
निर्वाचन
अधिकारी/सहायक निर्वाचन अधिकारी

का नाम ...

मुहर

प्रादेशिक निर्वाचन क्षेत्र संख्या .....

विकास खण्ड .....

तहसील .....

जनपद .....

*जो लागू न हो उसे काट दीजिए।

From the perusal of the above instructions issued by the State Election Commission, it is evident that the certificate of winning candidate can be issued by the Returning Officer only after the finalization of the election result in Form-56 which is to be sent to the District Magistrate for onward report to the State Election Commission. The issuance of the certificate of elected candidate in Form-54, thus, can only be after the declaration of the result in Form-56. The date of preparation of Form-56 or the details thereof is/are not before us. The column (4) of Form-56 must contain the date and time of the declaration of result. The instant writ petition is completely silent about the preparation of Form-56 which must have been signed by the elected candidate or his Ganana Abhikarta.

The issuance of the certificate in Form-54 by the Assistant Returning Officer without preparation of Form-56 containing the details of the date and time of the declaration of the result will be of no consequence under the scheme of the procedure formulated by the State Election Commission to supplement the Rules' 1994.

17. Moreover, in absence of any detail given by the petitioner herein regarding the preparation of Form-56 containing his signature

or of his Ganana Adhikari, we are not inclined to accept her contention that the result of the election was declared with the issuance of the certificate in Form-54 to her on 3.5.2021.

18. On the other hand, as per the details given by the counsel for the State Election Commission, the mistake in the certificate issued by the Assistant Returning Officer was corrected by the Returning Officer on the very next date i.e. 4.5.2021 as soon as it came to his knowledge. Before correction of the mistake, the notice was also sought to be served upon the petitioner. The information about the final result declaring the opposite party no. 7 as elected candidate was uploaded on the portal of the State Election Commission on 7.5.2021 at about 14:19 Hours. The issuance of the certificate by the Assistant Returning Officer in Form-54 to the petitioner herein, therefore, cannot be said to have marked the culmination of the election.

19. Having considered the scheme of the Rules 1994 and the instructions as contained in the Guide Book issued by the State Election Commission for the Panchayat General Elections-2021, we further find that the ratio of the decisions in **Kamlesh** (supra), **Smt. Sunita Patel** (supra) and **Smt. Tara Devi** (supra) will have no application in the facts and circumstances of the instant case.

The reason being that in none of the above decisions, the scheme of the declaration of the election result in the prescribed Form-56 formulated by the State Election Commission was subject matter of consideration.

The reliance placed by the counsel for the petitioner on the decision in **Smt. Sunita Patel** (supra) to assert that the certificate issued by the Returning Officer marked the culmination of the election, is, thus, of no benefit to the petitioner.

20. Much emphasis has been laid by the counsel for the petitioner on the previous date on the application of the principle of *functus officio* to assert that the Returning Officer lacked jurisdiction to make any correction in the election result after the certificate was issued declaring the petitioner as elected candidate.

21. To deal with the said submission, we may note that clerical or arithmetical mistake in any decision or errors arising therein from any accidental slip or omission, may, at any time, be corrected by the competent authority on its own motion or as soon as such an error is brought to its notice in any manner whatsoever. The Returning Officer being Incharge of his office on the relevant date was well within his jurisdiction to correct the errors of clerical/arithmetical nature. To hold otherwise would mean that the wrong result of election had to be declared by the Returning Officer even after discovering the mistake which was only of calculation/totaling of the votes cast in favour of each candidate. The accidental slip or omission attributable to the office of the Returning Officer must be corrected at the earliest possible opportunity so as to maintain the sanctity of the election and to ensure free and fair election. The Returning Officer cannot be said to be *functus officio* with respect to its power to correct its record before sending the same to the District Magistrate for declaration of the election result on the portal of the State Election Commission. The fact that the Returning Officer was holding the charge of his office on 4.5.2021, when the mistake was corrected, is not disputed before us. We, therefore, hold that till the Returning Officer was Incharge of his office under the order of the State Election Commission and the election result was not finalised by uploading the same on the portal of the State Election Commission, the Returning Officer cannot be denuded of his power to make correction of an error which was only clerical or arithmetical in nature, to put the record of his office straight. The Returning Officer is duty bound to ensure that the declaration made by it of the election

result is true; and when he had made correction of minor or formal nature for removing inadvertent error he cannot said to have become *functus officio* nor can it be said that it was outside the scope and jurisdiction of the Returning Officer under the authority given by the Election Commission.

Further, the writ petition is completely silent about the election return of polling booth nos. 180 and 181 having been received by the petitioner or her Nirvachan Abhikarta and Ganana Abhikarta. The copy of the election returns in Form-47 (as per the Guide Book) alongwith the counting sheet (Ganana Parchi) in Form 43 dated 3.5.2021 of the polling booth nos. 180 and 181 placed before us alongwith the written instructions show the description/details of the votes as is required to be noted under Rule 53 of the Rules, 1994. The total number of the votes received by each candidate have been mentioned therein.

The petitioner herein also does not dispute the details or the number of votes indicated in the memo dated 6.5.2021, subject matter of challenge in the present writ petition.

22. For the aforesaid, in the facts and circumstances of the case, we find that the mistake in the computation of the votes of two polling booths was an arithmetical/clerical mistake. The said mistake when brought to the notice of the Returning Officer on 4.5.2021 on the very next day when the certificate of the elected candidate was issued to the petitioner on 3.5.2021, he, as a vigilant officer, after scrutinizing the record of his office when found the mistake being minor/formal in nature proceeded to erase the same at the earliest by issuance of the notice to the petitioner.

It is demonstrated before us that in the process of correction, the petitioner did not participate.

23. From a thread-bare discussion on the issues raised before us, in the light of the legal position and the procedure of the declaration of the election results under Rule' 1994 and the instructions issued by the State Election Commission, we find that the action of the Returning Officer in making correction of such an error by only tallying the votes already shown in the election return Form 47 (prepared under Rule 53) cannot be said to be hit on the plea of lack of jurisdiction. Rather the re-inspection of the records by the Returning Officer was needed to maintain the sanctity and stability in the election process. There was no reason as to why a candidate who had received highest number of votes be asked to approach the Election Tribunal when the mistake could be corrected by the machinery which was operational at the relevant point of time. We may reiterate that the elections were not denotified by then and even the final result had not been declared on the Portal created by the State Election Commission for the purpose.

There is one more aspect of the matter that while exercising equitable discretionary jurisdiction under Article 226 of the Constitution of India, we must keep in mind that substantial justice is done in the matter and the High Court would not issue a writ which would revive any illegality. [Reference **Maharaja Chintamani Saran Nath Shahdeo vs. State of Bihar and others8].**

24. The quashing of the certificate issued in favour of the opposite party no. 7 would result in cancellation of the election of a candidate having attained highest number of votes. We see no reason to upset the election result and relegate the candidate having highest number of votes to approach the Election Tribunal for removal of a minor defect.

25. Moreover, before parting with the judgment, we deem it fit to express our concern

on the number of litigations flowed to this Court post declaration of the result of Member, Kshetra Panchayat. In the month of May and June, 2021 soon after the elections of Member, Kshetra Panchayat were concluded, this Court has been flooded with the writ petitions during the peak of second wave of pandemic Covid-19. Most of the writ petitions were raising the issue of the cancellation of the certificates or issuance of the subsequent certificates to the elected candidates by the Returning Officers. In almost all of the cases before us, the mistake was found to be clerical or arithmetical. The candidates whose certificates had been cancelled had vehemently pressed that the Returning Officers lacked jurisdiction to issue another certificate by cancellation of the previous certificate. Such a situation, according to us, arose on account of the language of the Rules 54 and 56 of the Rules, 1994 which give room for doubt. In the 1994 Rules, there is no provision for issuance of a certificate nor any Form for the certificate to be issued to the winning candidate had been prescribed therein.

When we notice the procedure for declaration of the result of the election as set out in the Conduct of Elections Rules, 1961, we find that Rule 64 provides for the declaration of the result in Form 21-C and that the signed copies of those forms to be sent the Election Commission. After declaration of the result in Form 21-C or Form 21-D and sending the copies thereof to the Election Commission, the certificate of the election in Form 22 is issued to the candidate therein, who has been declared elected in accordance with the provisions of Section 66 of the Representation of People Act. The manner in which the declaration is made in the prescribed format by the Returning Officer and the information and the issuance of the certificate of election in Form 22 has been prescribed in the said rule itself.

26. Rule 64 of the Conduct of Elections Rules, 1961 is quoted hereunder:-

*"**64. Declaration of result of election and return of election.**--The returning officer shall, subject to the provisions of section 65 if and so far as they apply to any particular case, then--*

(a) declare in Form 21-C or Form 21-D, as may be appropriate, the candidate to whom the largest number of valid votes have been given, to be elected under section 66 and send signed copies thereof to the appropriate authority, the Election Commission and the chief electoral officer; and

(b) Complete and certify the return of election in Form 21-E, and send signed copies thereof to the Election Commission and the chief electoral officer.] "

Similarly, Rule 29 of the Uttar Pradesh Kshettra Panchayats (Election of Pramukhs and Up-Pramukhs and Settlement of Election Disputes) Rules, 1994 prescribes the procedure for declaration of result in the following manner:-

*"**Rule 29. Declaration of result.**- When the counting of the votes has been completed and the result of the voting has been determined, the Returning Officer shall in the absence of any direction by the State Election Commission to the contrary, forthwith-*

(a) declare the result to those present;

(b) report the result to the District Magistrate, the State Election Commission and the State Government;

(c) prepare and certify a return of the election in Form VIII; and

(d) seal up in separate packets the valid ballot papers and the rejected ballot papers and record of each such packet a description of its contents."

Earlier having noted both the above rules, the Division Bench in **Smt. Tara Devi** (supra) had suggested for suitable amendments in Rules 54 and 56 of the Rules, 1994 to be made so as to bring further stability in the election process and to be avoid future litigations.

27. It appears that the State Government did not take note of the said suggestion nor any effort seems to have been made to bring the Rules 1994 at par with the Election Rules framed under the Representation of the People Act to remove all possible anamolies.

28. The apathy on the part of the State Government in making suitable amendment in the 1994 rules has resulted in the flood of avoidable litigation before this Court that too during the peak of second wave of pandemic Covid-19.

29. In our considered opinion, the proformas for preparation of the election papers and the certificate to be issued by the Returning Officer have to be prescribed in the Rules' 1994 itself and certificate to a winning candidate can only be issued after the final declaration of the result after intimation is sent to the State Election Commission as is to be made under Rule 56 of the Rules, 1994 which is also clear from the guiding instructions issued by the State Election Commission for the Panchayat Elections-2021.

30. For the above, we request the Advocate General, High Court, Allahabad to bring this judgment to the notice of the State Government to advise to make suitable amendments in the Rules 1994 in order to avoid future litigation and to bring stability in the Panchayat election process in future.

The Additional Chief Secretary, Panchayat Raj, Government of U.P., Lucknow is directed to take up the issue so as to initiate the necessary exercise at the earliest.

For the above discussion, in the facts and circumstances of the case, we do not find any merit in the challenge before us. The writ petition is, accordingly, **dismissed.**

No order as to costs.

(2021)11ILR A338
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.11.2021

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE VIKAS BUDHWAR, J.

Writ C No. 18204 of 2021

Mithlesh Narayan Tiwari ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Sanjay Mishra

Counsel for the Respondents:
C.S.C.

A. Civil Law – Witness Protection Scheme, 2018 – Protection of witnesses – Failure of State Govt. in implementing the Scheme – Held, various circulars or letters being issued by the State Government are merely an eye wash and in truth the Witness Protection Scheme, 2018 is not being properly implemented by the State respondents – High Court directed the State Government to implement the Witness Protection Scheme, 2018 forthwith. (11 and 12)

Writ petition disposed of. (E-1)

Cases relied on :-

1. Mahender Chawla & ors. Vs U.O.I. & ors.; (2019) 14 SCC 615

(Delivered by Hon'ble Surya Prakash Kesarwani, J.
&
Hon'ble Vikas Budhwar, J.)

1. Heard learned counsel for the petitioner and the learned Chief Standing Counsel.

2. This writ petition has been filed praying for the following relief :

a) Issue a writ, order or direction in the nature of certiorari to quash the order dated 16.06.2021 (letter dated 17.06.2021 passed by respondent no.2/District Magistrate/District Level Security Committee Prayagraj, District - Prayagraj.

b) Issue a writ, order or direction in the nature of mandamus commanding and directing to the respondent no.2 to take appropriate action and provide the security to petitioner.

3. Briefly stated facts of the present case are that according to the petitioner he is a witness in Case Crime No.0057 of 2018, dated 10.06.2018, under Sections 147, 148, 149, 504, 302 IPC P.S. Holagarh, District - Prayagraj. Earlier by Order dated 21.08.2020, पुलिस उपाधीक्षक 'प्रज्ञान' प्रयागराज, intimated the petitioner that there is no need for protection. Consequently, the petitioner filed the Writ C No.27614 of 2020 which was allowed and a direction was issued to the District Level Committee/Superintendent of Police, Prayagraj, to pass an order afresh in accordance with law in the light of the directions of Hon'ble Supreme Court in the case of **Mahender Chawla and Others Vs. Union of India and Others (2019) 14 SCC 615.** Again the respondents passed almost identical order on 17.06.2021 refusing to grant protection to the petitioner. Consequently, the petitioner has filed the present writ petition.

4. Learned counsel for the petitioner states that after this Court passed the order dated 05.10.2021, the respondents are giving protection on dates fixed in the trial which shall continue till the conclusion of the trial.

5. Learned Chief Standing Counsel submits that protection has been provided to the petitioner by order dated 13.10.2021. He further submits that the State Government has taken a decision to implement the **Witness Protection Scheme, 2018** and has taken several steps and it is being fully implemented.

6. To support his submissions, the learned Chief Standing Counsel has referred several paragraphs of the personal affidavit of the Secretary (Home) State of U.P. dated 08.11.2021.

7. We have carefully considered the submissions of learned counsels for the parties.

8. We find that Hon'ble Supreme Court in the case of **Mahender Chawla** (Supra) approved the Witness Protection Scheme, 2018 which is reproduced below :

Witness Protection Scheme, 2018

PREFACE

Aims & Objective:

The ability of a witness to give testimony in a judicial setting or to cooperate with law enforcement and investigations without fear of intimidation or reprisal is essential in maintaining the Rule of law. The objective of this Scheme is to ensure that the investigation, prosecution and trial of criminal offences is not prejudiced because witnesses are intimidated or frightened to give evidence without protection from violent or other criminal recrimination. It aims to promote law enforcement by facilitating the protection of persons who are involved directly or indirectly in providing assistance to criminal law enforcement agencies and overall administration of Justice. Witnesses need to be given the confidence to come forward to assist law enforcement and Judicial Authorities with full assurance of safety. It is aimed to identify series of measures that may be adopted to safeguard witnesses and their family members from intimidation and threats against their lives, reputation and property.

Need and justification for the scheme:

Jeremy Bentham has said that "Witnesses are the eyes and ears of justice." In cases involving influential people, witnesses turn hostile because of threat to life and property. Witnesses find that there is no legal obligation by the state for extending any security.

The Hon'ble Supreme Court of India also held in State of Gujarat v. Anirudh Singh MANU/SC/0749/1997 : (1997) 6 SCC 514 that: "It is the salutary duty of every witness who has the knowledge of the commission of the crime, to assist the State in giving evidence." Malimath Committee on Reforms of Criminal Justice System, 2003 said in its report that "By giving evidence relating to the commission of an offence, he performs a sacred duty of assisting the court to discover the truth". Zahira Habibulla H. Sheikh and Anr. v. State of Gujarat MANU/SC/0322/2004 : 2004 (4) SCC 158 SC while defining Fair Trial said "If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial".

First ever reference to Witness Protection in India came in 14th Report of the Law Commission of India in 1958. Further reference on the subject are found in 154th and 178th report of the Law Commission in India. 198th Report of the Law Commission of India titled as "Witness Identity Protection and Witness Protection Programmes, 2006" is dedicated to the subject.

The Hon'ble Supreme Court observed in Zahira case supra, "country can afford to expose its morally correct citizens to the peril of being harassed by anti-social elements like rapists and murderers". The 4th National Police Commission Report, 1980 noted 'prosecution witnesses are turning hostile because of pressure of Accused and there is need of Regulation to check manipulation of witnesses."

The Legislature has introduced Section 195A Indian Penal Code in 2006 making Criminal Intimidation of Witnesses a criminal offence punishable with seven years of imprisonment. Likewise, in statues namely Juvenile Justice (care and Protection of Children) Act, 2015, Whistle Blowers Protection Act, 2011, Protection of Children from Sexual Castes and Tribes (Prevention of Atrocities) Act, 1989 also provides for safeguarding witnesses again the threats. However no formal structured programme has been introduced as on date for addressing the issue of witness protection in a holistic manner.

In recent year's extremism, terrorism and organized crimes have grown and are becoming stronger and more diverse. In the investigation becoming and prosecution of such crimes, it is essential that witnesses, have trust in criminal justice system. Witnesses need to have the confidence to come forward to assist law enforcement and prosecuting agencies. They need to be assured that they will receive support and protection from intimidation and the harm that criminal groups might seek to inflict upon them in order to discourage them from co-operating with the law enforcement agencies and deposing before the court of law. Hence, it is high time that a scheme is put in place for addressing the issues of witness protection uniformly in the country.

Scope of the Scheme:

Witness Protection may be as simple as providing a police escort to the witness up to the Courtroom or using modern communication technology (such as audio video means) for recording of testimony. In other more complex cases, involving organised criminal group, extraordinary measures are required to ensure the witness's safety viz. anonymity, offering temporary residence in a safe house, giving a new identity, and relocation of the witness at an undisclosed place. However, Witness protection needs of a witness may have to be viewed on case to case basis depending upon their vulnerability and threat perception.

1. Short Title And Commencement:-

(a) The Scheme shall be called "Witness Protection Scheme, 2018

(b) It shall come into force from the date of Notification.

Part I

2. Definitions:-

*(a) "**Code**" means the Code of Criminal Procedure, 1973 (2 of 1974);*

*(b) "**Concealment of Identity of Witness**" means and includes any condition prohibiting publication or revealing, in any manner, directly or indirectly, of the name, address and other particulars which may lead to the identification of the witness during investigation, trial and post-trial stage;*

*(c) "**Competent Authority**" means a Standing Committee in each District chaired by District and Sessions Judge with Head of the Police in the District as Member and Head of the Prosecution in the District as its Member Secretary.*

*(d) "**Family Member**" includes parents/guardian, spouse, live-in partner, siblings, children, grandchildren of the witness;*

*(e) "**Form**" means "Witness Protection Application Form" appended to this Scheme;..*

*(f) "**In Camera Proceedings**" means proceedings wherein the Competent Authority/Court allows only those persons who are necessary to be present while hearing and deciding the witness protection application or deposing in the court;*

*(g) "**Live Link**" means and include a live video link or other such arrangement whereby a witness, while not being physically present in the courtroom for deposing in the matter or interacting with the Competent Authority;*

*(h) "**Witness Protection Measures**" means measures spelt out in Clause 7, Part-III, Part-IV and Part V of the Scheme.*

*(i) "**Offence**" means those offences which are punishable with death or life imprisonment or an imprisonment up to seven years and above and also offences punishable Under Section 354, 354A, 354B, 354C, 354D and 509 of Indian Penal Code.*

*(j) "**Threat Analysis Report**" means a detailed report prepared and submitted by the Head of the Police in the District Investigating the case with regard to the seriousness and credibility of the threat perception to the witness or his family members. It shall contain specific details about the*

nature of threats by the witness or his family to their life, reputation or property apart from analyzing the extent, the or persons making the threat, have the intent, motive and resources to implement the threats. It shall also categorize the threat perception apart from suggesting the specific witness protection measures which deserves to be taken in the matter;

*(k) "**Witness**" means any person, who posses information or document about any offence;*

*(l) "**Witness Protection Application**" means an application moved by the witness in the prescribed form before a Competent Authority for seeking Witness Protection Order. It can be moved by the witness, his family member, his duly engaged counsel or IO/SHO/SDPO/Prison SP concerned and the same shall preferably be got forwarded through the Prosecutor concerned;*

*(m) "**Witness Protection Fund**" means the fund created for bearing the expenses incurred during the implementation of Witness Protection Order passed by the Competent Authority under this scheme;*

*(n) "**Witness Protection Order**" means an order passed by the Competent Authority detailing the witness protection measures to be taken;*

*(o) "**Witness Protection Cell**" means a dedicated Cell of State/UT Police or Central Police Agencies assigned the duty to implement the witness protection order.*

Part II

*3. **Categories Of Witness As Per Threat Perception:-***

Category 'A': *Where the threat extends to life of witness or his family members, during investigation/trial or thereafter.*

Category 'B': *Where the threat extends to safety, reputation or property of the witness or his family members, during the investigation/trial or thereafter.*

Category 'C': *Where the threat is moderate and extends to harassment or intimidation of the witness or his family member's, reputation or property, during the investigation/trial or thereafter.*

4. ***State Witness Protection Fund:-***

(a) There shall be a Fund, namely, the Witness Protection Fund from which the expenses incurred during the implementation of Witness Protection Order passed by the Competent Authority and other related expenditure, shall be met.

(b) The Witness Protection Fund shall comprise the following:

i. Budgetary allocation made in the Annual Budget by the State Government;

ii. Receipt of amount of costs imposed/ordered to be deposited by the courts/tribunals in the Witness Protection Fund;

iii. Donations/contributions from Charitable

Institutions/Organizations and individuals permitted by Central/State Governments.

iv. Funds contributed under Corporate Social Responsibility.

(c) The said Fund shall be operated by the Department/Ministry of Home under State/UT Government.

5. ***Filing Of Application Before Competent Authority:-***

The application for seeking protection order under this scheme can be filed in the prescribed form before the Competent Authority of the concerned District where the offence is committed, through its Member Secretary along with supporting documents, if any.

6. ***Procedure For Processing The Application****:-*

(a) As and when an application is received by the Member Secretary of the Competent Authority, in the prescribed form, it shall forthwith pass an order for calling for the Threat Analysis Report from the ACP/DSP in charge of the concerned Police Sub-Division.

(b) Depending upon the urgency in the matter owing to imminent threat, the Competent Authority can pass orders for interim protection of the witness or his family members during the pendency of the application.

(c) The Threat Analysis Report shall be prepared expeditiously while maintaining full confidentiality and it shall reach the Competent Authority

within five working days of receipt of the order.

(d) The Threat Analysis Report shall categorize the threat perception and also include suggestive protection measures for providing adequate protection to the witness or his family.

(e) While processing the application for witness protection, the Competent Authority shall also interact preferably in person and if not possible through electronic means with the witness and/or his family members/employers or any other person deemed fit so as to ascertain the witness protection needs of the witness.

(f) All the hearings on Witness Protection Application shall be held in-camera by the Competent Authority while maintaining full confidentiality.

(g) An application shall be disposed of within five working days of receipt of Threat Analysis Report from the Police authorities.

(h) The Witness Protection Order passed by the Competent Authority shall be implemented by the Witness Protection Cell of the State/UT or the Trial Court, as the case may be. Overall responsibility of implementation of

all witness protection orders passed by the Competent Authority shall lie on the Head of the Police in the State/UT. However the Witness Protection Order passed by the Competent Authority for change of identity and/or relocation shall be implemented by the Department of Home of the concerned State/UT.

(i) Upon passing of a Witness Protection Order, the Witness Protection Cell shall file a monthly follow-up report before the Competent Authority.

(j) In case, the Competent Authority finds that there is a need to revise the Witness Protection Order or an application is moved in this regard, and upon completion of trial, a fresh Threat Analysis Report shall be called from the ACP/DSP in charge of the police sub-division concerned.

7. Types Of Protection Measures:-

The witness protection measures ordered shall be proportionate to the threat and shall be for a specific duration not exceeding three months at a time.

They may include:

(a) Ensuring that witness and Accused do not come face to face

during investigation or trial;

(b) Monitoring of mail and telephone calls;

(c) Arrangement with the telephone company to change the witness's telephone number or assign him or her an unlisted telephone number;

(d) Installation of security devices in the witness's home such as security doors, CCTV, alarms, fencing etc;

(e) Concealment of identity of the witness by referring to him/her with the changed name or alphabet;

(f) Emergency contact persons for the witness;

(g) Close protection, regular patrolling around the witness's house;

(h) Temporary change of residence to a relative's house or a nearby town;

(i) Escort to and from the court and provision of Government vehicle or a State funded conveyance for the date of hearing;

(j) Holding of in-camera trials;

(k) Allowing a support person to remain present during recording of statement and deposition;

(l) Usage of specially designed vulnerable witness court rooms which have special arrangements like live video links, one way mirrors and screens apart from separate passages for witnesses and Accused, with option to modify the image of face of the witness and to modify the audio feed of the witness' voice, so that he/she is not identifiable;

m) Ensuring expeditious recording of deposition during trial on day to day basis without adjournments;

(n) Awarding time to time periodical financial aids/grants to the witness from Witness Protection Fund for the purpose of re-location, sustenance or starting a new vocation/profession, if desired;

(o) Any other form of protection measures considered necessary.

8. Monitoring and review:- *Once the protection order is passed, the Competent Authority would monitor its implementation and can review the same in terms of follow-up reports received in the matter. However, the Competent Authority shall review the Witness Protection Order on a quarterly basis based on the monthly follow-up report submitted by the Witness Protection Cell.*

Part III

9. Protection Of Identity:-

During the course of investigation or trial of any offence, an application for seeking identity protection can be filed in the prescribed form before the Competent Authority through its Member Secretary.

Upon receipt of the application, the Member Secretary of the Competent Authority shall call for the Threat Analysis Report. The Competent Authority shall examine the witness

or his family members or any other person it deem fit to ascertain whether there is necessity to pass an identity protection order.

During the course of hearing of the application, the identity of the witness shall not be revealed to any other person, which is likely to lead to the witness identification. The Competent Authority can thereafter, dispose of the application as per material available on record.

Once, an order for protection of identity of witness is passed by the Competent Authority, it shall be the responsibility of Witness Protection Cell to ensure that identity of such witness/his or her family members including

name/parentage/occupation/address/digital

footprints are fully protected.

As long as identity of any witness is protected under an order of the Competent Authority, the Witness Protection Cell shall provide details of persons who can be contacted by the witness in case of emergency.

Part IV

10. Change Of Identity:- *In appropriate cases, where there is a request from the witness for change of*

identity and based on the Threat Analysis Report, a decision can be taken for conferring a new identity to the witness by the Competent Authority.

Conferring new identities includes new name/profession/parentage and providing supporting documents acceptable by the Government Agencies. The new identities should not deprive the witness from existing educational/professional/property rights.

Part V

11. Relocation Of Witness:- *In appropriate cases, where there is a request from the witness for relocation and based on the Threat Analysis Report, a decision can be taken for relocation of the witness by the Competent Authority.*

The Competent Authority may pass an order for witness relocation to a safer place within the State/UT or territory of the Indian Union keeping in view the safety, welfare and wellbeing of the witness. The expenses shall be borne by the Witness Protection Fund.

Part VI

12. Witnesses To Be Apprised Of The Scheme:- *Every state shall give wide publicity to this Scheme. The IO and the Court shall inform witnesses about the existence of "Witness Protection Scheme" and its salient features.*

13. Confidentiality And Preservation Of Records:- *All stakeholders including the Police, the Prosecution Department, Court Staff, Lawyers from both sides shall maintain full confidentiality and shall ensure that under no circumstance, any record, document or information in relation to the proceedings under this scheme shall be shared with any person in any manner except with the Trial Court/Appellate Court and that too, on a written order.*

All the records pertaining to proceedings under this scheme shall be preserved till such time the related trial or appeal thereof is pending before a Court of Law. After one year of disposal of the last Court proceedings, the hard copy of the records can be weeded out by the Competent Authority after preserving the scanned soft copies of the same.

14. Recovery Of Expenses:-

In case the witness has lodged a false complaint, the Home Department of the concerned Government can initiate proceedings for recovery of the expenditure incurred from the Witness Protection Fund.

15. Review:-

In case the witness or the police authorities are aggrieved by the decisions of the Competent Authority, a review application may be filed within 15 days of

passing of the orders by the Competent Authority.

Witness Protection Application

under

Witness Protection Scheme, 2018

(To be filed in duplicate)

Before,
The Competent Authority,
District
Application for:
1. Witness Protection
2. Witness Identity Protection
3. New Identity
4. Witness Relocation

1.	**Particulars of the Witness** (Fill in Capital):	
	(1) Name	
	(2) Age	
	(3)Gender (Male/Female/Other)	
	(4) Father's/ Mother's Name	
	(5) Residential Address	
	(6) Name and other details of family members of the witness who are receiving or perceiving threats	
	(7)Contact details (Mobile/e-mail)	
2.	**Particulars of criminal matter:**	
	(1) FIR	
	(2) Under Section	
	(3) Police Station	
	(4) District	
	(5) D.D. No. (in case FIR not yet registered)	
	(6) Cr. Case No. (in case of private complaint)	
3.	**Particulars of the accused** (if available/known):	
	(1) Name	
	(2) Address	
	(2) Address	
	(4) Email id	
4.	**Name & other particulars of the person giving/ suspected of giving threats**	
5.	**Nature of threat perception. Please give brief details of threat received in the matter with specific date, place, mode and words used**	
6.	**Type of witness protection measures prayed by/for the witness**	
7.	**Details of interim/Urgent Witness Protection needs, if required**	
	Protection needs, if required	

Applicant/witness can use extra sheets for giving additional information.

_____

(Full Name with signature)
Date:.....
Place:..... ...

UNDERTAKING

1 . I undertake that I shall fully cooperate with the competent authority and the Department of Home of the State and Witness Protection Cell.

2. I certify that the information provided by me in this application is true and correct to my best knowledge and belief.

3 . I understand that in case, information given by me in this application is found to be false, competent authority under the scheme reserves the right to recover the expenses incurred on me from out of the Witness Protection Fund.

(Full Name with signature)
Date:.....
Place:.....

9. After reproducing the aforequoted Witness Protection Scheme, 2018, Hon'ble Supreme Court in the case of **Mahender Chawla** (Supra) further observed/directed as under :

"27. As is clear from its reading, the essential features of the Witness Protection

Scheme, 2018 include identifying categories of threat perceptions, preparation of a "Threat Analysis Report" by the Head of the Police, types of protection measures like ensuring that the witness and accused do not come face to face during investigation, etc. protection of identity, change of identity, relocation of witness, witnesses to be apprised of the scheme, confidentiality and preservation of records, recovery of expenses, etc.

28. Since it is beneficial and benevolent scheme which is aimed at strengthening the criminal justice system in this country, which shall in turn ensure not only access to justice but also advance the cause of justice itself, all the States and Union Territories also accepted that suitable directions can be passed by the Court to enforce the said scheme as a mandate of the Court till the enactment of a statute by the legislatures.

29. It is clear from the aforesaid events that the Scheme is the outcome of the efforts put in by the Central Government with due assistance not only from the State Governments as well as Union Territories but other stakeholders including police personnel, NALSA and State Legal Services Authorities, High Courts and even civil society. There is no reason not to accede to the aforesaid submission of the learned Attorney General and other respondents.

35. One thing which emerges from the aforesaid discussion is that there is a paramount need to have witness protection regime, in a statutory form, which all the stakeholders and all the players in the criminal justice system concede. At the same time no such legislation has been brought about. These are the considerations which had influenced this Court to have a holistic regime of witness protection which should be considered as law under Article 141 of the Constitution till a suitable law is framed

36. We, accordingly, direct that:

36.1. This Court has given its imprimatur to the Scheme prepared by Respondent 1 which is approved hereby. It comes into effect forthwith.

36.2 The Union of India as well as the States and the Union Territories shall enforce the Witness Protection Scheme, 2018 in letter and spirit.

36.3 It shall be the "law" under Articles 141/142 if the Constitution, till the enactment of suitable parliamentary and/or State legislations on the subject.

36.4 In line with the aforesaid provisions contained in the Scheme, in all the district courts in India, Vulnerable Witness Deposition Complexes shall be set up by the States and Union Territories. This should be achieved within a period of one year i.e. by the end of the year 2019. The Central Government should also support this endeavour of the States/Union Territories by helping them financially and otherwise."

10. In paragraph 8 of his personal affidavit the Secretary (Home) has stated that Standing Committee consisting of District and Sessions Judge (Chairman), District Magistrate (Member Secretary) and Senior Superintendent of Police/Superintendent of Police (Member) has been constituted in each District of Uttar Pradesh. A Chart containing the description of Constitution of standing committee in each district has been filed as Annexure 5 to the personal affidavit.

11. However, from perusal of the personal affidavit, it appears that merely letters have been issued by the State Government and its top officials to the District Level Officers and the Standing Committees have been constituted but the Witness Protection Scheme, 2018 is not being implemented in letter and spirit which fact is further evident from the facts of the present case itself that the petitioner (witness) to get protection under the aforesaid scheme has to approach this court twice and concerned authorities have passed the orders without any

sense of responsibility. Despite the orders of this Court dated 10.06.2020 and 19.03.2021, passed in Writ C No.8925 of 2020 and Writ C No.27614 of 2020 respectively the State respondents repeatedly passed the same order. It is only after the present writ petition was filed and an order dated 05.10.2021 was passed, only then the State respondents have given protection to the petitioner by passing the order dated 30.10.2021. This instance itself is sufficient to discern the truth that various circulars or letters being issued by the State Government are merely an eye wash and in truth the Witness Protection Scheme, 2018 is not being properly implemented by the State respondents.

12. In view of the aforesaid, we **dispose** of this writ petition with the directions to the State Government and all its concerned authorities/committees to implement the Witness Protection Scheme, 2018 forthwith as well as the directions issued by the Hon'ble Supreme Court in the case of **Mahender Chawla** (Supra) forthwith.

(2021)11ILR A347
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.08.2021

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE JAYANT BANERJI, J.

Writ-C No. 18612 of 2021

M/s Sri Maa Chemist, Kanpur Nagar
...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Madhusudan Dikshit

Counsel for the Respondents:
C.S.C.

A. Drugs and Cosmetics Rules, 1945 – Rule 66 – Licence in favour of a Firm – It's cancellation after death of one partner – Legality challenged – Opportunity of hearing, when is not required to be provided – Nature of the cancellation order, punitive or declaratory – Impact – Held, the order impugned is not punitive but declaratory in nature as it merely declares about the automatic consequence of condition no. 5 in the licence. Condition no. 5 is an enabling provision whereunder a firm even after losing a partner could continue its business under the licence for three months – As no fresh licence was obtained within that window period and by the time the petitioner gave information regarding death of one of its partners, already three months had passed, the licence stood automatically lapsed in terms of the aforesaid condition no. 5 – Thus the impugned order being more of an information about automatic lapse of licence, no opportunity of hearing was required to be provided before its issuance – Since cancellation order is based on no misconduct, High Court issued the direction. (Para 7, 8 and 10)

B. Firm – Nature and status – Distinction from Body Corporate – A body corporate is distinct legal entity separate from its shareholders, whereas an ordinary partnership firm is not a distinct legal entity. It is only a compendium of its partners – Even the registration of a firm does not mean that it becomes a distinct legal entity like a company. Hence, the partners of a firm are co-owners of the property of the firm, unlike shareholders who are not co-owners of the property of the company. (Para 6)

C. Firm – Death of the partner – Effect – On death of any of the partners of the firm, the constituents of the firm change though, by an enabling clause in the partnership agreement, the firm may not automatically dissolve on death of any one of the partners –Nevertheless, on death of one of the partners, the constitution of the firm would definitely change. (Para 6)

Writ petition disposed of .(E-1)

Cases relied on :-

1. V. Subramaniam Vs Rajesh Raghuvandra Rao; (2009) 5 SCC 608.

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

1. Heard Shri Madhusudan Dixit, learned counsel for the petitioner; the learned Standing Counsel for the respondent nos.1 and 2; and have perused the record.

2. The petitioner is a firm whose partners were Mannu Lal Manjhi; Anil Kumar; Reeta Singh; and Anshu Gambhir. The said firm was granted a drug licence in Form-20 of the Drugs and Cosmetics Rules, 1945. Condition no.5 of the licence is as follows:

"The licensee shall inform the Licensing Authority in writing in the event of any change in the constitution of the firm operating under the licence. Where any change in the constitution of the firm takes place, the current licence shall be deemed to be valid for a maximum period of three months from the date on which the change takes place unless, in the meantime, a fresh licence has been taken from the Licensing Authority in the name of the firm with the changed constitution"

3. Mannu Lal Manjhi, one of the partners of the firm, expired on 09.09.2020. An application giving information of death of Mannu Lal Manjhi was submitted to the Licensing Authority on 01.07.2021. The Licensing Authority, by the order impugned dated 03.07.2021, declared the licence cancelled under the Rules.

4. The order impugned dated 03.07.2021 has been challenged by the licencee-firm on ground that paragraph 12 of the partnership deed between partners of the firm specifically provided that in the event of death of any partner, the partnership shall not dissolve but shall continue among the surviving partners and the legal heirs/representatives of the deceased partner, if they so desired. It has been urged that since the partnership did not automatically dissolve on death of any one of the partners, condition no.5 of the licence, on the basis of which the Licensing Authority has taken a decision that licence automatically lapsed, would not apply as the firm continued with the remaining partners.

5. In addition to above, the learned counsel for the petitioner submitted that under Rule 66 of the Drugs and Cosmetics Rules, 1945, the licence could only be cancelled after giving opportunity of hearing to the licencee but since no such opportunity was provided, the order impugned is liable to be quashed.

6. Insofar as the first contention of the learned counsel for the petitioner that there was no change in the constitution of the firm, therefore, condition no.5 was not applicable, is concerned, we are of the view that there is a difference between a firm and a body corporate. A body corporate is distinct legal entity separate from its shareholders, whereas an ordinary partnership firm is not a distinct legal entity. It is only a compendium of its partners. Even the registration of a firm does not mean that it becomes a distinct legal entity like a company. Hence, the partners of a firm are co-owners of the property of the firm, unlike shareholders who are not co-owners of the property of the company, **(Vide V. Subramaniam v. Rajesh Raghuvandra Rao, (2009) 5 SCC 608, para 11)**. On death of any of the partners of the firm, the constituents of the firm change though, by an enabling clause in the partnership agreement, the firm may not automatically dissolve on death of any one of the partners. Nevertheless, on death of one of the partners, the constitution of the firm would definitely change. Therefore, the contention of the learned counsel for the

petitioner that on mere death of any one of the partners, the constitution of the firm would not change, is liable to be rejected and is, accordingly, rejected.

7. Insofar as the second contention of the learned counsel for the petitioner that licence cancellation stood vitiated as no opportunity of hearing was given to the petitioner before passing the order impugned is concerned, suffice it to say that the order impugned is not punitive but declaratory in nature as it merely declares about the automatic consequence of condition no.5 in the licence. Importantly, condition no.5 of the licence has not been challenged. Otherwise also, condition no.5 is an enabling provision whereunder a firm even after losing a partner could continue its business under the licence for three months. It thus, gives a time window to the licencee firm to obtain a fresh licence with the changed constitution of the firm.

8. In the instant case, as no fresh licence was obtained within that window period and by the time the petitioner gave information regarding death of one of its partners, already three months had passed, the licence stood automatically lapsed in terms of the aforesaid condition no.5. Thus, in our view, the impugned order being more of an information about automatic lapse of licence, no opportunity of hearing was required to be provided before its issuance.

9. In view of above, we find no merit in this petition. The prayer of the petitioner to quash the impugned order dated 03.07.2021 is, accordingly, rejected.

10. However, since the order impugned is not based on any misconduct on the part of the firm or any of its partners, we deem it appropriate to dispose of this petition by giving liberty to the petitioner to apply for a fresh licence for the firm by giving its new constitution. It is expected that if any such application is submitted after completing all the necessary formalities, the same shall be addressed in accordance with law and appropriate orders shall be passed thereon, preferably, within a period of one month from the date of filing of such application alongwith a copy of this order.

With the aforesaid observations and directions, the writ petition is **disposed of.**

(2021)11ILR A349
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.09.2021

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE JAYANT BANERJI, J.

Writ-C No. 20607 of 2021

Ishwar Singh & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Abhitabh Kumar Tiwari

Counsel for the Respondents:
C.S.C., Sri Kartikeya Saran

A. Electricity Act, 2003 – Section 67 – Works of Licensees Rules, 2006 – Rules 3 and 10 – Shifting of transmission line – Liability of licensee – Compensation for damages – Though the licensee is empowered to carry out the works contemplated under the Act, 2003 and the Licensees Rules, 2006 framed thereunder but, for carrying out such works, it must keep in mind that minimal damage or inconvenience is caused to the public or private person and their property – However, if damage is caused or the work carried out is to the detriment or inconvenience of any party,

the licensee would have to fully compensate the person concerned for any damage, detriment or inconvenience caused by him or any one employed by him – The order of District Magistrate to shift transmission line was held within jurisdiction. (Para 10 and 12)

B. Civil Law – Revisional power of UP Electricity Regulatory Commission – Scope – Revisional power and Appellate power – Distinction – Held, no doubt, the revisional powers of the Commission are not limited by the provisions of the Code of Civil Procedure but the term revision by itself limits the scope of consideration and it cannot be equated to appellate power – Whereas an appeal confers statutory vested right on the litigant which accrues the moment the proceedings in question are instituted, the right of revision is merely a discretionary power to be exercised by the revisional court according to the circumstances of the case or exigencies of the situation – A person cannot as a matter of right claim the proceedings to be revised. (Para 14 and 15)

Writ petition dismissed. (E-1)

Cases relied on :-

1. Chandrika Prasad (dead) through LRS & ors. Vs Umesh Kumar Verma & ors.; (2002) 1 SCC 531

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

1. Heard learned counsel for the petitioners; learned Standing Counsel for the respondents 1, 2 and 3; Sri Kartikeya Saran for the respondents 4 and 5; and perused the record.

2. The petitioner seeks quashing of the order, dated 17.03.2021, passed by U.P. Electricity Regulatory Commission, Lucknow (for short the 'Commission') in Petition No.1530 of 2019. The petitioners also seek quashing of the orders dated 26.08.2019 and 05.01.2018 passed by the District Magistrate, Meerut in Misc. Case No.14 of 2018 and Misc. Case No.7 of 2016, respectively. In addition to above, the petitioners pray for a direction upon the respondents to lay electricity transmission lines according to the sanctioned map approved by the District Magistrate, Meerut (hereinafter referred to as the D.M.) vide order dated 23.08.2016 passed in Misc. Case No.2 of 2016.

3. To have a clear understanding of the controversy at hand, a glimpse at the facts would be apposite. Paschimanchal Vidyut Vitran Nigam Limited-4th respondent (for short the Nigam) proposed to lay an electricity transmission line in village Karnawal, District Meerut. The route for the line was to pass from near a structure (room) that housed a tube-well of the petitioners. Aggrieved with proposed line's close proximity with that structure, an application was submitted by the petitioners before the D. M. with copy to the Managing Director (for short M.D.) of the Nigam. The M. D. of the Nigam, on 29.05.2015, passed an order rejecting the application of the petitioners after noticing and observing that the proposed line was not passing from over the room or structure housing the tube-well of the petitioners and that the poles of the proposed line were placed on chak-road (i.e. village path-way), though near petitioners' place but at a distance which would obviate any threat or danger of an accident. Aggrieved with rejection of their application, the petitioners filed Writ-C No.10033 of 2016, which was disposed off, vide order dated 31.03.2016, by giving liberty to the petitioners to apply to the D. M. in terms of the second proviso to Rule 3(b) of the Works of Licensees Rules, 2006 (for short 'Licensees Rules, 2006') framed under the Electricity Act, 2003 (for short 'Act, 2003'). Pursuant to that liberty, the petitioners filed a representation before the D.M. The D.M., after calling for reports, vide order dated 23.08.2016, directed shifting of the proposed transmission line,. That shift made the transmission line to pass through the fields of

few tenure holders. Consequently, Jaipal Singh and another (the predecessor-in-interest of the respondents 6/1 to 6/3) filed Writ-C No.48248 of 2016, which was disposed off, vide order dated 04.10.2016, by giving liberty to those petitioners to represent their cause to the D.M. under the Licensees Rules, 2006. As a result, the predecessor-in-interest of the respondents 6/1 to 6/3 submitted a representation before the D.M. The D.M. again examined the matter and, after considering spot inspection report, upon finding that the initially proposed route of the transmission line, prior to its alteration by order dated 23.08.2016, was to be mounted on poles installed on the chak-road adjoining plot Nos.1239, 1260, 1261, 1262, 1265, 1266 and 1267 and was not passing over anybody's field, by his order dated 05.01.2018 affirmed the original proposed route of the transmission line.

4. Being aggrieved with the restoration of the original route, the petitioners filed Writ-C No.11086 of 2018 to question the order dated 05.01.2018 on the ground that the D. M. held no jurisdiction to revisit the order dated 23.08.2016 which was passed after hearing both sides, particularly, when it was not challenged in Writ-C No.48248 of 2016; and that the writ court's direction issued in Writ-C No.48248 of 2016 was obtained by concealing the order dated 23.08.2016. After noticing the aforesaid plea taken by the petitioners, Writ-C No.11086 of 2018 was disposed off, vide order dated 30.03.2018, by giving liberty to the petitioners to seek for recall of the order dated 05.01.2018 passed by the D.M. Pursuant to that liberty, the petitioners filed recall application before the D.M. This recall application was rejected by impugned order dated 26.08.2019.

5. A perusal of the order dated 26.08.2019 would reveal that it was passed after considering a report dated 14.06.2019 submitted by a team comprising Executive Engineer, Vidyut Vitran Khand-3, Meerut; Superintending Engineer (Gramin), Vidyut Vitran; and Additional District Magistrate (Finance and Revenue), Meerut. The said team conducted spot inspection and prepared alignment map, as per which, seven pillars were found standing on spot. It also found that there was no drain (Naali) on spot and all the pillars were erected on chak-road thereby obviating violation of property rights of any tenure holder. The report also indicated that the poles that were put were at a safe distance from the rooms established by the petitioners on plot nos.1260 and 1261 to house the tube-well. In the light of this report and after dealing with all the arguments and material brought on record, the recall application was rejected by a well considered order.

6. Aggrieved with the order dated 26.08.2019, the petitioners filed Writ-C No.32783 of 2019, which was disposed off, vide order dated 15.10.2019, by giving liberty liberty to the petitioners to avail alternative remedy of revision available under sub-rule (3) of Rule 3 of the Licensees Rules, 2006. Pursuant to that liberty, the petitioners moved an application before the Commission, which was registered as Petition No.1530 of 2019. The Commission dismissed the revision vide impugned order dated 17.03.2021.

7. Assailing the impugned orders, the learned counsel for the petitioners has submitted as follows:- (a) the D. M. had no jurisdiction to pass a fresh order of the nature passed by him on 05.01.2018 as he had already taken a decision on 23.08.2016 and, as there existed no power of review, the recall application of the petitioners ought to have been allowed; (b) the Commission did not afford opportunity of personal hearing to the counsel for the petitioners therefore, the order passed by the Commission is vitiated; and (c) the Commission has failed to exercise its jurisdiction by limiting the scope of revision to examine only jurisdictional errors, at par with those revisional courts that exercise powers

under the Code of Criminal Procedure and Civil Procedure Code when, otherwise, there existed no such limitation on Commission's powers under the Licensees Rules, 2006. The learned counsel for the petitioners thus contended that the order passed by the Commission deserves to be set aside and the matter be remanded back to the Commission for fresh adjudication.

8. **Per contra**, learned counsel for the respondents submitted that D.M.'s order dated 23.08.2016 altering the proposed route of the line did not address the grievance of Jaipal Singh (the predecessor-in-interest of the respondents 6/1 to 6/3). Under the circumstances, as the altered route affected the right of predecessor-in-interest of the respondents 6/1 to 6/3, he had a right to approach the D.M. Thus, the order passed by the D. M. dated 05.01.2018 cannot be said to be without jurisdiction. Moreover, now, the recall application of the petitioners has been rejected by a speaking order, after considering the case of both sides and taking into consideration the spot inspection report which clearly indicated that the proposed transmission line is not to pass over land of any tenure holder but is to be mounted on towers erected on chak-road. With regard to the submission that the petitioners were not given opportunity of hearing by the Commission, it was submitted that due opportunity of hearing was given by the Commission. The order of the Commission reflects that 27.10.2020 was the date fixed for hearing but the counsel for the petitioners did not appear. Further, paragraph 8 of the impugned order passed by the Commission reflects that the Commission has examined submissions made by all the parties. With regard to the contention that the Commission did not properly examine the matter under the pretext that its revisional jurisdiction is limited, it was submitted that the Commission examined the legality of the order impugned before it and its approach did not suffer from any legal infirmity.

9. Having noticed the rival submissions, before we proceed to assess the weight of the respective submissions, it would be useful to have a glance at the relevant provisions. The Licensees Rules, 2006 have been framed in exercise of the powers conferred upon the Central Government under Clause (e) of sub-section (2) of Section 176 read with sub-section (2) of Section 67 of the Act, 2003. Sub-section (2) of Section 67 empowers Appropriate Government to frame rules in respect of carrying out works by the licensee. Rule 3 of the Licensees Rules, 2006 confers certain powers on the licensee and also provides for a mechanism to keep a check and control on exercise of those powers. Rule 3 is extracted below:-

"3. Licensee to carry out works.--

(1) A licensee may--

(a) carry out works, lay down or place any electric supply line or other works in, through, or against, any building, or on, over or under any land whereon, whereover or whereunder any electric supply-line or works has not already been lawfully laid down or placed by such licensee, with the prior consent of the owner or occupier of any building or land;

(b) fix any support of overhead line or any stay or strut required for the purpose of securing in position any support of an overhead line on any building or land or having been so fixed, may alter such support:

Provided that in case where the owner or occupier of the building or land raises objections in respect of works to be carried out under this rule, the licensee shall obtain permission in writing from the District Magistrate or the Commissioner of Police or any other officer authorised by the State Government in this behalf, for carrying out the works:

Provided further that if at any time, the owner or occupier of any building or land on which any works have been carried out or any

support of an overhead line, stay or strut has been fixed shows sufficient cause, the District Magistrate or the Commissioner of Police, or the officer authorised may by order in writing direct for any such works, support, stay or strut to be removed or altered.

(2) When making an order under sub-rule (1), the District Magistrate or the Commissioner of Police or the officer so authorised, as the case may be, shall fix, after considering the representations of the concerned persons, if any, the amount of compensation or of annual rent, or of both, which should in his opinion be paid by the licensee to the owner or occupier.

(3) Every order made by a District Magistrate or a Commissioner of Police or an authorised officer under sub-rule (1) shall be subject to revision by the Appropriate Commission.

(4) Nothing contained in this rule shall effect the powers conferred upon any licensee under section 164 of the Act."

Sub-section (3) of Section 67 of the Act, 2003, provides the guiding principle for exercise of those powers in following terms:-

"A licensee shall, in exercise of any of the powers conferred by or under this section and the rules made thereunder, cause as little damage, detriment and inconvenience as may be, and shall make full compensation for any damage, detriment or inconvenience caused by him or by any one employed by him."

Likewise, Rule 10 of the Licensees Rules, 2006 further guides exercise of that power by providing as follows:-

*"**Avoidance of public nuisance, environmental damage and unnecessary damage to the public and private property by such works.--**The licensee shall, while carrying out works, ensure that such works do not cause public nuisance, environmental damage and unnecessary damage to the public or private property."*

10. A combined reading of the extracted provisions would reveal that though a licensee is empowered to carry out works, lay down or place any electric supply line or other works in, through, or against, any building, or on, over or under any land whereon, where over or where under any electricity supply-line or works has not already been lawfully laid down or placed by such licensees, with the prior consent of the owner or occupier of any building or land but, in a case where the owner or occupier of the building or land raises objections in respect of works to be carried out under this rule, a permission in writing is to be obtained by the licensee from the District Magistrate or the Commissioner of Police or any other officer authorised by the State Government in this behalf, for carrying out the works. In a case where the works have been carried out and the owner or occupier of any building or land on which any works have been carried out shows sufficient cause, the District Magistrate or the Commissioner of Police or the officer authorised may by order in writing direct for any such works, support, stay or strut to be removed or altered. Sub-rule (3) of Rule 3 of the Licensees Rules, 2006 provides that every order made by a District Magistrate or a Commissioner of Police or an authorised officer under sub-rule (1) shall be subject to revision by the Appropriate Commission. Thus, in a nutshell, Rule 3 contemplates two situations: (a) before the work is carried out; and (b) after the work is carried out. If before the work is carried out, the owner or occupier of the building or land affected raises objections in respect of works to be carried out, a permission, in writing, from the District Magistrate or the Commissioner of Police or any other officer authorised by the State Government in that behalf, for carrying out the works, is to be obtained by the licensee. Where the works have already been carried out and the owner or occupier of any building or land on which any works have been carried out shows sufficient cause, the District Magistrate or

the Commissioner of Police or the officer authorised is empowered to direct by an order in writing for any such works to be removed or altered. When Rule 3 of the Licensees Rules, 2006 is read with sub-section (3) of Section 67 of the Act, 2003 and Rule 10 of the Licensee Rules, 2006, it would suggest that though the licensee is empowered to carry out the works contemplated under the Act, 2003 as also the Licensees Rules, 2006 framed thereunder but, for carrying out such works, it must keep in mind that minimal damage or inconvenience is caused to the public or private person and their property. What is important to note is that the Act, 2003 as well as Licensees Rules, 2006 both mandate that the licensee while carrying out the works must avoid unnecessary damage to the public or private property. However, if damage is caused or the work carried out is to the detriment or inconvenience of any party, the licensee would have to fully compensate the person concerned for any damage, detriment or inconvenience caused by him or any one employed by him.

11. Seen in the light of the legal position noticed above, in the instant case, the work proposed by the licensee was to be carried out by erecting poles on the chak-road adjoining the fields of various tenure holders and the transmission line was to be mounted on those poles that were to be placed on chak-road. Meaning thereby that the Licensee took pains to avoid damage to any private property. The petitioners, however, raised objection because one of the electricity poles was in close proximity to the room housing the tube-well of the petitioners. This objection was rejected by the M.D. of the Nigam. But, as this issue ought to have been decided by the D.M., on a challenge laid by the petitioners to the order of the M.D., the writ court gave liberty to the petitioners to file objections before the D.M. under the second proviso to Rule 3(b) of the Licensees Rules, 2006. Pursuant thereto, the District Magistrate on objection of the petitioners altered the course of the proposed line so as to shift it from the chak-road into the fields of few tenure holders. Aggrieved therewith, some of the tenure holders filed a separate writ petition before this Court, which was disposed off by giving them liberty to file their objection before the D.M. Whereafter, the D.M. passed the order dated 05.01.2018 restoring the same position that was obtaining from before.

12. The contention of the learned counsel for the petitioners that once the D.M. had passed his order on the objection of the petitioners, the order could not have been reviewed/altered is misconceived for the simple reason that Rule 3 of the Licensee Rules, 2006 envisage consideration of objections at two stages one before the work is carried out and the other after the work is carried out. When the objection of the petitioners was first decided by the M.D., the other tenure holders were not affected. But, when the proposed work was altered by the decision of the D.M., they became affected and, therefore, they had a right to raise an objection before the D. M., which the D.M. was required to consider. In view of the above, the claim of the petitioners that the D.M. held no jurisdiction to pass a fresh order, as it amounted to review of his earlier order, is misconceived and is not in consonance with the provisions of Rules. More so, when it does not appear from the earlier order of the D.M. that he had considered the grievances of those tenure holders who were to get affected by the alteration in the route. Further, the contention of the learned counsel for the petitioners that the petitioners would suffer on account of close proximity of the proposed transmission line to the room housing the tube-well of the petitioners is not acceptable because the licensee, while carrying out the works, is expected to ensure that a safe distance is maintained from the private property. Furthermore, it is not in dispute that the

proposed line is to be mounted on poles planted on chak-road and not over private land. It has also come on record that the towers to be erected are of sufficient height enabling maintenance of minimum safe distance from any structure nearby. Thus, the over all balance of convenience lies in placement of the towers on chak-road than over private land. If, thereafter, the petitioners suffer any loss or damage, they can always seek for compensation. We, therefore, find no merit in the submission of the learned counsel for the petitioner that the order of the D.M. was without jurisdiction and that it was prejudicial to the interest of the petitioners.

13. With respect to the second submission of the learned counsel for the petitioners that the Commission did not accord proper hearing to the petitioners as would be clear from paragraph 7 of the order of the Commission, suffice it to say that paragraph 7 of the order of the Commission records that the counsel for the petitioners had filed an application dated 03.11.2020 stating therein that, by mistake, she had noted the date of hearing on the revision as 28.10.2020 in place of 27.10.2020 and so she could not attend the proceedings of the revision on 27.10.2020. The paragraph proceeds to record that the case proceeded ex-parte on 27.10.2020 and the judgment was reserved and therefore the counsel for the revisionist could not be heard personally though, later, on 04.11.2020, written submissions were filed by the revisionist. The order though notices that written arguments were furnished after the judgment was reserved but states, in paragraph 7, that written submissions were not considered. But, immediately thereafter, in paragraph 8, it is stated as follows:- *"The Commission has examined the submission made by all the parties and perused the records. The first and foremost argument taken by the learned counsel for the revisionist that the respondent no.2 the District Magistrate was not empowered to change, alter or modify the line route/order....."* This observation clearly demonstrates that the Commission did apply its mind to the submissions made and grounds taken by the revisionist and thereafter it proceeded to dismiss the revision as being devoid of merit. No doubt, the observation made in paragraph 7 of the order passed by the Commission may suggest that the petitioner was not heard and that his arguments were not considered but from the following paragraphs it appears that the arguments were noticed and considered. Therefore, on this technical fault in the order, the whole order would not become vulnerable. In view of the above, the second submission of the learned counsel for the petitioners also deserves rejection and is, accordingly, rejected.

14. Coming to the third contention of the learned counsel for the petitioners that the Commission failed to examine the factual aspects of the case by placing on itself unwarranted restriction on the scope of its revisional power, it be observed that, no doubt, the revisional powers of the Commission are not limited by the provisions of the Code of Civil Procedure but the term revision by itself limits the scope of consideration and it cannot be equated to appellate power. In the case of ***Chandrika Prasad (dead) through LRS and others Vs. Umesh Kumar Verma and others: (2002) 1 SCC 531,*** while dealing with the revisional power under the proviso to Section 14 (8) of the Bihar Rent Act, the Apex Court, in paragraph 7, made certain general observations regarding the scope of revisional jurisdiction. They are extracted below:-

".....The scope of the revisional jurisdiction depends on the language of the statute. Though, revisional jurisdiction is only a part of the appellate jurisdiction, it cannot be equated with that of full-fledged appeal."

15. In ***P. Ramanatha Aiyar's Advance Law Lexicon, Fourth Edition,*** it has been

provided that there is a distinction between an appeal and a revision. Whereas an appeal confers statutory vested right on the litigant which accrues the moment the proceedings in question are instituted, the right of revision is merely a discretionary power to be exercised by the revisional court according to the circumstances of the case or exigencies of the situation. A person cannot as a matter of right claim the proceedings to be revised.

16. Having noticed the import of the term "revision", we may now proceed to examine the provisions of the Licensees Rules, 2006 that enables a revision by the Appropriate Commission. Sub-rule (3) of Rule 3 of the Licensees Rules, 2006 is the enabling provision which provides that every order made by a District Magistrate or a Commissioner of Police or an authorised officer under sub-rule (1) shall be subject to revision by the Appropriate Commission. Rule 15 of the Licensees Rules, 2006 provides that when a matter is brought to the Appropriate Commission for determination under these Rules, the matter shall be determined by the Appropriate Commission within a period of 30 days after hearing the parties concerned. The Rules, 2006 do not specifically provide that the person aggrieved shall have a right to file a revision before the Commission. What is provided is that the order passed by the District Magistrate or a Commissioner of Police or an authorised officer under sub-rule (1) shall be subject to revision by the Appropriate Commission. Rule 15 provides the mode and manner in which the revision is to be decided once the matter is brought before the Appropriate Commission. Though the scope of revision is not defined by the provisions of the Licensees Rules, 2006 or the Act, 2003 but there is nothing shown to us which may suggest that the scope of revision is equivalent to that of an appeal. Having said that, we may observe that though the revisional powers cannot be equated to that of an appellate authority in a full-fledged appeal but, the revisional powers of the Commission can be utilised to scrutinise whether the subordinate authority has: (a) acted within its jurisdiction and in consonance with the provisions of the statute and the rules framed thereunder; (b) conducted its proceeding in accordance with the procedure prescribed and the principles of natural justice; and (c) rendered a perverse finding. Where, upon such scrutiny, it is found that the subordinate authority has not acted within its jurisdiction or in consonance with the provisions of the statute and the rules framed thereunder or has acted in flagrant violation of the procedure prescribed or the principles of natural justice or has rendered finding(s) that is/are perverse, the Commission, in exercise of its revisional power, may interfere and pass appropriate orders.

17. In the instant case, we find from the record and from the orders passed by the District Magistrate that an effort was there on the part of the licensee to cause minimum damage to private property and for that end the electricity poles were placed on chak-road by maintaining a safe distance from the adjoining property, which is in consonance with the provisions of sub-section (3) of section 67 of the Act, 2003 and Rule 10 of the Licensees Rules, 2006 and the route was finalized after according consideration to the grievances of all the persons likely to be affected. Accordingly, as we find that the licensee has taken pains to install towers over chak-road and not over the fields/property of the petitioners, such an exercise of the licensee cannot be questioned by the petitioners. If the petitioners still have any grievance, they may raise a claim for compensation.

18. Before parting, we may observe that in the instant case the proposal for transmission of electricity was mooted in the year 2015. Now, we are in the year 2021 and the matter is still under litigation. Electricity is a basic human need and its supply wherever possible and

permissible should not be delayed. Therefore, whenever a dispute arises in respect of the route of an electricity line the same should be addressed with utmost expedition so that the supply of electricity is not indefinitely stalled. Thus, where objections are considered and rejected, unless there is perversity in its consideration and rejection, ordinarily, such a decision should not be interfered with, particularly, where the affected party has been heard before the decision. More so, because the person affected can be monetarily compensated.

19. Accordingly, for all the reasons recorded above, we do not find any merit in this petition and the same is ***dismissed.***

(2021)11ILR A357
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.09.2021

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE DEEPAK VERMA, J.

Writ-C No. 21099 of 2021

M/s SPML Infra Ltd., New Delhi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Raghav Dev Garg, Sri Anurag Khanna (Senior Adv.)

Counsel for the Respondents:
C.S.C., Sri Kaushalendra Nath Singh

A. Civil Law – Auction – Tender process – Requirement of past experience – Concealment of the fact regarding termination of earlier work for poor performance – Effect – Purpose of past experience explained – Held, the requirement of furnishing proof of experience is to judge capability of the bidder on two aspects. Firstly, the purpose is to ascertain whether the bidder had the capability to successfully undertake and complete the work under the contract in terms of its quality. It is for the said reason that previous experience should be in relation to 'completed work'. Second aspect is to make qualitative assessment - whether the bidder had experience of undertaking work of such magnitude – High Court found no illegality in the decision of the respondents in declaring the petitioner as disqualified to participate in the tender process. (Para 10)

Writ petition disposed of. (E-1)

(Delivered by Hon'ble Manoj Kumar Gupta, J.
&
Hon'ble Deepak Verma, J.)

1. Heard Sri Anurag Khanna, learned Senior Counsel, assisted by Sri Raghav Dev Garg for the petitioner, learned Standing Counsel for respondent 1 and Sri Kaushalendra Nath Singh for respondents 2 and 4. With their consent, the writ petition is being disposed of finally, without inviting a formal counter affidavit.

2. The petitioner, an incorporated Company, has preferred the instant writ petition being aggrieved by a communication dated 23.6.2021, issued by the fourth respondent, informing the petitioner-Company that it stands disqualified and precluded from participating in the tender process in future also, as it had furnished wrong information relating to its previous experience. The petitioner has also prayed for a mandamus directing the second respondent to issue LOI, execute agreement and work orders in its favour, being the lowest bidder (L1).

3. The second respondent, i.e. New Okhla Industrial Development Authority (NOIDA), issued a notice on 24.3.2021, inviting tenders for providing and fixing smart water meters with set up of Advanced Metering Infrastructure (AMI)

in pilot project area with 10 years O&M. The last date for submission of bids was 30.3.2021. The petitioner-Company had submitted its bid on 26.3.2021. The tender process comprised of two stages, i.e. technical round and financial round. One of the requirements for prequalification of tender was submission of proof of previous experience. Clause 10 which stipulates nature of proof to be submitted is as follows: -

"10. Proof of previous experience:

(1) Experience of having successfully completed works during the last 7 years ending last day of the month previous to the one in which applications are invited with Govt./Semi Govt./PSU only:

Or

Three similar completed works costing not less than the amount equal to 60% of estimated cost put to tender

Or

One similar completed works of aggregate cost not less than the amount equal to 80% of estimated cost put to tender

(2) Experience of having successfully completed works during the last 7 years ending last day of the month previous to the one in which applications are invited."

4. The petitioner-Company submitted Experience Certificate dated 5.2.2021, issued by Executive Engineer (Project) Water - I, Delhi Jal Board, Govt. of NTC of Delhi, certifying that it had satisfactorily completed the work of supply and installation of water meters described therein and completed maintenance of those meters for a period of approximately six years from its installation. The value of the work said to have been done was Rs. 67,14,09,841/-. The petitioner was declared to have qualified technical bid and was permitted to participate in the second stage, i.e. financial round. In all, there were three bidders, out of whom, the bid of the petitioner was the lowest. As per the tendering process, the solvency and experience certificate of the petitioner were sent for verification to the issuing authority. In response thereto, the Superintending Engineer (Project) W - II, Delhi Jal Board, vide e-mail dated 10.6.2021 informed the second respondent that the contract of the petitioner-Company for supply, installation and seven years maintenance of 15mm size AMR/Non AMR Water Meters, in respect of which, it had submitted Experience Certificate dated 5.2.2021, was terminated vide letter dated 28.11.2019 for poor performance. The petitioner-Company had obtained a stay order against the termination order from the court of District and Sessions Judge, South East Saket, New Delhi and the matter is sub judice. Consequently, the Experience Certificate issued by Executive Engineer (Project) dated 5.2.2021, stands withdrawn in respect of satisfactory performance of the work. The petitioner submitted representation dated 14.6.2021 against the communication (e-mail) of Delhi Jal Board dated 10.6.2021. The technical committee considered the representation of the petitioner, but decided to disqualify the petitioner. It was communicated to the petitioner by the order impugned.

5. By means of an amendment application, the petitioner has challenged the fresh e-tender notice issued on 13.9.2021, pertaining to the same work.

6. The amendment application is allowed, being consequential to the main relief sought in the writ petition.

7. Sri Anurag Khanna, learned counsel appearing on behalf of the petitioner, submitted that the impugned decision is illegal on two grounds. Firstly, that the order terminating the contract by Delhi Jal Board, is admittedly stayed by a court of competent jurisdiction and therefore any decision of Delhi Jal Board withdrawing the Experience Certificate, would

itself be illegal. Second, it is submitted that it is not disputed even by Delhi Jal Board that the petitioner had completed work of value of Rs. 67,14,09,841/-, which was much more than 80% of the value of present tender. Consequently, the petitioner possesses requisite experience as per Clause 10.

8. Sri Kaushalendra Nath Singh, learned counsel for respondents 2 and 4, on instruction, submitted that according to Clause 10, "one similar completed work of aggregate cost not less than the amount equal to 80% of the estimated cost put to tender", would not mean that the work done should exceed 80% of the cost of work done, or the estimated cost of the work put to tender. It would mean that the experience should be in relation to a completed work, the aggregate value whereof should not be less than an amount equal to 80% of estimated cost of the present tender. He further submitted that the petitioner has been declared disqualified not only for the reason that he did not have previous experience in terms of Clause 10, but also for not disclosing correct facts and making attempt to mislead the Authority by procuring the Experience Certificate which is vague and did not reflect the fact that the contract with Delhi Jal Board was cancelled for unsatisfactory work and the petitioner had been working on basis of a stay order.

9. The facts which are not in dispute are that the petitioner had a contract in its favour from Delhi Jal Board and whereunder, it was required to perform a similar kind of work. It is also not in dispute that the petitioner had completed more than 80% of the total value of the contract awarded in its favour by Delhi Jal Board. Its value is also more than 80% of the estimated cost put to tender by the second respondent. The main question is whether on basis of the petitioner having completed more than 80% of the work awarded to it by Delhi Jal Board, it was qualified to participate in the tender process in question or not. The own case of the petitioner is that it would fall under a last portion of Clause 10 of the Tender Document, which envisages "One similar completed works of aggregate cost not less than the amount equal to 80% of estimated cost put to tender". The total value of the project as per Tender Document is Rs. 9,46,52,321.38. 80% of the said value is Rs. 7,57,21,900/-, in term of Clause 10 of the Tender Document. Concededly, the work done by the petitioner with Delhi Jal Board was of much more value than that was required. However, as per stipulation, the experience of work should be in relation to a completed work and not work which is yet to be completed. Clause 10 gives three different options to bidders in relation to nature of past experience. However, the common feature in all the three options is that the experience certificate should be in relation to a 'completed work'. Since it is not in dispute that the work of the petitioner with Delhi Jal Board is still not complete and therefore, the first part of the stipulation under Clause 10, is not met and thus the petitioner would not qualify in terms of work experience.

10. The impugned order has been passed primarily on the ground that the petitioner had concealed correct facts relating to its past experience as it was not disclosed that contract with Delhi Jal Board was terminated by it on account of poor performance. Albeit there is a stay order in favour of the petitioner against the order terminating the contract and in terms whereof, it may have been permitted to undertake the remaining work, but the fact remains that the earlier contract was terminated on ground of poor performance. The matter is still stated to be pending before the District and Sessions Judge, South East Saket, New Delhi and thus, it has yet to be decided as to whether work done under the contract was of poor quality or not. The requirement of furnishing proof of experience is to judge capability of the bidder on two aspects. Firstly, the purpose is to

ascertain whether the bidder had the capability to successfully undertake and complete the work under the contract in terms of its quality. It is for the said reason that previous experience should be in relation to 'completed work'. Second aspect is to make qualitative assessment - whether the bidder had experience of undertaking work of such magnitude. That is why there is stipulation regarding the monetary value of previous work. The fact that the work in respect of which experience certificate was furnished was terminated for poor performance, was thus an important factor, while adjudging the capability from the qualitative point of view. The technical committee thus cannot be faulted for declaring the petitioner disqualified as soon as the fact relating to cancellation of previous contract came to its knowledge. At the same time, it cannot be said that the petitioner was guilty of furnishing any wrong information, as concededly the extent of work done with the Delhi Jal Board, is not in dispute. We thus do not find any illegality in the decision of the second and fourth respondents in declaring the petitioner as disqualified to participate in the tender process. The apprehension expressed by learned Senior Counsel appearing for the petitioner that stipulation in the impugned order that the petitioner will not be permitted to participate in future amounts to black listing the petitioner, is unfounded. Sri Kaushalendra Nath Singh, learned counsel for second respondent, on instructions, has clarified that the said stipulation would not preclude the petitioner from participating in other tenders that may be floated by the second respondent in future. However, in respect of present work, as held above, the petitioner did not possess requisite experience, therefore is not qualified to participate in the same. As the same qualification applies to fresh tender notice dated 13.9.2021, the challenge to it, also fails.

11. In the end, we would like to record the statement of Sri Kaushalendra Nath Singh, learned counsel appearing on behalf of the second and fourth respondents that the interpretation made by us above, will be uniformly applied to all the bidders and in case none qualifies as per the said interpretation, they will not proceed any further in pursuance of the fresh tender notice. However, as prayed by Sri Kaushalendra Nath Singh, liberty is reserved in favour of the second respondent to relax stipulation relating to previous work experience in future, if they still do not get a bidder who meets the above requirements. In such an event, the petitioner shall also be entitled to participate in the tender process and its bid will be evaluated as per new norms without being influenced by the impugned order, or any observation made in the instant order.

12. The writ petition stands disposed of accordingly.

(2021)11ILR A360
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.10.2021

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Writ C No. 22299 of 2021

Regional Manager & Anr. ...Petitioners
Versus
Prabhu Dayal & Anr. ...Respondents

Counsel for the Petitioners:
Sri Awadhesh Kumar Saxena, Sri Avijit Saxena

Counsel for the Respondents:
C.S.C., Sri Aditya Vardhan Singh, Sri Samir Sharma

A. Labour Law – Termination order passed after domestic inquiry, upheld in Appeal and Revision – Industrial dispute raised after reference to the Labour court – Doctrine of res judicata – Application – Maintainability of

industrial dispute challenged – Held, domestic enquiry and Labour Court are not in one line of forum. Therefore, doctrine of merger would not come into play – In case, order passed in domestic enquiry was challenged before High Court prior to reference, then issue of res judicata would also be very important – In the present case Respondent no. 1 has not challenged his termination order or the orders passed in appeal and revision before the High Court. Therefore, the judgment in *Mahmood Khan's case* would not be applicable in the present case – Reference is not hit by 'res judicata'. (Para 23 and 28)

B. Doctrine of Merger – Doctrine of relation back – Termination order passed, which was upheld in Appeal and Revision – Relevant date of termination, since when it to be counted – Held, according to 'theory of merger' order of termination and order passed by appellate authority got merged into order passed in revision, which upheld the order of termination – However, the respondent no. 1 would be considered to be terminated from service with effect from 16.02.2013 only, therefore according to doctrine of 'relation back' the relevant date would be 16.02.2013 for termination and not the date when appeal and revision were dismissed. (Para 22)

Writ petition dismissed. (E-1)

Cases relied on :-

1. Gojer Bros. Pvt. Ltd. Vs Ratan Lal Singh (1974) 2 SCC 453

2. Collector Customs, Calcutta Vs East India Commercial Co.; AIR 1963 SC 1124

3. S.S.Rathore Vs St. of M.P.; (1989) 4 SCC 582

4. Pondicherry Khadi & Village Industries Vs P Kulothangan & anr.; (2004) 1 SCC 68

5. District Administrative Committee & anr. Vs Presiding Officer, Labour Court, Bareilly; 2008 (4) ADJ 658

6. U.P. State Road Transport Corporation, Kanpur Vs Mahmood Khan & anr.; 2007 (4) ADJ 345

7. Secretary, Indian Tea Association Vs Ajit Kumar Barat & ors; (2000) 3 SCC 93

8. Hochtief Gammon Vs Industrial Tribunal, Bhubaneshwar; AIR 1964 SC 1746

9. U.O.I. & ors. Vs Dinesh Prasad; 2012 (12) SCC 63

10. R.Thiruvirkolam Vs Presiding Officer & anr.; 1997 (1) SCC 9

11.L.I.C. of India & ors. Vs Central Industrial Tribunal, Jaipur & ors.; 1997 (1) SCC 59

12. Syndicate Bank Ltd.Vs Workmen, 1966 (2) LLJ 194 (SC)

13. Delhi Cloth & General Mills Co. Ltd. Vs Workmen & ors.; AIR 1967 SC 469

14. Western India Match Company Ltd. Vs Workmen; 1974 (3) SCC 330

15. Executive Engineer, Electricity Store Division, Gorakhpur & anr. Vs Presiding Officer, Labour Court, Gorakhpur & ors.; 1997 (1) UPLBEC 322 (Alld)

16. J.K. Synthetics Vs Rajasthan Trade Union Kendra & ors.; 2001 (2) SCC 87

17. Managing Director, A.P. State Road Transport Corporation Vs Presiding Officer, Industrial Tribunal, Ramkote, Hyderabad & ors.; 2001 (2) SCC 695

18. Workmen of M/S Firestone Tyre & Rubber Co. of India (P) Ltd. Vs Management & ors.; 1973 (1) SCC 813

19. Bharat Singh & Others Vs St. of Har. & ors.; (1988) 4 SCC 534

20. Kunhayammed & ors. Vs St.of Kerala & anr.; (2000) 6 SCC 359

21. St. of Uttrakhand Vs Sureshwati; 2021 (3) SCC 108

22. Workmen Vs Firestone Tyre & Rubber Co. of India (P); (1973) 1 SCC 813

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. Respondent no.1 was appointed as Bus Conductor in Buduan Depot of the petitioner-Uttar Pradesh State Road Transport Corporation *(hereinafter referred to as the "UPSRTC")* in the year 1997 and was confirmed on 05.09.1998.

2. On 09.04.2008, the bus No.U.P.25-Q 9475, plying between Budaun to Farrukhabad in

which respondent no. 1 was Conductor, was checked by a team of three members while going and coming back. During checking 3 and 13 passengers were found travelling without ticket, respectively.

3. A charge-sheet dated 13.05.2008 was served upon respondent no.1 on 13.05.2008. Shri Z.A. Nomani was appointed as Enquiry Officer, who after conducting enquiry submitted his report dated 23.12.2008. Relevant part of the enquiry report is mentioned hereinafter.

"अधोहस्ताक्षरी द्वारा प्रकरण पत्रावली में उपलब्ध समस्त अभिलेखों का अध्ययन करने पर पाया कि आरोपी द्वारा दिनांक 09-04-08 को बदायूँ फरुखाबाद मार्ग पर वाहन संख्या यू0 पी025 क्यू-9475 का उसावाँ में निरीक्षण करने पर 34 यात्री में 03 यात्री बदायूँ से कलान के बिना टिकट पकड़े गये जिनकी धनराशि आरोपी द्वारा पूर्व में वसूल की जा चुकी थी तथा उसी दिवस फरुखाबाद से वापस बदायूँ आते समय नौगवां नामक स्थान पर वाहन का निरीक्षण करने पर 47 यात्री में 13 यात्री बिना टिकट पकड़े गये, जिसमें कुछ यात्रियों के पैसे आरोपी द्वारा वसूल किये जा चुके थे तथा शेष के रिपोर्टकर्ता द्वारा वसूल कर मिर्जापुर से कलान के टिकट निर्गत किये गये। जबकि नौगवां से कलान की दूरी मात्र 02 कि0मी0 थी। इस प्रकार आने व जाने में बिना टिकट वाहन लिखा जाना तथा आरोपी द्वारा साक्षात्कार के समय में कोई गवाह आदि प्रस्तुत न करना, तथा आरोपी द्वारा रिपोर्टकर्ता से साक्षात्कार के समय में पूछा जाना कि वाहन खड़ी थी या चल रही थी। रिपोर्टकर्ता द्वारा उत्तर दिया वाहन को निरीक्षण हेतु संकेत देकर रुकवाया गया, वाहन गतिशील स्थिति में थी। आरोपी द्वारा अपने बचाव में कोई ऐसा सबूत व गवाह आदि प्रस्तुत नहीं किया जो उसके ऊपर लगे गम्भीर आरोपों को कम कर सके।

अतः श्री प्रभु दयाल परिचालक, बदायूँ डिपो के विरुद्ध आरोप पत्र संख्या 1002 दिनांक 13-05-08 में लगे आरोप सिद्ध पाये गये।"

4. A show cause notice dated 07.01.2012, along with a copy of enquiry report was served upon the petitioner, who submitted his reply on 06.02.2013. The Assistant Regional Manager passed order dated 16.02.2013 wherein he found charges against the Respondent No. 1 to be proved and awarded punishment of removal from service and forfeiting arrears of salary of gratuity etc. for the period the respondent No.1 was under suspension.

5. The appeal and revision filed by the respondent no.1 was rejected by orders dated 25.06.2013 and 05.12.2014 by Regional Manager and Managing Director, UPSRTC, respectively.

6. The petitioner raised an industrial dispute before the Labour Court and a reference No.10534-37 CP 23/15 dated 07.10.2016 was referred, which was registered as Industrial Dispute No.15/2016 that:

"क्या श्रमिक श्री प्रभूदयाल पुत्र स्व0 श्री मंगूलाल पदनाम परिचालक की सेवायें दिनांक 16-2-13 से समाप्त करना उचित तथा/अथवा वैधानिक है, यदि नहीं तो संबंधित श्रमिक किस हितलाभ/अनुतोष/क्षतिपूर्ति पाने का अधिकारी है तथा अन्य किस विवरण सहित है।"

7. The Presiding Officer after considering the written statements and oral statements decided the preliminary issue by order dated 17.02.2021 and held that domestic enquiry was not conducted according to due procedure and thus cannot be considered to be valid and legal, and permitted UPSRTC to submit evidence in support of the charge. The said order was not challenged by the UPSRTC and participated in further proceedings. The relevant part of the said order is mentioned hereinafter:

"जांच कार्यवाही में किसी रिपोर्टकर्ता ने न तो उन तथाकथित बिना टिकट यात्रियों को गवाही हेतु प्रस्तुत किया और न ही उनके बयान लिये न ही उन बिना टिकट यात्रियों के नाम व पते प्रस्तुत किये और न ही उनके द्वारा मार्गपत्र पर अपनी रिपोर्ट में उन तथाकथित बिना टिकट यात्रियों द्वारा बयान व नाम पते न देने का कारण ही स्पष्ट किया है। इस प्रकार परिवहन निगम मुख्यालय लखनऊ द्वारा जारी परिपत्रों 446 एलएएस./95 दिनांक 12-3-1996, सं0-71 से से0टि0स्टो/ टी0सी0/ मिस 85 दिनांक 6-2-88, में दिये गये दिशा निर्देशों का पालन नहीं किया गया है।

जांच रिपोर्ट के अवलोकन से यह तथ्य स्पष्ट नहीं हो रहा है कि जांच अधिकारी ने वी0के0 पाण्डे के बयान लेने के पश्चात संबंधित श्रमिक को उनसे प्रतिपरीक्षण का अवसर क्यों नहीं दिया एवं मुख्य रिपोर्टकर्ता श्री मनोहर लाल सहायक यातायात निरीक्षक जांच कार्यवाही में उपस्थित नहीं हुए जिसके अभाव में संबंधित श्रमिक को उनसे प्रतिपरीक्षण का अवसर प्रदान नहीं हो सका।

जांच अधिकारी द्वारा प्रस्तुत अपनी जांच रिपोर्ट के समर्थन में वह न्यायालय में उपस्थित नहीं हुए न ही अपनी जांच को प्रमाणित किया है और न ही चेकिंग दल के अन्य सहयोगी व रिपोर्टकर्ता ही जांच रिपोर्ट की पुष्टि हेतु न्यायालय में उपस्थित हुए अतः श्रमिक पर लगाये गये आरोपों के संबंध में करायी गयी घरेलू जांच उचित व वैधानिक नहीं कही जा सकती।

इस प्रकार पत्रावली पर उपलब्ध समस्थ तथ्यों, साक्ष्य एवं विवेचना के आधार पर घरेलू जांच प्राकृतिक न्याय के सिद्धान्तों के अनुरुप की जानी प्रतीत नहीं हो रही है अतः घरेलू जांच दूषित है। तदानुसार प्रारम्भिक वाद बिन्दू निर्णीत किया जाता है।"

8. In further proceedings, Manohar Lal, a member of 3 member checking team recorded his statement before the Labout Court, who did not appear during domestic enquiry. Other member, Roshan Lal, since dead, could not appear in domestic enquiry, though had appeared during domestic inquiry.

9. The Presiding Officer, Labour Cout passed award dated 29.04.2021 and has held that termination of service of respondent no.1 was not legal and directed him to be reinstated with all benefits. The relevant part of the order is mentioned hereinafter:

"इस साक्षी ने अपनी साक्ष्य में यह कहा है कि बस सं0 यू0पी0 25 क्यू 9475 की चेकिंग मैंने की थी। जब मैं चेकिंग कर रहा था तो मेरे साथ सहायक यातायात निरीक्षक बदायूँ श्री रोशन लाल, श्री ए0के0पाण्डे सहायक क्षेत्रीय प्रबंधक बदायूँ थे। श्री रोशन लाल की मृत्यु हो गयी है सेवाकाल के दौरान और यह भी सुना है कि श्री ए0के0 पाण्डे साहब की भी मृत्यु हो गयी है। श्रमिक के विरुद्ध आरोप साबित करने के लिये सेवायोजक की ओर से ऐसा कोई साक्ष्य पत्रावली पर नहीं है। मुख्य साक्षी श्री रोशन लाल सहायक यातायात निरीक्षक व श्री ए0के0 पाण्डे सहायक क्षेत्रीय प्रबंधक बदायूँ की मृत्यु हो चुकी है इसीलिए श्रमिक के विरुद्ध आरोप साबित नहीं होना पाया जाता है।

उपर्युक्त सम्पूर्ण विवेचन के आधार पर संदर्भादेश इस प्रकार निर्णीत किया जाता है कि श्रमिक श्री प्रभूदयाल पुत्र स्व0 श्री मंगुलाल पदनाम परिचालक की सेवायें दिनांक 16-2-2013 से समाप्त करना उचित तथा/अथवा वैधानिक नहीं है जिसे निरस्त किया जाता है। वादी श्रमिक को दिनांक 16-2-2013 से नौकरी निरन्तरता के साथ सेवा में बहाल किया जाता है एवं दिनांक 16-2-2013 से श्रमिक सेवा में रहते हुए जो भी वेतन भत्ते आदि प्राप्त करता वह सभी वेतन भत्ते आदि को प्राप्त करने का अधिकारी है। प्रारम्भिक वाद बिन्दु पर पारित आदेश दिनांक 17-2-2021 इस अभिनिर्णय का भाग होगा।" *(emphasis added)*

10. The above referred order/award is impugned in the present writ petition.

Submission on behalf of the petitioner.

11. Shri Avijit Saxena, learned counsel for the petitioner has submitted that reference referred, itself was illegal, as only termination/punishment order dated 16.02.2013 was referred. Neither the order dated 25.06.2013, whereby appeal nor order dated 05.12.2014 whereby revision filed by Respondent no. 1 was dismissed, were part of the reference. Learned counsel has placed his arguments on the basis of "Doctrine of Merger" that only revisional order dated 05.12.2014 remained as operative decision under law and original termination order dated 16.2.2013 and appellate order dated 25.06.2013 got merged with the revisional order dated 5.12.2014. He buttress his argument by relying upon the following judgments. (i) **Gojer Bros. Pvt. Ltd. Vs. Ratan Lal Singh (1974) 2 SCC 453**, **(ii) Collector Customs, Calcutta Vs. East India Commercial Co. AIR 1963 SC 1124 and (iii) S.S.Rathore Vs. State of Madhya Pradesh (1989) 4 SCC 582.** Relevant paragraphs No.12, 13 and 14 of S.S. Rathore (supra) are mentioned hereinafter:

"12. The next Constitution Bench decision of this Court is that of Collector of Customs, Calcutta v. East India Commercial Co. Ltd. [1963] 2 SCR 563 where this Court observed :

The question, therefore, turns on whether the order of the original authority becomes merged in the order of the appellate authority even where the appellate authority merely dismisses the appeal without any modification of the order of the original authority. It is obvious that when an appeal is made, the appellate authority can do one of three things, namely, (i) it may reverse the order under appeal, (ii) it may modify that order, and (iii) it may merely dismiss the appeal and thus confirm the order without any modification. It is not disputed that in the first two cases where the order of the original authority is either reversed or modified it is the order of the appellate authority which is the operative order and if the High Court has no jurisdiction to issue a writ to the appellate authority it cannot issue a writ to the original authority. The question therefore is whether there is any difference between these two case and the third case where the appellate authority dismisses the appeal and thus confirms the order of the original authority. It seems to us that on principle it is difficult to draw a distinction between the first two kinds of orders passed by the appellate authority and the third kind of order passed by it. In all these three case after the appellate authority has disposed of the appeal, the operative order is the order of the appellate authority whether it has reversed the original order or modified it or confirmed it. In Jaw, the appellate order of confirmation is quite as efficacious as an operative order as an appellate order of reversal or modification.

13. A three Judge Bench decision in the case of Somnath Baku v. The State of Orissa and Ors. (1969)3SCC384 is an authority in support of the position as accepted by the two Constitution Bench judgments referred to above. There, it was held in the case of a service dispute that the original order merged in the appellate order of the State Government and it is the appellate decision which subsisted and became operative in law and was capable of enforcement. That judgment relied upon another decision of this Court in support of its view being C.I.T. v. Amrit lal Bhagilal & Co. [1958] 34 ITR 130 (SC) .

14. The distinction adopted in Mohammad Nooh's case between a court and a tribunal being the appellate or the revisional authority is one without any legal justification. Powers of adjudication ordinarily vested in courts are being exercised under the lay by tribunals and other constituted authorities. In fact, in respect of many disputes the jurisdiction of the Court is now barred and there is a vesting of jurisdiction in tribunals and authorities. That being the position, we see no justification for the distinction between courts and tribunals in

regard to the principle of merger. On the authority of the precedents indicated, it must be held that the order of dismissal made by the Collector did merge into the order of the Divisional Commissioner when the appellant's appeal was dismissed on 31.8.1966."

12. Learned counsel also contended that jurisdiction of the Labour Court was barred by the principle of *res judicata*, since Respondent no. 1 had challenged the validity of his termination in departmental appeal and revision and the appellate and revisional authorities had adjudicated upon the said issue and given their decision, he is barred from raising the same issue before Labour Court being barred by *res judicata*. Thus proceedings before labour court were without jurisdiction and void. In support of his submission he has relied upon following judgments: **(i) Pondicherry Khadi and Village Industries Vs. P Kulothangan & Anr (2004) 1 SCC 68, (ii) District Administrative Committee and another Vs. Presiding Officer, Labour Court, Bareilly, 2008 (4) ADJ 658 and (iii) U.P. State Road Transport Corporation, Kanpur Vs. Mahmood Khan and another, 2007 (4) ADJ 345.** Relevant paragraphs No.7,8,9 and 10 of **Mahmood Khan, (supra)** are mentioned hereinafter:

"7. In my opinion, the reference with regard to the validity and legality of the order of the termination of the respondent No. 2 could not have been referred for adjudication to the labour court. In my opinion, the reference was barred by the principles of res judicata.

8. In Executive Engineer, ZP. Engg. Divn. and Anr. v. Digambara Rao and Ors.: 2004(8) SCC 262, the Supreme Court held that the principles of res judicata squarely applies to an industrial adjudication. In this case, the workman had challenged the validity of his termination order before a writ court and after the dismissal of the writ petition, the workman got the matter referred for adjudication under the Industrial Disputes Act before the labour court and in that scenario, the Supreme Court held that no industrial dispute could have been referred to the labour court and that the principles of res judicata was squarely applicable.

9. In Pondicherry Khadi and Village Industries Board v. P. Kulothangan and Anr.: (2004) 1 SCC 68, the Supreme Court held that the principle of res judicata would operate on a court or tribunal holding-

We are, therefore, of the opinion that the High Court erred in upholding the award of the Labour Court having regard to Section 11 of the Code of Civil Procedure. In this view of the mater, it is not necessary for us to consider the other contentions raised by the appellant. The appeals are accordingly allowed and the decision of the High Court as well as the award of the Labour Court are set aside. However, the appellant will not recover any amount that may have been paid to the respondent under the provisions of Section 17B of the Industrial Disputes Act, 1947. There will be no order as to cost.

10. In view of the aforesaid, once the workmen elects a forum for adjudication of a dispute, it is not open to him to approach another forum at a subsequent stage."

13. Mr. Saxena, learned counsel also submitted that State Government did not form reasoned opinion before making reference and relied upon a judgment passed by Apex Court in **Secretary, Indian Tea Association Vs. Ajit Kumar Barat And Ors, (2000) 3 SCC 93.**

14. Mr. Saxena, lastly submitted that Labour Court cannot travel beyond reference and he relied upon a judgment passed by Apex Court in **Hochtief Gammon Vs. Industrial Tribunal, Bhubaneshwar, AIR 1964 SC 1746,** wherein it has been held that Industrial Tribunal is a tribunal of limited jurisdiction and can try only those disputes referred to it through order

of reference. It can neither expand the scope of reference nor can travel beyond it as terms of reference determines the scope of power and jurisdiction of tribunal.

Submissions on behalf of Respondent No.1

15. Shri Samir Sharma, Senior Advocate assisted by Shri Aditya Vardhan Singh, learned counsel for the respondent no.1 stated that all the arguments raised by the petitioner are without any pleadings in the writ petition and relied upon paragraph 20 of **Union of India and others vs. Dinesh Prasad, 2012 (12) SCC 63**, wherein it is held that:

"20. In our view, the learned Single Judge was clearly in error in allowing such argument. Firstly, the argument was raised without any foundation in the writ petition. No plea of actual or likelihood of bias was raised in the writ petition. There was also no plea taken in the writ petition that he was denied fair trial in the course of summary court-martial. Secondly, and more importantly, the learned Single Judge overlooked and ignored the statutory provisions referred to hereinabove. The Division Bench also failed in considering the matter in right perspective and in light of the provisions in the Army Act and the Army Rules."

16. Learned Senior Counsel submits that the reference order was couched in very wide terms, as it did not refer to any order. Instead, it only referred to the date of termination of service of the workman. The appellate and revisional order only confirmed the order of termination of service, however date of termination, remained the same. Thus, according to "doctrine of relation back", the date of termination related back to the original date. Thus there was no infirmity in the reference order. He has relied upon following judgments passed by Supreme Court in **R.Thiruvirkolam Vs. Presiding Officer and another, 1997 (1) SCC 9, and Life Insurance Corporation of India and others VS. Central Industrial Tribunal, Jaipur and others, 1997 (1) SCC 59.** Relevant paragraphs 4 and 13 of **R. Thiruvirkolam (supra) states that:**

"4. Reference may be made first to the decision in Kalyani. This point arose directly before the Constitution Bench and such a contention was rejected, making a distinction between a case where no domestic inquiry had been held and another in which the inquiry is defective for any reason and the Labour Court on its own appraisal of evidence adduced before it reaches the conclusion that the dismissal was justified. It was held that in a case where the inquiry was found to be defective by the Labour Court and it then came to the conclusion on its own appraisal of evidence adduced before it that the dismissal was justified, the order of dismissal made by the employer in a defective inquiry would still relate to the date when that order was made. In that decision it was stated thus:

...If the inquiry is defective for any reason, the Labour Court would also have to consider for itself on the evidence adduced before it whether the dismissal was justified. However, on coming to the conclusion on its own appraisal of evidence adduced before it that the dismissal was justified its approval of the order of dismissal made by the employer in a defective inquiry would still relate back to the date when the order was made.... In the present case an inquiry has been held which is said to be defective in one respect and dismissal has been ordered. The respondent had however to justify the order of dismissal before the Labour Court in view of the defect in the inquiry. It has succeeded in doing so and therefore the approval of the Labour Court will relate back to the date on which the respondent passed the order of dismissal. The contention of the appellant therefore that dismissal in this case

should take effect from the date from which the Labour Court's award came into operation must fail.

13. As a result of the aforesaid decision it must be held that the only point involved for decision in the appeal is concluded against the appellant by the Constitution Bench decision of this Court in Kalyani and the observations to the contrary in Gujarat Steel are, therefore, per incuriam and not binding. The order of punishment in the present case operated from November 18, 1981 when it was made by the employer and not from December 11, 1985, the date of Labour Court's award. The appellant is, therefore, not entitled to any relief."

17. Mr. Samir Sharma, learned Senior Advocate further argued that the Labour Court while adjudicating the matter can consider the issues incidental to/connected with the dispute referred and the actual dispute has to be gauged from the pleadings of the parties. The appellate/revisional order were connected with the dispute referred i.e. validity of termination of the workman w.e.f. 16.02.2013. Thus there was no infirmity in the order of reference and the impugned award. He has relied upon judgments in **Syndicate Bank Limited Vs. Workmen, 1966 (2) LLJ 194 (SC); Delhi Cloth & General Mills Co. Ltd. Vs Workmen and others, AIR 1967 SC 469, Western India Match Company Ltd. Vs. Workmen, 1974 (3) SCC 330; Executive Engineer, Electricity Store Division, Gorakhpur and another Vs. Presiding Officer, Labour Court, Gorakhpur and others, 1997 (1) UPLBEC 322 (Alld); J.K. Synthetics Vs. Rajasthan Trade Union Kendra and others; 2001 (2) SCC 87 and Managing Director, A.P. State Road Transport Corporation Vs. Presiding Officer, Industrial Tribunal, Ramkote, Hyderabad and others, 2001 (2) SCC 695.** Relevant paragraphs 2 and 7 of **Managing Director, A.P. State Road Transport Corporation (supra)** are mentioned hereinafter:

"2. In this Court the contentions urged before the Tribunal and the High Court are reiterated that the question referred to the Tribunal being of a limited character as to whether the benefits accruing to the present T.T.D. workers could be extended to the employees of the transport wing or not and having answered that the said employees have all opted for being governed by the Corporation rules and regulations and other service conditions, it is not open to them to claim those benefits.

7. Shri Nageswara Rao pointedly addressed that direction given by the Tribunal is far beyond the scope of the reference. The question referred to the Tribunal though worded as to the cover applicability of conditions of service in T.T.D. to the members of the respondent Union, what was really in issue is as to what conditions of service are applicable to them after they exercised their option to abide by the Corporation regulations, and thereafter both parties have raised pleadings and adduced evidence. Hence, we cannot say that the Tribunal travelled beyond the scope of reference."

18. He further submitted that with the insertion of Section 11-AA (Central Act, 1947)/6 (2-A) of U.P. I.D. Act, 1947, the Labour Court/Industrial Tribunal has been invested with very wide powers to not only adjudicate upon the validity of the departmental enquiry, but also the proof of charges and the proportionality of punishment imposed against the workman. In support of his submission he relied upon **Workmen of M/S Firestone Tyre & Rubber Co. of India (P) Ltd. Vs. Management & Others, 1973 (1) SCC 813.** Relevant paragraphs of **Workmen of M/S Firestone Tyre & Rubber Co. of India (P) Ltd. (supra)** are mentioned hereinafter:

"32-A. The above was the law as laid down by this Court as on 15-12-1971 applicable to all industrial adjudication arising out of orders of dismissal or discharge.

33. The question is whether Section 11A has made any changes in the legal position mentioned above and if so, to what extent ? The Statement of objects and reasons cannot be taken into account for the purpose of interpreting the plain words of the section. But it gives an indication as to what the Legislature wanted to achieve. At the time of introducing Section 11A in the Act, the legislature must have been aware of the several principles laid down in the various decisions of this Court referred to above. The object is stated to be that the Tribunal should have power in cases, where necessary, to set aside the order of discharge or dismissal and direct reinstatement or award any lesser punishment. The Statement of objects and reasons has specifically referred to the limitation on the powers of an Industrial Tribunal, as laid down by this Court in Indian Iron and Steel Co. Ltd. Case.

40. Therefore, it will be seen that both in respect of cases where a domestic enquiry has been held as also in cases where the Tribunal considers the matter on the evidence adduced before it for the first time, the satisfaction under Section 11A, about the guilt or otherwise of the workman concerned, is that of the Tribunal. It has to consider the evidence and come to a conclusion one way or other. Even in cases where an enquiry has been held by an employer and a finding of misconduct arrived at, the Tribunal can now differ from that finding in a proper case and hold that no misconduct is proved.

41. We are not inclined to accept the contentions advanced on behalf of the employers that the stage for interference Under section 11A by the Tribunal is reached only when it has to consider the punishment after having accepted the finding of guilt recorded by an employer. It has to be remembered that a Tribunal may hold that the punishment is not justified because the misconduct alleged and found proved is such that it does not warrant dismissal or discharge. The Tribunal may also hold that the order of discharge or dismissal is not justified because the alleged misconduct itself is not established by the evidence. To come to a conclusion either way, the Tribunal will have to reappraise the evidence for itself. Ultimately it may hold that the misconduct itself is not proved or that the misconduct proved does not warrant the punishment of dismissal or discharge. That is why, according to us, Section 11A now gives full power to the Tribunal to go into the evidence and satisfy itself on both these points, Now the jurisdiction of the Tribunal to reappraise the evidence and come to its conclusion enures to it when it has to adjudicate upon the dispute referred to it in which an employer relies on the findings recorded by him in a domestic enquiry. Such a power to appreciate the evidence and come to its own conclusion about the guilt or otherwise was always recognised in a Tribunal when it was deciding a dispute on the basis of evidence adduced before it for the first time. Both categories are now put on a par by Section 11A.

42. Mr. Deshmukh rather strenuously urged that in all its previous decisions, this Court had not considered a breach or an illegality, as he calls it committed by an employer in not holding a domestic enquiry. The learned Counsel urged that this Court has consistently held in several decisions that there is an obligation on the part of an employer to conduct a proper domestic enquiry in accordance with the Standing Orders before passing an order of discharge or dismissal. Hence an order passed without such an enquiry is, on the face of it, illegal. The effect of such an illegal order deprives the employer of an opportunity being given to him to adduce evidence for the first time before the Tribunal to justify his action. These aspects, according to the learned Counsel, have not been considered

by this Court when it recognised an opportunity to be given to an employer to adduce evidence before the Tribunal.

50. The legislature in Section 11A has made a departure in certain respects in the law as laid down by this Court. For the first time, power has been given to a Tribunal to satisfy itself whether misconduct is proved. This is particularly so, as already pointed out by us, regarding even findings arrived at by an employer, in an enquiry properly held. The Tribunal has also been given power, also for the first time, to interfere with the punishment imposed by an employer. When such wide powers have been now conferred on Tribunals, the legislature obviously felt that some restrictions have to be imposed regarding what matters could be taken into account. Such restrictions are found in the Proviso. The Proviso only emphasises that the Tribunal has to satisfy itself one way or other regarding misconduct, the punishment and the relief to be granted to workmen only on the basis of the 'materials on record' before it. What those materials comprise of have been mentioned earlier. The Tribunal, for the purposes referred to above, cannot call for further or fresh evidence, as an appellate authority may normally do under a particular statute, when considering the correctness or otherwise of an order passed by a subordinate body. The 'matter' in the Proviso refers to the order of discharge or dismissal that is being considered by the Tribunal."

19. Learned Senior Advocate also submitted that the principle of *res judicata* is referable to Section 11 of CPC which refers to an issue decided by a Court. The aforesaid principle is not applicable to the facts of the present case, as the order passed by the Regional Manager of the UPSRTC in appeal and the Managing Director in revision, cannot be said to be an order passed by a Court. Section 2-A of the U.P. Industrial Disputes Act, 1947, provides for the termination of service of a workman to be deemed to be an industrial dispute. Hence by operation of law, the termination of the respondent workman was an industrial dispute, and the rejection of appeal/revision would make no difference.

20. Lastly, he submitted that it is not open for the petitioner to challenge the order referring the dispute to the Labour Court, without there being any pleadings/relief in that respect in the writ petition. He has relied upon **Bharat Singh & Others Vs. State of Haryana & Others, (1988) 4 SCC 534**, and submitted that in any case, once the termination of service of the respondent workman was deemed to be an industrial dispute, (under section 2-A of the U.P. Industrial Disputes Act, 1947), no reasons were required while referring the dispute. Relevant paragraph 13 of **Bharat Singh & Others (supra)** is mentioned hereinafter:

"13. As has been already noticed, although the point as to profiteering by the State was pleaded in the writ petitions before the High Court as an abstract point of law, there was no reference to any material in support thereof nor was the point argued at the hearing of the writ petitions. Before us also, no particulars and no facts have been given in the special leave petitions or in the writ petitions or in any affidavit, but the point has been sought to be substantiated at the time of hearing by referring to certain facts stated in the said application by HSIDC. In our opinion, when a point which is ostensibly a point of law is required to be substantiated by facts, the party raising the point, if he is the writ petitioner, must plead and prove such facts by evidence which must appear from the writ petition and if he is the respondent, from the counter-affidavit. If the facts are not pleaded or the evidence in support of such facts is not annexed to the writ petition or to the counter-affidavit, as the case may be, the court will not entertain the point. In this context, it

will not be out of place to point out that in this regard there is a distinction between a pleading under the CPC and a writ petition or a counter-affidavit. While in a pleading, that is, a plaint or a written statement, the facts and not evidence are required to be pleaded, in a writ petition or in the counter-affidavit not only the facts but also the evidence in proof of such facts have to be pleaded and annexed to it. So, the point that has been raised before us by the appellants is not entertainable. But, in spite of that, we have entertained it to show that it is devoid of any merit."

Discussion and Conclusion

21. Heard the learned counsel for the parties, perused the record and written submissions filed by parties.

22. The reference was only to consider whether the respondent no.1 was legally terminated on 16.02.2013, i.e. the termination order. According to "theory of merger' order of termination and order passed by appellate authority got merged into order passed in revision, which upheld the order of termination however, the respondent no.1 would be considered to be terminated from service with effect from 16.02.2013 only, therefore according to doctrine of "relation back' the relevant date would be 16.02.2013 for termination and not the date when appeal and revision were dismissed. In **Kunhayammed & Ors Vs. State of Kerala and another, (2000) 6 SCC 359,** the Supreme Court has held that *"the doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject matter of challenge laid or capable of being laid shall be determinative of the applicability of merger."*

23. In the present case, domestic enquiry and Labour Court are not in one line of forum. Therefore, doctrine of merger would not come into play. In case, order passed in domestic enquiry was challenged before High Court prior to reference, then issue of *res judicata* would also be very important as held in **Mahmood Khan (supra)** but in the present case Respondent no. 1 has not challenged his termination order or the orders passed in appeal and revision before the High Court. Therefore, the judgment in **Mahmood Khan (supra)** would not be applicable in the present case.

24. **District Administrative Committee (supra)** was a case under U.P. Cooperative Societies Act, 1965, where statutory remedy was available in the relevant Act. However, it was not the case in hand, therefore, *res judicata* would not be applicable. Relevant paragraphs no. 12 of said judgment is mentioned hereinafter:

"12. There is yet another facet to the issue. Admittedly the workman had availed the statutory remedy of appeal which has been decided against him. This decision would act as res judicata and therefore, the Labour Court could not have proceeded with the reference. The Apex Court in the case of Pondicherry Khadi and Village Industries Board v. P. Kulothangan and Anr. 2003 (99) FLR 1175, has held that where the issue was substantially the same in earlier proceedings and has been decided by the competent authority, even though the entire Civil Procedure Code is not applicable to industrial adjudication, the principles of Section 11 C.P.C. including the principles of constructive res judicata will apply."

25. The Labour Court has decided the reference only which was referred to it and it has not travelled beyond it. Since it came to the conclusion that domestic enquiry was not fairly conducted, it called the employee/petitioner to led evidence to prove charges against the

respondent no.1, which it found to be insufficient as the person who actually inspected the bus could not appear before the Labour Court since he was dead and there was no other evidence to prove that inspection of bus was conducted.

26. The argument of counsel for the respondent no.1 that the argument raised by the learned counsel for the petitioner are being not supported by the pleadings has also some force, though legal issue could be raised at any time still it should be followed from the pleading.

27. Recently, the Apex Court in **State of Uttrakhand Vs. Sureshwati, 2021 (3) SCC 108** has relied upon paragraphs no.40 and 41 of the judgment passed in the case of **Workmen Vs. Firestone Tyre & Rubber Co. of India (P) , (1973) 1 SCC 813,** wherein it was held that:

"40. Therefore, it will be seen that both in respect of cases where a domestic enquiry has been held as also in cases where the Tribunal considers the matter on the evidence adduced before it for the first time, the satisfaction under Section 11-A, about the guilt or otherwise of the workman concerned, is that of the Tribunal. It has to consider the evidence and come to a conclusion one way or other. Even in cases where an enquiry has been held by an employer and a finding of misconduct arrived at, the Tribunal can now differ from that finding in a proper case and hold that no misconduct is proved.

41. We are not inclined to accept the contentions advanced on behalf of the employers that the stage for interference under Section 11-A by the Tribunal is reached only when it has to consider the punishment after having accepted the finding of guilt recorded by an employer. It has to be remembered that a Tribunal may hold that the punishment is not justified because the misconduct alleged and found proved is such that it does not warrant dismissal or discharge The Tribunal may also hold that the order of discharge or dismissal is not justified because the alleged misconduct itself is not established by the evidence. To come to a conclusion either way, the Tribunal will have to re-appraise the evidence for itself. Ultimately it may hold that the misconduct itself is not proved or that the misconduct proved does not warrant the punishment of dismissal or discharge. That is why, according to us, Section 11-A now gives full power to the Tribunal to go into the evidence and satisfy itself on both these points. Now the jurisdiction of the Tribunal to reappraise the evidence and come to its conclusion enures to it when it has to adjudicate upon the dispute referred to it in which an employer relies on the findings recorded by him in a domestic enquiry. Such a power to appreciate the evidence and come to its own conclusion about the guilt or otherwise was always recognised in a Tribunal when it was deciding a dispute on the basis of evidence adduced before it for the first time. Both categories are now put on a par by Section 11-A ."

28. In view of the above discussions, the reference is not hit by "doctrine of merger", or by "*res judicata*". The reference was rightly referred to Labour Court. The Labour Court considered the inquiry report and came to the conclusion that domestic enquiry was faulty/irregular. The most crucial and relevant evidence of Mr. Roshan Lal, who conducted inspection of the bus was neither recorded during domestic enquiry nor before the Labour Court (due to his death). There was no other evidence with the petitioner-UPSRTC, which could prove the inspection of the bus and thus the termination order of the Respondent No. 1 was bad on facts as well as on law. No other point was argued by the petitioner. Therefore, there is no illegality in the impugned Award, on law as well as on facts.

29. The writ petition is accordingly dismissed.

(2021)11ILR A372
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.04.2019

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ C No. 60362 of 2013

Akshay Lal Rai ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Vinod Kumar Sharma

Counsel for the Respondents:
C.S.C., Sri R.P. Mishra, Sri R.C. Upadhyay

A. Civil Law – Fair Price Shop – Administrative enquiry – Rule of law – Government's liability – Held, we have a society governed by rule of law – Where Government enters in domain of contract and is on driver's seat, the minimum requirement of law would be that action is procedurally always correct – When procedure prescribes even in the matters of administrative enquiry requires that certain things are to be done in a certain manner then authorities cannot be permitted to proceed at their whims and in arbitrary manner which would lead to miscarriage of justice. (Para 21)

B. Civil law – Essential commodities Distribution Order, 2004 – Clause 22 – Fair Price Shop – License cancellation – Fair and just enquiry – Essentials required to be followed – Held, if a person has been charged with certain gross irregularities/ illegality then such person is not only entitled to submit explanation but is also entitled to due supply of requisite documents to enable him to submit proper reply and he is also entitled to examine such complaints on the basis of which serious charges have been levelled against him to hold an enquiry to cancel the license. (Para 29)

C. Constitution of India – Article 14 – Fair Price Shop – Licence cancellation – Principle of natural justice – Application – Failure to supply the inspection report to the dealer – Denial of opportunity of hearing – Effect – Held, once fair price shop is suspended, the charge sheet/notice is issued may be in the form of suspension order, the supply of that *ex parte* inspection report to the fair price shop dealer alongwith documents if any forming basis of such report is *sine qua non* – This is also in furtherance of principles of natural justice in cases where such enquiry report forms the basis of impugned order. (Para 23)

Writ petition disposed of. (E-1)

Cases relied on :-

1. Puran Singh Vs St. of U.P.; 2011 AIR, 73

2. Smt. Santara Devi Vs St.of U.P & ors.; 2016 2 ADJ 70

3. Dayananad Yadav Vs St.of U.P. through Secretary & ors.; 2019 (1) AWC 347

4. Ajay Pal Singh Vs St. of U.P. & ors.; 2018 (7) ADJ 301

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

1. Heard learned counsel for the parties.

2. By means of this writ petition under Article 226 of the Constitution, the petitioner has sought a writ of certiorari for quashing the order dated 28th May, 2013 passed by the prescribed authority cancelling the fair price shop license of the petitioner as well as the order passed by the Commissioner, Azamgarh Division Azamgarh order dated 4.10.2013 rejecting the appeal.

3. The main plank of the argument of the counsel for the petitioner is that order cancelling fair price shop license has been passed as a result of enquiry de hors the rules and the procedure prescribed and which according to him has resulted in serious miscarriage of justice.

4. In support of his argument, learned counsel for the petitioner has relied upon the

relevant provisions of the Essential Commodities Distribution Order 2004 as well as Government Order issued 29th July,2004. Learned counsel for the petitioner has further relied upon full bench judgment of this Court in the case of **Puran Singh v. State of U.P., 2011 AIR, 73** and the judgments of the learned Single Judges in the case of **Smt. Santara Devi v. State of U.P and Others, 2016 2 ADJ, 70, Dayananad Yadav v.State of U.P. Through Secretary and Others, 2019 (1) AWC 347, and Ajay Pal Singh v. State of U.P. and Others 2018 (7) ADJ, 301.**

5. Learned Standing Counsel has urged that findings of facts have come to be returned by the prescribed authority and the same having been confirmed by the appellate authority, this Court may not interfere in such findings of facts. It is further argued by learned Standing Counsel that rights of the petitioner emanates from pure contract reached between petitioner and Government authority and whereby the petitioner is only acting as an agent of the Government. He argued that the prime concern of the allotment of fair price shop is to ensure smooth sailing of the public distribution system so as to take essential commodities to the most needy people in right quantity and at a right price and, therefore, if in case on inspection, irregularity is found in the distribution, management at fair-price shop and allegations are of overpricing by the dealer in respect of scheduled commodities, the Government has every right through designated authority to cancel the license. He would submit that principles of natural justice as such cannot be put into a straight jacket formula so as to defeat the very object of the distribution system. He would urge that once the spot inspection has been carried out and the ration cardholders have given their complaints and the verification thereof from the relevant registers, if results in *prima facie* establishing the charge, the prescribed authority is fully justified in taking action for cancellation of fair price shop license. He further submits that in so far present case is concerned there were serious complaints and the enquiry shows that petitioner was in fact involved in irregularities at the time of distribution and also quantity and at times of non distribution of the scheduled commodities to the deserving ration card holders and also was guilty for charging higher price than prescribed one from the scheduled commodities and according to him since findings have come to be returned against the petitioner bringing home the charge and admittedly the petitioner was given opportunity to defend himself, it is not a fit case a for interference.

6. In order to appreciate the rival submissions advanced before this Court, it is necessary to appreciate the facts at first. In the present case, the petitioner's fair price shop license was in fact suspended under the order dated 1st April, 2013 passed by Sub Divisional Officer and as many as 10 charges were levelled. The order of suspension that carries charges as states that inspection was carried out on the spot on 17th March, 2013 by a team consisting of Tehsildar Sadar, supply Inspector Sadar as well as Supply Clerk of the Tehsil. It is stated that whether said team conducted inspection of shop at that time many ration cardholders of the category like Antyoday cardholders, BPL cardholders were present and the made complaints against the petitioner and ration cardholders lodged their complaint by name, like BPL cardholder Raj Kumar (Card No. 98113), Rama Shankar(Card No. 98171), Sonmati (Card No. 98111), Ramvyas (Card No. 98132), Uma Shankar (Card No. 98151) and their complaints were that scheduled commodities were not distributed properly and sometimes wheat and rice would not be distributed and some times sugar would not be distributed and even there was allegation of over pricing at the end of the petitioner.

7. There was further complaint by APL cardholders who were 20 in number and the complaint was that they were being charged

higher price for kerosene oil and they were being distributed 2 liters of kerosene oil a lesser quantity and was being distributed for higher price.

8. Similarly Antyoday cardholders also made a complaint that they were being distributed lesser quantity of scheduled commodities and that too at a higher price and there was one America Singh S/o Ramvriksh (Card No. 59582) who made allegation that he was never given any ration.

9. Taking the report dated 17th March, 2013 as *prima facie* correct the fair price shop of the petitioner was suspended and explanation was called. The petitioner submitted a very detailed reply to the charges point-wise and in response to overpricing he made not only denial but pleaded that conduct of ration cardholder was such that at time he would not turn up to the shop. He also stated at the same time that those ration cardholders whose ration card was burnt and yet in their name and number of respective cards the commodities were distributed. Similarly in respect of kerosene oil and the charge of overpricing, the petitioner submit a detailed reply.

10. From the record it is clear that petitioner while submitted reply to the charges on 15.4.2013 also filed affidavits of various ration cardholders addressed to Sub Divisional Officer, Ballia, in which those ration cardholders have categorically stated that they had not made any complaint so far distribution of scheduled commodities was concerned and price charged in that regard by the dealer. What is very interesting to notice that one America Singh S/o Ramvriksh (Card No. 59582) who had made a complaint that he was never distributed any scheduled commodities filed his personal affidavit dated 15.4.2013, in which he stated that he had not made any complaint against ration cardholders. Raja Ram , Ramashray, Chhote Lal, Tetari, Smt. Ambi, Bhankumar, Moti Lal, Kripa Shankar, Ram Avatar, Prabhawati Devi, Nain Kumari, Dulari, Janglee, Shivji, Janaradan, Bhola, Rajmani and Shanti many of them were also shown as complainants, besides ,others also filed affidavit to the effect that they had not made any complaint against the petitioner and that they were fully satisfied with distribution of essential commodities and the price charged by the petitioner was accurate as prescribed. Accordingly as these documents in the form of affidavits were brought on record and supply and distribution register placed before the prescribed authority and the fact that the reply of the petitioner was there, the prescribed authority proceeded to pass final order which is impugned in the writ petition as by the said order, fair price shop license of the petitioner was cancelled

11. From the recitals as have come to be made in the impugned order, it is clear that the prescribed authority simply entertained the objections of the petitioners in terms of the reply and the affidavits and also accepted other documents like supply register, stock and distribution registers and had also complaints before him already submitted alongwith spot inspection enquiry report dated 17th March, 2013. However, no specific date was fixed for the petitioner to place his reply and lead some oral evidence in support of his reply submitted. Further though affidavits were filed of all such ration-cardholders to whom it is alleged that they had complained, the enquiry authority did not fix any date for oral hearing in the matter to get such statements verified as statements were made denying the complaints and it appears that on the basis of records available before him, he proceeded to pass order.

12. From perusal of the order by which the fair price shop license has been cancelled, I find that complaints of individual cardholder were taken as a general complaints and then on the basis of some irregularities if detected in terms

of the maintenance of distribution register being not as per prescribed format and that it being not at all counter signed by the Inspector findings have been returned that charges stood proved and the petitioner was thus held guilty for irregular distribution of essential commodities and also for charging higher price.

13. It has been recorded as finding of fact that at the time of inspection what was shown that Antyoday cardholders were distributed scheduled commodities were shown to be 65 Antyoday card holders 86 BPL cardsholders and in the distribution register further price of 15 kg of BPL wheat was shown as 68.70 paise whereas prescribed rate of 15 kg of BPL wheat would be 69.75 paise so there was difference of about one rupees five paise in distribution of 15 kg of wheat. What clinching issue is that in spot inspection enquiry report that has been referred to in suspension order, there was no such complaint in the nature that distribution register was not properly maintained and that relevant pages were not countersigned by the concerned officer, namely Supply Inspector and, therefore, they appeared to be forged and manipulated documents. There being no such report at least it is so reflected from the order of suspension, this Court is amazed to find as to how in the absence of any such report, prescribed authority on his own proceeded to assume that register maintained by the ration cardholder was not on proper format. Moreover, from the findings that have come to be returned it does not transpire that those individual cardholders who had made complaint before Supply Inspector they were not summoned to explain away as to why did they change their respective stand . It is also clear from the order impugned that copy of the enquiry report was not at all given to the petitioner to make reply in rebuttal. The question therefore, remains that if complaint is for reason ABC and those reasons or the complaints are not proved from record, the prescribed authority was not justified in recording other reasons to cancel the fair price shop. There is no such charge in the suspension order which carries list of charges that distribution register was not properly maintained and that it was not countersigned and that it was a forged document. In the absence of any such charge being levelled, the petitioner certainly had no opportunity to offer his explanation as no oral hearing was held nor, any date for enquiry was fixed after reply was submitted.

14. In the absence of enquiry report as was not made available to the petitioner, and there being no allegations in the order of suspension or show cause to the effect that distribution register was not countersigned by the official, this Court cannot justify the conduct of the prescribed authority on placing reliance upon such enquiry report while bringing home the charge.

15. Black marketing of the essential commodities has been made part of the findings returned by the prescribed authority in his ultimate order also does not find any place in the form of charge in the suspension order and, therefore, the petitioner also had not been given any opportunity to explain away the charge of black-marketing. The appellate authority has, however, concurred with findings returned by the prescribed authority and has passed final order without any independent application of mind.

16. Coming to the legal aspect and argument so advanced by learned counsel for the petitioner, I find that clause 22 of the Distribution Order 2004 prescribes for suspension and cancellation of fair price shop, it provides vide clause 22 of the Control Order 2004, which is reproduced hereunder:

"22. ***Power of entry, search, seizure, etc.-*** *(1) The Food Officer, the Competent Authority, the Senior Supply Inspector or Supply*

inspector may within his jurisdiction with such assistance if any, as he thinks fit,-

(a) Require the owner, occupier or any other person in charge of any place, premises, vehicles or vessels in which he has reason to believe that any contravention of the provisions of this order has been or is being, or is about to be made to produce any book, account or other documents showing transaction relating to such contravention;

(b) Enter, inspect or break open and search any place or premises, vehicle or vessel in which he has reason to believe that any contravention of the provisions of this order has been or is being or it about to be made;

(c) Examine and seize any books of accounts and documents which in the opinion of such officer may be useful for or relevant to any proceeding under this order and return such books of accounts and documents to the person from whom they were seized after copies thereof or extracts therefrom as may be considered necessary and certified by the person to be correct have been taken;

(d) Seize any Scheduled Commodities, if he is satisfied that there has been contravention of this order;

(e) Send a report as provided in Section 6(a) of the Act to the Collector of the District inwhich such seizure is made and the Collector may thereafter proceed to confiscate the Scheduled Commodities, animal vehicles, vessel or other conveyance so seized in accordance with the provisions of the Act.

(2) The provisions of Section 100 of the Code of Criminal Procedure, 1973 (Act No. 2 of 1974) relating to search shall as far as may apply to search under this clause.

17. Thus, the word contemplated in clause 22 (supra) is that if the fair price shop is suspended, further enquiry will be conducted and in case if any such enquiry conducted against the fair price shop dealer the ultimate order will depend upon the enquiry report and also after giving further opportunity to the dealer to peruse the enquiry report and also to peruse the evidence relied upon enquiry report and then offer his explanation in reply to the enquiry report.

18. In aid to the aforesaid provision, Government Order was issued on 29.7.2004 which dealt with proceedings of suspension and cancellation and procedure prescribed to be followed. Paragraphs 4 and 5 of the Government Order are reproduced hereunder:

"4- निलम्बित की गयी दुकानों के विरूद्ध जांच की कार्यवाही अधिकतम एक माह में अनिवार्य रूप से पूरी की जायेगी तथा जांच में सम्बन्धित दुकानदार को सुनवाई का पूरा मौका दिया जायेगा। सम्बन्धित दुकानदार का यह दायित्व होगा कि वह जांच मे अपना पूरा सहयोग दे ताकि जांच का कार्य जल्दी से जल्दी पूरा किया जा सके तथा नियुक्ति प्राधिकारी द्वारा प्रकरण में गुण दोष के आधार पर अन्तिम निर्णय लिया जा सके। यदि दुकानदार द्वारा जांच में सहयोग नहीं दिया जा रहा हो और जांच में विलम्ब करने का प्रयास किया जा रहा हो तो दुकानदार को इस आशय का भी नोटिस जारी किया जायेगा और अपना पक्ष रखने का अन्तिम अवसर प्रदान किया जायेगा।

5. जॉच की कार्यवाही अधिकतम एक माह में पूर्ण करके नियुक्ति प्राधिकारी द्वारा प्रकरण में अन्तिम निर्णय लिया जायेगा और गुण दोष के आधार पर एक ''स्पीकिंग आर्डर'' जारी किया जायेगा। इस आदेश में यह स्पष्ट उल्लेख होना चाहिए कि सम्बन्धित दुकानदार को सुनवाई का अवसर दिया गया और उसे सुना गया। यदि दुकानदार ने जांच में सहयोग नहीं किया हो और सुनवाई के अवसर को जानबूझकर उपयोग नहीं किया हो तो अन्तिम आदेश में इस बात का भी पूरा उल्लेख होना चाहिए कि दुकानदार को अवसर प्रदान किया गया तथा अन्तिम नोटिस दिया गया परन्तु उसने जानबूझ कर अवसर का उपयोग नही किया और जांच में सहयोग नहीं किया। "

19. The provisions in the Government Order are to the effect that after suspension has taken place, a complete enquiry will be held within a month and in which fair price shop dealer shall be provided full opportunity to defend himself. Of-course he would to have

cooperate with the enquiry so that enqury is concluded at the earliest, positively within a month and then prescribed authority /licensing authority /designated authority shall take final decision in the matter on merits. It is further provided that in case cooperation is not extended by the dealer, he shall be given one last opportunity through notice.

20. Important aspect of clause 5 of the Government Order is that while taking final decision in the matter prescribed authority shall not only pass a final order but shall specifically state that concerned fair price shop dealer was afforded reasonable opportunity and was heard and in case if the dealer was not cooperating with the same, the order shall also be passed in that particular circumstances recording such facts. From the provisions of the Clause 22 of the Control Order and Clause 4 and 5 of the Government Order (supra), this Court finds that Government Order provides for the procedural part as an aid to what is substantively provided under clause 22(1) of the Draft Agreement of the Distribution Order. Therefore, the mere fact that right flows from a pure contract between the parties will not have the effect as argued by learned Standing Counsel but such contract is subject to conditions prescribed. Such matter is to provide a smooth and easy public distribution system of the essential commodities to achieve the goal of taking essential commodities to the poorest of the poor and that too, at the earliest and also at a fair price.

21. We have a society governed by rule of law where Government enters in domain of contract and is on driver's seat, the minimum requirement of law would be that action is procedurally always correct. The question therefore, is that when procedure prescribes even in the matters of administrative enquiry requires that certain things are to be done in a certain manner then authorities cannot be permitted to proceed at their whims and in arbitrary manner which would lead to miscarriage of justice.

22. From the perusal of clause 4 and 5 and Draft Rule under the Distribution Order, 2004, it is very much clear that if preliminary enquiry was conducted and fair price shop license of the dealer stood suspended, yet another enquiry be framed as full fledged enquiry which is necessary. The preliminary enquiry is an elementary enquiry only to proceed further and to form *prima facie* opinion to suspend the shop so that atleast irregularities complained are immediately arrested and that is why the full bench of this Court in the case of **Puran Singh v. State *(supra)*** has virtually held that while authorities are proceeding to suspend the license and for that purpose had held a preliminary enquiry, the fair price shop dealer is not required to have prior notice/ opportunity of hearing. So preliminary enquiry is only enabling enquiry held on complaints and is confined to action of suspension only and is the basis to call explanation and for further full fledged enquiry.

23. Under the circumstances, once fair price shop is suspended, the charge sheet/notice is issued may be in the form of suspension order, the supply of that ex parte inspection report to the fair price shop dealer alongwith documents if any forming basis of such report is *sine qua non*. This is also in furtherance of principles of natural justice in cases where such enquiry report forms the basis of impugned order.

24. Even otherwise , this Court is of the opinion that supply of the documents which are basically complaints and the ex parte spot inspection report which is must to set into motion full fledged enquiry referred to under the Government Order, may be such enquiry report may not form the ultimate basis of the order

impugned but it would certainly clear doubts as to whether the ultimate order was being passed on the basis of the charges set out pursuant to enquiry report or some additional charges have come to be considered by the prescribed authority without affording opportunity to the dealer to rebut those charges. Further full fledged enquiry means an enquiry subsequent to the preliminary enquiry and this could be even held by the prescribed authority who is to ultimately pass an order but since enquiry means examination of records and verification of documents submitted by the charged person and also oral evidence if at all required, it is mandatory for the prescribed authority to fix a date for taking such evidence or at-least giving opportunity to the dealer to submit his oral statement in support of the explanation already submitted and would also explain away the documents and registers submitted by him. As a matter of fact he would justify his explanation with records and such enquiry if conducted, it would facilitate the prescribed authority in taking decision on merits with proper evaluation of the documents on record and oral submissions made in respect thereof.

25. Paragraph 35 of the full bench judgment in the case of **Puran Singh** *(supra)* has emphasized the aspect of the full fledged enquiry before final order is taken. Vide paragraph 35 of judgment has held thus:

"35.Powers of suspension is centrally there but while exercising care is to be taken to the mandate of the proviso which states that the order is to be speaking one. Thus so far the power of suspension while proceeding to call upon the licencee about cancellation of the shop is concerned it is always there. It will be incorrect to hold that without preliminary enquiry in respect to a fact finding and without any opportunity the shop is not to be suspended. Para 4 and 5 of the Government Order clearly permits fulfledged enquiry purusant to the show cause notice for cancellation and then final decision in the matter. So far the order of suspension is concerned Government Order do not provide any appeal and at the same time there was no contention of signing an agreement as was made obligatory pursuant to Distribution Order of 2004."

26. In the case of **Ajay Pal Singh v. State of U.P. and others** ***(supra)*** this Court has considered various judgments and has summarized the procedure to be followed vide paragraph 14 which runs as under:-

"The Authority which is performing a qausi judicial functioning has to function judicially. Simply by saying that the petitioner i.e. Fair Price Shop dealer had not submitted his reply and therefore the licence should be cancelled was wrong on the part of the Sub Divisional Magistrate. It was his bounden duty:-

I. To direct the complaints to lead their evidence;

II should have given an opportunity to the Fair Price Shop Dealer(the petitioner) to cross examine the witnesses of the complaints

III. The petitioner should have also been allowed to lead his evidence.

IV. The complainants should have been allowed to cross examine the witnesses of the defence.

V. If any documentary evidence was produced then the same should have been proved as per law.

VI. For doing the above, the Sub Divisional Magistrate should have fixed a date and a place.

VII. And only thereafter the Sub Divisional Magistrate should have come to a conclusion as to what had to be done with the licence/agreement of the petitioner to run the Fair Price Shop. "

27. This Court in the case of **Dayanand Yadav v. State** ***(supra)*** relied upon the

judgment of Patiram Writ-C with 14206 of 2014, vide paragraph 24 has held thus.

"In another case in Writ-C No. 14206 of 2014 (Pati Ram v. State of U.P. And Others), this Court has held that if the decision is based on the sttement of the complainants/cardholders, then the copies of the statements have to be provided to the fair price shop agent, so that, he may be able to cross-examine the persons whose statement has been made basis for cancellation of license."

28. Now applying the above principle of law, I find justification in the argument advanced by learned counsel for the petitioner that order impugned passed by the prescribed authority is clearly not sustainable as neither enquiry report dated 17th March, 2013 was supplied to the petitioner nor, any enquiry was conducted in the matter by the prescribed authority as after reply was submitted by the petitioner on 15.4.2013 alongwith the documents neither any further date was fixed by the prescribed authority to hold oral hearing in the matter, nor, there is any reference to any affidavit of complainant on the basis of which it is alleged that inspection team was constituted to submit report and on the basis of inspection report the alleged enquiry was set into motion.

29. It is cardinal principle of rule of law that no body should be condemned unheard. If a person has been charged with certain gross irregularities/ illegality then such person is not only entitled to submit explanation but is also entitled to due supply of requisite documents to enable him to submit proper reply and he is also entitled to examine such complaints on the basis of which serious charges have been levelled against him to hold an enquiry to cancel the license. The question is not only of cancellation of fair price shop license of a dealer but if a dealer's license stands cancelled on certain charges being proved then such fair price shop dealer may not be entitled to get license in future. Even otherwise, if a person is charged with black-marketing and overpricing or irregularities in distribution of essential commodities to the poor and needy for which Government has evoked public distribution system, such charges cause serious stigma on the character of such person in the society.

30. Under the circumstances, without holding proper enquiry, charge of such nature if said to have been brought home, in the considered opinion of the Court, such an order is vitiated in law and findings returned are absolutely perverse.

31. In view of above, the order dated 28.5.2013 passed by Sub Divisional Officer, Sadar Ballia and the order dated 04.10.2013 passed by Commissioner, Azamgarh, Division Azamgarh are set aside. It is always necessary that if any oral statement is made in the complaint and charge is levelled on such basis then such statements is taken on affidavit. In the absence of any such affidavit and merely statements alleged to have been signed, the prescribed authority/ enquiry officer has to be conscious in accepting and admitting such statements.

32. The matter is remitted to the prescribed authority to either appoint an enquiry officer or himself hold enquiry after supplying necessary copies of the preliminary enquiry report/ inspection report and the complaints made against the petitioner giving him opportunity to lead evidence and then to permit him if he requests for cross- examination of such complainant. The final decision shall be taken by the prescribed authority after holding proper enquiry as directed hereinabove within period of three months from the date of production of certified copy of the order.

33. It is further made clear that as far as status of the shop is concerned, same shall

continue as it exists today and shall abide by ultimate order to be passed by the prescribed authority as directed hereinabove.

34. With the aforesaid observations and directions, the writ petition is disposed of.

(2021)11ILR A380
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.10.2021

BEFORE

THE HON'BLE NAHEED ARA MOONIS, J.
THE HON'BLE SAUMITRA DAYAL SINGH, J.

Income Tax Appeal No. 52 of 2013

Manas Sewa Samiti ...Appellant
Versus
Addl. Commissioner of Income Tax, Range-I, Aligarh ...Respondent

Counsel for the Appellant:
Sri Rahul Agarwal, Sri Vishwjit

Counsel for the Respondents:
C.S.C., I.T., Sri Gaurav Mahajan

A. Civil Law - Income Tax Act, 1961: Sections 10 (23C) (iiiad) & 12AA - The Court rejected the reasoning of the assessing authority for clubbing the receipts of the Institution with the other income of the Society, for the purpose of considering the benefit of Section 10(23C)(iiiad). The Court finds that the there were two separate accounts were maintained by the assessee. One for the institution and the other one for the Society. After the Income and Expenditure account of the Institution has been made, its excess of Income over expenditure were carried to the account of society for taxation and other purposes. That did not lead to an inference that the receipts of thw Society were also the receipts of the Institution. (Para 22)

Appeal Allowed. (E-10)

List of Cases cited:-

1. CIT Vs M/s Children's Education Society (2013) 358 ITR 373 (Kar) *(followed)*

2. M/s Vivekan & Society of Education &Research Vs CIT another ITA No. 23/2014 *(followed)*

3. CIT Alld Vs Wachaspati Madhupati Prani Sewa Sansthan ITA No. 258 of 2013

4. Visvesvaraya Technological University Vs Assistant Commissioner of Income Tax (2016) 384 ITR 37 (SC) *(distinguished)*

(Delivered by Hon'ble Naheed Ara Moonis, J.
&
Hon'ble Saumitra Dayal Singh, J)

1. Heard Sri Rahul Agarwal, learned counsel for the appellant/assessee and Sri Gaurav Mahajan, learned counsel for the revenue.

2. Present appeal has been filed under Section 260-A of the Income Tax Act, 1961 (hereinafter referred as the Act) against the order of the Income Tax Appellate Tribunal, Agra Bench, dated 23.10.2012 passed in ITA No.29/Agra/2011 for the A.Y. 2007-08. By that order the Tribunal has dismissed the appeal filed by the assessee and upheld the assessment of the appellant's income at Rs.86,34,460/-, after denying the benefit claimed by the assessee under Section 10(23C)(iiiad) of the Act.

3. Upon earlier hearing, the question of law, on which the present appeal arises, was framed as below:

"Whether, in view of the law laid down in CIT Vs. Children's Education Society [2013] 358 ITR 373 (Kant.) and the order passed by this Hon'ble Court in CIT (Exemption) v. Chironji Lal Virendra Pal Saraswati Shiksha Parishad [2016] 380 ITR 265 (All), the order of the Tribunal denying the exemption under Section 10 (23C) (iiiad) and clubbing the voluntary contributions received by the

appellant Society with the receipts of the educational institution is justified in law?"

4. Having heard the learned counsel for the parties, it transpires that the appellant/assessee Manas Sewa Samiti is a Society (hereinafter referred to as "Society"). It is registered under the Societies Registration Act, 1860. Under its registered objects, it established an educational institution in the name, Institute of Information Management and Technology at Aligarh (hereinafter referred to as "Institution"). For the previous year relevant to A.Y. 2007-08, undisputedly the said Institution received fees Rs. 85,95,790/- and interest on FDR Rs. 86,121/-. Thus the total receipts of the Institution were Rs.86,81,911/-. After deducting expenditure of the Institution, the excess of Income over Expenditure, Rs.38,54,310/- was carried to the Income and Expenditure Account of the Society. Also, undisputedly the Society received donations or subscription amount Rs.47,62,000/- and interest on FDR Rs.18,155/-.

5. With respect to the receipts arising from the Institution, the assessee claimed benefit of Section 10(23C)(iiiad) of the Act. Relevant to our discussion, that provision of law is quoted below:

*"**Section 10** In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included:-*

***S. 10 (23C)** any income received by any person on behalf of*

(i) .....
(ii) .....
(iii) .....
(iiia).....
(iiiaa).....
(iiiaaa).....
(iiiaaaa).....
(iiiab).....
(iiiac).....

(iiiad) any university or other educational institution existing solely for educational purposes and not for purposes of profit if the aggregate annual receipts of such university or educational institution do not exceed the amount of annual receipts as may be prescribed."

6. It is also undisputed that in the relevant Assessment Year, the upper limit prescribed for such receipts was Rs.1 Crore, under Rule 2(BC) of the Income Tax Rules, 1962.

7. The assessing authority accepted the fact that the Society was running the Institution. He also accepted the fact that the total receipts of the Institution were below the prescribed limit of Rs.1 Crore. However, he proceeded to deprive the assessee of the benefit of Section 10(23C)(iiiad) of the Act since the aggregate of the fee receipts of the Institution and the receipts of the Society breached the prescribed upper limit of Rs.1 Crore. That reasoning came to be approved and affirmed by Commissioner of Income Tax vide his order dated 15.3.2011, in Appeal No.59 of 2009. He rejected the claim made by the assessee on the further reasoning since the Institute was the only activity carried out by the Society, all donations received by the Society were attributable to that activity alone and therefore to the Institution. He further relied on the fact that the surplus of income over expenditure of the Institute was carried to the accounts of the Society.

8. The Tribunal has also affirmed that order on the further reasoning that there was no evidence that the donations had been received by the Society with any specific direction that they will form part of the corpus of the Institution. Reliance has also been placed on the fact that there exists no registration under Section 12AA of the Act. Hence the assessee was not entitled to the benefit and it did not exit solely for education purpose of imparting education.

9. In support of his submission, learned counsel for the assessee has relied on the decisions in the case of ***CIT vs M/S Childrens Education Society reported in (2013) 358 ITR 373 (Kar)*****; M/S Vivekanand Society of Education and Research vs. CIT another,** dated 29.12.2017 in ITA No.23/2014 and a division bench of this Court in ITA No.258 of 2013 **(The CIT Alld. Vs. Wachaspati Madhupati Prani Sewa Sansthan)** decided on 30.10.2017.

10. On the other hand, Sri Gaurav Mahajan, learned counsel for the revenue has relied on a decision of the Supreme Court in Visvesvaraya Technological University Vs. Assistant Commissioner of Income-tax reported in (2016)384 ITR 37(SC).

11. Having considered the submissions advanced by the learned counsel for the parties and having perused the record, the benefit granted under Section 10(23C)(iiiad) is only with reference to an activity of running a University or other educational institution, existing solely for educational purposes. By virtue of Section 10(23C)(iiiad) such receipts are excluded from the income received by the "person", who may have run such University or other educational institution.

12. Thus, the benefit has been granted with respect to receipts arising from a specified activity. The benefit is not conditioned or restricted to the person who may have established or may have run such activity or who may have been in receipt of such receipts.

13. Though, obviously, the issue whether that benefit is available or not would arise only in the course of assessment proceedings of a person/assessee , who may have engaged in such activity, at the same time, it is not the intent of the Act to look at the aggregate income or receipt of such person for the purpose of granting the benefit under section 10(23C)(iiiad) of the Act.

14. In fact, as lucidly explained in the decision of the Karnataka High Court, it is the receipt of each individual University or other educational institution that would be looked at to determine whether the receipt would qualify for the benefit conferred under Section 10(23C)(iiiad), read with Rule 2 BC of the Income Tax Rules, 1962.

15. In paragraphs 20, 21, 23 and 24 of the report in **CIT Vs. M/S Childrens Education Society (Supra)** decision, it was held as under:-

20. Now, we are concerned with the meaning to be attached to the word "aggregate annual receipt". The argument is, other educational institution referred to in the said sub-clause refers to all educational institutions run by the assessee and aggregate annual receipts of such other educational institutions means the aggregate of annual receipts of all such educational institutions put together. Otherwise, the use of the word "aggregate" loses its meaning. We find it difficult to accept the said argument.

21. Firstly, if the word "aggregate annual receipts" of other educational institution is to be understood as clubbing of annual receipts of all educational institutions run by an assessee society, then it will also include the annual receipts of an educational institution which is wholly or substantially financed by the Government. If that was intention of the Legislature, they would not have introduced separate sub- clauses as (iii)(ab) and (iii)(ad). If such interpretation is placed, sub-clause (iii)(ab) becomes otiose. Therefore, it is not possible to place such an interpretation. If an assessee society is running several educational institutions, if some of them are wholly or substantially financed by the Government in terms of sub-clause (iii)(ab), the income on

behalf of such educational institution received by the assessee is exempted from being computed the total income of the assessee. If the assessee is running other educational institutions which are not wholly or substantially financed by the Government, then the benefit of that exemption is also extended to the income derived from such educational institutions and received by the assessee under sub-clause (iii)(ad) reading with sub-clause (iii)(ad) along with Rule2BC. It was contended, the Legislature used the word "aggregate annual receipt" and "amount of annual receipts" and therefore, the provisions are not one and the same. The word "aggregate" has been defined in Chambers 21st Century Dictionary as under:

"aggregate - noun = a collection of separate units brought together, a total taken altogether, bring together."

In Wharton's Law Lexicon, it is defined as thus:

"a collocation of individuals, units or things in order to form a whole"

23. No doubt, education has become a business, a very profitable business also. But it requires huge investment. It is the duty of the Government to provide education to all its citizens, as the Government is not able to shoulder the responsibility completely. Therefore, the field of education is now thrown open to private organizations. But for throwing open the field to the private operators, probably, the country would not have achieved in the field of education what it has achieved. Therefore, lot of funds are invested in running these educational institutions, either by creating a Society or a Trust. In course of time, they have expanded their activity providing course in various subjects at various levels and for that purpose they have established more than one educational institution. Each educational institution is a separate entity controlled under various statutes for various purposes. May be the Management of these educational institutions would be in the hands of the Societies or the Trust, but for all other purposes they are different, independent entities. That is the reason why Section 10 (23)(c) is worded as under:

"Any income received by any person on behalf of..."

24. Here "any person" refers to the assessee and "on behalf of" refers to such institutions. It may be an University, it may be an educational institution, it may be a hospital or other institutions of similar nature. As all such institutions are independent entity and they generate income and when that income is received by the assessee, it becomes the income in the hand of the assessee and it is such income which is sought to be excluded while computing the total income of the assessee underSection 10. The test prescribed under the aforesaid provision is not the income of the educational education. It is the aggregate annual receipts of such educational institution that is prescribed at Rs.1 crore. Therefore, irrespective of the expenditure incurred by those institutions, the exemption is based on the total receipts. Even if the word "aggregate" has to be understood as suggested by the Revenue as the annual receipts of such educational institutions put together, probably, the said provision regarding exemption would be of no use at all. Especially, if the society is running a medialcollege or any engineering college or other professional courses, then the annual receipt of each institution would run to few crores and therefore, the very object of granting exemption to such genuine institution would be lost. Therefore, the word "aggregate annual receipt" has to be understood with the context in which it is used and the purpose for which the said provision was inserted, keeping in mind, theScheme of the Act. Therefore, if an assessee is running several educational institutions, if any of them is wholly or substantially financed by the Government, then the income from such educational institution received by the assessee is not included while computing his total

income. Similarly, income from each educational institution if they are not receiving any aid from the Government wholly or substantially in respect of which the aggregate annual receipt do not exceed Rs.1 crore received by the assessee, is also not included while computing annual total income of the assessee."

16. Similar view was taken by the Jammu and Kashmir High Court in ***M/s Vivekanand Society of Education and Research vs. CIT and another (Supra).*** It was held as under:-

13. On a plain reading of the above provisions, it is evident that any income received by any person on behalf of any University or other educational institution existing solely for educational purposes and not for purposes of profit, if the aggregate annual receipts of such University or educational institution do not exceed the amount of aggregate receipts, as may be prescribed (which is Rs. 1 crore as per Rule 2BC of the said Rules), would not be included in the total income of that person.

14. It is not in issue that ,,the person" in the facts of the present case has reference to the assessee society. It is also not in issue that the expression ,,educational institution" has reference to the two institutions of the assessee society. It is also not disputed that these two institutions exist solely for educational purposes and not for purposes of profit. It is, therefore, clear that there is a distinction between the expression ,,any person" and ,,educational institution", and that the two are not the same. Had it been the intention of the legislature to have limited the scope of the provision to the interpretation which has been given by the Tribunal, it could easily have said that, if the aggregate annual receipts of any person from all institution(s) do not exceed Rs. 1.00 crore then the income derived there from would not be included in the total income of that person. But, this is not the case here. The reference here is pointedly to the ,,aggregate annual receipts" of the educational institution. The expression, ,,educational institution" and ,,any person" do not refer to the same entity and are distinct and different insofar as Section 10 (23C) (iiiad) of the said Act is concerned.

15. In our view, therefore, where there are more than one such institutions, which are under a particular society or trust, such as the assessee society in the present case, the aggregate annual receipts of each of the educational institutions would have to be considered separately and not together. Thus, if there are two institutions A and B and if the aggregate annual receipts of the Institution A is less than Rs. 1.00 crore, then the income received by a person (such as the assessee society) on behalf of the Institution A, would not be included in the total income of that person (such as the assessee society). At the same time, if the aggregate annual receipts of Institution B exceeds Rs. 1.00 www.taxguru.inITA No. 23/2014 Page 6 of 8 crore, then any income received by any person on behalf of Institution B would be included in the total income of that person. Similarly, by taking this logic further, if neither Institution A nor Institution B has aggregate annual receipts of Rs. 1.00 crore or more, any income received by any person on behalf of these institutions, would not form part of the total income for the purposes of income tax."

17. Thereafter, the Jammu and Kashmir High Court concurred with the opinion of the Karnataka High Court in ***CIT Vs. Children's Education Society [2013] 358 ITR 373.***

18. A coordinate bench of this Court also appears to have offered a similar reasoning in ***ITA No.258 of 2013*** **(The Commissioner of Income Tax Alld. Vs. Wachaspati Madhupati Prani Sewa Sansthan)** wherein, it was observed as under:-

"We are in full agreement with the finding of the ITAT as we find that the assessee society is running a school and has admittedly

received the tuition fee being the annual receipts below the prescribed limit of Rs.1 crore and according to us the exemption limit clearly provides the cut of figure of Rs.1 crore being the annual receipt of the educational Institution or the University, as the case may be, and not that of the total income of the society running the educational Institution or University. In the present case, the income of Rs.6,67,000/- towards the buildings/capital assets and Rs.4,01,900/- received towards donation cannot be part of the annual receipts of the University/College/School. Therefore, in our considered opinion the assessee is entitled for exemption under Section 10(23C)(iiiad) as annual income of the assessee society did not exceed Rs.1 crore."

19. Insofar as the decision of the Supreme Court relied upon by the learned counsel for the Revenue is concerned, it was a case pertaining to provision of Section 10(23C)(iiiab). The question that arose before the Supreme Court was whether the University receiving finance by the Government below one percent of its total receipts could be considered to be a University substantially financed by the Government. Those facts of law are not involved in the present case. Therefore, the said decision is found to be wholly distinguishable and hence inapplicable.

20. In the first place, for reasons given above, we find ourselves in complete agreement with the reasoning of the Karnataka High Court in ***CIT vs. Children's Education Society (Supra*)** as also the decision of the Jammu & Kashmir High Court in ***M/s Vivekanand Society of Education and Research vs. CIT and another (Supra).***

21. Next, we find, the reasoning adopted by the assessing authority as affirmed by the appellate authority and the Tribunal, wholly erroneous in law. As noted above, the benefit of Section 10(23C)(iiiad) being activity centric, the limit of Rs. 1 crore prescribed thereunder had to be seen only with reference to the fee and other receipts of theeligible activity/Institution. Admittedly, those were below Rs. 1 Crore. In the facts of the present case, the eligibility condition prescribed by law was wholly met by the assessee.

22. The further reasoning offered by the assessing authority to disallow that benefit, on account of excess of income over expenditure of the Institution having been carried to the Society, is extraneous to the issue involved in the present case.

23. The fact that the Institution did not exist on its own and was run by the Society could never be a valid consideration to disallow that benefit. It is clearly not contemplated under the Act. Here, we may further note, according to the assessing authority itself, there were two accounts maintained. One for the Institution and the other of the Society. After the Income and Expenditure account of the Institution had been made, its excess of Income over Expenditure were carried to the account of Society for taxation and other purposes. That did not and it could not lead to the inference that the receipts of the Society were also the receipts of the Institution. That reasoning is based on no material or evidence on record.

24. Legally, it is only a figment of imagination. Even in the computation of the income, the assessing authority has recognized the difference between the two receipts being "Surplus as per Income/ Expenditure A/c of college". It was taken at Rs. 38,54,310 and, "Surplus as per Income/Expenditure A/c of Society" of the of society which was taken at Rs. 47,62,000/-.

25. Once that difference of the receipts was acknowledged by the assessing authority,

there was absolutely no other material existing to treat the donations received by the Society to be receipts of the Institution.

26. Similarly, the further reasoning offered by the appellate authority to affirm the order of the assessing authority is wholly erroneous and contrary to law. Merely because the assessee Society was the person running the Institution, it did not cause any legal effect of depriving the benefit of Section 10(23C)(iiiad) which was activity specific and had nothing to do with the other income of the same assessee.

27. To complete the discussion, the Tribunal has also erred in looking at provisions Section 12 AA of the Act and the fact that the donations received by the Society may not have been received with any specific instructions. It is not relevant in the facts of the present case. It is so because here the assessee had only claimed the benefit of Section 10(23C)(iiiad) with respect to the receipts of the Institution, Information Management and Technology and it had not claimed any benefit with respect to the donations received by the Society.

28. In view of the above, the question of law is answered in the negative i.e. in favour of the assessee and against the Revenue. There would be no clubbing of the receipts of the Institution with the other income of the Society, for the purpose of considering the benefit of Section 10(23C)(iiiad).

29. Appeal ***Allowed.*** No order as to costs.

(2021)11ILR A386
ORIGINAL JURISDICTION
CIVIL SIDE

DATED: ALLAHABAD 28.09.2021

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ C No. 40261 of 2018

Sanjay Maheshwari ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Pawan Kumar Shukla

Counsel for the Respondents:
C.S.C.

A. Stamp deficiency – Nature of land – Small scale production of jiggery – Industrial activity – Competent authority declared the land as agricultural land in a proceeding u/s 144 of UPZA&LR Act, 1950 – However, Collector (Stamps) determined the valuation holding that land was not being used for agricultural purpose – Legality challenged – Held, Production of jaggery on small scale is an agricultural activity undertaken by small farmers. This is clearly distinguishable from large scale industrial production of jiggery – Small scale production of jaggery is often made by various village households. The same cannot be categorized as industrial activity for the purposes of the Indian Stamp Act – High Court set aside the impugned order holding it arbitrary and illegal – Matter remanded back to the Collector (Stamp) with several direction. (Para 5, 6 and 7)

Writ petition allowed. (E-1)

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

1. The order dated 30.10.2017 passed by the Collector (Stamps)/ District Magistrate, Moradabad found that there is an old dilapidated boundary wall around the disputed land. Further the existence of sugar cane crushing equipment attests the fact that the land was not being used for agricultural

purposes. On this footing it was found that the land was not agricultural land. The valuation of the land comprised in the instrument was accordingly made and the stamp liability was then determined.

2. The appellate authority agreed with the findings of the adjudicating authority in the impugned judgment dated 20.09.2018 and affirmed its judgment.

3. Heard Sri Pawan Kumar Shukla, learned counsel for the petitioner and Sri Sanjay Goswami, learned Additional Chief Standing Counsel for the State.

4. The appellate authority neglected to consider the fact that parcel of land comprised in the instrument had been declared as land to be used for agricultural propose by the competent authority in proceedings taken out under Section 144 of the U.P.Z.A.& L.R. Act by the judgment dated 19.07.2013. The sale deed was executed on 30.06.2015. The Collector Stamps/ Adjudicating authority as well as the appellate authority cannot overreach the findings and declaration regarding agricultural usage of land entered by the competent authority in proceedings under Section 144 of the U.P. Z.A & L.R. Act.

5. Production of jaggery on small scale is an agricultural activity undertaken by small farmers. This is clearly distinguishable from large scale industrial production of jaggery. There is no finding that the in the case at hand at any point in time large scale production of jaggery by industrial process was being made on the disputed parcel of land. No existence of any industrial unit capable of such large scale production has been recorded in the impugned order or disclosed from the record. Small scale production of jaggery is often made by various village households. The same cannot be categorized as industrial activity for the purposes of the Indian Stamp Act.

6. In the wake of preceding discussion the impugned orders dated 20.09.2018 passed by respondent No. 2/ Commissioner Moradabad Mandal Moradabad as well as order dated 30.10.2017 and 07.02.2018 passed by respondent No. 3/ Collector Moradabad are arbitrary and illegal and are liable to be set aside and are set aside.

7. The matter is remitted to the respondent no. 3/ Collector (Stamps)/ District Magistrate, Moradabad with the following directions:

(1) The respondent No. 3 shall decide the controversy within a period of four months from the date of receipt of copy of this order downloaded from the official website of the High Court of Judicature at Allahabad. The concerned Court/ Authority/ Official shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

(2) The respondent No. 3 shall give due opportunity of hearing to the petitioner.

(3) The respondent No. 3 shall decide the controversy consistent with the observations made in this judgment.

(4) The land comprised in the offending instrument shall be treated as agricultural land for the purpose of valuation of property.

(5) The existence of sugar cane crushers for production of jaggery, in the facts of this case shall not be treated as proof of industrial activity on the disputed parcel of land.

8. The writ petition is allowed to the extent indicated above.

(2021)11ILR A388
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.10.2021

BEFORE

THE HON'BLE NAHEED ARA MOONIS, J.
THE HON'BLE SAUMITRA DAYAL SINGH, J.

Writ Tax No. 690 of 2015

M/s GEM AROMATICS PVT. LTD., Badaun ...Petitioner

Versus

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

Counsel for the Petitioner:
Sri Madan Lal Srivastava, Sri Naveen Sinha(Senior Adv.)

Counsel for the Respondents:
C.S.C., Sri Akhilesh Tripathi, Sri C.B. Tripathi, Sri S.K. Kakkar

A. Civil Law - U.P. Trade Tax Act, 1948 - Sections 34 (1) & (2) - The property-in-dispute was under the charge created 'in favour' of the State Bank of India (SBI), till before the execution of the sale-deed dated 16.07.2014. The sale deed was executed in favour of the petitioner in pursuance of the One Time Settlement reached between the 'assessee-in-default' and the SBI.

The Act created indefeasible right in the SBI by virtue of its status as a 'banking company' as defined under the Banking Act, occasioned by its charge over the property-in-dispute. That indefeasible right cannot be lost or diluted, merely because in the process of recovering its dues, that bank chose to negotiate or allow a third-party sale of the property-in-dispute, in favour of the petitioner, instead of first obtaining title in it. The words 'transfer in favour of banking company' appearing in Section 34(2) of the Act are wide enough to include within their plain ambit, a transaction of this nature whereby instead of first obtaining a transfer of the 'property-in-dispute', in its own name, the SBI allowed that charged property to be sold to the petitioner, for the same purpose, for its benefit namely, to recover its dues from the 'assessee-in default'. (Para 30,31)

Writ Petition Allowed. (E-10)

List of Cases cited:-

1. Musahar Sahu & anr. Vs Hakim Lal &anr. AIR 1915 PC 115

2. Ma Pwa May & anr. Vs S.R.M.M.A. Chettyar Firm AIR 1929 PC 279

3. Chogmal Bhandari Vs Deputy Commissioner Tax Officer (1976) 3 SCC 749

4. U.O.I. Vs Rajeshwari & Co. & ors. (1986) 3 SCC 426

5. Dena Bank Vs Bhikabhai Prabhuda Parekh & CO. & ors. (2000) 5 SCC 694

6. Reflex Industries & anr. Vs St. of U.P. & ors. 2004 (4) ACC 3471 *(distinguished)*

7. Madhav Rao Jivaji Rao Scindia Vs U.O.I. (1971) 1 SCC 85

8. U.O.I. Vs G.M. Kokil 1984 Supp SCC 196

9. Tirath Singh Vs Bachittar Singh AIR 1955 SC 830 *(followed)*

10. D. Saibaba Vs Bar Council of India (2003) 6 SCC 186

11. The Bank of Bihar Vs The St. of Bihar & ors. (1972) 3 SCC 196

12. M/s Rana Girders Ltd. Vs U.O.I. (2013) 10 SCC 746

13. Principal Commissioner of Income Tax Vs Monnet Ispat & Energy Ltd. 2018 (18) SCC 786

(Delivered by Hon'ble Naheed Ara Moonis, J.
&
Hon'ble Saumitra Dayal Singh, J.)

1. Heard Sri Navin Sinha, learned Senior Counsel assisted by Sri Madan Lal Srivastava, Sri Apoorv Hajela, learned Standing Counsel for the revenue and Sri Sumit Kumar Kakkar, learned counsel for the respondent- Bank.

2. Present writ petition has been filed, effectively to restrain the respondent-State authorities from adopting coercive measures against the property purchased by the petitioner company, under a registered sale-deed dated 16.07.2014. Thereby, Plot Nos.126/1, 10 and 126M situate at Village- Gathauna, Pargana Ujhani, District - Badaun (hereinafter referred to as 'the property-in-dispute') were purchased by the petitioner, from another company - M/s Kanha Vanaspati Ltd.- respondent no.7 (hereinafter referred to as 'assessee-in-default'). Relief has also been sought against the citation dated 26.05.2015, seeking those recoveries from the petitioner.

3. Undisputedly, the "assessee-in-default' was assessed to tax for the A.Ys. 1992-93 (U.P. and Central), 1993-94 (Central), 2006-07 (Central) and 2006-07 (Entry Tax), under the provisions of U.P. Trade Tax Act, 1948, Central Sales Tax Act, 1956 and The U.P. Entry Tax Act. It was further faced with other demands of tax etc. raised against it for the A.Ys. 1994-95 to 2000-01. Those arrears of tax were stated to be Rs.17,64,83,574/-, in the impugned recovery citation dated 26.05.2015.

4. Though the revenue authorities deny, yet, upon exchange of affidavits, it appears, the "assessee-in-default' owed dues to the State Bank of India, against loan facility availed by it. According to the petitioner, amongst others, the "property-in-dispute' had been mortgaged by the "assessee-in-default', to the State Bank of India. Thus, a first charge existed over the same which was duly registered with the Registrar of Companies, Kanpur. In this regard, a Certificate dated 06.08.2014, issued by the Registrar of Companies (Annexure 7 to the writ petition) certifying satisfaction of charge no. 80067412 dated 08.11.2005 for Rs. 32,89,00,000 in full has been placed on record. It is undisputed. The petitioner has brought on record copy of letter dated 15.07.2014 issued by the State Bank of India, acknowledging lifting its charge on the "property-in-dispute', upon satisfaction of its dues under the One Time Settlement (OTS in short). Also, the State Bank of India has filed a copy of its letter dated 10.05.2015 written to the petitioner acknowledging the prior existence of its charge in favour of that bank and of that charge agreed to be lifted from over the "property-in-dispute', upon payment of Rs. 2.61 crores.

5. In such facts, the petitioner claims, pursuant to the OTS entered between the "assessee-in-default' and the State Bank of India, Rs. 2.61 crores were paid by it directly to that bank, towards the entire consideration for the "property-in-dispute'. Upon that deposit made, the charge (over it) was lifted on 15.07.2014. Only thereafter, the "property-in-dispute' could be and it was sold by means of the registered sale-deed dated 16.07.2014, a copy of which is also on record. Later, the petitioner learnt about the attachment of the "property-in-dispute', first made in the year 2015. By means of a Supplementary Affidavit filed to the writ petition, a copy of the Khatauni has been attached which document is admitted to the State. It recites, the fact of the attachment order made on 18.06.2015 - over the "property-in-dispute' i.e., after the sale-deed came to be registered.

6. Relying on Section 34 of U.P Trade Tax Act, 1948 (hereinafter referred to as the 'Act, 1948'), it has been first submitted by Sri Sinha, the first charge over the "property-in-dispute' was created in the year 2005, in favour of the State Bank of India. Undisputedly, it is a "banking company' as defined under the Banking Regulation Act, 1949 (hereinafter referred to as the Banking Act). Therefore, by virtue of Section 34(2) of the Act, nothing contained in Section 34(1) of the Act, would apply to the transaction in question. Consequently, the sale-deed dated 16.07.2014

was wholly valid and the petitioner cannot be deprived of its property on account of outstanding tax dues, of the "assessee-in-default'. Alternatively, it has been submitted, even if Section 34(1) of the Act was applicable, no fraud was committed by the petitioner. In that regard, it is submitted, the respondent bank was a secured creditor of the "assessee-in-default' and undisputedly, full, and fair consideration had been paid; no rights had been reserved in favour of the transferor and the parties to the sale deed were unrelated. Even then, if at all, the only remedy available to the revenue authority was to institute a proper suit proceeding as in any case such a transaction would remain voidable and it is not *void ab initio*. No suit proceeding having been instituted within limitation, the revenue authorities cannot resist the absolute right and title of the petitioner over the "property-in-dispute'.

7. Reliance has been placed on two decisions of the Privy Council in **Musahar Sahu and another vs Hakim Lal and another** reported in **AIR 1915 PC 115** and **Ma Pwa May and another vs S.R.M.M.A. Chettyar Firm** reported in **AIR 1929 PC 279**. That principle of law was applied and followed by the Supreme Court in **Chogmal Bhandari vs Deputy Commissioner Tax Officer reported in (1976) 3 SSC 749 and in Union of India vs Rajeshwari and Co. and others** reported in **(1986) 3 SCC 426**. Still later, this principle was applied by the Supreme Court in **Dena Bank vs. Bhikhabhai Prabhudas Parekh & Co. and others** reported in **(2000) 5 SCC 694.** As to the remedy, if at all being suit proceedings, reliance has been placed on **Chogmal Bhandari (Supra).**

8. In short, it has been submitted, in absence of any contrary statutory provision creating preferential right in favour of the Crown/State, the secured creditor stands in preference over the Crown/State dues. A valid charge was created over the "property-in-dispute', in favour of the State Bank of India, a "banking company' within the meaning of that term under Section 34(2) of the Act, 1948. It came to be lifted to allow the execution of the sale-deed in favour of the petitioner, after satisfaction of that charge. Nothing contained in Section 34(1) of the Act, 1948 may apply to override that sale- deed. Alternatively, it has been submitted, no fraud was committed. Therefore, resort may not be had to the provisions of Section 34(1) of the Act. In any case, the remedy if any, would be to institute a suit proceeding and seek a declaration, before resorting to coercive measures against the petitioner.

9. Responding to the above, the learned Standing Counsel has vehemently urged, the first relief sought in the writ petition is wholly inadequate, since the attachment order dated 18.06.2015 has neither been placed on record nor it has been specifically challenged. At the same time, the learned Standing Counsel does not dispute the existence of the attachment order dated 18.06.2015. It is also not the case of the revenue that there was any other attachment order made, prior to the first charge created over the "property-in-dispute', in favour of the State Bank of India.

10. Relying on the contents of the counter affidavit, it has been next submitted - various demands of tax and other dues (under the taxation enactments), were in existence against the "assessee-in-default', since long, from A.Y. 1992-93 onward. These dues were in the knowledge of the petitioner. Though the petitioner asserts, it first acquired that knowledge in the year 2015, at the same time, it is the own case of the petitioner that its registration application filed under the Act had been rejected, in the year 2015 itself i.e., prior to be attachment order. That rejection order was passed, for reason of pre-existing tax dues against the "assessee-in-default'.

11. Last, reliance has been placed on the recital contained in the sale-deed dated 16.07.2014; the letter issued by the Bank dated 15.7.2014 (annexed to the writ petition) and letter dated 01.10.2015. Relying on the same, the learned Standing Counsel has vehemently urged - on 15.07.2014 itself the State Bank of India lifted its charge over the "property-in-dispute'. Thus, no charge existed on 16.07.2014 when the sale-deed was executed by the "assessee-in-default'. There is a complete absence of any recital in that sale-deed of any existing charge in favour of the State Bank of India. Also, with equal vehemence, it has been stressed, the sale-deed dated 16.7.2014 was neither executed in favour of nor, it has been executed by the State Bank of India. Instead, it has been executed by the "assessee-in-default', itself. Hence, the sale-deed dated 16.07.2014 is not protected under Section 34(2) of the Act.

12. Next, relying on a decision of a co-ordinate Bench of reported in this Court in the case of **Reflex Industries and another vs. State of U.P. and others** reported in **2004 (4) ACC 3471,** it has been submitted, in similar circumstances, such a transaction was found to fraudulent and therefore *void ab initio*. Therefore, there is no requirement of law to compel the revenue authorities to first institute a suit proceeding and to then seek recovery from the "property-in-dispute', only upon a decree in that suit.

13. Relying on Rule 285 of U.P Z. A & L.R Rules, 1952, it has been submitted, there exists a preferential right in favour of the revenue authorities, over the "property-in-dispute'. Last, a plea of alternative remedy has been raised. It has been submitted, if at all, objections should have been raised by the petitioner before the Collector/Commissioner under the provisions of U.P.Z.A & L.R, Rules, 1952, before approaching this Court.

14. Having heard the learned counsel for the parties and perused the record, we observe, it is too late in the day to accept the plea of alternative remedy. The writ petition had been filed in the year 2015. The revenue and the State Bank of India are represented. They have filed pleadings. The matter is ripe for final hearing. An interim order is also operating in favour of the petitioner. Further, the issue raised is purely legal and it does not arise on disputed facts. Therefore, the objection raised and pressed at this stage by the learned Standing Counsel, on that count, is rejected.

15. Again, no reliance may be placed on Rule 285N of U.P.Z.A. & L.R., Rules, 1952. It would apply only if the sale of the "property-in-dispute' had been confirmed under that enactment. Here, admittedly, the "property-in-dispute' was first attached by the respondent authorities, almost a year after its purchase by the petitioner. Also, no auction ever took place. Clearly, Rule 285 N of the U.P. Z.A. & L.R., Rules is inapplicable to the present facts.

16. As to the main issue of applicability of Section 34 of the Act, 1948, it would be fruitful to our discussion to extract that provision, in entirety. It reads as below.

"34(1) Transfer to defraud revenue void.-(1) Where, during the pendency of any proceedings under this Act, any person liable to pay any tax or other dues creates a charge on, or transfers any [movable or immovable] property belonging to him in favour of any other person with the intention of defrauding any such tax or other dues, such charge or transfer shall be void as against any claim in respect of any tax or other dues payable by such person as a result of the completion of the said proceedings:

Provided that nothing in this section shall impair the rights of a transferee in good faith and for consideration.

(2) Nothing in sub-section (1) shall apply to a charge or transfer in favour of a banking company as defined in the Banking Regulation Act, 1949, or any other financial institution specified by the State Government by notification in this behalf.

17. Undisputedly, the State Bank of India is a "banking company' defined under the Banking Act. Therefore, it became open to it to raise a plea based on Section 34(2) of the Act. A plain reading of that provision brings out the existence of a *non obstante* clause created by the legislature. Thus, nothing contained in Section 34(1) of the Act, 1948 shall apply to (i) a charge created in favour of the State Bank of India or (ii) transfer made "in favour' of the State Bank of India.

18. Undisputedly, on 15.07.2014, State Bank of India wrote to the "assessee-in-default', as below:

"SAMB/CL-II/693
DT: 15/07/2014
M/S Kanha Vanaspati Ltd.
126, Ayodhya Nagar,
Ujhani, Distt. Budaun (U.P.)

Dear Sirs,

STRESSED ASSETS MANAGEMENT BRANCH

M/S KANHA VANASPATI LTD.

We advise that the Bank has released the property of M/s. Kanha Vanaspati Ltd. situated at Khasra No.8, 9, 10 & 126, Gram Gathona, Ujhani, District Budaun (U.P.), which was mortgaged to the Bank, on receipt of payment as per terms of approved OTS entered between the Bank and the above company. Henceforth the Bank will not have any charge over the said land."

19. Again, on 01.10.2015, the State Bank of India wrote to the petitioner, as under.

"SAMB-ND/CL-II/2015-16/885 Date: October 01, 2015

The Authorised Signatory
Gem Aromatic Pvt. Ltd.
A/410, Kailash Complex, Park Site
Vikhroli-Powai Link road, Vikroli(W)

Dear Sir,

M/s KANHA VANASPATI LIMITED

With reference to your letter dated September 14, 2015, we reply in seriatim as follows:

The immovable property i.e. land at Khasra No.8, 9, 10 & 126, Gram Gathona, Ujhani, Distt. Budaun (U.P.) charged to our Bank, was sold to you by M/s Kanha Vanaspati Limited for a consideration of Rs. 2.61 crores.

In this connection, we have not confirmed at any point of time that there was any charge encumbrance or attachment or coercive proceedings on the said property as alleged in your letter except our charge which is evident form our letter no.SAMB/CL-II/594 dated 27.06.2014 addressed to yourselves. It had been specifically confirmed to you that the charge over the land at Khasra no.8, 9, 10 & 126, Gram Gathona, Ujhani, Distt. Budaun(U.P.) will be released and the original title deeds and possession of the property will be handed over to you on receipt of Rs.2.61 crores (Rs. Two crores sixty-one lacs only) as per under noted schedule of payment.

1. Rs.11.00 lacs vide cheque no.723031 dated 27.06.2014 as up front payment.

2. Rs. 250.00 lacs through RTGS by 15.07.2014(+/- 5 days).

We would also like to bring to your notice that the MOU dated 27.06.2014 entered between M/s Gem Aromatics Pvt. Ltd. Mumbai (Buyer) and M/s Kanha Vanaspati Ltd. (seller) states that the seller has agreed to sell the said plot/ property for a total consideration of Rs.2.61 crores and the buyer agrees to buy the same and further states that the buyer will be idemnified for any statutory or other liabilities

including any defective title found if any at a later date by the seller. It is encumberance upon M/s Kanha Vanaspati Ltd.(seller) to discharge such statutory or other liabilites on the said property and to disclose details any encumbrances or statutory liabilities etc.

We reiterate once again that nowhere at any point of time, have we ever represented that there is no charge, liability, encumbrance, and proceedings over the property except our charge. Therefore, the allegations made by you are baseless and we are not responsible for any kind of loss referred by you."

20. Reading the above letters along with the Certificate issued by the Registrar of Companies, Kanpur, dated 06.08.2014, it is clear, a charge was created (on 08.11.2005), in favour of the State Bank of India, over the "property-in-dispute' i.e., the land bearing Khasra Nos. 8, 9, 10 & 126, Gram Gathona, Ujhani, Distt. Budaun(U.P.). That was done almost nine years before the impugned sale-deed was executed on 16.07.2014, in favour of the petitioner. There is no evidence that the petitioner was in the picture at that stage. Also, the existence of that charge (in the first place), is undisputed by the revenue authorities. Clearly, that charge on the "property-in-dispute' was created "in favour' of the State Bank of India.

21. Further, the impugned sale-deed dated 16.07.2014 was executed in pursuance of the One Time Settlement (OTS in short), reached between the "assessee-in-default' and the State Bank of India. Towards that settlement reached, the amount of Rs. 2.61 crore was paid by the petitioner to the State Bank of India, prior to execution of that sale-deed, under the apparently consequential Memorandum of Understanding (MOU in short) dated 27.06.2014 executed between the petitioner and the "assessee-in-default'/respondent no. 7. Thus, Rs. 11,00,000/- (on 26.06.2014) and Rs. 2,50,00,000/- (on or before 15.07.2014), were paid by the petitioner to the State Bank of India, under that MOU. These facts emerge from the recital made in the letters dated 15.07.2014 and 01.10.2015 written by the State Bank of India. They are wholly corroborated by the recital made in the impugned sale-deed dated 16.07.2014, and upon being duly evidenced by the representatives of the State Bank of India and the banker of the present petitioner. Both bankers signed that deed as marginal witnesses. There is nothing on record to doubt the due issuance or execution of such documents, in the manner narrated above. Clearly, the "property-in-dispute' was under the charge created in favour of the State Bank of India, till before the execution of the sale-deed dated 16.07.2014.

22. In face of the aforesaid charge (over the "property-in-dispute'), created "in favour' of the State Bank of India on 08.11.2005, it survives for consideration whether despite that charge being satisfied on 15.07.2014, it insulated the transfer of the "property-in-dispute' made in favour of the petitioner, on 16.07.2014, from the recoveries being sought by the revenue authorities. Section 34(2) of the Act insulates a 'charge' or 'transfer' made "in favour of' a "banking company', as defined under the Banking Act. Hence, spoken in the literal sense, that transfer may not appear to be directly protected under sub-section (2) of section 34.

23. Interestingly, the meaning of the word "charged' (used in Articles 291 and 112(2) of the Constitution of India), came up for consideration in the context of the challenge raised to the Presidential Orders de-recognising the erstwhile Rulers of the former Indian States, in **Madhav Rao Jivaji Rao Scindia v. Union of India,** reported in **(1971) 1 SCC 85.**While dealing with that question, the majority view of the nine-Judge Constitution bench of the Supreme Court, took note of the meaning attached to the word "charged', under the general law relating to transfer of property. It was thus observed:

"122. In support of his contention that by using the expression "charged" in Articles 291 and 112(2) it is only intended to enact that the expenditure is not subject to the vote of the Parliament and that no priority in payment in respect of expenditure is declared, and in any event the expression "charged" creates no obligation enforceable at the instance of the person for whose benefit it is charged, the Attorney-General invited our attention to different provisions of the Constitution in each of which there is both a charge on the Consolidated Fund of an item of expenditure and an express direction for payment of the prescribed sum, and contended that Article 291 which merely recognizes the obligations of the Union Government to abide by the pre-existing covenants, creates no obligation for payment of the Privy Purse to the Rulers. He urged that the word "charge" in the Constitution in dealing with State financial procedure has the meaning it has in accountancy practiced it merely specifies the source from which payment is to be made and does not create a right in the Ruler or any enforceable obligation against the Union. Under the general law relating to transfer of property, a charge does not give rise to a right in rem : the right is however more than a mere personal obligation, for it is a jus ad rem a right to payment out of property specified : Govind Chandra Pal v. Dwarka Nath Pal [ILR 35 Cal 837, 843] ; Raja Sri Shiva Prasad v. Beni Madhab [ILR 1 Pat 387] . A charge gives a right to payment out of a specific fund or property, and a right to prior payment; but it does not create a right in rem in the fund or the property. A charge therefore gives rise to a right to receive payment, out of a specified fund or property in preference over others. In the absence of a clear indication to the contrary, it would be difficult to hold that the expression "charged" used in the contest of financial matters of the State, has a different meaning. Our Constitution-makers borrowed the concept of a Consolidated Fund from the British system. That has also been adopted in the Constitutions of Canada, Australia, South Africa and other Commonwealth Countries. Certain Acts in the United Kingdom and elsewhere prescribe a sequence of priorities in payment of different heads of expenditure charged on the Consolidated Fund; Section I Consolidated Funds Act, 1816; Section 1 The House of Commons (Speaker) Act, 1832; Sections 103, 104 and 105 of the British North America Act, 1867; Sections 117, 119 Constitution of the Union of South Africa, 1909; Sections 81 and 82 of the Australian Constitution 1900".

(emphasis supplied)

24. Pertinent to our discussion, the "charge' created in favour of the State Bank of India clearly gave rise to a right to the State Bank of India to receive payment, out of the specified property i.e., the "property-in-dispute', in preference over others. Section 34(1) seeks to create a part exception to that well established rule under the "general law', in certain circumstances, in favour of the Crown/state dues. At the same time, Section 34(2) of the Act, overrides Section 34(1) of the Act and thus completely negates the exception and makes that pre-existing preferential right absolute. That effect arises in law, by virtue of the "charge' created in favour of a "banking company' as defined under the Banking Act.

25. Thus, it cannot be disputed - had the "charge' created over the "property-in-dispute', continued to exist till date, the respondent revenue authorities would continue to stand restrained from proceeding against the "property-in-dispute', for recovery of their dues. Also, that direct consequence of section 34(2) of the Act would have been caused, if the State Bank of India had obtained the sale-deed of the "property-in-dispute', in its favour, either pursuant to that charge or otherwise, to recover its dues. It is so because, Section 34(2) of the Act completely negates Section 34(1) of the Act

by use of the words - "Nothing in sub-section (1) shall apply". That overriding effect may be avoided, only if the revenue were to contend, either that the charge was never created, or it was not created in favour of a "banking company' as defined under The Banking Act. Clearly, that is not the case here.

26. Undoubtedly, a non obstante clause appearing in sub-Section (2) of Section 34 of the Act, is a legislative device employed to give an overriding effect to that provision of law, over section 34(1) of the Act. In **Union of India v. G.M. Kokil, 1984 Supp SCC 196**, the Supreme Court while dealing with a similar clause appearing under the Factories Act, reasoned and held as under:

"11. Section 70, so far as is relevant, says "the provisions of the Factories Act shall, notwithstanding anything contained in that Act, apply to all persons employed in and in connection with a factory". It is well-known that a non obstante clause is a legislative device which is usually employed to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other enactment, that is to say, to avoid the operation and effect of all contrary provisions. Thus the non obstante clause in Section 70, namely, "notwithstanding anything contained in that Act" must mean notwithstanding anything to the contrary contained in that Act and as such it must refer to the exempting provisions which would be contrary to the general applicability of the Act. In other words, as all the relevant provisions of the Act are made applicable to a factory notwithstanding anything to the contrary contained in it, it must have the effect of excluding the operation of the exemption provisions. Just as because of the non obstante clause the Act is applicable even to employees in the factory who might not be "workers' under Section 2(1), the same non obstante clause will keep away the applicability of exemption provisions qua all those working in the factory. The Labour Court, in our view, was, therefore, right in taking the view that because of the non obstante clause Section 64 read with Rule 100 itself would not apply to the respondents and they would be entitled to claim overtime wages under Section 59 of that Act read with Section 70 of the Bombay Shops and Establishments Act, 1948".

(emphasis supplied)

27. Therefore, to accept the objection raised by Shri. Hajela - that the protective gaze of section 34(2) of the Act did not extend to the sale-deed dated 16.07.2014 executed by the "assessee-in-default' (in favour of the petitioner), may lead to unintended, anomalous, inconvenient, and even absurd results, in law. If accepted, a secured creditor may hold safe a secured asset till eternity, both against the debtor and the world at large, and no other creditor may attach it, till all dues of that secured creditor were satisfied. However, that secured creditor may never be enabled to negotiate a sale of such secured asset, to recover its dues, without first obtaining a prior transfer, in its favour.

28. Thus, in absence of any statutory intervention made, if the submission raised by the learned Standing Counsel is accepted, it would introduce an unreasonable restriction on the free play of section 34(2) of the Act. It would, without any legislative intent or purpose shown to exist, dictate a material alteration of the rights of the parties and force a change in the mode and way, a "banking company' under the Banking Act may conduct itself viz a viz its secured assets. Though the debt of the State Bank of India may remain a secured debt against its charge existing on the "property-in-dispute' and it may remain entitled to recover its dues upon sale of the "property-in-dispute', to the exclusion of the Crown/state dues, however, that sale may be obtained only in its own name.

29. There is absolutely no warrant to allow for such an anomalous, uncertain, and therefore undesirable and even absurd result to arise. Plainly, there is nothing in the language of the Act, to allow for such a restrictive condition to be read into the words "in favour of' prefixed to the words "banking company' appearing in section 34(2) of the Act. That narrow meaning (as discussed above) would lead to results that are wholly absurd and may defeat the very object of enactment of Section 34(2) of the Act.

30. The Act created indefeasible right in the State Bank of India, by virtue of its status as a "banking company' as defined under the Banking Act, occasioned by its charge over the "property-in-dispute'. That indefeasible right cannot be lost or diluted, merely because in the process of recovering its dues, that bank chose to negotiate or allow a third-party sale of the "property-in-dispute', in favour of the petitioner, instead of first obtaining title in it. Therefore, we hold, the words "in favour' appearing in section 34(2) of the Act must be read to refer, indicate, and include all transfers made to the sole benefit of the "banking company' (as defined under the Banking Act), towards discharge of its/their outstanding dues, against charge existing over the "property-in-dispute".

31. The charge over the "property-in-dispute' being in existence, in favour of the "banking company' as defined under the Banking Act, the words "in favour' need not be read literally - to mandate only such transfer as may have been made to that "banking company' itself. The words "transfer in favour of banking company" appearing in Section 34(2) of the Act are wide enough to include within their plain ambit, a transaction of this nature whereby instead of first obtaining of transfer of the "property-in-dispute', in its own name, the State Bank of India allowed that charged property to be sold to the petitioner, for the same purpose, for its benefit namely, to recover its dues from the "assessee-in-default'. It is inconsequential that the pre-existing charge over the "property-in-dispute' was satisfied on 15.07.2014 or that the State Bank of India did not first obtain title in it.

32. We are supported in our approach by the decision of the Supreme Court in ***Tirath Singh v. Bachittar Singh,*** **AIR 1955 SC 830.** In that case a question arose if the words "all persons" appearing in section 99(1)(ii) of the Representation of Peoples Act, 1951, would include a person against whom charge of corrupt practice may have been proved, for the purpose of issue of a fresh notice preceding the order of the Election Tribunal as to corrupt practice committed at an election. Read literally, such notice was contented to be mandatory. However, that interpretation was rejected, and the requirement to issue a fresh notice was restricted to refer to any person other than one against whom proceeding had already been conducted. It was reasoned and held:

"6. The object of giving notice to a person under the proviso is obviously to give him an opportunity to be heard before a finding is given under Section 99(1)(a)(i) that he has committed a corrupt or illegal practice. This clearly appears from clause (b) of the proviso, which enacts that the person to whom notice is to be given should have an opportunity of cross-examining witnesses who had been examined before and given evidence against him, of calling his own evidence and of being heard. This is in accordance with the rule of natural justice which requires that no one should be condemned without being given an opportunity to be heard. The reason of the rule, therefore, requires that notice should be given to persons who had had no previous opportunity in respect of the matters mentioned in sub-clause (b) to the proviso. Such, for example, would be witnesses and possibly agents of the parties, as observed in Nyalchand Virachand v. Election Tribunal [8

Election Law Reports 417, 421] though it is not necessary to decide that point, but it cannot refer to parties to the petition who have had every opportunity of taking part in the trial and presenting their case. Where an election petition is founded on a charge of corrupt practice on the part of the candidate, that becomes the subject-matter of enquiry in the petition itself. If at the trial the Tribunal came to the conclusion that the charge had been proved, then it has to hold under Section 100(2)(b) that the election is void, and pass an order to that effect under Section 98(d). Section 99(1) enacts that the finding of corrupt practice under Section 99(1)(a)(i) or naming a person under Section 99(1)(a)(ii) should be at the time of making an order under Section 98. If the contention of the appellant is to be accepted, then the result will be that even though there was a full trial of the charges set out in the petition, if the Tribunal is disposed to hold them proved it has first to give notice of the finding which it proposes to give, to the parties, and hold a fresh trial of the very matters that had been already tried. That is an extraordinary result, for which it is difficult to discover any reason or justification. It was argued by the learned Attorney-General that the giving to a party to a proceeding a second opportunity to be heard was not unknown to law, and he cited the instance of an accused in a warrant case being given a further opportunity to recall and cross-examine prosecution witnesses after charge is framed, and of a civil servant being given an opportunity under Article 311 to show cause against the action proposed to be taken against him. In a warrant case, the accused is not bound to cross-examine the prosecution witnesses before charge is framed, and in the case of civil servants, the decision that they are entitled to a second opportunity was based on the peculiar language of Sections 240(2) and (3) of the Government of India Act, 1935, and Article 311 of the Constitution. They are exceptional cases, and do not furnish any safe or useful guidance in the interpretation of Section 99".

(emphasis supplied)

33. Again, in **D. Saibaba v. Bar Council of India, (2003) 6 SCC 186** a question arose, if the words "sixty days from the date of that order" appearing in Section 48-AA of the Advocates Act, 1961 require computation of that time, from the date on which such order was passed or from the date when that order was served on the person aggrieved. Departing from the obvious grammatical meaning of the words, the Supreme Court reasoned and held:

"16. Placing such a construction, as we propose to, on the provision of Section 48-AA is permitted by well-settled principles of interpretation. Justice G.P. Singh states in Principles of Statutory Interpretation (8th Edn., 2001):

"It may look somewhat paradoxical that plain meaning rule is not plain and requires some explanation. The rule, that plain words require no construction, starts with the premise that the words are plain, which is itself a conclusion reached after construing the words. It is not possible to decide whether certain words are plain or ambiguous unless they are studied in their context and construed." (p. 45)

The rule of literal interpretation is also not to be read literally. Such flexibility to the rule has to be attributed as is attributable to the English language itself.

17. The learned author states again:

"In selecting out of different interpretations "the court will adopt that which is just, reasonable and sensible rather than that which is none of those things', as it may be presumed "that the legislature should have used the word in that interpretation which least offends our sense of justice'." (p. 113, ibid)

"The courts strongly lean against a construction which reduces the statute to a

futility. A statute or any enacting provision therein must be so construed as to make it effective and operative "on the principle expressed in the maxim: ut res magis valeat quam pereat'." (p. 36, ibid)

"If the language used is capable of bearing more than one construction, in selecting the true meaning regard must be had to the consequences resulting from adopting the alternative constructions. A construction that results in hardship, serious inconvenience, injustice, absurdity or anomaly or which leads to inconsistency or uncertainty and friction in the system which the statute purports to regulate has to be rejected and preference should be given to that construction which avoids such results." (pp. 112-13, ibid)

18. Reading word for word and assigning a literal meaning to Section 48-AA would lead to absurdity, futility and to such consequences as Parliament could have never intended. The provision has an ambiguity and is capable of being read in more ways than one. We must, therefore, assign the provision a meaning -- and so read it -- as would give life to an otherwise lifeless letter and enable the power of review conferred thereby being meaningfully availed and effectively exercised".

34. As discussed above, in the facts of the present case, there is absolutely no doubt that the transfer of the "property-in-dispute' took place for the sole benefit of a "banking company' as defined under the Banking Act. Therefore, that transaction was covered within the meaning of the words - "in favour of the banking company". In such undisputed facts, the non-obstante clause pre-fixed to sub-Section (2) of Section 34 of the Act, wholly insulates the sale-deed dated 16.07.2014. In fact, it takes that sale-deed out of the reach and gaze of sub-Section (1) of Section 34 of the Act.

35. That piercing gaze of sub-section (1) of Section 34 of the Act would ever remain confined to tear apart the protective shield of an otherwise valid sale-deed, if it seeks to protect a transaction conducted to defraud the revenue, involving a creditor, other than a "banking company' as defined under the Banking Act.

36. Resultantly, by virtue of Section 34(1) of the Act, a partial exception arises to the general principle in law, that exists to the benefit of all secured creditors *viz a viz* Crown/revenue dues. This principle was clearly laid down in **Musahar Sahu (supra)** as under:

"As a matter of law their Lordships take it to be clear that in a case in which no consideration of the law of bankruptcy or insolvency applies there is nothing to prevent a debtor paying one creditor in full and leaving others unpaid although the result may be that the rest of his assets will be insufficient to provide for the payment of the rest of his debts. The law is, in their Lordships' opinion, rightly stated by Palles C.B. in Inre Moroney(1), where he says: "The right of the creditors, taken as a whole, is that all the property of the debtor should be applied in payment of demands of them or some of them, without any portion of it being parted with without consideration or reserved or retained by the debtor to their prejudice. Now, it follows from this, that security given by a debtor to one creditor upon a portion of or upon all his property, 'although the effect of it or even the interest of the debtor in making it, may be 'to defeat an expected execution of another creditor, is not a fraud within the 'Statute, because notwithstanding such an act, the entire property remains 'available for the creditors or some or one of them, and as the Statute gives no 'right to rateable distribution, the right of the creditors by such act is not 'invaded or affected.'

The transfer which defeats or delays creditors is not an instrument which prefers one creditor to another, but an instrument which removes, property from the creditors to the

benefit of the debtor. The debtor must not retain a benefit for himself. He may pay one creditor and leave another unpaid [Middleton v. Pollock (2 Ch. Div., 108)]. (1) So soon as it is found that the transfer here impeached was made for adequate consideration in satisfaction of genuine debts, and without reservation of any benefit to the debtor it follows that no ground for impeaching it lies in the fact that the plaintiff, who also was a creditor, was a loser by payment being made to this preferred creditor- there being in the case no question of bankruptcy."

37. That principle was followed in **Ma Pwa May (Supra)**. It was specifically applied by the Supreme Court in **Union of India vs Rajeswari and Co. (supra)** in the context of Section 53 of Transfer of Property Act. Therein the Supreme Court observed as below:

"9. It seems clear that it is open to a debtor to prefer one or more creditors over the others in the payment of his debts, and so long as he retains no benefit in the property the mere circumstance that some creditors stand paid while others remain unpaid does not attract the provisions of section 53 of the Transfer of Property Act. It is not disputed that the debts satisfied by payment of the sale proceeds are genuine. A faint attempt was made to show that some of the debts discharged were owed to persons who were also Directors of the Company. There is no findings by the High Court in support of that contention. It was also urged that the consideration which passed for the sale of the assets was inadequate and that the assets had been undervalued. Here again there is no finding to support the submission. The questions raised are questions of fact, and this Court will not permit such questions to be raised unless there is material evidence which has been ignored by the High Court or the finding reached by the Court is perverse.

10. A point was sought to be made by learned counsel for the appellant that the transfer of the assets was effected in favour of Rajeswari & Co. which was not one of the creditors. It has been found by the High Court that the sale was effected for the purpose of discharging the debts payable by the Company. Once it is also found that the consideration was not inadequate it is immaterial, as the High Court has observed, that the transfer was effected in favour of a person who was not a creditor. It has been clearly found that the sale proceeds were employed for paying off the creditors of the Company."

38. Besides the above, in **The Bank of Bihar vs The State of Bihar and others** reported in **(1972) 3 SCC 196**, in the context of right of a pawnee viz a viz the sovereign's right over the pawned goods, it was held:

"6. In our judgment the High Court is in error in considering that the rights of the Pawnee who had parted with money in favour of the pawnor on the security of the goods can be defeated by the goods being lawfully seized by the Government and the money being made available to other creditors of the pawnor without the claim of the Pawnee being fully satisfied. The Pawnee has special property and a lien which is not of ordinary nature on the goods and so long as his claim is not satisfied no other creditor of the pawnor has any right to take away the goods or its price. After the goods had been seized by the Government it was bound to pay the amount due to the plaintiff and the balance could have been made available to satisfy the claim of other creditors of the pawner. But by a mere act of lawful seizure the Government could not deprive the plaintiff of the amount which was secured by the pledge of the goods to it. As the act of the Government resulted in deprivation of the amount to which the plaintiff was entitled it was bound to reimburse the plaintiff for such amount which

the plaintiff in ordinary course would have realized by sale of the goods pledged with it on the pawnor making a default in payment of debt.

7. The approach of the trial court was unexceptionable. The plaintiff's right as a Pawnee could not be extinguished by the seizure of the goods in its possession inasmuch as the pledge of the goods was not meant to replace the liability under the cash credit agreement. It was intended to give the plaintiff a primary right to sell the goods in satisfaction of the liability of the pawnor. The Cane Commissioner who was an unsecured creditor could not have any higher rights than the pawnor and was entitled only to the surplus money after satisfaction of the plaintiff's dues.

39. That principle was again applied in **Dena Bank (supra)**. It was held as below:

"10. However, the Crown's preferential right to recovery of debts over other creditors is confined to ordinary or unsecured creditors. The Common Law of England or the principles of equity and good conscience (as applicable to India) do not accord the Crown a preferential right for recovery of its debts over a mortgagee or pledgee of goods or a secured creditor. It is only in cases where the Crown's right and that of the subject meet at one and the same time that the Crown is in general preferred. Where the right of the subject is complete and perfect before that of the King commences, the rule does not apply, for there is no point of time at which the two rights are at conflict, nor can there be a question which of the two ought to prevail in a case where one, that of the subject, has prevailed already. In Giles v. Grover 1832 131 ER 563 it has been held that the Crown has no precedence over a pledgee of goods. In Bank of Bihar v. State of Bihar & Ors. AIR 1971 SC 1210, the principle has been recognised by this Court holding that the rights of the pawnee who has parted with money in favour of the pawnor on the security of the goods cannot be extinguished even by lawful seizure of goods by making money available to other creditors of the pawnor without the claim of the pawnee being first fully satisfied. Rashbehary Ghose states in Law of Mortgage (T.L.L., Seventh Edition, p.386) It seems a Government debt in India is not entitled to precedence over a prior secured debt."

40. The above noted principle has been consistently applied by the Supreme Court in **M/s Rana Girders Ltd. Vs Union of India** reported in **(2013) 10 SCC 746** wherein it was observed:

"18. In so far dues of the Government in the form of tax or excise etc. are concerned, the Court was of the opinion that rights of the Crown to recover the dues would prevail over the right of the subject. Crown debt means the debts due to the State or the King. Such creditors, however, must be held to mean unsecured creditors. The principle of Crown debt pertains to the common law principle. When Parliament or State Legislature makes an enactment, the same would prevail over the common law and thus the common law principles which existed on the date of coming into force of the Constitution of India, must yield to a statutory provision. A debt, which is secured or which by reason of the provisions of a statute becomes the first charge over the property must be held to prevail over the Crown debt which is an unsecured one. On this reasoning, the debt payable to secured creditor like the Financial Corporation was prioritised vis-a- vis the Central Excise Dues."

41. Again, in **Principal Commissioner Of Income Tax Vs Monnet Ispat And Energy Ltd.** reported in **2018 (18) SCC 786** the same principle was applied in the context of dues of Income Tax. The only exception drawn in certain other decisions is where the Crown/state dues had been specifically given a preferential right, by statutory intervention.

42. As discussed above, Section 34 (1) of the Act makes a part exception to the above noted principle, in cases involving a charge created in favour of a creditor who is not a "banking company' under the Banking Act. In those cases, alone, the revenue may be permitted to overlook any charge created or transfer made in favour of such a creditor, if that was done to defraud the revenue. Even then, Section 34(1) does not seek to completely override the otherwise pre-existing preferential right in favour of a secured creditor. It only draws an exception to that principle, in specified circumstance - of fraud being committed.

43. To complete our discussion, in any case, if Section 34(1) of the Act was to be invoked there would have to exist a prima facie case of fraud made out against the petitioner. In that case the remedy may not lie with the revenue authorities themselves, by way of first and only choice. A regular suit proceeding may always be instituted to seek a declaration in that regard, as was opined by Supreme Court in **Chogmal Bhandari (supra).** Though that law was laid down in the context of Section 54 of the Transfer of Property Act, at the same time, those provisions being similar (in material parts) to Section 34 of the Act, that ratio is wholly applicable. In that decision, it was held as below:

"10. In the special and peculiar facts of the present case which have been catalogued above, in our opinion, this is not a fit case In which the sales tax authorities can be allowed to hold that the deed of trust executed by the settlors was hit by section 53 of the Transfer of Property Act. It may be noted that under section 53 of the Transfer of Property Act if a transfer is made with intent to defeat or delay the creditors it is not void but only voidable. If the transfer is voidable, then the ' sales tax authorities cannot ignore or disregard it but have to get it set aside through a properly constituted suit after impleading necessary parties and praying for the desired relief. In Chutterput Singh & ors. v. Maharaj Bahadoor and others, (2) the Privy Council observed as follows:

"No issue was stated in this suit whether the transfers were or were not liable to be set aside at the instance of Dhunput under section 53 of the Transfer for Property Act, and no decree has been made for setting them aside. Such an (1) [1974] 2 S.C.R. 655. (2) L.R. 32 I.A. 1.

7-L522SCI/76 issue could be raised and such a decree could be made only in a suit properly constituted either as to parties or other wise."

To the same effect is the later decision of the Privy Council in Safer Hasan and others v. Farid-Ud-Din and others,(l) where Lord Thankerton made the following observations:

"Further, under section 53 the wakfnama would only be voidable at the option of the "person so defrauded or delayed"... Until so voided the deed remains valid."

44. At the same time, in a case of fraud established on admitted/undisputed facts, the principle - fraud vitiates everything may be invoked to claim such a sale-deed to be *void ab initio* and the plea of nullity may be set-up, outside the suit remedies as well. However, such is not the case here.

45. The decision of the co-ordinate Bench of this Court in the **Reflex Industries and another (supra)** is wholly distinguishable. It was not a case arising under section 34 of the Act. It was also not a case of involving liquidation of debts of a secured creditor or a "banking company' under the Banking Act. Rather, it was a case of sale made to defraud the revenue as stood established on undisputed facts. The Court lifted the corporate veil and found the

sale-deed set up by the petitioner (in that case), to be *void ab initio*. Neither such facts exist in this case, nor that ratio may arise, in the context of section 34 of the Act.

46. As to the objection with respect to the relief, we find, the petitioner has sought a writ of Mandamus, to restrain the respondents from making any recovery from the personal assets of the petitioner. The exact wording of the prayer clause apart, in effect that prayer is duly supported by pleadings and material on record. In absence of any doubt as to the rights of the parties that stand established on the strength of undisputed facts noted above, it would be hyper technical to deny relief to the petitioner. The substance and the essence of the prayer made is clear. It arises on a clear cause of action admittedly existing, in the shape of the attachment order enforced by the State respondents. Also, all material facts giving rise to the cause of action and for our decision are undisputed.

47. In such undisputed facts and in the position of law discussed above, the writ Court cannot be seen to be diffident or stingy in granting the consequential relief. A writ Court ensures obedience to the rule of law. In that process, relief may flow to the petitioner as a natural outcome of the exercise. Once, the facts are clear and the crease or doubt in law stands cleared, relief must flow unhindered, upon application of that law to the clear facts of the case. It may not be obstructed on mere technicalities - such as the objection to the exact wording of the prayer clause.

48. Consequently, the respondents are restrained from proceeding against the personal assets of the petitioner or the "property-in-dispute', so however, they may remain at liberty to recover their dues from respondent no. 7 and its properties, in accordance with law.

49. The writ petition is **allowed.** No order as to costs.

(2021)11ILR A402
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 21.09.2021

BEFORE
THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MRS. SAROJ YADAV, J.

U/S 378 Cr.P.C. No. 216 of 2016

Sushma Maurya ...Applicant
Versus
State of U.P. & Anr. ...Opposite Party

Counsel for the Applicant:
Mr. Mukesh Barnwal, Mr. Lal Ji Gupta, Mr. Rajeev Singh

Counsel for the Opposite Party:
Mr. Arunendra, A.G.A., Mr. S.K. Tripathi

Appeal against the acquital of accused-allege poison was mixed in the liquor of the deceased-and after that threw the dead body from the roof-no direct evidence-chain of circumstantial evidence not complete-motive of crime not established-postmortem shows no poison nor such injuries as claimed.

Appeal dismissed. (E-9)

List of Cases cited:

1. Shivaji Chintappa Patil Vs St. of Mah. , (2021) 5 SCC 626,

2. Anwar Ali & anr. Vs The St. of H.P. :(2020) 10 SCC 166

3. Achhar Singh Vs St. of H.P. reported in (2021) 5 SCC 543

(Delivered by Hon'ble Mrs. Saroj Yadav, J.)

1. This appeal alongwith application under Section 378 (3) of the Code of Criminal Procedure, 1973(in short 'Cr.P.C.') has been filed by Sushma Maurya, the mother of the deceased with a prayer that leave to appeal may

be granted against the judgment and order dated 19.08.2016 passed by Additional Sessions Judge/ Special Judge Anti Corruption Act, Court No.1, Lucknow in Sessions Trial No.432 of 2011, (Case Crime No.431 of 2008) State of U.P. Vs. Girja Shankar Mishra) under Section 302, 201 of the Indian Penal Code (in short '***I.P.C.***'), Police Station Bazar Khala, District Lucknow whereby the trial court acquitted the accused / respondents.

2. Heard Shri Lalji Gupta, learned counsel for the appellant, Sri S.K. Tripathi, learned counsel for the accused/respondent No.2 and Sri Arunendra learned Additional Government Advocate (in short '***A.G.A***.') for the respondent/State of U.P., perused the impugned judgment and order and record of the trial court.

3. Shorn of unnecessary details, the facts necessary for the disposal of this appeal are as under :-

4. .A First Information Report (in short '***F.I.R***.') was registered on the basis of a written report presented by the complainant Jagdish Prasad Maurya, the father of the deceased on 17.10.2008 in Police Station Bazar Khala, District Lucknow at Case Crime No.431 of 2008, under Sections 302 & and 201 of the I.P.C.. In written report it was stated that Sanjeev Maurya son of the complainant, on 11.10.2008 at about 8:00 PM left the house on his Motorcycle No.UP 32 CP 0407 telling him that he (Sanjeev Maurya) was going to attend a function at the house of some Vikas Jaiswal. When he did not return late in the night, the complainant tried to contact on his mobile numbers 9336110444 and 9415581178, but could not connect. The complainant tried to search his son, but could know nothing in the night. Next morning on 12.10.2008 at about 7:00 AM the people of locality informed him that dead body of Sanjeev Maurya was lying in the lane behind the house of Maikyu Yadav, upon it he went there and found the dead body of his son. The face of his son became black and no visible injury was there on the body. Thereafter he gave written information to the Police Station about the death of his son. After cremation of dead body he inquired about the death of his son from the people and he came to know that on the date of incident at about 9:00 PM Maiku Yadav conversed with his son Sanjeev Maurya, thereafter Girja Shankar, Pankaj Jaiswal, Anshu Yadav and others went to liquor shop situated at Bulaki Bus Stand alongwith his son. There they made his son consume liquor and they all also consumed liquor. At about 11:00 PM in the night they all came back to the house of Vikas Jaiswal, where Maiku Yadav, Vikas Jaiswal and others were present. They all took his son on the roof of the house, there also they all consumed liquor and made his son to consume liquor, in the meantime they mixed poison in the liquor of his son and he died of that. There after they threw the dead body in the lane from the roof. He doubted that these people due to some enmity mixed the poison in the liquor and killed his son. The Motorcycle of his son got parked near the house of Vikas Jaiswal and Maiku Yadav at some distance in locked condition.

5. The investigation was made, the Investigating Officer found no involvement of Maiku Yadav, Vikas Jaiswal, Pankaj Jaiswal, Amit Shukla and Anshu Verma and dropped their names. The Charge-sheet was submitted in the Court only against Girja Shankar accused /respondent No.2. The Chief Judicial Magistrate concerned after taking cognizance committed the case to the Court of Sessions for trial. The Trial Court framed charges under Sections 302 and 201 of I.P.C. against the accused. The accused denied the charges and claimed to be tried. In order to prove the charges, the prosecution examined ten witnesses, PW1 Smt. Sushma Maurya (mother of the deceased and wife of the complainant), PW2 Surendra Kumar, PW3 Pradeep Kumar, PW4 Dr. Nurul Haq

Siddiqui, PW5 Constable Hari Charan, PW6 Sub Inspector Arun Kumar Dubey, PW7 Deepak Singh, PW8 Head Constable- Hari Prasad Shukla, PW9 Station House Officer- Jai Karan Singh and PW10- Sub Inspector Lal Mani Tiwari. In documentary evidence Exhibit- Ka-1 to Exhibit Ka-13 were also proved. Thereafter statement of accused under Section 313 of the Cr.P.C. ('in short Criminal Procedure Code') was recorded. He denied the crime and stated that witnesses have deposed falsely. He is innocent and has been implicated in the crime only on the basis of doubt.

6. The trial court after analysing the evidence available on record came to the conclusion that prosecution has failed to prove that the deceased was 'last seen' in the company of the accused, beyond reasonable doubt. It is not established that the accused administered the poisoned liquor to the deceased. The statement of witnesses in this regard are not trust worthy as they have given contradictory statements. Therefore, the trial Court acquitted the accused. Being dissatisfied of the acquittal, the mother of deceased Smt. Sushma Maurya filed this appeal alongwith application under Section 378 (3) of Cr.P.C.

7. As far as application under Section 378(3) is concerned, the proviso added to Section 372 by Code of Criminal Procedure (Amendment) Act, 2008, w.e.f. 31.12.2009 confers right on the victim to prefer an appeal against acquittal or conviction for lesser offence of accused. Hence, in our considered opinion, there is no need for seeking permission under Section 378(3) Cr.P.C. for filing the appeal by the mother of the deceased. The application under Section 378(3) Cr.P.C. is disposed of accordingly.

8. Learned counsel for the applicant/appellant challenged the impugned order mainly on the grounds that learned trial court did not consider the motive of the crime. There was dispute of Rs.50,000/- (fifty thousand) between the deceased and the accused. The accused took the deceased from his house on a pretext to go to attend a function. The deceased was 'last seen' in the company of accused. The accused did not explain under what circumstances and when deceased parted with him. The burden was on the accused under section 106 of the Indian Evidence Act. The Trial Court disbelieved the evidence of witnesses of facts for minor contradictions.

9. Contrary to it learned counsel for the respondent No.2/ accused argued that there is no reliable evidence on record to prove the fact that deceased was 'last seen ' in the company of the accused or the accused has any connection with the crime. There is no evidence of money-dispute between the accused and the deceased. No motive of the crime has been proved. The accused/respondent has been implicated in the crime on the basis of doubt only. The confessional statement allegedly made in police custody is not admissible under Section 25 of the Indian Evidence Act. The prosecution has failed to prove the charges against the accused beyond reasonable doubt, hence the learned trial court has rightly acquitted the accused/respondent No.2. Therefore, the appeal deserves to be dismissed.

10. Considered the rival submissions and perused the record of the trial. Admittedly the case is based on circumstantial evidence, as there is no eyewitness of the crime. The most important principle of criminal jurisprudence is that accused is considered innocent until proved guilty. In a case based on circumstantial evidence heavy duty lies on the court to examine the evidence with great care and caution to hold an accused guilty. In a case based on circumstantial evidence, it is necessary that chain of circumstances should be intact and all the circumstances must indicate that in all

probabilities the crime was committed by the accused and accused alone. There should be no space for doubt that some one else could have committed the crime. The Hon'ble Apex Court in this regard in the case of S***hivaji Chintappa Patil Vs. State of Maharashtra reported in (2021) 5 SCC 626,*** the Hon'ble Supreme Court has laid down as under (para 12):-

*"12. The law with regard to conviction on the basis of circ***umstantial evidence has been very well crystalised in the judgment of this Court in** *S**harad*** Birdhichand Sarda ***v. State of Maharashtra :-(SCC p.185, paras 153-54)***

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

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

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra where the observations were made: [SCC p. 807 : para 19, SCC (Cri) p. 1047]

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

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

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

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

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

11. In the present matter Jagdish Prasad Maurya, the father of the deceased lodged F.I.R. after a delay of six days. Previously on the next day of incident he just informed at the Police Station about the death of his son. In the F.I.R. there is no mention of any money-dispute regarding Rs.50,000/-(fifty thousand) between accused and the deceased. This fact was disclosed for the first time in the Court by PW1 Smt. Sushma Maurya, the mother of the deceased in her examination-in-chief. But in her cross-examination she has stated that she had no knowledge about the money transactions done by the deceased. She further stated that this would be in the knowledge of the wife of the deceased. The wife of the deceased had not been examined in the Court. The Investigating Officer PW 10 had stated that the wife of the deceased told him that her husband neither had enmity nor money-dispute with any one. There is no evidence of money dispute between the accused and deceased except the statement of PW1 the mother of the deceased in her examination-in-chief. During the investigation, the mother of the deceased gave affidavit to the Circle-Officer concerned, but in that affidavit too there is no mention about the money-dispute between the

accused and the deceased. This fact was neither mentioned in the F.I.R. nor in the information given to the Police Station in the beginning, on the day when the dead body was recovered. Unfortunately, the complainant-father of the deceased could not be examined as he died.

12. Learned counsel for the appellant argued that accused had admitted that there was dispute of Rs.50,000/-(fifty thousand) between deceased and him, so he killed the deceased, in police custody, but this argument is not tenable as the confession made in police custody is not admissible as has been provided under Section 25 of the Indian Evidence Act, unless in regard of some discovery as provided under Section 27 of the Indian Evidence Act. Hence, it is clear that prosecution has failed to establish the motive of the crime. Though, it is not necessary to prove the motive always, as no body can peep into the mind of an author of the crime, but in the case based on circumstantial evidence the motive plays an important role, rather it helps to connect the chain of the circumstances. In this matter the prosecution has failed to prove the motive of the crime.

13. The Hon'ble Apex Court in the case of ***Anwar Ali and another Vs. The State of Himanchal Pradesh :(2020) 10 SCC 166,*** has held as under (Paragraph 24) :-

"24. Now so far as the submission on behalf of the accused that in the present case the prosecution has failed to establish and prove the motive and therefore the accused deserves acquittal is concerned, it is true that the absence of proving the motive cannot be a ground to reject the prosecution case. It is also true and as held by this Court in Suresh Chandra Bahri v. State of Bihar 1995 Supp (1) SCC 80 that if motive is proved that would supply a link in the chain of circumstantial evidence but the absence thereof cannot be a ground to reject the prosecution case. However, at the same time, as observed by this Court in Babu (supra), absence of motive in a case depending on circumstantial evidence is a factor that weighs in favour of the accused. In paras 25 and 26, it is observed and held as under (Babu's case SCC pp.200-01) :

"25. In State of U.P. v. Kishanpal, this Court examined the importance of motive in cases of circumstantial evidence and observed: (SCC pp. 87-88, paras 38 -39)

"38. ... the motive is a thing which is primarily known to the accused themselves and it is not possible for the prosecution to explain what actually promoted or excited them to commit the particular crime.

39. The motive may be considered as a circumstance which is relevant for assessing the evidence but if the evidence is clear and unambiguous and the circumstances prove the guilt of the accused, the same is not weakened even if the motive is not a very strong one. It is also settled law that the motive loses all its importance in a case where direct evidence of eyewitnesses is available, because even if there may be a very strong motive for the accused persons to commit a particular crime, they cannot be convicted if the evidence of eye witnesses is not convincing. In the same way, even if there may not be an apparent motive but if the evidence of the eyewitnesses is clear and reliable, the absence or inadequacy of motive cannot stand in the way of conviction."

26. This Court has also held that the absence of motive in a case depending on circumstantial evidence is a factor that weighs in favour of the accused. (Vide Pannayar v. State of T.N."

14. Now comes the 'last seen evidence' counsel for the appellant argued that the learned trial court has committed grave error in not relying on the evidence of PW 2 & 3 regarding

the fact that deceased was 'last seen' in the Company of the accused. In this regard PW1, the mother of the deceased has stated in her examination-in-chief that accused along with others has came to her house and her deceased son left with them to attend a function. But in her cross-examination she has stated that she did not know whether Girja Shankar, accused came to her house before incident. She has stated that she could not see who were driving the motorcycle or who was riding on that. She has further stated in her cross-examination that Girja Shankar, accused had no enmity with her deceased son. In the affidavit given to Circle-Officer, Bazar Khala, Lucknow, during the investigation, Smt. Sushma Maurya has stated that on 11.10.2008 at about 8:00 PM, Anshu Verma and Amit Shukla came to call her son. In that affidavit too she has not disclosed the name of Girja Shankar. PW2 Surendra Kumar and PW3 Pradeep (cousin of the deceased) have been examined as witnesses of 'last seen evidence'. The trial court rightly did not find them trustworthy for the reason that their statements show that they did not watch the deceased in the Company of the accused and others. PW2 Surendra Kumar has stated that while going to watch Ramlila on the day of incident at about 8:30 to 9:00 PM in the night he saw that under the 'Banyan Tree' the accused Girja Shankar alongwith others was conversing amongselves, thereafter Girja Shankar pulled Sanjeev Maurya towards the house of Maiku Yadav. In the cross-examination this witnesses has stated that he did not know the friends and relatives of the deceased. He came there alongwith Pradeep (PW3) to work as labour in the house of deceased, which was under construction at the time. He denied that he gave any affidavit to the police, while PW9 the Investigating-Officer Jai Karan Singh has stated that an affidavit was given by him. PW3 Pradeep has stated that on the night of incident at about 10:30 PM while going to watch Ramlila alongwith Surendra Kumar he saw that in front of house of Pankaj under the 'Peepal Tree' accused alongwith others were pulling the deceased Sanjeev Maurya towards the house of Pankaj Jayaswal. This witness is admittedly cousin of the deceased. It appears unnatural when he watched the accused pulling the deceased into the house of Pankaj Jaiswal why he did not inform the parents of the deceased who were his near relatives. Apart from it, PW 2 and 3 both have stated that they were going to watch Ramlila, but time has been narrated differently. PW 2 has stated that he saw the accused and deceased at about 8:30 to 9:00 PM while PW3 has told the time 10:30 PM. There is a contradiction on the point in the statement of these two and also that they have stated that they both have gone to watch Ramlila. In the F.I.R. Exhibit Ka-1 it has been stated that deceased alongwith accused and others came back at about 11:00 PM in the night after consuming liquor from Model Shop situated at Bulaki Bus Stand. Hence at that time the presence of PW 2 and 3 as per their own statement is highly improbable as they both have gone to watch Ramlila together.

15. Thus the factum of 'last seen' is not established by the prosecution beyond reasonable doubt. Now comes the argument of the appellant counsel that under Section 106 of the Indian Evidence Act, the burden was on the accused to explain how he parted from company of the deceased. Section 106 of the Indian Evidence Act runs as under:-

*"**106. Burden of proving fact especially within knowledge.-** When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."*

16. This Section comes into play when it is established that deceased was 'last seen' in the company of the accused and not before that. As has been noted above that prosecution could not establish the fact that the deceased was 'last seen'

in the company of the accused, so it is not required on the part of the accused to explain how the deceased parted from his company. In other word the burden cannot be shifted on the accused.

17. Thus to sum up it is clear that the case is based on circumstantial evidence as no eyewitness of the incident was there. F.I.R. was lodged after a delay of 6 days and no plausible explanation of delay is on the record. The motive of the crime has not been alleged in the F.I.R., but disclosed in the statement of PW1 for the first time in the Court and that too has not been proved. The fact of 'last seen' has not been established beyond reasonable doubt. There is no evidence of mixing poison in the liquor by the accused and to administer the same to the deceased.

18. More over, the view of the trial court is possible view. The Hon'ble Apex Court in the case of ***Achhar Singh Vs. State of Himachal Pradesh reported in (2021) 5 SCC 543***, has laid down as under (para 16) :-

"16. It is thus a well crystalized principle that if two views are possible, the High Court ought not to interfere with the trial Court's judgment. However, such a precautionary principle cannot be overstretched to portray that the "contours of appeal" against acquittal under Section 378 CrPC are limited to seeing whether or not the trial Court's view was impossible. It is equally well settled that there is no bar on the High Court's power to re-appreciate evidence in an appeal against acquittal. This Court has held in a catena of decisions (including ***Chandrappa v. State of Karnataka, State of Andhra Pradesh v. M. Madhusudhan Rao, And Raveen Kumar v. State of Himachal Pradesh)*** *that the Cr.P.C does not differentiate in the power, scope, jurisdiction or limitation between appeals against judgments of conviction or acquittal and that the appellate Court is free to consider on both fact and law, despite the self-restraint that has been ingrained into practice while dealing with orders of acquittal where there is a double presumption of innocence of the accused".*

19. In the light of the above discussions and the law laid down by Hon'ble Apex Court referred above, we do not find any factual or legal error in the appreciation of evidences by the trial court for the reasons that there is no direct evidence of the offence and the chain of circumstantial evidence is not complete. The motive of the crime has not been established. There is no evidence of the fact that accused mixed poison in the liquor of the deceased. Further more it has been mentioned in the F.I.R. that accused was thrown away from the roof of Maiku Yadav in the lane behind the house, but in the postmortem conducted on the cadaver, no such injuries were found on the body, which could establish that the dead body was thrown down from the roof of the house. There is no trustworthy evidence of the fact that deceased was 'last seen' in the company of accused / respondent No.2.

20. There is no reliable and trustwothy evidence on the record to connect the accused with the crime. The learned trial court has given cogent convincing and satisfactory reasons while passing the order of acquittal.

21. We therefore, do not find any merit in the appeal. The appeal is accordingly ***dismissed.***

(2021)11ILR A408
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.09.2021

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 482 No.3634 of 2021

Imamuddin & Ors. ...Applicants

Versus

State of U.P. ...Opposite Party

Counsel for the Applicants:
Sri Vindeshwari Prasad

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

FIR lodged under cow slaughter act-over 10kg meat of calf of cow-sample send to Forensic lab-till date no chemical analysis report obtained and chargesheet submitted-Magistrate took cognizance and accused summoned-primafacieFIR discloses commission of offence -No interference can be made at the threshhold.

Application dismissed.(E-9)

List of Cases cited:

1.R.P. Kapoor Vs St. of Pun. AIR 1960 S.C. 866

2.St.of Har. Vs Bhajanlal, 1992 SCC (Crl.)426,

3. St. of Bihar Vs P.P. Sharma, 1992 SCC (Crl.)192

4. Zandu Pharmaceutical Works Ltd. Vs Mohd. Saraful Haq & anr.;, (Para-10) 2005 SCC (Cri.) 283

5. M/s Neeharika Infrastructure Pvt. Ltd. Vs St. of Mah., AIR 2021 SC 1918

6. S.W. Palankattkar & ors. Vs St. of Bihar, 2002 (44) ACC 168

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard learned counsel for the applicants as well as learned A.G.A. for the State and perused the record.

2. This application has been filed by the applicants with a prayer to quash the entire criminal proceeding of Criminal Case No. 525 of 2020, pending in the Court of First Additional Chief Judicial Magistrate, Amroha/J.P. Nagar arising out of Case Crime No. 81 of 2020, under Section 3/5/8 of Uttar Pradesh Prevention of Cow Slaughter Act, 1955 (hereinafter referred to as the "Act, 1955"), Police Station-Amroha Dehat, District-Amroha/J.P. Nagar as well as charge sheet dated 10.04.2020, cognizance order dated 16.05.2020 & summoning order dated 16.05.2020.

3. As per the F.I.R. version, the prosecution case is as follows :

"नकल फर्द बरामदगी गोवंशीय खाल व एक दरात लोहा वा एक छुरी लोहा व दो रस्सी व दो चाकू नाजायज व एक लकडी का गोटा, गोवंशीय मीट व गिरफ्तारी 05 नफर अभियुक्त अन्तर्गत धारा 3/5/8 गोवध निवारण अधि० व 4/25 शस्त्र अधि० आज दिनांक 2.4.20 क मैं उ०नि० सुनील कुमार शर्मा मय उ०नि० लवनीश कुमार मय हे० का० 174 ब्रजलाल गंगवार, का० 555 धनुज, का० 1143 देवेन्द्र, का० 1226 मनदीप मय जीप सरकारी नं० UP23G0349 मय चालक हे० का० रामप्रसाद मिश्रा के थाने से बहवाले रपट नं० 23 समय 9.44 बजे रवाना होकर वास्ते गस्त, देखरेख शान्ति व्यवस्था व लाकडाउन डियूटी के अनुपालन के अन्दर इलाका थाना क्षेत्र मामूर थे जैसे ही हम पुलिस वाले गस्त करते हुए अम्बरपुर चौराहे पर पहुंचे तो द्वारा मुखबिर खास सूचना मिली की ग्राम सिरसाखुमार में डहर के पास खेत में कुछ व्यक्ति गोवंशीय पशु का वध करेगे व मीट को ज्यादा कीमत पर आर्थिक लाभ के लिये बेचेगे। उनके पास अवैध शस्त्र भी है। सूचना पर विश्वास कर मौके से जनता के गवाह फराहम करने का प्रयास किया परन्तु कोरोना से सम्बन्धित लाकडाउन होने के कारण कोई भी व्यक्ति उपलब्ध नहीं हो सका। हम पुलिस वालो ने आपस में मय मुखबिर के एक दूसरे की जामा तलाशी ले देकर विश्वास किया कि किसी के पास कोई अवैध वस्तु नहीं है ओर मुखबिर को साथ लेकर जीप क सिरसाखुमार बैंक के पास खडी करके हे० का० चालक को जीप में छोडा गया ओर मुखबिर को साथ लेकर पैदल ईदगाह वाले रास्ते पर डहर के ऊपर पंहुचे तो मुखबिर ने बताया कि सामने जो ईख का खेत है इसी खेत में कुछ व्यक्ति गोंवशीय पशु का वध कर रहे है और मुखबिर बता कर चला गया हम पुलिस वालो ने ईख की आड में छुपते छुपाते खडे

होकर देखा तो पांच व्यक्ति मृत गोंवशीय पशु के मीट को छुरी व दरात से काटकाट कर अलग-अलग हिस्से बनाकर रख रहे है। एक व्यक्ति ने कहा कि नाजिम बछडा तो छोटा था किन्तु मीट अच्छा निकला है। हम पुलिस वालो को देखकर व सुनकर पूर्ण विश्वास हो गया कि इन पांचो व्यक्तियों में गोवंशीय बछडे का वध किया है व पुलिस की सिखलाई अनुसार चारो तरफ से घेराबन्दी कर एक दम दविश देकर बागने का मौका न देते हुए पांचो व्यक्तियों को समय करीब 11.00 बजे मौके पर ही चेतावनी देते हुए पकड लिया। जिनके पास अलग-अलग पांच हिस्सो में करीब 10 किलो गोंवशीय मीट व गोवंशीय खाल व अवशेष व एक दरात, एक छुरी व एक लकडी का गोटा व दो रस्सी रक्तरंजित पडे है। जिनका नाम पता पूछते हुए जामा तलाशी ली गयी तो पहले ने अपना नाम नईम पुत्र यासीन निवासी सिरसाखुमार थाना अमरोह देहात जनपद अमरोहा बताया जिसकी जामा तलाशी ली गयी तो पहनी पैन्ट के सुड्डे मे घुरसा एक चाकू नाजायज जिसका बैटा मछलीनुमा 9 अंगुल फल धारदार 8 अंगुल व खोलने व बंद करने के लिये पीतल का खटका लगा है, बरामद हुआ। दूसरे व्यक्ति ने अपना नाम माजिम पुत्र फिदा हुसैन निवासी सिरसाखुमार थाना अमरोह देहात जनपद अमरोह बताया जिसकी जामा तलाशी ली तो पहने तेहमंद के सुड्डे में घुरसा एक चाकू नाजायज जिसका बैटा मछलीनुमा एल्यूमिनियम 9 अंगुल फल धारदार करीब 8 अंगुल खोलने व बन्द करने के लिये पीतल का खटका लगा है। तीसरे व्यक्ति ने अपना नाम इमामुद्दीन पुत्र अलीहुसैन निवासी सिरसाखुमार थाना अमरोह देहात जनपद अमरोहा व चौथे व्यक्ति ने अपना नाम सरफराज पुत्र इमामुद्दीन निवासी सिरसाखुमार थाना अमरोह देहात जनपद अमरोहा व पांचवे ने अपना नाम शाहनवाज पुत्र इमामुद्दीन निवासी सिरसाखुमार थाना अमरोहा देहात जनपद अमरोहा बताया। अभियुक्तगणों से गोवंशीय वध व प्राप्त उपकरण एवं गोंवशीय मीट व अवैध शस्त्र के सम्बन्ध में पूछा गया तो पांचो माफी मागने लगे और कहने लगे कि साहब बहुत बडी गलती हो गयी है। हम पांचो ने गोवंशीय बछडे का वध अपने आर्थिक लाभ के लिये किया है। गोवंशीय मीट ज्यादा पैसो में हम लोग बेचते है। मुझ उ०नि० द्वारा पशु चिकित्साधिकारी बिजेन्द्र सिंह को उनके मो० 7906033880 पर बुलवाकर एक लिखित रिपोर्ट दी जिन्होने खाल व मीट को देखकर गोवंशीय खाल व मीट का होना बताया व मौके पर ही मीट नमूना लिया गया व रिपोर्ट तैयार की गयी। बरामदा खाल व अवशेषो को संक्रमण फैलने की आंशका के कारण नियमानुसार गड्ढा खुदवाकर अवशेषो को जमीन में दबाया गया व मौके से प्राप्त रक्तरंजित लकडी का गोटा, छुरी, दरात, रस्सी को एक प्लास्टिक के सफेद कट्टे में व अभियुक्त नईम व नाजिम से प्राप्त नाजायज चाकू को अलग-अलग कपडे में सील सर्वे मोहर कर नमूना मोहर बनाये गये। अभियुक्तो का यह जुर्म धारा 3/5/8 गोवध निवारण अधि० व धारा 4/25 आर्म्स एक्ट का है जिनको उनके जुर्म व मानवाधिकार आयोग एवं माननीय उच्चतम न्यायालय के आदेश निर्देशो से अवगत कराते हुए हिरासत पुलिस में लिया गया। अभियुक्त सरफाज ने पुलिस को देखकर मौके से भागने का प्रयास किया था जिसको जल्दी में फिसलने के कारण हाथ में मामूली चोट आ गयी थी। जो हाथ में दर्द बताता है। फर्द मौके पर मुझ उ०नि० द्वारा बोलबोलकर उ० नि० लवनीश कुमार के द्वारा लिखायी गयी। फर्द मौके पर पढकर सुनाकर हमराहीयान की गवाही करायी गयी। फर्द की एक प्रति सामुहिक रूप से अभियुक्त नईम को देकर सबी के अलामात बनवाये जाते है। गिरफ्तारी की सूचना थाने जाकर उचित माध्यम से दी जावेगी। ह० अग्रेजी उ०नि० सुनील कुमार थाना अमरोहा देहात जनपद अमरोहा दिनांक 2.4.2020 , ह० अग्रेजी उ०नि० लवनीश कुमार, ह० हे०का० 174 ब्रजलाल गंगवार, ह० का० 555 धनुज, ह० का० 1143 देवेन्द्र , ह० का० 1226 मनदीप। ह० सरफराज अली ह० अग्रेजी शाहनवाज, अंगूठा निशानी इमामुद्दीन, नि० अंगूठा नाजिम, नि० अंगूठा नईमः- मैं सीसी 517 जुगेन्द्र सिंह प्रमाणित करता हूं कि फर्द की नकल मेरे द्वारा शब्द व शब्द बोल बोलकर कम्प्युटरकर्मी म०का० 549 बबीता द्वारा टाईप करायी गयी है।"

4. Learned counsel for the applicants submits that as per the report prepared by the Veterinary Officer, Government Veterinary Hospital Nanhera

Alyarpur, Amroha, 10 kg suspected meat of calf of cow was found and sample of the same was sent to the Forensic Lab Mathura for chemical analysis but till date no chemical analysis report has been obtained by the Investigating Officer and in the absence of any chemical analysis report, the Investigating Officer submitted charge sheet against all the accused persons and the learned Magistrate has also taken cognizance in a routine manner and summoned the applicants for facing trial.

5. Per contra, learned A.G.A. submits that charge sheet was rightly submitted by the Investigating officer and the cognizance taken by the learned Magistrate is also in accordance with law, as from the possession of the applicant the skin of calf of cow as well as meat and other material like knife and wooden cutting board used for cutting the meat were also recovered on the spot, therefore, *prima facie* offence under Section 3/5/8 of the Act, 1955 is made out against the applicants.

6. After considering the arguments as advanced by the learned counsel for the parties and from the perusal of the charge sheet as well as cognizance order and the F.I.R., offence under Section 3/5/8 of the Act, 1955 is prima facie made out against the applicants. No case is made out for quashing of the proceeding of Criminal Case No. 525 of 2020, under Section 3/5/8 of Act, 1955. It is relevant to quote Section 3, 5, & 8 of Act, 1955 for adjudication of this case :

3. Prohibition of cow slaughter.- (1) Except as hereinafter provided, no person shall slaughter or cause to be slaughtered, or offer or cause to be offered for slaughter-

(a) a cow, or

(b) a bull or bullock, unless he has obtained in respect thereof a certificate in writing, from the competent authority of the area in which the bull or bullock is to be slaughtered, certifying that it is fit for slaughter, in any place in Uttar Pradesh; anything contained in any other law for the time being in force or an usage or custom to the contrary notwithstanding.

(2) No bull or bullock, in respect of which a certificate has been issued under sub-section (1) (b) shall be slaughtered at any place other than the place indicated in the certificate. [* * *]

(3) A certificate under sub-section (1) (b) shall be issued by the competent authority, only after it has, for reasons to be recorded in writing; certified that-

(a) the bull or bullock is over the age of [fifteen years] or

(b) in the case of a bull, it has become permanently unfit and unserviceable for the purpose of breeding and, in the case of bullock, it. has become permanently unfit and unserviceable for the purposes of daughter and any kind of agricultural operation :

Provided that the permanent unfitness or un-serviceability has not been caused deliberately.

(4) The competent authority, shall, before issuing the certificate under sub-section (3) or refusing to issue the same, record its order in writing [***].

(5) The State Government may, at any time, for the purposes of satisfying itself as to the legality or propriety of the action taken under this section call for and examine the record of any case and may pass such order thereon as it may deem fit.

[(6) Subject to the provisions herein contained, and action taken under this section,

shall be final and conclusive and shall not be called in question.]

5. Prohibition on sale of beef. - Except as herein excepted and notwithstanding anything contained in any other law for the time being in force, no person shall sell or transport or offer for sale or transport or cause to be sold or transported beef or beef-products in any form except for such medicinal purposes as may be prescribed.

Exception. - A person may sell and serve or cause to be sold and served beef or beef-products for consumption by a bona fidepassenger in an air-craft or railway train.

[5A. Regulation on transport of cow, etc. - (1) No person shall transport or offer for transport or cause to be transported any cow, or bull or bullock, the slaughter whereof in any place in Uttar Pradesh is punishable under this Act, from any place within the State to any place outside the State, except under a permit issued by an officer authorised by the State Government in this behalf by notified order and except in accordance with the terms and conditions of such permit.

(2) Such officer shall issue the permit on payment of such fee not exceeding five rupees for every cow, bull or bullock as may be prescribed :

Provided that no fee shall be chargeable where the permit is for transport of the cow, bull or bullock for a limited period not exceeding six months as may be specified in the permit.

(3) Where the person transporting a cow, bull or bullock on a permit for a limited period does not bring back such cow, bull or bullock into the State within the period specified in the permit, he shall be deemed to have contravened the provision of sub-section (1).

(4) The form of permit, the form of application therefor and the procedure for disposal of such application shall be such as may be prescribed.

(5) The State Government or any officer authorised by it in this behalf by general or special notified order, may, at any time, for the purpose of satisfying itself, or himself, as to the legality or propriety of the action taken under this section, call for and examine the record of any case and pass such orders thereon as it or he may deem fit].

[(6) Where the said conveyance has been confirmed to be related to beef by the competent authority or authorised laboratory under this Act, the driver, operator and owner related to transport, shall be charged with the offence under this Act, unless it is not proved that the transport medium used in crime, despite all its precautions and without its knowledge, has been used by some other person for causing the offence.

(7) The vehicle by which the beef or cow and its progeny is transported in violation of the provisions of this Act and the relevant rules, shall be confiscated and seized by the law enforcement officers. The concerned District Magistrate/Commissioner of Police will do all proceedings of confiscation and release, as the case may be.

(8) The cow and its progeny or the beef transported by the seized vehicle shall also be confiscated and seized by the law enforcement officers. The concerned District Magistrate/ Commissioner will do all proceedings of the confiscation and release, as the case may be.

(9) The expenditure on the maintenance of the seized cows and its progeny shall be recovered from the accused for a period of one year or till the release of the cow and its progeny in favour of the owner thereof whichever is earlier.

(10) Where a person is prosecuted for committing, abetting, or attempting to an offense under Sections 3, 5 and 8 of this Act and the beef or cow-remains in the possession of accused has been proved by the prosecution and transported things are confirmed to be beef by the competent authority or authorised laboratory, then the court shall presume that such person has committed such offence or attempt or abetment of such offence, as the case may be, unless the contrary is proved.

(11) Where the provisions of this Act or the related rules in context of search, acquisition, disposal and seizure are silent, the relevant provisions of the Code of Criminal Procedure, 1973 shall be effective thereto.]

[5B. Whoever causes any physical injury to any cow or its progeny so as to endanger the life thereof such as to mutilate its body or to transport it in any situation whereby endangering the life thereof or with the intention of endangering the life thereof does not provide with food or water shall be punished with imprisonment for a term which shall not be less than one year and which may extend to seven years and with fine which shall not be less than one Lakh rupees and which may extend to three Lakh rupees.]

[8. (1) Whoever contravenes or attempts to contravene or abets the contravention of the provisions of Section 3, Section 5 or Section 5-A shall be guilty of an offence punishable with rigorous imprisonment for a term which shall not be less than three years and which may be extend to ten years and with fine which shall not be less than three Lakh rupees and which may extend to five Lakh rupees.

(2) Whoever after conviction of an offence under this Act is again guilty of an offence under this Act, shall be punished with double the punishment provided for the said offence for the second conviction.

(3) The names and the photograph of the person accused of the contravention of the provision of Section 5-A shall be published at some prominent place in locality where the accused ordinarily resides or to a public place, if he conceals himself from the law enforcement officers.]

7. Accordingly, the contention of the learned counsel for the applicants that no offence against the applicants is disclosed and the present prosecution has been instituted with a malafide intention for the purposes of harassment **has no force.**

8. At the stage of issuing process the court below is not expected to examine and assess in detail the material placed on record, only this has to be seen whether prima facie cognizable offence is disclosed or not. The Apex Court has also laid down the guidelines where the criminal proceedings could be interfered and quashed in exercise of its power by the High Court in the following cases:-**(i) R.P. Kapoor Vs. State of Punjab, AIR 1960 S.C. 866, (ii) State of Haryana Vs. Bhajanlal, 1992 SCC (Crl.)426, (iii) State of Bihar Vs. P.P. Sharma, 1992 SCC (Crl.)192, (iv) Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq & Anr.;, (Para-10) 2005 SCC (Cri.) 283 and (iv) M/s Neeharika Infrastructure Pvt. Ltd. vs. State of Maharashtra, AIR 2021 SC 1918.**

9. From the aforesaid decisions the Apex Court has settled the legal position for quashing

of the proceedings at the initial stage. The test to be applied by the court is whether uncontroverted allegation as made prima facie establishes the offence and whether chances of ultimate conviction are bleak and no useful purpose is likely to be served by allowing criminal proceedings to be continue. In **S.W. Palankattkar & others Vs. State of Bihar, 2002 (44) ACC 168**, it has been held by the Hon'ble Apex Court that quashing of the criminal proceedings is an exception than a rule. The inherent powers of the High Court under Section 482 Cr.P.C itself envisages three circumstances under which the inherent jurisdiction may be exercised:-(i) to give effect an order under the Code, (ii) to prevent abuse of the process of the court ; (iii) to otherwise secure the ends of justice. The power of High Court is very wide but should be exercised very cautiously to do real and substantial justice for which the court alone exists.

10. The High Court would not embark upon an inquiry as it is the function of the Trial Judge/Court. **The interference at the threshold of quashing of the criminal proceedings in case in hand cannot be said to be exceptional as it discloses *prima facie* commission of an offence. In the result, the prayer for quashing of proceedings, charge sheet as well as cognizance and summoning order under Section 3/5/8 of Uttar Pradesh Prevention of Cow Slaughter Act, 1955 is refused. There is no merit in this application filed by the applicants, under Section 482 Cr.P.C.**

11. In view of the aforesaid submissions made by learned counsel for the parties and considering the judgment passed by Hon'ble Apex Court referred above, this court finds no merit in the present application and the same is liable to be dismissed.

12. **Accordingly, this application under Section 482 Cr.P.C. filed by the applicants is dismissed.**

(2021)11ILR A414
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 02.11.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

U/S 482/378/407 . No. 4050 of 2021

Giri Raj Sharma ...Applicant

Versus

U.O.I. ...Opposite Party

Counsel for the Applicant:
Pranjal Krishna

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

Money Laundering Act, 2002 – Sections 3 & 4 - Cognizance taken against the petitioner on supplementary prosecution complaint-for offence u/s3 and 4 of Prevention of money laundering Act, 2002-No ban on exercising of inherent power where abuse of process of court or extraordinary situation excites Court's jurisdiction-E.D. has copy pasted the relevant portion of charge sheet of the CBI in the supplementary prosecution complaint-before taking the cognizance -provision of section 44 (1) (ii) of the Act, 2002 be considered-to consider further evidence-operation of the impugned order stayed.

Petition pending. (E-9)

List of Cases cited:

1. New India Assurance Co. Ltd. Vs Krishna Kumar Pandey (Criminal Appeal No.1852 o 2019 arising out of Special Leave to Appeal (Crl.) No.8499 of 2014)

2. Prabhu Chawla Vs St. of Raj.& anr. reported in (2016) 16 SCC 30

3. Smt. Janata Jha & anr. Vs Assistant Director, Directorate of Enforcement, Government of India & anr. (CRLMC No.114 of 2011 (Application U/S 482 Cr.P.C.))

4. Pepsi Foods Ltd. & another Vs S.J.M. & ors. reported in (1998) 5 SCC 749

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Pranjal Krishna, learned counsel for the petitioner and Sri Shiv P. Shukla, learned counsel for the opposite parties.

2. On the first date of admission, this Court has passed the order dated 23.10.2021 as under:-

"Heard Sri Pranjal Krishna, learned counsel for the petitioner and Sri S.B. Pandey, learned Assistant Solicitor General of India and the learned Senior Advocate assisted by Sri Shiv P. Shukla, learned Central Government Standing Counsel for the opposite parties.

By means of this petition, the petitioner has prayed the following relief:-

"Wherefore, it is most respectfully prayed that this Hon'ble Court may graciously be pleased to quash the petitioner's prosecution in the Criminal Case No.1154 of 2021 (Directorate of Enforcement, Lucknow vs. Giri Raj Sharma) under Sections 3 & 4 of Prevention of Money Laudering Act, 2002 arising out of ECIR/09/PMLA/LZO/2013 and pending before the learned Special Court (PMLA), Lucknow including the Supplementary Prosecution Complaint dated 29.06.2020 and the cognizance order dated 11.08.2021 so as to secure the ends of justice."

Learned counsel for the petitioner has contended that the present case is a glaring example of misuse of the process of law inasmuch as the learned Special Judge by taking cognizance against the petitioner on the supplementary prosecution complaint dated 29.06.2020 (E.D.) for allegedly committing an offence under Section 3 punishable under Section 4 of Prevention of Money Laudering Act, 2002 (here-in-after referred to as the "Act, 2002") without taking into account the fact that that petitioner is being falsely prosecuted in this case. Therefore, he is humbly praying for the extraordinary jurisdiction of this Court under Section 482 Cr.P.C.

Sri Pranjal Krishan, learned counsel for the petitioner has drawn attention of this Court toward running page 58 of the petition, which is portion of the charge-sheet filed by the C.B.I. on 13.10.2013, whereby the alleged culpability of the present petitioner has been indicated. Sri Pranjal Krishna has read over the relevant portion relating to the present petition in the C.B.I. charge-sheet and thereafter drawn attention of this Court towards the complaint filed by the E.D. seeking attention of running page 133 of the petitioner wherein the role of the accused i.e. the present petitioner is blank and conclusion of the investigation is verbatim the same as of the C.B.I.

Sri Pranjal Krishna has submitted that if the E.D. has arrived on the conclusion after investigation, if any, the conclusion of E.D. should have been shown to be an independent conclusion but E.D. has narrated the same conclusion as of C.B.I. without application of mind.

Sri Pranjal Krishna has also submitted that the supplementary complaint has been filed in sheer, illegal and unwarranted manner inasmuch as such supplementary complaint could have not been filed invoking the explanation No.2 of Section 44 (1) of Act, 2002.

Per contra, the learned counsel for the opposite parties has raised a preliminary objection regarding maintainability of this petition saying that as per Section 47 of the Act, 2002 instead of filing the petition under Section 482 Cr.P.C., the petitioner should file revision.

However on that objection, Sri Pranjal Krishna, learned counsel for the petitioner has referred the dictum of Hon'ble Apex Court

rendered in re: ***State of Haryana and others vs. Bhajan Lal and others*** *reported in* ***(1992) Supp. (1) SCC 335 and Pepsi Foods Ltd. and another vs. Special Judicial Magistrate and others*** *reported in* ***(1998) 5 SCC 749*** *by saying that this petition is very well maintainable.*

Since the learned counsel for opposite parties wants to address on the aforesaid legal submission of learned counsel for the petitioner, for that, he prays some shortest time, therefore, list/ put up this case on 27.10.2021 as fresh in the additional cause list to enable the learned counsel for the opposite parties to address the Court on the point of maintainability.

Learned counsel for the petitioner shall also come prepared on the point of maintainability on the next date."

3. Replying the objection regarding maintainability of the present petition filed under Section 482 Cr.P.C., Sri Pranjal Krishna has drawn attention of this Court towards Section 47 of the Prevention of Money Laundering Act, 2002 (here-in-after referred to as the "Act, 2002"), which reads as under:-

"47. ***Appeal and revision****. -The High Court may exercise, so far as may be applicable, all the powers conferred by Chapter XXIX or Chapter XXX of the Code of Criminal Procedure, 1973 (2 of 1974), on a High Court, as if a Special Court within the local limits of the jurisdiction of the High Court were a Court of Session trying cases within the local limits of the jurisdiction of the High Court."*

4. Sri Pranjal Krishna has contended that under Section 47 of the Act, 2002, the High Court has got the discretionary power of appeal and revision. The term 'may' has been used to mean they are in addition and in supplement to Section65 of the Act, 2002 which talks about the applicability of the Provisions of Cr.P.C. to cases brought under the Act, 2002 which very well include the provisions of Section 482 Cr.P.C. Besides, by means of this petition, the petitioner has not only assailed the cognizance order dated 11.08.2021 but has prayed for quashing the Supplementary Prosecution Complaint dated 29.06.2020. Under the revisional jurisdiction the cognizance order can be assailed but the Supplementary Prosecution Complaint may not be assailed as it would be beyond the scope of revision. However, under the inherent jurisdiction of this Court under Section 482 Cr.P.C. both the cognizance order as well as the Supplementary Prosecution Complaint may be assailed. Therefore, in the given circumstances, the present petitioner may not be relegated to file the criminal revision instead of petition under Section 482 Cr.P.C.

5. In support of his aforesaid arguments, Sri Pranjal Krishna has cited the decision of Hon'ble Apex Court in re: ***New India Assurance Co. Ltd. vs. Krishna Kumar Pandey (Criminal Appeal No.1852 o 2019 arising out of Special Leave to Appeal (Crl.) No.8499 of 2014)***, whereby vide para-8 the Hon'ble Apex Court has observed as under:-

"8. The scope of the revisional jurisdiction of the High Court (or Sessions Court) under Section 397 Cr.P.C is limited to the extent of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order passed by an inferior Court. The revisional Court is entitled to look into the regularity of any proceeding before an inferior Court. The revisional court is entitled to look into the regularity of any proceeding before an inferior Court. As reiterated by this Court in a number of cases, the purpose of this revisional power is to set right a patent defect or an error of jurisdiction or law."

6. Sri Pranjal Kirshna has also cited the dictum of Hon'ble Apex Court in re: ***Prabhu***

Chawla vs. State of Rajasthan and another reported in (2016) 16 SCC 30 referring paras-4, 5, 6, 7 & 8, which read as under:-

"4. Mr. P.K. Goswami learned senior advocate for the appellants supported the view taken by this Court in the case Dhariwal Tobacco Products Ltd. (supra). He pointed out that in paragraph 6 of this judgment Justice S. B. Sinha took note of several earlier judgments of this Court including that in R.P. Kapur v. State of Punjab and Som Mittal v. Govt. of Karnataka for coming to the conclusion that: (Dhariwal Case, SCC p. 372)

"6.....only because a revision petition is maintainable, the same by itself, ... would not constitute a bar for entertaining an application under Section 482 of the Code."

5. Mr. Goswami also placed strong reliance upon judgment of Krishna Iyer, J. in a Division Bench in the case of Raj Kapoor and Ors v. State and Ors. Relying upon judgment of a Bench of three Judges in the case of Mathu Limaye v. The State of Maharashtra and quoting therefrom, Krishna Iyer, J. in his inimitable style made the law crystal clear in paragraph 10 which runs as follows:

"10. The first question is as to whether the inherent power of the High Court under Section 482 stands repelled when the revisional power under Section 397 overlaps. The opening words of Section 482 contradict this contention because nothing of the Code, not even Section 397 , can affect the amplitude of the inherent power preserved in so many terms by the language of Section 482 . Even so, a general principle pervades this branch of law when a specific provision is made: easy resort to inherent power is not right except under compelling circumstances. Not that there is absence of jurisdiction but that inherent power should not invade areas set apart for specific power under the same Code. In Madhu Limaye v. The State of Maharashtra this Court has exhaustively and, if I may say so with great respect, correctly discussed and delineated the law beyond mistake. While it is true that Section 482 is pervasive it should not subvert legal interdicts written into the same Code, such, for instance, in Section 397 (2). Apparent conflict may arise in some situations between the two provisions and a happy solution

'would be to say that the bar provided in sub-section (2) Section 397 operates only in exercise of the revisional power of the High Court, meaning thereby that the High Court will have no power of revision in relation to any interlocutory order. Then in accordance with one or the other principles enunciated above, the inherent power will come into play, there being no other provision in the Code for the redress of the grievance of the aggrieved party. But then, if the order assailed is purely of an interlocutory character which could be corrected in exercise of the revisional power of the High Court under the 1898 Code, the High Court will refuse to exercise its inherent power. But in case the impugned order clearly brings about a situation which is an abuse of the process of the Court or for the purpose of securing the ends of justice interference by the High Court is absolutely necessary, then nothing contained in Section 397 (2) can limit or affect the exercise of the inherent power by the High Court. But such cases would be few and far between. The High Court must exercise the inherent power very sparingly. One such case would be the desirability of the quashing of a criminal proceeding initiated illegally, vexatiously or as being without jurisdiction' (SCC pp.555-56, para 10).

In short, there is no total ban on the exercise of inherent power where abuse of the process of the court or other extraordinary situation excites the court's jurisdiction. The

limitation is self-restraint, nothing more. The policy of the law is clear that interlocutory orders, pure and simple, should not be taken up to the High Court resulting in unnecessary litigation and delay. At the other extreme, final orders are clearly capable of being considered in exercise of inherent power, if glaring injustice stares the court in the face. In between is a tertium quid, as Untwalia, J. has pointed out as for example, where it is more than a purely interlocutory order and less than a final disposal. The present case falls under that category where the accused complain of harassment through the court's process. Can we state that in this third category the inherent power can be exercised? In the words of Untwalia, J.: (SCC p. 556, para 10) process of the Court and/or to secure the ends of justice. The label of the petition filed by an aggrieved party is immaterial. The High Court can examine the matter in an appropriate case under its inherent powers. The present case undoubtedly falls for exercise of the power of the High Court in accordance with Section 482 of the 1973 Code, even assuming, although not accepting, that invoking the revisional power of the High Court is impermissible.'

I am, therefore clear in my mind that the inherent power is not rebuffed in the case situation before us. Counsel on both sides, sensitively responding to our allergy for legalistics, rightly agreed that the fanatical insistence on the formal filing of a copy of the order under cessation need not take up this court's time. Our conclusion concurs with the concession of counsel on both sides that merely because a copy of the order has not been produced, despite its presence in the records in the court, it is not possible for me to hold that the entire revisory power stands frustrated and the inherent power stultified."

"6. In our considered view any attempt to explain the law further as regards the issue relating to inherent power of High Court under Section 482 Cr.P.C. is unwarranted. We would simply reiterate that Section 482 Cr.P.C. begins with a non-obstante clause to state:

***"482. Saving of inherent powers of High Court**.- Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."*

A fortiori, there can be no total ban on the exercise of such wholesome jurisdiction where, in the words of Krishna Iyer, J.

"abuse of the process of the Court or other extraordinary situation excites the court's jurisdiction. The limitation is self-restraint, nothing more."

We venture to add a further reason in support. Since Section 397 Cr.P.C. is attracted against all orders other than interlocutory, a contrary view would limit the availability of inherent powers under Section 482 Cr.P.C. only to petty interlocutory orders! A situation wholly unwarranted and undesirable.

7. As a sequel, we are constrained to hold that the Division Bench, particularly in paragraph 28, in the case of Mohit alias Sonu and another (supra) in respect of inherent power of the High Court in Section 482 of the Cr.P.C. does not state the law correctly. We record our respectful disagreement.

8. In our considered opinion the learned Single Judge of the High Court should have followed the law laid down by this Court in the case of Dhariwal Tobacco Products Ltd. (supra) and other earlier cases which were cited but wrongly ignored them in preference to a judgment of that Court in the case of Sanjay

Bhandari (supra) passed by another learned Single Judge on 05.02.2009 in S.B. Criminal Miscellaneous Petition No. 289 of 2006 which is impugned in the connected Criminal Appeal arising out of Special Leave Petition No. 4744 of 2009. As a result, both the appeals, one preferred by Prabhu Chawla and the other by Jagdish Upasane & Ors. are allowed. The impugned common order dated 02.04.2009 passed by the High Court of Rajasthan is set aside and the matters are remitted back to the High Court for fresh hearing of the petitions under Section 482 of the Cr.P.C. in the light of law explained above and for disposal in accordance with law. Since the matters have remained pending for long, the High Court is requested to hear and decide the matters expeditiously, preferably within six months."

7. In view of the aforesaid decisions of Hon'ble Apex Court, Sri Pranjal Krishna has submitted that the present petition filed under Section 482 Cr.P.C. is maintainable.

8. Per contra, Sri Shiv P. Shukla, learned counsel for the opposite parties has cited the decision of Orissa High Court dated 16.12.2013 in re: ***Smt. Janata Jha and another vs. Assistant Director, Directorate of Enforcement, Government of India and another (CRLMC No.114 of 2011 (Application U/S 482 Cr.P.C.)***) by submitting that one petition was filed before the High Court under Section 482 Cr.P.C. under the same Act i.e. Act, 2002 stand dismissed by the Orissa High Court observing that "it may be made clear that the question as to whether the inherent power available under Section 482 Cr.P.C. can be exercised for quashing a proceeding initiated under PMLA or not, is left open."

9. After considering the arguments of the parties on the point of maintainability, I find that the Orissa High Court in re: ***Smt. Janata Jha and another (supra)*** has not held that the petitioner under Section 482 Cr.P.C. is not maintainable as the petitioners of that petition have not availed the remedy of revision, rather it has been observed that for quashing the proceeding initiated under the Act, 2002 the High Court may examine as to whether the inherent powers are to be invoked or not.

10. On the other hand, the Hon'ble Apex Court in re: ***New India Assurance Company Ltd. (supra)*** has clearly held that the scope of revisional jurisdiction of the High Court is limited to the extent of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order passed by an inferior court. The purpose of revisional power is to set right a patent defect or an error of jurisdiction or law.

11. Likewise, the Hon'ble Apex Court in re:***Prabhu Chawla (supra)*** has observed that there is no ban on the exercise of inherent power where abuse of the process of the court or other extraordinary situation excites the court's jurisdiction. The policy of law is clear that interlocutory orders, pure and simple, should not be taken up to the court resulting unnecessary litigation and delay.

12. Therefore, keeping in view the prayers made in the petition, the inherent jurisdiction of this Court enshrined under Section 482 Cr.P.C. may be invoked and, therefore, the present petition is maintainable.

13. So far as the prima-facie satisfaction of the Court for interim relief is concerned, I would refer Annexure No.4 of the petition which is a Prosecution Complaint No.ECIR/09/PMLA/LZO/2013 filed by the Directorate of Enforcement (here-in-after referred to as the "E.D.") on 30.06.2018. Thereafter, I would refer Annexure No.5 of the petition, which is a Supplementary Prosecution Complaint, the impugned complaint filed on 29.06.2020.

14. Admittedly, the present petitioner was not accused in the Prosecution Complaint filed on 30.06.2018. However, in the Supplementary Prosecution Complaint, which was filed on 29.06.2020, the present petitioner was made accused.

15. Sri Pranjal Krishna, learned counsel for the petitioner has drawn attention of this Court towards various statements of various persons recorded under Section 50 of the Act, 2002, pursuant to which, the Supplementary Prosecution Complaint has been filed against the petitioner. It would be apt to indicate the names of those persons and dates when the statements have been recorded.

(a) Statement of Mr. Prabhat Chand Gopalan dated 25.10.2016

(b) Statement of the present petitioner (Giri Raj Sharma) dated 08.11.2016

(c) Statement of Mr. Dilip Kumar dated 13.01.2015 and 18.10.2016

(d) Statement of Mr. Jonas Lal Marandi dated 09.01.2015 and 25.10.2016

(e) Statement of Mr. Dhirendra Kumar Singh dated 16.09.2016, 09.11.2016 & 10.11.2016

(f) Statement of Mr. Bhupendra Singh dated 21.09.2016

(g) Statement of Mr. Rakesh Kumar Gupta dated 27.10.2016

(h) Statement of Mr. B.R. Arora dated 23.01.2015, 19.10.2016 & 21.11.2017

(i) Statement of Mr. A.C. Srivastava dated 29.06.2018

(j) Statement of Mr. H.C. Pant dated 29.06.2018

The careful perusal thereof would clearly reveal that all the aforesaid statements of the aforesaid persons were recorded under Section 50 of the Act, 2002 before 30.06.2018 i.e. the date of filing the Prosecution Complaint before the learned trial court.

16. It would be apposite to refer the explanation (ii) of Section 44 (1) of the Act, 2002 as the Supplementary Prosecution Complaint could have been filed by the ED under the aforesaid provisions of law

"44. Offence triable by Special Courts.- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),-

(ii) the complaint shall be deemed to include any subsequent complaint in respect of further investigation that may be conducted to bring any further evidence, oral or documentary, against any accused person involved in respect of the offence, for which complaint has already been filed, whether named in the original complaint or not."

17. As per the aforesaid provision of law, further investigation is permissible but that may be conducted to bring any '*further evidence*', oral or documentary, against any accused person involved in respect of offence, for which, the complaint has already been filed, whether he is named in the original complaint or not.

18. So as to examine the authenticity or legality of the impugned Supplementary Prosecution Complaint in the instant case, this Court has to examine as to whether the Supplementary Prosecution Complaint has been filed on the basis of any *'further evidence'* . On the basis of material available on record, the prosecution has not considered any '*further evidence'*, rather the statements of various persons, which have been recorded under

Section 50 of the Act, 2002 prior to the date when the first complaint was filed on 30.06.2018, have been considered.

19. On a pin point query being made from learned counsel for the opposite parties as to why the petitioner has not been made accused in the original complaint which was filed on 30.06.2018 on the basis of statements of various persons recorded from 2015 onwards till 29.06.2018, the learned counsel for the opposite parties has submitted that the ED has got ample power to prosecute the petitioner even on the basis of earlier statements. On the question about 'further evidence' which has been procured after filing the original complaint, learned counsel for the opposite parties has got no specific instructions on that point.

20. On being further asked from learned counsel for the opposite parties as to whether any specific allegations of money laundering have been made out against the petitioner in the Supplementary Prosecution Complaint so as to attract the provisions of Section 3 of the Act, 2002, Sri Shiv P. Shukla has submitted that since the petitioner was responsible for correctness of the bills submitted by the Contractor and the maintenance of necessary records in this regard and he was also responsible for implementation of contract provisions which he failed to do so, therefore, he abused his official position and fraudulently prepared the entries of forged bills of Cement, Bitumen and Recron in the relevant Registers, therefore, he is also responsible.

21. Therefore, in view of the above, I am of the considered opinion that the question as to whether the allegation of abuse of official position by not taking proper care and precaution in verifying the entries and bills would be treated as an offence under the Act, 2002, may be considered after exchange of affidavits.

22. I have noted one more thing from Annexure No.2, which is a charge-sheet filed by the C.B.I. before the learned trial court of C.B.I. on 30.10.2013 indicating the culpability of the present petitioner. The relevant portion thereof is at running page 58 of the petition whereby the petitioner has been held responsible for abusing his official position as such a public servant and further allegation is relating to accepting an illegal gratification from the Contractor Sri B.R. Arora.

23. The impugned Supplementary Prosecution Complaint against the petitioner alleges the same allegation as has been levelled by the C.B.I. At running page 133 of the petition, the conclusion of investigation by the ED has been indicated verbatim the same allegation with the same language has been levelled which has been levelled by the C.B.I..

24. If it was an independent investigation by the ED, the finding and observation should be placed in a different manner or atleast the language of the charge-sheet of C.B.I. should not be copied. Prima-facie, it appears that the ED has cut the relevant portion of the charge-sheet of the C.B.I., copied and pasted it in his Supplementary Prosecution Complaint, which may not be appreciated. Besides, if the ED was relying the same allegation of C.B.I charge-sheet which was filed on 30.10.2013, the petitioner should have been made accused in the original complaint which was filed on 30.06.2018. Therefore, prima-facie, it appears that without following the due procedure of law and without giving proper explanation of the aforesaid chain of facts and incidences, the Supplementary Prosecution Complaint has been filed against the petitioner.

25. Since the impugned Supplementary Prosecution Complaint was filed before the learned trial court of ED, therefore, before taking cognizance on the aforesaid

Supplementary Prosecution Complaint the provisions of Section 44 (1) (ii) of the Act, 2002 should have been considered. The learned trial court must ask from the prosecution as to what 'further evidence', oral or documentary has been collected after filing the first prosecution complaint to prosecute the petitioner in the present case inasmuch as the further investigation may only be conducted to bring any 'further evidence', oral or documentary, against the accused person.

26. In the present case, the learned trial court of ED vide the impugned order dated 11.08.2021 (Annexure No.6) has taken cognizance against of the second Supplementary Prosecution Complaint and issued summon against the petitioner without adverting to the relevant factual and legal aspects.

27. The Hon'ble Apex Court in re: ***Pepsi Foods Ltd. & another vs. Special Judicial Magistrate & others*** reported in ***(1998) 5 SCC 749*** vide para-28 has mandated that the order of learned trial court summoning the accused must reflect that he has applied his mind to the facts of the case as well as law applicable thereto. If the learned trial court summons an accused person without carefully adverting to the facts and law of the case, the said summoning order would be bad in law. For convenience, para-28 reads as under:-

"28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. it is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

28. In view of the facts and circumstances stated here-in-above, it appears that the matter requires consideration.

29. Let the counter affidavit be filed within a period of three weeks. Rejoinder affidavit,if any, may be filed within a week thereafter.

30. List this petition in the week commencing 29.11.2021 as fresh.

31. Till the next date of listing, the operation and implementation of the impugned cognizance order dated 11.08.2021 (Annexure No.6) taken in Criminal Case No.1154 of 2021 (Directorate of Enforcement, Lucknow vs. Giri Raj Sharma) under Section 3 & 4 of Prevention of Money Laundering Act, 2002 arising out of ECIR/09/PMLA/LZO/2013 pending before the learned Special Court (PMLA), Lucknow, shall remain stayed and the petitioner may not be compelled to appear before the court concerned to participate in the aforesaid criminal proceedings.

(2021)11ILR A423
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 02.11.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

U/S 482/378/407 . No. 4064 of 2021

Varun Tiwari ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Arun Sinha, Ram Chandra Singh, Umang Agarwal

Counsel for the Opposite Party:
G.A.

Criminal Law – Code of Criminal Procedure,1973 – Section 167 (2) - Application for default bail rejected-despite expiry of 90 days and chargesheet not submitted-chargesheet was submited on the same day but subsequent to filing of the Application u/s 167 (2) of the Cr.P.C.-right of the Applicant accrued immediately after filing such application -since chargesheet not filed in time-impugned order quashed-learned trial Court directed to release the Applicant on bail.

Held, In view of the above, I find that the order passed by the learned trial court dated 7.6.2021 is patently illegal and unwarranted inasmuch as the appropriate order in an application u/s 167(2) Cr.P.C. must have been disposed of promptly and such application should have not been treated as if ti is a regular bail application filed by the applicant. Had it been a regular bail application, such application should have been presented before the learned Sessions Court then it should be heard by the trial court which is special court in the present case but so far as the issue of default bail is concerned, it should be decided by the learned trial court inasmuch as the charge-sheet is presented by the prosecution before the trial court. Further, the fact as to whether the mandatory period of filing charge-sheet as per section 167(1) has expired or not can only be seen by the learned trial court and if after expiry of such mandatory period and till the filing of an appropriate application u/s 167(2) Cr.P.C. the charge-sheet has not been filed, even the learned trial court should not extend the remaining period and if any request on behalf of accusedapplicant is made by his counsel even orally to the extent that he is ready to submit sureties / bail bonds as per satisfaction of the court seeking default bail, the learned trial court may not refuse bail to the accused as the right of default bail emanates from Article 21 of the Constitution of India which guarantees right to life and personal liberty. **(para 14)** (E-9)

List of Cases cited:

1. Sanjay Dutta Vs St. reported in (1994) 5 SCC 410

2. Uday Mohanlal Acharya Vs St. of Mah. (2001) 5 SCC 453

3. Bikramjit Singh Vs St. of Punj. (2020) Supreme Court Cases 616

4. M. Ravindran Vs The Intelligence Officer, Directorate of Revenue Intelligence passed in Criminal Appeal No. 699 of 2020 arising out of S.l.P. (Criminal) No. 2333 of 2020 decided on 26.10.2020

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Arun Sinha, learned counsel for the applicant and Sri Anurag Verma, learned AGA-I for the State.

2. The precise question for consideration in this petition is as to whether the accused has an indefeasible right to 'compulsive bail' i.e. 'default bail' under proviso to section 167(2) Cr.P.C. on the expiry of the period of 90 days, (or 60 days as the case may be), if the charge-sheet has not been filed within aforesaid stipulated time.

3. So as to answer this question some facts in brief of the case are required to be considered.

4. The present applicant is an accused in Sessions Trial No. 669/2021, Crime No. 23/2021, u/s 342, 376D, 372, 506 IPC, & section

5/6 POCSO Act, P.S. Mahanagar, District Lucknow. He was sent to judicial custody on 14.1.2021.

5. As per learned counsel for the applicant this is a case wherein the investigation should be completed within a period of 90 days and charge-sheet should have been filed within aforesaid period under section 167 Cr.P.C.

6. The aforesaid 90 days period has expired on 14.4.2021 but no charge sheet has been filed before the learned trial court i.e. Special Judge, POCSO Act, Lucknow.

7. On 22.4.2021 an application under section 167(2) Cr.P.C. was filed before the learned trial court through physical filing. However, at that point of time filing of physical application was not allowed in terms of restriction being imposed by the High Court as a Covid -19 Protocol. Thereafter, the petitioner filed an online application. Learned counsel for the applicant was appointed to file such application before the learned Court of Sessions Judge as this is a case relating to session trial. Learned counsel for the applicant has filed the certified copy of those applications with this petition as Annexure no. 7 and Annexure no. 8. Both the applications are of 22.4.2021. In both the applications before the learned trial court and before the learned sessions court it has been indicated that after expiry of 90 days period no charge-sheet has been filed, therefore, the applicant may be granted bail under section 167(2) Cr.P.C. as 'default bail'.

8. Per contra, Sri Anurag Verma, learned AGA-I has submitted that even if the applicant has filed an application under section 167(2) Cr.P.C. on 22.4.2021, he would not be entitled for default bail under section 167(2) inasmuch as the charge-sheet was filed before the learned trial court on 22.4.2021 and the cognizance thereof has been taken. Therefore, in view of the decision of Apex Court in re: ***Sanjay Dutta vs. State reported in (1994) 5 SCC 410*** the benefit of default bail may not be extended to the present applicant. Replying to the aforesaid objection being made by learned AGA -I, Sri Sinha, learned counsel for the applicant has cited some decisions of Apex Court i.e. ***Uday Mohanlal Acharya vs. State of Maharashtra (2001) 5 SCC 453, Bikramjit Singh vs. State of Punjab (2020) 10 Supreme Court Cases 616 and M. Ravindran vs. The Intelligence Officer, Directorate of Revenue Intelligence passed in Criminal Appeal No. 699 of 2020 arising out of S.l.P. (Criminal) No. 2333 of 2020*** decided on 26.10.2020.

9. Sri Sinha has submitted that the judgment of Apex Court in re: ***Sanjay Dutta (supra)*** would not be applicable in the present case inasmuch as in the case of ***Sanjay Dutta (supra)*** the challan was presented by the prosecution on 25.3.2019 and application u/s 167(2) was filed on the next date i.e. 26.3.2019. Whereas in the present case the charge-sheet was presented by the prosecution on 22.4.2021 subsequent to the application u/s 167(2) has been filed on the same day i.e. 22.4.2021. Therefore, the right of the present applicant accrued immediately after filing such application under section 167(2) since the charge-sheet was not filed by that time.

10. It would be apt to consider some recent cases of the Apex Court whrein the quashing of default bail has been considered :

Saravanan vs State Rep. By The Inspector Of ... on 15 October, 2020

CRIMINAL APPEAL NOS. 681682 OF 2020 (Arising from S.L.P. (Criminal) Nos.43864387/2020)

Para 9. ".....in the case of Rakesh Kumar Paul (supra), where the investigation is not completed within 60 days or

90 days, as the case may be, and no chargesheet is filed by 60 th or 90th day, accused gets an "indefeasible right" to default bail, and the accused becomes entitled to default bail once the accused applies for default bail and furnish bail. Therefore, the only requirement for getting the default bail/statutory bail under Section 167(2), Cr.P.C. is that the accused is in jail for more than 60 or 90 days, as the case may be, and within 60 or 90 days, as the case may be, the investigation is not completed and no chargesheet is filed by 60th or 90th day and the accused applies for default bail and is prepared to furnish bail. No other condition of deposit of the alleged amount involved can be imposed. Imposing such a condition while releasing the accused on default bail/statutory bail would frustrate the very object and purpose of default bail under Section 167(2), Cr.P.C. As observed by this Court in the case of Rakesh Kumar Paul (supra) and in other decisions, the accused is entitled to default bail/statutory bail, subject to the eventuality occurring in Section 167, Cr.P.C., namely, investigation is not completed within 60 days or 90 days, as the case may be, and no chargesheet is filed by 60 th or 90th day and the accused applies for default bail and is prepared to furnish bail.

Bikramjit Singh vs The State Of Punjab on 12 October, 2020

CRIMINAL APPEAL NO. 667 OF 2020 (@ Special Leave Petition (Crl.) No. 2933 of 2020)

Para 11. Section 167 of the Code makes it clear that whenever a person is arrested and detained in custody, the time for investigation relating to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, cannot ordinarily be beyond the period of 15 days, but is extendable, on the Magistrate being satisfied that adequate grounds exist for so doing, to a maximum period of 90 days - See first proviso (a)(i) to Section 167(2) of the Code. The said proviso goes on to state that the accused person shall be released on bail if he is prepared to and does furnish bail on expiry of the maximum period of 90 days, and every person so released on bail be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter.

*Para 24. ".....If the expression "availed of" is interpreted to mean that the accused must factually be released on bail, then in a given case where the Magistrate illegally refuses to pass an order notwithstanding the maximum period stipulated in Section 167 had expired, and yet no challan had been filed then the accused could only move to the higher forum and while the matter remains pending in the higher forum for consideration, if the prosecution files a charge-sheet then also the so-called right accruing to the accused because of inaction on the part of the investigating agency would get frustrated. Since the legislature has given its mandate it would be the bounden duty of the court to enforce the same and it would not be in the interest of justice to negate the same by interpreting the expressio*n "if not availed of" in a manner which is capable of being abused by the prosecution.

Para 29".....The right to default bail, as has been correctly held by the judgments of this Court, are not mere statutory rights under the first proviso to Section 167(2) of the Code, but is part of the procedure established by law under Article 21 of the Constitution of India, which is, therefore, a fundamental right granted to an accused person to be released on bail once the conditions of the first proviso to Section 167(2) are fulfilled."

S. Kasi vs State Through The Inspector Of ... 19 June, 2020

CRIMINAL APPEAL NO. 452 OF 2020 (ARISING OUT OF SLP (CRL.) NO.2433/2020)

Para 12. ".....there has been very detailed consideration of Section 167 by a Three-Judge Bench of this Court in ***Rakesh Kumar Paul versus State of Assam, (2017)15 SCC 67.*** *This Court in the above case has traced the legislative history of the provision of Section 167. This Court in the above case emptice both on the part of the prosecution as well as some courts must be very strongly and vehemently discouraged, we reiterate that no subterfuge should be resorted to, to defeat the indefeasible right of the accused for "default bail" during the interregnum when the statutory period for filing the charge-sheet or challan expires and the submission of the charge-sheet or challan in court."hasised that the debate on Section 167 must also be looked at from the perspective of expeditious conclusion of investigation and from the angle of personal liberty. This Court also held that right for default bail is an indefeasible right which cannot be allowed to be frustrated by the prosecution. Following was laid down in paragraphs 37, 38 and 39: -*

"37. This Court had occasion to review the entire case law on the subject in ***Union of India v. Nirala Yadav, (2014) 9 SCC 457****. In that decision, reference was made to* ***Uday Mohanlal Acharya v. State of Maharashtra, (2001) 5 SCC 453*** *and the conclusions arrived at in that decision. We are concerned with Conclusion (3) which reads as follows:*

"13.(3) On the expiry of the said period of 90 days or 60 days, as the case may be, an indefeasible right accrues in favour of the accused for being released on bail on account of default by the investigating agency in the completion of the investigation within the period prescribed and the accused is entitled to be released on bail, if he is prepared to and furnishes the bail as directed by the Magistrate."

38. ***This Court also dealt with the decision rendered in*** *Sanjay Dutt, (1994) 5 SCC 410 and noted that the principle laid down by the Constitution bench is to the effect that if the charge sheet is not filed and the right for "default bail" has ripened into the status of indefeasibility, it cannot be frustrated by the prosecution on any pretext. The accused can avail his liberty by filing an application stating that the statutory period for filing the charge sheet or challan has expired and the same has not yet been filed and therefore the indefeasible right has accrued in his or her favour and further the accused is prepared to furnish the bail bond.tice both on the part of the prosecution as well as some courts must be very strongly and vehemently discouraged, we reiterate that no subterfuge should be resorted to, to defeat the indefeasible right of the accused for "default bail" during the interregnum when the statutory period for filing the charge-sheet or challan expires and the submission of the charge-sheet or challan in court."*

39. This Court also noted that apart from the possibility of the prosecution frustrating the indefeasible right, there are occasions when even the court frustrates the indefeasible right. Reference was made to ***Mohd. Iqbal Madar Sheikh v. State of Maharashtra, (1996) 1 SCC 722*** *wherein it was observed that some courts keep the application for "default bail" pending for some days so that in the meantime a charge-sheet is submitted. While such a practice both on the part of the prosecution as well as some courts must be very strongly and vehemently discouraged, we reiterate that no subterfuge should be resorted to, to defeat the indefeasible right of the accused for "default bail" during the interregnum when the statutory period for filing the charge-sheet or challan expires and the submission of the charge-sheet or challan in court."*

11. Having heard learned counsel for the parties and having perused the material available on record as well as the aforesaid decisions of the Apex Court, I am of the considered opinion that the right of the accused under section 167(2) if by that time the charge-sheet has not been filed by the prosecution within stipulated period so indicated under section 167(1). The Apex Court in ***Bikramjit Singh (supra)*** has held vide para 29 that an accused must be held to have availed all his right flowing from the legislative mandate engrafted in the proviso to sub-section (2) of Section 167 Cr.P.C. if he has filed an application after the expiry of the stipulated period alleging that no challan has been filed and he is prepared to offer the bail that is ordered, and it is found as a fact that no challan has been filed within the period prescribed from the date of the arrest of the accused. Such interpretation would sub-serve the purpose and the object for which the provision in question was brought on to the statutory-book. In the same para the Apex Court has also held that even if the application for consideration of an order of being released on bail is posted before the court after some length of time, or even if the Magistrate refuses the application erroneously and the accused moves the higher forum for getting a formal order of being released on bail in enforcement of his indefeasible right, then filing of challan at that stage will not take away the right of the accused.

12. The ratio of judgment of Apex Court in re: ***Sanjay Dutta (supra***) would not be applicable in the present case inasmuch as the application under section 167(2) was filed on the next day after filing the challan by the prosecution, whereas in the instant case the application under section 167(2) was filed on the same day i.e. 22.4.2021, by that time the charge-sheet was not presented by the prosecution before the learned trial court. However, it was presented on the same day i.e. 22.4.2021 and the learned trial court took cognizance thereof.

13. The Apex Court in re: ***M. Ravindran (supra)*** has held in para 18 and 18.1 as under :

"18. Therefore, in conclusion

18.1 Once the accused files an application for bail under the Proviso to Section 167(2) he is deemed to have 'availed of or enforced his right to be released on default bail, accruing after expiry of the stipulated time limit for investigation. Thus, if the accused applies for bail under Section 167(2), Cr.P.C. read with Section 35A (4), NDPS Act upon expiry of 180 days or the extended period, as the case may be, the Court must release him on bail forthwith without any unnecessary delay after getting necessary information from the public prosecutor, as mentioned supra. Such prompt action will restrict the prosecution from frustrating the legislative mandate to release the accused on bail in case of default by the investigative agency."

14. In view of the above, I find that the order passed by the learned trial court dated 7.6.2021 is patently illegal and unwarranted inasmuch as the appropriate order in an application u/s 167(2) Cr.P.C. must have been disposed of promptly and such application should have not been treated as if ti is a regular bail application filed by the applicant. Had it been a regular bail application, such application should have been presented before the learned Sessions Court then it should be heard by the trial court which is special court in the present case but so far as the issue of default bail is concerned, it should be decided by the learned trial court inasmuch as the charge-sheet is presented by the prosecution before the trial court. Further, the fact as to whether the mandatory period of filing charge-sheet as per section 167(1) has expired or not can only be seen by the learned trial court and if after expiry of such mandatory period and till the filing of an appropriate application u/s 167(2) Cr.P.C. the charge-sheet has not been filed, even the learned trial court should not extend the

remaining period and if any request on behalf of accused-applicant is made by his counsel even orally to the extent that he is ready to submit sureties / bail bonds as per satisfaction of the court seeking default bail, the learned trial court may not refuse bail to the accused as the right of default bail emanates from Article 21 of the Constitution of India which guarantees right to life and personal liberty. Such liberty guaranteed under chapter 3 of the Constitution of India may not be circumvented, ignored or violated by the learned trial court.

15. Accordingly, the petition u/s 482 Cr.P.C. is allowed.

16. The order dated 7.6.2021 passed by the Special Judge, POCSO Act / Additional Sessions Judge, Lucknow rejecting the bail application of the applicant u/s 167(2) Cr.P.C. is hereby **quashed.**

17. The learned trial court is directed to release the present applicant on default bail u/s 167(2) Cr.P.C. in S.T. No. 669/2021, Crime No. 23/2021, u/s 342, 376D, 372, 506 IPC & Section 5/6 POCSO Act, P.S. Mahanagar, District Lucknow in the case 'The State vs. Upreta Kumar Rasail & others, pending in the court of Special Judge, POCSO Act, Lucknow on on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned with the following conditions which are being imposed in the interest of justice:-

(i) The applicant shall file an undertaking to the effect that he shall not seek any adjournment on the dates fixed for evidence when the witnesses are present in court. In case of default of this condition, it shall be open for the trial court to treat it as abuse of liberty of bail and pass orders in accordance with law.

(ii) The applicant shall remain present before the trial court on each date fixed, either personally or through his counsel. In case of his absence, without sufficient cause, the trial court may proceed against him under Section 229-A of the Indian Penal Code.

(iii) In case, the applicant misuses the liberty of bail during trial and in order to secure his presence proclamation under Section 82 Cr.P.C. is issued and the applicant fails to appear before the court on the date fixed in such proclamation, then, the trial court shall initiate proceedings against him, in accordance with law, under Section 174-A of the Indian Penal Code.

(iv) The applicant shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court absence of the applicant is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of bail and proceed against him in accordance with law.

18. Before parting with it is to mention that useful assistance has been provided by Ms. Shama Parveen, Law Clerk and Mr. Vaibhav Srivastava, Law Intern.

(2021)11ILR A428
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.09.2021

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 482 No.9361 of 2021

Yogendra Goswami ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Vineet Kumar Singh, Sri H.N. Singh(Sr. Advocate), Sri Abhishek Dwivedi

Counsel for the Opposite Parties:
A.G.A., Sri Ronak Chaturvedi

Civil Law - Negotiable Instrument Act, 1881 - Section 138 - Compromise/settlement between the parties-cheque handed over to the counsel for opposite party by the counsel for the Applicant-entire proceedings of complaint case quashed-inherent power u/s 482 Cr.P.C. (E-9)

List of Cases cited:

1.B.S. Joshi Vs St.of Har. & ors. 2003 (4) ACC 675

2. Gian Ssingh Vs St.of Punj. 2012 (10) SCC 303

3. Dimpey Gujral & ors. Vs Union Territory Through Administrator 2013 (11) SCC 697

4. Narendra Singh & ors. Vs St. of Punj. & ors. 2014 (6) SCC 466

5. Yogendra Yadav & ors. Vs St.of Jharkhand 2014 (9) SCC 653

6. Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur & ors. Vs St. of Guj.& anr,; reported in (2017) 9 SCC 641

7. R.P. Kapoor Vs St. of Punj., AIR 1960 S.C. 866,

8.St. of Har. Vs Bhajanlal, 1992 SCC (Crl.)426,

9. St. of Bihar Vs P.P. Sharma, 1992 SCC (Crl.)192

10. Zandu Pharmaceutical Works Ltd. Vs Mohd. Saraful Haq & anr., (Para-10) 2005 SCC (Cri.) 283

11. S.W. Palankattkar & ors. Vs St.of Bihar, 2002 (44) ACC 168

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard Shri H.N. Singh, Senior Advocate assisted by Shri Abhishek Dwivedi, learned counsel for applicant and Shri Ronak Chaturvedi, learned counsel appearing for opposite party no.2 and learned AGA for the State and perused the record.

2. This application u/s 482 Cr.P.C. has been filed with the prayer to quash the impugned order dated 13.10.2020 passed by the Additional Judicial Magistrate, Mathura in Complaint Case No.699 of 2020 (Manoj Kumar Sharma Vs. Yogendra Goswami), under Section 138 Negotiable Instrument Act P.S. Vrindavan District Mathura.

3. Shri H.N.Singh, learned Senior Counsel for the applicant has handed over the cheque amount of Rs.4,50,000.00 by way of bank draft No.167559 dated 22.02.2021 re-validated on 28.06.2021 to Shri Ronak Chaturvedi, learned counsel for opposite party no.2 before this Court today itself.

4. Learned counsel for opposite party no.2 has received the draft of Rs.4,50,000/- on the instruction of his client Manoj Kumar Sharma and submits that his client is not interested to pursue the case i.e. Complaint Case No.699 of 2020 (Manoj Kumar Sharma Vs. Yogendra Goswami), under Section 138 Negotiable Instrument Act P.S. Vrindavan District Mathura pending in the Court of Additional Judicial Magistrate, Mathura, and therefore, the proceedings of the aforesaid case may be quashed by this Court.

5. Considering the arguments as advanced by learned counsel for the parties and the statement given by learned counsel for opposite party no.2, a draft of Rs.4,50,000/- is being handed over to the learned counsel for opposite party no.2 today by the learned counsel for the applicant in Court and a photostat copy of the same is being kept in the file of this case as well as in the file of learned AGA.

6. Learned AGA has submitted that since the parties have entered into compromise and the cheque amount has been paid by way of bank draft, therefore, no useful purpose would be

served if the proceedings of the aforesaid case go on further.

7. Learned counsel for the parties has drawn the attention of this Court and placed reliance on the judgment of the Hon'ble Apex Court in support of their case.

(i) B.S. Joshi Vs. State of Haryana & Others 2003 (4) ACC 675.

(ii) Gian Ssingh Vs. State of Punjab 2012 (10) SCC 303.

(iii) Dimpey Gujral And Others Vs. Union Territory Through Administrator 2013 (11) SCC 697.

(iv) Narendra Singh And Others Vs. State of Punjab And Others 2014 (6) SCC 466.

(v) Yogendra Yadav And Others Vs. State of Jharkhand 2014 (9) SCC 653.

8. Summarizing the ratio of all the above cases the latest judgment pronounced by Hon'ble Apex Court in the case of **Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur & Ors. Vs. State of Gujarat & Anr,; reported in (2017) 9 SCC 641** and in paragraph no.16, the Hon'ble Apex Court has summarized the broad principles with regard to exercise of powers under Section 482 Cr.P.C. in the case of compromise/settlement between the parties which emerges from precedent of the subjects as follows:-

i. "Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognizes and preserves powers which inhere in the High Court.

ii.The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

iii. In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

iv. While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

v. The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

vi. In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are truly speaking not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

vii. As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

viii. Criminal cases involving offences which arises from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

ix. In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

x. There is yet an exception to the principle set out in propositions (viii) and (ix) above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

9. The Apex Court has also laid down the guidelines where the criminal proceedings could be interfered and quashed in exercise of its power by the High Court in the following cases:- **(i) R.P. Kapoor Vs. State of Punjab, AIR 1960 S.C. 866, (ii) State of Haryana Vs. Bhajanlal, 1992 SCC (Crl.)426, (iii) State of Bihar Vs. P.P. Sharma, 1992 SCC (Crl.)192 and (iv) Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another, (Para-10) 2005 SCC (Cri.) 283.**

10. From the aforesaid decisions the Apex Court has settled the legal position for quashing of the proceedings at the initial stage. The test to be applied by the court is to whether uncontroverted allegation as made prima facie establishes the offence and the chances of ultimate conviction is bleak and no useful purpose is likely to be served by allowing criminal proceedings to be continue. In **S.W. Palankattkar & others Vs. State of Bihar, 2002 (44) ACC 168**, it has been held by the Hon'ble Apex Court that quashing of the criminal proceedings is an exception than a rule. The inherent powers of the High Court under Section 482 Cr.P.C itself envisages three circumstances under which the inherent jurisdiction may be exercised:-(i) to give effect an order under the Code, (ii) to prevent abuse of the process of the court ; (iii) to otherwise secure the ends of justice. The power of High Court is very wide but should be exercised very cautiously to do real and substantial justice for which the court alone exists.

11. With the assistance of the aforesaid guidelines, keeping in view the nature and gravity and the severity of the offence which are more particularly is private dispute and differences it is deem proper and meet to the ends of justice. The proceeding of the aforementioned case be quashed.

12. The present 482 Cr.P.C. application stands **allowed.** Keeping in view the law laid down by the Hon'ble Apex Court in the above referred judgment and in view of the statement/compromise made by the applicants as well as opposite party no.2 and the observation made above, the entire proceedings of complaint case no.699 of 2020 (Manoj Kumar Sharma Vs. Yogendra Goswami), under section 138 of the Negotiable Instruments Act, Police Station Vrindavan, District Mathura pending in the Court of Additional Judicial Magistrate, Mathura is hereby quashed.

13. The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad or certified copy issued from the Registry of the High Court, Allahabad.

14. The concerned Court/ Authority/ Official shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

(2021)11ILR A432
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.10.2021

BEFORE
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Application U/S 482 No. 9961 of 2021

Jaikawar ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Punya Sheel Pandey

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

Excuse Act, 1944 - Section 72 - Application filed for release of vehicle-rejected-provision u/s 72 (1) to (4) of Excise Act-have the effect of denuding the Magistrate of his power to pass any order u/s 47 of the Code for release of any article seized under offence under the act-impugned order correct.

Application dismissed. (E-9)

List of Cases cited:

1.Virendra Gupta Vs St. of U.P, 2019 (108) ACC 438

2. Nand Vs St of U.P., 1997 (1) AWC 41

3. Rajiv Kumar Singh Vs St. of U.P. & ors, 2017 (5) ADJ 351

4.Vikas Kumar Vs St.of U.P. & anr., (Application u/s 482 No. 33012 of 2019, decided on 22.1.2020)

5.Chandra Pal Vs St. of U.P. & anr., (Application u/s 482 No. 1325 of 2021, decided on 12.2.2021)

6. Sunderbhai Ambalal Desai Vs St. of Guj. AIR 2003 SC 638

7. Vikki Vs St. of U.P., 2021 0 Supreme (All) 479

8.Ved Prakash Vs St. of U.P., 1982 19 ACC 183

9. Maru Ram Vs U.O.I. , (1981) 1 SCC 107

10. St. (U.O.I.) Vs Ram Sharan, (2003) 12 SCC 578

(Delivered by Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard Sri Punya Sheel Pandey, learned counsel for the applicant and Sri Pankaj Saxena, learned Additional Government Advocate-I along with Ms. Rachna Tiwari, learned Additional Government Advocate appearing for State-opposite party.

2. The present application under Section 482 of the Code of Criminal Procedure1 has been filed seeking to quash the order dated 08.09.2020 passed by the Additional Sessions Judge/F.T.C. Court No.1, Deoria in Criminal Revision No. 21 of 2020 (Jaikawar vs. State of U.P.) and order dated 17.01.2020 passed by the learned Chief Judicial Magistrate, Court No.17, Deoria in Misc. Application No. 37 of 2020, arising out of Case Crime No. 924 of 2019, under Sections 60/63 of Excise Act and Section 473 IPC, P.S. Kotwali, District Deoria.

3. The facts as reflected from the records of the case indicate that an application was filed by the applicant herein before the court of Chief Judicial Magistrate seeking release of vehicle bearing Registration No. H.R. 60-J-1553, Engine

No. 15CRA1LPYW01221 and Chassis No. MAT627121KLA01882 contending that no recovery of any intoxicant had been made from the vehicle and that the applicant had possessed all the valid papers relating to the vehicle and accordingly a prayer was made for release of the vehicle. The Magistrate rejected the application as being not maintainable by referring to a Division Bench judgment of this Court in **Virendra Gupta Vs. State of U.P.2,** for the proposition that the provisions contained under sub-sections (1) to (4) of Section 72 of the U.P. Excise Act, 1910, clearly denude the Magistrate of his power to pass any order under Section 457 of the Code for release of anything seized in connection with an offence purporting to have been committed under the Excise Act.

4. Aggrieved against the order, the applicant preferred a revision being Criminal Revision No. 21 of 2020. The revision was argued on the jurisdictional point as to whether the Magistrate had the power and jurisdiction to release the vehicle when the confiscation proceedings under Section 72 of the Act were pending before the Collector, and after referring to the facts and the material on record and also the law laid down in the case of **Virendra Gupta** (supra), the revision was rejected.

5. Learned counsel for the applicant has sought to assail the orders of the courts below by contending that mere pendency of confiscation proceedings before the Collector under Section 72 of the Excise Act shall not operate as a bar against release of a vehicle seized under Section 60 of the Excise Act. In support of his contention, reliance has been placed upon the judgments in the case of **Nand Vs. State of U.P.3, Rajiv Kumar Singh Vs. State of U.P. and others4, Vikas Kumar vs. State of U.P. and another5, Chandra Pal vs. State of U.P. and another6** and **Sunderbhai Ambalal Desai vs. State of Gujarat7.**

6. Learned Additional Government Advocate-I submits that in terms of the scheme of the Act, the release of any property which is subject matter of confiscation proceedings under Section 72 of the Excise Act before the Collector cannot be sought in terms of the powers exerciseable under the Code. It is pointed out that the controversy in the present case stands squarely covered by a recent judgment of this Court in the case of **Vikki vs. State of U.P.8** and also the earlier decisions in the case of **Ved Prakash Vs. State of U.P.9 and Virendra Gupt**a (supra).

7. In order to appreciate the rival contentions the provisions as contained under Sections 5, 451, 452 and 457 of the Code of Criminal Procedure may be adverted to, and the same are as under :-

"**5. Saving.-**Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.

451. Order for custody and disposal of property pending trial in certain cases.- When any property is produced before any Criminal Court during an inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy and natural decay, or if it is otherwise expedient so to do, the Court may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of.

Explanation.-For the purposes of this section,"property" includes-

(a) property of any kind or document which is produced before the Court or which is in its custody,

(b) any property regarding which an offence appears to have been committed or which appears to have been used for the commission of any offence.

452. Order for disposal of property at conclusion of trial.-(1) When an inquiry or trial in any Criminal Court is concluded, the Court may make such order as it thinks fit for the disposal, by destruction, confiscation or delivery to any person claiming to be entitled to possession thereof or otherwise, of any property or document produced before it or in its custody, or regarding which any offence appears to have been committed, or which has been used for the commission of any offence.

(2) An order may be made under sub-section (1) for the delivery of any property to any person claiming to be entitled to the possession thereof, without any condition or on condition that he executes a bond, with or without sureties, to the satisfaction of the Court, engaging to restore such property to the Court if the order made under sub-section (1) is modified or set aside on appeal or revision.

(3) A Court of Session may, instead of itself making an order under sub-section (1), direct the property to be delivered to the Chief Judicial Magistrate, who shall thereupon deal with it in the manner provided in Sections 457, 458 and 459.

(4) Except where the property is livestock or is subject to speedy and natural decay, or where a bond has been executed in pursuance of sub-section (2), an order made under sub-section (1) shall not be carried out for two months, or when an appeal is presented, until such appeal has been disposed of.

(5) In this section, the term" property" includes, in the case of property regarding which an offence appears to have been committed, not only such property as has been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise.

457. Procedure by police upon seizure of property.-(1)Whenever the seizure of property by any police officer is reported to a Magistrate under the provisions of this Code, and such property is not produced before a Criminal Court during an inquiry or trial, the Magistrate may make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or if such person cannot be ascertained, respecting the custody and production of such property.

If the person so entitled is known, the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit and if such person is unknown, the Magistrate may detain it and shall, in such case, issue a proclamation specifying the articles of which such property consists, and requiring any person who may have a claim thereto, to appear before him and establish his claim within six months from the date of such proclamation."

8. Sections 60 and 72 of the U.P. Excise Act, 1910 which are also relevant for the purposes of the controversy at hand, read as follows :-

"**60. Penalty for unlawful import, export, transport, manufacture, possession, sale, etc.**- (1) Whoever, in contravention of this Act or of any rule or order made thereunder, or

of any licence, permit or pass obtained thereunder-

(a) exports any intoxicant; or

(b) transports or possesses any intoxicant which is not covered under Section 63 of this Act; or

(c) collects or sells the leaves and small stalks (not accompanied by flowering or fruiting tops) of natural and spontaneous growth of wild Indian Hemp plant (Cannabis Sativa) other than charas, ganja or any other intoxicating drug covered under the Narcotic Drugs and Psychotropic Substances Act, 1985; or

(d) constructs or works any distillery, brewery, manufactory or vintnery; or

(e) uses, keeps or has in his possession any material, still, utensil, implement or apparatus, whatsoever, for the purpose of manufacturing any intoxicant other than tari; or

(f) removes any intoxicant from any distillery, brewery, manufactory, vintnery or warehouse licenced, established or continued under this Act; or

(g) bottles any liquor for the purposes of sale; or

(h) sells any intoxicant, save in the case provided for by Section 61; or

(i) taps, or draws tari from any tari producing tree in the areas notified under Section 42;

shall be punished with imprisonment which may extend to two years and with fine which may extent to one thousand rupees in the case of an offence under sub-clause (i) and in any other case, with imprisonment which may extend to three years and with fine which shall, not be less than ten times of the amount of consideration fee or duty which would have been leviable if such intoxicant had been dealt with in accordance with this Act and the rules and orders made thereunder or in accordance with any licence, permit or pass obtained thereunder, or two thousand rupees whichever is greater.

(2) Whoever in contravention of this Act or any rule or order made thereunder or of any licence, permit or pass, obtained under this Act, manufactures any intoxicant shall be punished with imprisonment which shall not be less than six months and which may extend to three years and also with fine which shall not be less than five thousand rupees and which may extend to ten thousand rupees.

(3) Whoever, in contravention of this Act, or any rule or order made thereunder, consumes any intoxicant, shall be punished with fine which shall not be less than one thousand rupees and which may extend to two thousand rupees.]

"72. What things are liable to confiscation-(1) Whenever an offence punishable under this Act has been committed:

(a) every intoxicant in respect of which such offence has been committed;

(b) every still, utensil, implement or apparatus and all materials by means of which such offence has been committed;

(c) every intoxicant lawfully imported, transported, manufactured, held in possession or sold along with or in addition to any intoxicant liable to confiscation under clause (a);

(d) every receptacle, package and covering which any intoxicant as aforesaid or

any materials, still, utensil, implement or apparatus is or are found, together with the other contents (if any) of such receptacle or package; and

(e) every animal, cart, vessel or other conveyance used in carrying such receptacle or package shall be liable to confiscation.

(2) Where anything or animal is seized under any provision of this Act and the Collector is satisfied for reasons to be recorded that an offence has been committed due to which such thing or animal has become liable to confiscation under sub-section (1), he may order confiscation of such thing or animal whether or not a prosecution for such offence has been instituted:

Provided that in the case of anything (except on intoxicant) or animal referred to in sub-section (1), the owner thereof shall be given an option to pay in lieu of its confiscation such fine as the Collector thinks adequate not exceeding its market value on the date of its seizure.

(3) Where the Collector on receiving report of seizure or on inspection of the seized things, including any animal, cart, vessel or other conveyance, is of the opinion that "any such things or animal is subject to speedy wear and tear or natural decay or it is otherwise expedient in the public interest so to do", he may order such things (except an intoxicant) or animal to be sold at the market price by auction or otherwise.

(4)Where such things or animals are sold as aforesaid, and-

(a) no order of confiscation is ultimately passed or maintained by the Collector under sub-section (2) or on review under sub-section (6); or

(b) an order passed on appeal under sub-section (7) so requires; or

(c) in the case of a prosecution being instituted for the offence in respect of which the thing or the animal is seized, the order of the court so requires,

the sale proceeds after deducting the expenses of the sale shall be paid to the person found entitled thereto.

(5) (a) No order of confiscation under this section shall be made unless the owner thereof or the person from whom it is seized is given-

(i) a notice in writing informing him of the grounds on which such confiscation is proposed;

(ii) an opportunity of making a representation in writing within such reasonable time as may be specified in the notice; and

(iii) a reasonable opportunity of being heard in the matter.

(b) Without prejudice to the provisions of clause (a), no order confiscating any animal, cart, vessel, or other conveyance shall be made if the owner thereof proves to the satisfaction of the Collector that it was used in carrying the contraband goods without the knowledge or connivance of the owner, his agent, if any, and the person in charge of the animal, cart, vessel or other conveyance and that each of them had taken all reasonable and necessary precautions against such use.

(6) Where on an application in that behalf being made to the Collector within one month from any order of confiscation made under sub-section (2), or as the case may be, after issuing notice on his own motion within

one month from the order under the sub-section refusing confiscation to the owner of the thing or animal seized or to the person from whose possession it was seized, to show cause why the order should not be reviewed, and after giving him a reasonable opportunity of being heard, the Collector is satisfied that the order suffers from a mistake apparent on the face of the record including any mistake of law, he may pass such order on review as he thinks fit.

(7) Any person aggrieved by an order of the confiscation under subsection (2) or sub-section (6) may, within one month from the date of the communication to him of such order, appeal to such judicial authority as the State Government may appoint in this behalf and the judicial authority shall, after giving an opportunity to the appellant to be heard, pass such order as it may think fit, confirming, modifying or annulling the order appealed against.

(8) Where a prosecution is instituted for the offence in relation to which such confiscation was ordered the thing or animal "shall subject to the provisions of sub- section (4) be disposed of in accordance with the order of the Court".

(9) No order of confiscation made by the Collector under this section shall prevent the infliction of any punishment to which the person affected thereby may be liable under this Act."

9. As per Section 72 of the Excise Act, whenever an offence punishable under the Act has been committed the articles enumerated under sub-section (1) are liable to confiscation and the Collector, upon being satisfied for reasons to be recorded, may pass an order for confiscation.

10. In the case of **Virendra Gupta (supra)**, the question referred for consideration was as follows:-

"Whether pending confiscation proceedings under Section 72 of the U.P. Excise Act before the Collector, the Magistrate/Court has jurisdiction to release any property subject-matter of confiscation proceedings, in the exercise of powers under Sections 451, 452 or 457 of the Code of Criminal Procedure?"

11. The views taken in the judgments in the case of **Nand and Rajiv Kumar Singh (supra)**, which have been relied upon by counsel for the applicant, were considered and the views taken therein were not approved. It was stated as follows:-

"15. As far as Nand (supra) is concerned, Section 72 of the U.P. Excise Act was not examined by the learned Single Judge while deciding that case. In the case of Rajiv Kumar Singh (supra), the day on which the release application was rejected, no confiscation proceedings under Section 72 of the 'Act' were pending and were started thereafter. In Mustafa (supra), another single Judge of this Court although examined the effect of Section 5 of the Code of Criminal Procedure and Section 72 of the U.P. Excise Act on the power of a Magistrate to release the vehicle under Section 457 Cr.P.C. which was seized on account of it being connected with a case under the 'Act' but since the date on which the application for release was made, the confiscation proceedings stood decided and hence, the issue was left undecided. In the case of Dilipsinh Ramsinh Solanki (supra) and General Insurance Counsel (supra), the issue involved was entirely different from the one which is engaging our attention. Similarly, the Apex Court in Sundarbhai Ambalal Desai (supra) was dealing with a case in which challenge was to an order of police remand for the petitioners granted to the prosecuting agency, where the petitioners were police personnel involved in offences punishable under Sections 429, 420, 465, 468, 477A and 114 I.P.C. on the charges that they had committed

offences for a period of time involving replacement of valuable articles retained as case property by other spurious articles, misappropriation of money also seized in connection with cases, unauthorized auction of property seized and kept at the police station, pending investigation. Thus, the offences which were the subject-matter of the case of Sundarbhai Ambalal Desai (supra) were under the I.P.C. to which the provisions of Section 451 and 457 Cr.P.C. were applicable with full force. The Hon'ble Apex Court in the case of Sundarbhai Ambalal Desai (supra) had neither any occasion to examine the effect of Section 72 of the 'Act' on the power of a Magistrate to release seized properties in view of Section 5 of the Code of Criminal Procedure. Therefore, Sundarbhai Ambalal Desai (supra) can at best be said to be an authority on the general law regarding release of vehicles seized in connection with any criminal case.

16. Thus, in our opinion, none of the authorities relied upon by the learned counsel for the applicant can be said to be authorities on the issue involved in this matter."

12. The judgment in the case of **Ved Prakash** (supra) was also considered and the view taken therein that the provisions regarding disposal of property as contained in the Code, can be invoked only to the extent they are not inconsistent with Section 72 of the Excise Act, having regard to the language of Section 5 of the Code, was noticed, and the following paragraphs of the judgment in the case of **Ved Prakash** were reproduced with approval.

"5. Learned Counsel for the applicant urged that even accepting that the Collector has complete powers to deal with the property seized in connection with the commission of an offence under the U.P. Excise Act, the power of the Magistrate, before whom the prosecution is pending, is not taken away and if the Magistrate exercises his jurisdiction to pass an order under Section 457 Cr.P.C. it will prevail. In other words the argument is that the jurisdiction of the Magistrate under Section 457 Cr.P.C. shall override the jurisdiction conferred on the Collector under Section 72 of the U.P. Excise Act. The argument fails to impress me.

6. Section 5 of the Code of Criminal Procedure reads as follows:

"Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force."

7. There can be no controversy about the fact that the U.P. Excise Act is a "local law" within the meaning of that expression as used in Section 5 of the Criminal Procedure Code. Section 72 of that Act prescribes a special form of procedure for dealing with the property seized under the Excise Act and confers power or jurisdiction on the Magistrate to deal with the same. In view of the clear provisions contained in Section 5 of the Criminal Procedure Code, the provision contained therein regarding the disposal of property, can be used only to the extent they are not inconsistent with Section 72 of the U.P. Excise Act. Sub-section (4)(c) of Section 72 says that if anything is sold under Sub-section (3) the sale proceeds shall be disposed of in accordance with such order as the Magistrate trying the case may choose to pass at the end. Sub-section (8) provides that where the prosecution is instituted for the offence in relation to which such confiscation was ordered, the thing or animal shall, subject to the provisions of Sub-section (4), be disposed of in accordance with the order of the Court. It would mean that if the article in question is sold by the Collector under sub-section (3), then the Court

seized of the criminal case shall have jurisdiction to pass orders with respect to the sale proceeds only. If, however, the Collector has merely ordered confiscation under sub-section (1) and the sale of the property has not taken place, the Magistrate will also have jurisdiction, at the end of the trial, to pass orders regarding the disposal of the property and, despite the order of confiscation by the Collector, the property shall be handed over to such party as may be directed by the Court.

8. There can be yet another situation in which the order of the Magistrate will prevail. It will be where the criminal case is disposed of by the Court before the Collector is able to pass final orders under sub-section (1) of Section 72. In such a case, in my opinion, the Court shall have the jurisdiction to pass such orders regarding the disposal of property as it may deem fit and, thereafter, the Collector shall have no jurisdiction to further deal with the property.

9. It may be argued that since the words used in sub-section (8) "where a prosecution is instituted for the offence in relation to which such confiscation was ordered" indicate that sub-section (8) shall come into play only after the confiscation has been ordered. To my mind, however, it cannot be so. If even after the confiscation it is the order of the Court which shall be decisive regarding the custody or disposal, where is the sense in continuing proceedings for confiscation after final orders are passed by the Court, including orders regarding custody and disposal of property. Sub-section (8) has been couched in the existing language only because the legislature thought that the proceedings before the Collector being of summary nature, he shall always be able to finalise the same before the Court is able to decide the criminal case."

13. The Division Bench thereafter answered the reference by recording its conclusion that the view taken in the case of **Ved Prakash** had laid down the law correctly. It was stated thus :-

"19...Section 72 of the 'Act' which is admittedly a local act does not contain any provision for release of anything seized or detained in connection with an offence committed under the Act in respect of which confiscation proceedings are pending. In fact the sub-section (1) to sub-section (4) of Section 72 of the 'Act' prescribe the manner in which anything seized in connection with an offence committed under the 'Act' and in respect of which confiscation proceedings under Section 72 of the 'Act' are pending, shall be dealt with. Section 72 of the 'Act' does not contain any provision indicating that such seized property may be released by the Magistrate in the exercise of his power under Section 457 Cr.P.C. The provisions contained in sub-sections (1) to (4) of Section 72 of the 'Act', clearly denudes the Magistrate of his power to pass any order under Section 457 Cr.P.C. for release of anything seized in connection with an offence purporting to have been committed under the 'Act'.

In view of the foregoing discussion, we find that the case of Ved Prakash (supra) lays down the correct law on the subject-matter of this reference and neither Nand v. State of U.P., 1997 (1) AWC 41 or Rajiv Kumar Singh v. State of U.P. and others, 2017 (5) ADJ 351 nor Sunderbhai Ambalal Desai v. State of Gujarat, 2002 (10) SCC 283, can be said to be authorities on the power of the Magistrate to release anything seized or detained in connection with an offence committed under the 'Act' in respect of which confiscation proceedings under Section 72 of the U.P. Excise Act are pending before the Collector."

14. The question with regard to the applicability of the provisions contained under Sections 451, 452 and 457 of the Code in a case

where the property had been seized and was subject to confiscation proceedings under the special Act namely Delhi Excise Act was considered in **State (NCT of Delhi) Vs. Narendra10** and it was held as follows :-

"12. It is relevant here to state that in the present case, the High Court, while releasing the vehicle on security has exercised its power under Section 451 of the Code. True it is that where any property is produced by an officer before a criminal court during an inquiry or trial under this section, the court may make any direction as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, as the case may be. At the conclusion of the inquiry or trial, the court may also, under Section 452 of the Code, make an order for the disposal of the property produced before it and make such other direction as it may think necessary. Further, where the property is not produced before a criminal court in an inquiry or trial, the Magistrate is empowered under Section 457 of the Code to make such order as it thinks fit.

13. In our opinion, the general provision of Section 451 of the Code with regard to the custody and disposal of the property or for that matter by destruction, confiscation or delivery to any person entitled to possession thereof under Section 452 of the Code or that of Section 457 authorising a Magistrate to make an order for disposal of property, if seized by an officer and not produced before a criminal court during an inquiry or trial, however, has to yield where a statute makes a special provision with regard to its confiscation and disposal."

15. The applicability of the Code in an area covered by a special or local law, in the context of the saving clause under Section 5 of the Code was considered in the Constitution Bench judgment in the case of **Maru Ram Vs. Union of India11** and also in **State (Union of India) Vs. Ram Sharan12,** and it was held that the section consists of three components: (i) the Code covers matters covered by it; (ii) if a special or local law exists covering the same area, the said law is saved and will prevail; (iii) if there is a special provision to the contrary, that will override the special or local law.

16. The aforementioned legal position has been discussed in **Vikki Vs. State of U.P. and another8,** and thereafter it has been held as follows :-

"14. As per terms of Section 60 of the Excise Act, the transportation of any intoxicant in contravention of the provisions of the Act or of any rule or order made thereunder or any licence, permit or pass obtained thereunder, is punishable and any vehicle used for carrying the same, is liable for confiscation under Section 72 of the Excise Act.

15. Section 72 of the Excise Act deals with the powers of confiscation of the Collector and sub-section (2) thereof provides that where anything is seized under any provision of the Act, the officer seizing and detaining such property shall produce the same along with a detailed report, seizure memo and other relevant documents before the Collector. The Collector, if satisfied for reasons to be recorded that an offence has been committed, may order confiscation.

16. It is therefore seen that under the scheme of the Excise Act, any vehicle used for carrying the intoxicant, upon being seized, is required to be produced before the Collector, who in turn has been conferred with the power of its confiscation.

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19. The U.P. Excise Act is a 'local law' within the meaning of Section 5 of the Code and

in view thereof the general provision contained under Section 451 of the Code with regard to the custody and disposal of the property pending trial or the power for making an order for disposal of property at the conclusion of the trial under Section 452 or the procedure whereunder the Magistrate is authorised to make an order for disposal of property upon its seizure by the police under Section 457, would therefore be subject to the powers exerciseable under Section 72 of the Excise Act, which makes a special provision with regard to confiscation and disposal of the seized property.

20. It can therefore be said that the provisions contained under sub-sections (1) to (4) of Section 72 of the Act would have the effect of denuding the Magistrate of his power to pass any order under Section 457 of the Code for release of any article seized in connection with an offence purporting to have been committed under the Act."

17. Having regard to the foregoing discussion and the law as laid down in terms of the decisions in the case of **Virendra Gupta and Vikki (supra)**, it is clear that the provisions contained under sub-section (1) to (4) of Section 72 of the Excise Act would have the effect of denuding the Magistrate of his power to pass any order under Section 457 of the Code for release of any article seized in connection with an offence purporting to have been committed under the Act.

18. As regards the decision in the case of **Vikas Kumar** (supra) sought to be relied upon by the counsel for the applicant it may be taken note of that the aforesaid decision has been rendered without considering authoritative pronouncement made by the Division Bench in the case of **Virendra Gupta** (supra) and has followed the view taken in the case of **Nand** (supra), which has been disapproved by the Division Bench in the case of **Virendra Gupt**a; therefore, the decision in the case of **Vikas Kumar** cannot be of any aid to the counsel for the applicant.

19. The other judgment relied upon by the counsel for the applicant which is the case of Chandra Pal (supra) is also distinguishable on facts since in that case the criminal courts instead of deciding the jurisdiction regarding release of the seized vehicle rejected the revision by placing reliance upon the judgment in the case of State (NCT of Delhi) vs. Narendra10 which was based upon a consideration of the provisions of the Delhi Excise Act, 2009 and accordingly the court held that the ratio in the case of State (NCT of Delhi) (supra) would be confined to the matters arising out of Delhi Excise Act.

20. In the case of **Sunderbhai Ambalal Desai Vs. State of Gujarat13** which is sought to be relied upon on behalf of the applicant, the subject matter of consideration was a challenge which had been raised to an order of police remand granted to the prosecuting agency for the petitioners therein, who were police personnel involved in offences punishable under Sections 429, 420, 465, 468, 477-A and 114 of the Indian Penal Code, 1860 on allegations that they had committed offences during a period of time by replacing of valuable articles retained as case property by other spurious articles, misappropriation of the amount which was kept at the police station, unauthorised auction of the property which was seized and kept in the police custody pending trial and tampering with the records of the police station. The offences which were subject matter of the case were under the penal code and not under a special Act, and accordingly, the provisions under Sections 451 and 457 were applicable. The judgment in the case Sunderbhai Ambalal Desai (supra), which is an authority relating to release of vehicles seized in connection with criminal proceedings under general law, would not be applicable

under the facts of the present case which relate to proceedings under a special Act, particularly in view of the provisions under Section 5 of the Code.

21. Learned counsel for the applicant has not been able to dispute the aforesaid legal position.

22. No other ground was urged.

23. For the aforestated reasons, this Court is of the view that the orders passed by the courts below do not warrant any interference.

24. The application under Section 482 Cr.P.C. accordingly stands dismissed.

(2021)11ILR A442
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.09.2021

BEFORE

THE HON'BLE VIVEK AGARWAL, J.

Application U/S 482 No. 10674 of 2021

Jai Shankar Singh (Karta) ....Applicant
Versus
U.O.I. & Ors. ....Opposite Parties

Counsel for the Applicant:
Sri Amit Mahajan

Counsel for the Opposite Parties:
G.A.

Income Tax Act, 1961- Section 276 - CC-Applicant-an assessee-he belatedly submitted return-issued show cause notice-no reply by the Applicant-'in due time' used in section 276 -CC-no provision for condonation-as due term prescribed u/s 139 (1) or (2) will not get diluted by filing return u/s 139 (4) -it is against the legislative intent-.

Held, Thus, when examined in light of said legal position, then the argument that applicant had already furnished his return in terms of Section 139 (4) will not take away the liability of filing the return 'in due time' as mentioned in Section 276-CC, merely because no notice was issued prior to filing of the return. **(para 38)**

Application dismissed. (E-9)

List of Cases cited:

1. Suchitra Components Ltd. Vs Commissioner of Central Excise, Guntur; 2007 (208) ELT 321 (SC)

2. Commissioner of Central [4] Application U/S 482 No. - 10674 of 2021 Excise, Bangalore Vs Mysore Electricals Industries Ltd; 2006 (204) ELT 517 (SC)

3. Director of Income Tax Circle 26 (1), New Delhi Vs S.R.M.B. Dairy Farming (P) Ltd.; [2018 (400) ITR 9]

4. S.C. Naregal Vs Commissioner of Income Tax & ors.; [2019 (418) ITR 455 (SC)]

5. Rakapalli Raja Rama Gopala Rao Vs Naragani Govinda Sehararao & anr.; AIR 1989 SC 2185

6. St. of Orissa & ors. Vs Mohd. Illiyas; (2006) 1 SCC 275

7. Income-Tax Officer Vs Autofil & ors.; [1990 (184) ITR 47]

8. Narayan Vs U.O.I. ; [1994 (208) ITR 82 (M.P.)

9. Rajkumar Thiyagarajan Vs Income Tax Department, Ward II, Theni; [2021 (277) Taxman 437 (Madras)]

10. Suresh Sholapurmath Vs Income Tax Department; (2017) 397 ITR 147

11. Forzza Projects (P) Ltd. & ors. Vs Principal, Commissioner of Income Tax, Kochi & ors.; [2021 (2) KLJ 473]

12. M/S. Jai Fibres Ltd. Vs Commissioner of Central Excise, Mumbai-III; (2008) 1 SCC 434

13. Jay Mahakali Rolling Mills Vs U.O.I. & ors.; (2007) 12 SCC 198

14. Prakash Nath Khanna & ors. Vs Commissioner of Income Tax & ors.; [2004 (266)

15. Vodafone International Holdings B.Vs Vs U.O.I. & ors.; (2012) 6 SCC 613

16. Hyderabad Asbestos Cement Products & ors. Vs U.O.I. & ors.; (2000) 1 SCC 426

17. Scrutton L.J. in Green Vs Premier Glynrhonwy Slate Co. (1928) 1 KB 561, 56

18. Mersey Docks and Harbour Board Vs Vs Henderson Brors.; (1888) 13 AC 595, P.603

19. Pooran Singh & ors. Vs St. of M.P.; AIR 1965 SC 1583 (para-5)

20. U.O.I. (UOI) & ors. Vs IndSwift Laboratories Ltd. (2011) 4 SCC 635

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

1. Sri Amit Mahajan, learned counsel for the applicant and Sri Subham Agarwal, learned counsel for the respondents.

2. This application under Section 482 Cr.P.C. has been filed seeking quashing of the summoning order dated 16.01.2018 and non bailable warrants issued on 11.12.2019 against the accused in Complaint Case No.28 of 2018, under Section 276-CC of the Income Tax Act, 1961 (Union of India vs. Jai Shankar Singh), pending in the court of Ld. Special Chief Judicial Magistrate, Varanasi.

3. Learned counsel for the applicant submits that applicant is an income tax assessee as defined under Section 2(7) of the Income Tax Act, 1961 (hereinafter referred as "Act') and has been regularly paying income tax. He has been allotted with Pan No. AAHHJ6630A and is karta of M/s Jai Shankar Singh (HUF). It is submitted that applicant had filed his return of income belatedly on 31.03.2017 for the assessment year 2015-16 declaring totaling income of Rs.24,12,050/- (twenty four lakhs twelve thousand fifty) and had deposited a sum of Rs.8,28,930/- (eight lakhs twenty eight thousand nine thirty) as self assessment tax on 31.03.2017 alongwith interest payable under Section 234-A and 234-C amounting to Rs.82,892/- (eighty two thousand eight hundred ninety two), though as per the provisions contained in Section 139(1) of the Act, he was required to file his return of income on or before 07.09.2015.

4. It is submitted that the Deputy Commissioner of Income Tax, Circle- 3, Varanasi filed a complaint in his official capacity at the instance of the Principal Commissioner of Income Tax, Varanasi on being authorized and granted sanction under Section 279(1) of the Act on 08.01.2018.

5. It is mentioned in the sanction order that a show cause notice was sent to the applicant on 30.11.2017 by speed post asking the applicant to appear and file reply on or before 15.12.2017, but despite service of show cause notice on 06.12.2017 and even thereafter applicant did not file any reply nor attended office of the authority. Though, according to the applicant he never received any show cause notice.

6. Applicant's grievance is that since applicant had filed income tax return though belatedly on 31.03.2017 alongwith penalty and interest, thus there being no mens-rea on the part of the applicant, therefore, issuance of show cause notice after applicant had made compliance and deposited the tax did not call for any action. It is submitted that it is not a case of failure to furnish returns of Income Tax so to attact action under Section 276-CC of the Income Tax Act, 1961, merely because assessee had filed his return belatedly by 19 months.

7. Applicant has placed reliance on Circular No.24 of 2019 dated 09.09.2019 issued by the Central Board of Direct Taxes, New Delhi, Annexure-5, to the petition to point out

that in this circular in Clause-(4), it is mentioned that cases where the amount of tax, which would have been evaded if the failure had not been discovered, is Rs.25 lakhs or below, shall not be processed for prosecution except with the previous administrative approval of the Collagium of 2CCIT/DGIT rank officers as mentioned in para-3. It is submitted that in terms of this circular also, since liability of tax is less than Rs.25 lakhs, no action is warranted on part of the respondents.

8. Reliance is placed on the judgment of Supreme Court of India in case of ***Suchitra Components Ltd. Vs. Commissioner of Central Excise, Guntur; 2007 (208) ELT 321 (SC)***, wherein, relying on the judgment of Supreme Court in case of ***Commissioner of Central Excise, Bangalore Vs. Mysore Electricals Industries Ltd; 2006 (204) ELT 517 (SC),*** it is held that a beneficial circular has to be applied retrospectively while oppressive circular has to be applied prospectively. Thus, when the circular is against the asssessee, they have right to claim enforcement of the same prospectively. Placing reliance on this decision of Supreme Court, it is submitted that Circular No.24 of 2019 shall apply retrospectively and its benefit can be given to the applicant.

9. Similarly, reliance is placed on the judgment of Supreme Court in case of ***Director of Income Tax Circle 26 (1), New Delhi Vs. S.R.M.B. Dairy Farming (P) Ltd.; [2018 (400) ITR 9]***, wherein, it is held that whether Circular No.3 of 2011 dated 09.02.2011 issued as a measure for reducing litigation by revising monitory limits for filing of appeals by department before Appellate Authorities would apply even to pending matters, but subject to two caveats that this circular would not be applied by the High Courts Ipso facto, when matter had a cascading effect and where common principles may be involved in a subsequent group of matters or a large number of matters.

10. Reliance is also placed on the judgment of Supreme Court in case of ***S.C. Naregal Vs. Commissioner of Income Tax and others; [2019 (418) ITR 455 (SC)],*** wherein again, it is held that instructions of C.B.D.T. No.05 of 2008 dated 15.05.2008 revising monitory limit to file appeal would apply even to pending matters when, there was no possibility of cascading effect, nor issue was involved in group of matters, it has been answered in affirmative in favour of the assessee.

11. Reliance is also placed on order of co-ordinate Benches in Application under Section 482 No.2736 of 2003 (Chhotey Lal Vs. Union of India and another) and Application under Section 482 No.2730 of 2003 (Chhotey Lal Vs. Union of India and another) dated 09.01.2017, wherein, on concession by the learned counsel for the opposite party no.2 that there is Circular of C.B.D.T. to the effect that in case of the prosecution, the proceeding would be dropped against the assessee, who is above the age of 70 years, Application U/S 482 was disposed off.

12. Reliance is also placed on the provisions contained in Section 278-E of the Income Tax Act, which deals with presumption as to the culpable mind and reads as under:-

*"**278-E.(1)** In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state, but it shall be a defense for the accused to prove the fact that he had no such mental state with respect to the Act charged as an offence in the prosecution.*

***Explanation:-** In this sub-Section "culpable mental state" includes intention,*

motive or knowledge of a fact or belief in, or reason to believe, a fact.

(2) For the purposes of this Section, a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability."

13. Reliance is also placed on the judgment of Supreme Court in case of ***Rakapalli Raja Rama Gopala Rao vs Naragani Govinda Seharara o & another; AIR 1989 SC 218***5, wherein, it is held that an act is said to be wilful, if it is intentional, conscious and deliberate.

14. Similarly, reliance is placed on the judgment of Supreme Court in case of ***State of Orissa & Others Vs. Mohd. Illiyas; (2006) 1 SCC 275***, wherein the Supreme Court has considered the true import of the word "wilful' and placing reliance on the judgment of Rakapalli Raja Rama Gopala Rao vs Naragani Govinda Seharara o & another ***(supra)*** has held that an act is said to be "wilful', if it is intentional, conscious and deliberate. It is further held that the expression "wilful' excludes casual, accidental, bona fide or unintentional acts or genuine inability. It is to be noted that a wilful act does not encompass, accidental, involuntary, or negligence. It must be intentional, deliberate calculated and conscious wilful knowledge of legal consequences flowing therefrom. The expression "wilful' means an act done with a bad purpose, with an evil motive.

15. Reliance is placed on the judgment of High Court of Andhra Pradesh in case of ***Income-Tax Officer Vs. Autofil and others; [1990 (184) ITR 47],*** wherein, it is held that in terms of the provisions contained in Section 276-CC of the Income Tax Act, 1961, there is failure to furnish returns of income and they were filed late for relevant assessment years for reasons that due to indisposition of its clerk, day-to-day accounts could not be finalized and that partners were not conversant with preparation of profit and loss account and balance-sheet, however, assessee had paid not only advance tax but also penal interest and penalty for late filing of returns. It is held that in absence of presence of mens-rea or bad motive and guilty mind on the part of the assessee, its partner could not be prosecuted under Section 276-CC.

16. Reliance is also placed on judgment of High Court of Madhya Pradesh in case of ***Narayan Vs. Union of India; [1994 (208) ITR 82 (M.P.)]*** wherein, the ratio is that, it is not merely failure to file return in time which constitutes offence under Section 276-CC of the Income Tax Act, 1961, but failure to file return in time must be proved by clear, cogent and reliable evidence to be wilful and there should be no plausible doubt of its being wilful. It is held that ingredients of delay being wilful being not proved beyond reasonable doubt by prosecution, therefore, petitioner was to be acquitted of offence under Section 276-CC.

17. Reliance is also placed on the judgment of Madras High Court in case of ***Rajkumar Thiyagarajan Vs. Income Tax Department, Ward II, Theni; [2021 (277) Taxman 437 (Madras)],*** wherein, it is held that if assessee failed to file return in time and files it later on, then revenue's complaint against assessee under Section 276-C(1)(i) and Section 276-CC is nothing but clear abuse of process of law and it cannot be substantiated.

18. Reliance is also placed on the judgment of Supreme Court in case of ***Suresh Sholapurmath Vs. Income Tax Department; (2017) 397 ITR 147,*** wherein, it is held that in view of the fact that total amount involved was below Rs.25,000/- and same had already been paid with interest long ago, proceeding under

Section 276-C/277 initiated against assessee were quashed in favour of the assessee.

19. Reliance is also placed on the judgment of High Court of Kerala in case of ***Forzza Projects (P) Ltd. and others Vs. Principal, Commissioner of Income Tax, Kochi and others; [2021 (2) KLJ 473]***, wherein, it is held that if there was only a failure on part of the assessee to pay tax in time, which was later on paid after availing installment facilities with interest, then mere failure to pay income tax based on self assessment would not constitute offence under Section 276-C(2).

20. Learned counsel for the respondent-Department, in his turn, places reliance on the judgment of Supreme Court in case of ***M/S. Jai Fibres Ltd. Vs. Commissioner of Central Excise, Mumbai-III; (2008) 1 SCC 434*** wherein, Supreme Court has held that words "henceforth" used by the Board must lead to the conclusion that only prospective effect thereto could be given and not a retrospective effect. Drawing attention to the Circular No.24 of 2019 dated 09.09.2019, it is submitted that in paragraph-5 of the Circular itself, it is mentioned that this circular shall come into effect immediately and shall apply to all the pending cases, where complaint is yet to be filed. It is submitted that this circular has no retrospective application, inasmuch as, complaint was, admittedly, filed on 16.01.2018, Annexure-4, to the Application, before the court of Special C.J.M., Varanasi and once complaint was filed Circular No.24 of 2019 will not be of any help to the applicant.

21. Reliance is also placed on the decision of Supreme Court in case of Jay ***Mahakali Rolling Mills Vs. Union of India and others; (2007) 12 SCC 198***, wherein words "now', used in circulars and clarifications on excise and customs circulars dated 31.03.1987 has been interpreted and it is held that the effect of the word "now" is that it is to operate henceforth. If the intention was to give retrospective effect, it would have been stated to be so specifically.

22. In para-9, it is held that "Retrospective" means looking backward, contemplating what is past, having reference to a statute or things existing before the Statute in question. Retrospective law means a law which looks backward or contemplates the past; one, which is made to affect acts or facts occurring, or rights occurring, before it comes into force. Retroactive statute means a statute, which creates a new obligation on transactions or considerations or destroys or impairs vested rights.

23. Reliance is also placed on the judgment of Supreme Court in ***Prakash Nath Khanna and others Vs. Commissioner of Income Tax and others; [2004 (266) ITR 1 (SC)]***, wherein it is held that one of the significant terms used in Section 276-CC is "in due time'. The time within which the return is to be furnished is indicated only in sub-Section (1) of Section 139 and not in sub-Section (4) of Section 139, that being so, even if a return is filed in terms of the sub-Section 4 of Section 139, that would not dilute the infraction in not furnishing the return in due time as prescribed under sub-Section (1) of Section 139. Otherwise, the use of expression "in due time" would lose its relevance and it cannot be said that the said expression was used without any purpose. Before substitution of expression "Clause (1) of sub-Section (1) of Section 142' by Direct Tax Laws (Amendment) Act, 1987, w.e.f. 01.04.1989, the expression used was "sub-Section (2) of Section 139". At the relevant point of time, the assessing officer was empowered to issue a notice requiring furnishing of a return within the time indicated therein. That means the infractions which are covered by Section 276-CC relate to non-furnishing of return within the time in terms of sub-Section (1) or indicated in the notice given

under sub-Section (2) of Section 139. There is no condonation of said infraction, even if a return is filed in terms of sub-Section (4). Accepting such a plea would mean that a person who has not filed a return within the due time as Prescribed under sub-Section (1) or (2) of Section 139 would get benefit by filing the return under Section 139 (4) much later. This cannot certainly be the legislative intent. It is further held that the term of imprisonment is higher when the amount of tax would have been evaded, but for the discovery of the failure to furnish the return exceeds Rs.1,00,000/-(one lakh). If the plea of the applicant is accepted, it would mean that in a given case where there is infraction and where a return has not been furnished in terms of sub-Section (1) of Section 139 or even in response to a notice issued in terms of sub-Section (2), the consequences flowing from non-furnishing of return would get obliterated. At the relevant point of time, Section 139(4)(a) permitted filing of return, where, return has not been filed within sub-Section (1) and sub-Section (2). The time limit was provided in Clause (b). Section 276-CC refers to "due time" in relation to sub-Sections (1) and (2) of Section 139 and not to sub-Section (4). Had the legislature intended to cover sub-Section (4) also, use of expression "Section 139" alone would have sufficed. It cannot be said that legislature without any purpose or intent specified only the sub-Sections (1) and (2) and the conspicuous omission of sub-Section (4) has no meaning or purpose behind it. Sub-Section (4) of Section 139 cannot by any stretch of imagination control operation of sub-Section (1), wherein, a fixed period for furnishing the return is stipulated. The mere fact that for purposes of assessment and carrying forward and to set-off losses, it is treated as one filed within sub-Sections (1) or (2) cannot be pressed into service to claim it to be actually one such, though, it is factually and really not by extending it beyond its legitimate purpose.

24. It is further held that whether there was wilful failure to furnish the return is a matter which is to be adjudicated factually by the court, which deals with the prosecution case. It is held that there is a statutory presumption prescribed in Section 278-E. The Court has to presume the existence of culpable mental state, and absence of such mental state can be pleaded by an accused as a defense in respect to the act charged as an offence in the prosecution. Therefore, the factual aspects highlighted by the applicants were rightly not dealt by the High Court. This is a matter of trial. It is certainly open to the applicants to plead absence of culpable mental state when the matter is taken up for trial and on such appreciation, appeals were dismissed.

25. After hearing learned counsel for the parties and going through the material produced by them certain facts needs to be answered namely, Circular No.24 of 2019 dated 09.09.2019 has no retrospective application as is evident from the law laid down in case of M/s. Jay Mahakali Rolling Mills Vs. Union of India and others ***(supra)*** and law laid down in case of Director of Income Tax Circle 26 (1), New Delhi Vs. S.R.M.B. Dairy Farming (P) Ltd. ***(supra)*** will not be applicable looking to the language of the circular itself as is used in para-5 of the circular specifically providing that it shall be applicable only to all pending cases, where complaint is yet to be filed, when, admittedly, complaint was filed prior to coming into force of this circular.

26. Similarly, law laid down in case of S.C. Naregal Vs. Commissioner of Income Tax, Hubli ***(supra)*** will also not be applicable and on its own facts, these judgments are distinguishable and will not apply to the facts and circumstances of the present case.

27. Similarly, reliance is placed on Circular dated 24.04.2008 to demonstrate that

for offences under Section 278, it provides that in case of an individual, he shall not ordinarily be proceeded for launching prosecution for any offence, if the individual concerned has attained age of 70 years at the time of the commission of offence will also not be applicable as has been applied by a co-ordinate Bench in case of Chhotey Lal Vs. Union of India and another **(supra)**, because if this proviso is applied, then it will frustrate the ratio of the law laid down by the Supreme Court in case of Prakash Nath Khanna and another Vs. Commissioner of Income Tax and another ***(supra)***.

28. Same is the situation in regard to the judgments cited by the applicant in case of Rakapalli Raja Rama Gopala Rao vs Naragani Govinda Sehararao & another ***(supra),*** which is not a judgment on tax statute but a judgment in regard to the Buildings (Lease, Rent And Eviction) Control Act, 1960, and cannot be given same interpretation as is to be given to a fiscal statute which require strict interpretation in terms of the law laid down by Supreme Court in case of ***Vodafone International Holdings B.V. Vs. Union of India (UOI) and others; (2012) 6 SCC 613.***

29. Judgment in case of State of Orissa and others Vs. Mohd. Illiyas **(supra)** is also in relation to the interpretation of the provisions of Orissa Gram Panchayat Act and will again be not covered by the law laid down by Supreme Court in regard to interpretation to the fiscal laws.

30. Judgments given by various High Courts of Andhra Pradesh in case of Income Tax Officer Vs. Autofil **(supra)**, High Court of Madhya Pradesh in case of Narayan Vs. Union of India **(supra)**, High Court of Madras in case of Rajkumar Thiyagarajan Vs. Income Tax Department, Madurai **(supra)** turn on to their own facts. In fact, High Court of Madras has not taken into consideration law laid down by Supreme Court in case of Prakash Nath Khanna and another Vs. Commissioner of Income Tax and another (supra), where judgment was delivered on 16.02.2004.

31. Judgment in case of Suresh Sholapurmath Vs. Income Tax Department **(supra)** is also distinguishable on its own facts, inasmuch as, Supreme Court quashed the proceedings as the amount involved was meagre and below Rs.25,000/- and was already paid with interest long ago. Thus, it held that amount involved was small and had already been paid with interest long ago, the Circular dated 07.02.1992 squarely applied and, therefore, no proceedings should have been filed as the amount was below Rs.25,000/- There is no mention of a clause like Clause (5) in C.B.D.T. Circular No.24 of 2019, specifying conditions as to the date and time of applicability.

32. Judgment in case of Forzza Projects (P) Ltd. Vs. Principal Commissioner of Income Tax **(supra**) is a case under Section 276-C of Income Tax Act, 1961 and not under the provisions of Section 276-CC, therefore, has no application to the facts of the present case.

33. Thus, when facts of the present case are examined in the light of the law laid down by Supreme Court in case of Prakash Nath Khanna and another Vs. Commissioner of Income Tax and another (surpa), then it is evident that use of words "in due time' is a significant term used in Section 276-CC and relates to non-furnishing of return within the time in terms of sub-Section (1) or indicated in the notice given under sub-Section (2) of Section 139. There is no provision for condonation of the said infraction, even if, a return is filed in terms of sub-Sections (4) of Section 139 because due time as prescribed under sub-Section (1) or (2) of Section 139 will not get diluted by filing return under Section 139(4) much later as it is against the legislative intent.

34. Contention of applicant's counsel that return was filed prior to issuance of any notice by the department is to be examined in terms of the use of word "or' under sub-Sections (1) or (2) of Section 139. Word "or' is normally disjunctive and "and' is normally conjunctive as has been held in case of ***Hyderabad Asbestos Cement Products and others vs. Union of India and others; (2000) 1 SCC 42***6, wherein, it is held that "or' in its natural sense denotes an "alternative' and is not read as "substitutive'.

35. In case of Nasiruddin Vs. State Transport Appellate Tribunal; AIR 1976 SC 331 P.338 quoting ***Scrutton L.J. in Green v. Premier Glynrhonwy Slate Co. (1928) 1 KB 561, 568*** it is held that "You do sometimes read "or' as "and' in a statute. But you do not do it unless you are obliged because "or' does not generally mean "and' and "and' does not generally mean "or'.

36. Lord Halsbury in case of ***Mersey Docks and Harbour Board v. V. Henderson Brothers; (1888) 13 AC 595, P.603*** and Supreme Court in case of ***Pooran Singh and others Vs. State of M.P.; AIR 1965 SC 1583 (para-5)*** has held that the reading of "or' as "and' is not to be resorted to, "unless some other part of the same statute has the clear intention of it requires that to be done.

37. In case of ***Union of India (UOI) and Ors. vs. Ind-Swift Laboratories Ltd. (2011) 4 SCC 635***, In Para-18, it is held that where provision is clear and unambigous the word "or' cannot be read as "and' by applying the principle of reading down.

38. Thus, when examined in light of said legal position, then the argument that applicant had already furnished his return in terms of Section 139 (4) will not take away the liability of filing the return "in due time' as mentioned in Section 276-CC, merely because no notice was issued prior to filing of the return.

39. Law laid down in case of State of Orissa and others Vs. Mohd. Illiyas **(supra)** deals with situation, which are bona fide or unintentional or genuine inability. Applicant was, if acting bonafidely was obliged to explain his acts to be bonafide or unintentional or genuine inability by furnishing his explanation, which is not on record accept a bald assertion that notice under Section 139(2) was not received.

40. Thus, in the light of the law laid down by Supreme Court in case of Prakash Nath Khanna and another Vs. Commissioner of Income Tax and another **(supra)**, the ratio being that, though, plea of lack of culpable mental state may be evoked by an accused in defense, but that cannot be seen at the time of filing of the complaint or at the stage of taking of the cognizance in terms of the provisions contained in Section 278-E(1) of the Income Tax Act, 1961, which deals with presumption of existence of such mental state being a matter of trial and, therefore, the petition/Application deserves to be dismissed and is **dismissed.**

(2021)11ILR A449
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.10.2021

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 482 No. 12495 of 2021

Richa Dubey ....Applicant
Versus
State of U.P. & Anr. ....Opposite Parties

Counsel for the Applicant:
Sri Prabha Shanker Mishra

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

Criminal Law – Indian Penal Code, 1860 – Sections 419 & 420 - Applicant used sim issued in the name of her servant-gross violation of Telecom Regulatory Authority-offence u/s 419, 420 IPC made out-at the stage of issuing process , the court below not expected to examine material placed on record.

Application dismissed. (E-9)

Held, The High Court would not embark upon an inquiry as it is the function of the Trial Judge/Court. The interference at the threshold of quashing of the criminal proceedings in case in hand cannot be said to be exceptional as it discloses prima facie commission of an offence. In the result, the prayer for quashing of impugned charge sheet, cognizance order and the entire proceedings of the case is refused.**(para 17)** (E-9)

List of Cases cited:

1. R.P. Kapoor Vs St. of Punj., AIR 1960 S.C. 866

2. St. of Har. Vs Bhajanlal, 1992 SCC (Crl.)426

3. St. of Bihar Vs P.P. Sharma, 1992 SCC (Crl.)192

4. Zandu Pharmaceutical Works Ltd. Vs Mohd. Saraful Haq & anr.;, (Para-10) 2005 SCC (Cri.) 283

5. M/s Neeharika Infrastructure Pvt. Ltd. Vs St. of Mah., AIR 2021 SC 1918

6. S.W. Palankattkar & ors. Vs St. of Bihar, 2002 (44) ACC 168

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard Sri Prabha Shankar Mishra, learned counsel for the applicant as well as Sri Manish Goyal, learned Additional Advocate General assisted by Sri Rajesh Mishra learned A.G.A. and Sri Abhijit Mukharji, learned Brief Holder for the State and perused the record.

2. This application has been filed by the applicant with a prayer to quash the entire proceedings including the charge sheet and cognizance/summoning order dated 18.2.2021, arising out of Case No.0323 of 2021 under Section 419, 420 IPC, P.S. Chaubeypur District Kanpur Nagar, pending in the court of Special Judge (D.A.A.), Ramabai Nagar (Kanpur Dehat).

3. Learned counsel for the applicant submits that as per the allegation in the FIR, the applicant and 8 other co-accused were using Sim in mobile phones which was registered on some other person's identity. The applicant was using mobile Sim card no.7317771173 wherein the sim card of Mahesh, son of Bharat Prasad, resident of Nigoha, Mau, was inserted. He further submits that the applicant has been falsely implicated in the present case. The mobile used by the applicant is of her servant and there is no allegation against the applicant that any misuse of the aforesaid number or any crime was committed by use of the aforesaid customer I.d. number of Mahesh son of Bharat Prasad.

4. Learned counsel for the applicant further submits that the applicant had no mobile phone of her own, so she used the mobile phone Sim card No.7317771173 of her servant Mahesh whenever she needed and Mahesh had no problem with this. It was further submitted that on 3.7.2020 in Bikru village, Police Station Chaubeypur, District Kanpur Nagar, an incident of shoot-out (Bikru incident) had taken place in which husband of the applicant namely Vikas Dubey was made accused and after the shoot-out, Mahesh was afraid so he left applicant's house and went to Sitapur and left his mobile phone Sim card bearing No.7317771173 at the applicant house as she had no mobile phone and Sim card of her own.

5. Learned counsel for the applicant further submits that Mahesh stayed in his village almost about 3 months and during this period on the permission of Mahesh, the applicant transferred mobile Sim card No. 7317771173 on her own identity. The applicant never misused the mobile Sim card No. 7317771173 and presently the same is registered on her own identity and Mahesh has no problem with this even he is staying in her house which is located in Lucknow. Mahesh has given a notarial affidavit before the concerned authority in this regard. The applicant has never misused mobile Sim card No. 7317771173 for any illegal purpose or any criminal activity. From perusal of the entire case diary there is not a single whisper about the misuse of mobile phone Sim card No.7317771173 for any criminal purpose as well as the owner of sim card Mahesh has not made any complaint to the any police officer or telecommunication officer for misuse of his mobile and sim card by the applicant. In absence of the complaint the whole proceeding so initiated by the concerned police as well as Investigating Officer is abuse of process of law.

6. Learned counsel for the applicant further submits that Investigating Officer without considering the legal proposition as established by the law, in a mechanical manner has submitted the charge sheet against the applicant and the learned Magistrate has also taken cognizance in a routine manner.

7. Per contra, learned AGA has filed short counter affidavit and has submitted that the mobile SIM card was on the name of Mahesh having mobile Sim card No. 7317771173. This person Mahesh was the servant of Vikas Dubey, husband of the applicant. It is clear from the statement of Mahesh under Section 161 CrPC that his mobile Sim card No.7317771173 was used by the applicant since 2017 and for this he had not given any "no objection' to the applicant.

8. It was further stated in the short counter affidavit that the FIR which was lodged on 19.11.2020 under Section 419, 420 IPC is based upon the detailed report of S.I.T. who has come to the conclusion that there has been gross violation of the guidelines of **Telecom Regulatory Authority** by the accused applicant and other co-accused persons, which is incriminating in nature, therefore, the ingredients of the offence under Section 419, 420 IPC is being made out. In this regard, the instructions and guidelines dated 9.8.2012 of the Government of India, Ministry of Communication, Information Technology, Department of Tele-communication, New Delhi was placed which is for the purpose of verification of mobile subscribers and Clause-7 of the guidelines is directly applicable in the case of the applicant. The above Clause-7 is reproduced hereinbelow:

"Change in the name of Subscriber

The change of name of subscriber is not permitted as the SIM card in user terminal is not transferable. The change in name between the blood relatives/legal heirs is permitted provided new CAF and all the procedure as for registering a new subscriber is followed and new SIM card is issued. However, after the change in name the connection shall be treated as new connection. In such case, change in address is not permitted. Further, No Objection Certificate from the original user shall also be taken. In case of death of the original user, death certificate will suffice instead of No Objection Certificate."

9. A bare perusal of the aforesaid provision makes it clear that apart from blood relation the name of SIM card holder cannot be changed or used by any other person without any "No Objection Certificate". This use shall entail and presumption of act, which has been done to cause the cheating as dishonest inducement or

fraudulent method by another person to use SIM card without the consent of user.

10. Apart from this, Clause-10 of the guidelines also provides that FIR may be lodged by the concerned police official or any law enforcement agency for such fraudulent activities. Clause-10 of the guidelines is also reproduced hereinbelow:

"Lodging Complaint/FIR

(i) TERM Cell shall indicate the apparently forged cases as per their observation in the CAF Audit giving reasons for prima facie observation to the Licensee and marking them as a failed case for CAF Audit. The Licensee shall investigate such cases at their level and take necessary action as detailed below.

(ii) In order to deal with the use of forged documents for obtaining mobile connections, complaint/FIR may be lodged with the law enforcement agencies under the law of land, The complaint should clearly mention the information about the mobile number, type of document forged along with the details about the issuing authority, date of issue, Reason for suspicion as forged document, name of the person suspected (e.g. name of subscriber/ PoS/Franchisee/Licensee)

(iii) In cases where forged documents are submitted by the subscriber and originals are also forged, police complaint/ FIR shall be lodged by the PoS/Franchisee against the subscriber within fifteen days of bringing it to the notice of the Licensee.

(iv) In case PoS/Franchisee fails to lodge complaint/FIC as above, Licensee shall lodge FIR/ Complaint against the subscriber and Franchisee/POS within further three days.

(v) In case where it is found that the forgery has been done by point or sale, the Licensee shall lodge the compliant / FIR against the franchisee/ point or sale within one week and financial penalty shall be imposed.

(vi) In case no action is taken by the Licensee as above or the Licensee itself is involved in forgery, TERM Cell shall lodge Complaint/ FIR against Licensee. Penalty shall be imposed on all such forged cases also.

(vii) In cases where it is found that the act of issuing connections were done by point of sale using the document of some other subscriber or any person without the knowledge of the subscriber or the person, or the documents were forged by the franchisee/PoS of Licensee, the concerned PoS/franchisee may be terminated by the Licensee under intimation to the Licensor (concerned TbRM cell of DoT) and the designated security agencies, in addition to the actions mentioned above. The same may be intimated to all other Licensee(s) in that Service Area by TERM Cell. The other Licensees after getting any such intimation shall terminate/ not appoint any such point of sale.

(viii) No penalty shall be imposed on the Licensee, if the laid down process of activation/verification applicable at the time of activation has been followed and the forgery is done by the subscriber. In case where activation/verification process is not followed by the Licensee, the penalty shall be imposed even if the documents are found to be forged."

11. Learned Additional Advocate General Sri Manish Goyal further argued that the charge sheet and cognizance order was rightly submitted against the applicants in accordance with law, therefore, prima facie offence is made out against the applicant.

12. In reply thereto learned counsel for the applicant has filed rejoinder affidavit and reiterated the same version made in the application under Section 482 CrPC. He further submits that submitted that though it is an admitted fact that there was an unfortunate incident in which several police officials were killed but the applicant has been roped falsely in the present case only for the reason that she is the wife of main accused.

13. After considering the arguments as advanced by the learned counsel for the parties and from the perusal of the charge sheet as well as cognizance order and the F.I.R., this Court is of the view that the SIM card was on the name of Mahesh having mobile Sim card No. 7317771173, who was the servant of Vikas Dubey (Bikru incident) and his wife i.e. present applicant. It is clear from the statement of Mahesh under Section 161 CrPC that his mobile Sim card No. 7317771173 was used by the wife of his master since 2017 and for this he had not given any "no objection certificate'. His master who was also a gangster could also take away his life if he would not comply. Therefore, the accused being in a dominating position could easily enable Mahesh to provide her the Sim and use the same for her benefit. The Sim card, therefore, may be read in the instant case within the purview of the word "property' under Section 415 IPC.

14. Apart from the above, the acts and omissions of the applicant have otherwise tainted the reputation of the servant, which is part of his right to life under Article 21 of the Constitution of India and it was owing to the fear psychosis that the servant could not muster the courage to lodge an FIR against the master, who was a known gangster for using his Sim card against his own will. It is only after the incident of Bikru in Police Station Chaubeypur that the servant rather could muster courage to make the statement under Section 161 CrPC. So far as mobile Sim card No. 7317771173 is concerned, as per the record it reveals that during investigation it was found that the short convas under which the offences being made out are only on impersonation and deceiving, her servant and inducing him to deliver property (SIM Card) without his consent. Therefore, the ingredients for the offence under Section 419, 420 IPC are completely made out against the applicant. In doing so there is a clear mens rea of the applicant which is prima facie apparent on face of the record and also as per Clause-7 and 10 of the guidelines issued by the Government of India, Ministry of Communications and IT Department of Telecommunications, dated 9.8.2012, offence is prima facie made out against the applicant. Accordingly, the contention of the learned counsel for the applicant that no offence against the applicant is disclosed and the present prosecution has been instituted with a malafide intention for the purposes of harassment has no force.

15. At the stage of issuing process the court below is not expected to examine and assess in detail the material placed on record, only this has to be seen whether prima facie cognizable offence is disclosed or not. The Apex Court has also laid down the guidelines where the criminal proceedings could be interfered and quashed in exercise of its power by the High Court in the following cases:-**(i) R.P. Kapoor Vs. State of Punjab, AIR 1960 S.C. 866, (ii) State of Haryana Vs. Bhajanlal, 1992 SCC (Crl.)426, (iii) State of Bihar Vs. P.P. Sharma, 1992 SCC (Crl.)192, (iv) Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq & Anr.;, (Para-10) 2005 SCC (Cri.) 283 and (iv) M/s Neeharika Infrastructure Pvt. Ltd. vs. State of Maharashtra, AIR 2021 SC 1918.**

16. From the aforesaid decisions the Apex Court has settled the legal position for quashing of the proceedings at the initial stage. The test to

be applied by the court is whether uncontroverted allegation as made prima facie establishes the offence and whether chances of ultimate conviction are bleak and no useful purpose is likely to be served by allowing criminal proceedings to be continue. In **S.W. Palankattkar & others Vs. State of Bihar, 2002 (44) ACC 168,** it has been held by the Hon'ble Apex Court that quashing of the criminal proceedings is an exception than a rule. The inherent powers of the High Court under Section 482 Cr.P.C itself envisages three circumstances under which the inherent jurisdiction may be exercised:-(i) to give effect an order under the Code, (ii) to prevent abuse of the process of the court ; (iii) to otherwise secure the ends of justice. The power of High Court is very wide but should be exercised very cautiously to do real and substantial justice for which the court alone exists.

17. The High Court would not embark upon an inquiry as it is the function of the Trial Judge/Court. The interference at the threshold of quashing of the criminal proceedings in case in hand cannot be said to be exceptional as it discloses prima facie commission of an offence. **In the result, the prayer for quashing of impugned charge sheet, cognizance order and the entire proceedings of the case is refused.** There is no merit in this application filed by the applicant under Section 482 Cr.P.C.

18. In view of the aforesaid submissions made by learned counsel for the parties, this Court finds that prima facie no case is made out for interference by this Court exercising power under Section 482 CrPC.

19. Accordingly, this application under Section 482 Cr.P.C. filed by the applicant is **dismissed.**

(2021)11ILR A454
ORIGINAL JURISDICTION

CRIMINAL SIDE
DATED: ALLAHABAD 28.09.2021

BEFORE

THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Application U/S 482 No. 14699 of 2021

Pradeep Singh ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Rajeev Ranjan Singh, Sri Rajesh Kumar Mall

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

Mines And Mineral (Development Regulation) Act,1957 - Section 22 - For filing of a complaint before the Jurisdictional Magistrate has not been followed-Offences as far as relates to penal code-and cognizance taken by Magistrate-cannot be faulted-and in so far of offences under MMDR Act-cognizance cannot sustained being in violation of section 22. (E-9)

List of Cases cited:

1. Ram Bahal Vs St. of U.P. & anr., (Application u/s 482 No.19576 of 2020, decided on 20.09.2021)

(Delivered by Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard Sri Rajesh Kumar Mall, learned counsel for the applicant and Sri Pankaj Saxena, learned Additional Government Advocate-I for the State-Opposite party.

2. The present application under Section 482 of the Code of Criminal Procedure, 19731 has been filed seeking to quash the entire proceedings as well as the Cognizance Order dated 05.09.2019 passed by the Additional Chief Judicial Magistrate, Court No.5, Prayagraj in Case No.1841 of 2019 (State Vs. Bhawarjeet

Singh and Others), arising out of Case Crime No.367/2018, under Section 379 Indian Penal Code, 18602 and Section 4 and 21 Mines and Minerals (Development and Regulation) Act, 19573, Police Station Sankargarh, District Prayagraj.

3. It is pointed out that proceedings in the present case were initiated pursuant to an FIR dated 25.11.2018 lodged under Section 379, 411 of the Penal Code and Section 4, 21 of the MMDR Act and a police report under Section 173(2) of the Code dated 24.12.2018 was filed whereupon cognizance was taken by the learned Magistrate on 05.09.2019 and the applicant has been summoned.

4. It is submitted that in so far as the offences referable to Sections 4, 21 of the MMDR Act are concerned, the procedure prescribed under Section 22 of the Act having not been followed, the Magistrate could not have taken cognizance in respect of the said offence.

5. In support of his submission reliance has been placed on a decision of this Court dated 20.09.2021 rendered in **Ram Bahal Vs. State of U.P. and Another4.** In particular, the following paragraphs of the judgment have been referred to:-

"43. The legal position, as emanating from the aforesaid discussion, may be summarized as follows :-

43.1 The prohibition applying the rule against double jeopardy would be attracted in a situation where the same act constitutes an offence under more than one enactment. However, if the two offences are distinct and different with different ingredients, under two different enactments, the rule against double jeopardy would not be applicable. 43.7 The investigation of offences being within the domain of the police, the power of a police officer to investigate into a cognizable offence would ordinarily not be impinged by any fetter and courts would interfere only where it is found that the investigatory powers have been exercised in breach of the statutory provisions putting the personal liberty and/or the property of the citizen in jeopardy. The procedural law is designed to further the ends of justice and should not be allowed to be frustrated on mere technicalities and any defect or illegality in exercise of investigatory powers would have no direct bearing on the competence or the procedure relating to taking of cognizance or the trial.

44. It would therefore be seen that the bar under Section 22 of the Act shall not be attracted at the stage of lodging of an FIR or registration of the criminal case. The bar under the section shall get attracted only at the stage when the Magistrate takes cognizance of the offence and orders issuance of process/summons for the offence under the MMDR Act and the Rules made thereunder. On receipt of the police report, insofar as it relates to commission of offence under the Penal Code, the Magistrate having jurisdiction can take cognizance of the offence and proceed further. However, in respect of offences under the MMDR Act upon submission of the police report the same would be required to be sent to the concerned Magistrate as well as to the concerned authorised officer as mentioned in Section 22 of the MMDR Act whereupon the concerned authorised officer may file a complaint before the Magistrate along with the report submitted by the investigating officer and thereafter it would be open for the Magistrate to take cognizance after following due procedure, issue process/summons in respect of the violations of the various provisions of the MMDR Act and the Rules made thereunder and at that stage it can be said that cognizance has been taken by the Magistrate in respect of an offence under the MMDR Act.

45. In the case at hand, the offence under Section 4, 21 of the MMDR Act read with Rules 3, 57, 70 of the Concession Rules which relate to illegal mining, and the offence under Section 379, 411 IPC which would relate to theft, cannot be said to be one and the same. The two offences being distinct and under separate enactments with ingredients also being distinct the principle based on the rule against double jeopardy would not be attracted.

46. The offence under Section 379 IPC, which is with regard to theft of minerals, being undisputedly a cognizable offence, the act of the police in registering a case, investigating the same and placing a police report under Section 173 of the Code, cannot be said to be unlawful. The concerned Magistrate is also well within his jurisdiction in taking cognizance as per the provisions under the Code.

47. The contention sought to be raised on behalf of the applicant that the facts as disclosed in the FIR would constitute a mere violation of Section 4 of the MMDR Act which would be an offence cognizable only under Section 21 of the MMDR Act and not under any other law therefore stands rejected. The FIR version having disclosed an offence under Section 379 of the Penal Code and a police report having also been submitted pursuant thereto, there is no bar on the jurisdictional Magistrate from taking cognizance of the offence under the Penal Code. The contravention of the provisions under Section 4 of the MMDR Act also constituting a cognizable offence, the police were within their rights in investigating the same, there being no bar under the MMDR Act with regard to the same.

48. The initiation of the proceedings by lodging of an FIR under relevant provisions of the MMDR Act and the Rules made thereunder and also the provisions of the Penal Code therefore cannot be said to be hit by the bar under Section 22 of the MMDR Act. The investigation of the case and the submission of the police report under Section 173 also cannot be said to be barred by the provisions under the MMDR Act.

49. Insofar as the offences under the MMDR Act are concerned, at the stage of submission of the police report, it was for the concerned authorized officer as specified under Section 22 of the MMDR Act to have filed a complaint before the Magistrate along with the police report whereupon the Magistrate could have taken cognizance after following due procedure and issued process/summons in respect of the violations of the various provisions of the MMDR Act and the Rules made thereunder."

6. Learned Additional Government Advocate-I does not dispute the aforesaid legal position. He also does not dispute that in respect of the offences under the MMDR Act the procedure under Section 22, with regard to filing of a complaint before the jurisdictional magistrate, has not been followed.

7. Learned Additional Government Advocate-I, however, points out that in so far as the proceedings relating to offences under the Penal Code are concerned, in respect of which cognizance has been taken by the learned Magistrate and process/summons have been issued, the bar under the MMDR Act would not operate and there is no illegality in the proceedings in so far as the offences under the Penal Code are concerned.

8. Learned counsel appearing for the applicant has fairly submitted that he is pressing his application only in respect of the proceedings relating to the offences under the MMDR Act and not in respect of those under the Penal Code.

9. Having regard to the aforestated facts and circumstances and following the decision in the case of **Ram Bahal vs. State of U.P. and**

Another (supra) and the legal propositions summarized therein, the proceedings, insofar as they relate to the offences under the Penal Code in respect of which cognizance has been taken by the Magistrate and process/summons have been issued, cannot be faulted with and the challenge raised in regard to the same cannot be sustained and is accordingly rejected.

10. However, insofar as the offences under the MMDR Act are concerned, the procedure under Section 22 having not been followed and in the absence of a complaint by the authorized officer, the cognizance taken by the Magistrate cannot be legally sustained and the proceedings in this regard are set aside and quashed. It would be open to the authorized officer to initiate proceedings in this regard as per the procedure under Section 22 of the MMDR Act and to lodge a complaint before the concerned Magistrate along with report submitted by the investigating officer whereupon the Magistrate concerned may take cognizance after following due procedure and issue process/summons.

11. The application under Section 482 Cr.P.C. stands **partly allowed** to the extent indicated above.

(2021)11ILR A457
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.11.2020

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 482 No.16691 of 2020

Adesh Kumar ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Rajesh Dwivedi

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

Allegation upon the Applicant of enticing and trying to outrage her modesty-Applicant filed application for DNA Examination/Narco test to determine whether the blood and spermatozoa found in the semen belongs to the accused-Such DNA test will not conclude that the Applicant had not committed rape on the victim.

Application dismissed. (E-9)

Held, the confessions made by a semi-conscious person is not admissible in court. Deception Detecting Test report has some validity but is not totally admissible in court, which considers the circumstances under which it was obtained and assess its admissibility. Results of such tests can be used to get admissible evidence, can be collaborated with other evidence or to support other evidence. But if the result of this test is not admitted in a court, it cannot be used to support any other evidence obtained the course of routine investigation. **(para 65)** (E-9)

List of Cases cited:

1. Criminal Appeal No.1267 of 2004, Smt. Selvi & ors. Vs St. of Karn. (decided on 5th May, 2010)

2. Crl. ReVs Pet. No.2329 of 2012, Abdurahiman Vs St. of Kerala (decided on 10th July, 2013)

3. Criminal Appeal No.111 of 2020, Dashrath s/o Hiraman Johare Vs St. of Mah. (decided on 14th July, 2020)

4.Crl. ReVs Pet. No.2280 of 2003, Anil Kumar Vs Ayyappan & anr. (decided on 5th April, 2013)

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard Shri Rajesh Dwivedi, learned counsel for the applicant as well as learned Additional Government Advocate and perused the record.

2. This application u/s 482 Cr.P.C. has been preferred for quashing of the impugned

order dated 15.10.2019 passed by the Special Judge (Protection of Children from Sexual Offences Act, 2012)/ VIII Additional District and Sessions Judge, Kanpur Dehat in application no.28 Kha under section 54 of Cr.P.C. filed by the applicant in Special Sessions Trial No.167 of 2017 (State Vs. Adesh Kumar) and further prayed to direct the Court below to pass an appropriate order for DNA Test/ Narco Test as mentioned in the application No.28 Kha as well as other legal enquiry.

3. Learned counsel for the applicant submits that an F.I.R was lodged on 20.02.2017 which was registered as Case Crime No.28 of 2017, under Section 376, 506 I.P.C. and section 4 of Protection of Children from Sexual Offences Act, 2012 at Police Station Satti, District Kanpur Dehat against the applicant and his father by the first informant Sri Anand Kumar stating that on 09.02.2017 at 1.00 P.M. when the family members had gone for voting for general election, then the applicant aged about 18 years enticed her minor daughter and tried to outrage her modesty.

4. Learned counsel for the applicant further submits that the applicant has not committed any offence as alleged in the F.I.R and he has been falsely implicated in the present case. The real facts of this case are that some hot talk ensued between first informant and the mother of applicant on 18.02.2017 and the first informant has abused and assaulted with kicks and fists to the mother of the applicant. The applicant belongs to S.C./S.T caste and only due to fear and apprehension that the mother of the applicant might lodge the FIR under the SC/ST Act against him, he lodged the present F.I.R. against the applicant.

5. Learned counsel for the applicant further submits that the incident as alleged has taken place on 19.02.2017 at 13.00 hrs and the first information report was lodged on 20.02.2017 at 15.10 hrs. Thus the F.I.R. was highly delayed about 1 day but no proper explanation has been given by the first informant. The applicant is a good student and he has a bright future as is evident from his High School certificate. The applicant has been falsely implicated in the present case only with malafide intention and with the purpose for ruining his career. He further submits that several villagers have given their statements to the Investigating Officer with their signatures that the applicant is innocent. The applicant is below 18 years and has given an application before the Court of Juvenile Justice Board, Kanpur Dehat to declare him juvenile, which was rejected on 13.09.2017. The applicant has given an application bearing application No.28 Kha, u/s 54 of Cr.P.C. on 04.09.2019 before the Court of A.D.J. VIII/ POCSO Act Judge, Kanpur Dehat for D.N.A Examination/Narco Test to determine whether human bloods which was found on the body of the victim is of the accused or not and also to determine whether the spermatozoa found in the semen belongs to the accused. The said application submitted by the applicant was rejected by the Special Judge, POCSO Act/8th Additional Sessions Judge, Kanpur Dehat vide order dated 15.10.2019.

6. Learned counsel for the applicant further submits that the procedure as mentioned in the Cr.P.C is a balancing procedure for both sides i.e. prosecution side as well as defence side but in the present case, the opportunity of defence has been curtailed by the court below illegally and arbitrarily. There are much contradictions in the prosecution case from the beginning, hence it is clear that the prosecution is trying to implicate the applicant on the basis of false case. Therefore, in the present case, the DNA/ Norco Test is necessary to establish the case fairly. The Investigating Officer has not followed the procedure properly and he has falsely implicated the applicant on the basis of the statement of the first informant and his family members.

7. Learned Additional Government Advocate opposed the argument raised by learned counsel for the applicant and submitted that the court below has rightly passed the impugned order dated 15.10.2019 and further submits that in each and every case DNA/Narco Test cannot be directed to be done otherwise the entire system of the State machinery will collapse. It was further argued that this present application u/s 482 Cr.P.C. has been filed by the applicant only for delaying the trial. All the prosecution witnesses are examined and the case is at the final stage. Therefore, this application cannot be entertained at this stage.

8. Considering the arguments advanced by the learned counsel for the parties and after perusal of the record, the legal question involved in the present application filed under Section 482 CrPC relates to examine certain scientific techniques and principles for adjudication of the correctness of the allegations levelled against the applicant namely for D.N.A. (Deoxyribonucleic Acid), NARCO Analysis Test, etc. so that the Investigating Agencies may arrived at fair conclusion. To understand this aspect, it is necessary to examine the ratio of balance between efficient investigation and individual rights. Accordingly, Law, Science and Technology has a great relevance in our lives. Law and Science encounter each other in many ways. When technology intrudes in the ambit of legal rights it is checked by law, for example, cyber crimes, in the same manner to protect legal rights and strengthening the evidence with the help of science, cannot be denied.

9. At present days, when the legal system has so much advanced, criminals take care to erase all the evidences of their involvement, then in such case, scientific and highly sophisticated methods are required to trace the involvement of criminals. Narcoanalysis, Polygraphy and Brain Mapping tests collectively called ***deception detection tests (DDT)*** are new kinds of interrogation techniques including the ***DNA Test (Deoxyribonuclie Acid)*** which are simple and civilized way of conducting investigation. But, at the same time, one has to be conscious of its limitations also. It infringes fundamental rights under Article 20(3), and also right to privacy and right to health which are guaranteed under Article 21 of the Constitution of India.

10. In spite of the verily limitations, it affirms certain attributes also which includes: "order of court', "pre-consent of subject' "non-manipulated statements by subject' and "secure public interest' Thus, there is a tension between desirability of efficient investigation and preservation of individual rights.

Let us understand briefly the Concept Of Investigation-

11. In order to study about the scientific criminal investigation, we need to understand the term "investigation',

"Investigation means to examine, study, or inquire into systematically, search or examine into the particulars of; examine in detail, or, to search out and examine the particulars of in an attempt to learn the facts about something hidden, unique, or complex, especially in an attempt to find a motive, cause, it is about finding things."

12. According to the Code of the Criminal Procedure under section 2(h) of the Code," investigation includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a

magistrate) who is authorized by a Magistrate in this behalf. Investigation, under the Code includes:-

1. Proceeding to the spot of crime.

2. Ascertaining the facts and circumstances of the case.

3. Discovery and arrest of the suspected offenders.

4. Collection of evidence,

* examination of various persons including the accused and recording their statements in writing.

* Search of places or seizures of things which are considered necessary.

13. Criminal Investigation is an applied science that involves the study of facts, used to identify, locate and prove the guilt of a criminal. A complete criminal investigation can include searching, interviews, interrogations, evidence collection and preservation and various methods of investigation. Modern day criminal investigations commonly employ many modern scientific techniques known collectively as forensic science.

Application of science and technology in criminal investigation is also an important issue to be considered.

14. The search for effective aids to interrogation is probably as old as man's need to obtain information from an uncooperative source and as persistent as his impatience to shortcut any tortuous path. In the annals of police investigation, physical coercion has at times been substituted for painstaking and time consuming inquiry in the belief that direct methods produce quick results. The use of technology in the service of criminal investigations, and the application of scientific techniques to detect and evaluate criminal evidence has advanced the investigation process criminal justice system throughout the country. According to Cowan in his article "Decision Theory in Law, Science, and Technology",

"the aim of science, traditionally put, is to search out the ways in which truth may become known. Law aims at the just resolution of human conflict. Truth and justice, we might venture to say, having different aims, use different methods to achieve them. Unfortunately, this convenient account of law and science is itself neither true nor just. For law must know what the truth is within the context of the legal situation: and science finds itself ever engaged in resolving the conflicting claims of theorists putting forward their own competing brands of truth."

15. This quote roughly means that the law needs to find the truth to resolve "human conflict" and one method of doing so is to use the field of science. Today's society has improved upon the methods of the past to bring about more precise and accurate techniques. Forensic Science has expanded to Trauma Inducing Drugs and Psychotropic Substances. The application of science to matters of law has made great strides in recent years. Development of new tools of investigation has led to the emergence of scientific tools of interrogation. Before analyzing these techniques it will be necessary and useful to frame and consider the question of law in this case.

Whether these scientific techniques infringes fundamental rights under Article 20(3) and also right to privacy and right to health which are guaranteed under Article 21 of the Constitution of India.

16. The following scientific techniques are important to be considered for the criminal justice system namely DNA profiling test/Narco analysis test in the present case. Before answering the above question, it is relevant to consider and examine the scientific and legal aspect of the above techniques along with other techniques and their use and application in the field of criminal justice, the following scientific techniques will be considered and discussed for adjudication of the case.

*Narco analysis Test
*Brain Mapping Test/ Brain Electrical Oscillation Signature Profile (Beos)
*Polygraphy Test
*DNA profiling test
* Fingerprinting Test

Narco Analysis Test:

17. The term Narco-Analysis is derived from the Greek word narkç (meaning "anesthesia" or "torpor") and is used to describe a diagnostic and psychotherapeutic technique that uses psychotropic drugs, particularly barbiturates, to induce a stupor in which mental elements with strong associated affects come to the surface, where they can be exploited by the therapist. The term narco-analysis was coined by Horseley. Narco analysis first reached the mainstream in 1922, when Robert House, a Texas obstetrician used the drug scopolamine on two prisoners. The narco analysis test is conducted by mixing 3 grams of Sodium Pentothal or Sodium Amytal dissolved in 3000 ml of distilled water. Narco Test refers to the practice of administering barbiturates or certain other chemical substances, most often Pentothal Sodium, to lower a subject's inhibitions, in the hope that the subject will more freely share information and feelings. A person is able to lie by using his imagination. In the narco Analysis Test, the subject's inhibitions are lowered by interfering with his nervous system at the molecular level. In this state, it becomes difficult though not impossible for him to lie .In such sleep-like state efforts are made to obtain "probative truth" about the crime. Following procedure has to be adopted while conducting narco test:-

#This test is conducted in government hospitals after a court order is passed instructing the doctors or hospital authorities to conduct the test. Personal consent of the subject is also required.

#Experts inject a subject with hypnotics like Sodium Pentothal or Sodium Amytal under the controlled circumstances of the laboratory.

#The dose is dependent on the person's sex, age, health and physical condition.

#The subject which is put in a state of Hypnotism is not in a position to speak up on his own but can answer specific but simple questions after giving some suggestions.

#The answers are believed to be spontaneous as a semi-conscious person is unable to manipulate the answers.

#Wrong dose can send the subject into coma or even result in death.

#The effect of the bio-molecules on the bio-activity of an individual is evident as the drug depresses the central nervous system, lowers blood pressure and slows the heart rate, putting the subject into a hypnotic trance resulting in a lack of inhibition.

#The subject is then interrogated by the investigating agencies in the presence of the doctors.

#The revelations made during this stage are recorded both in video and audio

cassettes. The report prepared by the experts is what is used in the process of collecting evidence.

18. A person is able to lie by using his imagination. In the Narco Analysis Test, the subject's imagination is neutralised by making him semi-conscious. In this state, it becomes difficult for him to lie and his answers would be restricted to facts he is already aware of. The subject is not in a position to speak up on his own but can answer specific and simple questions. The answers are believed to be spontaneous as a semi-conscious person is unable to manipulate the answers. Narcoanalysis is a tool which is now being, alarmingly, used by investigating agencies in criminal cases, as an interrogation technique. It was first used in 2002, in the Godhra carnage probe. During the Telgi scam, the use of narcoanalysis came under the scanner, and then it was used in the Arushi murder investigation. The scientific validity of the test has been questioned by medical professionals, and the legal validity has also been debated in several international and national cases.

Brain Mapping Test:

19. Brain-mapping is a comprehensive analysis of brainwave frequency bandwidths. In this test, forensic experts apply unique neuroscience techniques to find out if a suspect's brain recognizes things from a crime scene which an innocent person's brain will have no knowledge of.

20. In brain-mapping, sensors are attached to the suspect's head and he or she is made to sit in front of a computer screen. The suspect is then made to see images or hear sounds.

21. The sensors monitor electrical activity in the brain and register certain waves which are generated only if the suspect has any connection with the stimulus (image or sound).

22. This test was developed and patented in 1995 by neurologist Dr. Lawrence A. Farwell, Director and Chief Scientist "Brain Wave Science", This method, called the "Brain-wave finger printing"; the accused is first interviewed and interrogated to find out whether he is concealing any information. Then sensors are attached to the subject's head and the person is seated before a computer monitor. He is then shown certain images or made to hear certain sounds. The sensors monitor electrical activity in the brain and register P300 waves, which are generated only if the subject has connection with the stimulus i.e. picture or sound. The subject is not asked any questions. Dr. Farwell has published that a MERMER (Memory and Encoding Related Multifaceted Electro Encephalographic Response) is initiated in the accused when his brain recognizes noteworthy information pertaining to the crime. These stimuli are called the "target stimuli". In a nutshell, Brain finger printing test matches information stored in the brain with information from the crime scene. Studies have shown that an innocent suspect's brain would not have stored or recorded certain information, which an actual perpetrator's brain would have stored.

Lie Detecting Test:

23. A polygraph, popularly referred to as a lie detector, is an instrument that measures and records several physiological indices such as blood pressure, pulse, respiration and breathing rhythms and skin conductivity while a suspect is asked a series of questions.

24. Deceptive answers are said to produce physiological responses that can be differentiated from those associated with non-deceptive answers.

25. It is an examination, which is based on an assumption that there is an interaction between the mind and body and is conducted by various components or the sensors of a polygraph machine, which are attached to the body of the person who is interrogated by the expert. The machine records the blood pressure, pulse rate and respiration and muscle movements. Polygraph test is conducted in three phases- a pretest interview, chart recording and diagnosis. The examiner (a clinical or criminal psychologist) prepares a set of test questions depending upon the relevant information about the case provided by the investigating officer, such as the criminal charges against the person and statements made by the suspect. The subject is questioned and the reactions are measured. A baseline is established by asking questions whose answers the investigators know. Lying by a suspect is accompanied by specific, perceptible physiological and behavioural changes and the sensors and a wave pattern in the graph expose this. Deviation from the baseline is taken as a sign of lie. All these reactions are corroborated with other evidence gathered. The polygraph test was among the first scientific tests to be used by the interrogators.

What is DNA

26. Here's a look at what DNA is made of, how it works, who discovered it and other interesting DNA facts. As per the writer Rachael Rettner, DNA stands for deoxyribonucleic acid, which is a molecule that contains the instructions an organism needs to develop, live and reproduce. These instructions are found inside every cell and are passed down from parents to their offspring.

27. DNA is made up of molecules called nucleotides. Each nucleotide contains a phosphate group, a sugar group and a nitrogen base. The four types of nitrogen bases are adenine (A), thymine (T), guanine (G) and cytosine (C).

28. Nucleotides are attached together to form two long strands that spiral to create a structure called a double helix. The double-helix structure as a ladder, the phosphate and sugar molecules would be the sides, while the base pairs would be the rungs. The bases on one strand pair with the bases on another strand: Adenine pairs with thymine (A-T), and guanine pairs with cytosine (G-C).

29. Human DNA is made up of around 3 billion base pairs, and more than 99% of those bases are the same in all people, according to the U.S. National Library of Medicine (NLM).

30. Similar to the way the order of letters in the alphabet can be used to form words, the order of nitrogen bases in a DNA sequence forms genes, which, in the language of the cell, cells tell how to make proteins. The shorthand for this process is that genes "encode" proteins. But DNA is not the direct template for protein production. To make a protein, the cell makes a copy of the gene, using not DNA but ribonucleic acid, or RNA. This RNA copy, called messenger RNA, tells the cell's protein-making machinery which amino acids to string together into a protein, according to "Biochemistry" (W. H. Freeman and Company, 2002).

31. DNA molecules are long -- so long, in fact, that they can't fit into cells without the right packaging. To fit inside cells, DNA is coiled tightly to form structures called chromosomes. Each chromosome contains a single DNA molecule. Humans have 23 pairs of chromosomes, which are found inside each cell's nucleus.

32. Rosalind Elsie Franklin (1920-1958) was a british chemist and crystallographer who is best known for her role in the discovery of the structure of DNA. DNA was first observed by Swiss biochemist Friedrich Miescher in 1869, according to a paper published in 2005 in the journal Developmental Biology. Miescher used biochemical methods to isolate DNA -- which he

called nuclein -- from white blood cells and sperm, and determined that it was very different from protein. (The term "nucleic acid" derives from "nuclein.") But for many years, researchers did not realize the importance of this molecule.

How does DNA function?

33. Genes encode proteins that perform all sorts of functions for humans (and other living beings). The human gene HBA1, for example, contains instructions for building the protein alpha globin, which is a component of hemoglobin, the oxygen-carrying protein in red blood cells.

34. DNA sequencing involves technology that allows researchers to determine the order of bases in a DNA sequence. The technology can be used to determine the order of bases in genes, chromosomes or an entire genome.

35. Accordingly, what has been discussed above the three Tests namely Narco Analysis Test, Brain Mapping Test and Lie Detecting Test are called **Deception Detecting Test** which implies psychological evaluation of human brain. Deception, in another word means lying, it may lead to a serious aftermath in the enforcement of law and the proceedings in the courtroom, deception is defined as a deliberate attempt to mislead others. Hence, much effort is devoted by the forensic psychologists in developing different techniques and methods to detect lies. The deception detection tests (DDT) such as **polygraph, narco-analysis and brain-mapping have important clinical, scientific, ethical and legal implications.** The DDTs are useful to know the concealed information related to crime. This information, which is known only to self, is sometimes crucial for criminal investigation.

36. The narcoanalysis is used as a tool of investigation, the procedure of narco analysis finds legal sanction under the newly amended Section 53 of the Criminal Procedure Code. In 2005, an Explanation clause was added to Section 53 of the Criminal Procedure Code, the relevant part of which reads as follows: (a) examination" shall include the examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modem and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case; The expression 'such other tests' signifies a provision for recognizing newly developed techniques in forensic science and permitting the same in investigative procedures.

37. The present criminal justice system is obsessed with individual liberty and freedom and in this context a safe passage forgone and criminals due to weakness in the criminal justice system leading to dilution of evidence. Since the validity of the test and admissibility of DDT upheld taking into consideration the circumstances under which it was obtained, there is a little possibility of miscarriage of justice when administered as per procedure prescribed and observing the due safety precautions, the apprehension on the part of counsels of accused and critics is unwarranted.

38. Deception detecting test comes under the general power of investigation (Sections 160-167,Cr.P.C.).But it must be realized that it is prerogative of the person to allow himself/herself to be put to the test or not and it should not be left to the discretion of police. Unless it is allowed by law and the accused himself, it must be seen as illegal and unconstitutional. But, if it is conducted with free consent' of the person it may be permitted. The person should be made well aware of the technicalities of the procedure, the effect of the narcotics under whose influence he shall be interrogated as well as the physical,

psychological and legal ramifications of undergoing the procedure, this knowledge becoming the basis on-which he renders his voluntary consent.

39. "Free consent' means it is voluntary and is not given under coercive circumstances. For example, If a person says, "I wish to take a lie detectors test because I wish to clear my name". It shows his/her free consent but it is still to be shown that whether this voluntariness was under coercive circumstances or not. If a person is told by police "If you want to clear your name take a lie detector test" or" take a lie detector test and we will let you go" then it shows that police has linked up the freedom to go with the lie detector test and as such it cannot be held voluntary.

40. **If an accused volunteers for a lie-detector test, then he should be given access to a lawyer and the physical, emotional and legal implications of such a test should be explained to him by both police and his lawyer. Moreover, the consent should be recorded before a judicial magistrate and during the hearing, the person who has agreed to the test should be duly represented by a lawyer. Among other things, NHRC guidelines say the actual recording of the lie-detector test should be done by an independent agency like a hospital and in the presence of a lawyer. Also, a full medical and factual narration of the manner of the information received must be put on record.**

41. The use of Deception Detecting Tests has been questioned in courts. The main argument against it is the infringement of the fundamental right under Article 20(3)and under Article 21 of the Constitution, which provides for a privilege against self incrimination and right to health and privacy, respectively. The revelations made during the Narco analysis have been found to be of very useful in solving some sensational cases. Thus, it is right to say that DDT is proving to be a useful tool in the field of criminal investigation. Legal questions are raised about their validity with some upholding its validity in the light of legal principles and others rejecting it as a blatant violation of constitutional provisions.

42. Accordingly, a person's DNA contains information about their heritage, and it can sometimes reveal whether they are at an elevated risk for certain diseases. DNA tests, or genetic tests, are used for a variety of reasons, including to diagnose genetic disorders, to determine whether a person is a carrier of a genetic mutation that they could pass on to their children and to examine whether a person is at risk for a genetic disease.

43. Genetic test results can have implications for a person's health, and the tests are often provided along with genetic counseling to help individuals understand the results and consequences.

44. People also use the results of genetic testing to find relatives and learn about their family trees.

45. Applicability of Section 27 in The Indian Evidence Act, 1872 in respect of above scientific techniques:- How much of information received from accused may be proved.- Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police- officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

46. The right to remain silent is a legal right recognized, explicitly or by convention, in many of the world's legal systems. Universal Declaration of Human Rights, 1948 under Art.

11.1 declares, "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence." The International Covenant on Civil and Political Rights, 1966 to which India is a party states in Art. 14(3)(g) "Not to be compelled to testify against himself or to confess guilt". The European Convention for the Protection of Human Rights and Fundamental Freedoms states in Art. 6(1) that every person charged has a right to a "fair' trial and Art. 6(2) thereof states:

47. "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law." The right covers a number of issues centered around the right of the accused or the defendant to refuse to comment or provide an answer when questioned, either prior to or during legal proceedings in a court of law. This can be the right to avoid self-incrimination or the right to remain silent when questioned. The right usually includes the provision that adverse comments or inferences cannot be made by the judge or jury regarding the refusal by a defendant to answer questions.

48. The constitutional provisions against self incrimination the Courts have required the prosecution to prove guilt beyond reasonable doubt and there has been no encroachment whether at the stage of interrogation or trial, into the right to silence vested in the suspect or accused.

49. The right against forced self-incrimination, widely known as the Right to Silence is enshrined in the Code of Criminal Procedure (CrPC) and the Indian Constitution. In, CrPC, the legislature has guarded a citizen's right against self-incrimination. S.161 (2) of the Code of Criminal Procedure states that every person "**is bound to answer truthfully all questions**, put to him by [a police] officer, other than questions the answers to which would have a tendency to expose that person to a criminal charge, penalty or forfeiture".

50. The constitution of India guarantees every person right against self incrimination under Article 20(3) of the Indian Constitution "**No person accused of any offense shall be compelled to be a witness against himself."**

51. It is well established common law doctrine that every accused person is presumed innocent unless proved guilty and it is for the prosecution to prove the guilt and in the process the accused cannot be compelled to make a **self incriminating** statement.

52. The term "self-incrimination' means the act of accusing oneself of a crime for which a person can then be prosecuted. Self-incrimination can occur either directly or indirectly: directly, by means of interrogation where information of a self-incriminatory nature is disclosed; indirectly, when information of a self-incriminatory nature is disclosed voluntarily without pressure from another person.

53. It is well established that the Right to Silence has been granted to the accused by virtue of the pronouncement in the case of Nandini Sathpathy vs P.L. Dani Hon'ble Supreme Court was pleased to hold that " no one can forcibly extract statements from the accused, who has the right to keep silent during the course of interrogation (investigation). By the administration of these tests, forcible intrusion into one's mind is being restored to, thereby nullifying the validity and legitimacy of the Right to Silence. Moreover, under the influence of the drug, the accused has garbled speech and tends to talk about fantasies, and labours under delusions. For example, a person may talk about a crime s/he fantasized about committing, even if they actually have not done it. Their state resembles that of a person in delirium. So, it

ultimately constitutes self incrimination of a person because it is difficult to distinguish reality from fantasy.

54. Self-Incrimination, Privilege Against the constitutional right of a person to refuse to answer questions or otherwise give testimony against himself or herself which will subject him or her to an incrimination.

55. **Self-Incrimination**: Acts or declarations either as testimony at trial or prior to trial by which one implicates himself in a crime. The constitutions and laws, prohibit the government from requiring a person to be a witness against himself involuntarily or to furnish evidence against himself.

56. T**hus, Right to Privacy is implicit in the Right to life and liberty guaranteed to the citizens of India by Article 21 of the Constitution of India. None can publish anything covering the above matters without his consent whether truthful or otherwise and whether laudatory or critical. If done so, it will be violating right to privacy of person concerned and would be liable in an action for damages.**

57. **Deception detection tests amounts to an invasion of privacy if it involves eliciting personal information from the accused known only to him. However, it must be noted that the test assumes the character of a restriction imposed by law on the said right.**

58. It is further necessary to elaborate that the Society has the right to be protected against the criminal, and all of society's rights are manifestly superior to those of the criminal. There can be no gainsaying the fact that a suspect is either innocent or guilty, and no one knows the truth better than does the suspect himself. It, therefore, stands to reason, that where there is a safe and humane measure existing to evoke the truth from the consciousness of the suspect, that society is entitled to have the truth. If society has the right to take property, liberty, and life for its protection, then society has the right to make, by trained men, the use of truth serum legal. The framers of the Bill of Rights believed the rights of society were paramount to the rights of the criminal. It was an instrument for the protection of the innocent and not intended for the acquittal of the guilty. If the right against self incrimination is upheld against the public interest and it would weaken the evidence and thereby denial of justice to the public. Murderers, money launderers, terrorist are allowed to walk away Scott free exploiting the loopholes in the legal system. Ironically in all these issues we apply criminal procedures only to protect the individual freedom of the accused while rights and lives of many people have been sacrificed.

59. The DDTs are useful to know the concealed information related to crime. This information, which is known only to self, is sometimes crucial for criminal investigation. The DDTs have been used widely by the investigating agencies. **However, investigating agencies know that the extracted information cannot be used as evidence during the trial stage.** They have contested that it is safer than "third degree methods' used by some investigators. **Here, the claim is that, by using these so called, "scientific procedures" in fact-finding, it will directly help the investigating agencies to gather evidences, and thereby increase the rate of prosecution of the guilty and the rate of acquittal of the innocent.** Recently, these methods are being promoted as more accurate and best to none, without convincing evidence.

60. In this regard, the Hon'ble Supreme Court has taken similar view in **Criminal Appeal No.1267 of 2004, Smt. Selvi and**

others vs. State of Karnataka (decided on 5th May, 2010) and was pleased to observe in paragraph nos. 217, 218, 219, 220, 221, 222 and 223 of the judgment as under:-

217. Even though the main task of constitutional adjudication is to safeguard the core organising principles of our polity, we must also highlight some practical concerns that strengthen the case against the involuntary administration of the tests in question. Firstly, the claim that the results obtained from these techniques will help in extraordinary situations is questionable. All of the tests in question are those which need to be patiently administered and the forensic psychologist or the examiner has to be very skilful and thorough while interpreting the results. In a narcoanalysis test the subject is likely to divulge a lot of irrelevant and incoherent information. The subject is as likely to divulge false information as he/she is likely to reveal useful facts. Sometimes the revelations may begin to make sense only when compared with the testimony of several other individuals or through the discovery of fresh materials. In a polygraph test, interpreting the results is a complex process that involves accounting for distortions such as `countermeasures' used by the subject and weather conditions among others. In a BEAP test, there is always the possibility of the subject having had prior exposure to the `probes' that are used as stimuli. All of this is a gradually unfolding process and it is not appropriate to argue that the test results will always prove to be crucial in times of exigency. It is evident that both the tasks of preparing for these tests and interpreting their results need considerable time and expertise.

218. Secondly, if we were to permit the forcible administration of these techniques, it could be the first step on a very slippery-slope as far as the standards of police behaviour are concerned. In some of the impugned judgments, it has been suggested that the promotion of these techniques could reduce the regrettably high incidence of `third degree methods' that are being used by policemen all over the country. This is a circular line of reasoning since one form of improper behaviour is sought to be replaced by another. What this will result in is that investigators will increasingly seek reliance on the impugned techniques rather than engaging in a thorough investigation. The widespread use of `third-degree' interrogation methods so as to speak is a separate problem and needs to be tackled through long-term solutions such as more emphasis on the protection of human rights during police training, providing adequate resources for investigators and stronger accountability measures when such abuses do take place.

219. Thirdly, the claim that the use of these techniques will only be sought in cases involving heinous offences rings hollow since there will no principled basis for restricting their use once the investigators are given the discretion to do so. From the statistics presented before us as well as the charges filed against the parties in the impugned judgments, it is obvious that investigators have sought reliance on the impugned tests to expedite investigations, unmindful of the nature of offences involved. In this regard, we do not have the authority to permit the qualified use of these techniques by way of enumerating the offences which warrant their use. By itself, permitting such qualified use would amount to a law- making function which is clearly outside the judicial domain.

220. One of the main functions of constitutionally prescribed rights is to safeguard the interests of citizens in their interactions with the government. As the guardians of these rights, we will be failing in our duty if we permit any citizen to be forcibly subjected to the tests in question. One could argue that some of the parties who will benefit from this decision are

hardened criminals who have no regard for societal values. However, it must be borne in mind that in constitutional adjudication our concerns are not confined to the facts at hand but extend to the implications of our decision for the whole population as well as the future generations. Sometimes there are apprehensions about judges imposing their personal sensibilities through broadly worded terms such as `substantive due process', but in this case our inquiry has been based on a faithful understanding of principles entrenched in our Constitution. In this context it would be useful to refer to some observations made by the Supreme Court of Israel in Public Committee Against Torture in Israel v. State of Israel, H.C. 5100 / 94 (1999), where it was held that the use of physical means (such as shaking the suspect, sleep-deprivation and enforcing uncomfortable positions for prolonged periods) during interrogation of terrorism suspects was illegal. Among other questions raised in that case, it was also held that the `necessity' defence could be used only as a post factum justification for past conduct and that it could not be the basis of a blanket pre-emptive permission for coercive interrogation practices in the future. Ruling against such methods, Aharon Barak, J. held at p. 26:

"... This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the `Rule of Law' and recognition of an individual's liberty constitutes an important component in its understanding of security."

CONCLUSION

221. In our considered opinion, the compulsory administration of the impugned techniques violates the `right against self-incrimination'. This is because the underlying rationale of the said right is to ensure the reliability as well as voluntariness of statements that are admitted as evidence. This Court has recognised that the protective scope of Article 20(3) extends to the investigative stage in criminal cases and when read with Section 161(2) of the Code of Criminal Procedure, 1973 it protects accused persons, suspects as well as witnesses who are examined during an investigation. The test results cannot be admitted in evidence if they have been obtained through the use of compulsion. Article 20(3) protects an individual's choice between speaking and remaining silent, irrespective of whether the subsequent testimony proves to be inculpatory or exculpatory. Article 20(3) aims to prevent the forcible `conveyance of personal knowledge that is relevant to the facts in issue'. The results obtained from each of the impugned tests bear a `testimonial' character and they cannot be categorised as material evidence.

222. We are also of the view that forcing an individual to undergo any of the impugned techniques violates the standard of `substantive due process' which is required for restraining personal liberty. Such a violation will occur irrespective of whether these techniques are forcibly administered during the course of an investigation or for any other purpose since the test results could also expose a person to adverse consequences of a non-penal nature. The impugned techniques cannot be read into the statutory provisions which enable medical examination during investigation in criminal cases, i.e. the Explanation to Sections 53, 53-A and 54 of the Code of Criminal Procedure, 1973. Such an expansive interpretation is not feasible in light of the rule of `ejusdem generis' and the considerations which govern the interpretation of statutes in relation to scientific advancements. We have also elaborated how the compulsory administration of any of these techniques is an unjustified intrusion into the mental privacy of

an individual. It would also amount to `cruel, inhuman or degrading treatment' with regard to the language of evolving international human rights norms. Furthermore, placing reliance on the results gathered from these techniques comes into conflict with the `right to fair trial'. Invocations of a compelling public interest cannot justify the dilution of constitutional rights such as the `right against self-incrimination'.

223. In light of these conclusions, we hold that no individual should be forcibly subjected to any of the techniques in question, whether in the context of investigation in criminal cases or otherwise. Doing so would amount to an unwarranted intrusion into personal liberty. However, we do leave room for the voluntary administration of the impugned techniques in the context of criminal justice, provided that certain safeguards are in place. Even when the subject has given consent to undergo any of these tests, the test results by themselves cannot be admitted as evidence because the subject does not exercise conscious control over the responses during the administration of the test. However, any information or material that is subsequently discovered with the help of voluntary administered test results can be admitted, in accordance with Section 27 of the Evidence Act, 1872. The National Human Rights Commission had published `Guidelines for the Administration of Polygraph Test (Lie Detector Test) on an Accused' in 2000. These guidelines should be strictly adhered to and similar safeguards should be adopted for conducting the `Narcoanalysis technique' and the `Brain Electrical Activation Profile' test. The text of these guidelines has been reproduced below:

(i) No Lie Detector Tests should be administered except on the basis of consent of the accused. An option should be given to the accused whether he wishes to avail such test.

(ii) If the accused volunteers for a Lie Detector Test, he should be given access to a lawyer and the physical, emotional and legal implication of such a test should be explained to him by the police and his lawyer.

(iii) The consent should be recorded before a Judicial Magistrate.

(iv) During the hearing before the Magistrate, the person alleged to have agreed should be duly represented by a lawyer.

(v) At the hearing, the person in question should also be told in clear terms that the statement that is made shall not be a `confessional' statement to the Magistrate but will have the status of a statement made to the police.

(vi) The Magistrate shall consider all factors relating to the detention including the length of detention and the nature of the interrogation.

(vii) The actual recording of the Lie Detector Test shall be done by an independent agency (such as a hospital) and conducted in the presence of a lawyer.

(viii) A full medical and factual narration of the manner of the information received must be taken on record.

61. Further, in the context of the present case, the Court is of the view that the DNA Test or Narcoanalysis Test, as prayed by the applicant, is of no relevance in the case of rape. The DNA Test can be said to be a conclusive evidence regarding rape, but the said DNA test will not conclude that the applicant had not committed rape on the victim, even the test come negative, it cannot be ruled out that the rape has not been committed, therefore there is

no force in the argument of the learned counsel for the applicant and the prayer for conducting the DNA test and the Narcoanalysis test is refused.

62. In reference to the above findings, reliance is being placed on paragraph nos.6,7,8,9,10 and 11 of the judgment passed by Kerala High Court in **Crl. Rev. Pet. No.2329 of 2012, Abdurahiman vs. State of Kerala (decided on 10th July, 2013)**, wherein the Court was pleased to observe as under:-

6. Learned Public Prosecutor contended that the question of paternity does not arise for consideration in an allegation of rape. It is not the paternity of the child that is in issue, but the question is whether the victim has been sexually assaulted. Even assuming that the DNA test goes against the victim, it does not mean that no sexual assault has been committed by the accused. Viewed from any angle, according to the learned Public Prosecutor, there is no scope for DNA test in a trial of a case of rape.

7. The learned Public Prosecutor relied on the decision reported in Babu v. State of Kerala [2013 (2) KHC 526] and pointed out that this Court has elaborately considered the necessity to conduct the DNA test in a case of rape and has come to the conclusion that even assuming that the DNA test is against the accused, that by itself is not a clinching evidence and that has no relevance in determining whether the act committed amounts to a rape or not. In the light of the principle laid down in the said decisions, according to the learned Public Prosecutor, claim made for DNA test has no basis.

8. True, normally, the court will not, as a matter of fact, shut out the evidence which enables the court to determine the truth. But to say that a DNA test is the necessity in a case of rape cannot be accepted. True, in the case on hand, from the deposition produced along with the petition of the defacto complainant, it is seen that she has a case of only a solitary instance of sexual intercourse with the

accused as a result of which she claims to have been conceived. This aspect is highlighted by the learned counsel for the petitioner that the DNA test is the issue and that should have been allowed.

9. As already noticed, it is not the paternity that is in issue, but whether the act was committed by the accused, and if the act was committed by the accused, whether there was any consent on the part of the victim. Even assuming that the DNA test goes against the defacto complainant, that by itself may not be a ground to hold that the incident has not taken place as alleged by the victim. Sections 7 and 11 on which considerable reliance is placed by the learned counsel for the petitioner, have no application to the facts of the case. They deal with different circumstances and situations altogether. The learned counsel try to contend that the effect of sexual assault is impregnation and therefore, DNA test is relevant. It is not such an act which is contemplated by Sections 7 and 11 as could be clear from the illustrations provided by these Sections. The argument based on Sections 7 and 11 is misconceived.

10. True, in the decisions reported in State of Kerala v. Ayoob [2005 (2) KLT 441], the court has indicated the relevance of the DNA test. In the decision reported in Krishan Kumar Malik v. State of Haryana [2011 (7) SCC 130], in paragraph 45, it is held as follows:

"45. We have also gone through the orders of dismissal passed by this Court in Crl MP No. 9646 on 15.06.2009 as also of the review petition dated 5.11.2009 filed by Smt. Hardevi. Admittedly, the said orders passed in the SLP and the review petition by this Court

did not assign any reasons for the dismissal, thus it would not be proper and safe for us to place reliance thereon."

11. Apart from the fact that in relation to the new provision of Section 53 (A) in Cr.P.C., that decision cannot be taken to lay down principle that in case of rape, DNA test is a must. This Court in the decision referred to by the learned Public Prosecutor has considered the issue elaborately and has held that it is not necessary to go for a DNA test nor can that the result of DNA test is conclusive either way. If that be so, there is no merit in the contention that if the DNA test goes in favour of the petitioner, he would be exonerated. As rightly pointed out by the learned Public Prosecutor, the issue is one whether the act is alleged to have been committed by the petitioner is with consent or not and not whether the child is that of the petitioner. Following the principles laid down in the decision rendered by the Division Bench of this Court referred to by the learned Public Prosecutor, it is held that the court below was justified in declining to grant relief to the petitioner for DNA test though for different reasons.

63. Further reliance has been placed on paragraph 3 and 5 of the judgment passed by Bombay High Court in **Criminal Appeal No.111 of 2020, Dashrath s/o Hiraman Johare vs. State of Maharasthra (decided on 14th July, 2020)** wherein the Court was pleased to observe as under:-

3. Per contra, learned APP vehemently submitted that, perusal of the judgment by the Trial Judge would make it clear that he has considered all the aspects involved. Taking into consideration the relationship, the appellant has not much disputed about the age of the victim girl. She is a `child', as contemplated under the POCSO Act. In her FIR; statement under Section 164 of Cr.P.C. and testimony before the Trial Court, she has clearly stated that, she was raped by the present applicant-appellant and thereafter she has become pregnant. The learned Trial Judge has rightly held that there may be a mistake in taking the sample and, therefore, the said DNA test will not conclude that the applicant had not committed rape on the victim. The purpose of DNA test is different and even if it has come in negative; yet it does not rule out that the appellant never committed forcible sexual intercourse on the victim. The present appellant has taken disadvantage of the physical situation of the victim as well as her mother. He deserves no sympathy at all for committing such heinous crime.

5. It appears that the appellant is heavily relying on the result of the DNA test. In fact, the accused had admitted that document and, therefore, it appears that the concerned authority, i.e. Chemical Analyzer, was not examined by the prosecution. The learned Trial Judge has taken pains to say as to whether the DNA test can be said to be a conclusive evidence regarding rape and whether it can be solely relied on by excluding the ocular evidence. This Court agrees to the observation made by the learned Trial Judge that the DNA report is a corroborative piece of evidence. Whether the ocular evidence is believable or not and whether it has shaken in cross, will have the effect on the ultimate analysis of the evidence. The general principle is that when there is variance between the ocular evidence and the medical evidence, then in catena of judgments, it has been held that ocular evidence will have to be given weightage as compared to the medical evidence.

64. Further reliance has been placed on the judgment passed by Kerala High Court in Crl. Rev. Pet. No.2280 of 2003, Anil Kumar vs. Ayyappan and another (decided on 5th April, 2013) and submitted that the Court was pleased

to observe in paragraph no.15 of the judgment as under:-

15. Finally, it is pointed out by the learned counsel for the revision petitioner that, at the appellate stage a document was produced which would show that maintenance was claimed for the child. Whether such a petition was filed or not is not a matter in dispute. But, one fact is very clear that the order by which the maintenance petition was allowed to be withdrawn was passed subsequent to the judgment of the trial court in S.C.No.10/1996 whereby the petitioner stood convicted and sentenced to suffer a term of imprisonment already made mention of. It is clear that he could not have produced the said order at the time of trial. The significance of the order is that, it is seen that when the petitioner receives summons on the proceedings instituted by PW3 for maintenance of the child, he moved a petition for DNA test. When that petition was taken up for hearing, it is seen that the petitioner submitted that the petition for maintenance is not pressed and that may be dismissed. Normally, DNA test had of no relevance in a case of rape. But, here one has to remember that there is only a solitary incident of violation of the body of the victim and the victim has a definite case that because of the said act she conceived. There is no case for the victim or her father that any subsequent sexual assault had occurred. Under these circumstances, the DNA test assumes significance and importance. Whatever that be, these aspects have not been considered by the courts below. May be because it was not urged at the relevant time. However, it is felt that these matters have a substantial bearing on the issue.

65. Accordingly, in view of the discussion made above and in light of the judgments passed by the Apex Court referred above, this Court is of the view that the confessions made by a semi-conscious person is not admissible in court. Deception Detecting Test report has some validity but is not totally admissible in court, which considers the circumstances under which it was obtained and assess its admissibility. Results of such tests can be used to get admissible evidence, can be collaborated with other evidence or to support other evidence. But if the result of this test is not admitted in a court, it cannot be used to support any other evidence obtained the course of routine investigation.

66. The Investigating Agency has statutory right to investigate the crime and to find out the truth and to reach to the accused. Narco Analysis Test for criminal interrogation is valuable technique which would profoundly affect both the innocent and the guilty and thereby hasten the cause of justice. Conducting of Narco Analysis Test and Brain Mapping Test on the accused is in process of collection of such evidence by the Investigating Agency. Section 161 of the Criminal Procedure Code enables the police to examine the accused also during the investigation. Criminal justice system cannot function without the cooperation of the people. Rather, it is the duty of every person to assist the State in the detection of the crime and bringing criminal to justice. Withholding such information cannot be traced to the right to privacy, which itself is not an absolute right. It is the statutory duty of every witness, who has the knowledge of the commission of the crime, to assist the State in giving evidence.

67. The criminal justice system should be based on just and equitable principles. In spite of the fact that Narco Analysis is "not so reliable" method, its significance and necessity in the present scenario cannot be in any way negated but yet it has its own controversies and concerns. With the growth and development of society the nature of the crime has been also changing and diversifying. The developments and advancements in science and technology should

be utilized to the fullest for effective aids to interrogation and investigations in criminal justice system.

68. It could be understood that these pscho-medicl tests are violative in character but at the same time individual interest cant be placed above collective interest. Let us fulfill the dream of having crime free society and the maxim "Jura publica anteferendaprivatis juribus" should be followed meaning thereby "public rights are to be preferred to private rights whenever there being a dilemma between individual liberties and security of public interest. The Forensic science is defined as the application of science in answering questions that are of legal interest. More specifically, forensic scientists employ techniques and tools to interpret crime scene evidence, and use that information in investigations.

69. The DNA evidence, no doubt has the ability to increase the accuracy of verdicts in criminal trials. But this does not mean that we should be complacent about its use and presentation. DNA will create a comprehensive database eventually resulting in a human databank of DNA publicly accessible and tremendously utilized in criminal investigations.

70. Further, in the context of the present case, the Court is of the view that the DNA Test or Narcoanalysis Test, as prayed by the applicant, is of no relevance in the case of rape. The DNA Test can be said to be a conclusive evidence regarding rape, but the said DNA test will not conclude that the applicant had not committed rape on the victim, even the test come negative, it cannot be ruled out that the rape has not been committed, therefore there is no force in the argument of the applicant's counsel.

71. This Court cannot go into the disputed questions of fact once the prima facie offence is made out and in the present case, as per the allegation, prima facie offence is made out against the applicant. Therefore, no case is made out by the applicant for interference by this Court exercising power under Section 482 CrPC for the relief claimed and no such direction can be issued as prayed by the applicant.

72. **In the result, the prayer for quashing of impugned order dated 15.10.2019 passed by Special Judge (Protection of Children from Sexual Offences Act, 2012)/VIII Additional District and Sessions Judge, Kanpur Dehat in Application No.28Kha, under Section 54 CrPC is refused. There is no merit in this application filed by the applicant under Section 482 Cr.P.C.**

73. **Accordingly, this application filed under Section 482 Cr.P.C. by the applicant is dismissed.**

(2021)11ILR A474
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.09.2021

BEFORE

THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Application U/S 482 No.19576 of 2020

Ram Bahal ....Applicant
Versus
State of U.P. & Anr. ....Opposite Parties

Counsel for the Applicant:
Sri Arvind Singh, Sri Roopesh Kumar Mishra

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

Mines and Minerals (Development and Regulation) Act, 1957- Section 22 - Bar u/s 22 not attracted at the stage of lodging of an FIR

or registration of criminal case-bar only when Magistrate takes cognizance of oofence and issue process-case against the Applicant are under MMDR Act andd under IPC-both not same and one-distinct-Registering a case for offence u/s 379 IPC and investigating it u/s 173 Cr.P.C-well within jurisdiction-as far as offence under the MMDR , concerned authorized officer u/s 22 -to have filed a complaint before the Magistrate along with the police report-proceedings so far as relate to offences under the Penal Code cannot be faulted-but insofar as offences under the MMDR Act are concerned-procedure u/s 22 not followed-cognizance by the Magistrate cannot be legally sustained-proceedings set aside in this regard.

Application partly allowed.(E-9)

List of Cases cited:

1. M.Palanisamy Vs The St. of T.N., AIR 2012 Mad 215

2.Centre for Public Interest Litigation Vs U.O.I., (2012) 3 SCC 1

3. M.C.Mehta Vs Kamal Nath, (1997) 1 SCC 388

4. Intellectuals Forum Vs St. of A.P., (2006) 3 SCC 549

5. Lalita Kumari Vs Govt. Of U.P. & ors., (2014) 2 SCC 1

6. H.N. Rishbud & ors. Vs St. of Delhi, AIR 1955 SCC196

7. Manohar Lal Sharma Vs Principal Secretary, (2014) 2 SCC 532

8. Maqbul Hussain Vs St. of Bombay, AIR 1953 SC 325

9. Charles, J. In R VsMiles, (1890) 24 QBD 423

10.The St. of Bombay Vs S.L. Apte & anr., AIR 1961 SC 578

11.Om Prakash Gupta VsSt. of UP, AIR 1957 SC 458

12. St. of M.P. Vs Veereshwar Rao Agnihotri, AIR 1957 SC 592

13. St. of Bihar Vs Murad Ali Khan & ors., (1988) 4 SCC 655

14. Blockburger Vs United St. s, 284US 299 (1932)

15. Jeffers Vs United St. s,432 US 137 (1977)

16. St. (NCT of Delhi) Vs Sanjay, (2014) 9 SCC 772

17. Jayant and ors. Vs St. of M.P., (2021) 2 SCC 670

18. Kanwar Pal Singh Vs St. of U.P. & anr.,(2020)14 SCC 331

19.St. (NCT of Delhi) Vs Sanjay, (2014) 9 SCC 772

20. H.N.Rishbud Vs St. of Delhi, AIR 1955 SC 196

21. Directorate of Enforcement Vs Deepak Mahajan, (1994) 3 SCC 440

(Delivered by Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard Sri Arvind Singh, learned counsel for the applicant and Sri Vinod Kant, learned Additional Advocate General appearing along with Sri Pankaj Saxena, learned Additional Government Advocate-I and Sri Arvind Kumar, learned Additional Government Advocate for the State-opposite parties.

2. The present application under Section 482 CrPC has been filed seeking to quash the charge-sheet no. 19 of 2019 dated 30.05.2019 and cognizance order dated 27.08.2020 along with entire proceedings of Case No. 6772 of 2020 (State Vs. Dinesh Sharma and others) under Section 4, 21 of the Mines and Minerals (Development and Regulation) Act, 19571 read with Rules 3, 57, 70 of Uttar Pradesh Minor Minerals (Concession) Rules, 19632 and Sections 379, 411 Indian Penal Code3, Police Station Chopan, District Sonebhadra arising out of Case Crime No. 274 of 2018 pending in the court of Chief Judicial Magistrate, Sonebhadra.

3. The principal ground which is sought to be raised in order to raise a challenge to the proceedings is that the provisions under Sections

21 and 22 of the Mines and Minerals (Development and Regulation) Act, 1957 would operate as a bar against initiation of proceedings by registration of an FIR in respect of allegations constituting offences under the Penal Code. It has been contended that the applicant cannot be prosecuted and punished for the same offence under two enactments namely the MMDR Act and the Indian Penal Code as the same would be barred by applying the rule against double jeopardy. It has been further urged that in respect of the offence, if at all committed, cognizance would have been taken under the MMDR Act, that too on the basis of a complaint to be filed under Section 22 by an authorized officer.

4. Learned Additional Advocate General submits that the bar under Section 22 of the Act would apply only in respect of offences punishable under the MMDR Act and not in respect of offences under the provisions of the Indian Penal Code. He accordingly submits that the initiation of proceedings by lodging of an FIR cannot be said to be prohibited under law. Further submission is that the FIR having been lodged for distinct offences under the Penal Code and MMDR Act, there is no illegality in initiation of the criminal proceedings pursuant thereto. It is pointed out that the State Government has authorized all the District Magistrates/District Mines Officers, in the State of Uttar Pradesh, for the purposes of initiating prosecution under Section 22 of the MMDR Act and Rule 74 of the Concession Rules.

5. The question which thus falls for consideration is with regard to the scope and applicability of the bar contained under Section 22 of the MMDR Act and as to whether the provisions under the section would operate as a bar against initiation of proceedings also in respect of offences under the Penal Code. The other question would be as to what would be the stage when the Magistrate can be said to have taken cognizance so as to attract the bar under Section 22 of the MMDR Act.

6. In order to appreciate the rival contentions, the relevant provisions under the MMDR Act may be adverted to, and the same are as follows :-

"**4. Prospecting or mining operations to be under licence or lease. (**1) No person shall undertake any reconnaissance, prospecting or mining operations in any area, except under and in accordance with the terms and conditions of a reconnaissance permit or of a prospecting licence or, as the case may be, of a mining lease, granted under this Act and the rules made thereunder :

Provided that nothing in the sub-section shall effect any prospecting or mining operations undertaken in any area in accordance with the terms and conditions of a prospecting licence or mining lease granted before the commencement of this Act which

Provided further that nothing in this sub-section shall apply to any prospecting operations undertaken by the Geological Survey of India, the Indian Bureau of Mines, the Atomic Minerals Directorate for Explorations and Research of the Department of Atomic Energy of the Central Government, the Directorate of Mining and Geology of any State Government (by whatever name called), and the Mineral Exploration Corporation Limited, a Government company within the meaning of Clause (45) of Section 2 of the Companies Act, 2013 (18 of 2013), and any such entity that may be notified for this purpose by the Central Government.

(1-A) No person shall transport or store or cause to be transported or stored any mineral otherwise than in accordance with the provisions of this Act and the rules made thereunder.

(2) No reconnaissance permit, prospecting licence or mining lease shall be granted otherwise than in accordance with the provisions of this Act and the rules made thereunder.

(3) Any State Government may, after prior consultation with the Central Government and in accordance with the rules made under Section 18, undertake reconnaissance, prospecting or mining operations with respect to any mineral specified in the First Schedule in any area within that State which is not already held under any reconnaissance permit, prospecting licence or mining lease.

21. Penalties. (1) Whoever contravenes the provisions of sub-section (1) or sub-section (1-A) of Section 4 shall be punishable with imprisonment for a term which may extend to five years and with fine which may extend to five lakh rupees per hectare of the area.

(2) Any rule made under any provision of this Act may provide that any contravention thereof shall be punishable with imprisonment for a term which may extend to two years or with fine which may extend to five lakh rupees, or with both, and in the case of a continuing contravention, with additional fine which may extend to fifty thousand rupees for every day during which such contravention continues after conviction for the first such contravention.

(3) Where any person trespasses into any land in contravention of the provisions of sub-section (1) of Section 4, such trespasser may be served with an order of eviction by the State Government or any authority authorised in this behalf by that Government and the State Government or such authorised authority may, if necessary, obtain the help of the police to evict the trespasser from the land.

(4) Whenever any person raises, transports or causes to be raised or transported, without any lawful authority, any mineral from any land and for that purpose, uses any tool, equipment, vehicle or any other thing, such mineral, tool, equipment, vehicle or any other thing shall be liable to be seized by an officer or authority specially empowered in this behalf.

(4-A) Any mineral, tool, equipment, vehicle or any other thing seized under sub-section (4), shall be liable to be confiscated by an order of the court competent to take cognizance of the offence under sub-section (1) and shall be disposed of in accordance with the directions of such court.

(5) Whenever any person raise, without any lawful authority, any mineral from any land, the State Government may recover from such person the mineral so raised, or where such mineral has already been disposed of, the price thereof, and may also recover from such person rent, royalty or tax, as the case may be, for the period during which the land was occupied by such person without any lawful authority.

(6) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an offence under sub-section (1) shall be cognizable.

22. Cognizance of offences. No court shall take cognizance of any offence punishable under this Act or any rules made thereunder except upon complaint in writing made by a person authorised in this behalf by the Central Government or State Government.

23-B. Power to search. If any gazetted officer of the Central or a State Government authorised by the Central Government or a State Government, as the case may be, in this behalf by general or special order

has reason to believe that any mineral has been raised in contravention of the provisions of this Act or the rules made thereunder or any document or thing in relation to such mineral; secreted in any place or vehicle he may be search for such mineral, document or thing and the provisions of Section 100 of the Code of Criminal Procedure, 1973 (2 of 1974), shall apply to every such search."

7. The corresponding provisions with regard to cognizance of offences under the Uttar Pradesh Minor Minerals (Concession) Rules, 1963, which have been made in exercise of powers under Section 15 of the MMDR Act, are also required to be referred to. Rules 3, 57, 70, 74 of the Concession Rules are being extracted below :-

"3. Mining operations to be under a mining lease or mining permit.-(1) No person shall undertake any mining operations in any area within the State of any minor minerals to which these rules are applicable except under and in accordance with the terms and conditions of a mining lease or mining permit granted under these rules:

Provided that nothing shall affect any operations undertaken in accordance with the terms and conditions of a mining lease or permit duly granted before the commencement of these rules.

(2) No mining lease or mining permit shall be granted otherwise than in accordance with the provisions of these rules.

57. Penalty for unauthorised mining.-Whoever contravenes the provisions of Rule 3 shall on conviction be punishable with imprisonment of either description for a term, which may extend up to six months or with fine which may extend to twenty-five thousand rupees or with both."

70. Restriction on transport of the Minerals.- (1) The holder of a mining lease or permit or a person authorised by him in this behalf may issue a pass in Form MM-11 to every person carrying a consignment of minor mineral by a vehicle, animal or any other mode of transport. The State Government may, through the District Officer, make arrangements for the supply of printed MM-11 Form books on payment basis.

(2) No person shall carry, within the State a minor mineral by a vehicle, animal or any other mode of transport, excepting railway, without carrying a pass in Form MM-11 issued under sub-rule (1), Form-C issued under Rule 5 (2) of The Uttar Pradesh Mineral (Prevention of Illegal Mining, Transportation and Storage) Rules, 2002 or similar valid transit pass issued by any other State.

Provided that if the State Government enters into an agreement to collect the Royalty through contractor, receipt of royalty or zero receipt as the case may be shall be issued by such contractor and in such cases carrying out such receipt with Form MM-11 will be mandatory for transportation.

(3) Every person carrying any minor mineral shall, on demand by any officer authorised under Rule 66 or such officer as may be authorised by the State Government in this behalf, so the said pass to such officer and allow him to verify the correctness of the particulars of the pass with references to the quantity of the Minor Mineral.

(4) The State Government may establish a check post for any area included in any mining lease or permit, and when a check post is so established public notice shall be given to this fact by publication in the Gazette and in such other manner as may be considered suitable by the State Government.

(5) No person shall transport a minor mineral for which these rules apply from such area without first presenting the mineral at the check post established for that area for verification of the weight or measurement of the mineral.

(6) Any person found to have contravened any provision of this rule shall on, conviction, be punishable with imprisonment of either description for a term which may extend to six months or with fine which may extend to Twenty Five thousand rupees or with both.

74. Cognizance of offences- (1) No court shall take cognizance of any offence punishable under these rules except on a complaint in writing of the facts constituting such offences by the District Officer or by any officer authorised by him in this behalf.

(2) No court inferior to that of a Magistrate of the first class, shall try any offence under these rules."

8. On an analysis of the provisions of the MMDR Act and the Concession Rules, referred to above, the position which emerges is as follows :-

8.1 Section 4, in particular sub-section (1-A) thereof puts a total restriction on transportation or storage of any mineral otherwise than in accordance with the provisions of the Act and the Rules made thereunder.

8.2 Section 21 provides for the penalties and as per the terms of the section contravention of Section 4 (1-A) of the Act is punishable. Sub-section (3) of Section 21 would show that the State Government or any other authority authorized by the State Government may obtain the help of police to evict any person who trespasses into any land in contravention of the provisions of Section 4 (1) of the Act. Sub-section (4) further empowers the officer or an authority specially empowered in this behalf to seize any tool, equipment, vehicle or any other thing which are used by any person who illegally or without any lawful authority raises, transports any mineral from any land. Those minerals, tools, equipment or vehicle or any other thing so seized shall be confiscated by the order of the court competent to take cognizance and shall be disposed of in accordance with the directions of such court as contemplated under sub-section (4-A) of Section 4 of the Act. Sub-section (6) of Section 21 has been inserted by an Amendment Act of 1986 whereby an offence under sub- section (1) of the section has been made cognizable.

8.3 Section 22 would show that cognizance of any offence punishable under the Act or the Rules made thereunder shall be taken only upon a written complaint made by a person authorized in this behalf by the Central Government or the State Government.

8.4 Section 23-B confers power on any gazetted officer of the Central or State Government authorized in that behalf to make search of minerals, documents or things in case there is a reason to believe that any mineral has been raised in contravention of the Act or the Rules made thereunder.

8.5 Rule 3 of the Concession Rules prohibits any mining operations in respect of a minor mineral, in any area within the State to which the rules are applicable except under and in accordance with the terms of a mining lease or a mining permit granted under the rules. The contravention of Rule 3 invites penalty and constitutes a punishable offence. Rule 70 contains a restriction on transport of the minerals and in terms thereof there is a prohibition on transport of a minor mineral within the State, without carrying a pass in the prescribed form or similar valid transit pass issued by any other

State. The contravention of the provision has been made punishable. In terms of Rule 74, no court is to take cognizance of any offence punishable under the rules except on a complaint in writing by the District Officer or by any officer authorized by him in this behalf.

9. Certain provisions of the Code, which are relevant for the purposes of the controversy involved in the present case, are also required to be referred to and the same are as follows :-

"2.Definitions-(c)"cognizable offence" means an offence for which, and "cognizable case" means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant;

(d) "complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

(h) "investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf;

4. Trial of offences under the Indian Penal Code and other laws-(1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.

5. Saving-Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.

41. When police may arrest without warrant-(1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person-

(a) who commits, in the presence of a police officer, a cognizable offence;

(b) against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine, if the following conditions are satisfied, namely:

(i) the police officer has reason to believe on the basis of such complaint, information, or suspicion that such person has committed the said offence;

(ii) the police officer is satisfied that such arrest is necessary-

(a) to prevent such person from committing any further offence; or

(b) for proper investigation of the offence; or

(c) to prevent such person from causing the evidence of the offence to disappear

or tampering with such evidence in any manner; or

(d)to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or

(e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured, and the police officer shall record while making such arrest, his reasons in writing.

Provided that a police officer shall, in all cases where the arrest of a person is not required under the provisions of this sub-section, record the reasons in writing for not making the arrest.

(ba) against whom credible information has been received that he has committed a cognizable offence punishable with imprisonment for a term which may extend to more than seven years whether with or without fine or with death sentence and the police officer has reason to believe on the basis of that information that such person has committed the said offence.

(c)who has been proclaimed as an offender either under this Code or by order of the State Government; or

(d) in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; or

(e) who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; or

(f) who is reasonably suspected of being a deserter from any of the Armed Forces of the Union; or

(g) who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India; or

(h) who, being a released convict, commits a breach of any rule made under sub-section (5) of section 356; or

(i) for whose arrest any requisition, whether written or oral, has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition.

2. Subject to the provisions of section 42, no person concerned in a non-cognizable offence or against whom a complaint has been made or credible information has been received or reasonable suspicion exists of his having so concerned, shall be arrested except under a warrant or order of a Magistrate.

149. Police to prevent cognizable offences-

Every police officer may interpose for the purpose of preventing, and shall, to the best of his ability, prevent, the commission of any cognizable offence.

150. Information of design to commit cognizable offences- Every police officer receiving information of a design to commit any cognizable offence shall communicate such information to the police officer to whom he is subordinate, and to any other officer whose duty it is to prevent or take cognizance of the commission of any such offence.

151. Arrest to prevent the commission of cognizable offences-(1) A police officer, knowing of a design to commit any cognizable offence may arrest, without orders from a Magistrate and without a warrant, the person so designing, if it appears to such officer that the commission of the offence cannot be otherwise prevented.

(2) No person arrested under sub-section (1) shall be detained in custody for a period exceeding twenty-four hours from the time of his arrest unless his further detention is required or authorized under any other provisions of this Code or of any other law for the time being in force.

152. Prevention of injury to public property-A police officer may of his own authority interpose to prevent any injury attempted to be committed in his view to any public property, movable or immovable, or the removal or injury of any public landmark or buoy or other mark used for navigation."

10. An overview of the aforestated provisions under the Code would go to show the following :-

10.1 Sub-section (1) of Section 4 provides that all offences under the Indian Penal Code shall be investigated, inquired into, tried and otherwise dealt with according to the provisions contained in the said Code.

10.2 Sub-section (2) of Section 4 provides that all offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions but subject to any enactment regulating the manner or place of investigation, inquiry or trial of such offences.

10.3 According to Section 5 of the Code, the procedure provided under the Special Act shall prevail over the general procedure provided under the Code of Criminal Procedure.

10.4 Section 41 of the Code goes to show that a police officer may without an order from a Magistrate and without a warrant, arrest any person, under the circumstances provided therein.

10.5 Chapter XI (Sections 149 to 153) of the Code confers powers and duties upon the police officer to take preventive action in certain cases.

11. It would also be relevant to refer to the provisions of Chapter XIV, XV and XVI of the Code.

11.1 Chapter XIV (Sections 190-199) of the Code deals with "Conditions requisite for initiation of proceedings". Section 190 empowers a Magistrate to take cognizance of an offence in certain circumstances. Sub-section (1) thereof is material and may be quoted in extenso:

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

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

(b) upon a police report of such facts;

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

11.2 Chapter XV (Sections 200-203) relates to "Complaints to Magistrates" and covers cases before actual commencement of proceedings in a court or before a Magistrate. Section 200 of the Code requires a Magistrate taking cognizance of an offence to examine the complainant and his witnesses on oath. Section 202, however, enacts that a Magistrate is not bound to issue process against the accused as a matter of course. It enables him before the issue of process either to inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit for the purpose of deciding whether there is sufficient ground for proceeding further. The underlying object of the inquiry under Section 202 is to ascertain whether there is prima facie case against the accused.

11.3 Chapter XVI is in respect of commencement of proceedings before Magistrates and would become applicable after cognizance of an offence has been taken by the Magistrate under Chapter XIV. Section 204, whereunder process can be issued, reads as under :-

"204. Issue of process.-- (1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be-

(a) a summons case, he shall issue his summons for the attendance of the accused, or

(b) a warrant case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.

(2) No summons or warrant shall be issued against the accused under sub-section (1) until a list of the prosecution witnesses has been filed.

(3) In a proceeding instituted upon a complaint made in writing, every summons or warrant issued under sub-section (1) shall be accompanied by a copy of such complaint.

(4) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.

(5) Nothing in this section shall be deemed to affect the provisions of Section 87."

12. The provisions of the MMDR Act, which is an Act to provide for the development and regulation of mines and minerals under the control of the Union have been consistently interpreted keeping in view the compelling need to restore the ecological imbalances and to stop damages being caused to nature. The issues relating to the adverse environmental impact of illegal mining transportation and storage of minerals have been viewed with concern and the need to scrupulously adhere to the statutory provisions with regard to regulation of the mining operations have been emphasized.

13. The public trust doctrine has been held to be part of our legal system wherein the State is a trustee of all natural resources which are by nature meant for public use and enjoyment, and

is under the legal duty to protect the environment and the natural resources. In this regard, reference may be had to the decisions in **M.Palanisamy Vs. The State of Tamil Nadu4, Centre for Public Interest Litigation Vs. Union of India,5 M.C.Mehta Vs. Kamal Nath6**, and **Intellectuals Forum Vs. State of A.P.7**

14. In the Constitution Bench judgment in **Lalita Kumari Vs. Govt. of U.P. and others8,** registration of FIR under Section 154 of the Code has been held mandatory, if the information discloses commission of a cognizable offence.

15. The question as to whether proceedings can be held to be vitiated upon a defect in investigation or the same can be held to be a mere irregularity was subject matter of consideration in **H.N. Rishbud and others Vs. State of Delhi9**, and it was held that a defect or illegality in investigation, however serious, has no direct bearing on the competence or the procedure relating to cognizance or trial. The relevant observations made in this regard are being extracted below :-

"9.The question then requires to be considered whether and to what extent the trial which follows such investigation is vitiated. Now, trial follows cognizance and cognizance is preceded by investigation. This is undoubtedly the basic scheme of the Code in respect of cognizable cases. But it does not necessarily follow that an invalid investigation nullifies the cognizance or trial based thereon. Here we are not concerned with the effect of the breach of a mandatory provision regulating the competence or procedure of the Court as regards cognizance or trial. It is only with reference to such a breach that the question as to whether it constitutes an illegality vitiating the proceedings or a mere irregularity arises.

A defect or illegality in investigation, however serious, has no direct bearing on the competence or the procedure relating to cognizance or trial. No doubt a police report which results from an investigation is provided in Section 190 CrPC as the material on which cognizance is taken. But it cannot be maintained that a valid and legal police report is the foundation of the jurisdiction of the Court to take cognizance. Section 190 CrPC is one out of a group of sections under the heading "Conditions requisite for initiation of proceedings". The language of this section is in marked contrast with that of the other sections of the group under the same heading, i.e. Sections 193 and 195 to 199.

These latter sections regulate the competence of the Court and bar its jurisdiction in certain cases excepting in compliance therewith. But Section 190 does not. While no doubt, in one sense, Clauses (a), (b) and (c) of Section 190(1) are conditions requisite for taking of cognizance, it is not possible to say that cognizance on an invalid police report is prohibited and is therefore a nullity. Such an invalid report may still fall either under Clause (a) or (b) of Section 190(1), (whether it is the one or the other we need not pause to consider) and in any case cognizance so taken is only in the nature of error in a proceeding antecedent to the trial. To such a situation Section 537 CrPC which is in the following terms is attracted :

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, unless such error, omission or irregularity, has in fact occasioned a failure of justice."

If, therefore, cognizance is in fact taken, on a police report vitiated by the breach

of a mandatory provision relating to investigation, there can be no doubt that the result of the trial which follows it cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice. That an illegality committed in the course of investigation does not affect the competence and the jurisdiction of the Court for trial is well settled as appears from the cases in- 'Parbhu v. Emperor', AIR 1944 PC 73 (C) and 'Lumbhardar Zutshi v. The King', AIR 1950 PC 26 (D)."

16. It was thereafter held in the case of **H.N. Rishbud** (supra) that when the breach of such a mandatory provision is brought to the knowledge of the Court at a sufficiently early stage, the Court, while not declining cognizance, will have to take the necessary steps to get the illegality cured and the defect rectified.

17. The power to investigate into offences which are of a cognizable offence by the police officer concerned as part of our criminal justice system whereunder the investigation of an offence is the domain of the police was emphasized in **Manohar Lal Sharma Vs. Principal Secretary10**, and it was held that where such power is exercised consistent with the statutory provisions and for a legitimate purpose the courts ordinarily would not interfere. It was stated thus :

"24. In the criminal justice system the investigation of an offence is the domain of the police. The power to investigate into the cognizable offences by the police officer is ordinarily not impinged by any fetters. However, such power has to be exercised consistent with the statutory provisions and for legitimate purpose. The courts ordinarily do not interfere in the matters of investigation by police, particularly, when the facts and circumstances do not indicate that the investigating officer is not functioning bona fide. In very exceptional cases, however, where the court finds that the police officer has exercised his investigatory powers in breach of the statutory provision putting the personal liberty and/or the property of the citizen in jeopardy by illegal and improper use of the power or there is abuse of the investigatory power and process by the police officer or the investigation by the police is found to be not bona fide or the investigation is tainted with animosity, the court may intervene to protect the personal and/or property rights of the citizens."

18. In order to consider the question as to whether the provisions of the MMDR Act would either explicitly or impliedly exclude the provisions of the Penal Code when the act of the accused is an offence under both the enactments on the principle of the rule against 'double jeopardy', it may be noted that in order to attract applicability of the aforementioned principle as incorporated under Article 20 (2) of the Constitution, there must be a second prosecution and punishment for the same offence for which the accused has been prosecuted and punished previously. A subsequent trial or a prosecution and punishment would not be barred if the ingredients of the two offences are distinct.

19. The rule against double jeopardy is embodied in the common law maxim "nemo debet bis vexari pro una et eadem causa". It is a basic rule of criminal law that no man shall be put in jeopardy twice for one and the same offence and provides foundation for the plea based on the doctrine of autrefois convict.

20. The principle of 'autrefois convict' or 'double jeopardy' as incorporated under Article 20 (2) of the Constitution came up for consideration in the Constitution Bench judgment in the case of Maqbul Hussain Vs. State of Bombay11, wherein it was held that where the offences are distinct, there is no question of the rule against double jeopardy

being extended and applied. Referring to the observations made by Charles, J. in R. v. Miles12 and the maxim "Nimo Bis Debet Punire Pro Uno Delicto" it was stated as follows :-

"7. The fundamental right which is guaranteed in Article 20(2) enunciates the principle of 'autrefois convict' or 'double jeopardy'. The roots of that principle are to be found in the well-established rule of the common law of England 'that where a person has been convicted of an offence by a court of competent jurisdiction the conviction is a bar to all further criminal proceedings for the same offence.' (Per Charles, J. in R. v. Miles (1890) 24 QBD 423. To the same effect is the ancient maxim 'Nemo bis debet punire pro uno delicto', that is to say that no one ought to be twice punished for one offence or as it is sometimes written 'pro eadem causa', that is, for the same cause."

21. The principle on which a plea of autrefois convict or autrefois acquit may be taken was also considered by referring to **Halsbury's Laws of England, Vol. 9, p.152 and 153, para 21213** and it was stated thus :-

"8. This is the principle on which the party pursued has available to him the plea of "autrefois convict" or "autrefois acquit".

"The plea of "autrefois convict" or "autrefois acquit" avers that the defendant has been previously convicted or acquitted on a charge for the same offence as that in respect of which he is arraigned..... The question for the jury on the issue is whether the defendant has previously been in jeopardy in respect of the charge on which he is arraigned, for the rule of law is that a person must not be put in peril twice for the same offence. The test is whether the former offence and the offence now charged have the same ingredients in the sense that the facts constituting the one are sufficient to justify a conviction of the other, not that the facts relied on by the Crown are the same in the two trials. A plea of 'autrefois acquit' is not proved unless it is shown that the verdict of acquittal of the previous charge necessarily involves an acquittal of the latter." (Vide Halsbury's Laws of England-Hailsham Edition, Vol. 9, pages 152 and 153, para 212)."

22. The **Fifth Amendment of the American Constitution and Constitutional Law by Willis14** were referred to and it was observed as follows :-

"9. This principle found recognition in Section 26 of the General Clauses Act, 1897-

"Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments but shall not be liable to be punished twice for the same offence,"

and also in Section 403(1) of the Criminal Procedure Code, 1898, -

"A person who has been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236, or for which he might have been convicted under Section 237."

10. The Fifth Amendment of the American Constitution enunciated this principle in the manner following :-

".....nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be witness against himself....."

Willis in his Constitutional Law, at page 528, observes that the phrase

"jeopardy of life or limb" indicates that the immunity is restricted to crimes of the highest grade, and that is the way Blackstone states the rule. Yet, by a gradual process of liberal construction the Courts have extended the scope of the clause to make it applicable to all indictable offences, including misdemeanours."....."Under the United States rule, to be put in jeopardy there must be a valid indictment or information duly presented to a Court of competent jurisdiction, there must be an arraignment and plea, and a lawful jury must be impaneled and sworn. It is not necessary to have a verdict. The protection is not against a second punishment but against the peril in which he is placed by the jeopardy mentioned."

11. These were the materials which formed the background of the guarantee of fundamental right given in Article 20 (2). It incorporated within its scope the plea of "autrefois convict" as known to the British jurisprudence or the plea of double jeopardy as known to the American Constitution but circumscribed it by providing that there should be not only a prosecution but also a punishment in the first instance in order to operate as a bar to a second prosecution and punishment for the same offence."

23. The rule against double jeopardy as embodied in Article 20 (2) of the Constitution was subject matter of consideration in the Constitution Bench judgment in the case of **The State of Bombay Vs. S.L. Apte & Another15**, and it was held that the rule applies only when both complaints relate to the same offence. It was stated thus :-

"13. To operate as a bar the second prosecution and the consequential punishment thereunder must be for "the same offence". The crucial requirement therefore for attracting the Article is that the offences are the same i.e., they should be identical. If, however, the two offences are distinct, then notwithstanding that the allegations of facts in the two complaints might be substantially similar, the benefit of the ban cannot be invoked. It is, therefore, necessary to analyse and compare not the allegations in the two complaints but the ingredients of the two offences and see whether their identity is made out..."

24 . In **Om Prakash Gupta Vs. State of UP16,** as well as **State of Madhya Pradesh v. Veereshwar Rao Agnihotri17**, it was held that prosecution and conviction or acquittal under Section 409 of IPC do not debar the accused being tried on a charge under Section 5(2) of the Prevention of Corruption Act, 1947 because the two offences are not identical in essence, import and content.

25. A similar plea in the context of the provisions contained under Section 55 of the Wild Life (Protection) Act, 1972, which is almost pari materia to Section 21 of the MMDR Act, to the effect that the provisions under Section 55 would constitute a bar to cognizance of an offence under Sections 447, 429 and 379 IPC, was repelled in the case of State of Bihar Vs. Murad Ali Khan and others18, and it was held that the cognizance of the offence against the accused can be taken under Section 55 of the Act, 1972 notwithstanding pendency of police investigation for offences under the relevant provisions of the Penal Code. The observations made in this regard are as follows :-

"24. We are unable to accept the contention of Shri R. F. Nariman that the specific allegation in the present case concerns the specific act of killing of an elephant, and that such an offence, at all events, falls within the overlapping areas between Section 429, IPC on the one hand and Section 9(1) read with Section

50(1) of the Act on the other and therefore constitutes the same offence. Apart from the fact that this argument does not serve to support the order of the High Court in the present case, this argument is, even on its theoretical possibilities, more attractive than sound. The expression "any act or omission which constitutes any offence under this Act" in Section 56 of the Act, merely imports the idea that the same act or omission might constitute an offence under another law and could be tried under such other law or laws also."

26. Referring to the decisions in **Blockburger v. United States19,** and J**effers v. United States20**, it was observed as follows :-

"26. Broadly speaking, a protection against a second or multiple punishment for the same offence, technical complexities aside, includes a protection against reprosecution after acquittal, a protection against reprosecution after conviction and a protection against double or multiple punishment for the same offence. These protections have since received constitutional guarantee under Article 20(2). But difficulties arise in the application of the principle in the context of what is meant by 'same offence'. The principle in American law is stated thus:

The proliferation of technically different offences encompassed in a single instance of crime behaviour has increased the importance of defining the scope of the offence that controls for purposes of the double jeopardy guarantee.

Distinct statutory provisions will be treated as involving separate offenses for double jeopardy purposes only if "each provision requires proof of an additional fact which the other does not" ***(Blockburger v. United States)*** (1932) 284 US 299. Where the same evidence suffices to prove both crimes, they are the same for double jeopardy purposes, and the clause forbids successive trials and cumulative punishments for the two crimes. The offences must be joined in one indictment and tried together unless the defendant requests that they be tried separately. (Jeffers v. United States) (1977) 432 US 137."

27. The tests to identify the common legal denominators of 'same offence' were considered by referring to Double Jeopardy21 by Friedland (Oxford 1969). It was stated thus :

"27. The expressions "the same offence", "substantially the same offence" "in effect the same offence" or "practically the same", have not done much to lessen the difficulty in applying the tests to identify the legal common denominators of "same offence". Friedland in 'Double Jeopardy' (Oxford 1969) says at page 108:

The trouble with this approach is that it is vague and hazy and conceals the thought processes of the court. Such an inexact test must depend upon the individual impressions of the Judges and can give little guidance for future decisions. A more serious consequence is the fact that a decision in one case that two offences are "substantially the same" may compel the same result in another case involving the same two offences where the circumstances may be such that a second prosecution should be permissible....

28. In order that the prohibition is attracted the same act must constitute an offence under more than one Act. If there are two distinct and separate offences with different ingredients under two different enactments, a double punishment is not barred..."

28. It is therefore seen that in order that the prohibition is attracted the same act must constitute an offence under more than one Act. If the two offences are distinct and separate,

with different ingredients under two different enactments, the rule against double jeopardy would not be attracted.

29. The questions as to whether the provisions contained under Sections 21, 22 and the other sections of MMDR Act operate as a bar against prosecution of a person who has been charged with allegations which constitute offences under Sections 379/414 and other provisions of the Penal Code and as to whether the provisions of the MMDR Act explicitly or impliedly exclude the provisions of the Penal Code when the act of an accused is an offence under both the enactments, were considered in detail in the case of **State (NCT of Delhi) Vs. Sanjay22** and it was stated as follows :-

"60. There cannot be any two opinions that natural resources are the assets of the nation and its citizens. It is the obligation of all concerned, including the Central and the State Governments, to conserve and not waste such valuable resources. Article 48-A of the Constitution requires that the State shall endeavour to protect and improve the environment and safeguard the forests and wild life of the country. Similarly, Article 51-A enjoins a duty upon every citizen to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for all the living creatures. In view of the Constitutional provisions, the Doctrine of Public Trust has become the law of the land. The said doctrine rests on the principle that certain resources like air, sea, water and forests are of such great importance to the people as a whole that it would be highly unjustifiable to make them a subject of private ownership.

61. Reading the provisions of the Act minutely and carefully, prima facie we are of the view that there is no complete and absolute bar in prosecuting persons under the Indian Penal Code where the offences committed by persons are penal and cognizable offence.

62. Sub-section (1-A) of Section 4 of the MMDR Act puts a restriction in transporting and storing any mineral otherwise than in accordance with the provisions of the Act and the rules made thereunder. In other words no person will do mining activity without a valid lease or license. Section 21 is a penal provision according to which if a person contravenes the provisions of Sub-section (1-A) of Section 4, he shall be prosecuted and punished in the manner and procedure provided in the Act. Sub-section (6) has been inserted in Section 4 by amendment making the offence cognizable notwithstanding anything contained in the Code of Criminal Procedure, 1973. Section 22 of the Act puts a restriction on the court to take cognizance of any offence punishable under the Act or any rule made thereunder except upon a complaint made by a person authorized in this behalf. It is very important to note that Section 21 does not begin with a non-obstante clause. Instead of the words "notwithstanding anything contained in any law for the time being in force no court shall take cognizance.....", the Section begins with the words "no court shall take cognizance of any offence."

63. It is well known that a non-obstante clause is a legislative device which is usually employed to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other enactment, that is to say, to avoid the operation and effect of all contrary provisions.

64. In **Liverpool Borough v. Turner Lord Campbell23**, C.J. at p. 380 said : (ER p.718)

"...No universal rule can be laid down for the construction of statutes, as to whether

mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of courts to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed."

65. In **Pratap Singh v. Shri Krishna Gupta24,** at p. 141, the Supreme Court while interpreting the mandatory and directory provisions of statute observed as under:

"3. We do not think that is right and we deprecate this tendency towards technicality; it is the substance that counts and must take precedence over mere form. Some rules are vital and go to the root of the matter; they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance with the rules read as whole and provided no prejudice ensues; and when the legislature does not itself state which Judges must determine the matter and, exercising a nice discrimination, sort out one class from the other along broad based, commonsense lines."

66. The question is whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other.

67. In **Maxwell on the Interpretation of Statutes,10th Edn. at page 38125**, it is stated thus:

"On the other hand, where the prescriptions of a statute relate to the performance of a public duty and where the invalidation of acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty without promoting the essential aims of the legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or, in other words, as directory only. The neglect of them may be penal, indeed, but it does not affect the validity of the act done in disregard of them."

30. Applying the principles of statutory interpretation and the language used under Section 22, it was held that the provision cannot be construed to be a complete and absolute bar with regard to taking action by the police for committing theft of minerals including sand from riverbed and it was held that the ingredients constituting the offence under the MMDR Act and the ingredients of dishonestly removing sand and gravel from riverbeds without consent, which is the property of the State, are distinct and in view thereof in respect of an offence under Section 378 IPC, on receipt of the police report, the Magistrate having jurisdiction can take cognizance of the said offence without awaiting receipt of complaint that may be filed by the authorized officer for taking cognizance in respect of violation of various provisions of the MMDR Act. The observations made in the judgment are as follows :-

"69.Considering the principles of interpretation and the wordings used in Section 22, in our considered opinion, the provision is not a complete and absolute bar for taking action by the police for illegal and dishonestly committing theft of minerals including sand from the riverbed. The Court shall take judicial notice of the fact that over the years rivers in India have been affected by the alarming rate of unrestricted sand mining which is damaging the

ecosystem of the rivers and safety of bridges. It also weakens riverbeds, fish breeding and destroys the natural habitat of many organisms. If these illegal activities are not stopped by the State and the police authorities of the State, it will cause serious repercussions as mentioned hereinabove. It will not only change the river hydrology but also will deplete the groundwater levels.

70. There cannot be any dispute with regard to restrictions imposed under the MMDR Act and remedy provided therein. In any case, where there is a mining activity by any person in contravention of the provisions of Section 4 and other sections of the Act, the officer empowered and authorized under the Act shall exercise all the powers including making a complaint before the jurisdictional magistrate. It is also not in dispute that the Magistrate shall in such cases take cognizance on the basis of the complaint filed before it by a duly authorized officer. In case of breach and violation of Section 4 and other provisions of the Act, the police officer cannot insist Magistrate for taking cognizance under the Act on the basis of the record submitted by the police alleging contravention of the said Act. In other words, the prohibition contained in Section 22 of the Act against prosecution of a person except on a complaint made by the officer is attracted only when such person sought to be prosecuted for contravention of Section 4 of the Act and not for any act or omission which constitute an offence under the Penal Code.

71. However, there may be situation where a person without any lease or licence or any authority enters into river and extracts sands, gravels and other minerals and remove or transport those minerals in a clandestine manner with an intent to remove dishonestly those minerals from the possession of the State, is liable to be punished for committing such offence Under Sections 378 and 379 of the Penal Code.

72. From a close reading of the provisions of MMDR Act and the offence defined under Section 378, IPC, it is manifest that the ingredients constituting the offence are different. The contravention of terms and conditions of mining lease or doing mining activity in violation of Section 4 of the Act is an offence punishable under Section 21 of the MMDR Act, whereas dishonestly removing sand, gravels and other minerals from the river, which is the property of the State, out of State's possession without the consent, constitute an offence of theft. Hence, merely because initiation of proceeding for commission of an offence under the MMDR Act on the basis of complaint cannot and shall not debar the police from taking action against persons for committing theft of sand and minerals in the manner mentioned above by exercising power under the Code of Criminal Procedure and submit a report before the Magistrate for taking cognizance against such person. In other words, in a case where there is a theft of sand and gravels from the Government land, the police can register a case, investigate the same and submit a final report Under Section 173, CrPC before a Magistrate having jurisdiction for the purpose of taking cognizance as provided in Section 190(1)(d) of the Code of Criminal Procedure.

73. After giving our thoughtful consideration in the matter, in the light of relevant provisions of the Act vis-à-vis the Code of Criminal Procedure and the Indian Penal Code, we are of the definite opinion that the ingredients constituting the offence under the MMDR Act and the ingredients of dishonestly removing sand and gravel from the riverbeds without consent, which is the property of the State, is a distinct offence under the IPC. Hence, for the commission of offence under Section 378 IPC, on receipt of the police report, the Magistrate having jurisdiction can take cognizance of the said offence without awaiting the receipt of complaint that may be filed by the authorized officer for taking cognizance in

respect of violation of various provisions of the MMDR Act. Consequently the contrary view taken by the different High Courts cannot be sustained in law and, therefore, overruled. Consequently, these criminal appeals are disposed of with a direction to the concerned Magistrates to proceed accordingly."

31. It was therefore held that the bar contained under Section 22 of the MMDR Act would be attracted only in a case where prosecution is initiated for contravention of the provisions under Section 4 of the MMDR Act and not for any act or omission which constitutes an offence under the Penal Code.

32. The scope and manner in which the bar under Section 22 operates in the context of offences under the MMDR Act/Rules and offences under the IPC in respect of illegal mining and transportation of minerals and the manner in which proceedings in respect of either kind of offences may be initiated and proceeded with, including the possibility of simultaneous and/or independent conduct of either kind of proceedings was considered in detail in the case of **Jayant and others Vs. State of Madhya Pradesh26.**

33. In considering the question as to when and at what stage the Magistrate can be said to have taken cognizance attracting the bar under Section 22 of the MMDR Act, the scope of the powers of a Magistrate with regard to taking of 'cognizance of offence' was discussed in the light of provisions contained under Sections 190, 200 to 204 and 156 (3) of the Code.

34. Referring to the earlier judicial precedents, the principles with regard to taking of 'cognizance' of an offence were summarized and it was reiterated that taking cognizance does not involve any formal action of any kind and the same occurs as soon as a Magistrate applies his mind to the suspected commission of an offence.

35. The question whether or not a Magistrate has taken cognizance of an offence would depend on the facts and circumstances of each case and no rule of universal application can be laid down as to when a Magistrate can be said to have taken cognizance. It was further held that on receiving the police report, if the Magistrate is satisfied that on the facts discovered or unearthed by the police there is sufficient material for him to take cognizance of an offence, he may take cognizance under Section 190 (1) (b) of the Code and issue process straightaway to the accused. Referring to the earlier decisions on the point it was stated as follows :-

"11.3. In **Chief Enforcement Officer v. Videocon International Limited27,** it is observed and held as under: (SCC pp. 499-504)

'19. The expression "cognizance" has not been defined in the Code. But the word (cognizance) is of indefinite import. It has no esoteric or mystic significance in criminal law. It merely means "become aware of" and when used with reference to a court or a Judge, it connotes "to take notice of judicially". It indicates the point when a court or a Magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such offence said to have been committed by someone.

20. "Taking cognizance" does not involve any formal action of any kind. It occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance is taken prior to commencement of criminal proceedings. Taking of cognizance is thus a sine qua non or condition precedent for holding a valid trial. Cognizance is taken of an offence and not of an offender. Whether or not a Magistrate has taken cognizance of an offence depends on the facts and circumstances of each case and no Rule of universal application can be laid down as to when a Magistrate can be said to have taken cognizance.

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26. In **Legal Remembrancer v. Abani Kumar Banerjee,28 the High Court of Calcutta** had an occasion to consider the ambit and scope of the phrase "taking cognizance" under Section 190 of the Code of Criminal Procedure, 1898 which was in pari materia with Section 190 of the present Code of 1973. Referring to various decisions, Das Gupta, J. (as His Lordship then was) stated: (AIR p. 438, para 7)

'7...What is "taking cognizance" has not been defined in the Criminal Procedure Code, and I have no desire now to attempt to define it. It seems to me clear, however, that before it can be said that any Magistrate has taken cognizance of any offence under Section 190(1)(a) CrPC, he must not only have applied his mind to the contents of the petition, but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter, proceeding under Section 200, and thereafter sending it for enquiry and report under Section 202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind, e.g. ordering investigation under Section 156(3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence.'

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32. In **Nirmaljit Singh Hoon v. State of W.B.29**, the Court stated that it is well settled that before a Magistrate can be said to have taken cognizance of an offence under Section 190(1)(a) of the Code, he must have not only applied his mind to the contents of the complaint presented before him, but must have done so for the purpose of proceeding under Section 200 and the provisions following that section. Where, however, he applies his mind only for ordering an investigation under Section 156(3) or issues a warrant for arrest of the accused, he cannot be said to have taken cognizance of the offence.

33. In **Darshan Singh Ram Kishan v. State of Maharashtra30,** speaking for the Court, Shelat, J. stated that under Section 190 of the Code, a Magistrate may take cognizance of an offence either (a) upon receiving a complaint, or (b) upon a police report, or (c) upon information received from a person other than a police officer or even upon his own information or suspicion that such an offence has been committed. As has often been said, taking cognizance does not involve any formal action or indeed action of any kind. It occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance, thus, takes place at a point when a Magistrate first takes judicial notice of an offence.

34. In **Devarapalli Lakshminarayana Reddy v. V. Narayana Reddy31**, this Court said:

'14. This raises the incidental question: What is meant by "taking cognizance of an offence" by a Magistrate within the contemplation of Section 190? This expression has not been defined in the Code. But from the scheme of the Code, the content and marginal heading of Section 190 and the caption of Chapter XIV under which Sections 190 to 199 occur, it is clear that a case can be said to be instituted in a court only when the court takes cognizance of the offence alleged therein. The ways in which such cognizance can be taken are set out in Clauses (a), (b) and (c) of Section 190(1). Whether the Magistrate has or has not taken cognizance of the offence will depend on the circumstances of the particular case including the mode in which the case is sought to be instituted, and the nature of the preliminary

action, if any, taken by the Magistrate. Broadly speaking, when on receiving a complaint, the Magistrate applies his mind for the purposes of proceeding under Section 200 and the succeeding Sections in Chapter XV of the Code of 1973, he is said to have taken cognizance of the offence within the meaning of Section 190(1)(a). If, instead of proceeding under Chapter XV, he has, in the judicial exercise of his discretion, taken action of some other kind, such as issuing a search warrant for the purpose of investigation, or ordering investigation by the police under Section 156(3), he cannot be said to have taken cognizance of any offence.'

11.4. In **Fakhruddin Ahmad v. State of Uttaranchal32**, it is observed and held as under: (SCC pp. 161-163)

"9. Before examining the rival contentions, we may briefly refer to some of the relevant provisions in the Code. Chapter XIV of the Code, containing Sections 190 to 199 deals with the statutory conditions requisite for initiation of criminal proceedings and as to the powers of cognizance of a Magistrate. Sub-section (1) of Section 190 of the Code empowers a Magistrate to take cognizance of an offence in the manner laid therein. It provides that a Magistrate may take cognizance of an offence either (a) upon receiving a complaint of facts which constitute such offence; or (b) upon a police report of such facts; or (c) upon information received from any person other than a police officer, or upon his own knowledge that such offence has been committed.

10. Chapter XV containing Sections 200 to 203 deals with "Complaints to Magistrates" and lays down the procedure which is required to be followed by the Magistrate taking cognizance of an offence on complaint. Similarly, Chapter XVI deals with "Commencement of Proceedings before Magistrates". Since admittedly, in the present case, the Magistrate has taken cognizance of the complaint in terms of Section 190 of the Code, we shall confine our discussion only to the said provision. We may, however, note that on receipt of a complaint, the Magistrate has more than one course open to him to determine the procedure and the manner to be adopted for taking cognizance of the offence.

11. One of the courses open to the Magistrate is that instead of exercising his discretion and taking cognizance of a cognizable offence and following the procedure laid down under Section 200 or Section 202 of the Code, he may order an investigation to be made by the police under Section 156(3) of the Code, which the learned Magistrate did in the instant case. When such an order is made, the police is obliged to investigate the case and submit a report under Section 173(2) of the Code. On receiving the police report, if the Magistrate is satisfied that on the facts discovered or unearthed by the police there is sufficient material for him to take cognizance of the offence, he may take cognizance of the offence under Section 190(1)(b) of the Code and issue process straightaway to the accused. However, Section 190(1)(b) of the Code does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation makes out a case against the accused. Undoubtedly, the Magistrate can ignore the conclusion(s) arrived at by the investigating officer.

12. Thus, it is trite that the Magistrate is not bound by the opinion of the investigating officer and he is competent to exercise his discretion in this behalf, irrespective of the view expressed by the police in their report and decide whether an offence has been made out or not. This is because the purpose of the police report under Section 173(2) of the Code, which will contain the facts discovered or unearthed by the police as well as the conclusion drawn by the

police therefrom is primarily to enable the Magistrate to satisfy himself whether on the basis of the report and the material referred therein, a case for cognizance is made out or not.

13. The next incidental question is as to what is meant by the expression "taking cognizance of an offence" by a Magistrate within the contemplation of Section 190 of the Code?

14. The expression "cognizance" is not defined in the Code but is a word of indefinite import. As observed by this Court in Ajit Kumar Palit v. State of W.B. : AIR 1963 SC 765 (AIR p. 770, para 19)

'19....The word "cognizance" has no esoteric or mystic significance in criminal law or procedure. It merely means- become aware of and when used with reference to a court or Judge, to take notice of judicially.'

Approving the observations of the Calcutta High Court in Emperor v. Sourindra Mohan Chuckerbutty, ILR (1910) 37 Cal 412 (at ILR p. 416), the Court said that:

'taking cognizance does not involve any formal action, or indeed action of any kind, but occurs as soon as a Magistrate, as such, applies his mind to the suspected commission of an offence."

36. Referring to the provisions under the MMDR Act and the Rules made thereunder and applying the aforementioned principles of law with regard to taking of cognizance, it was held that Section 22 of the MMDR Act would not constitute a bar against registration of a criminal case or investigation by the police agency or submission of a report by the police on completion of investigation, as contemplated by Section 173 of the Code. It was noted that as per Section 21 of the MMDR Act, the offences thereunder are cognizable.

37. In the light of the relevant provisions of the MMDR Act and the Rules made thereunder vis-a-vis the provisions contained under the Code and the Penal Code, and also the various judicial precedents, the conclusions recorded, in the case of **Jayant** (supra), are as under :-

"21.1 That the learned Magistrate can in exercise of powers under Section 156 (3) of the Code order/direct the In-charge/SHO of the police station concerned to lodge/register crime case/FIR even for the offences under the MMDR Act and the Rules made thereunder and at this stage the bar under Section 22 of the MMDR Act shall not be attracted.

21.2 The bar under Section 22 of the MMDR Act shall be attracted only when the learned Magistrate takes cognizance of the offences under the MMDR Act and Rules made thereunder and orders issuance of process/summons for the offences under the MMDR Act and Rules made thereunder;

21.3 For commission of the offence under the IPC, on receipt of the police report, the Magistrate having jurisdiction can take cognizance of the said offence without awaiting the receipt of complaint that may be filed by the authorised officer for taking cognizance in respect of violation of various provisions of the MMDR Act and Rules made thereunder.

21.4 That in respect of violation of various provisions of the MMDR Act and the Rules made thereunder, when a Magistrate passes an order under Section 156 (3) of the Code and directs the In-charge/SHO of the police station concerned to register/lodge the

crime case/FIR in respect of the violation of various provisions of the Act and the Rules made thereunder and thereafter after investigation the In-charge of the police station/investigating officer concerned submits a report, the same can be sent to the Magistrate concerned as well as to the authorised officer concerned as mentioned in Section 22 of the MMDR Act and thereafter the authorised officer concerned may file the complaint before the learned Magistrate along with the report submitted by the investigating officer concerned and thereafter it will be open for the learned Magistrate to take cognizance after following due procedure, issue process/summons in respect of the violations of the various provisions of the MMDR Act and Rules made thereunder and at that stage it can be said that cognizance has been taken by the learned Magistrate.

2.15 In a case where the violator is permitted to compound the offences on payment of penalty as per sub-section (1) of Section 23-A, considering sub-section (2) of Section 23-A of the MMDR Act, there shall not be any proceedings or further proceedings against the offender in respect of the offences punishable under the MMDR Act or any Rules made thereunder so compounded. However, the bar under sub-section (2) of Section 23-A shall not affect any proceedings for the offences under the IPC, such as, Sections 379 and 414 IPC and the same shall be proceeded with further."

38. It would also be apposite to refer to the decision in the case of **Kanwar Pal Singh Vs. State of Uttar Pradesh and another33,** which was rendered in an appeal arising out of an order passed by the High Court, in terms of which a petition under Section 482 of the Code for quashing criminal prosecution under Section 379 of the Penal Code, Rules 3, 57, and 7 of the Concession Rules, Sections 4 and 21 of the MMDR Act and Sections 3 and 4 of the Prevention of Damage to Public Property Act, 1984, had been dismissed. The submissions which were put forward to assail the order passed by the High Court were primarily based on the alleged violation of Section 22 of the MMDR Act and the legal effect thereof to contend that the offences, at best, could be held to be violative of Section 4, which is punishable under Section 21 of the MMDR Act, and as per Section 22, no court can take cognizance of the offences under the said Act except on a complaint in writing by a person authorized by the Central or State Government; accordingly the State police being not authorized could not have filed the charge-sheet/complaint.

39. The judgment in the case of **State (NCT of Delhi) Vs. Sanjay20** was referred to and it was observed that the investigation of offences is within the domain of the police and the power of a police officer to investigate into a cognizable offence is not ordinarily impinged by any fetters and the court would interfere only where it is found that the police officer in exercise of the investigatory powers has breached the statutory provisions and put the personal liberty and/or the property of a citizen in jeopardy by illegal and improper use of the powers or when the investigation by the police is not found to be bonafide or when the investigation is tainted with animosity.

40. The decisions in the case of **H.N.Rishbud Vs. State of Delhi34, and Directorate of Enforcement Vs. Deepak Mahajan35** were also taken note of to reiterate the cardinal principle of law that every law is designed to further the ends of justice and should not be frustrated on mere technicalities and that a defect or illegality in investigation, however serious, has no direct bearing on the competence or the procedure relating to the taking of cognizance or trial.

41. The challenge to the prosecution on the ground that there can be no multiplicity of

offences under different enactments was also considered and answered by relying upon Section 26 of the General Clauses Act and it was observed as follows :-

"9....Section 26 of the General Clauses Act permits prosecution for "different offences" but bars prosecution and punishment twice for the 'same offence' under two or more enactments..."

42. The contention that where there is a special act dealing with a special subject, resort cannot be taken to a general act, was held to be without force by referring to Section 26 of the General Clauses Act and stating that the offence under Section 4 read with Section 21 of the MMDR Act being different from the offence punishable under Section 379 of the Penal Code, the two are 'different' and not the 'same offence' and it was accordingly held that the contention that the action as impugned in the FIR, is a mere violation of Section 4 which is an offence cognizable only under Section 21 of the MMDR Act and not under any other law, was accordingly rejected and it was held that there was no bar on the Court from taking cognizance of the offence under Section 379 of the Penal Code. It was further held that the violation of Section 4 being a cognizable offence, the police could have always investigated the same. The only clarification was made that the prosecution and cognizance under Section 21 read with Section 4 of the MMDR Act would not be valid and justified in the absence of the requisite authorisation.

43. The legal position, as emanating from the aforesaid discussion, may be summarized as follows :-

43.1 The prohibition applying the rule against double jeopardy would be attracted in a situation where the same act constitutes an offence under more than one enactment. However, if the two offences are distinct and different with different ingredients, under two different enactments, the rule against double jeopardy would not be applicable.

43.2 In a case, where the mining activity is carried on by any person in contravention of the provisions of Section 4 and other provisions under the MMDR Act, the officer empowered and authorized under the Act shall exercise all the powers including making a complaint before the jurisdictional Magistrate, whereupon the Magistrate may take cognizance. In a case of breach of Section 4 and other allied provisions, the police officer cannot insist upon the Magistrate for taking cognizance under the Act on the basis of the report submitted by the police alleging contravention. The prohibition under Section 22 of the Act against prosecution of a person except on a complaint made by the person authorized would be attracted only when such person is sought to be prosecuted for contravention of the provisions under Section 4 or other provisions under the MMDR Act and not for any act or omission which constitutes of an offence under the Penal Code.

43.3 In a situation where a person, without any lease or licence or any authority seeks to extract minerals and removes or transports them dishonestly, he would be liable to be punished for committing offences under Section 378 of the Penal Code.

43.4 The contravention of terms and conditions of a mining lease or carrying on any mining activity in violation of Section 4 of the MMDR Act would be an offence punishable under Section 21, whereas dishonestly removing minerals without proper authorization, lease or licence would constitute the offence of theft. The ingredients constituting the offence under the two enactments are distinct and different. Therefore, merely because proceedings for commission of an offence under the MMDR Act

have been initiated on the basis of a complaint, the same would not operate as a bar from taking cognizance relating to an offence of theft by exercising powers under the Code and submission of a report before the Magistrate for taking cognizance. The jurisdictional Magistrate would thereafter be empowered to take cognizance of the offence without awaiting receipt of a complaint that may be filed by the authorized officer for taking cognizance in respect of any offence under the MMDR Act.

43.5 The powers under Section 156 (3) of the Code for issuance of a direction for investigation of a case disclosing cognizable offence would be exercisable by the concerned jurisdictional Magistrate even in respect of offences under the MMDR Act and the Rules made thereunder; at this stage the bar under Section 22 of the MMDR Act would not be attracted. The provisions of Section 22 of the MMDR Act and the bar thereunder would get attracted only at the stage when the Magistrate takes cognizance of the offences under the MMDR Act and the Rules made thereunder and proceeds for issuance of process.

43.6 In a case where the Magistrate passes an order under Section 156 (3) and directs investigation in respect of offences arising out of violation of various provisions of the MMDR Act and the Rules made thereunder, and subsequent to the investigation the police submits a report, the same can be sent to the Magistrate concerned as well as to the officer authorized under Section 22 of the MMDR Act, as held in the case of Jayant (supra). It would thereupon be open to the said officer to file a complaint before the Magistrate along with the report submitted by the police and the Magistrate may take cognizance after following due procedure and issue process in respect of the violations of the provisions under the MMDR Act and the Rules made thereunder and it is at this stage that the Magistrate can be said to have taken cognizance.

43.7 The investigation of offences being within the domain of the police, the power of a police officer to investigate into a cognizable offence would ordinarily not be impinged by any fetter and courts would interfere only where it is found that the investigatory powers have been exercised in breach of the statutory provisions putting the personal liberty and/or the property of the citizen in jeopardy. The procedural law is designed to further the ends of justice and should not be allowed to be frustrated on mere technicalities and any defect or illegality in exercise of investigatory powers would have no direct bearing on the competence or the procedure relating to taking of cognizance or the trial.

44. It would therefore be seen that the bar under Section 22 of the Act shall not be attracted at the stage of lodging of an FIR or registration of the criminal case. The bar under the section shall get attracted only at the stage when the Magistrate takes cognizance of the offence and orders issuance of process/summons for the offence under the MMDR Act and the Rules made thereunder. On receipt of the police report, insofar as it relates to commission of offence under the Penal Code, the Magistrate having jurisdiction can take cognizance of the offence and proceed further. However, in respect of offences under the MMDR Act upon submission of the police report the same would be required to be sent to the concerned Magistrate as well as to the concerned authorised officer as mentioned in Section 22 of the MMDR Act whereupon the concerned authorised officer may file a complaint before the Magistrate along with the report submitted by the investigating officer and thereafter it would be open for the Magistrate to take cognizance after following due procedure, issue process/summons in respect of the violations of the various provisions of the

MMDR Act and the Rules made thereunder and at that stage it can be said that cognizance has been taken by the Magistrate in respect of an offence under the MMDR Act.

45. In the case at hand, the offence under Section 4, 21 of the MMDR Act read with Rules 3, 57, 70 of the Concession Rules which relate to illegal mining, and the offence under Section 379, 411 IPC which would relate to theft, cannot be said to be one and the same. The two offences being distinct and under separate enactments with ingredients also being distinct the principle based on the rule against double jeopardy would not be attracted.

46. The offence under Section 379 IPC, which is with regard to theft of minerals, being undisputedly a cognizable offence, the act of the police in registering a case, investigating the same and placing a police report under Section 173 of the Code, cannot be said to be unlawful. The concerned Magistrate is also well within his jurisdiction in taking cognizance as per the provisions under the Code.

47. The contention sought to be raised on behalf of the applicant that the facts as disclosed in the FIR would constitute a mere violation of Section 4 of the MMDR Act which would be an offence cognizable only under Section 21 of the MMDR Act and not under any other law therefore stands rejected. The FIR version having disclosed an offence under Section 379 of the Penal Code and a police report having also been submitted pursuant thereto, there is no bar on the jurisdictional Magistrate from taking cognizance of the offence under the Penal Code. The contravention of the provisions under Section 4 of the MMDR Act also constituting a cognizable offence, the police were within their rights in investigating the same, there being no bar under the MMDR Act with regard to the same.

48. The initiation of the proceedings by lodging of an FIR under relevant provisions of the MMDR Act and the Rules made thereunder and also the provisions of the Penal Code therefore cannot be said to be hit by the bar under Section 22 of the MMDR Act. The investigation of the case and the submission of the police report under Section 173 also cannot be said to be barred by the provisions under the MMDR Act.

49. Insofar as the offences under the MMDR Act are concerned, at the stage of submission of the police report, it was for the concerned authorized officer as specified under Section 22 of the MMDR Act to have filed a complaint before the Magistrate along with the police report whereupon the Magistrate could have taken cognizance after following due procedure and issued process/summons in respect of the violations of the various provisions of the MMDR Act and the Rules made thereunder.

50. Having regard to the aforesaid, the proceedings, insofar as they relate to the offences under the Penal Code in respect of which cognizance has been taken by the Magistrate and process/summons have been issued, cannot be faulted with and the challenge raised in regard to the same cannot be sustained and is accordingly rejected.

51. However, insofar as the offences under the MMDR Act are concerned, the procedure under Section 22 having not been followed and in the absence of a complaint by the authorized officer, the cognizance taken by the Magistrate cannot be legally sustained and the proceedings in this regard are set aside and quashed. It would be open to the authorized officer to initiate proceedings as per the procedure under Section 22 of the MMDR Act and to lodge a complaint before the concerned Magistrate along with report submitted by the investigating officer

whereupon the Magistrate concerned may take cognizance after following due procedure and issue process/summons.

52. The observations made hereinabove while deciding the legal questions may not be treated as findings on merits and the trial court would be expected to independently apply its mind to the factual allegations while proceeding with the trial.

53. The procedure in respect of initiating proceedings and taking cognizance in respect of offences under the MMDR Act and the Penal Code having been discussed above, it would be open to the appropriate authority of the State Government to issue directions delineating suitable guidelines in respect of initiation of proceedings regarding matters which would constitute offences under the MMDR Act as also the Penal Code.

54. The application under Section 482 CrPC stands partly allowed to the extent indicated above.

(2021)11ILR A500
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.09.2021

BEFORE

THE HON'BLE AJIT SINGH, J.

Criminal Appeal No. 22 of 1989

Vijai Prakash ...Appellant (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri A.K. Bhatt, Sri Kumar Ashutosh Srivastava, Sri Nagendra Bahadur Singh, Sri N.P. Singh Sri Anurag Pandey

Counsel for the Respondents:
A.G.A.

(A) Criminal Law - The Essential commodities Act,1955 - section 3/7 - Appeal against conviction - Rehabilitary & Reformative aspects in sentencing - doctrine of proportionality - Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically - in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix - duty of every court to award proper sentence having regard to nature of offence and manner of its commission - striking a balance between reform and punishment - criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective.(Para - 13,15)

Accused was a licence holder of fertilizer - inspection of shop by Tehsildar - no cash memo & sale register maintained - nor was shown to S.D.M - physical verification - shortage of 8 bags of fertilizer detected - accused-appellant charged under 3/7 E.C. Act - conviction of appellant - appellant is old and aged persons - does not propose to challenge the impugned judgement and order on its merits - modification of order of sentence for the period already undergone. (Para - 3,5)

HELD:- Conviction upheld. Appeal dismissed. It would not be proper to send the accused-appellant to jail at the fag end of his life and the accused was on bail since 3.1.1989 and the accused person has suffered the agony of conviction for more than three decade and no criminal antecedents have been shown to his credit after passing of so much long period out of jail. Accused be sentenced with the period already undergone and the amount of fine be enhanced. (Para - 17,18)

Criminal Appeal partly allowed. (E-7)

List of Cases cited:-

1. Mohd. Giasuddin Vs St. of A.P., AIR 1977 SC 1926

2. Sham Sunder Vs Puran, (1990) 4 SCC 731

3. St. of M.P. Vs Najab Khan, (2013) 9 SCC 509

4. Jameel Vs St. of U.P., (2010) 12 SCC 532

5. Guru Basavraj Vs St. of Karnatak, (2012) 8 SCC 734

6. Deo Narain Mandal Vs St. of U.P., (2004) 7 SCC 257

7. Shyam Narain Vs St. (NCT of delhi), (2013) 7 SCC 77

8. Sumer Singh Vs Surajbhan Singh, (2014) 7 SCC 323

9. St. of Punj. Vs Bawa Singh, (2015) 3 SCC 441

10. Raj Bala Vs St. of Haryana, (2016) 1 SCC 463

11. Kokaiyabai Yadav Vs St. of Chhattisgarh, (2017) 13 SCC 449

12. Ravada Sasikala Vs St. of A.P., AIR 2017 SC 1166

13. Jameel Vs St. Of U.P., (2010) 12 SCC 532

14. Guru Basavraj Vs St. of Karnatak, (2012) 8 SCC 734

15. Sumer Singh Vs Surajbhan Singh, (2014) 7 SCC 323

16. St. of Pun. Vs Bawa Singh, (2015) 3 SCC 441

17. Raj Bala Vs St. of Hary., (2016) 1 SCC 463

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

1. Heard Sri Nagendra Bahadur Singh learned counsel appearing on behalf of the appellant, Rameshwar Prasad Shukla, learned A.G.A. appearing on behalf of the State and perused the record.

2. This criminal appeal has been preferred against the judgment and order dated 21.12.1988 passed by Special Judge, Allahabad in Criminal Case No. 5 of 1985 whereby the appellant has been convicted and sentenced to undergo rigorous imprisonment under section 3/7 E.C. Act for a period of one year and to pay a fine of Rs.500/-. In case of default of the payment of fine, he shall further undergo six months rigorous imprisonment. Both the sentences shall run concurrently.

3. The prosecution case in brief is that Sri R.S. Saxena was posted as S.D.M. Sirathu. It was mentioned that the accused Vijay Prakash was a licence holder of fertilizer and was doing his business at Saini. On 5.10.1983, Sri Saxena alongwith Tehsildar Sri T.R. Ram inspected the shop of the accused and he found that there was no sale register maintained by the accused nor was shown to the S.D.M; there was no cashmemo prepared by the accused-appellant nor was shown to the S.D.M.; there was entry of 48 bags of Urea upto 21st September, 1983. Thereafter there was no entry at all; on physical verification a shortage of 8 bags of fertilizer was detected and there was no entry of 12 bags of fertilizer in the stock register which were found on the shop. The accused-appellant was charged under 3/7 E.C. Act and after taking prosecution evidence, the trial court convicted the appellant with sentence of one year rigorous imprisonment and fine of Rs.500/-.

4. The trial court recorded statement of the witnesses and after hearing the argument of both the sides, convicted the appellant as aforesaid.

5. At the very outset, learned counsel for the appellant, on instructions, stated that he does not propose to challenge the impugned judgement and order on its merits. He, however, prayed for modification of the order of the sentence for the period already undergone by the appellant.

7. Learned counsel for the appellant has specifically stated that incident had happened in the year 1983 and at present the accused-appellant is aged about 68 years old and has submitted that he does not want to press this appeal on merit but requests the Court that considering the age of the accused and considering that he is suffering from age related

ailments, conviction of the accused be modified suitably and he has further submitted that the accused person had suffered mental and physical agony of incarnation and he has suffered mental agony of criminal trial and after conviction since year 1988.

8. Learned A.G.A. has vehemently opposed the argument advanced by the learned counsel for the appellant. He has however, submits that if slight reduction in sentence is made, he has no objection.

9. I have perused the entire material available on record and the evidence as well as judgment of the trial court. The learned counsel for the accused-appellant does not want to press the appeal on its merit and requests to take a lenient view of the matter.

10. In ***Mohd. Giasuddin Vs. State of AP, AIR 1977 SC 1926***, explaining rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court:

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by reculturization.Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

11. In ***Sham Sunder vs Puran, (1990) 4 SCC 731***, where the high court reduced the sentence for the offence under section 304 part I into undergone, the supreme court opined that the sentence needs to be enhanced being inadequate. It was held:

"The court in fixing the punishment for any particular crime should take into consideration the nature of offence, the circumstances in which it was committed, the degree of deliberation shown by the offender. The measure of punishment should be proportionate to the gravity of offence."

12. In ***State of MP vs Najab Khan, (2013) 9 SCC 509***, the high court, while upholding conviction, reduced the sentence of 3 years by already undergone which was only 15 days. The supreme court restored the sentence awarded by the trial court. Referring the judgments in ***Jameel vs State of UP (2010) 12 SCC 532, Guru Basavraj vs State of Karnatak, (2012) 8 SCC 734***, the court observed as follows:-

"In operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. We also reiterate that undue sympathy to impose inadequate sentence would do more harm to the justice dispensation system to undermine the public confidence in the efficacy of law. It is the duty of court to award proper sentence having regard to the nature of offence and the manner in which it was executed or committed. The courts

must not only keep in view the rights of victim of the crime but also the society at large while considering the imposition of appropriate punishment."

13. Earlier, "Proper Sentence" was explained in ***Deo Narain Mandal Vs. State of UP (2004) 7 SCC 257*** by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the principle of proportionately. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

In subsequent decisions, the supreme court has laid emphasis on proportional sentencing by affirming the doctrine of proportionality. In ***Shyam Narain vs State (NCT of delhi), (2013) 7 SCC 77,*** it was pointed out that sentencing for any offence has a social goal. Sentence is to be imposed with regard being had to the nature of the offence and the manner in which the offence has been committed. The fundamental purpose of imposition of sentence is based on the principle that the accused must realize that the crime committed by him has not only created a dent in the life of the victim but also a concavity in the social fabric. The purpose of just punishment is that the society may not suffer again by such crime. The principle of proportionality between the crime committed and the penalty imposed are to be kept in mind. The impact on the society as a whole has to be seen. Similar view has been expressed in ***Sumer Singh vs Surajbhan Singh, (2014) 7 SCC 323 , State of Punjab vs Bawa Singh, (2015) 3 SCC 441, and Raj Bala vs State of Haryana, (2016) 1 SCC 463.***

14. In ***Kokaiyabai Yadav vs State of Chhattisgarh(2017) 13 SCC 449,*** it has been observed that reforming criminals who understand their wrongdoing, are able to comprehend their acts,have grown and nartured into citizens with a desire to live a fruitful life in the outside world, have the capacity of humanising the world.

15. In ***Ravada Sasikala vs. State of A.P. AIR 2017 SC 1166***, the Supreme Court referred the judgments in J***ameel vs State of UP (2010) 12 SCC 532, Guru Basavraj vs State of Karnatak, (2012) 8 SCC 734, Sumer Singh vs Surajbhan Singh, (2014) 7 SCC 323 , State of Punjab vs Bawa Singh, (2015) 3 SCC 441, and Raj Bala vs State of Haryana, (2016) 1 SCC 463*** and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not

long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system."

16. Considering the facts and circumstances of the case and the substantive period already undergone by the appellant in this case and the fact that the appellant is old and aged persons; and by so far he has realized the mistake committed by him and is remorseful to his conduct and feels it necessary to serve with his polite and cooperative behaviour to the society which he belongs to and now he wants to transform himself into a law abiding citizen, I am of the considered opinion that he should be given a chance to reform himself and extend his better contribution to the society to which he belongs to.

17. After considering the rival submissions made by learned counsel for the appellant, considering the facts and circumstance of the case, considering that the alleged incident which took place in the year 1983 about 38 years ago and now appellant is more than 68 years of age, at this stage, this Court feels that it would not be proper to send the accused-appellant to jail at the fag end of his life and the accused was on bail since 3.1.1989 and the accused person has suffered the agony of conviction for more than three decade and no criminal antecedents have been shown to his credit after passing of so much long period out of jail, at this stage it does not appear appropriate to send the accused-appellant to jail. It has been pointed out by learned counsel for the accused-appellant that the accused-appellant had remained in jail for sometime during trial. Considering all these facts, it would be appropriate and proper that the accused be sentenced with the period already undergone and the amount of fine be enhanced.

18. Consequently, taking into consideration the period already undergone in prison by the appellant in this case as well as considering that he has suffered physical and mental agony of trial and after conviction for a long period of about 35 years, the conviction is upheld. Appeal is dismissed and accused is convicted which the period already undergone by him in prison during trial and after conviction and with a fine of Rs.2000/-.

19. Accused-appellant is directed to deposit the fine of Rs.2,000/- before learned trial court within a period of three months from the date of production of a copy of the judgement, in default of payment of fine as directed above, he shall undergo simple imprisonment for a period of fifteen days.

20. Appeal is partly allowed in the above terms and surety bonds of the sureties are discharged.

21. Office is directed to transmit the lower court record along with a copy of this judgment to the learned court below for information and necessary compliance as warranted

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(2021)11ILR A504
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.10.2021

BEFORE

THE HON'BLE AJIT SINGH, J.

Criminal Appeal No. 259 of 1983

Ram Bilas ...Appellant (In Jail)
Versus
The State ...Respondent

Counsel for the Appellant:
Sri O.P. Gupta

Counsel for the Respondents:
A.G.A.

(A) Criminal Law - The Essential commodities Act,1955 - Section 3/7 -The U.P. Sugar Control Order, 1962 - U.P. Sugar Dealers Licencing Order, 1962 - Appeal against conviction - Rehabilitary & Reformative aspects in sentencing - doctrine of proportionality - Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically - in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix - duty of every court to award proper sentence having regard to nature of offence and manner of its commission - striking a balance between reform and punishment - criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective.(Para - 10,13,16)

Accused (fair-price-shop owner) - going to sell away two bags of sugar on higher rate rather than the controlled sugar rate - contravened the provisions of U.P. Sugar Control Order, 1962 and U.P. Sugar Dealers Licencing Order, 1962 - charged under provisions of Essential Commodities Act - arrested - written report lodged by Naib Tehsildar - charge-sheet filed against accused - does not propose to challenge impugned judgement and order on merits - modification of order of sentence for the period already undergone.(Para -3)

HELD:-It would not be proper to send the accused-appellant to jail at the fag end of his life and the accused was on bail since 03.02.1983 and the accused person has suffered the agony of conviction for more than 38 years and no criminal antecedents have been shown to his credit after passing of so much long period out of jail. Accused be sentenced with the period already undergone and the amount of fine be enhanced.(Para - 17,18)

Criminal Appeal partly allowed. (E-7)

List of Cases cited:-

1. Mohd. Giasuddin Vs St. of A.P., AIR 1977 SC 1926

2. Sham Sunder Vs Puran, (1990) 4 SCC 731

3. St. of M.P. Vs Najab Khan, (2013) 9 SCC 509

4. Jameel Vs St. of U.P., (2010) 12 SCC 532

5. Guru Basavraj Vs St. of Karnatak, (2012) 8 SCC 734

6. Deo Narain Mandal Vs St. of U.P., (2004) 7 SCC 257

7. Shyam Narain Vs St. (NCT of delhi), (2013) 7 SCC 77

8. Kokaiyabai Yadav Vs St. of Chhattisgarh,(2017) 13 SCC 449

9. Ravada Sasikala Vs St. of A.P. ,AIR 2017 SC 1166

10. Jameel Vs St. of U.P. ,(2010) 12 SCC 532

11. Guru Basavraj Vs St. of Karnatak, (2012) 8 SCC 734

12. Sumer Singh Vs Surajbhan Singh, (2014) 7 SCC 323

13. St. of Punjab Vs Bawa Singh, (2015) 3 SCC 441

14. Raj Bala Vs St. of Haryana, (2016) 1 SCC 463

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

1. Heard Sri O.P. Gupta, learned counsel the appellant, learned A.G.A. appearing for State and perused the record.

2. This criminal appeal has been preferred against the judgment and order dated 20.01.1983 passed by Special Judge, Ballia in Criminal Case No. 158 of 1982 (State of U.P. Vs. Ran Bilas), under Sections 3/7 of Essential Commodities Act for having breached the U.P. Sugar Control Order, 1962 and U.P. Sugar Dealers Licencing Order, 1962, whereby the appellant was convicted and sentenced to undergo eighteen (18) months rigorous imprisonment.

3. The prosecution story in brief is that the present accused Ram Bilas was arrested on 04.09.1980 by Sri Indra Bahadur Singh, Naib Tehsildar Siar (Rasra), district Ballia while the present accused was going to sell away two bags of sugar on higher rate rather than the controlled sugar rate as he was fair-price-shop owner, therefore, contravened the provisions of the U.P. Sugar Control Order, 1962 and U.P. Sugar Dealers Licencing Order, 1962 and he was charged under Section 3 punishable under Section 7 of the Essential Commodities Act. A written report was lodged by the Naib Tehsildar which is Exhibit- Ka-1. The case was investigated and ultimately charge-sheet was filed against the present accused Ram Bilas.

4. The trial court after examining the prosecution witnesses and hearing the accused persons under Section 313 Cr.P.C., convicted and sentenced the accused-apellant to undergo eighteen months rigorous imprisonment under Section 3/7 of Essential Commodities Act.

5. Feeling aggrieved from the judgment and order dated 20.01.1983 passed by Special Judge, Ballia, this criminal appeal has been filed.

6. At the very outset, learned counsel for the appellant, on instructions, stated that he does not propose to challenge the impugned judgement and order on its merits. He, however, prayed for modification of the order of the sentence for the period already undergone by the appellant.

7. Learned counsel for the appellant further submits that the incident has happened in the year 1980 and more than four decades have passed and since then the appellant is living peacefully and after conviction the appellant had not indulged in any other criminal activity. During trial after conviction the appellant had served the prison term of more than twenty days. Learned counsel for the appellant has further prayed that since the accused person is old, he should not be sent to jail at the fag-end of his life. He has further submitted that the appellant is more than 70 years of age and he is are suffering from age related ailments. Further submission is that there is no bread earner in the family of the appellant. He also submits that on the question of legality of sentence he is not pressing this appeal and only pressing on the quantum of sentence and he has prayed for taking lenient view considering the age of the accused and his age related ailments.

8. Sri Narayan Mishra, learned A.G.A. for the State on the other hand has opposed the appeal and has submitted that the trial court has properly awarded sentence to the accused person and no interference in his sentence is called for, hence the appeal be dismissed and accused be directed to suffer the sentence.

9. I have perused the entire material available on record and the evidence as well as judgment of the trial court. The learned counsel for the accused-appellant does not want to press the appeal on its merit and requests to take a lenient view of the matter.

10. In **Mohd. Giasuddin Vs. State of AP, AIR 1977 SC 1926**, explaining rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court:

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by reculturization.Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of

reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

11. In **Sham Sunder vs Puran, (1990) 4 SCC 731,** where the high court reduced the sentence for the offence under section 304 part I into undergone, the supreme court opined that the sentence needs to be enhanced being inadequate. It was held:

"The court in fixing the punishment for any particular crime should take into consideration the nature of offence, the circumstances in which it was committed, the degree of deliberation shown by the offender. The measure of punishment should be proportionate to the gravity of offence."

12. In **State of MP vs Najab Khan, (2013) 9 SCC 509**, the high court, while upholding conviction, reduced the sentence of 3 years by already undergone which was only 15 days. The supreme court restored the sentence awarded by the trial court. Referring the judgments in Jameel vs State of UP (2010) 12 SCC 532, Guru Basavraj vs State of Karnatak, (2012) 8 SCC 734, the court observed as follows:-

"In operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. We also reiterate that undue sympathy to impose inadequate sentence would do more harm to the justice dispensation system to undermine the public confidence in the efficacy of law. It is the duty of court to award proper sentence having regard to the nature of offence and the manner in which it was executed or committed. The courts must not only keep in view the rights of victim of the crime but also the society at large while considering the imposition of appropriate punishment."

13. Earlier, "Proper Sentence" was explained in **Deo Narain Mandal Vs. State of UP (2004) 7 SCC 257** by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the principle of proportionately. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

14. In subsequent decisions, the supreme court has laid emphasis on proportional sentencing by affirming the doctrine of proportionality. In **Shyam Narain vs State (NCT of delhi), (2013) 7 SCC 77,** it was pointed out that sentencing for any offence has a social goal. Sentence is to be imposed with regard being had to the nature of the offence and the manner in which the offence has been committed. The fundamental purpose of imposition of sentence is based on the principle that the accused must realize that the crime committed by him has not only created a dent in the life of the victim but also a concavity in the social fabric. The purpose of just punishment is that the society may not suffer again by such crime. The principle of proportionality between

the crime committed and the penalty imposed are to be kept in mind. The impact on the society as a whole has to be seen. Similar view has been expressed in Sumer Singh vs Surajbhan Singh, (2014) 7 SCC 323 , State of Punjab vs Bawa Singh, (2015) 3 SCC 441, and Raj Bala vs State of Haryana, (2016) 1 SCC 463.

15. In **Kokaiyabai Yadav vs State of Chhattisgarh(2017) 13 SCC 449,** it has been observed that reforming criminals who understand their wrongdoing, are able to comprehend their acts,have grown and nartured into citizens with a desire to live a fruitful life in the outside world, have the capacity of humanising the world.

16. In **Ravada Sasikala vs. State of A.P. AIR 2017 SC 1166,** the Supreme Court referred the judgments in **Jameel vs State of UP (2010) 12 SCC 532, Guru Basavraj vs State of Karnatak, (2012) 8 SCC 734, Sumer Singh vs Surajbhan Singh, (2014) 7 SCC 323 , State of Punjab vs Bawa Singh, (2015) 3 SCC 441, and Raj Bala vs State of Haryana, (2016) 1 SCC 463** and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system.

17. After considering the rival submissions made by learned counsel for the appellant, considering the facts and circumstance of the case, considering that the alleged incident which took place in the year 1980 about 40 years ago and now appellant is more than 70 years of age, at this stage, this Court feels that it would not be proper to send the accused-appellant to jail at the fag end of his life and the accused was on bail since 03.02.1983 and the accused has suffered the agony of conviction for more than 38 years and no criminal antecedents have been shown to his credit after passing of so much long period out of jail, at this stage it does not appear appropriate to send the accused-appellant to jail. It has been pointed out by learned counsel for the accused-appellant that the accused-appellant had remained in jail for sometime during trial. Considering all these facts, it would be appropriate and proper that the accused be sentenced with the period already undergone and the amount of fine be imposed.

18. Considering all the facts and circumstances of the case, the accused-appellant is sentenced to the period already undergone by him in jail during trial and an amount of fine of

Rs. 2,000/- be imposed instead of sending him to jail.

19. Accused-appellant is directed to deposit the fine of Rs. 2,000/- before learned lower court within three months from the date of passing of the judgement and in default of payment of fine accused-appellant shall further undergo fifteen days imprisonment.

20. Appeal is ***partly allowed*** in the above terms.

21. Copy of this order be transmitted to the concerned lower court forthwith for compliance

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(2021)11ILR A509
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.10.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

Jail Appeal No. 315 of 2013

Prakash ...Appellant

Versus

State ...Respondent

Counsel for the Appellant:
From Jail, Shweta Pandey, Sri Sweta Pandey,A.C.

Counsel for the Respondent:
A.G.A.

(A) Criminal Law - - Indian Penal Code, 1860 - Sections 302, 323, 324 & 299 - Appeal from jail - Culpable homicide, Section 300 - murder , Section 304 - culpable homicide not amounting to murder - testimony of hostile witnesses cannot be thrown away merely on the ground of being hostile - can be relied on to the extent, it supports the prosecution case - person can tell a lie, but not the circumstances. (Para - 12,18)

Appellant used spade to attack deceased from reverse-side - sustained two injuries of contusion - no injury of incised wound - spade was used from reverse side - no intention to kill the deceased - knowledge that act was likely to cause death - deceased died due to excess bleeding of internal injuries - three witnesses of fact - complainant and eye-witness of the occurrence (PW1), injured (PW2) and daughter of the accused (PW3) - turned hostile .(Para -12, 25)

HELD:-Instant case false under the Exceptions 1 and 4 to Section 300 IPC . Appellant is guilty for commission of the offence under Section 304 (Part-I) IPC instead of offence under Section 302 IPC along with other offences punishable under Sections 323 and 324 IPC . (Para - 27,28,29)

Jail appeal partly allowed. (E-7)

List of Cases cited:-

1. Koli Lakhmanbhai Chandabhai Vs St. Of Guj., (1999) 8 SCC 624

2. Ramesh Harijan Vs St. Of U.P., (2012) 5 SCC 777

3. St. of U.P. Vs Ramesh Prasad Mishra & anr. ,1996 AIR (Supreme Court) 2766

4. St. of U.P. Vs Mohd. Iqram & anr., (2011) 8 SCC 80

5. Tuka Ram & ors. Vs St. of Mah., (2011) 4 SCC 250

6. BN Kavadakar & anr. Vs St. of Karn., 1994 Supp (1) 304

(Delivered by Hon'ble Ajai Tyagi, J.)

1. This appeal has been preferred by the appellant-Prakash against the judgment and order dated 16.2.2008, passed by Additional Sessions Judge, Court No.9, Kanpur Dehat, in Session Trial No.87 of 2007 (State vs. Prakash) arising out of Case Crime No.678 of 2006 under Section 302, 323, 324 IPC, Police Station-Ghatampur, District-Kanpur Nagar, whereby the accused was convicted and awarded sentence

under Section 302 IPC for life imprisonment and fine of Rs.10,000/-. He was directed to undergo further imprisonment for one year, in case of default of fine. The appellant was further convicted and sentenced under Section 323 IPC for six months RI and further convicted and sentenced under Section 324 IPC for one year RI. All sentences were directed to run concurrently.

2. The facts giving rise to this appeal are that complainant-Ram Khelawan submitted written-report at Police Station-Ghatampur, District-Kanpur Nagar, stating therein that on 18.12.2006, his elder brother Prakash was going to the brick-kiln of Jawahar with his wife Phoolkali (aged about 40 years) and children. He was milching his buffalo. At about 10:40 in the morning, he heard the noise of screaming from the side of field of pradhan Ramesh Yadav. On hearing the screaming, he and his cousin (brother), Shiv Raj s/o Bheekkhu, ran towards that direction and saw that Prakash was attacking on his own wife-Phoolkali with spade. They anyhow saved both the children, during which, Shiv Raj and daughter of Prakash, namely, Goldi (aged about 6 years), also sustained injuries. So many people of village gathered on the spot, but Prakash fled way. He brought injured Phoolkali for treatment, but she died.

3. A case crime bearing No.678 of 2006 was registered at police station under Sections 302 and 323 IPC. Investigation was taken up by SI-Badam Singh. Investigating Officer recorded statements of witnesses, prepared site-plan, collected plain and blood-stained earth. Inquest report was also prepared. Postmortem was conducted on the body of deceased by Dr.Autar Singh and postmortem report was prepared. In the postmortem, cause of death was ascertained as excess bleeding from antemortem injuries. Injured Shiv Raj and Kumari Goldi were also medically examined and their injury reports were also prepared by Dr.Vinod Kumar Mishra. During the course of investigation, the Investigating Officer arrested the accused-Prakash and on his pointing out made recovery of spade, which was said to be used in commission of crime. After completing the investigation, charge-sheet was submitted against accused appellant-Prakash under Sections 302, 324 and 323 IPC. The case being exclusively triable by court of session was committed to the court of session for trial.

4. Learned trial court framed charges against appellant under Sections 302, 324 and 323 IPC. Charges were read over to the accused, who denied the charges and claimed to be tried.

5. To bring home the charges, following witnesses were examined by the prosecution:

1.	Ram Khilawan	PW1
2.	Shiv Raj	PW2
3.	Waheed Ahmad	PW3
4.	Dr.Vinod Kumar Misra	PW4
5.	Dr.Autar Singh	PW5
6.	Silta	PW6
7.	Mola	PW7
8.	Badan Singh	PW8
9.	Raj Kumar	PW9

6. Apart from oral evidence, following documentary evidence were produced by prosecution and proved by leading the evidence:

1.	F.I.R.	Ex. Ka2
2.	Written report	Ex. Ka1
3.	Recovery-memo of blood-stained and plain-earth	Ex. Ka9

4.	Recovery-memo of spade	Ex. Ka10
5.	Injury report	Ex. Ka4
6.	Injury report	Ex. Ka5
7.	Postmortem report	Ex. Ka6
8.	Panchayatnama	Ex. Ka11
9.	Charge-sheet Mool	Ex. Ka16
10.	Site-plan with Index	Ex. Ka7
11.	Site-plan with Index	Ex. Ka18

7. Accused-appellant was examined under Section 313 Cr.P.C. and evidence led by prosecution against him was put to him. Accused stated that false evidence has been led against him. Accused did not examine any witness in his defence.

8. We have heard Ms.Shweta Pandey, learned Amicus Curiae appearing for the appellant, learned AGA for the State and perused the record.

9. Learned counsel for the appellant submitted that appellant has been falsely implicated in this case. He is innocent. It is strongly argued that all the prosecution witnesses of fact have turned hostile. No witness has supported the prosecution case. It is also submitted that antemortem injuries, shown in postmortem report, were not sufficient to cause death of the deceased. It is next submitted that appellant was not arrested on the spot and prosecution could not establish any motive to commit the crime by appellant. Deceased was wife of appellant and nothing is brought forward by prosecution as to why the appellant would have killed his own wife. Motive is absolutely silent. She also argued that false recovery of spade is made by Investigating Officer to strengthen the prosecution case and recovered spade is in fact planted by the police. Appellant is languishing in jail for more than 14 years.

10. Per contra, learned AGA submitted that appellant is named in FIR as single accused and it is very important to note that the FIR of this case was lodged by appellant's real younger brother. It is next submitted that first information report was lodged very promptly nearly about two hours after the occurrence. Therefore, there was no reason for false implication of the appellant. It is also very important to note that first information report is lodged by younger brother of accused and there is nothing on record that there was any sort of enmity between these two brothers. Learned AGA further submitted that the spade, which was used in commission of crime, was recovered by Investigating Officer on the pointing out of the appellant. It is also argued that antemortem injuries found in postmortem, could be inflicted to the deceased with the weapon/instrument like spade, if it is used from reverse-side. In this way, medical evidence also corroborates the prosecution version. Lastly, it is submitted by learned AGA that no doubt, witnesses of fact have turned hostile, but they have become hostile due to being close relative, i.e., brother and daughter etc., therefore, to save the accused from punishment, witnesses have turned hostile, but learned trial court has rightly appreciated the evidence on record and convicted the accused.

11. It is contended by the defence that prosecution could not establish the motive of crime, but this is the case of direct evidence and in case of direct evidence, motive losses importance. Hence, absence of motive does not affect the prosecution case adversely.

12. Perusal of the record shows that in this case, prosecution has produced three witnesses of fact, namely, Ram Khelawan, who is

complainant and eye-witness of the occurrence (PW1), Shiv Raj, injured (PW2) and Silta, the daughter of the accused (PW3). All these three witnesses have turned hostile. In such a situation, heavy duty has been cast upon us to scrutinize the evidence of PW1, PW2 and PW3. It is settled law that testimony of hostile witnesses cannot be thrown away merely on the ground of being hostile. The testimony of hostile witnesses can be relied on to the extent, it supports the prosecution case.

13. Hon'ble Apex Court in ***Koli Lakhmanbhai Chandabhai vs. State of Gujarat [(1999) 8 SCC 624***] has held that evidence of hostile witness can be relied upon to the extent it supports the version of prosecution and it is not necessary that it should be relied upon or rejected as a whole. It is settled law that evidence of hostile witness also can be relied upon to the extent to which it supports the prosecution version. Evidence of such witness cannot be treated as washed off the record. It remains admissible in the trial and there is no legal bar to base his conviction upon his testimony if corroborated by other reliable evidence.

14. In ***Ramesh Harijan vs. State of UP [(2012) 5 SCC 77***7, Hon'ble Supreme Court has also held that it is settled legal position that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witness cannot be treated as effaced or washed off the record altogether.

15. In ***State of UP vs. Ramesh Prasad Mishra and another [1996 AIR (Supreme Court) 2766],*** Hon'ble Apex Court held that evidence of a hostile witnesses would not totally rejected if spoken in favour of the prosecution or the accused, but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. Thus, the law can be summarized to the effect that evidence of a hostile witness cannot be discarded as a whole and relevant part thereof, which are admissible in law, can be used by prosecution or the defence.

16. We have scrutinized the evidence of hostile witnesses very meticulously and have also gone through the findings recorded by learned Trial Judge.

17. First information report was very promptly lodged at police station just after two hours of incident, in which the complainant named appellant-Prakash and he was single accused named in the FIR. There is no reason to falsely implicate the appellant by his real brother. Ram Khelawan (PW1) although has turned hostile, but in examination-in-chief, he has stated that written-report was written by Raj Kumar, but he had written it on his dictation. Although, he has further stated that it was not read over to him, but this statement cannot be believed in the light of evidence of scribe. The scribe of first information report Raj Kumar has been produced as PW9. He has stated in his examination-in-chief that report of occurrence was written by him on the dictation of Ram Khelawan and he had written verbatim whatever was dictated by him. In his cross-examination, PW9 has stated that he had written above report at police chauki on the dictation of police-inspector. Learned trial court has very well scrutinized the factum of writing of first information report and came to the conclusion that it is clear that first information report was written by Raj Kumar on the dictation of complainant-Ram Khelawan (PW1). At the cost of repetition, it is very pertinent to mention that there is no reason on record for false implication of accused-appellant by his real brother. More importantly, appellant is named in the FIR as single accused. Hence, it transpires that PW1

was the eye-witness of the incident. That is why he has named his brother Prakash in the FIR and at the time of deposition before learned trial court, he turned hostile to save him.

18. Shiv Raj (PW2) is cousin of complainant. It is said that on hearing the screaming, he also ran towards the place of occurrence. His presence is also proved on the spot because he sustained injuries as it is said in the first information report that Shiv Raj sustained injuries while trying to save the deceased. Medical examination of injuries of this witness was conducted by Dr.Vinod Kumar Mishra (PW4). He has stated in his statement that there was lacerated wound of size 2.0 cm x 0.8 cm, which was muscle deep on the left side of scull. The doctor has opined that this injury could be inflicted by hard and blunt object. Injury report of this witness is proved as Ex.ka5. Although, Shiv Raj (PW2) has also turned hostile, but injury sustained by him shows that he was present at the place of occurrence and as stated in the FIR, he sustained injury while trying to save the deceased from the clutches of accused-appellant. The same case goes with the daughter of appellant, namely, Kumari Goldi. Unfortunately, Kumari Goldi died before she could depose. In this way, the injuries of above injured persons established the fact that the incident, as alleged in the FIR, took place and while trying to save the deceased from the attack of appellant, they sustained injuries. Although, Shiv Raj (PW2) has stated that he got injury by falling, but this statement cannot be believed in view of the above circumstances. Learned trial court has rightly opined that a person can tell a lie, but not the circumstances.

19. We are convinced that learned trial court has rightly held that inquest report was prepared and punch gave opinion that deceased Phoolkali died due to inflicting the injuries with spade by Prakash. Complainant-Ram Khelawan has also signed the inquest report and Bhola has also signed, who is the witness of recovery of spade. This witness, namely, Bhola is produced as PW7 and has stated that police called him at police chauki and sought his thumb impression on a plain paper. He has denied recovery of spade in his presence, but in this way, however, he has admitted his thumb impression on recovery memo. Learned trial court has very rightly appreciated the fact that there is no signature or thumb impression of accused-Prakash on inquest report. It shows that accused appellant was not present at the time of preparation of inquest report of the deceased while deceased was his wife. His real brother Ram Khelawan, the complainant and Bhola (PW7), etc., were present, but accused was not present; meaning thereby that he had fled away from there. It is very strong circumstance against the appellant.

20. The finding of fact regarding the presence of witnesses at the place of occurrence cannot be faulted with. Death of deceased was a homicidal death. The fact that it was a homicidal death takes this Court to most vexed question whether it would fall within the four-corners of murder or culpable homicide not amounting to murder. Therefore, we are considering the question whether it would be a murder or culpable homicide not amounting to murder and punishable under Section 304 IPC. Accused is in jail for the last more than 14 years.

21. In ***State of Uttar Pradesh vs. Mohd. Iqram and another,*** [(2011) 8 SCC 80], the Apex Court has made the following observations in paragraph 26, therein:

"26. Once the prosecution has brought home the evidence of the presence of the accused at the scene of the crime, then the onus stood shifted on the defence to have brought-forth suggestions as to what could have brought them to the spot in the dead of night. The accused were apprehended and, therefore, they

were under an obligation to rebut this burden discharged by the prosecution and having failed to do so, the trial-court was justified in recording its findings on this issue. The High Court committed an error by concluding that the prosecution had failed to discharge its burden. Thus, the judgment proceeds on a surmise that renders it unsustainable."

22. Considering the evidence of these witnesses and also considering the medical evidence including postmortem report, there is no doubt left in our mind about the guilt of the present appellants. However, the question which falls for our consideration is whether on reappraisal of the peculiar facts and circumstances of the case, the conviction of the appellant under Section 302 IPC should be upheld or the conviction deserves to be converted under Section 304 (Part-I) or (Part-II) of the Indian Penal Code. It would be relevant to refer Section 299 of the Indian Penal Code, which reads as under:

*"**299.Culpable Homicide-**Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."*

23. The academic distinction between 'murder' and 'culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Sections 299 and 300 IPC. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	**Section 300**
A person commits culpable homicide if the act by which the death is caused is done.	Subject to certain exceptions, culpable homicide is murder is the act by which the death is caused is done.
INTENTION	
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
KNOWLEDGE	**KNOWLEDGE**
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

24. In the case in hand, the postmortem of deceased-Phoolkali was conducted by Dr.Autar Singh, who has produced before trial court as PW5. According to postmortem report, the deceased sustained following antemortem injuries:

(a) contusion on back at level of T-6 to T-12 about 15 cm x 9 cm.

(b) contusion on the right-side of back at level of T-10 to T-2 about 5 cm x 4 cm.

(c) abrasion on post aspect of right thigh near right knee joint about 2 cm x 1 cm.

25. In the internal-examination on the body of the deceased, the spinal cord and ribs were found fractured. Right lung and liver also found injured. The doctor opined that deceased died due to excess bleeding from antemortem injuries. Therefore, it is established that deceased died due to excess bleeding of internal injuries sustained by her. Having analyzed the antemortem injuries, we have reached to the conclusion that appellant used the spade to attack the deceased from reverse-side because deceased sustained two injuries of contusion. There is no injury of incised wound. Hence, spade was used from reverse side, which shows that appellant was not having any intention to kill the deceased, but certainly he had knowledge that his act was likely to cause death.

26. O n overall scrutiny of the facts and circumstances of the case coupled with the opinion of the medical officer and considering the principle laid down by the Hon'ble Apex Court in the case of ***Tuka Ram and others vs. State of Maharashtr***a [(2011) 4 SCC 250] and in the case of ***BN Kavadakar and another vs. State of Karnataka*** [1994 Supp (1) 304], we are of the considered opinion that the offence would be punishable under Section 304 (Part-I) IPC.

27. From the upshot of the aforesaid discussion, it appears that the death caused by the accused was not intended and the injuries were though sufficient in the ordinary course of nature to have caused death, the accused had no intention to cause death, therefore, the instant case false under the Exceptions 1 and 4 to Section 300 IPC.

28. In the light of the foregoing discussions, the appeal is liable to be allowed in part. Appellant is held guilty for commission of the offence under Section 304 (Part-I) IPC instead of offence under Section 302 IPC along with other offences punishable under Sections 323 and 324 IPC.

29. Hence, the conviction and sentence awarded to the appellant for the offence under Section 302 IPC is converted into the offence under Section 304 (Part-I) IPC and appellant is sentenced under Section 304 (Part-I) IPC for 14 years rigorous imprisonment and fine of Rs.5,000/-. The appellant shall undergo further simple imprisonment for one year in case of default of fine. Sentence awarded under Sections 323 & 324 IPC shall remain intact. All the Sentences shall run concurrently.

30. Accordingly, the appeal is **partly allowed**, as modified above.

(2021)11ILR A515
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.10.2021

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.
THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Criminal Appeal No. 530 of 1982

Mahabir & Ors. ...Appellants (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri C.S. Saran, Sri Amar Saran, Sri Devendra Swaroop, Sri Sikandar B. Kochar

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(A) Criminal Law - The Indian Penal Code, 1860 - Section 148 - Appeal against conviction - rioting ,armed with deadly weapon , Section 149 - Every member of unlawful assembly guilty of offence committed in prosecution of common object , Section 302 - Murder , Section 100 - When the right of private defence of the body extends to causing death - cardinal principle of law - in criminal cases primarily it is the duty of the prosecution to prove its case beyond reasonable doubt - burden on the prosecution alone but when there are two versions of the parties about the same occurrence the Court cannot loose the sight of either of them and has to consider both the versions in order to come to a conclusion as who was the aggressor and what was the real genesis of occurrence - accused not required to prove their case to the hilt like the prosecution, but it is to be seen if the defence version is probable.(Para - 16)

(B) Criminal Law - law of private defence - It does not require that the person assaulted or facing an apprehension of an assault must run away for safety - It entitles him to defend himself and law gives him the right to secure his victory over his assailant by using the necessary force. (Para - 21)

Complainant party forcibly trying to occupy disputed land - objection - started to assault - apart from lathi, sharp-edged weapon was also used - accused suffered some injuries on vital part of body - injuries grievous in nature - accused within their right of private defence of person - extends to causing death - Trial Court held - complainant party has the right of private defence of property and accused have no right of private defence of person. (Para - 22)

HELD:-Section 100 of I.P.C. is fully applicable on the facts of the present case and right of private defence of person extends to causing death. Trial Court failed to properly appreciate the evidence on record and findings recorded by it that the complainant party has the right of private defence of property and accused have no right of private defence of person is against the evidence on record and perverse, erroneous and not sustainable in the law. Trial Court committed error in holding accused guilty for charges under Section 148 and 302 read with Section 149 I.P.C.. Prosecution failed to prove its case and accused are entitled for acquittal. (Para - 24)

Criminal Appeal allowed. (E-7)

List of Cases cited:-

1. Satya Narain Vs St. Of Raj., (1997) 11 SCC 83

2. Jai Dev Vs The St. Of Punj., AIR 1963 SC 612

(Delivered by Hon'ble Syed Aftab Husain Rizvi, J.)

1. Heard Sri Sikandar B. Kochar, learned counsel for the appellants and Sri Ajeet Ray, learned A.G.A. for the State.

2. This criminal appeal has been filed against the judgment and order dated 27.02.1982 passed by IV Additional Session Judge, Muzaffarnagar in S.T. No 259 of 1981, convicting and sentencing the appellant Mahabir, Krishan Pal, Daulat, Topi, Ghasita, and Dharma to 2 years rigorous imprisonment under Section 148 and life imprisonment under Section 302 I.P.C. read with Section 149 I.P.C. Both the sentences

3. In brief, the prosecution case is that on 10.03.1980 at about 10:15 a.m. a Case Crime No.70 under Section 148, 149, and 302 I.P.C. was registered at Police Station- Bhopa, District-Muzaffarnagar on an application of Ram Gopal dated 10.03.1980. It was alleged in the application that to construct the houses for weaker sections a unanimous resolution was passed by the Gram sabha Wazirabad, for which a meeting was held a month earlier and plots were already allotted, 32 beneficiaries were selected for the construction of houses and Jagmohan was also included in it and his house was also to be constructed. Jagmohan has laid the foundation of his house, a day before. On 10.03.1980 at about 09 a.m. Jagmohan was raising construction on the foundation. Co-

villagers, Mahabir holding a Lathi, Krishan Pal holding a Ballam, Daulat holding a Tabbal, Topi holding a Ballam, Ghasita holding an axe, and Dharma holding a Bhala in their hands came abusing and started dismantling the foundation. In the meantime, the brother of the complainant Harnam also reached the spot. Harnam and Jagmohan both forbade the accused from abusing and dismantling the foundation. Accused suddenly pounced upon Harnam and started to beat him with the weapons in their hands. Devi Sahai, Rehala Das, and Tilak Ram tried to save Harnam but the accused continued to beat him due to which Harnam suffered serious injuries on his head, mouth, forehead, neck, chest, and abdomen. Jagmohan and Harnam also wielded lathi in defence. Harnam became unconscious and fell down due to injuries suffered by him and died on the spot. As his body was warm he was taken to Government hospital Morna in a horse carriage but the doctor was not present there then he was carried to Bhopa hospital where the doctor declared him dead. The incident was narrated by Jagmohan to the complainant and he has come to lodge the report leaving the dead body of Harnam in the horse carriage at Bhopa hospital and Jagmohan is beside the dead body.

The investigation commenced and the Investigating Officer on the same day recorded the statement of the complainant and came to Bhopa hospital, appointed S.I. Shyam Dhan Gupta for inquest who conducted the inquest proceedings and sent the body for post-mortem examination. Investigating Officer recorded the statements of other witnesses, arrested the accused, and sent them to the police station. Thereafter he searched the houses of the accused and recovered a blood-stained lathi from the house of accused Mahabir and a blood-stained Tabbal from the house of the accused Daulat, sealed it, and prepared its memo. Investigating Officer also visited the place of occurrence and prepared the site plan and collected blood-stained soil and plain soil and sent the articles for chemical examination. Thereafter on different dates recorded the statements of other witnesses and after completion of investigation submitted the charge sheet against all the six accused persons named in the F.I.R. under Section 147, 148, and 302 I.P.C.

4. The learned Trial Court framed charges against the accused Mahabir, Krishan Pal, Daulat, Topi, Ghasita, and Dharma under Sections 148, 302 read with Section 149 I.P.C. Accused pleaded not guilty and claimed for trial. The prosecution produced eight witnesses who have proved 15 papers as Ex.Ka-1 to 15 and 4 material exhibits. The statements of the accused were recorded under Section 313 Cr.P.C. in which they have denied the incriminating evidence. Accused Dharma has said that he was not present on the spot. Accused Ghasita, Topi, and Krishan Pal have said that Ram Gopal, Jagmohan, Rati Ram, and Tilak Ram were forcibly trying to take possession of the land of Hargyan and when it was objected, they assaulted them and Hargyan with lathi and Tabal. The accused also wielded lathi in defence. Accused Mahabir has stated that he was not present on the spot. He went to the police station to lodge a report with Krishan Pal and others, but were detained there. Two defence witnesses Dr. S.R. Rayal DW-1 and Dr. D.C. Mubar DW-2 have been examined. The learned Trial Court by the impugned judgment has held all the accused guilty for charges under Section 148, 302 read with Section 149 I.P.C.

5. Learned counsel for the appellants contended that Ram Gopal the brother of complainant and deceased was Pradhan of Goan Sabha Wazirabad and he illegally allotted a plot to his brother Jagmohan. This allotment was cancelled but Jagmohan and his brothers were trying to forcibly take possession of the disputed land and raised construction on it, when objected by the accused and Hargyan they assaulted them

with lathi and tabbal causing grievous injuries. The accused also defended themselves and in exercise of such right injuries were caused to Harnam causing his death. The act of the accused are covered by the right of private defence of person. The complainant party has no right of private defence of property as they have no right or title on the disputed land. The learned trail Court has failed to appreciate the evidence in its right perspective and findings recorded by it are erroneous and bad in law. Learned counsel for the appellants further contended that accused Dharma, Daulat and Mahabir were not present at the time of occurrence and they have been falsely implicated. They have gone to police station with injured accused Krishna Pal, Topi and Ghasita and other injured Hargyan to lodge the report but they were detained at the police station. The report was not lodged and after registration of the F.I.R. of the complainant the report of the accused was lodged. The accused persons are liable to be acquitted.

6. Learned A.G.A. contended that the disputed land was allotted to Jagmohan in 1972 and he has taken possession of it and constructed a hut on it. Jagmohan was in possession of the disputed land and one day before the incident he has laid the foundation of his house. At that time no objection was raised by the accused. At the time of incident when Jagmohan with Manson and labourers was at the site to construct the walls on the foundation, the accused persons in pre-planned manner armed with deadly weapons came on the spot and started to dismantle the foundation and assaulted Harnam and Jagmohan. Harnam suffered serious injuries in this assault and died on the spot. The accused persons have no right of private defence and they are aggressors. The learned trial Court has fully discussed and appreciated the entire evidence on record and findings recorded by it is proper and there is no illegality or perversity in it. The appeal is liable to be dismissed.

7. Post-mortem of Harnam (deceased) was conducted on 11.03.1980 at 12:30 p.m. by Dr. Pramod Kumar. According to the post-mortem report Ex.Ka-12 age of the deceased was 32 years, average built body, rigor mortis was present in both upper and lower extremities, eyes closed, mouth half-open.

Following antemortem injuries were found on the body of the deceased:-

1. Lacerated wound 1 ½" x ¾" x bone deep on left eye brow.

2. Lacerated wound ½" x ¼" x muscle deep on left eye outer angle.

3. Incised wound 2 ½" x ½" x bone deep present on left side head, 2½ above the left ear, direction anterio posterior, underlying bone was fractured. Margins contused.

4. Incised wound 1 ½" x ½" x bone deep present on left of head mid line anteroposteriorly placed, margins contused.

5. Incised wound ½" x 1/4" x scalp deep present on left side head at hair line anteroposteriorly placed, 3" above the left eye brow.

6. Incised wound 1/2" x ¼" x scalp deep present on left side head, ½" below and parallel to injury no. (5)

7. Lacerated wound ½" x ¼ x muscle deep on left side back of about 1" left to the mid line at the level of the inferior angle of the scapula.

8. Abrasion 5" x 1 ½" on back of right side chest just below the inferior angle of the scapula (Rt)

9. Punctured wound ½" x ¼" x chest cavity deep present on the left front of the chest at Costo sternum junction of 5th rib, junction is cut-The injury direction directly backward.

10. Punctured wound ½" x ¼" x chest cavity deep present on the left front of chest just below the middle of left clavicle, direction-directly backward.

11. Lacerated wound ½" x ¼ " x muscle deep on front of left abdomen 3½ away at 1' O clock position to umbilicus, direction Horizontal.

12. Lacerated wound ½" x ¼" x bone deep on the outer aspect of left forearm ½ above left wrist, direction horizontal.

13. Lacerated wound 1" x ¼" on front of Right leg-(bone deep), 3" below Right knee.

In the internal examination, the left parietal bone was fractured under injury no.3, a small external haematoma on the left side of the cerebrum. Left Pleura contains 6 oz blood, left lung was punctured under injury no.10. The pericardium was punctured and 2 oz blood was there. The left ventricle of the heart was punctured under injury no.9 and the heart was empty. In the stomach semi-digested food, large Intestine faecal matter and gases were present. The small intestine was empty. Gall Bladder was half full and the bladder was full.

The cause of death was shock and haemorrhage due to ante-mortem injuries and the duration was about one day.

Dr. Pramod Kumar in his statement has stated that the death may have occurred on 10.03.1980 at 09 a.m. and all the injuries were sufficient in the ordinary course of nature to cause death. Lacerated wounds were possible from lathi while incised wounds were possible from Tabbal and axe. Injuries no. 9 and 10 were possible from Ballam and abrasions were possible from fiction or from fall on the ground. Witness has also confirmed that injuries no. 3 and 4 may be caused by Tabbal Ex.-2/1.

8. Prosecution to prove its case has produced 8 witnesses, out of which 3 are public witnesses. Ram Gopal is the informant but he is not an eyewitness. The Incident was narrated to him by his brother Jagmohan and on this, he wrote the application and lodged the report. The witness in his examination-in-chief has said that he is Pradhan of Wazirabad since 1972. He has made allotment of Gram Samaj land and has also allotted one plot measuring 154 square-yards to his brother Jagmohan in the village Abadi. Jagmohan has deposited Rs.50/- for its value and a receipt dated 30.12.1972 was issued to him under his signature. The witness has proved this receipt as Ex.Ka-1. Witness has further stated that after this allotment Jagmohan was in possession of this plot and he constructed a hut on the said plot. In 1980 under the Government Scheme, the houses for weaker sections were to be constructed on such plots, and an amount of Rs.1,570/- was fixed for each house. One month before the incident, a meeting of Goan Sabha was held in which B.D.O., A.D.O. (A.G.), Gram Sevak, Secretary and he himself were present and it was decided to construct houses for 32 families whose income were less than Rs.2,000/- per annum. The resolution was written in the register. He has filed the original register and proved it as Ex.Ka-2. Witness has further stated that the khasra number of Jagmohan's plot is 541 and the total area is 3 bigha, 1 biswa, 5 biswansi and in Khatauni it is entered as Harijan Abadi. Narrating the other allegations of the F.I.R. witness has proved the F.I.R. as Ex.Ka3. Witness has further stated that Sub-Inspector came into the village on the day of the incident and in his presence, the houses of Mahabir and Daulat were searched. One lathi with blood stains was recovered from the house of the

Mahabir and one Tabbal with blood stains was recovered from the house of Daulat. Sub-Inspector prepared its memo exhibits Ka 4 and 5. Witness has proved its signature on it and pieces of lathi and tabbal as exhibits 1/1 to 1/4 and 2/1 to 2/3.

9. Jagmohan is the eyewitness. In his examination-in-chief the witness has stated that Harnam was his real brother. 8 years earlier a plot of 154 square yards (14 yards in length and 11 yards in width) was allotted to him by the Gram Samaj in village Wazirabad. He has taken possession of the land after 10-15 days of the allotment and constructed a hut on it. The wall of the hut was of bricks with a thatched roof. A meeting of B.D.O., A.D.O. (A.G.), Gram Sevak, and others was held in which it was decided that an amount of Rs.1,500/- will be given to each of 30-32 families for construction of the houses. His name was also included in the list of beneficiaries. A day before the incident he laid the foundation and wanted to construct one room and verandah on it. On the day of the incident at 9 a.m., he with Devi Sahai Mason, Rulha, and Tilak Ram was on the site to erect walls. Suddenly Mahabir, Daulat, Krishan Pal, Topi, Ghasita, and Dharma came there. Mahabir was holding a Lathi, Krishan Pal holding a Ballam, Daulat holding a Tabbal, Topi holding a Ballam, Ghasita holding an axe, and Dharma holding a Bhala in their hands. They started abusing and said that they will not permit the construction of the house there and started to dismantle the foundation. In the meantime, Harnam also came there. He was holding a lathi. Harnam asked them why they are dismantling the foundation. Accused said that he will be taught a lesson and killed. All the accused with the weapons in their hands started to assault Harnam. He and Harnam wielded lathi in their defence. He did not suffer any injury. Harnam suffered several injuries. Receiving injuries and moving back Harnam fell down on the way in the north of well. Devi Sahai, Daulat Ram, Rulha also saw the incident. He went to his brother Ram Gopal and narrated the incident, then he and Ram Gopal came on the spot. As the body of Harnam was warm but he was not talking, they carried him to Morna hospital in a horse carriage where the doctor was not present, then he was carried to Bhopa hospital where the doctor examined him on the horse carriage itself and declared him dead. From there Ram Gopal went to lodge the report.

10. Devi Sahai P.W-3 is also an eyewitness. In his examination-in-chief, the witness has said that he has gone on the plot of Jagmohan in village Wazirabad for mason work with Rehla Das and Tilak Ram the two labourers. This plot is near the houses of the accused and there is one public well in the north of this plot. On 09.03.1980 he has laid one feet high foundation beneath the ground. On the next day at about 8:30 a.m. they reached at the site. Jagmohan was also there. The foundation was constructed by Jagmohan. The incident is of 10.03.1980. The construction work was about to start. Mahabir holding a Lathi, Krishan Pal holding a Ballam, Daulat holding a Tabbal, Topi holding a Ballam, Ghasita holding an axe, and Dharma holding a Bhala in their hands came and prevented Jagmohan from construction work. Jagmohan said he will certainly construct his house, then the accused started abusing. In the meantime, Harnam holding a lathi came there and he also abused and said that they will construct the house. The accused started to assault. Before the arrival of Harnam accused have dismantled the foundation. Harnam and Jagmohan beat the accused with lathi. Jagmohan did not suffer any injury. Harnam died on the spot due to injuries. Harnam when assaulted fell moved back down on the way near the well where blood oozed out and spilled on the ground.

11. B.M. Mishra, S.O. PW-8 is the Investigating Officer. In his examination-in-chief, he has stated that on 10.03.1980 he started

the investigation of this case, recorded the statements of the complainant and constable Prakash Chandra. He reached Bhopa hospital and directed S.I. Shyam Dhan Gupta to conduct inquest proceedings. He visited the place of occurrence and raided the houses of the accused and arrested them and sent them to the police station through S.I. Surendra Singh. Then he recovered a blood-stained lathi from the house of Mahabir and a blood-stained tabal from the house of Daulat and prepared its memo. He visited the place of occurrence and prepared the site plan and collected blood-stained and plain soil from the place of occurrence in two separate containers and prepared its memo and sealed it. Recorded the statement of other witnesses, and sent the materials for chemical examination and after completion of investigation submitted the charge sheet. The witness has proved all the papers as Ex.Ka-4, Ka-5, and Ex.Ka-13 to Ka-15 and material exhibits 1/1 to ¼, 2/1 to ⅔, and 3 and 4.

12. Remaining witnesses are formal in nature. Constable Dharmvir PW-4 has carried the dead body for post-mortem after the inquest proceedings and has proved the same from his statement. Constable Prakash Chandra PW-5 is the Chik and G.D. writer and he has proved both the documents as Ex. Ka- 6 and 7. He has also proved the G.D. entry of arrest of accused as Ex.Ka-8. S.I. Shyam Dhan Gupta PW-6 has conducted the inquest proceeding and prepared related papers. Witness has proved the inquest report and related papers as Ex.Ka-9 to Ex.Ka-11.

13. The prosecution version is that at the time of the incident Jagmohan, the brother of complainant Ram Gopal and deceased Harnam was on the site for the construction of his house. The foundation was laid one day before. The accused persons armed with sharp-edged weapons and lathi came there and started abusing and dismantling the foundation. In the meantime, Harnam, the brother of Jagmohan holding a lathi came there. Harnam and Jagmohan both prevented the accused from dismantling the foundation. Suddenly the accused with weapons in their hands attacked and severely beat Harnam who after receiving serious injuries fell down on the way in the north of the well and died. It is also the prosecution version that Jagmohan and Harnam wielded lathi in defence causing injuries to accused Topi, Krishan Pal, and Ghasita. From the material on record it also appears that there is a cross-version and according to defence Ram Gopal, Jagmohan, Harnam, Rati Ram and Tilak Ram wanted to forcibly occupy the land of Hargyan and when it was objected, they assaulted Topi, Ghasita, Krishan Pal and Hargyan with lathi and tabal. The aforesaid accused wielded lathi and Ballam in self-defence. Mahabir, Daulat, and Dharma were not present on the spot. The injured accused and Mahabir and Hargyan went to the police station to lodge a report but they all were detained and their report was not registered at that time and after lodging the F.I.R. of the complainant ante-time, the report of the accused was lodged.

14. From the accused side, two witnesses have been examined. Dr. R.S. Ruyal DW-1 has examined the injuries of Hargyan, Topi, Krishan Pal, and Ghasita and according to the medical examination report of Hargyan Ex.Kha-2 his medical examination was conducted on 10.03.1980 at 2 p.m. and he was brought by Constable Rohtash Singh, police out post-Morna, Police Station- Bhopa, District-Muzaffarnagar. Following injuries were found on his body:-

1. Abrasion (unscabbed) 2 cm x 1 cm on the back of the left wrist.

2. Lacerated wound 2 cm x 0.5 cm x skin deep on back and root of left middle finger, obliquely placed. Bleeding on touch.

3. Abrasion (unscabbed) 0.5 cm x 0.5 cm on back and root of the left index finger.

4. Abrasion(unscabbed) 0.5 cm x 0.5 cm on back and root of the left ring finger.

5. Tender swelling 7 cm x 6 cm on top of the left shoulder (outer half of left collar bone).

All injuries were simple in nature except injury no. (5) which was kept under observation and advised X-Ray in both views.

Object-Blunt, except injury no.1, 3, and 4 which were caused by friction against a rough surface. The duration was fresh.

Accused Topi was medically examined on 10.03.1980 at 02:30 p.m. and according to his medical examination report Ex.Kha-3, the following injuries, were found on his body:-

1. Lacerated wound 2.5 cm x 0.5 cm x skin deep on the left eyebrow, obliquely placed. Bleeding on touch.

2. Abraded contusion (Unscabbed and red) 4cm x 2 cm in front of chest Rt. Side at 4'O clock position, 8 cm from Rt. Nipple.

3. Abraded contusion (unscabbed and red) 5cm x 1cm on outer left forearm just above the left wrist, with swelling 6 cm x 4 cm around it.

4. Abrasion (Unscabbed) 5 cm x 2 cm on the back of the left forearm, 2 cm above injury no.3.

5. Three abrasions (unscabbed) 5cm x 0.5 cm: 5cm x 0.5 cm and 1 cm x 1cm respectively on middle joints and outer surface of Rt. Index finger, middle finger, and right little finger.

All injuries were simple in nature except injury no.3 which was kept under observation and advised X-ray in both views.

All injuries were caused by blunt objects except injuries no.4 and 5 which were caused by friction against a rough surface.

All injuries were fresh in duration.

Accused Krishan Pal was medically examined on 10.03.1980 at 3 p.m. and according to his medical examination report Ex.Kha-4, the following injuries, were found on his body:-

1. Lacerated wound 4 cm x 0.5 cm on left side top of the head, 13 cm above left ear, obliquely placed. Bleeding on touch.

2. Abrasion (Unscabbed) 3 cm x 2 cm on front and outer of the left knee, 3 cm from left tibial tuberosity.

Complaint of pain Rt. Knee and back but no visible injury was there.

Nature-Simple.

Object- Injury No.1 caused by a blunt object and No.2 by friction against a rough surface.

Duration-Fresh.

Accused Ghasita was medically examined on 10.03.1980 at 3:30 p.m. and according to his medical examination report Ex.Kha-5, the following injuries, were found on his body:-

1. Incised wound 3cm x 0.5 cm x bone deep on Rt. Side forehead, 5 cm above Rt. Eyebrow, obliquely placed. Margins of the

wound were clean-cut and no tailing was there. Bleeding on touch.

2. Lacerated wound 3cm x 1m x scalp deep on Rt. side head, 7cm above the right ear. Bleeding on touch.

3. Incised wound 3cm x 1cm x bone deep on outer par of left elbow joint, transversely placed. Inj. back to front direction. Margins of the wound were clean-cut and the wound was continual with 3 cm x 11 near abrasion at its anterior part. Bleeding on touch.

4. Abraded contusion (unscabbed and red) 9 cm x 3 cm on the back and middle 1/3rd of Rt.forearm, obliquely placed, 13 cm x 8 cm swelling around it.

Complaint of pain left shoulder left forearm and left leg but no visible injury was there.

All injuries were simple in nature except injury no.4 which was kept under observation and advised X-Ray in both views.

Injuries No.1 and 3 were caused by a sharp-edged weapon and No.2 and 4 by a blunt object.

All injuries were fresh in duration.

Dr. R.S. Rayal DW-1 has proved the aforesaid medical examination report as Ex. Kha- 2 to Ex. Kha- 5.

Dr. D.K. Mubar DW-2 in his examination-in-chief has stated that on 17.03.1980 the X-Ray of the left shoulder of Hargyan was conducted under his supervision and a fracture of the collar bone was detected. The witness has proved the X-Ray report as Ex.Kha-6 and X-Ray plate.

15. So, the date and time and place of occurrence are admitted. What is to be judged is that who are aggressors and whether accused Dharma, Daulat, and Mahabir were involved in the incident or not and the presence of Hargyan at the time of occurrence.

16. It is cardinal principle of law that in criminal cases primarily it is the duty of the prosecution to prove its case beyond reasonable doubt. The burden is on the prosecution alone but when there are two versions of the parties about the same occurrence the Court cannot loose the sight of either of them and has to consider both the versions in order to come to a conclusion as who was the aggressor and what was the real genesis of occurrence. The accused are not required to prove their case to the hilt like the prosecution, but it is to be seen if the defence version is probable.

17. Admittedly, Ram Gopal, the brother of Jagmohan and Harnam (deceased) was Pradhan of Goan Sabha Wazirabad. In his cross-examination, Ram Gopal PW-1 has said that he remained suspended in 1976 for three months in relation to the allotment of land made by him in 1972. He has further admitted that a case was also filed to cancel the allotments made by him and allotments made by him were cancelled by the S.D.M. An appeal was filed before the Collector and the Collector cancelled some of the allotments. He has further said that in the order of Collector it was not made clear that which of the allotments were cancelled and which were not. He has given an evasive reply in this respect but has not specifically denied that allotment of Jagmohan was not cancelled by the Collector. So from the statement of Ram Gopal PW-1 the then Pradhan of Goan Sabha Wazirabad, it is clear that allotment made in favour of the Jagmohan was cancelled and there was no valid allotment in favour of Jagmohan of the disputed land so Jagmohan has no right in respect of the disputed land. Further prosecution

has also filed a receipt of allotment dated 30.12.1972 Ex. Ka-1. In this receipt, the particulars of the land allotted to Jagmohan is described as 11x14 yards, 154 sq. yards of land from Khasra number 541, boundaries of which are East- Ram Ratan, West- public way, North- well of Harijans, and south- Rasta. The boundaries as mentioned in this receipt do not match with the boundaries of the disputed plot as shown in the site plan Ex. Ka-13. In the site plan Ex. Ka-13 in the west vacant land of Plot No. 542 and in the South Plot No. 543 having a wheat crop are shown and there is no Rasta either in the west or in the south as mentioned in the receipt Ex. Ka-1. Further, the public way (Khadanja) is situated in the west of vacant Plot No. 542 in the site plan exhibit Ka-13. So the description of the boundaries as mentioned in the receipt Ex. Ka-1 does not tally with the spot position and it is clear that the land allotted vide receipt Ka-3 is not the disputed land and its location is different. Jagmohan PW-1 in his cross-examination could not tell the Khasra numbers of the lands allotted by him. He has also said that he does not remember whether any map was prepared by the Lekhpal. Plots were not marked on any paper. He has also said that some area of this plot was allotted earlier and the remaining area was allotted to Jagmohan and others. He has further said that he has pointed to the I.O., the land where Jagmohan has laid the foundation. Adjacent to it in the west there is Khasra No. 542 and rasta is in the west of Khasra No. 542 and in the South adjacent to it there was a wheat field at the time of occurrence. The oral statement of Jagmohan PW-1 also does not confirm the description of boundaries as mentioned in the receipt of allotment Ex.Ka-1. The learned trial court has not considered the fact that allotment made in favour of Jagmohan was cancelled and there was no valid allotment of the disputed land in favour of Jagmohan. The learned trial court has also failed to appreciate that the description of the land allotted as mentioned in the receipt exhibit Ka-1 does not match with the disputed land. The learned trial court has misread the evidence regarding the boundaries and has failed to properly appreciate it. The learned trial court has presumed the possession of the complainant party on the disputed land on the grounds that after allotment Jagmohan has constructed a hut on it and further that Jagmohan has laid the foundation on the disputed land one day before the incident and since Jagmohan was in possession of this land the accused had no right to disturb his possession or to use force against him. These observations of the learned trial court are not justified. Jagmohan PW-2 in his cross-examination has said that 4-5 days before the incident he has removed the hut and has thrown the bamboo and straws in the ditches but no sign or remains of any hut has been found on the spot by the investigating officer. The disputed land is in form of an open land and is situated near the houses of the accused persons. Since there was no valid allotment in favour of Jagmohan, they have no right or title on disputed property. It appears that the complainant party was trying to forcibly occupy the disputed land and raised construction on it. So their position was that of a trespasser. No settled possession can be presumed in favour of the complainant party just because foundation was laid one day before the incident. So from material on record, the defence version that the complainant party was forcibly trying to occupy the land got established and in such a situation the right of private defence of property will not be available to the complainant party. The learned trial Court has erred in holdings that complainant party has right of private defence of property.

18. From the evidence on record, it also stands proved that it was complainant party who first started the assault. Devi Sahai PW-3 the independent witness in his cross-examination has said that labourers have prepared the *gara* when accused persons came there and prevented Jagmohan from the construction work.

Jagmohan said that he will construct his house then both the parties started abusing each other. Meanwhile, Harnam holding a lathi came there and abused and said that he will certainly construct the house. The witness has further said that before arrival of Harnam the accused started to remove the bricks then Jagmohan and Harnam assaulted the accused with lathi. The witness on another place has also said that Jagmohan has also abused the accused and when the parties were abusing each other then Harnam said that he is ready with a lathi and at the time Jagmohan has also picked up a lathi. The witness has also said that when accused were removing the bricks then Jagmohan and Harnam started to assault the accused with lathi. As soon as the accused started to remove the bricks Jagmohan and Harnam started to assault the accused. The withness has further said that Jagmohan and Harnam have assaulted the accused for 15 minutes while they remain indulged in removing the bricks of the foundation. When all the bricks were taken out from the foundation then accused started to assault. From the above statement of the witness, it is clear that both the parties were abusing each other and when accused persons prevented the complainant party from construction work and started to remove the bricks of the foundation complainant party started the assault. So the genesis of the occurrence is that the complainant party with Devi Sahai Mason and two laboures came on the spot to raise construction on the disputed land. The accused came there and objected. Both the parties indulged in abusing each other. Accused in order to prevent the complainant party from raising construction started to remove the bricks from the foundation then complainant party started to assault them. From the evidence on record, it is also established that from the accused side Topi, Krishna Pal, and Ghasita have suffered visible injuries. Accused Topi has one lacerated wound on the head, one contusion on the chest, two contusions on the four arms, and three abrasions on the fingers while accused Krishna Pal has suffered one lacerated wound on the head and one abrasion on the left knee and accused Ghasita has suffered one incised wound on the forehead above right eyebrow, one incised wound on the left elbow joint and one lacerated wound on the head and one contusion on the right forearm. The injuries no. 1 and 3 of the accused Ghasita are incised wounds and according to the opinion of the doctor, these injuries have been caused by sharp-edged weapons.

19. The defence version is that the complainant party tried to forcibly occupy the land of Hargyan when objected assaulted Hargyan, Krishna Pal, Topi and Ghasita with lathi and tabal. This defence version also gets support from the medical evidence on the record. Besides the three accused persons, Hargyan also has visible injuries. According to his medical examination report Ex.Kha-2 five visible injuries one abrasion on the left wrist, one lacerated wound on the middle finger, two abrasions on the fingers and tender swelling on top of the left shoulder were found on the body of Hargyan and in the opinion of the doctor the duration of injuries was fresh. Injury no. 5 was kept under observation and X-Ray was advised. According to the X-Ray report Ex. Kha-6 fracture of clavicle bone was detected. It is also pertinent to mention that Hargyan was taken for medical examination by the police constable Rohtas Singh along with the other injured accused persons and it is mentioned in the G.D. No. 28, of 10.03.1980 at 13.00 p.m. He was medically examined along with injured accused persons by the same doctor at 2 P.M. and his injuries have been found fresh in duration which corresponds to the time of occurrence. So from the medical evidence on record, it stands proved that Hargyan has suffered injuries at the time of occurrence. The prosecution has failed to give any explanation of the injuries of Hargyan. The prosecution witnesses have simply denied the presence of Hargyan on the spot but the medical

evidence supports the defence version that Hargyan was very much present on the spot and suffered injuries in this incident.

The learned trial Court has held that Hargyan was not a participant in this marpit. The learned trial Court has observed that *"Although the accused are not required to prove their own case to the hilt in the present case the absence of F.I.R. lodged by the accused and absence of Hargyan from witness-box clearly show that accused have not come with clean hands and they do not wanted to assert and bring true facts before the Court. It cannot be said that the report of the complainant was written ante time because there is no evidence that accused reached the police station before 1.30 p.m.. If Hargyan had received injuries in this occurrence he could state this fact before the Investigating Officer when the accused persons were arrested. I'm not supported by any circumstances or evidence on the file to say that there was any other motive for the prosecution not to name Hargyan amongst the accused. The only inference which can be drawn is that Hargyan was not a participant in this marpit. The defence has not shown any reason as to why Hargyan himself did not come in the witness box."* The aforesaid observations of the learned trial Court are against evidence on record and unsustainable. The defence version is that after the incident the injured accused along with Krishna Pal and Hargyan have gone to police station to lodge the report but there report was not registered and they were detained at the police station. This defence version also stands proved from the circumstantial evidence on record. According to the prosecution, on search of the houses of the accused a blood-stained lathi from the house of accused Mahabir and a blood-stained tabbal from the house of the accused Daulat were recovered by the Investigating Officer B.M. Mishra S.O.. During this search none of the accused were present. The Investigating Officer has searched the houses in their absence while it is also the prosecution version that Investigating Officer B.M. Mishra S.O. after instructing S.I. Shyam Dhan to conduct inquest proceedings and recording statement of Jagmohan came back to police out post Morna and from there proceeded to place of occurrence. Investigating Officer in his statement has said that thereafter he conducted a raid on the houses of the accused persons and arrested all the six accused from their houses and sent them to police station through S.I. Surendra Singh. Witness has further said that thereafter he made a search of the houses of the accused persons. It was unnatural on the part of the Investigating Officer not to search the houses of accused at the time of their arrest in their presence. The natural conduct should be that if the accused were arrested from their houses, search should have been made at that very moment but contrary to it the search has been made in absence of the accused persons. This conduct of the Investigating Officer is highly unnatural and improbable and clearly indicates that accused were not arrested from their houses as stated by him. Further the occurrence has taken place at 9 a.m. while the entry of accused at police station has been registered in the G.D. at 13.00 p.m. after four hours of the incident. One person has lost his life in the incident and the accused persons were conscious of the aforesaid fact. They were also injured in the incident. So it is highly improbable that in injured condition they should have remained in their houses waiting for the police to arrive and arrest them. The G.D. entry also discloses the presence of Hargyan at the police station. Hargyan was neither named in the F.I.R. nor was an accused in the case. Why he reached the police station has not been made clear by the prosecution. The above circumstances clearly establishes that the accused after the incident went to the police station with Hargyan in injured condition to lodge the report but they were detained at the police station and after lodging of the F.I.R. of

the complainant their presence at police station was shown in the G.D. at serial no. 28 dated 10.03.1980 at 13.00 p.m.. In the aforesaid circumstance there is a probability that F.I.R. of this case may be ante timed. The learned trial Court has lost the sight of the circumstantial evidence and its findings in this regard are against the evidence on record and perverse.

20. From the evidence on record it is proved that accused Topi, Krishna Pal and Ghasita have suffered injuries. Accused Ghasita has also suffered injuries of sharp-edged weapon. Hargyan has also suffered injuries in this incident and one of his injuries is grievous in nature. So from the evidence on record it is proved that it was the complainant party who started the assault. They used lathi and tabbal in the assault causing injuries on three accused persons and Hargyan. Some of the injuries are on the vital part of the body and one of the injuries of Hargyan is grievous in nature.

21. Section 100 of I.P.C. provides for the right of private defence of the body and is as follows:-

"100. When the right of private defence of the body extends to causing death.-- The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely:--

(First)-- Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;

(Secondly)- Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;"

In **Satya Narain vs State Of Rajasthan (1997) 11 SCC 83**, it has been held that "having received injuries on their heads on account of the assault made by the deceased, the accused persons were well within their right to cause such injuries which were likely to cause the death of the deceased.

In **Jai Dev vs The State Of Punjab AIR 1963 SC 612**, the Hon'ble Apex Court has observed thus"

"There can be no doubt that in judging the conduct of a person who proves that he had a right of private defence, allowance has necessarily to be made for his feelings at the relevant time. He is faced with an assault which causes a reasonable apprehension of death or grievous hurt and that inevitably creates in his mind some excitement and confusion. At such a moment, the uppermost feeling in his mind would be to ward off the danger and to save himself or his property, and so, he would naturally be anxious to strike a decisive blow in exercise of his right. It is no doubt true that in striking a decisive blow, he must not use more force than appears to be reasonably necessary. But in dealing with the question as to whether more force is used than is necessary or than was justified by the prevailing circumstances, it would be inappropriate to adopt tests of detached objectivity which would be so natural in a court room, for instance, long after the incident has taken place. That is why in some judicial decisions it has been observed that the means which a threatened person adopts of the force which be uses should not be weighed in golden scales. To begin with, the person exercising a right of private defence must consider whether the threat to his person or his property is real and immediate. If he reaches the conclusion reasonably that the threat is immediate and real, he is entitled to exercise his right..... The law of private defence does not require that the person assaulted or

facing an apprehension of an assault must run away for safety. It entitles him to defend himself and law gives him the right to secure his victory over his assailant by using the necessary force. "

22. Applying the aforesaid law and legal preposition on the facts of the present case, it is quite clear that complainant party was forcibly trying to occupy the disputed land and when objected they started to assault, Complainant party and in that assault apart from lathi, sharp-edged weapon was also used causing injuries on three accused persons namely Krishna Pal, Ghasita and Topia and a non accused Hargyan. In this assault accused have suffered some injuries on the vital part of their body and Hargyan has suffered a grievous injury. So accused were within their right of private defence of person and injuries inflicted on Harnam is in the exercise of their right of private defence. In the circumstance of the case it is also clear that there was apprehension that the death otherwise will be a consequence of such assault and grievous injury was inflicted on one of the person from the accused side, so Section 100 of I.P.C. is fully applicable on the facts of the present case and the right of private defence of person extends to causing death.

23. The observation of the learned trial Court that the accused have not come with clean hand and they do not want to assert and bring the true facts before the Court are also not just and proper. From the material on record, it appears that it is the prosecution which has not come with clean hands and has not put the correct facts before the Court. The prosecution has denied the presence of Hargyan at the time of occurrence which stands proved from the evidence on record. The prosecution has also failed to explain the incised wound caused on the body of accused Ghasita as prosecution has put the case that at the time of occurrence Harnam was holding a lathi and Jagmohan picked a lathi from nearby during the course of incident. While from the evidence on record it is proved that sharp-edged weapon was also used from the accused side. The manner of arrest as shown by the prosecution also stands belied from the material on record and it is also proved that accused were not arrested from their houses as alleged by the prosecution and there is probability that F.I.R. is ante timed.

24. From the above discussions, it is clear that learned trial Court has failed to properly appreciate the evidence on record and findings recorded by it that the complainant party has the right of private defence of property and accused have no right of private defence of person is against the evidence on record and perverse, erroneous and not sustainable in the law. The learned trial Court has committed error in holding accused guilty for charges under Section 148 and 302 read with Section 149 I.P.C.. From the evidence on record it is clear that prosecution has failed to prove its case and accused are entitled for acquittal. The criminal appeal is liable to be allowed.

25. The criminal appeal is **allowed.**

26. The appellants no.3 to 6- Daulat, Topi, Ghasita and Dharma have died during the pendency of the appeal and appeal on their behalf has abated.

The appellant nos. 1 & 2- Mahabir, Krishna Pal are alive. They are on bail. They are acquitted from the charges under Section 148 and 302 read with Section 149 I.P.C.. Their bail bonds and sureties bonds stand cancelled. They need not surrender.

27. Lower court record along with copy of the judgment be transmitted immediately to the trial Court.

(2021)11ILR A529
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.11.2021

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE OM PRAKASH TRIPATHI, J.

Criminal Appeal No. 1813 of 2014

Monu ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Vikrant Rana, Sri Gajendra Kumar Gautam, Sri Pradeep Kumar, Sri R.V. Pandey, Sri Praveen Kumar

Counsel for the Respondents:

(A) Criminal Law - The Indian Penal Code, 1860 - Section 302, 506 - The Arms Act, 1959 - Section 25 (1) (b) - The Code of criminal procedure, 1973 - Section 313 - Appeal against conviction - Where there is direct evidence of unimpeachable character and nature of injury stands corroborated by medical evidence, the examination of the ballistic expert would not be essential - where the oral evidence of the witness is not trustworthy or the injuries sustained do not stand corroborated by medical evidence, the prosecution may have to take aid of the ballistic expert to bring home the guilt. (Para - 22,28)

Victim was shot from close range from the back side - hit on her head and hand with some iron object - negligence on part of investigating agency - alleged bullet recovered from the body of the victim was not sent for forensic examination - absence of the report of ballistic expert - PW-1 and PW-4 are eye witnesses - statement is consistent and of unimpeachable character - injuries sustained by the victim is fully corroborated by the medical evidence.

HELD:- Accused appellant inflicted injuries with the intention of causing such bodily injury as he knew to be likely to cause death of the victim. Rightly been held guilty of criminal intimidation and murder and convicted for the offences. Offence committed in a preplanned and ghastly manner inside the house of the victim. No reason to take lenient view and interfere with the sentence imposed by the trial court. Conviction and sentence upheld as awarded by the trial court in toto.(Para - 30,32)

Criminal Appeal dismissed. (E-7)

List of Cases cited:-

1. Himachal Pradesh Vs Mast Ram, AIR 2004 SC 5056

2. Munna alias Surendra Kumar Vs St. of M.P., AIR 2003 SC 3346

3. Vineet Kumar Chauhan Vs St. of U.P., (2007) 14 SCC 660

4. Mohinder Singh Vs The St., AIR 1963 SC 340

5. Sukhwant Singh Vs St. of Punj., AIR 1995 SC 1380

6. Surendra Paswan Vs St. of Jharkhand, (2003) 12 SCC 360

7. St. of H.P. Vs Mast Ram, AIR 2004 SC 5056

8. Prabhash Kumar Singh Vs St. of Bihar (now Jharkhand), (2019) 9 SCC 262

9. Manish Dixit & ors. Vs St. of Raj., (2001) 1 SCC 596

10. Ashraf Ali Vs St., (1991) 2 Crimes 226

(Delivered by Hon'ble Manoj Kumar Gupta, J.)

1. The accused appellant has filed the instant appeal assailing the judgment and order dated 7.04.2014 and 11.04.2014, passed by Additional District & Sessions Judge, Court No.4, Ghaziabad in S.T. No.1408 of 2006 convicting him under Section 302 IPC and awarding rigorous imprisonment for life and fine of Rs.50,000/- and in default in payment thereof, to three years additional simple imprisonment and under Section 506 IPC to seven years rigorous imprisonment and fine of Rs.20,000/-

and in default in payment thereof, to ten months additional simple imprisonment and in Sessions Trial No.1409 of 2006 under Section 25 (1) (b) of the Arms Act, to three years rigorous imprisonment and fine of Rs.10,000/- and in default in payment thereof, additional simple imprisonment of six months.

2. According to the prosecution case, on 13.6.2006 at about 10:30 p.m., accused Monu (appellant) and Khalid, neighbours of the victim Manju Sharma came to her house while she was sitting on a cot alongwith her daughter Komal (PW-1) on the open terrace. Her mother Sheela and brother Yogesh and Nitin were in the courtyard. Monu had some talk with her. After about five minutes, he took out pistol *(tamancha)* from his pocket and fired at the victim from the back side. While his accomplice co-accused Khalid, who was carrying some object made of iron, hit her on the head and hand several times. Her daughter Komal (PW-1/complainant), who had witnessed the incident, raised alarm and whereupon both of them escaped through the staircase brandishing the tamancha and threatening Yogesh and Nitin (brothers of the victim) and Smt. Sheela (mother of the victim) to kill them if they come in their way. The accused were duly identified in the moon light and light of lantern, as they live in the neighbourhood and the complainant (Komal) had known them since her childhood. Her mother was rushed to Jeevan Hospital by her maternal uncle. The victim was later shifted to Narendra Mohan Hospital and thereafter to Jang Bahadur Hospital, Delhi where she succumbed to her injuries and died on 14.06.2006 at 4:10 p.m. A first information report relating to the incident was got registered by Komal on 13.06.2006 under Sections 307, 506 IPC as Crime Case No.227 of 2006. Later on offence was converted to Section 302 IPC. The accused surrendered in court on 26.06.2006. On 04.07.2006, the court allowed police remand of 24 hours. On the same day, the police, on pointing out of the accused, recovered a country made pistol (tamancha) of 315 bore, 3 live cartridges - 315 bore and an iron handle of hand-pump. The Police, after investigation, submitted charge sheet under Sections 302 and 506 IPC. The Chief Judicial Magistrate by order dated 14.9.2006 committed the trial to the Court of Sessions and it came to be registered as S.T. No.409 of 2006. By order dated 3.7.2007, the trial court declared co-accused Khalid as juvenile and he was tried separately by the Juvenile court.

3. During course of investigation of Crime Case No.227 of 2006, a separate case bearing No.270 of 2006 was registered against the appellant under Section 25 of the Arms Act on basis of recovery of a country made pistol of 315 bore and three live cartridges 315 bore on 4.7.2006. The police, after investigation, submitted a charge sheet. The Chief Judicial Magistrate by order dated 14.9.2006 forwarded the charge sheet to the Court of Sessions, where it came to be registered as S.T. No.1408 of 2006. Both the cases were tried together and have been decided by common judgment impugned herein.

4. During course of trial, the prosecution examined two witnesses of facts. The first one is Km. Komal (PW-1), who is daughter of the victim and also the complainant. She had seen the accused firing and assaulting her mother. The other is Nitin Sharma (PW-4), who is brother of the deceased victim and had seen the accused running away after committing the offence. The prosecution had examined thirteen other witnesses: PW-5, Pawan Kumar, Assistant in Jeevan Hospital, PW-6, Dr. Barkha Gupta, who conducted the postmortem, PW-7 S.I. Chamu Bhagat, the police officer, who prepared the death report and got the postmortem done, PW-8 S.I. Krishna Pal, scribe of the first information report (Ex. Ka.10), PW-9 Inspector Somveer Singh, Investigating Officer of Crime Case No.227 of 2006, PW-10 S.I. Aftab Ali,

Investigating Officer of Crime Case No.270 of 2006, PW-11, retired S.I. Ram Saran, witness of seizure memo, PW-12 S.I. Vishesh Kumar Singh, last Investigating Officer of Crime Case No.227 of 2006, PW-13 S.I. Parvinder Pal Singh, first Investigating Officer of Crime Case No.227 of 2006.

5. The prosecution proved the written complaint (Ex. Ka-1) by examining PW-1, FIR (Ex. Ka-10) by examining PW-8, the Fard of ordinary and blood stained earth (Ex. Ka-2) by examining Chokhey Lal (PW-3), application filed by Nitin Sharma (Ex. Ka-3) by examining him (PW-4), postmortem report (Ex. Ka-4) by examining Dr. Barkha Gupta (PW-6), seizure memo of country made pistol, 3 live cartridges and iron handle of hand-pump (Ex. Ka-12) by examining PW-9, report of Vidhi Vigyan Prayogshala (Ex. Ka-20) by examining PW-12.

6. The accused was confronted with the incriminating material and evidence under Section 313 Cr.P.C. wherein he denied his involvement and stated that he was falsely implicated and claimed to be tried.

7. We have heard counsel for the parties and perused the record and the impugned judgment and order.

8. Learned counsel for the appellant submitted that the prosecution has utterly failed to bring home the charges. The appellant was falsely implicated. The deceased was a call girl and woman of loose character and she had been to jail in a double murder. There are inherent inconsistencies in the statement of PW-1 and PW-4. It is submitted that while PW-1, in her statement, said that her mother was not doing any work, PW-4 stated that she was working in a bulb factory in Modi Nagar. Again PW-1 admitted that her mother remained confined in jail in connection with murder of one Shashi but PW-4 feigned ignorance regarding her incarceration. It is further submitted that the medical evidence does not support the prosecution case; that the prosecution could not lead any evidence to prove mens rea. It is also urged that the alleged bullet recovered from the body of the victim was not sent for forensic examination, therefore, the prosecution had failed to establish link between the seized weapon and the bullet recovered from the body of the victim. In other words, the contention is that in the absence of the report of ballistic expert to connect the appellant with the bullet recovered from the body of the victim, the prosecution had failed to establish its case.

9. On the other hand, learned A.G.A. for the State submitted that the prosecution has succeeded in proving its case to the hilt. The eye version account of PW-1, daughter of the victim, is of unimpeachable character and so is the statement of her brother Nitin Sharma (PW-4). The prosecution story stands corroborated by the postmortem report wherein the injuries were found to tally with the manner in which the injuries were said to have been inflicted as per the prosecution story. It is submitted that the doctor PW-6 had fully proved that injury no.2 is a entry wound of bullet and was sufficient to cause death. The other injuries, as per her statement, are attributable to blows received from hard and blunt object and the prosecution had successfully established that those were inflicted by the iron handle of hand-pump. He further submitted that there is no material contradiction in the testimony of PW-1 and PW-4 inasmuch as their consistent version was that the victim died because of gun shot injury and other blows by a hard object. It is urged that the prosecution story is fully supported by medical evidence and consequently, it is wholly immaterial whether the bullet recovered from the body of the victim was sent for ballistic report or not. In support of his contention, he has placed reliance on judgments of Supreme Court in State of **Himachal Pradesh Vs. Mast Ram,**

AIR 2004 SC 5056 and **Munna alias Surendra Kumar Vs. State of M.P., AIR 2003 SC 3346.**

10. The first issue for consideration is whether the prosecution has succeeded in proving the time and place of occurence. The incident, as per prosecution case, had taken place on 13.6.2006 at 10:30 p.m. on the open terrace of the house of the victim. The first information report was got registered on 13.6.2006 i.e. on the same date at 11:20 p.m. The consistent version of eye witness PW-1, daughter of the victim and PW-4, brother of the victim, is that the victim received grievous injuries as a result of assault and was rushed to hospital by her brother. PW-1, who was stated to be 16 years of age at the time of alleged incident, got the report scribed by S.P. Samaniya, her neighbour and thereafter informed the police station. The F.I.R. was thus got registered immediately without any delay. There was no suggestion to any witness during cross-examination that the incident had not taken place on the terrace of the house of the victim, but at some other place. In fact, the accused appellant during his examination under Section 313 Cr.P.C. did not deny the time and place of incident but alleged that several other persons used to visit the house of the victim and thus tried to attribute the offence to them. He also claimed to have been falsely implicated.

11. Pawan Kumar (PW-5), Assistant, Jeewan Hospital stated that the victim was brought to the hospital on 13.6.2006 in serious condition. The first aid was given to her by Dr. Upendra Rana (Surgeon). Thereafter she was referred for further treatment to other hospital. S.I. Charmu, who prepared the death report of the victim, stated that she was admitted to the hospital on 13.6.2006 with number of injuries. She died on 14.6.2006 at 3 p.m. We thus find that time and place of incident is fully proved.

12. The next question is whether the prosecution case that the victim was shot from close range from the back side and also hit on her head and hand with some iron object, also from back side, is proved or not and what was the cause of her death? According to post mortem report, the following ante-mortem injuries were found :-

1. Lacerated wound 5.5 x 0.5 cm bone deep on left occipital protuberance, obliquely placed, medial end above the lateral end.

2. Firearm entry wound 3.0 x 2.0 cm on Right upper back of chest 2.0 cm outer to right from midline and 4.0 cm below shoulder top, surrounded by tatooing in a area of 20.0 x 10.0 cm more on Right side blackening present on Right side of the wound. On exploration wound was packed with surgical gauge piece. The track of the wound was going forward, downward and medially after shattering the vertebra T1 and T2 through and through bullet was found lodged in left mediastinal tissue surrounded by blood clots after injuring the mediastinal blood vessels.

3. Reddish bruise 5.0 x 1.0 cm present on outer aspect of right forearm 8.0 cm below elbow joint.

4. Incised wound 3.6 x 0.6 cm x 0.2 cm horizontally placed on Right thigh on front aspect 11.0 cm above the knee.

5. Incised wound skin deep 15.0 x 0.5 x 0.2 cm horizontally placed situated 0.8 cm below shoulder top on right back of the chest.

6. Reddish linear scratch mark 16.0 x 0.1 cm horizontally placed 2.0 cm below shoulder top on right back of chest 1.2 cm below injury No.5.

7. Linear Reddish abrasion 10.0 x 0.2 cm on Right lower back of chest horizontally placed 26.0 cm above gluteal cleft and inner end situated at midline.

13. According to medical opinion, cause of death is hemorrhagic shock due to ante mortem injury to mediastinal blood vessel produced by projectile of fire arm. Injury No.2 is fire arm entry wound on the back of chest. There is tattooing and blackening in the area of 20 x 10 cms on right side of the wound. The bullet was found lodged in left mediastinal tissue (between the lungs). This supports the prosecution case that firing was done from a close distance from the back side. The bullet recovered from the body measured 3.3 cm in length and 0.8 cm in diameter. It was opined that injury No.2 was sufficient to cause death in ordinary course of nature. Dr. Barkha Gupta, who conducted the post mortem, was examined as PW-6. In her statement she reiterated that injury No.2 was sufficient to cause death. She further stated during cross-examination that death had occurred due to profuse bleeding from the mediastinal vessel caused by gun shot injury.

14. PW-6 in her cross-examination clarified that injury No.1 was outcome of blow from *kundala* and injury No.5 by a sharp weapon. All other injuries were on shoulder, back of chest and fore arm. It duly supports the prosecution case that co-accused Khalid who was carrying some object made of iron, which during investigation was found to be iron handle of hand-pump was used in hitting the victim from the back side. There was no suggestion by the defence during cross-examination of PW-6 that the injuries found on the body of the victim were not result of gun shot or blows from iron handle of hand-pump. PW-1, who is eye witness, in her statement fully supported the prosecution version. Despite a lengthy cross-examination, the defence could not succeed in extracting anything which may demolish the prosecution story. The prosecution has thus succeeded in proving that the victim died because of gun shot and other injuries sustained during assault.

15. The most crucial issue is whether the prosecution has succeeded in proving that the accused-appellant was responsible for the crime in question or not? PW-1, as noted above, was eye witness of the occurrence. She is daughter of the victim and was aged about 16 years at that time. She has unequivocally supported the prosecution case that accused Monu and Khalid who are resident of same mohalla, came to the open terrace of her house where she was sitting on a cot alongwith the victim. Monu had some talk with the victim and after five minutes he fired at her from the back followed by several blows by co-accused Khalid with a *hatthi (हत्थी)*. The victim shouted and PW-1 also shouted. Her maternal uncle and her Naani, on hearing the shouts came near the staircase. However, Monu, brandishing the *tamancha* and threatening to fire at them, succeeded in running away from the gali towards field. The accused were identified in moon light and light of lantern. She further stated that she was able to identify them as they are her neighbours and she had been seeing them since childhood. She also stated that her mother was grieviously hurt as a result of assault from fire arm and iron *hatthi*. Her maternal uncle rushed her mother to Narendra Mohan Hospital and in the end to Jang Bahadur Hospital where she died. In her cross-examination, she clarified that her father had died when she was nine months of age. Her mother had since been residing with her Naani. She specifically denied that her mother was having enmity with other persons and they were instrumental in her murder. She also denied the suggestion that she had falsely implicated the appellant-accused as her engagement with him got snapped.

16. PW-4 Nitin Sharma is the brother of the victim. He stated that he was present in the

courtyard of the house at the time of occurrence. He also stated that it was a moonlit night and there was also light of lantern. The accused came to his house at about 10:30 p.m. on 13.06.2006. At that time the victim and her daughter were sitting on open terrace. He further stated that the accused told him that they want to talk to the victim and they were told that she was on terrace. Thereafter the accused went to the terrace through the staircase. After 5-6 minutes, he heard sound of gun shot and PW-1 was shouting for help. When he rushed towards the terrace, the accused were coming down through the staircase. Accused-appellant Monu was having tamancha and Khalid was having handle of hand-pump in his hand. Monu asked him to clear his way otherwise he will fire at him. He thereafter succeeded in running away. When they went on the terrace, they found victim bleeding profusely. The victim was taken to the hospital.

17. The submission of learned counsel for the appellant was that the statement of PW-1 and PW-4 is contradictory and has therefore to be discarded. It is true that PW-1 in her cross-examination stated that the victim was not doing any work, while PW-4 stated that she was engaged in a company at Noida. Again, PW-1 in her cross-examination admitted that her mother had been to jail in connection with a case relating to murder of two persons and was released after three months on bail, but denied her illicit relationship with them, or having murdered them, but PW-4 feigned ignorance regarding these facts. These small variations in the statement of PW-1 and PW-4 are not sufficient to doubt the creditworthiness of the witnesses as their testimony on the other crucial aspects as noted above, is fully consistent and unambiguous and totally supports the prosecution case. They are consistent and unambiguous on the point that the accused-appellant and his accomplice came to their house, went to the terrace, where the victim was sitting with PW-1. While PW-1 had witnessed the accused firing and inflicting grievous injuries to the victim, PW-4 who was in the courtyard had heard the sound of gun shot and seen them running away. The suggestion that accused-appellant was falsely implicated because of enmity, was categorically denied. The defense had made feeble attempt during cross-examination to show that the victim was having illicit relationship with two persons and was sent to jail in that connection, but neither it was able to prove the same nor does it in any manner detract from the merits of the prosecution version regarding the involvement of the accused-appellant in the crime.

18. The accused appellant had surrendered before the court on 26.6.2006. On 4.7.2006 the Court allowed police remand for 24 hours. On the same day, the police on pointing out of the accused recovered a country made pistol of 315 bore, three live cartridges -315 bore and an iron handle of hand-pump from nearby field burried under heap of grass. As per site plan, the said place was at the distance of 200 paces from the house of the deceased victim. It corroborates the version of PW-1 and PW-4 that the accused after committing the crime escaped through the gali to the adjoining field.

19. Inspector Somveer Singh PW-9 and Retired S.I. Ram Saran Sharma PW-11 proved the seizure memo (Ex. Ka-14). They also identified the accused-appellant and stated that the recovery was made on the pointing out of the accused. They also stated that only one seizure memo was prepared in respect of all seized goods. PW-9 who prepared the site plan relating to seizure (Ex. Ka-15) proved the same.

20. Learned counsel for the appellant vehemently contended that since the firearm and cartridges were not sent for examination by ballistic expert, therefore, according to him, the prosecution had failed to connect the appellant

with the weapon of crime. It is noteworthy that the trial court directed the prosecution to produce the lead bullet and the case property of Session Trial No. 1408 of 2006. The prosecution failed to produce the lead bullet and it transpired during enquiry held by the trial court that there was no entry relating to lead bullet in the register maintained at *Malkhana*. The trial court had found dereliction of duty and negligence on part of A.S.I. Chamu Bhagat and directed for enquiry to be held in that regard by the Director General of Police, Lucknow and by Police Commissioner, Delhi and for taking action against him and all other found responsible for the same.

21. The crucial question for consideration by this Court is whether on account of negligence on part of the investigating agency in ensuring safe custody of lead bullet and sending it for opinion of ballistic expert, the prosecution version comes under doubt and has to be discarded or conviction of the appellant could be made on basis of other oral and material evidence on record.

22. A similar situation arose for consideration before the Supreme Court in ***Vineet Kumar Chauhan vs. State of Uttar Pradesh, (2007) 14 SCC 660.*** The Supreme Court held that it cannot be laid down as a general proposition that in every case where there is a firearm injury, the prosecution must lead evidence of ballistic expert to prove the charge, irrespective of the quality of the direct evidence available on record. The Supreme Court went on to observe that where direct evidence is of unimpeachable character and the nature of injuries disclosed in the postmortem report is consistent with the direct evidence, the examination of ballistic expert may not be essential. The relevant observation in this regard is as follows: -

"11. It cannot be laid down as a general proposition that in every case where a firearm is allegedly used by an accused person, the prosecution must lead the evidence of a Ballistic Expert to prove the charge, irrespective of the quality of the direct evidence available on record. It needs little emphasis that where direct evidence is of such an unimpeachable character, and the nature of injuries, disclosed by post-mortem notes is consistent with the direct evidence, the examination of Ballistic Expert may not be regarded as essential. However, where direct evidence is not available or that there is some doubt as to whether the injuries could or could not have been caused by a particular weapon, examination of an expert would be desirable to cure an apparent inconsistency or for the purpose of corroboration of oral evidence. (See: Gurcharan Singh Vs. State of Punjab)."

23. The Supreme Court in the above judgment has also considered its earlier judgment in **Mohinder Singh vs. The State, AIR 1963 SC 340** and distinguished the same by observing thus: -

"12. In Mohinder Singh's case (supra) on which strong reliance is placed on behalf of the appellant, this Court has held that where the prosecution case was that the accused shot the deceased with a gun but it appeared likely that the injuries on the deceased were inflicted by a rifle and there was no evidence of a duly qualified expert to prove that the injuries were caused by a gun, and the nature of the injuries was also such that the shots must have been fired by more than one person and not by one person only, and the prosecution had no evidence to show that another person also shot, and the oral evidence was of witnesses who were not disinterested, the failure to examine an expert would be a serious infirmity in the prosecution case. It is plain that these observations were made in a case where the prosecution evidence was suffering from serious infirmities. Thus, in determining the effect of

these observations, the facts in respect of which these observations came to be made cannot be lost sight of. The said case therefore, cannot be held to lay down an inflexible rule that in every case where an accused person is charged with murder caused by a lethal weapon, the prosecution case can succeed in proving the charge only if Ballistic Expert is examined. In what cases, the examination of a Ballistic Expert is essential for the proof of the prosecution case, must depend upon the facts and circumstances of each case."

24. In **Sukhwant Singh vs. State of Punjab, AIR 1995 SC 1380, t**he Supreme Court found that the evidence of the complainant, the solitary eye witness, was not reliable, as it stood belied by the medical evidence. The presence of Gurmeet Singh, elder brother of the deceased, was also found to be doubtful. In the said background, the Supreme Court held that where the presence of the accused is doubtful, the prosecution ought to have sent the recovered empty cartridges and seized pistol for opinion of ballistic expert to connect the accused with the crime and omission on part of the prosecution in that regard was held to have seriously affected the creditworthiness of the prosecution case. Relevant observations made in this regard in paragraph 21 and 22 are as follows: -

"*21. There is yet another infirmity in this case. We find that whereas an empty had been recovered by PW6, ASI Raghubir Singh from the spot and a pistol alongwith some cartridges were seized from the possession of the appellant at the time of his arrest, yet the prosecution, for reasons best known to it, did not send the recovered empty and the seized pistol to the ballistic expert for the examination and expert opinion. Comparison could have provided link evidence between the crime and the accused. This again is an omission on the part of the prosecution for which no explanation has been furnished either in the trial court or before us. It hardly needs to be emphasised that in cases where injuries are caused by fire arms, the opinion of the Ballistic Expert is of a considerable importance where both the fire arm and the crime cartridge are recovered during the investigation to connect an accused with the crime. Failure to produce the expert opinion before the trial court in such cases affects the credit-worthiness of the prosecution case to a great extent.*

22. From a critical analysis of the material on the record, we find that it would not be safe to rely upon the sole testimony of PW3 Gurmej Singh, the brother of the deceased, without independent corroboration in view of the infirmities pointed out by us above which render his testimony as not wholly reliable and since in the present case no such independent corroboration is available on the record, it would be unsafe to rely upon the testimony of PW3 only to uphold the conviction of the appellant. The prosecution has not been able to establish the case against the appellant beyond a reasonable doubt. The trial court, therefore, fell in error in convicting and sentencing the appellant. His conviction and sentence cannot be sustained. This appeal consequently succeeds and is allowed. The conviction and sentence of the appellant is set aside. The appellant is on bail. His bail bonds shall stand discharged."

25. The judgement in **Sukhwant Singh** case was considered by the Supreme Court in **Surendra Paswan vs. State of Jharkhand, (2003) 12 SCC 360.** The Supreme Court once again reiterated that **Sukhwant Singh** is not an authority for the proposition that whenever bullet is not sent for ballistic examination, the prosecution has to fail. In that case the victim was fired on the left eye. On receiving bullet injuries the victim fell down and was later declared dead. The Supreme Court after considering the oral and medical evidence held that there was only one injury on the body of the

deceased which was fully explained by the doctor in his evidence and consequently, failure to send the weapon and the bullet for ballistic examination did not result in denting the prosecution version. The relevant observations are as follows :-

"10. So far as the effect of the bullet being not sent for ballistic examination is concerned, it has to be noted that Sukhwant Singh's case (supra) is not an authority for the proposition as submitted that whenever a bullet is not sent for ballistic examination the prosecution has to fail. In that case one of the factors which weighed with this Court for not finding the accused guilty was the prosecution's failure to send the weapon and the bullet for ballistic examination. In the instant case, the weapon was not seized. That makes a significant factual difference between Sukhwant Singh's case (supra) and the present case.

11. It has to be noted that there was not even a suggestion to any of the prosecution witnesses that the injuries were sustained by the accused-appellant in the manner indicated by him, as stated for the first time in the statement under Section 313 Cr.P.C.

12. So far as the confusion relating to bullet and pellet is concerned, the same has been clarified by the doctor's evidence. In his examination the doctor (PW-3) has categorically stated that there was only one injury on the body of the deceased and no other injury was found anywhere on the person of the deceased. Therefore, the question of the deceased having received any injury by a pellet stated to have been recovered by the investigating officer is not established. The investigating officer has clarified that the embodied bullet was given to the police officials by the doctor which was initially not produced as it was in the Malkhana but subsequently the witness was recalled and it was produced in Court."

26. Once again, the Supreme Court in **State of Himanchal Pradesh vs. Mast Ram, AIR 2004 SC 5056** reiterated the legal proposition that the bullet recovered from the body of the victim need not be necessarily sent for ballistic examination or in case of failure, an adverse inference is liable to be drawn. Paragraph 7 of the judgement, which is relevant, is reproduced below :-

"7. Thirdly, the High Court was of the view that during the course of post-mortem examination conducted by PW-2 Dr. Sanjay Kumar Mahajan, two pellets were recovered - one each from the right and left lung of the deceased, which were handed over to the police. However, the pellets recovered were never sent for examination to a ballistic expert in order to find out if such pellets were fired from the gun (Ex. P-11) or not. According to the High Court, failure of the prosecution to send the pellets for examination by a ballistic expert will draw an inference against the credibility of the prosecution story. This finding, in our view, is utterly perverse. It is not the requirement of law that pellets recovered from the body be sent to ballistic expert to determine as to whether the pellets were fired from the exhibited gun or not. On the contrary, the recovery of pellets from the body clearly establishes the prosecution case that the deceased died of gun shot injuries."

27. In a more recent judgement in **Prabhash Kumar Singh vs. State of Bihar (now Jharkhand), (2019) 9 SCC 262,** the Supreme Court was dealing with a case where the weapon of assault and the bullet were not even recovered. The issue was whether on the basis of eye witness account, the accused can be convicted. The Supreme Court dealt with the said issue in the concluding paragraph of the judgement as follows :-

"13.....As there is clear eyewitness account of the incident and none of

the two eyewitnesses could be shaken during cross-examination and they had stuck to the recollection of the facts relating to the incident, the mere fact that the weapon of assault or the bullet was not recovered cannot demolish the prosecution case."

28. Thus law on the point whether it is essential for the prosecution to obtain report of ballistic expert to prove the charge of gun shot injury against the accused is clear and unambiguous. Where there is direct evidence of unimpeachable character and nature of injury stands corroborated by medical evidence, the examination of the ballistic expert would not be essential. However, where the oral evidence of the witness is not trustworthy or the injuries sustained do not stand corroborated by medical evidence, the prosecution may have to take aid of the ballistic expert to bring home the guilt.

29. In the instant case, as discussed above, the statement of PW-1 and PW-4 who were eye witnesses is consistent and of unimpeachable character. They were put to lengthy cross-examination but the defence could not succeed in extracting anything which may demolish the prosecution case. The injuries sustained by the victim is fully corroborated by the medical evidence. Albeit, it would have been better if the lead bullet was sent for opinion of the ballistic expert but the same is not sufficient to demolish the prosecution case which otherwise stands fully proved. We thus find no force in the submission that the prosecution of the appellant should fail for want of opinion of ballistic expert.

30. In view of the foregoing discussions, it is clear that the accused appellant inflicted injuries with the intention of causing such bodily injury as he knew to be likely to cause death of the victim. He has rightly been held guilty of criminal intimidation and murder and convicted for the offences.

31. As regards offence under the Arms Act, according to the prosecution version, a tamancha (an immitation firearm converted into firearm) and three live cartridges were recovered on the pointing out of the appellant. Concededly, the appellant was not having any licence in that behalf, as envisaged under Section 6 of the Act. The seizure memo was duly proved by PW-9 and PW-11. The contention that in absence of public witness to the seizure memo, it cannot be relied upon, stands rightly discarded by the trial court relying on the judgement of the Supreme Court in **Manish Dixit and others vs. State of Rajasthan, (2001) 1 SCC 596** and judgement of Delhi High Court in **Ashraf Ali vs. State, (1991) 2 Crimes 226.** Learned counsel for the appellant did not make any other submission relating to the finding of conviction and sentence recorded by the court below in respect of commission of offence under the Arms Act. We have perused the statement of PW9 and PW11 and we fully endorse the findings recorded by the trial court in relation to commission of offence and under Section 25(1)(b) of the Arms Act.

32. As regards sentence, since the offence was committed in a preplanned and ghastly manner inside the house of the victim, we do not find any reason to take lenient view and interfere with the sentence imposed by the trial court. Accordingly, we uphold the conviction and sentence as awarded by the trial court in toto.

33. Before parting, we clarify that this judgement will in no manner influence or prejudice the proceedings, if any, pending before any court of law in respect of co-accused Khalid, who was declared juvenile and against whom separate trial was held.

34. The appeal lacks merit and is accordingly dismissed.

(2021)11ILR A539
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.10.2021

BEFORE

THE HON'BLE SUBHASH CHANDRA SHARMA, J.

Criminal Appeal No. 2130 of 2021

Abrar ...Appellant
Versus
State of U.P. & Anr. ...Respondent

Counsel for the Appellant:
Sri Bhuvnesh Kumar Singh

Counsel for the Respondents:
A.G.A.

(A) Criminal Law - U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986 - Section 2/3 ,Section 14 - Attachment of property , Section 15 - Release of property, Section 16 - Inquiry into the character of acquisition of property by Court, Section 17 - Order after inquiry - order of the District Magistrate attaching one's property should be based on reasons and not arbitrary - puts check on the arbitrary exercise of power of attachment by denying him of his right to any property - requirement of law - there must be reason to believe that the property sought to be attached has been acquired by a ''gangster' as a result of commission of any offence under the Act.(Para - 12)

(B) Words and Phrases - Indian Penal Code, 1860 - Section 26 - "reason to believe" - A person is said to have ''reason to believe'' a thing, if he has sufficient cause to believe that thing but not otherwise - contemplates an objective determination based on intelligent care and deliberation involving judicial review as distinguished from purely subjective consideration - must be rational and intelligible nexus between ''reason' and ''belief' - "Reason to believe" is not the same thing as "suspicion" or "doubt" and mere seeing also cannot be equated to believing - "Reason to believe" is a higher level of the state of mind. (Para-12,13)

District Magistrate passed an order under Section 14(1) of the Act - attaching house of appellant - not considered the plea of appellant - arbitrarily confirmed his order of attachment while rejecting his representation - held - house was constructed with illegally earned money - referred the case to Special Judge Gangster Act - trial judge after inviting objection and hearing the parties confirmed the order dated 19.10.2020 - aggrieved by these orders - criminal appeal has been filed.(Para - 1 to 7)

HELD:- No direct nexus has been established between acquisition of property by the accused and the source of income generated for purchasing property by indulgence in commission of offences under the Act as a ''gangster'. Not reflected from the impugned order as to whether a detailed enquiry has been conducted by the Court below as is contemplated under Section 16 of the Act, which was statutory duty cast upon the Court below.(Para - 15)

Criminal Appeal allowed. (E-7)

List of Cases cited:-

M/s. Ganga Saran & Sons Pvt. Ltd. Calcutta Vs Income Tax Officer & ors., AIR 1981 SC 1363

(Delivered by Hon'ble Subhash Chandra Sharma, J.)

1. This criminal appeal has been filed against the judgment and order dated 19.12.2000 passed by Additional Sessions Judge, Gangster Act, Court No. 5, Bijnor in Misc. Application No. 278 of 2020 (Abrar Vs. State of U.P.) which is as reference made to the court under Section 16 of U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986 (hereinafter referred to as "Act") whereby the order of the District Magistrate, Bijnor dated 19.10.2020 attaching the house of appellant under Section 14 of the Act dated 2.9.2020 as well as order dated 19.10.2020 dismissed the objection moved by the appellant have been affirmed.

2. The facts of the case in brief are that the District Magistrate, Bijnor have passed an order under Section 14(1) of the Act attaching the house of the appellant on the basis of report of in-charge Inspector, Police Station Mandawar, District Bijnor dated 07.07.2020, submitted through S.S.P., Bijnor. It was mentioned in the report that During investigation of Case Crime No. 232 of 2020 under Section 2/3 of the Act, it was found that appellant owned one house measuring 90 m2 amounting to cost for Rs. 10,00,000/- (ten lacs) which was constructed with illegally earned money as gangster.

3. Against the aforesaid attachment order, the appellant had filed objection on 14.09.2020. The District Magistrate, Bijnor dismissed the objection of the appellant and affirmed the order of attachment dated 02.09.2020. Simultaneously, he made reference to the court of Additional Sessions Judge, Gangster Act under Section 16 of the Act.

4. Specific case of appellant before the District Magistrate/Additional District Judge concerned was that the house said to be in his possession was constructed with the money earned by him and members of his family. He purchased the land measuring 90 m2 by registered sale deed in the year 2004 for Rs. 23,000/- on which house was constructed. Money for construction of the house was taken from the Punjab & Sind Bank as loan amounting to Rs. 40,000/-. In the year 2019, he took loan of Rs. 40,000/- from Sairin Credit Care Network Limited in the name of his wife. In the year 2018, he took loan of Rs. 80,000/- from Bandhan Bank, Bijnor. His son who works in Kuwait sends money in the account of his parents in the Punjab National Bank. His son Istakhar went to Kuwait where he lived for two years thereafter three months vacation, he again went there in July 2019. He got Rs. 70,000/- as salary. His other son Ikrar works at furniture house and earns Rs. 30,000/- per month. Except the house under attachment, he has no any other property. He is a poor labour having three young daughters and being his house under attachment is compelled to live under the open sky. No any case of cow slaughter was registered against him. In the year 2010 a single case under cow slaughter Act was registered which was false, thereafter in the year 2019 two cases shown in the gang chart were registered on the basis of which this case under Section 2/3 of the Act was lodged.

5. Learned Additional Sessions Judge, Court no. 5, Bijnor passed the order dated 19.12.2020, under challenge in this appeal, upholding the order of the District Magistrate dated 19.10.2020 dismissed the reference. It has been recorded by the court that appellant neither disclosed any source of his income nor produced any evidence which could prove that the house under attachment was constructed with the money earned by him. Therefore, he found no ground to make interference in the order passed by the District Magistrate, Bijnor dated 19.10.2020 and accordingly, rejected the application filed on behalf of appellant.

6. Learned District Magistrate, Bijnor did not consider the plea of appellant and arbitrarily confirmed his order of attachment while rejecting his representation and holding that it was constructed with illegally earned money and referred the case to Special Judge Gangster Act, Bijnor. Learned trial judge after inviting objection and hearing the parties confirmed the order dated 19.10.2020.

7. Being aggrieved by these orders, this criminal appeal has been filed before this Court.

8. Heard Shri Bhuvnesh Kumar Singh learned counsel for the appellant, learned A.G.A. and perused the record.

9. Learned counsel for the appellant submitted that the land of the house in question belonging to the appellant was purchased by him

in the year 2004 by registered sale deed, thereafter he constructed the house with the money taken on loan from several banks and also with the money contributed by his sons. The loan taken by him is in arrear. No any case relating to Cow Slaughter was registered against him except a single case in the year 2010. In the year 2019 other cases under cow slaughter act have been registered against him and on that basis this F.I.R. under Gangster Act was lodged in which his house has been attached without any proof of the fact that it was constructed with the money earned illegally as Gangster while conducting business in slaughtering of cows. There is no any material on record to show this fact. The police sent a report assessing the amount of the house Rs. 10,00,000/- (ten lacs). District Magistrate has also not tried to verify this fact but acted on the false report of police. Even a report of Tehshildar which was taken by the police inspector does not disclose the value of house as Rs.10,00,000/-(ten lacs). Even learned special judge has also not conducted the inquiry as provided under Section 16 of the Act but rejected the plea of appellant and affirmed the order passed by learned District Magistrate which is illegal and against the mandate of law.

10. Learned A.G.A. vehemently opposed the contentions made by learned counsel for the appellant.

11. In order to appreciate the rival submissions, it seems to be just and expedient to refer to the relevant provisions of the Gangster Act which are as under:

14.Attachment of property.- (1) If the District Magistrate has reason to believe that any property, whether movable or immovable, in possession of any person has been acquired by a gangster as a result of the commission of an offence triable under this Act, he may order attachment of such property whether or not cognizance of such offence has been taken by any Court.

(2) The provisions of the Code shall mutatis mutandis apply to every such attachment.

(3) Notwithstanding the provisions of the Code the District Magistrate may appoint an Administrator of any property attached under sub-section (1) and the Administrator shall have all the powers to administer such property in the best interest thereof.

(4) The District Magistrate may provide police help to the Administrator for proper and effective administration of such property.

15. Release of property .- (1) Where any property is attached under Section 14, the claimant thereof may, within three months from the date of knowledge of such attachment, make a representation to the District Magistrate showing the circumstances in and the sources by which such property was acquired by him.

(2) If the District Magistrate is satisfied about the genuineness of the claim made under sub-section (1) he shall forthwith release the property from attachment and thereupon such property shall be made over to the claimant.

16. Inquiry into the character of acquisition of property by court .- (1) Where no representation is made within the period specified in sub-section (1) of Section 15 or the District Magistrate does not release the property under sub-section (2) of Section 15 he shall refer the matter with his report to the Court having jurisdiction to try an offence under this Act.

(2) Where the District Magistrate has refused to attach any property under sub-section (1) of Section 14 or has ordered for release of any property under sub-section (2) of Section 15, the State Government or any person aggrieved by such refusal or release may make an application to the Court referred to in sub-section (1) for inquiry as to whether the property was acquired by or as a result of the commission of an offence triable under this Act. Such court may, if it considers necessary or expedient in the interest of justice so to do, order attachment of such property.

(3) (a) On receipt of the reference under sub-section (1) or an application under sub-section (2), the Court shall fix a date for inquiry and give notices thereof to the person making the application under sub-section (2) or, as the case may be, to the person making the representation under Section 15 and to the State Government, and also to any other person whose interest appears to be involved in the case.

(b) On the date so fixed or on any subsequent date to which the inquiry may be adjourned, the Court shall hear the parties, receive evidence produced by them, take such further evidence as it considers necessary, decide whether the property was acquired by a gangster as a result of the commission of an offence triable under this Act and shall pass such order under Section 17 as may be just and necessary in the circumstances of the case.

(4) For the purpose of inquiry under sub-section (3), the Court shall have the power of a Civil Court while trying a suit under the Code of Civil Procedure, 1908 (Act No. V of 1908), in respect of the following matters, namely:

(a) summoning and enforcing the attendance of any person and examining him on oath ;

(b) requiring the discovery and production of documents;

(c)receiving evidence on affidavits;

(d) requisitioning any public record or copy thereof from any court or office ;

(e) issuing commission for examination of witnesses or documents ;

(f) dismissing a reference for default or deciding it ex parte ;

(g) setting aside an order of dismissal for default or ex parte decision.

question or any part thereof was not acquired by a gangster as a result of the commission of any offence triable under this Act, shall be on the person claiming the property, anything to the contrary contained in the Indian Evidence Act, 1872 (Act No. 1 of 1872), notwithstanding.

17. Order after inquiry .- If upon such inquiry the Court finds that the property was not acquired by a gangster as a result of the commission of any offence triable under this Act it shall order for release of the property of the person from whose possession it was attached. In any other case the Court may make such order as it thinks fit for the disposal of the property by attachment, confiscation or delivery to any person entitled to the possession thereof, or otherwise.

12. From the above provision it is evident that the order of the District Magistrate attaching one's property should be based on reasons and not arbitrary. The expression "reason to believe" appearing therein has some intent and purpose. It puts check on the arbitrary exercise of power of attachment by denying him of his right to any property. What the law requires is that there must be reason to believe that the property sought to be attached has been acquired by a "gangster' as a result of commission of any

offence under the Act. The expression "reason to believe' contemplates an objective determination based on intelligent care and deliberation involving judicial review as distinguished from purely subjective consideration. There must be rational and intelligible nexus between "reason' and "belief'. The word "belief' is very much stronger word than "suspect' and it involves the necessity of showing that the circumstances were such that a reasonable man must have felt convinced in his mind that what has been alleged is true. The expression "reason to believe' is defined in u/s 26 of the Indian Penal Code as: A person is said to have "reason to believe" a thing, if he has sufficient cause to believe that thing but not otherwise. "Reason to believe" is not the same thing as "suspicion" or "doubt" and mere seeing also cannot be equated to believing. "Reason to believe" is a higher level of the state of mind. Similar words "reason to believe" as appearing in the Act are also there in the Income Tax Act.

13. Interpreting the said expression, the Supreme Court in the case of ***M/s. Ganga Saran and Sons Private Limited Calcutta vs. Income Tax Officer and Others, AIR 1981 SC 1363,*** observed that: words "has reason to believe" is stronger than the words "is satisfied". The belief entertained by the authority must not be based on reasons which are relevant and material. The Court, of course, cannot investigate into the adequacy or sufficiency of the reasons which weighed with the authority in coming to the belief, but the Court can certainly examine whether the reasons are relevant and have a bearing in the matter in regard to which it is required to entertain the belief.

14. It is now well settled that property being made subject matter of an attachment under sections 14 of the Act must have been acquired by a gangster and that too by commission of an offence triable under the Act. The District Magistrate has to record its satisfaction on this point. The satisfaction of the District Magistrate is not open to challenge in any appeal. Only a representation is provided for before the District Magistrate himself under section 15 of the Act and in case he refuses to release the property on such representation, he is to make a reference to the Court having jurisdiction to try an offence under the Act. The Court, while dealing with the reference made under sub-section (2) of Section 15 of the Act has to see whether the property was acquired by a gangster as a result of commission of an offence triable under the Act and has to enter into the question and record his own finding on the basis of the inquiry held by him under section 16 of the Act. If the Court comes to the conclusion that the property was not acquired by the gangster as a result of commission of an offence triable under the Act, the Court shall order for release of the property in favour of the person from whose possession it was attached. If the conclusion of the Court is otherwise, it may pass such orders as it thinks fit for the disposal of the property by attachment, confiscation or delivery to any person entitled to the possession thereof or otherwise. This power has been conferred on the Court under Section 17 of the Act. In other words, the attachment made under Section 14 of the Act can be upset by Court after an inquiry under section 16 of the Act and in that situation the Court has power to release the attached property in favor of the person from whose possession the property was attached. The power of the Court to hold an inquiry under Section 16 on the reference made by District Magistrate is not a mere formality, but has a purpose behind it. The object behind providing the power of judicial scrutiny under section 16 of the Code is to check arbitrary exercise of power by the District Magistrate in depriving a person of his properties and to restore the rule of law, therefore a heavy duty lies upon the Court to hold a formal enquiry to find out the truth with regard to the question, whether the property was acquired by or as a result of the commission

of an offence triable under the Act. The order to be passed under section 17 of the Act must disclose reasons and the evidence in support of finding of the Court. The Court is not empowered to act as a post office or mouthpiece of the State or the District Magistrate. If a person has no criminal history during the period the property was acquired by him, how the property can be held to be a property acquired by or as a result of commission of an offence triable under the Act is a pivotal question which has to be answered by the Court. Besides, the aforesaid question, the other important question to be considered by the Court is whether the property which was acquired prior to the registration of the case against the accused under the Act or prior to the registration of the first case of the Gangster chart can be attached by District Magistrate under Section 14 of the Act.

15. In the instant case learned Special Judge has completely overlooked to consider the aforesaid important questions and he has not recorded any specific finding thereon. It was obligatory on his part to consider the aforesaid questions while considering the main question whether the property attached by the District Magistrate was acquired by or as a result of the commission of an offence triable under the Act. The reasoning reflected from the impugned order seems to be that the property which has been attached is believed to have been acquired by the accused Abrar in his name because the Court below has expressed its agreement with the opinion of the District Magistrate that appellant did not have sufficient means/source of income to purchase the property & construct the house thereon. No direct nexus has been established between acquisition of this property by the accused Abrar and the source of income generated for purchasing this property by indulgence in commission of offences under the Act as a "gangster'. It is also not reflected from the impugned order as to whether a detailed enquiry has been conducted by the Court below as is contemplated under Section 16 of the Act, which was statutory duty cast upon the Court below.

16. It is also apparent that no proper appreciation has been made of the evidence given by the appellant containing the details of the source of income by which purchase and construction of the property was made as has been narrated above.

17. It was bounden duty of the Court below to take into consideration the details of the purchase made, sources of income disclosed for making that purchase & construction and whether they were not justified. No clear finding has been recorded by the Court below as to how this property which was purchased much prior to initiation of first case against Abrar shown in the gang chart, could have been linked to the income generated through indulgence in commission of offence under the Act. It was also required from the Court below to record its findings as to which of the cases out of the cases shown in the gang chart were covered under the Gangster Act. Meticulous detail has been provided by the appellant regarding purchase of this property & construction thereon as well as the source of income. How the sources of income are disbelieved, is not made clear. The learned Special Judge has overlooked these material aspects of the case and did not consider the evidence on record in correct perspective, therefore the impugned judgment and order in respect of the appellant's property deserves to be set aside and the matter needs to be remanded back to the learned Special Session Judge for deciding the matter afresh in accordance with law in the light of observations made by this Court as aforesaid.

18. The appeal is **allowed**. The impugned judgment and order dated 19.10.2020 is set aside. The case is remanded back to the Special Judge for being considered afresh in the light of

the observations made by this Court herein above. The learned Special Judge shall decide the matter afresh in accordance with law as expeditiously as possible within two months after providing a reasonable opportunity of hearing to all the parties, if required, even opportunity of leading evidence would also be given to them.

19. Copy of this judgment be transmitted to the Court concerned for necessary compliance.

(2021)11ILR A545
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.10.2021

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE BRIJ RAJ SINGH, J.

Criminal Appeal U/s 372 Cr.P.C. No. 2945 of 2012

Smt. Ram Shree ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri S.K. Chaubey, Sri R.K.S. Chauhan

Counsel for the Respondents:
A.G.A., Sri Apul Misra

(A) Criminal Law - Indian Penal Code, 1860 - Section 302 read with Sections 34 and 201 - The Code of criminal procedure, 1973 - Section 313 - appeal against acquittal - Scope of appellate court - cardinal principle in criminal jurisprudence - presumption of innocence of the accused is reinforced by an order of the acquittal -Appellate court, in such a case, would interfere only for very substantial and compelling reason - If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.(Para - 13)

Mother of deceased filed application to police station - allegation - her son was married with the daughter of accused - She further stated that she suspected that accused and his daughter together killed her son.

HELD:- Only one prosecution witness P.W. - 5(maternal uncle) has tried to support the prosecution version. There is no other prosecution evidence which supports the case. The testimony of P.W. -5 is wholly unreliable, being an outcome of afterthought, consultation and legal advice. (Para - 10,12)

Criminal Appeal dismissed at the admission stage. (E-7)

List of Cases cited:-

1. St. of U.P. Vs Surendra Singh, Govt. Appeal No. 511 of 2019

2. Sudershan Kumar Vs St. Of Himachal, (2014) 15 SCC 666

3. Dilawar Singh Vs St. Of Har.a, (2015) 1 SCC 737

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

1. This is an appeal filed by Smt. Ram Shree who is complaining against the acquittal order dated 3 December 2010 passed by the learned Additional Sessions Judge, Court No. 6, Pilibhit in Sessions Trial No. 588 of 2009 arising out of Case Crime No. 675 of 2009 (State Vs. Bhai Lal), under Section 302 read with Sections 34 and 201 I.P.C., Police Station Bilsanda, District Pilibhit.

2. The factual matrix of the case is that accused Bhai Lal had given an application to Police Station Bilsanda on 25 June 2009 mentioning therein that he had married his daughter Sunita with Bharat Lal. She had one child from that wedlock and she died. Thereafter, he married his second daughter, namely, Surja Devi with Bharat Lal. Bhai Lal had asked him to send Surja Devi to his house 7-8 days prior from the date of occurrence of the

incident but Surja Devi denied to go there. Bharat Lal had left the house and he consumed poison due to which he died in Gauhaniya and his dead body was found hanging from a pakad tree. The local police reached the spot and the dead body was taken into custody. Panchayatnama was done and the body was sent for post mortem. After post mortem Case Crime No. 675 of 2009 under Section 302 I.P.C. was lodged on 27 June 2009 and the investigation started. The mother of the deceased Bharat Lal filed an application on 27 June 2009, addressed to Police Station, Bilsanda, wherein she had mentioned that her son was married in Village Navdiya Marauri, with the daughter of Bhai Lal. She has four year old child and her daughter, Sunita died prior to three years after her death. The younger sister of Sunita was married to Bharat Lal. Surja Devi was studying in Class - VII. She used to come to the house of Smt. Ram Shree. Surja Devi had gone to the house of her father prior to 10 days. Bharat Lal had gone to take her on Wednesday 24 June 2009. The body of Bharat Lal was found in village Firsa Pastaur at road side on 25 June 2009. She went to the place of occurrence. The panchayat nama was conducted. She further stated that she suspected that Bhai Lal and Surja Devi together killed her son. She had further stated that Bharat Lal had no good relation with Surja Devi. Surja Devi usually would live in her village. After investigation, charge sheet was filed against Bhai Lal and Surja Devi under Sections 302 and 201 I.P.C.

3. The Court summoned the accused, the charges were framed for the offences under Section 302 read with Section 34 and Section 201 I.P.C. The accused denied the charges. The prosecution side led the evidences of P.W. -1 Ram Shree, P.W. -2 HCP Siyaram Rathaur, P.W. - 3 Phoolchandra, P.W. - 4 Smt. Reshma Devi, P.W. -5 Shankar Lal, P.W. - 6 S.I. Bhoopal Singh and P.W. -7 Dr. S.P. Singh.

4. P.W. -1 stated in her statement in examination in chief that Bharat Lal was her son in law and he was married to Sunita Devi earlier but after death of Sunita Devi he was married to her younger daughter Surja Devi. Surja Devi was not happy with Bharat Lal and she did not care of him, due to which there was quarrelsome and bitter atmosphere in the house, and she usually resided in her father's house. Bharat Lal had gone to take back Surja Devi but she refused and did not return. Bharat Lal and the accused quarreled throughout night. Bharat Lal was not given food and his dead body was found, accused had murdered him. She lodged the F.I.R. through Ram Kishan who had submitted the written application *(tahreer).*

5. P.W. - 2 HCP Siyaram Rathaur admitted that he lodged the report on the basis of the complaint. P.W. - 3 Phoolchandra and P.W. - 4 Smt. Reshma Devi were declared hostile, they did not support the prosecution version. P.W. - 5 Shankar Lal has supported the prosecution version stating that he was going to Bilsanda Market on a bicycle and on reaching Gauhaniya, at the place of occurrence, near a pakad tree, at 10 a.m., he saw that the deceased Bharat Lal was lying on the ground and his bicycle was lying nearby. Surja Devi was pressing the chest of Bharat Lal and Bhai Lal was pressing the neck. He saw the said incident for two minutes and thereafter went to Bilsanda Market. When he came back to the same place about 3 p.m., he saw that there was crowd, but, Bharat Lal and Surja Devi were not present. Bharat Lal was lying on the earth. After two months from the date of occurrence of the incident, he had informed about the incident to Ram Shree and she informed the police. He was summoned by police after a month thereafter when he told the story to Ram Shree. P.W. - 6 S.I. Bhoopal Singh conducted the panchayatnama and he was examined. P.W.-7 Dr. S.P. Singh was also examined who stated that he did the post mortem on 26 June 2009 at 4 p.m. The body was

1-1/2 days old, injuries found on the body of Bharat Lal follows as under:

i)- Multiple abraded contusions(15). The sizes of ranged from 1.5 cm x 1.0 cm to 0.5 cm x 0.5 cm. These injuries were present on chin, cheek and right portion of the forehead and raised part of the bone under the eyes in an area of 15 cm x 9 cm.

ii)- Three abrasions were found on the left cheek of the deceased. Their sizes ranging respectively from 0.5 cm x 0.5 cm to 0.5 cm x 4.00 cm. All these three abraisons were in an area of 6 cm x 4 cm.

iii)- Multiple abraded contusions were present on the membrane of the lips of the deceased. Their sizes ranged from 0.4 cm x 01 cm to 0.3 cm x 02 cm.

iv)- An abrasion measuring 3.5 cm x 1.5 cm was found on the posterior portion of the right elbow of the deceased.

v)- An abraision measuring 2.5. cm x 1.0 cm was present on medial aspect of the left elbow of the deceased.

vi)- Whole front of the neck was swollen. Size 5.5. cm x 6.0 cm.

6. The doctor had given opinion that the cause of death was asphyxia, a result of throttling and smothering. P.W. - 8 Smt. Shanti Devi and P.W. - 9 Sarla Devi were also declared hostile and did not support the prosecution case.

7. After evidence of prosecution the accused were afforded opportunity under Section 313 Cr.P.C. The accused had stated that Ram Shree, the complainant is the mother of the deceased, and Shankar Lal, P.W. - 5, is the maternal uncle. Both the witnesses had given false statements to implicate the accused falsely. He further stated that the information of death was given by him first to the police station. The accused had got summoned the application dated 25 June 2009 from the police station. Ram Shree has stated in her statement that she had given application on 27 June 2009 after three days of the date of incident that Surja Devi and her father Bhai Lal had killed her son Bharat Lal. Surja Devi had no good relation and she usually lived in her parental house. She had further stated that she did not see the occurrence and she had nominated the accused.

8. P.W. - 5 was examined before the Court and the same fact was reiterated by him in examination in chief. In cross examination he admitted that Ram Shree, the complainant, is the sister and Bharat Lal, the deceased was the son of his sister thus his Bhanja. The Court was of the opinion that the conduct and behaviour of P.W.-5 was unusual, he did not make any protest at the time of incident when he saw that his bhanja was being killed by the accused., rather he proceeded to Bilsanda Market. P.W. -5 did not inform his sister for three months, thus, his testimony was totally discarded. The Court has further mentioned that Shankar Lal, the P.W. - 5 has stated that he stopped for two minutes in front of the body of his bhanja Bharat Lal who was lying on the road. He then went to Bilsanda Market and thereafter again came to the place of occurrence where he saw that the body of his bhanja was lying on the road. He mentioned that he came back to his house because his son was ill. He remained in his village throughout the night. He admitted before the Court that he had gone for the last rites of his bhanja, but did not inform about the incident to his sister Ram Shree. He had also gone for dashwan. After three months of the incident he had gone to the police station and his statement was recorded. The Court was of the opinion that it is unnatural that a close relative P.W. -5 had not disclosed the death of his bhanja to his sister Ram Shree for three months. The statement of P.W. - 5 is an

after thought upon consultation and legal advice which was unreliable. Ram Shree in the cross examination stated that she had reached the spot of occurrence at 12 noon and Shankar Lal (P.W. - 5) was her real brother. She further stated that she had told Shankar Lal about the death of her son and Shankar Lal accompanied her to the police station. Shankar Lal mentioned that he got the information of the death of the deceased from his sister Ram Shree and had accompanied her to the police station, thus contradicting his statement of being occular witness. In the F.I.R., Ram Shree had not mentioned that Shankar Lal had seen the occurrence.

9. We have heard, Sri S.K. Chaubey, learned counsel for the appellant, learned A.G.A. for the State as well as Sri Apul Mishra, learned counsel appearing for the private respondents as also perused the record.

10. After going through the entire case only one prosecution witness Shankar Lal, P.W. - 5 has tried to support the prosecution version. The statement of Shankar Lal is to be analysed in the perspective of the overall prosecution case and inference is to be drawn from the circumstances and circumstantial evidence whether he was present on the spot or not.

11. In cross examination he has admitted that Ram Shree (P.W. -1), the complainant, is his sister and Bharat Lal, the deceased was the son of his sister, thus, the deceased was his *Bhanja* (nephew). He did not make any protest nor enquired when he saw that his bhanja was being subjected to assault by pressing his neck and chest by the accused. He rather proceeded to Bilsanda Market. The incident according to him is of 10 a.m. Thereafter, he again came to the place of occurrence at 3 p.m. and saw that the body of his *bhanja* was lying on the road. He came back to his house because his son was ill. He remained to his village throughout night. He deposed before the Court that he had gone for last rites of his bhanja, but did not inform about the incident to his sister Ram Shree. He had also gone for dashwan. After three months of the date of occurrence he had gone to the police station and his statement was recorded. It is unnatural that for three months he did not disclose the incident to his sister Ram Shree. In contradiction case as stated by P.W. - 5 is an after thought because the statement had been recorded by the police after three months. Lastly, it is noted that Ram Shree deposed statement in that she reached the spot of occurrence at 12 noon Shankar Lal her real brother accompanied her to the police station Shankar Lal had not informed her of the incident about the death of her son. In contradiction, Shankar lal deposed that he got the information of the death of his nephew from his sister Ram Shree and had gone along with her to lodge report at the police station. In the F.I.R., Ram Shree had not mentioned that Shankar lal had seen the incident.

12. There is no other prosecution evidence which supports the case. The testimony of P.W. -5 is wholly unreliable, being an outcome of after thought, consultation and legal advice.

13. While dealing with the scope of the appellate court a Division Bench of this Court in **State of U.P. Vs. Surendra Singh [Government Appeal No. 511 of 2019, decided on 20 January 2020]** observed as under:

*"12. In **Sudershan Kumar v. State of Himachal** reported in (2014) 15 SCC 666 the Hon'ble Supreme Court observed thus;-*

"31.It has been stated and restated that a cardinal principle in criminal jurisprudence that presumption of innocence of the accused is reinforced by an order of the acquittal. The appellate court, in such a case, would interfere only for very substantial and compelling reason. There is plethora of case laws on this proposition and we need not burden

this judgment by referring to those decisions. Our purpose would be served by referring to one reasoned pronouncement entitled Dhanapal v. State which is the judgment where most of the earlier decisions laying down the aforesaid principle are referred to. In para 37, propositions laid down in an earlier case are taken note of as under: -

*"**37. In Chandrappa v. State of Karnataka**, this Court held: (SCC p. 432 para 42), (1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.*

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

32. Thereafter, in para 39, the Court curled out five principles and we would like to reproduce the said para hereunder:

"39. The following principles emerge from the cases above:

1. The accused is presumed to be innocent until proven guilty. The accused possessed this presumption when he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent.

2. The power of reviewing evidence is wide and the appellate court can re- appreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law, but the Appellate Court must give due weight and consideration to the decision of the trial court.

3. The appellate court should always keep in mind that the trial court had the distinct advantage of watching the demeanour of the witnesses. The trial court is in a better position to evaluate the credibility of the witnesses.

4. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.

5. If two reasonable or possible views can be reached - one that leads to acquittal, the other to conviction - the High Courts/appellate courts must rule in favour of the accused."

*13. In **Dilawar Singh v. State of Haryana**, (2015) 1 SCC 737, the Supreme Court reiterated the same in paragraphs 36 and 37 as under :*

"36. The court of appeal would not ordinarily interfere with the order of acquittal unless the approach is vitiated by manifest illegality. In an appeal against acquittal, this Court will not interfere with an order of acquittal merely because on the evaluation of the evidence, a different plausible view may arise and views taken by the courts below is not correct. In other words, this Court must come to the conclusion that the views taken by the learned courts below, while acquitting, cannot be the views of a reasonable person on the material on record.

*36. In **Chandrappa v. State of Karnataka,** the scope of power of appellate court dealing with an appeal against acquittal has been considered and this Court held as under: (SCC p.432 para 42) "42....(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.*

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

Unless there are substantial and compelling reasons, the order of acquittal is not required to be reversed in appeal. It has been so stated in State of Rajasthan v. Shera Ram."

14. In view of the aforesaid factual backdrop, we are of the opinion that the appeal lacks merit and is **dismissed** at the admission stage.

(2021)11ILR A550
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.10.2021

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE MRS. SADHNA RANI (THAKUR), J.

Criminal Appeal No. 4025 of 2013
with
Criminal Appeal No. 4160 of 2013

Ramasankar Kushwaha & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Chandra Shekhar Kushwaha, Sri Lav Srivastava, Sri V.P. Srivastava (Senior Adv.)

Counsel for the Respondents:
A.G.A.

(A) Criminal Law - The Indian Penal Code, 1860 - Sections 147, 328/149, 302/149, 201 & 118/149 - The Code of criminal procedure, 1973 - Section 161 & 313 - appeal against conviction - Circumstantial evidence - surmises and conjectures - settled law - Prosecution has to prove its case beyond reasonable doubt - statement under Section 161 Cr.P.C. not on oath, so such statement cannot be said to be relied for bringing home the guilt of the accused persons - where two views of the prosecution story appear to be probable, the one that is in favour of the accused should be accepted - principle of Criminal Jurisprudence - mere suspicion, however, strong it may be, cannot take place of evidence . (Para - 59,60,67,72)

(B) Criminal law - Indian Evidence Act, 1872 - Section 101 (general rule) - Burden of proof ,

Section 106 (exception) - Burden of proving fact especially within knowledge - in a criminal case the burden of proof is on the prosecution and section 106 is certainly not intended to relieve it of that duty - conviction and acquittal of the accused depends upon the consistent of criminological chain leading to only conclusion of guilt of the accused - criminological chain which invariably comprises of "who, when, why, where and how". (Para - 25,69)

Written report by the brother of deceased (wife of the accused) - narration - his sister and her children were murdered in their house - thereafter, dead bodies were thrown on the railway line - by the accused (his brother-in-law) and his friends to give the incident a colour of suicide - other accused persons had been referred as friends of main accused in the FIR - trial court convicted all the accused persons - hence appeal.(Para - 83)

HELD:-The prosecution has failed to prove its case beyond reasonable doubts. All the witnesses of fact had turned hostile. Nothing incriminatory had come in their cross examination. Thus, there is no evidence on the record to bring home the guilt of the accused persons. Judgment and order passed by court below is found to have been passed on surmises and conjectures. The same, therefore, is liable to be set aside. The appellants accused persons are acquitted of all the offences under which they are charged giving them benefit of doubt. (Para - 88)

Criminal Appeal allowed. (E-7)

List of Cases cited:-

1. Attygalle Vs Emperor, 1936 (38) Bombay LR 700

2. Shambu Nath Mehra Vs The St. Of Ajmer, 1956 SC 404, 1956 Cr.L.J. 794

3. Chaudhary Razik Ram Vs Ch. J.S.Chauhan, AIR 1975 SC 667

4. Sucha Singh Vs St. of Punj., (2001) 4 SCC 375

5. Vikramjit Singh Vs St. of Punj., (2006) 12 SCC 306

6. Nupur Talwar Vs St. of U.P. & ors., 2018 (102) ACC 524

7. Mahabir Singh Vs St. of Har., (2001) 7 SCC 148

8. Devi Lal Vs St. of Raj., 2019 (19) SCC 447

9. Sharad Birdhichand Sarda Vs St. of Mah. 1984 SCC (Crl) 487

10. Vikramjit Singh Vs St. of Punj., (2006) 12 SCC 306

11. Shivaji Sahabrao Babode & anr. Vs St. of Mah., 1973 SCC (Crl) 1033

12. Dilavar Hussain & ors. Vs St. of Guj. & anr., 1991 SCC (Cri) 163

13. Amerika Rai & ors. Vs St. of Bihar, 2011 (4) SCC 677,

14. Dandu Jaggaraju Vs St. of A.P., 2011 (9) SCC 3387,

15. Ramchandran & ors. Vs St. of Kerala, 2011 (9) SCC 257.

16. Shankarlal Gyarasilal Dixit Vs St. Of Mah., 1981 (2) SCC 35

(Delivered by Hon'ble Mrs. Sadhna Rani (Thakur), J.)

1. As both the appeals arise from the same incident and common judgment, we have heard them together and they are being disposed of by this common judgment.

2. Both the above mentioned criminal appeals have been filed by the appellants Ramashankar Kushwaha, Mohan Gaur, Ravindra Prasad @ Doctor, Bacchan Gaur and Pappu @ Manoj Kumar Thakur against the judgment and order dated 27.8.2013 passed by the learned Additional Sessions Judge, Court No. 7, Deoria in S.T. No. 219 of 2010 (State Vs. Mohan Gaur and others) whereby the appellants have been convicted and sentenced under sections 147, 328/149, 302/149, 201 and 118/149 I.P.C. Police station Bankata, Distrct Deoria.

3. As per the prosecution story, the first information report was lodged by one Shakul Gaur

on 08.02.2010 at the police station Bhatni, District Deoria stating therein that his sister Indu Devi was married to Mohan Gaur son of late Baharan Gaur. Out of their wedlock, they had three sons namely Harikesh, Rakesh and Vikash and two daughters Sita and Shilpi. His brother-in-law had developed bad association and started taking liquor. He had purchased a tractor after selling his land but due to his bad habit of drinking, he had agreed to sell the tractor to one Bhola Singh for Rs. 2,50,000/-. Out of the sale amount, he took rupees one lac as advance and had spent the money on his friends enjoying liquor. At this, the complainant's sister namely, Smt. Indu Devi asked Bhola Singh (the vendee of the tractor) to give the rest of money in her hands so that she could deposit the same in the bank. His brother-in -law (Mohan Gaur) being annoyed with that had started harassing his sister. She had narrated her plight to the complainant and other family members. They tried to pacify the matter but Mohan Gaur paid no heed. On 07.02.2010, they came across a news in the newspaper that near Bankata railway station, six people were crushed over by a train and died. They suspected the dead bodies being of their sister and her children. The complainant along with other villagers then reached the railway station Bankata. The complaint's brother Ajay and Vijay went to the postmortem house and had identified the dead bodies as of their sister, nephews and nieces. They cremated the dead bodies in the village Bhaisahi. The house of the complainant's sister was found to be washed and cleaned. Near the railway line, the wheat crop was lying down. It was asserted that the deceased persons appeared to have been first murdered in their house in the night and then to give the whole incident the colour of suicide their dead bodies were thrown on the railway line by the accused Mohan Gaur (his brother-in-law) and his friends. Near the railway line, no blood was found. The complainant stated that he also came to know that upto 8.00 A.M. in the morning on 6.2.2010 accused Mohan Gaur was in his house and after that he had absconded.

4. Shrawan Kumar, the Assistant Station Master, Bankata, reported the incident to the G.R.P. Bhatni station at about 8.45 A.M. on 6.2.2010. Received the information, the police concerned reached the spot, recorded the requisite statements, prepared site plan, collected samples of blood stained stones from the railway track. The house of the deceased was also searched wherefrom a bottle of liquor (Royal Vat Premium Whisky) and a mobile phone without SIM were recovered. Inquest reports were prepared. The dead bodies were sent for the postmortem on 6.2.2010. Near the railway track, from the Corn-field of Nathuni Gupta one woolen shawl was recovered. From the field of Ram Sakal Maurya some broken pieces of red bangles and red thread were recovered. From the nearby wheat field of Indrajeet Maurya one steel glass, one heir clip, one necklace, one plastic bottle of liquor, a half piece of blade broken into two pieces with its cover and one pen were recovered. From the open field of Vijay Maurya, recovery of one plastic glass, one liquor bottle of 'Banti - Babli', two pairs of plastic slippers had been made, and one bottle of 'Banti-Babli' liquor was recovered from the drain of Chakroad.

5. The recovery memos were prepared. The Sub- inspector Gyan Prakash Pathak (P.W.-11) took over the investigation, collected blood stained stones from the place of recovery of dead bodies and recovery memos were prepared. During the investigation, the offence was suspected to have been committed inside the house of the deceased, so the investigation was transferred to the police station Bankata on 9.2.2010.

6. The Police Officer, at P.S. Bankata (P.W.10) started investigation on 12.2.2010 visited the house of the deceased on 13.2.2010, and recorded requisite statements, prepared site plan and arrested the accused Pappu @ Manoj Kumar Thakur and Ravindra Prasad from the market on 14.2.2010. He had recovered a shawl used in wrapping and throwing the dead bodies at the instance of accused Ravindra Prasad on

14.2.2010. Rest of the accused persons were also arrested later. The statements of all the accused persons were recorded. After receiving the post mortem reports the viscera of the deceased persons was sent to the Forensic Science Laboratory Varanasi and Lucknow on 18.2.2010 along with the clothes of the deceased. From the house of the deceased, two blood stained shalwars were recovered on 13.2.2010. On 18.4.2010 and 29.4.2010, reports of the Forensic Science Laboratory, Varanasi and Lucknow; respectively, were received. In viscera report, Aluminum Phosphate poison was found. The first information report registered under section 302/ 201 I.P.C. was amended and Section 328 I.P.C. was added to the same. After completion of the investigation charge sheet no. 44 / 10 under Sections 118, 147, 149, 34, 328, 302 and 201 I.P.C. was filed on 5.5.2010 against the five accused persons namely Mohan Gaur, Ravindra Prasad @ Doctor, Pappu @ Manoj Kumar Thakur, Ramashanker Kushawaha and Bachchan Gaur.

7. The learned trial court framed the charges on 23.3.2011 against all the accused persons under Sections 147, 328/149, 302/149, 201 and 118/149 I.P.C. For the prosecution, 18 witnesses were produced. The formal witnesses proved the documents and materials filed by the prosecution. The statements of accused persons under Section 313 Cr.P.C. were recorded. No defence evidence was adduced. The learned trial court held the accused persons guilty under the charged sections and passed the sentence, accordingly.

8. The grounds to assail the judgment of the learned trial court are:-

9. That the prosecution has failed to prove its case beyond reasonable doubts. All the witnesses of fact had been declared hostile. Nothing helpful in their cross examination had come out which can support the prosecution version. The entire prosecution version and the impugned judgment are based on suspicion. The appellant Pappu and co-accused Mohan Gaur had enmity prior to the alleged incident, and therefore, the association of the appellants Pappu and Mohan Gaur to commit the present offence is highly improbable. The trial court had convicted all the accused persons being swayed away by the gravity of the offence as six persons had been put to death. The contention is that in the alleged crime there is no cogent much less material evidence on record to implicate the accused persons beyond all reasonable doubts.

10. Heard the learned counsel for the appellants and the learned A.G.A. for the State and perused the record.

11. It is argued by the appellants counsel that there is no eye witness of the alleged incident and there is no witness of the last seen as well. The case is of circumstantial evidence wherein the chain of circumstances is no way complete. Several links between the circumstances brought forth by the prosecution are missing. There was no motive for the accused persons for committing the murder of the deceased persons. No incriminating material had been recovered by the police from the accused persons. Mere recovery of the liquor bottles from here and there or to say that the accused persons were drunkard will not make it a case of conviction. There is nothing on record to show that the poison was administered to the deceased persons by any of the accused person. Only one accused i.e Mohan Gaur, the brother-in-law of the complainant (husband and father of the deceased persons) was initially named in the first information report. All the other accused persons whose names came into light during the investigation are stated to the friends of the main accused Mohan Gaur and on this premise only they had been implicated in the crime by taking aid of Section 149 I.P.C.

12. Per contra, the learned A.G.A. argued that as the accused Mohan Gaur was a drunkard

person he used to harass his wife, the deceased Indu Devi and their children. Just few days before the incident, he had sold his tractor and the advance money was spent by him on his friends. The deceased Indu Devi was opposed to the same and in order to get rid of her, the accused Mohan Gaur had invited his friends on feast and with their help, he had administered poison to his wife namely Indu Devi and their five children in fish curry and after their death Mohan Gaur with the help of his abovenamed friends threw the dead bodies on the railway track to give the incident the colour of suicide. From the viscera reports, it came into light that all the deceased died of consuming "Aluminum phosphate" poison and all the injuries found on their persons were postmortem injuries. As it was not possible for a single person, i.e. the main accused Mohan Gaur to carry the dead bodies to the railway track, it was established by the prosecution that with the help of the co-accused persons after wrapping them in shawls, the dead bodies were thrown on the railway track. The police had also recovered one of such shawls at the instance of the accused Ravindra Prasad from the field of Nathuni Gupta after he was arrested. The dead bodies of Sita and Shilpi were said to have been wrapped in the said shawl and thrown on the railway track. One more shawl had been recovered by the police from the Corn-field of Nathuni Gupta, on their own.

13. It was also argued that the recovery of a liquor bottle from the house of the deceased, recovery of a plastic glass and two pairs of slippers (chappals) and a liquor bottle from the field of Vijay Maurya, pieces of red bangles from the field of Ram Sakal Maurya, recovery of two shawls from the field of Nathuni Gupta, recovery of one steel glass, one hair clip, blade, liquor bottle, a pen and necklace (mala) from the field of Indrajeet, show that the incident did not occur at the railway track rather initially the deceased persons were administered poison at their residence and then with the help of the rest of the accused persons dead bodies were dragged to the railway line after wrapping them in the shawls to cause disappearance of the evidence and to give the incident the colour of suicide.

14. It is vehemently argued that it was not possible for a single person to carry all the dead bodies to the railway track. This fact itself clearly suggests the involvement of the husband of the deceased i.e. brother-in-law of the complainant as well as all the other accused persons, moreover, all the accused persons had feast that night at the residence of Mohan Gaur. As per the prosecution case, the husband wanted to get rid of his wife so he committed the offence with the help of his friends. It is, thus, argued that the involvement of the main accused Mohan Gaur along with the other co-accused cannot be ruled out.

15. From the appellants side, it is further argued that the deceased persons had consumed poison themselves because there was no motive before the father to kill his young children and there was no motive to murder his wife also. There is no evidence of any quarrel prior to the incident. There is no evidence of administering poison by the accused persons to the deceased nor there is any evidence of throwing the dead bodies by them on the railway track. All the witnesses of fact had turned hostile. Nothing incriminatory had come in their cross examination. Thus, there is no evidence on the record to bring home the guilt of the accused persons. The prosecution can not take benefit of Section 106 of the Evidence Act in absence of any other evidence that the poison was administered to the deceased in their house. Only circumstance of being a drunkard or the main accused Mohan Gaur having absconded from his house after the incident would not be the grounds to hold him guilty along with other accused. The prosecution from any angle can not

be said to have proved its case beyond all reasonable doubts. All the appellants deserve to be acquitted, accordingly.

16. Considering the above submissions and having perused the record, we may note that it is an admitted fact that all the six dead bodies were found on the railway track in the dismembered condition. It has come out in the viscera report that the death of all the deceased persons was caused due to poisoning of Aluminum phosphate poison. Postmortem reports reveal that all the injuries on the persons of deceased were postmortem injuries. There is no doubt, thus, that the deceased persons were first poisoned and after their death with the intention of causing disappearance of the evidence of offence, their dead bodies were thrown on the railway track.

17. As per the defence version, the deceased had consumed poison themselves but how their dead bodies had reached on the railway track could not be explained. However, the fact that the deceased persons were administered poison by the accused persons is to be proved by the prosecution.

18. The family lived together and all the deceased persons were residents of one house along with the main accused Mohan Gaur being their husband / father, is an assumption to implicate him as the accused who could have administered poison to his whole family. According to the prosecution, the onus as per section 106 of the Evidence Act, is, thus, on the accused Mahan Gaur to explain as to how the deaths had been caused and how the dead bodies had reached on the railway track.

19. On the issue of applicability of the above provisions, both sections 101 (the general rule) and 106 (exception to the same) of the Evidence Act are relevant to be noted for ready reference:-

20. Section 101:- Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

21. Section 106:- When any fact is specially within the knowledge of any person, the burden of proving that fact is upon him.

22. On the application of Section 106 Evidence Act, the judgment placed by the learned Senior Counsel for the appellants are:-

23. In the case of **Attygalle Vs. Emperor 1936 (38) Bombay LR 700** the Privy Council held that Section 106 of the Evidence Act does not affect the onus of prove and throw upon the accused the burden of establishing the innocence.

24. In **Shambu Nath Mehra vs The State Of Ajmer, 1956 SC 404, 1956 Cr.L.J. 794**, it was held that the Section 106 of Evidence Act is an exception to Section 101 which lays down general rule that in a criminal case the burden of proof is on the prosecution and Section 106 of Evidence Act is certainly not intended to relieve it of that duty.

25. In Shambhu Nath (supra), it was held by the Apex Court as under:-

"11. This lays down the general rule that in a criminal case the burden of proof is on the prosecution and section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of

the accused and which he could prove without difficulty or inconvenience. The word "especially" stresses that. It means facts that are preeminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not. It is evident that cannot be the intention and the Privy Council has twice refused to construe this section, as reproduced in certain other Acts outside India, to mean that the burden lies on an accused person to show that be did not commit the crime for which he is tried. These cases are Attygalle v. Emperor(1) and Seneviratne v. R. (2).

12. Illustration (b) to section 106 has obvious reference to a very special type of case, namely to offences under sections 112 and 113 of the Indian Railways Act for travelling or attempting to travel without a pass or ticket or with an insufficient pass, etc. Now if a passenger is seen in a railway carriage, or at the ticket barrier, and is unable to produce a ticket or explain his presence, it would obviously be impossible in most cases for the railway to prove, or even with due diligence to find out, where he came from and where he is going and whether or not be purchased a ticket. On the other band, it would be comparatively simple for the passenger either to produce his pass or ticket or, in the case of loss or of some other valid explanation, to set it out; and so far as proof is concerned, it would be easier for him to prove the substance of his explanation than for the State to establish its falsity.

13. .....

This is a section which must be considered in a commonsense way; and the balance of convenience and the disproportion of the labour that would be involved in finding out and proving certain facts balanced against the triviality of the issue at stake and the ease with which the accused could prove them, are all matters that must be taken into consideration. The section cannot be used to undermine the well established rule of law that, save in a very exceptional class of case, the burden is on the prosecution and never shifts."

26. In the judgment of **Chaudhary Razik Ram Vs. Ch. J.S.Chauhan, AIR 1975 SC 667,** it was held that the principle underlying Section 106 of the Evidence Act which is an exception to the general rule governing the burden of prove applies only to such matter of defence which are supposed to be specially within the knowledge of the defendant respondent. It cannot apply when the fact is such as to be capable of being known also by the persons other than the respondent.

27. In **Sucha Singh Vs. State of Punjab (2001) 4 SCC 375**, it was held that:-

"19. Section 106 of the Evidence Act is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases where the prosecution has succeeded in proving facts for which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of special knowledge regarding such facts failed to offer any explanation which might drive the court to draw a different inference".

28. In **Vikramjit Singh Vs. State of Punjab, (2006) 12 SCC 306,** the Supreme Court held that Section 106 of Evidence Act, does not relieve the prosecution to prove its case beyond all reasonable doubt. Only when the prosecution case has been proved the burden in regard to

such facts which was within the special knowledge of the accused the onus may be shifted to the accused for explaining the same subject to certain statutory exceptions.

29. In Vikramjit Singh Alias Vicky (supra), the discussion in paragraph Nos.14 & 15 are relevant to noted as under:-

14. Section 106 of the Indian Evidence Act does not relieve the prosecution to prove its case beyond all reasonable doubt. Only when the prosecution case has been proved the burden in regard to such facts which was within the special knowledge of the accused may be shifted to the accused for explaining the same. Of course, there are certain exceptions to the said rule, e.g., where burden of proof may be imposed upon the accused by reason of a statute.

15. It may be that in a situation of this nature where the court legitimately may raise a strong suspicion that in all probabilities the accused was guilty of commission of heinous offence but applying the well-settled principle of law that suspicion, however, grave may be, cannot be a substitute for proof, the same would lead to the only conclusion herein that the prosecution has not been able to prove its case beyond all reasonable doubt.

30. In the judgment of ***Nupur Talwar vs. State of UP and others, 2018 (102) ACC 524***, the Division Bench of this Court had extensively dealt with the consequence of Section 106 of the Evidence Act by referring to the landmarks decisions of the Apex Court and held in paragraphs Nos.246, 247, 248 & 249:-

"246. Thus, what follows from the reading of the law reports referred to herein above, is that prosecution has to establish guilt of the accused filtered of all reasonable prognosis favourable to accused to secure conviction and it is never relieved of its initial duty. It is only when the initial burden has been discharged by the prosecution that the defence of the accused has to be looked into. Section 106 of the Indian Evidence Act can not be applied to fasten guilt on the accused, even if the prosecution has failed in its initial burden.

247. Section 101 to Section 114A of Chapter-VII of the Indian Evidence Act, 1872 deal with subject "OF THE BURDEN OF PROOF." Section 106 of the Indian Evidence Act provides that when any fact is especially within the knowledge of any person, the burden of proof to prove that fact is upon him. Section 106 is an exception to Section 101 of the Evidence Act which stipulates that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. Section 106 of the evidence act has to be read in conjunction with and not in derogation of section 101 Evidence Act. Section 106 of the Indian Evidence Act does not relieve prosecution of it's primary and foremost duty to establish the guilt of the accused beyond all reasonable doubts independent of weaknesses of the defence. It is only when prosecution, for well perceptible and acceptable reasons, is unable to lead evidence because of circumstances beyond it's control including the reason that the fact required to be proved was "within the special knowledge of an accused alone" and prosecution could not have known it by due care and diligence, that Section 106 can be resorted to by shifting burden on the accused to divulge that fact which is "in his special knowledge" and if accused fails to offer any reasonable explanation to satiate judicial inquisitive scrutiny, he is liable to be punished. Section 106 is not meant to be utilized to make up for the prosecution's inability to establish its case by leading, cogent and reliable evidence.

248. However once the prosecution establishes entire chain of circumstances

together in a conglomerated whole unerringly pointing out that it was accused alone who was the perpetrator of the crime and the manner of happening of the incident could be known to him alone and within his special knowledge, recourse can be taken to section 106 of the Evidence Act. Aid of Section 106 of the Evidence Act can be invoked only in cases where prosecution could produce evidence regarding commission of crime to bring all other incriminating circumstances and sufficient material on record to prima-facie probablise its case against the accused and no plausible explanation is forthcoming from the accused regarding fact within his special knowledge about the incident.

249. Section 106 of the Evidence Act lays down only this much that if a fact is in the "special knowledge of a person" and other side could not have due knowledge of it in spite of due diligence and care then burden of proving that fact lies on such person in whose special knowledge it is."

31. Placing reliance upon the above decisions, the learned counsel for the appellants had argued that as it was incumbent the prosecution to establish by cogent and reliable evidence inter-alia that the poison was administered to the deceased persons by the accused Mohan Gaur in connivance with the other accused persons and all the accused persons then collectively threw the dead bodies on the railway track.

32. It was further argued that Section 106 of the Evidence Act can not be understood to provide that the prosecution is absolved of its burden from proving its case and the burden of proving the entire case was entirely upon the accused persons.

33. Having carefully gone through the above decisions and the related law in the light of the language of Section 101 of the Evidence Act, there can be no two opinions that it was the duty of the prosecution to prove that the fact, 'as to how and when the deceased persons had consumed or administered poison', was within the special knowledge of the husband of the deceased Indu Devi, the main accused Mohan Gaur. The prosecution is not relieved of its burden to prove the existence of the said fact; or in other words, the presence of the accused Mohan Gaur either alone or along with other accused persons in his house at the time when the deceased had consumed or administered poison was to be proved by the prosecution.

34. From the facts on the record, it is evident that there is no eye witness or the witness of the last seen of either the incident or the presence of the accused persons much less the accused Mohan Gaur, the husband / father in the house on the date of the incident. This case admittedly is of circumstantial evidence and the chain of circumstances has to be completed by the evidence lead by the prosecution. The explanation of the main accused to discharge the onus laid upon him, if any, once prosecution discharged its initial burden, as per Section 106 of the Evidence Act, would be only an additional circumstance. To put it differently, the silence of the accused in the above situation would be only a link in the chain of the circumstances put forth by the prosecution. In any case, the burden to prove the existence of the circumstances leading to the guilt of the accused cannot be shifted entirely on the accused Mohan Gaur as he, in any case, cannot be asked to prove his innocence.

35. The prosecution had produced as many as 18 witnesses. Out of whom 12 are witnesses of fact. None of them had supported the prosecution version and all of them had been declared hostile and had been cross-examined by the Public Prosecutor.

36. P.W.-1 and 2, brothers of the deceased Indu Devi, were admittedly the residents of

another village. They came to know about the incident through a local newspaper. They then went to the police station concerned and had identified the dead bodies and lodged the first information report. P.W.-1 Shakul Gaur had deposed that his sister and her husband who were married for 26 years were having cordial relations. There was no suggestion of any fight or quarrel between them and his sister had never complained against her husband. In the cross examination, this witness had clearly denied his statement recorded under section 161 Cr.P.C. and stated that his brother-in-law (Mohan Gaur) was working outside the village for the last 3-4 months prior to the incident and came back only after getting the information of the incident. Regarding the first information report, he had stated that it was written on the dictation of the police and he had just put his signatures on it. He did not even know the scribe of the F.I.R. He had denied that the contents of the F.I.R. were read over or explained to him. He had also denied the presence of co-accused Pappu @ Manoj Kumar Thakur in the village on the date of the incident.

37. **P.W.-2 Ajay Prasad**, another brother of the deceased Indu Devi had stated that he had identified the dead bodies of his sister and her children in the postmortem house. He denied his statement under section 161 Cr.P.C. having been recorded by the police and stated that when they reached at the residence of his sister, the accused Pappu @ Manoj Kumar Thakur was out of the village for employment.

38. **P.W.-3 Nanhe Giri** who was projected as the witness of last seen, i.e. spotting the accused persons carrying the dead bodies had denied that he saw Ramashankar, Ravindra, Bacchan Gaur, Manoj and Mohan Gaur carrying / something hanging. Rather he had asserted that he was sleeping in his house with his family. In his main and cross examination, he had categorically denied his version recorded under Section 161 Cr.P.C. that he did go to the Bankata Railway Station to catch the train on the fateful night of 5/6.2.2010 and while returning back for the train being late, he witnessed the accused persons carrying something.

39. **P.W.-4 Chandra Shekhar Giri,** the witness of extra judicial confession of the accused Ravindra Prasad @ Doctor and Pappu @ Manoj Thakur stated that on 13.2.2010, they did not come at the gate of the house of Thakur Ajay Singh when he was present and nor there was any talk of the feast having been arranged at the house of accused Mohan Gaur. This accused had denied his statement under section 161 Cr.P.C. and he having any knowledge about the incident.

40. **P.W.- 5 Rudal Kushwaha** though had verified his signatures on the inquest report but stated that his signatures were taken on the blank papers and his 161 statement was also recorded at the dictation of the Investigating Officer. He had denied having knowledge regarding the incident. He had stated that he reached the railway station on getting the news and was part of the crowd collected on the spot.

41. **P.W.-6 Sudhir Chandra Shah** had stated that on 6.2.2010, the night of the incident he did not see the accused persons sitting and enjoying feast in the house of Mohan Gaur. In the cross examination, this witness had stated that Pappu @ Manoj Thakur and Mohan Gaur are having some property dispute and for the last 5-7 years prior to the incident, they were not on the talking terms and Pappu @ Manoj generally remained outside the village in relation of his job and on the date of incident he was not in the village.

42. **P.W.-7 Hasanu Ali** had stated that the work of digging the pond under 'MANREGA' was going on which was being supervised by Pradhanpati Sri Rama Shankar Kuswaha

(accused). On 5.2.2010, Bacchan Gaur and Mohan Gaur did not come to the pond nor the accused persons sat near the pond to enjoy liquor. No such incident of consumption of liquor had occurred near the pond on 5.2.2010. In the cross examination, he had denied his statement under Section 161 Cr.P.C. and that he met the Investigating Officer to record the said statement.

43. **P.W. 14 Bhola Singh** stated that he had no knowledge about Mohan Gaur being a drunkard type of person nor any dispute between him and his wife about the money for the sale of tractor. He stated that the tractor was purchased by him in the year 2009 for Rs. 2,65,000/- and that he had paid the entire money in one go. This witness had also denied his statement under Section 161 Cr.P.C. and stated that he never met the Investigating Officer and came to know about the incident after about 10 days.

44. **P.W.-15 Ajay Kuma**r had refused to acknowledge the recovery of one shawl from the field of Nathuni Gupta in his presence. In his cross examination, he had stated that some property dispute was going on between Mohan Gaur and Manoj Thakur prior to the incident.

45. **P.W.- 16 Ram Narain** a worker in the country liquor shop located near the railway station in his evidence had refused to identify the accused persons and had stated that he did not witness them coming to his shop with Mohan Gaur, and on the date when dead bodies were found he was on leave. He did not even know the Mauja or the police station where accused persons were residing. This witness had also denied his statement under Section 161 Cr.P.C.

46. **P.W.-17 Kundan Gaur** a worker in 'MANREGA' scheme stated that he was working on the pond on 5.2.2010 but denied having knowledge about any feast having been arranged on the fateful day / night of 5.2.2010 at the residence of the accused Mohan Gaur. He had denied having witnessed the accused persons together anywhere anytime on 5.10.2010.

47. **P.W.-18 Dharmendra Madhesiya** had denied having knowledge of the fact that on 5.2.2010, Bachchan Gaur had purchased liquor from the liquor shop where he was working and that the accused persons used to come to the shop to enjoy the liquor.

48. Rest of the prosecution witness are formal witnesses who had proved the documents prepared by them and recoveries made before them.

49. From the above statements of fact, it is clear that all the witnesses of fact did not support the prosecution story. They had been declared hostile by the prosecution and cross examined but nothing incriminatory had come out in their cross examination that could support the prosecution version. Mere finding some liquor bottles and other materials such as shawl, slippers, clips and necklace (maala) etc. from the field adjacent to the railway track can not be said to prove the guilt of the accused persons. Mere being drunkard or enjoying liquor itself cannot constitute an offence. Apart from the oral testimony no incriminating material had been collected by the prosecution from the house of the deceased or else where to prove that the accused persons were collected to form an assembly. Neither any leftover food had been collected from the house of the accused Mohan Gaur nor any incriminating material had been sent to the Forensic Science Laboratory to prove the allegation of administering poison in the house or the presence of other accused persons in the house of the deceased. There is not even a suggestion of any traces of poison having been found in any of the edible or utensils recovered from the house of the accused Mohan Gaur. There is no collection of the finger prints of any

of the accused persons over the utensils or any other material recovered from the house of the accused Mohan Gaur. There is no evidence nor even suggestion of the first Investigating Officer (P.W.-11) posted in the G.R.P., Bhatni that the scene of the crime was made up to remove all traces of the crime / poison, when he visited the house of the accused Mohan Gaur on 9.10.2010. In his examination-in-chief P.W.-11 only proved the recovery memo exhibited as Exhibit 'Ka-69' for the recovery of one liquor bottle and a mobile phone from the house of the deceased.

50. There is no evidence on record to even suggest any ill-relation between the deceased Indu Devi and her husband, the accused Mohan Gaur. Rather P.W. 1, the brother of deceased Indu Devi had stated that his sister and her husband were having cordial relations in their marriage of 26 years. There was no quarrel or fight between them before the incident and there was no report of any quarrel between Mohan Gaur and his wife or children, otherwise.

51. There is only one instance against the accused Mohan Gaur that he was normally the resident of the house where according to the prosecution the deceased were administered poison. But there is no witness of last seen of accused Mohan Gaur in his house or even in the village. No witness had testified the presence of accused Mohan Gaur in the village on the date of the incident, rather the testimony is otherwise. Even if it is assumed for a moment that the accused Mohan Gaur had absconded from the village, this fact itself cannot prove him guilty of the offence of murder. The accused Mohan Gaur can not be compelled to give evidence against him nor he or his alleged friends can be held liable for the charge of administering poison in absence of any prosecution evidence and, thus, committing murder. There is absolutely no evidence to put forth any of the circumstance against the accused persons including husband / father of the deceased Mohan Gaur. The prosecution has failed to discharge its burden to shift onus on the accused persons to offer any explanation.

52. The offence allegedly started from the house of the accused Mohan Gaur having extended upto the railway track can not be said to be only within the special knowledge of the accused Mohan Gaur as there is no iota of evidence that the offence was committed inside the four walls of the house of Mohan Gaur only, of which he can be said to have special knowledge. As the offence had continued upto the railway track, some other persons might have seen those circumstances which could bring home the guilt of the accused persons but none of the witnesses produced by the prosecution had supported its version. Without even proving the version of the first information report or any of the circumstance of presence of the accused Mohan Gaur along with other accused persons before the incident in his house, the prosecution cannot take benefit of Section 106 of the Evidence Act to shift the onus upon the accused persons to explain the circumstance where the allegations are made of commission of the offences under Section 302 and 328 with the aid of Section 149 I.P.C.

53. The prosecution without bringing any other incriminating circumstance and sufficient material on record to make out a prima facie probable case against the accused Mohan Gaur cannot shift the burden on him and cannot assert that no plausible explanation is forthcoming from the accused regarding the fact within his special knowledge about the incident.

54. The prosecution cannot successfully argue that in all probability because the offence had been committed within the house of the accused Mohan Gaur so it was within his special knowledge only as to how the deaths had been

caused and the onus, thus, had been shifted on him to explain the cause of death or to prove his innocence.

55. The argument of the prosecution that none of the accused person in their statements under section 313 Cr.P.C. had denied their presence in the village and admittedly all of them were residents of the same village Bhaisahi is neither here nor there. It was the duty of the prosecution to prove the presence of the accused persons in the village on the date of the incident and not only that it was also required to prove that the accused persons were seen together prior to the incident to prove that they had formed an assembly and the offence was committed during the course of the said assembly.

56. The lower court simply noticing the statements of the accused under section 313 Cr.P.C. and injuries on the persons of the deceased being postmortem injuries had held that since the recovery of a shawl was made at the pointing out of the accused Ravindra Prasad @ Doctor, by the first Investigating Officer and all the deaths were proved to have been caused as a result of consuming poisoning, the accused persons were guilty of poisoning and murder.

57. It had opined that a mother cannot give poison to her children and there was no reason as to why the major girl and four children would consume poison on their own. Further the main accused Mohan Gaur had absconded from the spot.

58. Regarding the motive, the trial court had held that there was a dispute between the accused Mohan Gaur and his wife Indu Devi regarding the remaining money of the sold tractor which had led to the murder by the drunkard husband / father. Only evidence against the accused are that the P.W.-18- Dharmendra Madesiya, in his statement under section 161 Cr.P.C., has supported the prosecution case that Mohan Gaur and his friends had gone to the liquor shop of witness and they purchased and consumed two bottles of the liquor there. Further the P.W.-17, Kundan Gaur, who worked in MGNREGA had stated that on that fateful day, Mohan Gaur and all other co-accused had consumed the liquor. It has further held that the Investigating Officer had recovered the liquor bottles from the nearby fields and house of the accused Mohan Gaur. The recovery memos of the same had been proved by the Investigating Officer in the Court.

59. In our opinion, the trial court had ignored the settled law that the prosecution has to prove its case beyond reasonable doubt. The witnesses of the prosecution had not supported its case. All the witnesses of fact had been declared hostile. Even with the help of Section 106 of the Evidence Act, the burden of proving the guilt cannot be shifted upon the accused persons.

60. So far as the relevance of the statements of witnesses under Section 161 Cr.P.C., the Apex Court in **Mahabir Singh Vs. State of Haryana** reported in **(2001) 7 SCC 148** has made clear in paragraph no. '14' that "a reading of Section 172 Cr.P.C. makes the position clear that discretion given to the Court to use case dairy is only for aiding the Court to decide on a point. It is made abundantly clear in sub section (2) itself that the Court is forbidden from using the entries of such diary as evidence. What cannot be used as evidence against the accused cannot be used in any other manner against him. If the Court uses the entries in a case diary for contradicting a police officer, it should be done only by giving the author of the statements of opportunity to explain the contradiction." It is settled law that the statement under Section 161 Cr.P.C. is not on oath, so such statement cannot be said to be relied for bringing home the guilt of the accused persons.

61. So far as the motive is concerned, as this is a case of circumstantial evidence and no eye witness of the incident is there, the motive

assumes importance. The motive suggested by the prosecution is that the husband and the deceased wife were having strained relations over the money received from the sale of the tractor and the wife had demanded the remaining amount which had become the reason to commit the crime.

62. Two witnesses P.W.-1 and P.W.-14 had been produced to prove the motive. P.W.-1 the brother of the deceased Indu Devi had stated in the examination-in-chief that during 26 years of marriage the relations between his sister and her husband were cordial. There was no dispute between Mohan Gaur and Indu Devi. Indu Devi had never complained against her husband. P.W.-14- Bhola Singh the vendee of the tractor had stated in his examination-in-chief that he had no knowledge whether there was any dispute regarding money received from the sale of the tractor between Mohan Gaur and his wife. He had further stated that he had paid the entire money to the accused Mohan Gaur in one go. Meaning thereby the prosecution story regarding motive that since the advance paid by P.W.-14 (Bhola Singh) for the purchase of tractor was wasted by the accused Mohan Gaur on the liquor and his deceased wife being annoyed had demanded the second installment to keep it safe, itself falls.

63. So the only evidence of strained relations between the deceased Indu Devi and Mohan Gaur could not establish the motive to commit murder of wife by the accused Mohan Gaur. As far as the other accused persons are concerned, as per own case of the prosecution, they had no independent motive to commit murder of the deceased persons, wife and children of Mohan Gaur.

64. Absence of motive becomes a missing link in the chain of the circumstances and creates a dent in the prosecution story. On the law of appreciation of circumstantial evidence, the appellants' counsel has placed reliance upon the following decisions of the Apex Court.

65. In the case of **Devi Lal Vs. State of Rajasthan** reported in **2019 (19) SCC 447,** the Supreme Court has held that to establish conviction on the basis of circumstantial evidence, the chain of circumstances against the accused persons must be complete and coherent to sustain the conviction on the basis of the above.

66. In the case of **Sharad Birdhichand Sarda Vs. State of Maharashtra**, reported in **1984 SCC (Crl) 487**, the Apext Court has held that circumstances in the chain of circumstantial evidence should be conclusive and complete giving no room of doubt or alternative theory. Where there are two possibilities; one pointing towards the guilt of the accused and another towards his innocence, the benefit of doubt has to go to the accused.

67. In the case of **Vikramjit Singh Vs. State of Punjab (2006) 12 SCC 306** the Supreme Court has opined that where two views of the prosecution story appear to be probable, the one that is in favour of the accused should be accepted.

68. In the case of **Shivaji Sahabrao Babode and another Vs. State of Maharashtra** reported in **1973 SCC (Crl) 1033**, the Supreme Court has held that it is the primary principle of Criminal Jurisprudence that the accused 'must be' and not merely 'may be' guilty before a Court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.

69. In the case of **Dilavar Hussain and others Vs. State of Gujrat and another** reported in **1991 SCC (Cri) 163**, Supreme Court has held that the conviction and acquittal of the

accused depends upon the consistent of criminological chain leading to only conclusion of guilt of the accused. Heinousness of the crime or cruel mode of its execution is not relevant. It has opined that the acquittal or conviction depends on proof or otherwise of the criminological chain which invariably comprises of "who, when, why, where and how". Each knot of the chain is to be proved beyond the shadow of doubt to bring home the guilt and any crack or loosening in it weakens the prosecution. Each link must be so consistent that the only conclusion which must follow is that the accused is guilty.

70. In the light of the above position, it is clear that the motive of the crime has not been proved and only because of the one circumstance that one person can not carry six dead bodies from the house of the deceased persons to the railway track, other accused persons in the crime cannot be implicated. The recovery of shawl at the pointing out of the accused Ravindra Prasad @ Doctor is not a circumstance on which conviction can be sustained in absence of any other circumstance holding the other accused persons guilty of murder. In absence of motive, it is not clear as to why would the accused persons administer poison to the deceased persons. It is also not clear that how, when and where poison was administered to the deceased persons. The question as to who had committed the crime has been left to many guesses. The place of crime is also not proved. There is no forensic evidence of any article or of the left over food from the utensils or any other incriminatings material having been recovered from the house of the accused Mohan Gaur which would even indicate that poison was administered to the deceased therein. The chain of circumstances which had been collected by the prosecution is broken and do not definitely lead to the guilt of the accused persons. The links in the chain of the circumstances are not consistent that the only conclusion of the accused persons being guilty can be drawn.

71. So far as the offence under Section 201 I.P.C. is concerned, the argument of the learned counsel for the appellants is that there is no evidence on the record to prove that the accused persons with the intention of causing disappearance of the evidence of offence had thrown the dead bodies of the deceased persons on the railway track. The only argument of the prosecution side is that only one person could not carry six dead bodies, so the involvement of the other accused persons cannot be ruled out.

72. Dealing with the same, it may be noted that the settled principle of Criminal Jurisprudence is that mere suspicion, however, strong it may be, cannot take place of evidence. The mere suggestion of the prosecution that one person cannot carry six dead bodies to the railway track is not enough to implicate the other accused persons or to hold them guilty.

73. No one had seen the accused persons in or near the house of the deceased or in the company of the main accused Mohan Gaur at or near the time of the incident or thereafter. There is no other circumstance which could even create a suspicion of them being together on the fateful day / night, before the dead bodies were found on the railway track.

74. There is absolutely no evidence of any unlawful assembly of the accused persons before or after commission of the murder near the scene of the crime or even elsewhere.

75. For implicating the other accused persons (other than Mohan Gaur, the husband / father), Section 106 of the Evidence Act cannot be pressed into service. The silence of the accused persons in their statement under section 313 Cr.P.C. or non-denial of their presence in the village on the fateful day / night will not be

relevant as there was no burden on them to explain any of the circumstances put forth by the prosecution. No motive had been assigned to them at all. The accused persons other than Mohan Gaur cannot be implicated under Sections 328, 302, 201 and 118 vicariously with the aid of Section 149 I.P.C., as none of the ingredients of Section 149 I.P.C. are found to be existed in the instant case.

76. Unlawful assembly as designated under Section 141 is an assembly of five or more persons, if the common object of the persons composing the assembly is found to be as provided in clauses first to fifth. The explanation to Section 141, however, provides that an assembly which was initially not unlawful may subsequently become unlawful assembly. Section 142 provides as to who shall be a member of unlawful assembly. Section 149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of that common object of that assembly, every person who, at the time of committing that offence, was a member of the same assembly, is guilty of that offence.

77. Section 149, thus, makes every and all members of unlawful assembly vicariously liable for the act(s) done by one or any member in prosecution of common object. The section, thus, does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly. However, in order to attract Section 149 of the Indian Penal Code, it must be shown that the incriminating act was done to accomplish the common object of unlawful assembly. It must be within the knowledge of the other members as one likely to be committed in prosecution of common object. If members of the assembly knew or were aware of the likelihood of a particular offence being committed in prosecution of a common object, they would be liable for the same under Section 149 IPC.

78. Thus, for making a person(s) vicariously liable under Section 149 of the Code, it is essential for the prosecution to establish that an unlawful assembly of five or more persons was formed and the accused persons were members of that assembly. Then comes the requirement of establishing the fact that in furtherance of common object of that unlawful assembly, offence was committed by one or more persons, member(s) of that assembly. The essential ingredients to attract Section 149 IPC are:-

(i) There must be an unlawful assembly; (ii) commission of an offence by any member of an unlawful assembly; (iii) such offence must be committed in prosecution of the common object of the assembly or must be such as the members of the assembly knew to be likely to be committed.

79. These conditions must be satisfied for making an accused vicariously liable for commission of offence under Section 149 IPC. Though for applicability of Section 149, there need not be a prior meeting of mind. Even mere presence in the unlawful assembly, with an active mind to achieve the common object, makes such a person vicariously liable for the act of the unlawful assembly. Reference **Amerika Rai & others Vs. State of Bihar** reported in **2011 (4) SCC 677, Dandu Jaggaraju Vs. State of A.P.** reported in 2011 (9) SCC 3387, **Ramchandran & others Vs. State of Kerala** reported in 2011 (9) SCC 257.

80. But it was obligatory on the prosecution to bring cogent material on record to prove that the other accused persons alongwith the main accused Mohan Gaur had formed an unlawful assembly at the time of commission of the offences, i.e. while administering poison to the deceased persons and carrying the dead bodies to the railway track with the intention to cause disappearance of the evidence. No such

circumstance has been brought forth by the prosecution and there is absolutely no evidence of formation of an unlawful assembly.

81. As far as the charges against the main accused Mohan Gaur are concerned, there is no evidence as all the witnesses of fact had turned hostile. Nothing incriminatory had come out from their cross examinations. There is no evidence of last seen and motive is also not proved.

82. We may note the observations of the trial court that it may not be understandable as to why a mother would poison her children, then also there is no reason as to why a father would administer poison to all his young children both male and female (5 in number) over a dispute related to money with his wife, leaving himself alone in the world.

83. The prosecution story starts with the written report by the brother of the deceased Indu Devi (wife of the accused Mohan Gaur) wherein it was narrated that it seemed that his sister and her children were murdered in their house and, thereafter, the dead bodies were thrown on the railway line by the accused (his brother-in-law) and his friends to give the incident a colour of suicide. The other accused persons had been referred as friends of Mohan Gaur the main accused in the FIR.

84. The first informant had appeared in the witness box as PW-1. Though he had proved the first information report as 'Exhibit-Ka 1' but in the cross-examination he had stated that whatever was written in the first information report, was written by the writer/scribe on the dictation of the police and he had only put his signatures on the same on the asking of the Investigating Officer. The contents of the first information report were neither read over nor explained to him. This witness had been declared hostile and in the cross by the ADGC he had denied his statement in Section 161 Cr.P.C. Nothing incriminating could come out from the cross-examination of this witness which would be of any aid to the prosecution story. The very basis of implication of other accused persons in the alleged offence of administering poison to wife and children of the main accused Mohan Gaur and carrying their dead bodies to the railway track to cause disappearance of the evidence of offences, is shaken.

85. As noted above, no incriminating material could be collected by the first Investigating Officer (PW-11) who had first visited the house of the deceased persons. PW-11 in his cross-examination had admitted that he had started investigation on 09.02.2010, three days after the incident which came to his knowledge on 06.02.2010. The first information report was lodged on 08.02.2010 and in the meantime he was collecting all clues. All the recoveries were made by him after the investigation was handed over to him on 09.02.2010 and he had completed the investigation on the same date. Whereafter, it was transferred to another police station. He did not collect any fingerprint from the spot of the crime or from the liquor bottle which was recovered by him from the house of the deceased. The second Investigating Officer (PW-10) had started investigation on 12.02.2010 and thereafter all the accused persons were arrested from the village itself. The role of the Investigating Officers in the present scenario also becomes questionable. It seems that the entire investigation had been proceeded in one direction treating the main accused Mohan Gaur as guilty from the very inception and all other accused persons were implicated as friends/acquaintances of the main accused Mohan Gaur to sustain the conviction of Mohan Gaur as there were six deaths and dead bodies were found on the railway track. It appears that in a zeal to solve the crime, the second

Investigating Officer had proceeded in a hurried manner with preconceived mind and notion that no-one else than the husband/father (main accused Mohan Gaur) could have committed the crime.

86. The present is not a case where putting all circumstances together, the Court can reach at the conclusion that "no one else than the appellant could be the perpetrator of the crime". Another question which comes in the mind of the Court is "if not the appellants then who else could be the perpetrator of the crime?". We are not finding answer to the question either way, in negative or in affirmative. We are also afraid to give answer to the said question in absence of any cogent material before us. For mere reason that we are not finding the real culprit, we cannot draw the inference that the appellants must have committed the crime.

87. In this regard, we would like to note the decision of the Apex Court in **Shankarlal Gyarasilal Dixit vs. State Of Maharashtra** reported in 1981 (2) SCC 35, wherein the Apex Court being in the same position as we are today, observed as under:-

"32. The High Court, it must be said, has referred to the recent decisions of this Court in Mahmood v. State of U.P. [1976 (1) SCC 542] and Chandmal v. State of Rajasthan [1976 (1) SCC 621] in which the rule governing cases of circumstantial evidence is reiterated. But, while formulating its own view the High Court, with respect, fell into an error in stating the true legal position by saying that what the Court has to consider is whether the cumulative effect of the circumstances establishes the guilt of the accused beyond the "shadow of doubt". In the first place, 'shadow of doubt', even in cases which depend on direct evidence is shadow of "reasonable" doubt. Secondly, in its practical application, the test which requires the exclusion of other alternative hypothesis is far more rigorous than the test of proof beyond reasonable doubt.

33. Our judgment will raise a legitimate query: If the appellant was not present in his house at the material time, why then did so many people conspire to involve him falsely ? The answer to such questions is not always easy to give in criminal cases. Different motives operate on the minds of different persons in the making of unfounded accusations. Besides, human nature is too willing, when faced with brutal crimes, to spin stories out of strong suspicions. In the instant case. the dead body of a tender girl, raped and throttled, was found in the appellant's house and, instinctively, everyone drew the inference that the appellant must have committed the crime. No one would pause to consider why the appellant would throw the dead body in his own house, why would he continue to sleep a few feet away from it and whether his house was not easily accessible to all and sundry, as shown by the resourceful Shrinarayan Sharma. No one would even care to consider why the appellant's name was not mentioned to the police until quite late. These are questions for the Court to consider."

88. For the above discussion, the judgment and order dated 27.8.2013 passed by the learned Additional Sessions Judge, Court No. 7, Deoria in S.T. No. 219 of 2010 (State Vs. Mohan Gaur and others) whereby the appellants Ramashankar Kushwaha, Mohan Gaur, Ravindra Prasad @ Doctor, Bacchan Gaur and Pappu @ Manoj Kumar Thakur have been convicted and sentenced under sections 147, 328/149, 302/149, 201 and 118/149 I.P.C. police station Bankata District Deoria, is found to have been passed on surmises and conjectures. The same, therefore, is liable to be set aside. The appellants accused persons are acquitted of all the offences under which they are charged giving them benefit of doubt.

89. The appeal, is thus, allowed.

90. The appellants are reported to be in jail. They shall be set at liberty forthwith, unless they are required in any other criminal case.

91. The office is directed to send back the lower court record along with a certified copy of this judgment for information and necessary compliance.

92. The compliance report be furnished to this Court through the Registrar General, High Court, Allahabad.

(2021)11ILR A568
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.11.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

Jail Appeal No. 4583 of 2012

Gulab Yadav ...Appellants (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
From Jail, Sri Devendra Mohan Singh,Sri Rajrshi Guta (A.C.)

Counsel for the Respondent:
A.G.A.

(A) Criminal Law - Indian Penal Code, 1860 - Sections 302, 506 & 299 - Appeal from jail - Culpable homicide , Section 300 - murder , Section 304 - culpable homicide not amounting to murder - The Code of criminal procedure, 1973 - Section 161,313 - interested witness.

Appellant hit wife of complainant - three witnesses of fact - supported prosecution case - no contradictions in statements of eye-witnesses - single blow inflicted by appellant - on neck of deceased - fatal injury - injuries sufficient in ordinary course of nature to have caused death - no intention to cause death - appellant wrongly convicted under Section 302 IPC.

HELD: - Instant case false under the Exceptions 1 and 4 to Section 300 IPC. Appellant is guilty for commission of the offence under Section 304 (Part-I) IPC instead of offence under Section 302 IPC along with other offence punishable under Section 506 IPC.(Para - 17,18,)

Jail appeal partly allowed. (E-7)

List of Cases cited:-

1. Tuka Ram & ors. Vs St. of Mah., (2011) 4 SCC 250

2. BN Kavadakar & anr. Vs St. of Karn., 1994 Supp (1) 304

(Delivered by Hon'ble Ajai Tyagi, J.)

1. This appeal has been preferred by the appellant- Gulab Yadav against the judgment and order dated 22.08.2012, passed by Sessions Judge, Mahoba, in Session Trial No.67 of 2011 *(State vs. Gulab Yadav)* arising out of Case Crime No.200 of 2011 under Section 302, 506 IPC, Police Station-Panwadi, District- Mahoba, whereby the appellant-accused was convicted and sentenced for life imprisonment and fine of Rs.20,000/- under Section 302 IPC. He was directed to undergo further imprisonment for two years, in case of default of fine. The appellant was further convicted and sentenced for two years R.I. under Section 506 IPC. All sentences were directed to run concurrently.

2. The facts giving rise to this appeal are that First Information Report was lodged by complainant Ram Babu at Police Station-Panwadi, District- Mahoba stating that on 26.02.2011 at about 12:00 noon Gulab Yadav, resident of that village, came and started demanding Rs.200/- for labour charges from the wife of complainant Ram devi. She told that she

was going to her house for lunch and would pay rupees after that. As soon as she started walking towards her house, Gulab Yadav hit the wife of the complainant at her neck with the axe in his hand. She sustained injury due to which after some time she died. Accused fled away from the spot by intimidating the persons present at the spot.

3. On the basis of above written report, a Case Crime No.200 of 2011 was registered at Police Station- Panwadi, District- Mahoba, under Section 302 and 506 IPC. S.O. Vishnu Pal Singh took up the investigation and recorded statements of witnesses under Section 161 Cr.P.C. I.O. prepared site-plan on the pointing out of the Kumari Shilu, daughter of the complainant. He also prepared site-plan and collected plain and blood stained earth from the place of the occurrence and the dead body was sent for post mortem. During the course of investigation, the Axe used for commission of crime was recovered on the pointing out of the appellant. After completing the investigation, charge sheet was submitted against the appellant under Section 304 and 506 IPC. The case being exclusively triable by court of session was committed to the court of competent Magistrate for trial.

4. Charges were framed by learned trial court against the accused under Sections 302 and 506 IPC. Charges were read over to the accused, who denied the charges and claimed to be tried.

5. To bring home the charges, following witnesses were examined by the prosecution:

1.	Ram Babu	PW1
2.	Shilu	PW2
3.	Harendra	PW3
4.	Dr. Anurag Purwar	PW4
5.	Rampal	PW5
6.	Gangacharan	PW6
7.	Vishnupal Singh	PW7
8.	Udit Narain Singh	PW8

6. Apart from oral evidence, following documentary evidence were produced by prosecution and proved by leading the evidence:

1.	F.I.R.	Ex. Ka3
2.	Written report	Ex. Ka1
3.	Recovery-memo of blood-stained and plain-earth	Ex. Ka5
4.	Recovery-memo of blood stained Axe	Ex. Ka7
5.	P.M. Report	Ex. Ka2
6.	Report of Vidhi Vigyan Prayogshala	Ex. Ka10
7.	Report of Vidhi Vigyan Prayogshala	Ex. Ka11
8.	Panchayatnama	Ex. Ka12
9.	Charge-sheet Mool	Ex. Ka9

7. Statement of accused was recorded under Section 313 Cr.P.C., in which he said that false evidence is produced against him. Accused produced two witnesses in his defence.

8. We have heard Shri Rajrshi Gupta, learned Amicus Curiae appearing for the appellant, learned AGA for the State and perused the record.

9. Learned counsel for the appellant submitted that appellant has been falsely

implicated in this case. He is innocent. It is further submitted by learned counsel for the appellant that learned trial court has not rightly appreciated the evidence on record. The witnesses of fact produced by the prosecution are related and interested witnesses, whose testimonies cannot be relied on. No independent witnesses was produced.

10. It is next submitted by the learned counsel for the appellant that if Court reaches to the conclusion that appellant has committed the offence, then in that case also the offence does not travel beyond the scope of Section 304 IPC because as per prosecution case, a single blow of axe was inflicted by the appellant. He did not try to repeat the blows. It clearly shows that accused had no intention to kill the deceased. Hence, no case under Section 302 IPC is made out. Learned trial court has wrongly convicted the appellant for the offence under Section 302 IPC.

11. *Per contra,* learned AGA submitted that appellant hit the deceased on her neck with the deadly cutting instrument like Axe. The neck is vital and sensitive part of the human body. Hence, the learned trial court has rightly appreciated the evidence and convicted and sentenced the appellant for the offence under Section 302 IPC.

12. Perusal of record shows that in this case, the prosecution has produced three witnesses of fact, namely, PW1- Ram Babu, PW2- Kumari Shilu and PW3- Harendra. All the three witnesses supported the prosecution case and there are no such contradictions in the statements of the eye-witnesses, which could go to the root of the case but it is admitted case of the prosecution that a single blow was inflicted by the appellant on the neck of the deceased, due to which she sustained fatal injury. Post mortem report also shows that there is single injury on the neck of the deceased. No other injury was found on the person of the deceased.

13. Considering the evidence of these witnesses and also considering the medical evidence including postmortem report, there is no doubt left in our mind about the guilt of the present appellant. However, the question which falls for our consideration is whether on reappraisal of the peculiar facts and circumstances of the case, the conviction of the appellant under Section 302 IPC should be upheld or the conviction deserves to be converted under Section 304 (Part-I) or (Part-II) of the Indian Penal Code. It would be relevant to refer Section 299 of the Indian Penal Code, which reads as under:

"299.Culpable Homicide-*Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."*

14. The academic distinction between 'murder' and 'culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Sections 299 and 300 IPC. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	**Section 300**
A person commits culpable homicide if the act by which the death is caused is done.	Subject to certain exceptions, culpable homicide is murder is the act by which the death is caused is done.

INTENTION	
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
KNOWLEDGE	**KNOWLEDGE**
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

15. In the case in hand, the postmortem of deceased was conducted. Postmortem report Ex.Ka-2 is on record, which shows that following antemortem injuries were found on the body of the deceased:

(a) an incised wound of size 10 cm x 4 cm over right side of the neck. It is along with the line of right side of jaw.

There was no other injury except the above said injury.

16. On overall scrutiny of the facts and circumstances of the case coupled with the opinion of the medical officer and considering the principle laid down by the Hon'ble Apex Court in the case of ***Tuka Ram and others vs. State of Maharashtra*** [(2011) 4 SCC 250] and in the case of ***BN Kavadakar and another vs. State of Karnataka*** [1994 Supp (1) 304], we are of the considered opinion that the offence would be punishable under Section 304 (Part-I) IPC.

17. From the upshot of the aforesaid discussion, it appears that the death caused by the accused was not intended and the injuries were though sufficient in the ordinary course of nature to have caused death, the accused had no intention to cause death, therefore, the instant case false under the Exceptions 1 and 4 to Section 300 IPC.

18. In the light of the foregoing discussions, the appeal is liable to be allowed in part. Appellant is held guilty for commission of the offence under Section 304 (Part-I) IPC instead of offence under Section 302 IPC along with other offence punishable under Section 506 IPC.

19. Hence, the conviction and sentence awarded to the appellant for the offence under Section 302 IPC is converted into the offence under Section 304 (Part-I) IPC and appellant is sentenced under Section 304 (Part-I) IPC for 10 years rigorous imprisonment and fine of Rs.5,000/-, which shall be paid as compensation to the complainant-husband of the deceased. The appellant shall undergo further simple imprisonment for one year in case of default of fine. Sentence awarded under Section 506 IPC shall remain intact. All the Sentences shall run concurrently as directed by learned trial court.

20. Accordingly, the appeal is **partly allowed**, as modified above.

(2021)11ILR A572
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.11.2021

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE BRIJ RAJ SINGH, J.

Criminal Appeal No. 5293 of 2011

Mahendra Pratap Singh ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri G.P. Dikshit

Counsel for the Respondents:
A.G.A.

(A) Criminal Law - Indian Penal Code, 1860 - Sections 323/34, 324/34, 325/34, 504, 506 & 307/34 - Section 101 - appeal against acquittal - when such rights extends to causing any harm other than death - The Code of criminal procedure, 1973 - Section 313 - scope of interference in an appeal or revision against acquittal - If two views of the evidence are reasonable possible, one supporting the acquittal and other indicating conviction, the High Court should not, in such a situation, reverse the order of acquittal recorded by the trial Court - If two reasonable or possible views can be reached - one that leads to acquittal, the other to conviction - the High Courts/appellate courts must rule in favour of the accused.(Para - 21,22,23)

F.I.R. lodged in pursuance to the direction under Section 156(3) Cr.P.C. - conclusion of trial court while acquitting accused - F.I.R. not lodged promptly - after four days from the date of incident - application under Section 156 (3) Cr.P.C. filed - complainant side were aggressor - accused assaulted in self-defence - accused safeguarded under Section 101 I.P.C. - view taken by the court below is one of the possible view - Present Appeal has been filed by the complainant against acquittal.. Para - 13,20)

HELD:- Considering the circumstances, evidence and material, trial court has drawn conclusion of acquitting the respondent. The view taken by the court below is one of the possible view and it cannot be said to be perverse. Trial Court was fully justified in acquitting the respondent. Trial court judgement needs no interference. (Para - 20)

Criminal Appeal dismissed at admission stage. (E-7)

List of Cases cited:-

1. St. of Karn. Vs K. Gopalkrishna , (2005) 9 SCC 291

2. Sudershan Kumar Vs St. of Himachal , (2014) 15 SCC 666

3. Dilawar Singh Vs St. of Har., (2015) 1 SCC 737

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

1. Heard on admission.

2. The present Appeal has been filed by the complainant against the judgment and order dated 06.07.2011 passed by the Additional District and Sessions Judge, Ist Auraiya in Sessions Trial No.500 of 2000 (State Vs. Umesh and others) arising out of Case Crime No.328 A /1998, under Sections 323/34, 324/34, 325/34, 504, 506, 307/34 I.P.C., Police Station - Bidhuna, District - Auraiya.

3. Sri Mahendra Pratap Singh filed an application under Section 156 (3) Cr.P.C. on 9.10.1998 before the Chief Judicial Magistrate, Etawah with a complaint that he was coming from his field on 5.10.1998 at 5.00 p.m. Sri Umesh Singh and Shiv Mangal Singh sons of Varnam Singh armed with knife, Aniruddha Singh son of Varnam Singh armed with Lathi and Indrabhan Singh son of Varnam Singh armed with country made pistol came in front of his house. Indrabhan exhorted that he should be killed today as he is contesting many cases. Indrabhan Singh who was armed with country made pistol fired at him and he escaped. In the

meantime, Umesh Singh, Shiv Mangal Singh and Aniruddha Singh who were armed with knife and Lathi started assaulting the Mahendra Pratap Singh due to which he received serious injuries. On hearing the noise, father of applicant Raghunandan Singh, brother Satya Narayan Singh, Gyan Singh son of Mahendra Pratap Singh and others reached to the spot and saw the incident. The accused ran away from the spot by threatening the applicant to kill him. The applicant could not go to the police station, however, he had informed the Superintendent of Police through telegram on 6.10.1998. He got himself examined by the Doctor and x-ray was done at Sadar Hospital, Etawah. No action was taken against the accused, therefore, he filed the application before the Court for necessary action. The case was registered at police station Kotwali Bidhuna vide chik F.I.R. The case was investigated by the Investigating Officer who prepared the site plan and thereafter he filed the charge sheet against the accused.

4. On the basis of charge sheet filed against the accused persons they were summoned by the concerned Court under Sections 323/34, 324/34, 325/34, 504, 506, 307/34 I.P.C. Accused persons denied the charges. The trial was conducted by adducing the evidence i.e. P.W.-1 Mahendra Pratap Singh, P.W.-2 Raghunandan Singh, P.W.-3 Nahar Singh, P.W.-4 Parmanand Kaler, P.W.-5 Dr. P.C. Pandey and P.W.-6 Tarak Nath.

5. The accused were afforded opportunity under Section 313 Cr.P.C. Accused persons denied all the charges and the incident. The accused also said that the false and fabricated doctor's report has been obtained and due to enmity the accused persons have been implicated. It is further pleaded under Section 313 Cr.P.C. that due to cross case lodged in Case Crime No.328 of 1998 against the complainant he has implicated the accused. The trial court after adducing the evidence on record and affording opportunity of hearing to accused as well as prosecution side recorded the finding in the following manner:

6. P.W.-1 Mahendra Pratap Singh had submitted in his chief examination that he was coming to his house from the field on 5.10.1998 at 5.00 p.m. Sri Umesh Singh, Shiv Mangal Singh, Aniruddha and Nawab and Indrabhan Singh came in front of his house, Shiv Mangal Singh and Umesh Singh were armed with knife, Aniruddha Singh armed with Lathi, Indrabhan Singh armed with country made pistol. Indrabhan Singh exhorted and said that Mahendra Pratap Singh is contesting many cases, therefore, he should be killed and he fired upon him but he got narrow escape. Shiv Mangal Singh and Aniruddha Singh armed with knife and *Lathi* assaulted on him. Mahendra Pratap Singh got injury and who shouted loudly, therefore, his father and brother came to the spot. The accused ran away from the place by threatening to kill him. The complainant could not lodge the F.I.R. due to threat and fear. Complainant did telegram on 6.10.1998 to Superintendent of Police, Auraiya. He has further stated in his chief examination that there is no other person in the name of Mahendra Pratap Singh who residing in his village. He further stated that he got himself examined by the doctor in Sadar Hospital, Etawah on 6.10.1998 and x-ray was also conducted on 8.10.1998. Since, no action was taken by the police, therefore, he filed an application before the A.C.J.M. - IInd, Etawah to lodge the F.I.R. The Investigating Officer taken his statement. The civil litigation is going on with the accused thats why the incident took place.

7. P.W.-2 Raghunandan Singh was also examined and he stated that the said incident took place on 5.10.1998 at 5.00 p.m. in the evening. He heard the noise of his son Mahendra Pratap Singh. After hearing the noise, P.W.-2 Raghunandan Singh and Gyan Singh reached to the house of Satya Narayan and he saw that

accused, Indrabhan Singh, Shiv Mangal Singh, Umesh Singh and Aniruddha Singh were armed with certain weapons. Shiv Mangal Singh, Umesh Singh, Aniruddha Singh were armed with knife, Indrabhan Singh was armed with country made pistol and they assaulted the Mahendra Pratap Singh. Indrabhan Singh fired at Mahendra Pratap Singh, but he escaped narrowly. Umesh Singh, Shiv Mangal assaulted with knife, Aniruddha Singh assaulted with Lathi due to which Mahendra Pratap Singh received injuries. Gyan Singh, Satya Narayan Singh, Shiv Prakash Singh and the other witnesses of the village came to the spot who saw the incident and they also saved Mahendra Pratap Singh. They could not lodge the F.I.R. due to fear and threat of the accused. The medical was conducted in Etawah.

8. Umesh Singh had also filed F.I.R. (Exhibit No.197 Kha/2) in Case Crime No.328 of 1998, under Sections 323, 324, 506, 307 I.P.C., Police Station Bidhuna. In the said report, the incident took place on 5.10.1998 at 5.00 p.m. due to this reason the present case was treated in cross case.

9. The site plan was also prepared by the Investigating Officer. The Investigating Officer had not given any evidence of disputed land.

10. P.W.-5 Dr. P.C. Pandey, who conducted the medical report, was examined as Exhibit No.4 and the following injuries were found on the body of Mahendra Pratap Singh:-

(i) Incised wound 1 cm X 0.2 cm skin-deep, 07 cm from the nipple on the left side of chest, in the shape of 1.00 o'clock; margins were swollen.

(ii) Incised wound 1.5 cm X 0.2 cm skin-deep, on the right side of abdomen; 13 cm away.

(iii) Bruise of deep blue colour, 8 X 2 cm on the left pakka?

(iv) Swollen injury 6 X 5 cm on the right side of back, 8 cm below pakkhe?

(v) Blue contusion 6 X 1 cm in the mid of the outer part of the right arm.

(vi) Complaint of pain in the back and in the right wrist.

11. In the examination, Dr. P.C. Pandey stated that he has not prepared supplementary injury report Exhibit-4. All the injujries are simple in nature. The Doctor further stated that the x-ray was not placed before him, therefore, he could not tell what type of injury was received by the injured. It is relevant to mention here that no witness was produced regarding the x-ray report by the prosecution side and Dr. P.C. Pandey did not certified the x-ray report legally. The Court opined that there is no serious injury found on the basis of the medical report available on record.

12. The trial court had given the reasons for acquittal which is worth to be mentioned here. The F.I.R. was lodged in pursuance to the direction under Section 156(3) Cr.P.C. As per the said F.I.R., the application was given on 9.10.1998 and no reason for delay is mentioned. The cross case being Case Crime No.328 of 1998 was lodged prior to the present date of incident i.e. prior to 2.40 hours. The distance of place of incident from the place of police station is 8 kilo meters. Sri Raghunandan P.W.-2 has accepted in his cross examination that he had gone to lodge the report in police station after the incident and he had no idea whether the accused were in the village or had gone somewhere else. He has further stated that he had gone to the police station just after the incident. When he reached the police station, the Inspector asked him to call his son Mahendra

Pratap Singh. He has further mentioned that he had reached the police station at 7.00 to 8.00 p.m. on the date of incident. He has further mentioned that Umesh Singh has not reached the police station. When his son Mahendra Pratap Singh did not reach the police station, he came back to the house from the police station. The same witness has accepted in his oral examination that he was present in the police station till 8.00 p.m. the timing of the cross case was 7.40 p.m. i.e. the said cross case was lodged against Mahendra Pratap Singh and Raghunandan Singh. Had he been present in the police station, he would have been arrested by the police for commission of the offence in the cross case. As per his version, he was present in the police station till 8 o'clock, whereas, the cross F.I.R. was lodged at 7.40 p.m. Thus, the trial court had disbelieved the testimony of P.W.-2, Raghunandan Singh.

13. The trial court has given conclusion while acquitting the accused in the last part of the judgment mentioning that the F.I.R. was not lodged promptly and after four days from the date of incident the application under Section 156 (3) Cr.P.C. was filed. Lastly, the Court was of the opinion that the complainant side were the aggressor and the accused assaulted in self-defence. The accused are safeguarded under Section 101 I.P.C. The accused have been acquitted under Sections 323/34, 324/34, 325/34, 504, 506, 307/34 I.P.C.

14. Heard learned A.G.A. at length and perused the lower court record with the assistance of the learned counsel.

15. Raghunandan Singh, P.W.-2 has accepted in his cross-examination that he had gone to lodge the F.I.R. in the police station after the incident and he had no idea whether the accused were in the village or they had gone elsewhere. He has further stated that he had gone to the police station just after the incident and police Inspector asked him to call his son Mahendra Pratap Singh. He had further mentioned that he had reached police station between 7.00 p.m. to 8.00 p.m. on the date of incident. He mentioned that Umesh Singh accused had not reached the police station. When his son did not reach to the police station he came back to the house from the police station. The same witness has accepted in his oral examination that he was present in the police station till 8.00 p.m. The timing of lodging the cross F.I.R. was 7.40 p.m. The said F.I.R. was lodged against Mahendra Pratap Singh and Raghunandan Singh while Raghunandan Singh was already present in the police station as per his version. The testimony of Raghunandan Singh is discarded.

16. We have also perused the record of Dr. P.C. Pandey who has said that he has not prepared the supplementary report (Exhibit No.4). All the injuries are simple in nature. The doctor further stated that the x-ray was not placed before him, therefore, he could not state what type of injuries were received by the injured. It is relevant to mention here that no witness was produced. The x-ray report prepared by the prosecution side. Dr. P.C. Pandey was not certified the x-ray report. There are no serious injuries on the basis of medical report.

17. Mahendra Pratap Singh was medically examined belatedly on the next date of the incident i.e. about 4.10 p.m. In the cross case accused Umesh Singh was medically examined on the same date of the incident.

18. As per site plan, the place of incident is near to the house of Umesh Singh and the house of the complainant is not mentioned. It implies that the accused were present in their house and there is no evidence to indicate that they had reached to the place of incident.

19. The complainant stated that the incident took place at 8.00 p.m. and he had gone

to lodge the F.I.R., is in contradiction to the cross case being already lodged by the accused at 7.40 p.m. against the complainant. Thus, the presence of the complainant in the police station at 8.00 p.m. is highly doubtful.

20. Considering the circumstances, evidence and material, trial court has drawn conclusion of acquitting the respondent. The view taken by the court below is one of the possible view and it cannot be said to be perverse.

21. While considering the scope of interference in an appeal or revision against acquittal, it has been held by the Supreme Court that if two views of the evidence are reasonable possible, one supporting the acquittal and other indicating conviction, the High Court should not, in such a situation, reverse the order of acquittal recorded by the trial Court. In the matter of **State of Karnataka vs. K. Gopalkrishna** reported in **(2005) 9 SCC 291,** the Hon'ble Supreme Court, while dealing with an appeal against acquittal, observed as under:

"In such an appeal the Appellate Court does not lightly disturb the findings of fact recorded by the Court below. If on the basis of the same evidence, two views are reasonably possible, and the view favouring the accused is accepted by the Court below, that is sufficient for upholding the order of acquittal. However, if the Appellate Court comes to the conclusion that the findings of the Court below are wholly unreasonable or perverse and not based on the evnidence on record, or suffers from serious illegality including ignorance or misreading of evidence on record, the Appellate Court will be justified in setting aside such an order of acquittal."

22. In **Sudershan Kumar v. State of Himachal reported in (2014) 15 SCC 666** the Hon'ble Supreme Court observed thus;-

"31.It has been stated and restated that a cardinal principle in criminal jurisprudence that presumption of innocence of the accused is reinforced by an order of the acquittal. The appellate court, in such a case, would interfere only for very substantial and compelling reason. There is plethora of case laws on this proposition and we need not burden this judgment by referring to those decisions. Our purpose would be served by referring to one reasoned pronouncement entitled Dhanapal v. State which is the judgment where most of the earlier decisions laying down the aforesaid principle are referred to. In para 37, propositions laid down in an earlier case are taken note of as under: -

*"37. In **Chandrappa v. State of Karnataka,** this Court held: (SCC p. 432 para 42), (1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.*

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is

available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

32. Thereafter, in para 39, the Court curled out five principles and we would like to reproduce the said para hereunder:

"39. The following principles emerge from the cases above:

1. The accused is presumed to be innocent until proven guilty. The accused possessed this presumption when he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent.

2. The power of reviewing evidence is wide and the appellate court can re- appreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law, but the Appellate Court must give due weight and consideration to the decision of the trial court.

3. The appellate court should always keep in mind that the trial court had the distinct advantage of watching the demeanour of the witnesses. The trial court is in a better position to evaluate the credibility of the witnesses.

4. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.

5. If two reasonable or possible views can be reached - one that leads to acquittal, the other to conviction - the High Courts/appellate courts must rule in favour of the accused."

23. In **Dilawar Singh v. State of Haryana, (2015) 1 SCC 737**, the Supreme Court reiterated the same in paragraphs 36 and 37 as under :

"36. The court of appeal would not ordinarily interfere with the order of acquittal unless the approach is vitiated by manifest illegality. In an appeal against acquittal, this Court will not interfere with an order of acquittal merely because on the evaluation of the evidence, a different plausible view may arise and views taken by the courts below is not correct. In other words, this Court must come to the conclusion that the views taken by the learned courts below, while acquitting, cannot be the views of a reasonable person on the material on record.

***36. In** Chandrappa v. State of Karnataka, the scope of power of appellate court dealing with an appeal against acquittal has been considered and this Court held as under: (SCC p.432 para 42) "42....(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.*

(5) If two reasonable conclusions are possible on the basis of the evidence on record,

the appellate court should not disturb the finding of acquittal recorded by the trial court."

Unless there are substantial and compelling reasons, the order of acquittal is not required to be reversed in appeal. It has been so stated in State of Rajasthan v. Shera Ram."

24. Considering the above legal position and the factual aspects of the case, we are of the view that the trial Court was fully justified in acquitting the respondent.

25. Taking all the circumstances and after perusing the evidence on record, we are of the considered opinion that trial court judement needs no interference. Thus, the appeal is dismissed at the admission stage itself

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(2021)11ILR A578
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.11.2021

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SAMEER JAIN, J.

Criminal Appeal No. 7387 of 2018

Sarwari ...Appellant

Versus

State of U.P. ...Respondent

Counsel for the Appellant:
Sri Nazrul Islam Jafri, Sri Mainuddin Ahamad, Sri Mohd. Irfan, Sri Raghuraj Kishore, Smt. Archana Singh

Counsel for the Respondents:
A.G.A.

(A) Criminal Law - Indian Penal Code, 1860 - appeal against conviction under Section 302 read with 120B IPC - acquitted of the charge for offences under Sections 147, 452, 326, 149 and 376 IPC - The Code of criminal procedure, 1973 - Section 313 , 319 - Dying declaration can be the sole basis of conviction and it does not require any corroboration - It is equally true that dying declaration goes against the cardinal principle of law that 'evidence must be direct - Dying declaration must be judged and appreciated in light of the surrounding circumstances and its weight determined by reference to the principle governing the weighing of evidence.(Para - 48)

(B) Criminal law - The Code of criminal procedure, 1973 - Section 313 - a solemn duty is cast on the court in dispensation of justice to adequately consider the defence of the accused taken under Section 313 Cr.P.C. and to either accept or reject the same for reasons specified in writing - appellant come with a specific and plausible defence but the trial court did not consider it - convicted the appellant - held - conviction of appellant unsustainable.**(Para - 60,61)**

Informant lodged an FIR against appellant and four others - informant's (PW-1's) niece (deceased) residing with him for the last about one and half years after death of her parents - Co-accused developed illicit relations with deceased and exploited her - deceased asked co-accused to marry her - co-accused refused - deceased warned accused that she will inform Police - co-accused, his father, his uncles and his mother (appellant) entered the house of the informant (PW-1) - set deceased ablaze after pouring kerosene oil on her - dying declaration recorded by Naib Tehsildar - convicted the appellant and acquitted rest of the accused persons.(Para - 3,4)

HELD:-Court unable to accept reasons given by trial court in convicting appellant . Prosecution failed to prove guilt of appellant beyond reasonable doubt. Incident does not appear to have happened in the manner stated by the prosecution . Appellant entitled to benefit of doubt & acquitted of all the charges for which she was tried. Conviction & sentence set aside. (Para - 62,63)

Criminal Appeal allowed. (E-7)

List of Cases cited:-

1. St. of Maharashtra Vs. Hemant Kawadu Chauriwal & ors., (2015) 17 SCC 598

2. Bhajju @ Karan Singh Vs. St. of M.P., (2012) 4 SCC 327

3. Takhaji Hiraji Vs. Thakore Kubersing Chamansing & ors., (2001) 6 SCC 145

4. Ritesh Chakarvarti Vs. St. of M.P., (2006) 12 SCC 321

5. Reena Hazarika Vs. St. of Assam, AIR 2018 SC 5361

(Delivered by Hon'ble Sameer Jain, J.)

1. The present appeal has been preferred by the appellant against the judgment and order dated 15.11.2018/16.11.2018 passed by Additional Sessions Judge/FTC I, Deoria in Sessions Trial No. 374 of 2014 by which learned trial court convicted the appellant under Section 302 read with 120B IPC and punished her with imprisonment for life and a fine of Rs.10,000/- (Rs.Ten Thousand) with a default sentence of six months rigours imprisonment. She was, however, acquitted of the charge for offences under Sections 147, 452, 326, 149 and 376 IPC.

2. Prosecution story in nutshell is that on 1.4.2014 at about 12.10 AM, PW-1 Azhar Ali, the informant of the case, lodged an FIR against appellant Sarwari and four others under Sections 307, 326, 376, 120B, 147 and 452 IPC at Police Station Salempur, District Deoria vide Case Crime No. 478 of 2014. As per FIR informant's (PW-1's) niece Ayesha Khatoon (the deceased) was residing with him for the last about one and half years after the death of her parents. Co-accused Guddan S/o Islam developed illicit relations with Ayesha Khatoon and exploited her. When Ayesha Khatoon asked co-accused Guddan to marry her, Guddan refused; upon which, Ayesha warned Guddan that if he will not perform marriage with her then she will inform the Police. In that background, it is alleged, on 27.3.2014, at about 2:00 PM (14 hours), co-accused Guddan, his father Islam; his uncles Abdul; Jabbar and Riyaz; and his mother Sarwari (appellant) entered the house of the informant (PW-1) and set the deceased ablaze after pouring kerosene oil on her. Immediately after the incident Ayesha Khatoon (the deceased) was rushed to Primary Health Centre, Salempur where Doctor referred her to the District Hospital, Deoria where she was fighting for her life.

3. As per prosecution, the statement of injured Ayesha Khattoon was recorded by Naib Tehsildar on 1.4.2014 (Ext.Ka-7). Injured Ayesha Khatoon succumbed to her burn injuries on 3.4.2014 at about 3.30 AM. On the information of her death sent by the Hospital, inquest proceeding was conducted on 3.4.2014. Thereafter, on 3.4.2014 her post mortem was conducted. As per post mortem report (Ext.Ka.8), Ayesha Khattoon died due to septicaemic shock as a result of ante mortem burn injuries.

4. A perusal of the post mortem report (Ext.Ka.8) shows that the deceased Ayesha Khatoon sustained superficial to deep burn all over the body except lower part of leg and sole (around 92%). After investigation, charge sheet was submitted against the appellant and four others under Sections 147, 307, 326, 302, 376, 452 and 120B IPC (Ext. Ka-16).

5. After submission of charge sheet case was committed to the court of session. On 12.1.2015 charges were framed against appellant and four other co-accused persons under Sections 147, 452, 326/149, 376 and 302 IPC. Appellant and other co-accused refused to plead guilty and claimed trial.

6. During trial, prosecution examined Azhar Ali, informant (PW-1); Shabana Khatoon (PW-2); Abdul Aziz (PW-3); Ali Hasan (PW-4);

Mustaq Ahmad (PW-5); Vinod Singh (PW-6); Zarina Khatoon (PW-7); Zainul Abdeen (PW-8); Dr. Alpana Rani Gupta (PW9); Constable Nikita Singh (PW-10); Hadish Ahmad (PW-11); Mithlesh Kumar Tripathi, Naib Tehsildar (PW-12); SHO (Retd.) Ram Autar Yadav (PW-14); SI (Retd.) Uma Shanker Mishra (PW-15); Meraj Alam alias Meraj Rai (PW-16); Vijendra Bahadur Singh (PW-17) (Retired Inspector); and Dr. Surendra Ram (PW-18). Out of total 18 prosecution witnesses, five witnesses are witnesses of fact, namely, Azhar Ali (PW-1)(informant); Shabana Khatoon (PW-2)(wife of PW-1); Zarina Khatoon (PW-7) (sister of deceased); Hadish Ahmad (PW-7) (uncle of deceased) and Meraj Ahmad @ Meraj Rai (PW-16)(brother-in-law) (Bahnoi) of deceased Ayesha Khatoon. Rest of them are formal witnesses.

7. After recording the statement of prosecution witnesses, statement of accused persons including appellant Sarwari was recorded under Section 313 Cr.P.C. by the trial court.

8. After perusing the entire evidence on record, learned trial court convicted the appellant under Section 302 IPC read with 120B IPC. Rest of the accused persons were acquitted of the charges. One co-accused Gudiya (not charge-sheeted) was summoned under Section 319 Cr.P.C and her trial was separated on 9.10.2018. Her trial is still pending.

9. We have heard Smt. Archana Singh, learned counsel for the appellant and Sri Gaurav Pratap Singh, learned Brief Holder for the State.

10. Learned counsel for the appellant submitted that during investigation all the witnesses of fact including the informant (PW-1) have turned hostile and they did not support the prosecution case. She further contended that all the prosecution witnesses clearly stated that deceased Ayesha Khatoon desired immediate marriage with co-accused Guddan i.e. son of the appellant (Sarwari), but due to weak economic condition co-accused Guddan and his family members including the appellant wanted that the marriage be performed after one year and only due to this reason she committed suicide by setting herself ablaze after pouring kerosene oil.

11. Learned counsel for the appellant further contended that PW-1 Azhar Ali clearly stated in his statement that he did not himself write the FIR. The FIR was typed by some villagers and he had put his thumb impression on it. PW-1 and other witnesses including PW-2 Shabana Khatoon wife of PW-1 specifically denied their statement recorded under Section 161 Cr.P.C. during investigation.

12. Learned counsel for the appellant also argued that the dying declaration (Ext.Ka-7) recorded by Naib Tehsildar also does not inspire confidence as it is contrary to the surrounding circumstances as well as contrary to the statement of prosecution witnesses. She further contended that there is no endorsement of Doctor that she was fit to give dying declaration and further before recording her statement, PW-12, Mithlesh Kumar Tripathi, Naib Tehsildar also failed to record his satisfaction as to whether the deceased Ayeshya Khatoon was in a fit state of mind to give her statement or not.

13. Learned counsel for the appellant (Sarwari) submitted that the conviction of the appellant in the present case is solely based on the dying declaration of deceased Ayesha Khatoon and as dying declaration recorded by Naib Tehsildar (PW-12) does not inspire confidence, therefore, conviction of appellant Sarwari cannot be sustained and the impugned order of conviction is liable to be set-aside.

14. Per contra, Sri Gaurav Pratap Singh, learned Brief Holder for the State, contended

that prosecution case cannot be discarded merely on the ground that the prosecution witnesses turned hostile and did not support the prosecution version during trial. As the FIR clearly made allegation against the appellant and all the prosecution witnesses of fact including PW-1 Azhar Ali; PW-2 Shabana Kahtoon; PW-7 Zarina Khatoon (sister of the deceased); PW-11 Hadish Ahmad and PW-16 Meraj Alam @ Meraj Rai clearly stated that deceased Ayesha Khatoon loved Guddan, son of the appellant, the twist in their testimony, under pressure, would not defeat the dying declaration.

15. Learned counsel for the State further pointed out that the post mortem report clearly shows that the deceased died due to burn injuries and the dying declaration (Ext. Ka.-7) recorded by Naib Tehsildar (PW-12) clearly and beyond reasonable doubt proved that the appellant Sarwari along with co-accused set the deceased Ayesha Khatoon on fire, which is consistent with the statements recorded under Section 161 Cr.P.C. during investigation by the Investigating Officer, therefore, the appellant Sarwari has been justifiably convicted and the present appeal filed by her is liable to be dismissed.

16. Having noticed the rival submissions and having perused the entire record of the case carefully, it would be appropriate to notice briefly the deposition of prosecution witnesses.

17. PW-1 Azhar (informant) in his statement stated that co-accused Guddan is his neighbour. Appellant and other co-accused persons named in the FIR did not set the deceased (Ayesha Khatoon) on fire but the deceased (Ayesha Khatoon) committed suicide by pouring kerosene oil on herself and setting herself on fire due to extreme frustration because the accused persons wanted to defer her marriage with Guddan by one year; whereas, the deceased (Ayesha Khatoon) wanted immediate marriage. Prosecution declared this witness hostile. In his cross-examination, PW-1 denied the version of the FIR and stated that the FIR was typed by some villagers and he put his signature on the typed paper on the instructions of "Daroga Ji". He also denied his statement recorded by the Investigating Officer during investigation. In the cross-examination, PW-1 further stated that Ayesha Khatoon (the deceased) very often threatened that if her marriage was not performed with Guddan, she will commit suicide by burning herself and if she remains alive then she will implicate Guddan; appellant and other family members in such a manner that they will remain in Jail throughout their life. He further stated that at the time of incident the appellant Sarwari and Gudia (the sister of co-accused Guddan) were not present at their house and they had gone to their relatives home. In his statement PW-1 stated that at the time of incident he was not present at the place of incident.

18. PW-2 Shabana Khatoon is the wife of informant (PW-1 Azhar Ali) and is the maternal aunt of deceased (Ayesha Khatoon). She also denied the version of FIR and her statement recorded under Section 161 Cr.P.C. and stated that the appellant and other co-accused persons neither entered her house nor they ablazed Ayesha Khatoon by pouring kerosene oil. This witness also reiterated the fact that deceased (Ayesha Khatoon) herself poured kerosene oil on her and ablazed herself due to frustration that the appellant and other co-accused persons wanted to defer her marriage with co-accused Guddan by one year; whereas, she wanted immediate marriage. This witness was also declared hostile by prosecution.

19. In her cross-examination, PW-2 stated that deceased Ayesha Khatoon was a very obstinate girl; she loved co-accused Guddan and wanted immediate marriage with him but appellant and other family members due to weak economic condition did not want to perform

marriage immediately. They wanted the marriage to be solemnized after one year.

20. PW-2 in her cross-examination also stated that deceased Ayesha Khatoon often use to tell that if her marriage is not immediately performed with Guddan then she will commit suicide by burning herself and if she remains alive then she will implicate the entire family of Guddan including the appellant. PW-2, Shabana Khatoon further stated that deceased Ayesha Khatoon bore a grudge mainly against appellant and Gudiya (sister of co-accused Guddan) and addressed them as "Nagin". According to her, appellant and Gudiya were the main hurdle in her marriage with Guddan. She further stated that at the time of incident the appellant and Gudiya were not present at their house as they had gone to the house of their relatives. PW-2 stated that she was not present in the house at the time of incident. The other family members also were out of their house.

21. Witnesses Abdul Aziz and Ali Hasan have been examined as PW-3 and PW-4 respectively. Both these witnesses are witnesses of recovery. Prosecution produced them to prove the recovery of burnt clothes of the deceased, which were allegedly recovered from the spot. Both PW-3 and PW-4 stated before the trial court that no recovery of any clothes were made in their presence, prosecution declared both of them hostile.

22. PW-5 Mustaq Ahmad, PW-6 Vinod Singh and PW-8 Zainul Abdeen are witnesses of inquest report (Ext.Ka.3).

23. PW-7, Zarina Khatoon, elder sister of the deceased (Ayesha Khatoon), although she was not at the spot at the time of incident but stated that her sister (deceased Ayesha Khatoon) wanted immediate marriage with co-accused Guddan, whereas, the appellant and her family members were not ready for immediate marriage, therefore, her sister Ayesha Khatoon committed suicide. This witness in her cross-examination also stated the same fact that her sister deceased (Ayesha Khatoon) used to state that if her marriage would not be performed immediately with co-accused Guddan then she will commit suicide by burning herself and if she remains alive then she will implicate the entire family of co-accused Guddan. This witness PW-7 also stated the same version as given by PW-2 that her sister deceased Ayesha Khatoon was very annoyed with appellant and Gudiya(sister of co-accused Guddan). This witness also denied her statement recorded under Section 161 Cr.P.C. during investigation.

24. PW-9 is Dr. Alpana Rani Gupta. She did internal examination of injured Ayesha Khatoon (since deceased) on 1.4.2014 and found her hymen old torn.

25. She proved the medical report dated 1.4.2014 of Ayesha Khatoon as Ext.Ka-4.

26. Constable Nikita Singh has been examined as PW-10. In her presence, Ayesha Khatoon was medically examined by Dr. Alpana Rani Gupta (PW-9) and she also prepared chick FIR.

27. PW-11, Hadish Ahmad is the uncle of the deceased. He also repeated the same version as given by PW-1, PW-2 and PW-7 in respect of manner and reason of the incident. Although, this witness is one of the witnesses of inquest too, but in his statement he stated that at the time he had put his signature on the inquest report (Panchayatnama) of the deceased Ayesha Khatoon, the police did not inform him that the appellant and co-accused persons were involved in burning the deceased after pouring kerosene on her. This witness was also declared hostile by the prosecution. In his cross-examination, this witness supported the version of PW-1, PW-2, PW-7 and stated that deceased (Ayesha

Khatoon) committed suicide only on account of frustration because of deferment of her marriage with co-accused Guddan; and that the appellant and her family members were not involved in her death.

28. PW-12 Mithlesh Kumar Tripathi, Naib Tehsildhar, who recorded dying declaration (Ext.Ka.7) of deceased Ayesha Khatoon on 1.4.2014. According to this witness on 1.4.2014 at about 4.20 AM he started recording dying declaration of the victim Ayesha Khatoon after the certificate of the Doctor that victim Ayesha Khatoon is conscious. PW-12 stated that dying declaration was concluded on 1.4.2014 at about 4:30 AM and after recording the statement, again, the Doctor endorsed that Ayesha Khatoon was fully conscious. He proved dying declaration dated 1.4.2014 as Ext. Ka-7. In his cross-examination, this witness stated that he cannot tell about the mental condition of victim Ayesha Khatoon and only the Doctor could tell about her mental condition. One important point in respect of the statement of PW-12, Mithlesh Kumar Tripathi, Naib Tehsildar is that in his statement he did not state about the contents of the dying declaration. He only stated that on 1.4.2014 at about 4.20 AM he started recording dying declaration of victim Ayesha Khatoon, which was completed at about 4.30 AM.

29. PW-13 is Dr. Suresh Kumar, who conducted the post mortem of deceased Ayesha Khatoon on 3.4.2014. At the time of post mortem, PW-13 Dr. Suresh Kumar found following ante mortem injuries:

"External injuries: (1) Superficial to deep burn all over the body except lower part of legs and sole (around 92%) and singing of hair present"

30. According to Dr. Suresh Kumar (PW-13) wounds of Ayesha Khatoon were filled with pus and she died due to septicaemic shock due to ante mortem burning. He proved the post mortem report as Ext.Ka-8.

31. PW-14 is SHO Ram Autar Yadav, second Investigating Officer of the case. He stated that on 1.4.2014 he was posted at Kotwali Salempur and after the transfer of earlier Investigating Officer, SHO Vijendra Bahadur Singh, he started investigation of the case. According to PW-14, he recorded the statement of Meraj Alam alias Meraj Rai (PW-16) on 23.6.2014 under Section 161 Cr.P.C. and after investigation he submitted charge sheet against appellant Sarwari, co-accused Guddan, Islam, Abdul Jabbar and Riyaz under Sections 147, 307, 326, 302, 376, 452 and 120-B IPC. He proved the charge sheet as Ext. Ka-16. In his cross-examination this witness stated except the accused persons nominated in the FIR, he did not find evidence against any other accused.

32. Perusal of the statement of this witness PW-14 shows he did not speak anything in respect of dying declaration (Ext.Ka.7) dated 1.4.2014 of deceased Ayesha Khatoon. It appears that during investigation and at the time of submission of charge sheet, he was not aware about the dying declaration (Ext.Ka.7) of deceased Ayesha Khatoon and, therefore, he did not submit charge sheet against co-accused Gudiya, who was nominated by deceased Ayesha Khatoon in her dying declaration dated 1.4.2014 (Ext.Ka.7) along with the appellant.

33. PW-15 is SI Uma Shanker Mishra (retired). This witness stated that on 3.4.2014 he was posted at Chowki of Police Station Sadar, Deoria and he received the information regarding death of deceased Ayesha Khatoon from District Hospital Deoria. On information he prepared inquest report and sent the body of deceased Ayesha Khatoon for post mortem. He proved the inquest report dated 3.4.2014 as Ext.Ka.3. In his cross-examination, he stated that at the time of inquest proceeding, no case

was registered at Police Station Kotwali Deoria in respect of death of deceased Ayesha Khatoon. This related to Police Station Salempur.

34. PW-16 Meraj Alam @ Meraj Rai is the brother-in-law (Bahnoi) of the deceased (Ayesha Khatoon) and husband of PW-7 (Zarina Khatoon). This witness was admittedly not present at the spot. He is resident of District Gopalganj (Bihar). In his examination-in-chief he stated that on 27.3.2014 Azhar Ali (PW-1) informed him on phone that his neighbour i.e. appellant and her family members ablazed Ayesha Khatoon and that she is being taken to Hospital. On this information he arrived at Deoria District Hospital in the night at about 10:00 PM along with his wife Zarina Khatoon (PW-7). This witness stated that deceased Ayesha Khatoon informed him that with regard to the incient she has already narrated the entire facts to the Investigating Officer. In his cross-examination, this witness did not support his previous statement given in the examination-in-chief and stated that deceased (Ayesha Khatoon) in the Hospital told him that she committed suicide because her marriage was not being performed immediately with co-accused Guddan. In his cross-examination this witness further stated that deceased (Ayesha Khatoon) did not inform him that appellant and accused persons ablazed her by pouring kerosene oil. PW-16 also stated that when he met Ayesha Khatoon, one day before her death she was regretting that she gave her statement against the appellant and co-accused Gudiya in anger.

35. PW-17 is Vijendra Bahadur Singh (retired Inspector). He is first Investigating Officer of the case. In his presence, case was registered on 1.4.2014. He recorded the statement of Constable Nikita Singh, who prepared chick FIR, informant Azhar Ali (PW-1) and injured victim Ayesha Khatoon. This witness stated that after recording the statement of informant and injured victim, he sent a report to Chief Medical Officer and Naib Tehsildar,Sadar, Mithlesh Kumar Tripathi for recording dying declaration of victim Ayesha Khatoon. PW.17 the first Investigating Officer stated that deceased Ayesha Khatoon informed him that co-accused Guddan, Islam, Abdul Jabbar, Riyaz and mother of Guddan, namely, Sarwari (appellant) wanted to kill her by pouring kerosene oil and had put her on fire.

36. PW-17 in his statement did not state at which time he recorded the statement of injured victim Ayesha Khatoon on 1.4.2014.

37. We notice an important feature in the statement of PW-17, i.e. first Investigating Officer Vijendra Kumar Singh, which is that he did not prove the statement of Ayesha Khatoon, alleged to have been recorded by him during investigation under Section 161 Cr.P.C. on 1.4.2014. Neither any exhibit was put on the statement of Ayesha Khatoon recorded under Section 161 Cr.P.C. nor PW-17 stated that before recording the statement of deceased Ayesha Khatoon, he obtained a certificate of fitness from Doctor.

38. During investigation this witness made arrest of appellant and other co-accused persons and also prepared site plan and did spot inspection. He also recovered burnt clothes of deceased Ayesha Khatoon along with one canister of kerosene oil in the presence of Ali Hasan (PW-4) and Abdul Aziz (PW-3). Although both these witnesses (PW-3 and PW-4) denied the alleged recovery of clothes and canister of kerosene oil in their presence. PW-17, during investigation recorded the statement of PW-2 Shabana Khatoon; PW-3 Abdul Aziz; PW-4 Ali Hasan; PW-6 Vinod Singh; PW-7 Zarina Khatoon; and PW-8 Zainul Abdeen. In his cross-examination, PW-17 stated that during investigation he did not record the statement of PW-12 Mithlesh Kumar Tripathi, who recorded the dying declaration, PW-13 Dr. Suresh Kumar

and PW-16 Meraj Alam alias Meraj Rai. He further stated in his cross-examination that he did not peruse the dying declaration (Ext.Ka.7) of deceased Ayesha Khatoon, which was recorded by Naib Tehsildar Mithlesh Kumar Tripathi (PW-12). He further stated that during investigation he did not record the statement of the Doctor who provided the certificate before recording the dying declaration.

39. The last witness of the prosecution is PW-18, Dr.Surendra Ram, who was present on 1.4.2014 as Emergency Medical Officer in District Hospital, Deoria and in his presence the dying declaration (Ext. Ka.7) of deceased Ayesha Khatoon was recorded on 1.4.2014. This witness stated that before the dying declaration, he endorsed that the patient is conscious and such endorsement was made again, after completion of dying declaration. He proved his signature on the documents Ext.Ka-20 and Ext. Ka-21. In his cross-examination, PW-18 stated that he had only endorsed on the dying declaration that the patient was conscious and did not make any endorsement in the dying declaration in respect of her orientation.

40. After recording the statement of prosecution witnesses, trial court recorded the statement of appellant and co-accused persons under Section 313 Cr.P.C.

41. Appellant Sarwari in her statement recorded under Section 313 Cr.P.C. denied all the allegations and in defence she specifically stated that she is innocent. She stated that the deceased Ayesha Khatoon loved her son Guddan (co-accused) and wanted an immediate marriage but due to weak economic condition she told her to keep patience for one to two years and as soon as their condition would improve, her marriage will be performed with Guddan but the deceased Ayesha Khatoon used to threatened if marriage is not immediately solemnized, then she will commit suicide and entire family will be in Jail. Appellant in her answer to question no.22, made a statement, under Section 313 Cr.P.C., that the deceased used to say that in her marriage, the appellant is the main hurdle. She further stated that she never burnt her.

Trial court findings:

42. Learned trial court found that the dying declaration (Ext.Ka.7)recorded by Naib Tehsildar, Mithlesh Kumar Tripathi was cogent and reliable piece of evidence and on its basis, convicted the appellant and acquitted rest of the accused persons, namely, Guddan, Islam, Abdul Jabbar and Riyaz.

Analysis:

43. In the present case all the five witnesses of facts, namely, Azhar Ali, informant (PW.1); his wife Shabana Khatoon(PW.2); Zarina Khatoon (PW7); Hadish Ahmad (PW-11); Meraj Alam alias Meraj Rai (PW-16) have turned hostile. They did not support the prosecution version. PW.1 Azhar Ali even denied the version of FIR.

44. The alleged dying declaration recorded by the Investigating Officer (PW-17) Vijendra Bahadur Singh does not inspire confidence as it was neither proved by him from the case diary nor he tried to procure the certificate of Doctor in respect of fitness of the deceased (Ayesha Khatoon). Further, he did not mention the time of recording such statement of deceased (Ayesha Khatoon).

45. Therefore, the only evidence that remains in the present case is the dying declaration (Ext. Ka.7) recorded by Naib Tehsildar (PW-12).

46. We have examined the admissibility and reliability of the dying declaration (Ext. Ka.7).

47. It is settled legal position that a dying declaration can become the sole basis of

conviction if it is reliable and the deceased at the time of giving statement is in a fit state of mind. If it is reliable and cogent, then it may be relied even without corroboration. But it is also equally true that as its giver is not present for cross-examination, it must be judged, appreciated and weighed in the light of surrounding and attending circumstances and its weight determined by reference to the principle governing the weighing of evidence.

48. The Apex Court in the case of **State of Maharashtra Vs. Hemant Kawadu Chauriwal and others,** reported in **(2015) 17 SCC 598**, in paragraph-8, observed as under:

"8. In our considered opinion, two main arguments have been advanced before this Court and we shall now examine each and every contention in light of the arguments adduced before us. It is a settled law that dying declaration can be the sole basis of conviction and it does not require any corroboration. But it is equally true that dying declaration goes against the cardinal principle of law that 'evidence must be direct'. Thus, dying declaration must be judged and appreciated in light of the surrounding circumstances and its weight determined by reference to the principle governing the weighing of evidence.

49. Similarly the Apex Court in the case of Bhajju alias Karan Singh Vs. State of Madhya Pradesh, reported in (2012) 4 SCC 327, in paragraph-12, observed as under:

"12. The law is well-settled that a dying declaration is admissible in evidence and the admissibility is founded on the principle of necessity. A dying declaration, if found reliable, can form the basis of a conviction. A Court of facts is not excluded from acting upon an uncorroborated dying declaration for finding conviction. The dying declaration, as a piece of evidence, stands on the same footing as any other piece of evidence. It has to be judged and appreciated in light of the surrounding circumstances and its weight determined by reference to the principle governing the weighing of evidence. If in a given case a particular dying declaration suffers from any infirmity, either of its own or as disclosed by the other evidence adduced in the case or the circumstances coming to its notice, the Court may, as a rule of prudence, look for corroboration and if the infirmities are such as would render a dying declaration so infirm that it pricks the conscience of the Court, the same may be refused to be accepted as forming basis of the conviction."

50. From the perusal of above noted judgments of the Hon'ble Apex Court, it is very much apparent that the dying declaration has to be judged and appreciated in the light of the surrounding circumstances and its weight determined by reference to the principle governing the weighing of evidence.

51. In the present case, the surrounding circumstances, as narrated by the witnesses of facts, demonstrated that the deceased (Ayesha Khatoon) was an obstinate girl and she herself committed suicide by pouring kerosene oil upon her, as she wanted immediate marriage with the son of the appellant, namely, Guddan, whereas, the accused persons were not ready for immediate marriage as their economic condition was weak and they wanted that the marriage may be performed after one year. All the witnesses clearly stated that the deceased (Ayesha Khatoon) bore a grudge against the appellant Sarwari and Gudiya (sister of co-accused Guddan), as according to her, both were the main hurdle in her immediate marriage with co-accused Guddan.

52. PW-16 Meraj Alam @ Meraj Rai specifically stated in his cross-examination that the deceased Ayesha Khatoon informed him that

she, in deep anger, implicated the appellant and other co-accused Gudiya. Thus, the surrounding circumstances of the present case do not support the dying declaration recorded on 1.4.2014 by Naib Tehsildar, Mithlesh Kumar Tripathi (PW-12) and, therefore, without corroboration, it is difficult to base a conviction solely on this dying declaration. Moreso, when all the prosecution witnesses of fact turned hostile and did not support the dying declaration and also disclosed the reason why the deceased had implicated the appellant and co-accused Gudiya in her dying declaration. As, in the present case, except the dying declaration (Ext.Ka.7) there is no reliable and cogent evidence on record, it is unsafe to rely on such uncorroborated dying declaration.

53. Further, during entire investigation none of the Investigating Officers noticed the dying declaration(Ext.Ka.7), dated 1.4.2014, recorded by PW-12, Mithlesh Kumar Tripathi, Naib Tehsildar. Further, during investigation, the statement of Naib Tehsildar (PW-12) and Surendra Ram (PW-18), who endorsed the consciousness of Ayesha Khatoon at the time of recording the dying declaration (Ext.Ka.7), was not recorded.

54. ` It appears that during entire investigation both the Investigating Officers were not even aware about the dying declaration (Ext.Ka.7). This fact casts a serious doubt on the authenticity and reliability of the dying declaration (Ext.Ka-7) recorded by Naib Tehsildar (PW-12). Therefore, in our considered view, dying declaration (Ext.Ka.7), recorded by Naib Tehsildar (PW-12), is not such on which alone, conviction could be recorded.

55. Another important feature of the present case is that prosecution failed to examine Shaukat Ali, maternal grandfather (Nana) of deceased (Ayasha Khatoon), who admitted her in the Hospital. Even during investigation, the Investigating Officer did not record his statement. In our view, Shaukat Ali was a material witness of fact and his non-examination deprives the court of having the best evidence to have a glimpse at the genesis of the incident.

56. In the case of **Takhaji Hiraji Vs. Thakore Kubersing Chamansing and others,** reported in **(2001) 6 SCC 145** the Supreme Court in para-19 observed as follows:

"It is true that if a material witness, who would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is a gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness who though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the Court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case."

57. In **Ritesh Chakarvarti Vs. State of M.P.** reported in **(2006) 12 SCC 32**1 the Supreme Court after examining illustration (g) of Section 114 of the Indian Evidence Act held that an adverse inference could be drawn for non-examination of material witnesses. As, in our opinion, Shaukat Ali, maternal grandfather (nana) of deceased Ayesha Khatoon was a material witness, who not examined, an adverse inference can be drawn against the prosecution and in the absence of his evidence uncorroborated dying declaration(Ext.Ka.7) is not so much worthy as could form the basis of conviction even in absence of any other corroborative evidence.

58. At this stage, we may notice, the answer of the appellant to question no. 23 recorded under Section 313 Cr.P.C. Question No. 23 and its answer are as follows:

"प्रश्न नं०23- क्या आपको और कुछ कहना है ?

उत्तरः- मैं निर्दोष हूँ आयशा खातून गुड्डन से प्रेम करती थी घटना के समय तत्काल उससे शादी करने की जिद पर अडी थी मैं उसको समझाया कि साल दो साल सबर करो आर्थिक स्थिति ठीक होते ही गुड्डुन से तुम्हारी शादी करा दी जायेगी मगर आयशा कहती थी कि तत्काल शादी नही हुई तो वह आग लगा कर आत्म हत्या कर लेगी या कोई ठोस कदम उठा लेगी जिससे परिवार के लोग जेल काटेंगें और कहती थी कि उसकी शादी तत्काल न होने में सबसे बड़ी बाधा मैं हूँ इस नाते वह मुझसे चीड़ी रहती थी मैं उसे न तो जलाया न ही गलत व्यवहार किया अगर उसने कोई ब्यान दिया होगा तो जिद व प्रतिशोध की भावना से झूठा दिया होगा।"

59. The answer of question no.23 clearly shows that the appellant has come with a clear and plausible explanation of her innocence which fits in with the scheme of events brought out in the prosecution evidence and also explains the reason why she was falsely implicated. Notably, Ayesha Khatoon loved Guddan, the son of appellant, and she wanted immediate marriage with Guddan and when the appellant tried to explain it to the deceased that their economic condition is not good and advised her to maintain patience for a year or two, the deceased got infuriated and used to consider the appellant as the main culprit for the delay in her marriage. This specific explanation offered by the appellant finds support from the statement of all witnesses of fact. The trial court while convicting the appellant completely failed to take note of the explanation offered by the appellant in her statement under Section 313 Cr.P.C. which was probable in the facts of the present case.

60. The Supreme Court in the case of **Reena Hazarika Vs. State of Assam,** reported in **AIR 2018 SC 5361,** in paragraph-16 of the judgment, observed as follows:

"16. Section 313, Cr.P.C. cannot be seen simply as a part of audi alteram partem. It confers a valuable right upon an accused to establish his innocence and can well be considered beyond a statutory right as a constitutional right to a fair trial under Article 21 of the Constitution, even if it is not to be considered as a piece of substantive evidence, not being on oath under Section 313(2), Cr.P.C. The importance of this right has been considered time and again by this court, but it yet remains to be applied in practice as we shall see presently in the discussion to follow. **If the accused takes a defence after the prosecution evidence is closed, under Section 313(1)(b) Cr.P.C. the Court is duty bound under Section 313(4) Cr.P.C. to consider the same. The mere use of the word ''may' cannot be held to confer a discretionary power on the court to consider or not to consider such defence, since it constitutes a valuable right of an accused for access to justice, and the likelihood of the prejudice that may be caused thereby. Whether the defence is acceptable or not and whether it is compatible or incompatible with the evidence available is an entirely different matter. If there has been no consideration at all of the defence taken under Section 313 Cr.P.C., in the given facts of a case, the conviction may well stand vitiated. To our mind, a solemn duty is cast on the court in dispensation of justice to adequately consider the defence of the accused taken under Section 313 Cr.P.C. and to either accept or reject the same for reasons specified in writing."**

61. In the present case, as the appellant has come with a specific and plausible defence but the trial court did not consider it and without considering it convicted the appellant, in our

considered opinion, the conviction of the appellant from this angle too, is unsustainable.

62. In view of the discussion made above, we are unable to accept the reasons given by the trial court in convicting the appellant in the present case. On the contrary, we are of the considered view that the prosecution has failed to prove the guilt of appellant (Sarwari) beyond reasonable doubt. The incident does not appear to have happened in the manner stated by the prosecution and the appellant is entitled to the benefit of doubt. Consequently, the appellant is entitled to be acquitted of all the charges for which she was tried.

63. As a result, the appeal is allowed and the conviction order is hereby set-aside. The judgement and order of conviction as well as sentence recorded by the trial court is set aside. The appellant is acquitted of all the charges for which she has been tried. The appellant (Sarwari) is said to be in Jail, she shall be set at liberty forthwith, if not wanted in any other criminal case. The appellant (Sarwari) will fulfill the requirement of Section 437-A Cr.P.C. to the satisfaction of the trial court at the earliest.

64. Let a copy of this order/judgement and the original record of the lower court be transmitted to the trial court concerned forthwith for necessary information and compliance. The office is further directed to enter the judgement in compliance register maintained for the purpose of the Court.

(2021)11ILR A589
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.10.2021

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.

Writ C No. 14888 of 2017

C/M, Sukhdeo Singh Kanya Laghu Madhyamik Vidyalaya Jamuee, Deoria & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
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Counsel for the Respondents:
C.S.C., Sri Shyam Krishna Gupta

A. Civil Law – Girls High School – Claim for Grant-in-aid – Not giving place in the list of 200 institutions, though it came at Serial no. 197 after ousting of four enlisted institution – Malicious exercise – Legality challenged – Held, the petitioner-institution was entitled to be included in the list of 200 institutions which was published on 2.12.2006 – It was also entitled for getting the grant-in-aid on the date 2.12.2006 – Maliciously it had been deprived of grant-in-aid since then. (Para 5)

Writ petition allowed. (E-1)

Cases relied on :-

1. Writ C No. 51176 of 2007; C/M Adarsh Balika Laghu Madhyamik Vidyalaya & anr. Vs St. of U.P. & ors. decided on 4.9.2014

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

1. When a Government Order was issued on 7.9.2006 to include 200 junior girls high schools in the list of grant-in-aid, the petitioner-institution which was granted permanent recognition on 23.4.1999 considering itself to be an eligible institution, applied for the grant-in-aid. Three committees were formed; one at the District Level; second at the State Level and thereafter at the Directorate Level. On 28.11.2006 the Directorate Level Committee upon getting all the names of the institutions which were desirous of getting grant-in-aid, prepared a list of 204 institutions. When the petitioner-institution was, however, not granted the aid, the then Manager Smt. Nand Kumari

Tiwari on 9.12.2006 represented to the Secretary, Basic Education that the petitioner-institution be also included in the list of institutions which were to be granted aid. When no heed was paid to the application of the petitioner-institution, a writ petition being Writ Petition No.51152 of 2007 (Committee of Management, Sukhdeo Singh Kanya Laghu Madhyamik Vidyalaya & Anr. vs. State of U.P. & Ors.) was filed. This writ petition was disposed of on 28.7.2009 with a direction to the Secretary, Basic Education to decide the representation of the petitioner by a reasoned and speaking order within a period of three months from the date of presentation of a certified copy of the order dated 28.7.2009. The Manager of the petitioner-institution represented along with the judgment of the High Court dated 28.7.2009. On 23.4.2010, the Secretary, Basic Education upon considering the representation of the petitioner held that since the petitioner-institution stood at Serial No.201 and only 200 girls institutions were to be granted the aid, the petitioner-institution could not be granted the aid. Upon getting knowledge of the fact that certain institutions which were contained in the list of 200 institutions had been squeezed out on account of their production of forged papers etc., the Manager of the petitioner-institution on 21.4.2011 again applied for being included in the list of grant-in-aid. When no action was taken on the petitioners' application, the petitioners again filed a writ petition being Writ-C No.37211 of 2011 (C/M Sukhdeo Singh Kanya Laghu Madhyamik Vidyalaya & Anr. vs. State of U.P. & Ors.). In this writ petition, categorically in paragraph nos.18 to 20, it was stated that the grant given to four institutions in the list of 200 institutions had been withdrawn as they had placed certain forged documents. On 31.3.2014, Writ-C No.37211 of 2011 was disposed of holding that the institutions which were eligible on 7.9.2006 i.e. the date when the Government Order was issued, alone were to be considered as eligible institutions and thereafter a further direction was also issued that the petitioners' representation be decided in the light of the observations made in the judgment dated 31.3.2014. On 27.3.2015, the petitioners' representation was rejected. Amongst other grounds on the basis of which the rejection order was passed a ground was taken that within three kilometers of the petitioner-institution, there were Parishadiya Schools/private schools which were aided, were running and, therefore, the petitioner-institution could not be granted the aid. It was also stated in the order dated 27.3.2015 that since 1000 schools already had been taken for the grant-in-aid as per the Government Order dated 7.9.2006, no further inclusion could be done. The petitioner again filed a writ petition being Writ-C No.26241 of 2015 (C/M Sukhdeo Singh Kanya Laghu Madhyamik Vidyalaya & Anr. vs. State of U.P. & Ors.) and submitted that the order dated 27.3.2015 was not sustainable as the grounds which had been taken in the impugned order were not available to the State when the Government Order dated 7.9.2006 was issued. The Writ Petition No.26241 of 2015 was allowed by the order dated 18.7.2016 and it was observed that the only issue which had to be decided by the respondents was as to whether when the institutions which had been taken in the grant-in-aid on 2.12.2006 were ousted from the said list on account of their ineligibility then would not the petitioner-institution be taken into that list by which the aid was granted. The order dated 27.3.2015 was quashed and the matter was again sent back for a fresh decision. The petitioners again approached the State Government. However, when the State Government once again rejected the petitioners' representation on 8.2.2017, the instant writ petition was filed.

2. Learned counsel for the petitioners has submitted that the action of the State-respondents in not granting the petitioner-institution the grant-in-aid was malicious.

Initially when the State Authorities had stated that since the petitioner-institution was at Serial No.201 and only 200 institutions had to be taken in the grant-in-aid list, then the petitioners had informed that when actually four institutions had been ousted from the list, then the petitioner-institution which was at Serial No.201, ought to have been treated as having been at Serial No.197 and, therefore, under no circumstance could the petitioner-institution be deprived of the grant-in-aid. Learned counsel for the petitioners further submitted that malice is writ large if one reads the order dated 8.2.2017 and the order dated 27.3.2015. The subsequent order is a verbatim reproduction of the earlier order which was set-aside by the High Court by the order dated 18.7.2016 passed in Writ Petition No.26241 of 2015. Learned counsel for the petitioners also submitted that the Acts and the Rules which had been promulgated after the issuance of the Government Order dated 7.9.2006 would not be taken into account for ousting the petitioner-institution from the grant-in-aid list.

3. Learned Standing Counsel appearing for respondent nos.1, 2 and 3 and the learned counsel, who represented respondent no. 4, on the basis of separate counter affidavits filed by them, argued that the petitioner-institution when was placed at Serial No.201 could not be considered for being included in the grant-in-aid list as the petitioners' right to get included in the list exhausted the day the first list was declared. In this connection, learned counsel appearing for the State and the respondent no.4 relied upon a judgment of this Court dated 4.9.2014 which was passed in **Writ-C No.51176 of 2007 (C/M Adarsh Balika Laghu Madhyamik Vidyalaya & Anr. vs. State of U.P. & Ors.)** and submitted that when the petitioner-institution had been ousted from the list of selected institutions which was issued on 2.12.2006, then subsequently if the petitioner-institution was eligible, it could not be included in the list.

4. Having heard learned counsel for the parties, this Court is of the view that when the list of 200 institutions was published on 2.12.2006, on that date had the four institutions which had been ousted from the list, not been put in the list, then the petitioner-institution would have definitely been at Serial No.197. Here the case of the petitioners is not that the petitioner-institution had attained eligibility on a subsequent date. In fact the case of the petitioners is that on 2.12.2006 if the four institutions which had been subsequently ousted were not there, then the petitioner-institution would have definitely been in the list of institutions which were to be granted the aid. The way the orders are being passed, especially the last order dated 8.2.2017 which is a verbatim of the order dated 27.3.2015, shows that the State Authorities had made up their mind not to include the petitioner-institution in the list of grant-in-aid. The Court also finds that the reasons given in the orders dated 27.3.2015 and 8.2.2017 were not available to the State Authorities for ousting the petitioner-institution from the list by which the grant-in-aid was to be granted. The Right of Children to Free and Compulsory Education Act, 2009 and the U.P. Right of Children to Free and Compulsory Education Rules, 2011 were not in operation in the year 2006 when the list was prepared.

5. The Court definitely holds that the petitioner-institution was entitled to be included in the list of 200 institutions which was published on 2.12.2006 and was also entitled for getting the grant-in-aid on the date 2.12.2006. The Court also finds that maliciously the petitioner-institution had been deprived of grant-in-aid since 2.12.2006.

6. Under such circumstances, a writ of mandamus is being issued to grant the aid to the petitioner-institution with effect from the date when the institutions which were included in the list on 2.12.2006 were granted the aid. All

arrears be granted to the petitioner-institution within a period of two months. A cost of Rs.25,000/- is also imposed on the Joint Secretary who has passed the order dated 8.2.2017 which is a verbatim reproduction of the order dated 27.3.2015 and which had been set-aside by this Court on 18.7.2016 in Writ-C No.26241 of 2015.

7. In view of what has been stated above, the writ petition stands allowed

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(2021)11ILR A592
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.10.2021

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.

Writ C No. 16186 of 2021

Bipin ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Raghawendra Kumar Singh

Counsel for the Respondents:
A.s.G.I., Sri Annapurna Singh, Sri Taniya Pandey

A. Labour Law – Industrial Dispute Act, 1947 – Sections 25FF, 25H, 25O, 25T & 25U – Workmen employed for particular project – Reinstatement with back wages, claimed – Award – Legality challenged – Held, when a workman is employed for a particular project, the services of that employee came to an end when the project was over and, therefore, could not be given a permanent status – *Lal Mohammad's case* followed. (Para 14)

Writ petition dismissed. (E-1)

Cases relied on :-

1. Lal Mohammad Vs Indian Railway Construction Co. Ltd. & ors.; 2004(5)AWC 3955All

2. Lal Mohammad & ors.. Vs Indian Railway Construction Co. Ltd. and Ors.; AIR 2007 SC 2230

3. Mineral Exploration Corp. Employees' Union Vs Mineral Exploration Corporation Ltd. & anr.; 2000 AIR SCW 3865

4.Secretary, St. of Karn. Vs Uma Devi'2006 (4) SCC 1

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

1. This writ petition has been filed challenging the award dated 23.11.2020 which has been passed by the Presiding Officer, Central Industrial Tribunal-cum-Court, Kendiry Bhawan, 8th Floor Hall No. 1, Sector - H, Aliganj, Lucknow. Further the writ petition has also challenged the notice/order dated 04.02.1998 which was issued by the Joint General Manager, IRCON International Ltd, Anpara, District - Sonbhadra. The writ petition was finally heard after the parties exchanged their affidavits.

2. Briefly stated the facts of the case are that the petitioner was employed by the Indian Railway Construction International Ltd. (hereinafter referred to as the "Company') initially as a peon on casual basis for a period of six months by the order of the Project Manager Vindhyay Nagar, District - Sithi (M.P.) on 19.4.1984. This was an employment under the grade "D" category. After the completion of six months of continuous service, the petitioner was re-employed on monthly basis with a consolidated wage of Rs. 196/- plus dearness allowance by an order dated 09.05.1985 and, thereafter, he was attached with Anpara Project, District - Mirzapur, U.P. His attachment there necessitated a training and on the completion of it, he was employed on the scale of pay which was in the grade pay of Rs. 196-237/-. This was done by an order dated 29.05.1998 issued by the Regional Manager IRCON - Anpara. In this arrangement, the petitioner continued for a period of four years and was thereafter by an order dated 28.4.1989 brought in the regular

scale. Thereafter the petitioner was transferred from Vindhya Nagar Project to Rihand Nagar Project, District - Sonbhadra U.P. by an order dated 23.12.1993. However, on 04.02.1998 a notice was served upon the petitioner that with effect from 06.02.1998 his services were dispensed with it.

3. Aggrieved by the termination/notice dated 04.02.1998, the petitioner alongwith 74 other workmen filed a writ petition being Writ Petition No. 6522 of 1998. However, the writ petition was disposed of on 23.01.2002 whereby it was ordered that other than the petitioners no. 31 & 61 the other petitioners who were 73 in number were to be given Rs. 3 lacs as compensation. The petitioner alongwith the petitioner no. 61 was given an option to file a writ petition afresh. The petitioner instead of filing a writ petition raised an industrial dispute and prayed for his reinstatement with back wages. The conciliation proceedings failed and the matter was referred by the Government of India to the Central Government Tribunal- cum - Labour Court, Lucknow (hereinafter referred to as the "Labour Court') and this reference came to be numbered as Reference No. 23 of 2009. When the award was passed by the Labour Court on 23.11.2020, the instant writ petition was filed.

4. Before proceeding to enumerate arguments advanced by the counsel for the petitioner, certain other facts also require a brief mention.

5. Certain workmen who were employed with the company had filed writ petitions which were numbered as 18561/1993, 32500/1993, 32651/1993, 34786/1993 and 44416/1993. When the petitioners in these writ petitions had been found to be surplus and their services were dispensed with then the above mentioned writ petitions were filed. These writ petitions were connected to each other and were decided by a common judgement on 7.12.1993 in which the order impugned by which the petitioners therein had been found to be surplus were set aside and the petitioners were directed to be absorbed in other projects. The order dated 7.12.1993 was challenged in an Intra-court Special Appeal and the Special Appellate Court had on 24.2.1998 allowed the special appeal and set aside the order passed by the learned single judge dated 7.12.1993. Aggrieved thereof five civil appeals were filed before the Supreme Court. The Supreme Court wherein on certain grounds set aside the order of the Division Bench dated 4.12.1998 and also set aside the order of the learned Single Judge dated 7.12.1993. The Supreme Court while remanding the matter framed certain questions for consideration and they were as follows:-

(i) Whether Anpara Rihand Nagar Project is subjected to a factual closure as mentioned in the impugned notices of March, 1998 or whether the project is not still completed;

(ii) In the light of the answer to the aforesaid question a further question would arise whether impugned notices of March, 1998 were in fact and in law closure notices as per Section 25O read with Section 25FFF of the Act or whether they still remain retrenchment notices and hence would be violative of Section 25N of the Act;

(iii) Even if it is held that the Anpara Rihand Nagar project is in fact closed down whether the 25 appellants were employed in the project or they were employees of the respondent - company entitling them to the absorbed in any other project of the company and consequently whether the impugned notices have not effected any snapping of employer-employee relationship between the appellants of the one hand and the Respondent-company on the other;

(iv) Even apart from the aforesaid questions whether the impugned notices are violative of the guarantee of Articles 14, 16 and 21 of the Constitution of India on the ground that the termination of services of the 25 appellants was arbitrary and discriminatory, respondent company being a "State' within the meaning of Article 12 of the Constitution of India.

6. Thereafter, upon remand, the five writ petitions being Writ Petition Nos.18561/1993, 32500/1993, 32651/1993, 34786/1993 and 44416/1993 were heard by a Division Bench. When on 17.5.2009 there was a conflict of opinion between the two judges of the Division Bench, again the matter went to the Supreme Court and, thereafter, the Supreme Court remanded the matter back and directed that the matter be disposed of on merit by a Full Bench of the High Court. Before the Full Bench, those very four issues which had been asked by the Supreme Court to be decided on 24.3.1998, were placed for consideration. All the issues were thereafter decided in favour of the respondent-company and against the petitioners. The Full Bench case was reported in **2004(5)AWC 3955All (Lal Mohammad vs. Indian Railway Construction Co. Ltd. And others.).** The petitioners in the Full Bench Case filed an Appeal before the Supreme Court which was numbered as Civil Appeal No. 6195-6198 of 2004 and Civil Appeal No. 5685 of 2006. The decision of the Appeal before the Supreme Court reported in **AIR 2007 SC 2230 (Lal Mohammad and Ors. vs. Indian Railway Construction Co. Ltd. and Ors.**) specifically decided that when a workman is employed for a particular project then the services of that employee came to an end as soon as the project was over and he could not be given a permanent status. It also held that shortfall of period of notice or compensation, after completion of the project ,would not render the termination bad on that count.

7. The Supreme Court found that the judgement of the Full Bench of the Allahabad High Court was correct. It also found that the petitioners were not entitled to be regularized in the services of the Company as they were not employees of the company. It, however, held that the petitioners were entitled for compensation and thereafter the appeals were dismissed.

8. The petitioner in this writ petition has claimed that his case was different from the case of Lal Mohammod (supra).

9. Learned counsel for the petitioner has submitted that the petitioner was given a status of regular employee because he had been given a scale of the regular employee with effect from 19.4.1984. He submits that on 19.5.1986 and 28.4.1989, the petitioner was further granted certain status which were different from the status which were granted to the petitioners in the case of Lal Mohammad (supra). Learned counsel further reiterated the provisions of 25H of the Industrial Disputes Act 1947 and stated that the petitioner had a right to be reappointed if the work was there. Learned counsel for the petitioner also submitted that IRCON Services Rules provided for promotion, implementation, regularization of casual employee.

10. Still further learned counsel for the petitioner submitted that the manner in which the respondents company had conducted itself clearly showed that it was resorting to unfair labour practices which was prohibited by Section 25T and Section 25 U of the Industrial Disputes Act, 1947.

11. Learned counsel relied upon **2000 AIR SCW 3865 (Mineral Exploration Corporation Employees' Union vs. Mineral Exploration Corporation Ltd. & another**) and submitted that employees who were engaged continuously for a number of years cannot be treated as

temporary or casual employees. He, therefore, submitted that the petitioners were entitled for regularization.

12. Learned counsel for the petitioner also submitted that his case was absolutely different from the case of Meghu Seikh. He submits that comparison of the case of Meghu Seikh with the case of the petitioner was not called for.

13. Learned counsel for the respondent nos. 2, 3 and 4, however, relying upon the judgements of Lal Mohammod(supra) which was passed in the Full Bench decision of the High Court and was confirmed by the Supreme Court has made her submission and has submitted that the case of the petitioner was at similar footing with the case of Meghu Seikh. She submitted that the very fact that the petitioner had got regular scale did not mean that the petitioner had been regularized. She still further submitted that the petitioner was an employee of the Project and not of the Company. Still further learned counsel for the respondents, Ms. Taniya Pandey submitted that in pursuance of the law laid down in **Secretary, State of Karnataka vs. Uma Devi,** reported in **2006 (4) SCC 1** regularization could be done only if there was a statutory rule framed in that regard.

14. Having heard the learned counsel for the parties and after having perused the written arguments which the parties have filed (which are now made part of the record) and also upon going through the award and the various pleadings which have been exchanged by the parties, this Court finds that no interference is warranted in the award. The Supreme Court in the case reported in **AIR 2007 SC 2230 (Lal Mohammad and Ors. vs. Indian Railway Construction Co. Ltd. and Ors**.) has categorically laid down that when a workman is employed for a particular project, the services of that employee came to an end when the project was over and, therefore, could not be given a permanent status. It has also held that the workman could not be considered as employee of the company under which various other projects ran. This Court also finds that there was similarity in the case of the petitioner and the case of Meghu Seikh.

15. Under such circumstances, no interference is warranted in the writ petition and the writ petition is, accordingly, dismissed.

(2021)11ILR A595
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.10.2021

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.

Writ C No. 20880 of 2020

Ram Sagar @ Sagar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Babu Lal Ram, Sri Jyoti Bhushan

Counsel for the Respondents:
C.S.C., Sri Bhupendra Kumar Tripathi

A. Civil Law – UP Revenue Code, 2006 – Sections 189 & 190 – UP Revenue Rules, 2016 – R. 57 – Fishery lease – Auction – Highest bidder defaulted in depositing the bid amount – Next bidder (petitioner) permitted to deposit 25% bid amount – Allotment claimed by the next bidder – Entitlement – Held, when as per the auction, the highest bidder could not deposit the 25 per cent of the bid amount which was required to be deposited by him then there was no other option left with the authorities but to re-auction the pond – The next bidder definitely had no right to claim for getting allotment – High Court directed to return back the amount deposited by the next

bidder with an interest of 12 per cent per annum (Para 6)

Writ petition dismissed. (E-1)

Cases relied on :-

1. Writ C No. 3997 of 2017; Sanjay Prasad Vs St. of U.P. & ors. decided on 25.01.2017

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

1. Brief facts of the case are that an advertisement with regard to auction of the pond over Plot No.353 situate at Village Daulatpur, Tehsil- Meh Nagar, Police Station- Meh Nagar, District- Azamgarh, was published in the newspaper on 24.07.2019. The auction took place on 28.08.2019 in which there were three bidders, namely, Dinesh, Rakesh and Ram Sagar (the petitioner). Dinesh made a bid of Rs.1,10,000/- per year; Rakesh made a bid of Rs.1,05,000/- per year and the petitioner Ram Sagar made a bid of Rs.12,000/- per year.

2. Admittedly, amongst the various bids, the bid of Rakesh was found to be the highest and, therefore, he was required to deposit 25 per cent of the bid amount. When the highest bidder Rakesh and the second highest bidder Dinesh did not deposit the amount, the petitioner claimed a right to get the allotment as he was the only bidder who was then available for getting the allotment. Thereafter, the petitioner was asked to deposit the amount as per the bid and on 24.10.2019, the petitioner also deposited Rs.1,20,000/- for a complete tenure of ten years as is clear from the receipt which is annexed as Annexure No.2 to the writ petition. Thereafter, it appears that various reports were called for by the Tehsildar and the Sub-Divisional Magistrate. The Revenue Inspector gave a report on 21.10.2019 that the petitioner was the only bidder available after Rakesh and Dinesh who had not deposited the required amounts as per their bids and therefore, the petitioner was entitled for the allotment. On the report of the Revenue Inspector, however the Tehsildar upon considering the various provisions of law wrote to the Sub-Divisional Magistrate that the auction could not be made in favour of the petitioner as the actual bidders i.e. Rakesh and Dinesh had failed to deposit the amount and, therefore, a re-sale had to take place. The Sub-Divisional Magistrate on 02.09.2020 again asked for a comment. In the meantime, the petitioner approached the High Court with a prayer that the Plot No.353 which contained the pond be settled in his favour as he was the only bidder available after the bidders Rakesh and Dinesh had left without depositing any money which they were required to deposit after making the bid.

3. Sri Ram Lakhan Deobanshi, learned Standing Counsel in reply referred to the contents of counter affidavit and supplementary counter affidavit and specially referred to the furd neelami dated 28.08.2019. From the furd neelami, he pointed out that there were three bidders Rakesh, Dinesh and Ram Sagar (the petitioner). He submitted that after Rakesh and Dinesh whose bids were higher than the petitioner Ram Sagar had failed to deposit the bid amount then under law, a fresh auction had to take place and allotment could not be done in favour of the petitioner. In support of his submission, learned Standing Counsel drew the attention of the Court to Rule 57 of the U.P. Revenue Code Rules, 2016 and therefore, for ready reference, the same is reproduced hereunder:

*"**57. Lease of smaller Tanks (Section 61). - (**1) Where the area of a tank referred to in section 61(b) exceeds 0.5 acre but does not exceeds 5 acres, the Samiti shall let out the same for fishing purposes or for growing Singhara with the prior approval of the Sub-Divisional Officer in accordance with the following procedure.*

(2) For the purposes of letting such tanks, a camp shall be organized at the Tahsil

level, about which wide publicity shall be given by publishing the date, time and place of the camp in at least one Hindi newspaper having wide circulation in the area.

(3) The Chairman, the Secretary and an officer not below the rank of Naib Tahsildar shall be present at such camp meetings. If, more than one Gram Panchayats are involved, the Chairmen and Secretaries of all the Samitees concerned shall attend such meetings.

(4) With the help of the representative of the fishermen community, to be appointed by the Collector for each Tahsil, the Secretary shall prepare a list of eligible persons who may be allotted the tank under reference, in accordance with the order of preference specified in sub-rule (5).

(5) The eligibility list of prospective lessees shall be prepared in accordance with the following order of preference:-

(a) Fishermen residing in the concerned Gram Panchayat;

(b) Members of the S.C.,S.T., Other Backward Classes or persons of General category living below poverty line residing in the Gram Panchayat.

(c) Fishermen residing in the concerned Nyaya Panchayat Circle;

(d) Fishermen residing in the concerned Development Block :

Explanation. - For the purposes of this rule and Rule 58, the expression 'Fishermen' means any person belonging to the community of Kewat, Mallah, Nishad, Bind, Dheemar, Kashyap, Vatham, Raikwar, Manjhee, Godia, Kahar, Tureha or Turaha or any other person traditionally engaged in the fishing profession.

(6) The persons referred to in any of the preceding clause of sub-rule (5) shall be entitled to the lease of such tank to the exclusion of those specified in the succeeding clauses.

(7) If the list of eligible persons prepared under sub-rule (4) consists of more than one person, then an auction shall be held on the spot in which only those shall be allowed to participate whose names are included in such list. If there is only one person eligible for the lease aforesaid, the lease shall be granted on the annual rent of the amount fix by the State Government from time to time which shall not be less than Rs. 1000/- and shall not exceed Rs.2000/- per acre.

(8) The provisions of Sections 189 and 190 of the Code shall apply to every auction under this rule.

(9) When the amount of the highest bid has been deposited, the eligibility List, the Bid Sheet and a report about the deposit of the bid amount duly signed by the Chairman, Secretary and the revenue officer referred to in sub-rule (3) shall be forwarded to the Sub-Divisional Officer for his approval.

(10) If the Sub-Divisional Officer is satisfied that the decision to let the tank is in accordance with the provisions of these rules, he shall accord his approval and shall return the papers to the Samiti.

(11) If the Sub-Divisional Officer approves the proposal, the papers shall be returned to the Samiti and a Deed of Lease shall be executed in R.C. Form-15 which shall be registered under the Registration Act, 1908.

(12) Every such lease shall be executed for a period of five years and the same shall not be renewed or extended.

(13) The lessee may use the tank allotted to him for the purpose of fishing or producing other aquatic produce or vegetables.

(14) If during the period of lease, the lessee commits any breach of the terms and conditions of such lease, the Sub-Divisional Officer may cancel the lease after issuing a show cause notice to the lessee.

(15) During the period of lease the rights of the local residents to use the tank for purposes of washing clothes, watering the cattle, digging out earth for purposes of pottery or the likes shall remain undisturbed."

4. He further submitted that as per Rule 57(8) of the U.P. Revenue Code Rules, 2016, the provisions of Sections 189 and 190 of the U.P. Revenue Code, 2006 were applied to every auction. For ready reference, Sections 189 and 190 of the U.P. Revenue Code, 2006 are also being reproduced hereunder:-

*"**189. Deposit by purchaser and re-sale on default.** - (1) The person declared to be the purchaser shall be required to deposit immediately twenty five percent of the amount of his bid, and in default of such deposit, the property shall be forthwith re-sold, and such person shall be liable for the expenses incurred on the first sale and any deficiency in price occurring on re-sale, and the same may be recovered from him by the Collector as if the same were an arrear of land revenue.*

(2) A deposit under sub-section (1) may be made either in cash or by a demand draft (issued by a scheduled bank) or partly in cash and partly by such draft.

Explanation. - For the purposes of this section, the expression "demand draft' includes a banker's cheque.

***190. Deposit of purchase money.** - The balance amount of the purchase money shall be paid by the purchaser on or before the fifteenth day from the date of the sale in the office of the Collector or at the district treasury or sub-treasury; and in case of default -*

(a) the property shall be resold; and

(b) the deposit made under Section 189 shall be forfeited to the State Government."

5. Learned Standing Counsel relied upon the provisions of Section 189 of the U.P. Revenue Code, 2006 and also a judgement of this Court passed in Writ - C No.3997 of 2017 (Sanjay Prasad Vs. State of U.P. and Others) on 25.01.2017 and has submitted that if the bidder defaults in depositing 25 per cent of the bid amount then a re-auction/ re-sale had to take place and no such person who might be there in the auction list could claim any right of getting any allotment whatsoever. He, therefore, submitted that the petitioner's claim for allotment could not be sustained and the writ petition was liable to be dismissed.

6. Having heard the learned counsel for the petitioner, Sri Ram Lakhan Deobanshi, learned Standing Counsel and Sri Jyoti Srivastava, Advocate holding brief of Sri Bhupendra Kumar Tripathi, learned counsel for the Gaon Sabha and also after having gone through the relevant provisions of Rule 57 of the U.P. Revenue Code Rules, 2016 and Sections 189 and 190 of the U.P. Revenue Code, 2006, this Court is of the view that when as per the auction, the highest bidder Rakesh could not deposit the 25 per cent of the bid amount which was required to be deposited by him then there was no other option left with the authorities but to re-auction the

pond. The petitioner definitely had no right to claim for getting allotment. However, the Court feels that the petitioner has been wronged in the sense that he had been directed to deposit the bid amount on 18.10.2019 which was also deposited by him on 24.10.2019. This amount, the Court definitely feels, is required to be returned to the petitioner with an interest of 12 per cent per annum.

7. The auction may now take place again by the 30th of November, 2021. It is further provided that the cost of re-auction as per Section 189 of the U.P. Revenue Code, 2006 shall be borne by the bidder Rakesh who had defaulted. The amount along with interest which had to be returned to the petitioner shall, however, be returned by the State Exchequer. The amount shall be reimbursed to the petitioner before the next auction takes place.

8. With these observations/directions, the writ petition is, accordingly, dismissed.

(2021)11ILR A599
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.10.2021

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ C No. 21097 of 2021

Rajat Yadav ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Sanjeev Kumar Pandey

Counsel for the Respondents:
C.S.C.

A. Constitution of India – Article 21 – Fundamental right – Right to carry Firearms – Acquisition and possession of a firearms under the Arms Act. 1959 is only a privilege and the right to carry firearms does not come within the purview of Article 21 of the Constitution of India. (Para 17)

B. Arms Act, 1959 – Fire Arms license – Entitlement – Threat to life and liberty – Judicial review – Scope – Held, in a case where discretion is conferred on a public authority to grant or refuse a licence to hold a firearm, the scope of judicial review is limited – Where the relevant circumstances have been taken in consideration and no extraneous considerations were taken into account, it would be outside the purview of judicial review of the Court to substitute its own opinion with the opinion of the licensing authority – Primacy is given to the threat assessment made by the competent authorities – Absence of danger to life and liberty of an applicant for firearms license, can be a valid and lawful reason for refusal of the firearm license – *Mahipat Singh's case* followed and *Bhoore Singh's case, Indal Singh's case, Kammod Singh's case* were held per incuriam – High Court found no infirmity in the order of licensing authority in refusing to grant the licence. (Para 47, 51, 55 and 61)

Writ petition dismissed. (E-1)

Cases relied on :-

1. Arvind Kumar Vs St. of U.P. & ors.; 2012 76 ACC 457

2. Ram Chandra Yadav Vs St. of U.P. & anr.; 2010 (69) ACC 490

3. Brij Nandan Singh Vs St.of U.P. & ors.; 2011 (75) ACC 331

4. Writ C No. 17507 of 2019; Bhoore Singh Vs St. of U.P. & anr. decided on 21.05.2019

5. Wrti C No. 17833 of 2019; Indal Singh Vs St. of U.P. & anr. decided on 23.05.2019

6. Writ C No. 39541 of 2019; Kammod Vs St. of U.P and other decided on 07.12.2019

7. St.of U.P. & ors. Vs Mahipat Singh; 2014 (2) ADJ 134

8. Kailash Nath & ors. Vs St. of U.P. & ors.; AIR 1985 All 291

9. Balram Singh Vs St. of U.P. & ors.; 1989 (87) ALJ 23

10. Ganesh Chandra Bhatt Vs D.M.; AIR 1993 All 291

11. Writ Petition No. 29963 of 1993; Devendera Pratap Singh Vs D.M. decided on 27.10.1993

12. Rana Pratap Singh Vs St. of U.P.; 1996 CriL.J. 665

13. Misc. Bench No. 3268 of 2012; Jitendra Singh Vs St. of U.P. decided on 07.10.2013

14. Hari Shanker Vs St. of U.P. & ors.; 2008 (4) ADJ 518

15. Parvez Ahmad Vs St. of U.P. & ors.; 2006 (55) ACC 669

16. Writ C No. 64953 of 2013; Mahipat Singh Vs St. of U.P. & ors. decided on 11.12.2013

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

1. The petitioner applied for a fire arms license by applications dated 03.07.2020 and 07.06.2021.

2. By the impugned order dated 05.07.2021 the licensing authority/ District Mainpuri has declined to grant the arms license to the petitioner.

3. Sri Sanjeev Kumar Pandey, learned counsel for the petitioner contends that the denial of the arms license to the petitioner on the footing that the petitioner does not faces any imminent threat to his life is arbitrary and illegal. He relied on various judgments rendered by this Court in **Arvind Kumar Vs. State of U.P. and others** reported at **2012 76 ACC 457**, **Ram Chandra Yadav Vs. State of U.P. and another** reported at **2010 (69) ACC 490; Brij Nandan Singh Vs. State of U.P. and others** reported at 2011 (75) ACC 331 and also the judgments rendered by this Court on 21.05.2019 in **Bhoore Singh Vs. State of U.P. and another Writ C No. 17507 of 2019**, judgment rendered on 23.05.2019 in **Indal Singh Vs. State of U.P. and another Wrti C No. 17833 of 2019** and the judgment of this Court rendered on 07.12.2019 in **Kammod Vs. State of U.P and other Writ C No. 39541 of 2019.**

4. Per contra learned Additional Chief Standing Counsel Sri J.P.N Raj, submits that the petitioner did not satisfy the criteria for grant of arms license as laid down in the Government Order dated 08.11.2018. It is further contended that the judgments relied upon by the learned counsel for the petitioner have been rendered by various Single Judges' of this Court. The ratio of the aforesaid judgments is contrary to the law laid down by learned Division Bench of this Court in **State of U.P. and others Vs. Mahipat Singh** reported at **2014 (2) ADJ 134**. The judgment of the learned Division Bench was not referred to the learned Single Judges' in **Bhoore Singh (supra), Kammod Singh (supra) and Indal Singh (supra)**. Applicable provisions of the Arms Act and Arms Rules as well as the Government Order dated 08.11.2018 have not been considered in the judgments cited in support of the petitioner's case. The said judgments rendered by the learned Single Judges' are per incuriam.

5. Heard learned counsel for the parties.

6. To process the application for grant of firearm license submitted by the petitioner, reports were called for by the licensing authority from the relevant government departments, namely, the revenue and the police authorities The said reports are extracted in the impugned order dated 05.07.2021.

7. The report submitted by the S.D.M., Karhal, dated 27.1.2021 records that the applicant is not victim of a crime, a trader, an industrialist, a serviceman, a member of paramilitary forces, a MLA, a MLC, a MP or an Enforcement Officer. The report on behalf of the police authorities submitted by the Inspector In-charge of Police Station, Karhal on 27.01.2021 asserts that no criminal case has been registered

against the applicant Rajat Yadav. Analysing the threat perception to the applicant Rajat Yadav, the said police report opined that the applicant does not face any threat to life or property from any individual. The applicant does not have a genuine requirement for possession of a firearm. The report of the Inspector of the concerned police station was duly approved by the C.O, Karhal, in his report dated 08.02.2021. The Additional Superintendent of Police, Mainpuri also accorded approval to the report submitted by the S.H.O and the C.O.

8. After agreeing with the reports submitted by various police functionaries, the Superintendent of Police, Mainpuri made the recommendation that the applicant was not entitled for grant of arms license.

9. The eligibility of the petitioner for grant of arms license was examined in the light of enquiry reports submitted by various competent authorities in the impugned order dated 05.07.2021. The petitioner did not fall in various categories of individuals entitled for grant of license by virtue of holding an office or discharging specific official functions which could entail threat to life.

10. The licensing authority also referenced the Government Order dated 08.11.2018 which categorically postulates that only those individuals who face a grave threat or imminent danger to their lives or there was real possibility of threat to their lives were entitled for consideration of their applications for grant of license. The Government Order dated 08.11.2018 also contemplates that the licensing authority will have to ensure that licenses should not be issued to persons who do not have any real requirement.

11. The licensing authority independently agreed with the threat perception reports submitted by the police authorities and recommendation of the revenue authorities. The licensing authority found that the petitioner does not face any imminent or forseeable threat to his life or property. The licensing authority in the impugned order recorded that the petitioner does not satisfy the eligibility criteria laid down in the said Government Order for grant of firearm license and does not have a genuine requirement for a firearm.

12. On the foot of this reasoning the licensing authority rejected the application of the petitioner for grant of arms license by the impugned order dated 05.07.2021.

13. The regulation of arms ownership in modern India has a chequered history. In British India the arms laws confined the ownership of arms to a select elite. Even Mahatma Gandhi wanted the said discriminatory laws to be repealed after achieving independence. The Arms Act, 1959 enacted by the Parliament in independent India, discarded the exclusivity in ownership of arms and introduced transparency in the grant of arms licenses. But what is noteworthy is that the Indian Parliament did not liberalise the grant of fire arms licenses, but continued with the policy of restrictive gun laws. The Arms Act, 1959 read with Arms Rules, 2016, lay down a transparent process for grant of fire arms licenses and tightly regulate ownership of arms.

14. The prevalence of fire arms in a society and its impact on state building and as a cause of State breakdown has been examined in various studies.

15. Commenting on the phenomena of global flow of guns and failure of States, Pratap Bhanu Mehta, writes that "supply of weapons matters, and unless controlled acquires an autonomous dynamic".

16. The restrictive regime of arms license possession in India under the Arms Act, 1959

faced constitutional challenge before this Court. A five Judges Full Bench of this Court in **Kailash Nath and others Vs. State of U.P. and others1** was called upon to decide the question whether the possession and acquisition of a firearm came within the ambit of Article 21 of the Constitution of India.

17. The learned five Judges Full Bench in **Kailash Nath (supra)** held that acquisition and possession of the firearm under the Arms Act, 1959 is nothing more than a privilege and set its face against the contention that possession and acquisition of firearms was a fundamental right flowing from Article 21 of the Constitution of India. by holding thus:

""3..... In my opinion the obtaining of a licence for acquisition and possession of firearms and ammunition under the Arms Act is nothing more than a privilege and the grant of such privilege does not involve the adjudication of the right of an individual nor does it entail civil consequences. I may, however, hasten to add that even an order rejecting the application for grant of licence may become legally vulnerable if it is passed arbitrarily or capriciously or without application of mind. No doubt, a citizen may apply for grant of a licence of firearms mostly with the object of protecting his person or property but that is mainly the function of the State. Even remotely this cannot be comprehended within the ambit of Art. 21 of the Constitution which postulates the fundamental right of protection of life and personal liberty. It deals with deprivation of life and as held in Gopalan v. State of Madras, 1950 SCR 88 : (AIR 1950 SC 27). Art. 21 is attracted only in cases of deprivation in the sense of total loss and that accordingly has no application to the case of a mere restriction upon the right to move freely or to the grant of licence for possession and acquisition of firearms which stands on an entirely different footing from the licence to carry on a trade or occupation. "

18. A Full Bench of this Court in **Balram Singh Vs. State of U.P. and others2** reiterated that grant of license for possessing of firearm is only a privilege to be granted by the State:

"13. In this connection, another aspect of the matter cannot be lost sight of. Obtaining of a licence for possessing a fire-arm has to be held a privilege only. No civil consequences follow. Even if we were to hold that consequences do follow as it may in proceedings concerning licences issued under Section 4 or 5 of the Act, the security of public peace or public safety would be of paramount importance....."

(emphasis supplied)

19. Subsequently there was a departure from the above position of law. The cleavage in judicial opinion in regard to the nature of the right to carry firearms opened when a learned Single Judge of this Court in **Ganesh Chandra Bhatt Vs. District Magistrate3** construed the right to carry firearm as one flowing from Article 21 of the Constitution of India.

"44. In my opinion the right to carry non-prohibited firearms is part of Article 21 of the Constitution, for to hold otherwise would amount to keeping good and peace loving citizens defenceless while the criminal are well armed. This would be wholly arbitrary and unreasonable. In these days when law and order has broken down it is only an armed man who can lead a life of dignity and self respect. No criminal or gangster can dare to assault or threaten such a person for fear of retaliation. Since the word "life' in Article 21 has been held by the Supreme Court to mean a life of dignity (as discussed above), the right to carry non-prohibited firearms must be deemed to be included in Article 21."

20. Discordant judicial views on the aforesaid issue became manifest when a learned

Division Bench judgment of this Court in **Devendera Pratap Singh Vs. District Magistrate4**, held that the right to carry non-prohibitory firearm was vested in a citizen by virtue of Article 21 of the Constitution of India. The proposition laid down in **Ganesh Chandra Bhatt (supra)** and **Devendra Pratap Singh (supra)** diverged from the holdings of in **Kailash Nath (supra)** and **Balram Singh (supra).**

21. Consequently, the matter was referred yet again to a Special Bench of this Court comprising of five learned Judges in **Rana Pratap Singh Vs. State of Uttar Pradesh5** for an authoritative pronouncement on the issue.

22. The learned five Judges Full Bench of this Court in **Rana Pratap Singh (supra)** essentially affirmed the opinion of this court in **Kailash Nath (supra)** and held that obtaining a firearms license for acquisition and possession of a firearms under the Arms Act. 1959 is only a privilege and the right to carry firearms does not come within the purview of Article 21 of the Constitution of India. The following proposition enunciated in **Rana Pratap Singh (supra)** finally settled the controversy :

"33. Turning now to the reference pertaining to the grant of an arms licence, there is the judgment of M. Katju, J. in Ganesh Chandra Bhatt v. The District Magistrate, Almora (1993(30) ACC 204) where the learned Judge held that the right to carry non-prohibited firearms was part of Article 21 of the Constitution of India since he said the word 'life' in Articles 21 has been held by the Supreme Court to be a life of dignity. It was, in this behalf, his view that is only an armed man who can lead a life of dignity and self respect.

34. The learned Judge went on to lay down as a legal proposition that "Whenever an application for a licence for a non-prohibited arm is made and it is not disposed of within three months it will be deemed to have been allowed on the expiry of three months". Not only this, but a general mandamus was also issued "to all concerned authorities that whenever any application for licence under the Arms Act is made the same must be processed and decided within three months, and the normal rule must be grant of the licence in the case of non-prohibited firearms, and the refusal should be exception and for strong reasons to be recorded in writing after giving opportunity of hearing to the applicant, and such reasons for rejection must be communicated to the application within three months of the application. The licence should also be normally not restricted to the district or State except for special reasons to be recorded in writing and communicated to the applicant."

35. Both these views, namely, that if no order is passed on an application for an arms licence within three months from the date thereof it shall be deemed to have been granted and that the right to carry a non-prohibited weapon was a right guaranteed under Article 21 of the Constitution, were later given the seal of approval by the Division Bench in Civil Misc. Writ Petition No.29963 of 1993 (Devendra Pratap Singh Vs. District Magistrate), decided on October 27, 1993, of which M. Katju, J. was a member.

36. Strong reservations were expressed by Bahuguna, J. in Ajai Singh's case to the rationale of the judgments in Ganesh Chandra Bhatt, 1993 (30) ACC 204 and Devendra Pratap's cases (supra) Civ. Misc. Writ Pet. No.29963 of 1993, D/-27-10-93 and he consequently sought their reconsideration by a larger Bench.

37. A reading of the relevant statutory provisions of the Arms Act would show that no time limit has been prescribed therein for the

consideration of an application for the grant of an arms licence, nor is there any provision to the effect that if the application is not finally decided within a particular time frame, the licensing authority shall be bound to grant the licence, or that the licence shall be deemed to have been granted. We, therefore, cannot but concur with the view of Vijay Bahuguna, J. that had the intention of the Legislature been such, specific provisions would undoubtedly have been made for it in the Act. On the face of it, therefore, the provisions of the Arms Act cannot be so construed as to provide for a deeming provisions for the grant of a licence merely on the expiry of a particular period of time.....

38. Equally unsustainable is the view that the right to carry non-prohibited fired arms comes within the purview of Art. 21 of the Constitution, nor indeed one can we subscribe to the theory as expounded by M. Katju, J. In Ganesh Chandra Bhatt's case 1993(30) ACC 204, that it is only an armed man who can lead a life of dignity and self respect. As rightly held in Kailash Nath's case 1985 AWC 493: AIR 1985 All 291 (supra), obtaining of a licence for acquisition and possession of fire arms under the Arms Act is no more than a privilege. M.N. Shukla, C.J. in this behalf, further observed "No doubt, a citizen may apply for grant of a licence of fire arms mostly with the object of protecting his person or property but that is mainly the function of the State. Even remotely this cannot be comprehended within the ambit of Article 21 of the Constitution which postulates the fundamental right of protection of life and personal liberty. It deals with deprivation of life and as held in Gopalan v. State of Madras, 1950 SCR 88 Article 21 is attracted only in cases of deprivation in the sense of total loss and that accordingly has no application to the case of a mere restriction upon the right to move freely or to the grant of licence for possession and acquisition of fire arms which stands on an entirely different footing from the licence to carry on a trade or occupation". M.K. Katju, J. in Ganesh Chandra Bhatt's case (1993 (30) ACC 204, brushed aside this observation by fastening upon it the label of "per incuriam". On the face of it, this represents a glaring instance of a learned Single Judge, as they say "Seeking to win the game by sweeping all the chessmen of the table" by so blatantly disregarding a binding judgment of a Full Bench of five Judges, by merely saying it is per incuriam, when it was clearly not so.

42. It will thus be seen that branding the observation in Kailash Nath's case (supra), with regard to the right to carry firearms and it not coming under Article 21 of the Constitution, as being merely per incuriam was not founded upon any law or precedent and was, therefore, wholly unwarranted, rather it constitutes a striking instance of the manner in which the per incuriam rule never can or should be applied. It follows, therefore, that the right to carry firearms does not come within the purview of Article 21 of the Constitution. We are, thus, again constrained to hold that both Ganesh Chandra Bhatt's case 1993 (30) ACC 204 as also Devendra Pratap Singh's case Civil Mis. Writ Petition No.29963 of 1993, D/-7-10-1993, do not lay down correct law and are consequently hereby over-ruled."

23. A Division Bench of this Court in ***Jitendra Singh Vs. State of U.P.6*** judicially noticed killing of a number of innocent persons in celebratory firing, the proliferation of arms in the society, and flaunting of weapons in public as a status symbol.

24. The Division Bench of this Court in ***Jitendra Singh (supra)*** found in meticulous detail the consequences of freely arming citizens:

"Principal Secretary, Home, however, has filed an affidavit today which displays a

very shocking state of affairs. According to Principal Secretary, Home, in State of U.P. 11,22,844 arms licence have been issued to 11,02,113 persons. 11,04,701 arms have been issued to the licence holders. Out of which, 3,81,966 for SBBL and 336954 for DBBL guns have been issued. 1,68,669 licence for rifles, 1,49,065 for revolvers, 54,035 for pistols, 96 for sport guns, 525 for Carbine and 13,882 licences have been issued for other weapons.

It is further stated that in the State of U.P. 35,698 persons are having two arm licences, 5959 persons are having three licences and 55 persons are having more than three arm licences. In para 8 of the affidavit it is stated that 5730 persons are holding arm licences against whom criminal trials are pending while 1061 persons are having licences against whom cases are registered at various police stations.

Above figures are appalling.

It is submitted at the bar that total number of licence holders in the State are far in excess with the arms available to the Police force. Entire 2.13 lakh force of State Police, has 2.25 lakh weapons with them. Thus, the private citizens possess weapons more than five times to the force of State. This does not include the figures of unauthorized arms.

It is further stated at the bar quoting figures from NCRB that more than half of the killings from firing, in the country, are reported from Uttar Pradesh. Number of applications pending for arms licence, is not on record. It was informed that in Lucknow district alone nearly 50 thousands ripe applications are pending for arms licence.

Experience shows that arms licences are procured merely for flaunting the status as it has become status symbol. Needless to say that arm licence is not a right rather it is statutory privilege available with the State. Arming society to such an extent sends danger bell. In fact, the State is sitting on Volcano. Large number of persons with criminal backgrounds with licenced arms including 525 Carbine pose a serious threat to the tranquility and order of the society.

Figures given by Principal Secretary show that more than 41,000 persons are having more than one licence. Fifty five persons are having more than three licences while Section 2(3) of the Arms Act limits the number to three. It is not clear as to what action has been taken by the State Government against the persons having more than three arms licence.

2,25,000 weapons with Police force faced with more than 11,00,000 authorized arms with citizens of Uttar Pradesh in addition to score of illegal arms, maintenance of law and order is bound to be a casualty."

25. This Court in **Jitendra Singh (supra)** looked askance at the inability of the State to regulate the grant of licenses:

"There is no evidence to establish that heavily arming citizens has shown any improvement in situation. Even otherwise maintenance of law and order is foremost duty of State and arming people is no alternative. In fact, State has come into existence because of need of protection to its subjects. No proposal has come foreward from the respondents to regulate this uncalled for and unproductive generosity of State."

26. After recording the magnitude of the problem of arming a society to its hilt and its "deleterious cascading effect", the State Government in **Jitendra Singh (supra)** was directed to frame a policy in regard to grant of arms licence and for action against the persons

with criminal antecedents possessing the arms licenses.

27. It would also be apposite to refer to some of the similar concerns voiced by a learned Single Judge of this Court in ***Hari Shanker Vs. State of U.P. and others7:***

"7. The Arms Act provides for a procedure for grant of licence for the fire arm. If the licensing authority is satisfied under Section 13(3)(c) of the Act that a person, who has applied for the licence, has good reason to obtain for the same, he may grant licence. In other case, the licensing authority may reject the application. The subjective satisfaction of the District Magistrate in such case cannot be put to any straight jacket formula.

8. The Court takes judicial notice of the fact that in the State of U.P., lakhs of fire arms licences have been conceded by indiscriminate grant to the persons for asking, including those who have affiliations to political parties and also those who have long criminal records. The Court also takes judicial notice of the fact that the persons, possessing fire arm licences are displaying these fire arms openly in public places including schools, colleges, hospitals, Courts, railway platforms and other places which creates a sense of fear in the society. The possession of a fire arm has become a source of forced respect and acquisition of power in the society.

9. The licensing authorities have granted licences virtually to everyone who applies to them to possess the fire arm. The peaceful existence of the citizens in the society is threatened by such reckless executive action. It is often found that the licensing authorities are not exercising their powers for the purposes for which it is given to him.

10. A person may need a licence for his self defence or for the defence of his property. The nature of the job of the person may also require him to possess the fire arm. In all such cases the facts, which constitute the special circumstances, are to be examined by the licensing authority. These circumstances need not be put to any objective test. There may be cases where a person may be the witness of a heinous/crime and is under threat or the nature of his occupation may require him to keep the fire arm. The licensing authority must also look into the back-ground and character of the person, and the type of fire arm required by such person before grant of licence. The fact, that a person is a contractor and alleges to have some unspecified enmity, is not a sufficient ground to grant fire arm licence.

11. The writ petition is dismissed with observations that the State Government shall issue necessary directions to all the licensing authorities to strictly adhere to the provisions of the Arms Act for grant of fire arm licences and make obligatory for all the licensing authority to give adequate and special reasons based on material on record for such grant or the renewal of existing licences."

28. Observations to similar effect were made in ***Parvez Ahmad Vs. State of U.P. and others8.***

29. Stage is now set to examine the relevant provisions of the Arms Act, 19599 and the Arms Rules, 201610 relating to grant/refusal of firm arms license.

30. Restrictive nature of the legislative intent regarding acquisition and possession of firearms is evident in Section 3(1) of the Arms Act, 1959 which contemplates that no person shall acquire, have in his possession, or carry any firearm or ammunition unless he holds in this behalf a licence issued in accordance with the provisions of the Arms Act, 1959 and the Rules framed thereunder. The provisions

relating to grant of licenses are contained in Chapter III of the Act.

31. Section 13 of the Act deals with the manner of grant of licenses and is reproduced below:

"13. Grant of licences.—(1) An application for the grant of a licence under Chapter II shall be made to the licensing authority and shall be in such form, contain such particulars and be accompanied by such fee, if any, as may be prescribed.

[(2) On receipt of an application, the licensing authority shall call for the report of the officer in charge of the nearest police station on that application, and such officer shall send his report within the prescribed time.

(2A) The licensing authority, after such inquiry, if any, as it may consider necessary, and after considering the report received under sub-section (2), shall, subject to the other provisions of this Chapter, by order in writing either grant the licence or refuse to grant the same:

Provided that where the officer in charge of the nearest police station does not send his report on the application within the prescribed time, the licensing authority may, if it deems fit, make such order, after the expiry of the prescribed time, without further waiting for that report.]

(3) The licensing authority shall grant--

(a) a licence under section 3 where the licence is required—

(i) by a citizen of India in respect of a smooth bore gun having a barrel of not less than twenty inches in length to be used for protection or sport or in respect of a muzzle loading gun to be used for bona fide crop protection: Provided that where having regard to the circumstances of any case, the licensing authority is satisfied that a muzzle loading gun will not be sufficient for crop protection, the licensing authority may grant a licence in respect of any other smooth bore gun as aforesaid for such protection, or

(ii) in respect of a point 22 bore rifle or an air rifle to be used for target practice by a member of a rifle club or rifle association licensed or recognised by the Central Government;

(b) a licence under section 3 in any other case or a licence under section 4, section 5, section 6, section 10 or section 12, if the licensing authority is satisfied that the person by whom the licence is required has a good reason for obtaining the same."

32. Section 14 of the Act provides for refusal of licenses and speaks thus:

"14. Refusal of licences.—(1) Notwithstanding anything in section 13, the licensing authority shall refuse to grant—

(a) a licence under section 3, section 4 or section 5 where such licence is required in respect of any prohibited arms or prohibited ammunition;

(b) a licence in any other case under Chapter II,—

(i) where such licence is required by a person whom the licensing authority has reason to believe--

(1) to be prohibited by this Act or by any other law for the time being in force from

acquiring, having in his possession or carrying any arms or ammunition, or

(2) to be of unsound mind, or

(3) to be for any reason unfit for a licence under this Act; or

(ii) where the licensing authority deems it necessary for the security of the public peace or for public safety to refuse to grant such licence.

(2) The licensing authority shall not refuse to grant any licence to any person merely on the ground that such person does not own or possess sufficient property.

(3) Where the licensing authority refuses to grant a licence to any person it shall record in writing the reasons for such refusal and furnish to that person on demand a brief statement of the same unless in any case the licensing authority is of the opinion that it will not be in the public interest to furnish such statement."

33. The scheme of the provisions of the Arms Act, 1959 for grant and refusal of firearms licences was analysed by a learned Division Bench of this Court in ***State of U.P. and others Vs. Mahipat Singh11*** thus:

"16(3)....Clause (a) of sub-section (1) of Section 14 would thus indicate that a licence under Section 3, Section 4 or Section 5 shall be refused where it is required in respect of any prohibited arms or prohibited ammunition. In any other case under Chapter-II, a licence shall be refused where the licensing authority has reason to believe that the person who requires a licence is prohibited by the Act or by any other law from acquiring, having in his possession or carrying any arms or ammunition; or that he is of unsound mind or unfit for any reason for a licence under the Act. Similarly, a licence shall be refused where the licensing authority deems it necessary for the security of the public peace or public safety to refuse the grant of such licence. In other words, the effect of Section 14 is to provide a catalogue of circumstances in which notwithstanding anything in Section 13, a licence shall be refused. This does not mean that in all other cases a licence must necessarily be granted. Section 14 specifies the grounds when a licence shall be refused, but even otherwise, under Section 13, the licensing authority is duty bound to apply its mind to all the relevant facts and circumstances in determining as to whether the licence should be granted or refused. In those cases which would fall within the ambit of Section 14, the licensing authority must necessarily refuse the licence."

34. Provisions of the Rules which have a bearing on the issue shall now be discussed.

35. Rule 11 of the Rules provides for the application for grant of license and its contents. The application has to be submitted in various statutory forms Form A1 to A14 as applicable to the category of license applied. Necessary information has to be disclosed in the application and the same has to be accompanied by supporting documents required for processing the application. Rule 11 also mandates the applicant not to suppress any factual information or furnish any wrong information in the application form. Column 18 to Form A1 requires the applicant to detail claims for special consideration for obtaining the license.

SCHEDULE III

PART II

Application Forms

Form A-1

(for individuals)

Forms of application for an arms license in Forms II, III and IV

(see Rule 11)

18	Claims for special consideration for obtaining the license, if any (attach documentary evidence)	

Declaration:

I hereby declare that the above particulars given in the application are true, complete and correct to the best of my knowledge and belief. I understand that in the event of any information being found false or incorrect at any stage, I am liable to be proceeded against and action taken under the relevant provisions of the Arms Act, 1959, the Arms Rules, 2016, and other central enactments or the law for the time being in force.

Place.....

Date..... Signature/Thumb-Impression of applicant

36. Rule 12 of the Rules cites the obligations of the licensing authority granting a license. The provision also details categories of persons whose application for grant of licence may be considered:

"12. Obligation of licensing authority in certain cases.-

(2) For grant of a license for the restricted arms or ammunition specified in Category I(b) and I(c) in Schedule I, the licensing authority, may consider the application of-

(a) any person who faces grave and anticipated threat to his life by reason of-

(i) being resident of a geographical area or areas where militants terrorists or extremists are most active; or

(ii) being the prime target in the eyes of militants, terrorists or extremists; or

(iii) facing danger to his life or being inimical to the aims and objectives of the militants, terrorists or extremists; or

(b) any Government official who by virtue of the office occupied by him or by the nature of duty performed by him and / or in due discharge of his official duty is exposed to anticipated risk of his life; or

(c) any Member of Parliament or Member of Legislative Assembly, who by virtue of having close or active association with anti-militant, anti-terrorist or anti-extremist programmes and policies of the Government or by mere reason of holding views, political or otherwise, exposed himself to anticipated risk of his life; or

(d) any family member or kith and kin of a person who by the very nature of his duty or performance (past or present) or position occupied in the Government (past or present) or even otherwise for known or unknown reasons exposed himself to anticipated rise to his life; or

(e) any other person, for any legitimate and genuine reason, to the satisfaction of the licensing authority, by passing of a speaking order in this regard:

Provided that before grant of a license under this sub-rule, the licensing authority based on the recommendations of the District Magistrate and of the State Government concerned and on examination of the police report and after conducting a separate verification from its own source, shall satisfy itself that the applicant requires such licence.

(3) For grant of license for the permissible arms or ammunition specified in Category III in Schedule I, and without prejudice to the provisions contained in clause (a) of sub-section (3) of Section 13, the licensing authority, based on the police report and on his own assessment, may consider the applications of-

(a) any person who by the very nature of his business, profession, job or otherwise has genuine requirement to protect his life and/ or property; or

(b) any dedicated sports person being active members for the last two years, of a shooting club or a rifle association, licensed under these rules and who wants to pursue sports shooting for target practice in a structured learning process; or

(c) any person in service or having served in the Defence Forces, Central Armed Police Forces or the State Police Force and has genuine requirement to protect his life and/ or property."

37. Regime for grant of arms licence so envisaged in the Act and the Rules framed thereunder was construed by this Court in ***State of U.P. Vs. Mahipat Singh (supra)*** in the following manner:

"16...In considering the grant of a licence, the authority is duty bound to consider such facts as may be personal to the applicant as well as the impact of the grant of the licence on the safety and security of others which may be impinged by the grant of the licence. Ultimately, the governing test is whether the public interest in the maintenance of law and order and public peace or safety would be enhanced or retarded by the grant of a fire-arm licence.

17. Hence, the scheme of the Act and the Rules indicates that a wide discretion has been given to the licensing authority while deciding applications filed for grant of licences and it is not possible to subscribe to the broad general proposition which has found favour with the learned Single Judge.

18. Undoubtedly, the licensing provisions of the Act would require that the power which is vested in the competent authority to grant or refuse the grant of a licence must not be exercised arbitrarily or whimsically but for just and sound reasons. The maintenance of law and order and public peace and safety is the responsibility of the State. The grant of a licence for a fire-arm is governed by the licensing provisions which are contained in the Act. A citizen cannot assert a right to hold a fire-arm. In every case where an application for the grant of a licence is made, the authority is duty bound to examine whether sufficient ground has been made out for grant of a licence. The discretion which is conferred upon the statutory authorities cannot be confined to fixed categories."

38. Though **State of U.P. V. Mahipat Singh (supra)** was rendered prior to Rules. However in light of the scheme of the Rules, the exposition of law in **State of U.P. Vs. Mahipat Singh (supra)** continues to be applicable to the amended Rules as well.

39. Government Order dated 08.11.2018 prescribes that apart from holders of certain offices, persons who have a requirement on account of threats to their lives are entitled to have their applications for grant of arms licenses considered. Relevant extracts of the Government Order dated 08.11.2018 are reproduced below:

"तद्दोपरान्त मा० उच्च न्यायालय, लखनऊ खण्डपीठ लखनऊ के आदेश दिनांक 28.11.2017 के अनुपालन में जारी शासनादेश संख्या-5/2018/रिट-100/छः-पु-5-2018-रिट-401/2012 दिनांक 08.11.2018 के पैरा 02 के बिन्दु संख्या (1) व (2) में नवीन शस्त्र लाइसेंस निर्गत हेतु स्पष्ट किया गया हैः-

बिन्दु संख्या-(1) के अनुसार व्यक्तिगत शस्त्र लाइसेंसों की अनुज्ञप्ति जारी करने के सम्बन्ध में आयुध नियमावली, 2016 में वर्णित प्राविधानो के अनुसार आवश्यक कार्यवाही सुनिश्चित की जाय।

बिन्दु संख्या- (2) में अनुसार व्यक्तिगत शस्त्र लाइसेंसों की अनुज्ञप्ति जारी करते समय निम्नलिखित श्रेणियों के आवेदकों को वरीयता प्रदान की जाय-

1- अपराध पीडित।

2- वरासतन।

3- व्यापारी/उद्यंमी।

4- बैंक/संस्थागत/वित्तीय संस्थायें।

5- विभिन्न विभागो के ऐसे कर्मी जो प्रवर्तन कार्य में लगे है।

6- सैनिक/अर्धसैनिक/पुलिस बल के कर्मी।

7- एम०एल०ए०/एम०एल०सी०/एम०पी०। 18

8- राज्य/राष्ट्रीय/अन्तर्राष्ट्रीय स्तर के निशानेबाज।

आयुध नियमावली- 2016 के बिन्दु संख्या-12 कतिपय मामलों में अनुज्ञापन प्राधिकारी की बाध्यताए में उल्लेख किया गया है कि - (1) अधिनियम में अन्यथा उपबंधित प्रत्येक अनुज्ञापन प्राधिकारी उपनियम (2) या उपनियम (3) में विनिर्दिष्ट मानकों के आवेदन को सम्यक ध्यान में रखते हुये अनुसूची 1 के क्रमशः प्रवर्ग 1-ख औ 1-ग या प्रवर्ग 3 में यथा विनिर्दिष्ट निर्बन्धित या अनुज्ञेय आयुध या गोला बारूद के लिये किसी व्यष्टि को प्रारूप 3 में अनुज्ञपति प्रदान करेगा।

18(2) अनुज्ञापन प्राधिकारी अनुसूची 1 में प्रवर्ग 1ख और 1ग में विनिर्दिष्ट निर्बन्धित आयुध या गोला बारूद के लिये किसी अनुज्ञपति को प्रदान करने के लिये आवेदन में निम्नलिखित विचार कर सकेगा- (क) अनुज्ञापन प्राधिकारी अनुसूची 1 में प्रवर्ग 1 ख और 1 ग में विनिर्दिष्ट निर्बन्धित आयुध या गोला बारूद के लिये किसी अनुज्ञप्ति को प्रदान करने के लिये आवेदन में निम्नलिखित विचार कर सकेगा-

(I) किसी भौगोलिक क्षेत्र या क्षेत्रों का निवासी जहां उग्रवाद, आतंकवाद या चरमपंथी अत्यधिक सक्रिय हैः या

(II) उग्रवादी, आतंकवादी या चरमपंथियों की दृष्टि में प्रमुख लक्ष्य के रूप में हैः या

(III) उग्रवादियों, आतंकवादियों या चरमपंथियों के लक्ष्यों और उद्देश्यों के लिये विरोधी होने के कारण उसके जीवन को खतरा उत्पन्न हो गया हैः या

(ख) कोई सरकारी पदधारी जो अपने पद धारण 18करने के आधार पर उसे या उसके द्वारा पालन किये जा रहे कर्तव्यों के प्रकृति के अनुपालन में और/या अपने पदीय कर्तव्यों के सम्यक निर्वहन में

उसके जीवन में संभावित जोखिम होने का प्रा कटय हैः

(ग) कोई संसद या विधान सभा सदस्य जो उग्रवाद रोधी, आतंकवाद रोधी या चरमपंथी रोधी कार्यक्रमों में निकट या सक्रिय रूप से सहबद्ध होने के द्वारा और सरकारी नीतियों या राजनैतिक या अन्यथा मत रखने के कारण उसके जीवन में संभावित जोखिम के लिये प्राकटय हैः या

(घ) कोई व्यक्ति जो अपने कर्तव्यों की प्रकृति या अनुपालन (भूत या वर्तमान) या सरकार में पद धारण करने की तिथि (भूत या वर्तमान) या अन्यथा कोई ज्ञात या अनुज्ञात के लिये उसके जीवन में कोई संभावित जोखिम में डालता है या कोई कुटुंब का सदस्य या संबंधी या रक्त संबंधीः या

(ड़) कोई व्यक्ति किसी विधि सम्मत या वास्तविक कारणों के लिये अनुज्ञापन प्राधिकारी के लिये समाधान होने पर उस सम्बन्ध में सकारण आदेश पारित करेगाः

परन्तु इस उपनियम के अधीन कोई अनुज्ञप्ति प्रदान करने के पूर्व अनुज्ञापन प्राधिकारी, जिला मजिस्ट्रेट संबंद्ध राज्य सरकार की सिफारिशों पर आधारित और पुलिस रिपोर्ट की परीक्षा पर तथा अपने श्रोत से पृथक सत्यापन कराने के पश्चात अपना समाधान होने पर कि आवेदक को ऐसी अनुज्ञप्ति की अपेक्षा है।""

40. The scheme of the Act read with the Rules, the Government Order dated 08.11.2018 and holdings of this Court in **Jitendra Singh (supra)** create a framework of arms licensing in the State of U.P. which is not permissive in nature but restrictive in its operation.

41. The judgements cited at the Bar by Sri Sanjeev Kumar Pandey learned counsel for the petitioner have been rendered by learned Single Judges' of this Court and need full consideration.

42. In **Ram Chandra Yadav Vs. State of U.P. and another12** the learned Single Judge opined as follows:

"9. A perusal of the impugned order shows that the grounds on which the respondent No.2 has refused the licence to the petitioner are that he had no enemies, that there was no special requirement of petitioner to possess a fire-arm licence and that his need was not genuine. The reasons given in the impugned order for refusing the licence to the petitioner are not covered by any of the grounds given in section 14 of the Act on which the licence may be refused. In my opinion the respondent No.2 failed to consider and decide the petitioner's application for grant of fire-arm licence keeping in view the provisions of section 14 of the Act and rejected the petitioner's application arbitrarily which has rendered his order totally unsustainable."

43. The possession of a firearm for personal safety and security was construed as a mode of realizing the fundamental right of life and liberty under the Constitution of India by a learned Single Judge in **Arvind Kumar Vs. State of U.P and others13** and in **Brij Nandan Singh Vs. State of U.P. and others14**. The holdings of the learned Single Judge in **Arvind Kumar (supra) and Brij Nandan Singh (supra)** are identically worded and are reproduced below:

"20. A fire arm licence cannot be denied only on conjectures and surmises and without appreciating the objective of statute under which the power is being exercised. Right to life and liberty which includes within its ambit right of security and safety of a person and taking, adopting and pursuing such means as are necessary for such safety and security, is a fundamental right of every person. Keeping a fire arm for the purpose of personal safety and security is a mode and manner of protection of oneself and enjoyment of fundamental right of

life and liberty under Article 21 of the Constitution. In the interest of maintenance of law and order certain reasonable restrictions have been imposed on such right but that would not make the fundamental right itself to be dependant on the vagaries of executive authorities. It is not a kind of privilege being granted by Government to individual but only to the extent where grant of fire arm licence to an individual would demonstratively prejudice or adversely affect the maintenance of law and order including peace and tranquillity in the society, ordinarily such right shall not be denied. It is in these circumstances, this Court has observed that grant of fire arm licence ordinarily be an action and denial an exception. In Vinod Kumar Shukla Vs. State of U.P. and others, (Writ Petition No. 38645 of 2011), decided on 15.07.2011 this Court has said:

"When a fire arm licence is granted for personal safety and security it does not mean that in the family consisting of several persons only one fire arm licence is to be granted. Moreover, this cannot be a reason for denial of arm licence. Fire arm licence can be denied only if the reason assigned by applicant or details given by him in application are not found to be correct but merely because there are one fire arm licence already possessed by one of the family member, the same cannot be denied. Grant of fire arm licence should ordinarily be an action and denial should be an exception. The approach of authorities below is clearly arbitrary and illegal. It also lacks purpose and objective of the statute."

44. The judgements rendered by the respective learned Single Judges' in **Bhoore Singh Vs. State of U.P. and another15, Indal Singh Vs. State of U.P. and another16, Kammod Vs. State of U.P.17** considered the issue of rejection of application for fire arm license on the ground that there "there is no threat perception." Following the rulings of this Court in **Ram Chandra Yadav (supra)** and **Brij Nandan Singh (supra),** the learned Single Judges' in **Bhoore Singh (supra), Indal Singh (supra)** and **Kammod Singh (supra)** Judges' invalidated the denial of arms license on the ground that there was no threat perception against the petitioner. The licensing authorities were thus mandamused, in all the aforesaid judgments:

"In view of the above consideration, it is clear that none of the grounds mentioned for rejecting the application of the petitioner for grant of fire arm license are covered by Section 14 of the Arms Act.

The order dated 27.4.2019 passed by District Magistrate, Mainpuri, is hereby quashed.

The Licensing Authority is directed to issue the fire arms license sought by the petitioner, within a period of three weeks, from the date of production of copy of this order.

The writ petition is allowed."

45. The same controversy arose for consideration before a learned Single Judge in **Mahipat Singh Vs. State of U.P. and others18,** wherein too the licensing authority had rejected the application for arms licence on the sole footing that there was no perception of threat to life of the petitioner. Holding such reasoning of the licensing authority to be erroneous, the learned Single Judge in **Mahipat Singh (supra)** stated:

"The court held that a licence can be granted for right to life and liberty which includes within its ambit right of security and safety of a person being a fundamental right. The petitioner was entitled to get a fire arm for the purpose of personal safety and security. The court also held that the order passed by the

District Magistrate was based on surmises and conjectures.

Inspite of this direction, the District Magistrate again rejected the application vide an order dated 6.1.2012 holding that the petitioner does not have any threat to his life.....

..... The court finds that the observation made by the writ court in its judgment dated 11.10.2011 has not been adhered to by the District Magistrate. The District Magistrate was bound by such observations and could not ignore such observations. By ignoring such observations the District Magistrate became guilty of contempt of the court.

In the instant case, the District Magistrate has mechanically, without any application of mind and without considering the observations of the writ court has again passed an order rejecting the petitioner's application for grant of an arms licence solely on the ground that there was no perception of threat to the life of the petitioner. Such reasoning adopted by the respondent is patently erroneous and against the provisions of Section 14 of the Arms Act. Even otherwise, the court finds that sufficient reasons have come on record to indicate the fear of the petitioner of his life where his real brother was murdered by some assailants, and that, by itself, is a sufficient ground. It is not necessary that the petitioner should intimate the District Magistrate the name of the persons against whom he has a threat. It is sufficient for the petitioner to indicate the reasons."

(emphasis supplied)

46. The judgment of the learned Single Judge of **Mahipat Singh (supra)** carried in appeal by the State and was registered as **Special Appeal No.62 of 2014, State of U.P. and others Vs. Mahipat Singh19.** The learned Division Bench in **State of U.P. and others Vs. Mahipat Singh (supra)** set aside the judgment of the learned Single Judge rendered in **Mahipat Singh (supra)** and dismissed the writ petition.

47. The learned Division Bench in **State of U.P. and others Vs. Mahipat Singh (supra)** found that the District Magistrate justifiably inferred that there was no danger to life and liberty of the respondent and that such findings recorded by the District Magistrate are not perverse by holding :

"22. The District Magistrate, in our view, justifiably inferred that there was no danger to the life or liberty of the respondent as the disclosure of such information was necessary to enable the District Magistrate to decide whether a case for the grant of a licence had been made out. The District Magistrate, while passing the order dated 29 August 2013, also observed that the incident in which the brother of the respondent had been murdered had taken place in 2007 which was nearly six years earlier and the respondent had not placed any material to indicate that during this period of over six years there was any basis or foundation to infer a threat perception to his life. It cannot, therefore, be said that the findings recorded by the District Magistrate are perverse.

23. The learned Single Judge has held that the reasons which weighed with the District Magistrate are patently erroneous and against the provisions of Section 14 of the Act. This conclusion of the learned Single Judge is not correct. Whether there is a perception of threat to the security of a citizen, is a matter which has to be considered by the licensing authority. The learned Single Judge has erred in substituting his opinion about a perception of threat with that of the of District Magistrate. We must hasten to add that in a case where discretion is conferred on a public authority to grant or refuse a licence to hold a firearm, the scope of judicial review is limited. The Court has to consider whether any

irrelevant or extraneous consideration has been taken into account by the authority and or if it ignored relevant, valid and germane matters. In a case like the present, where the relevant circumstances have been taken in consideration and no extraneous considerations were taken into account, it would be outside the purview of judicial review of the Court to substitute its own opinion with the opinion of the licensing authority.

(emphasis supplied)

24. For the aforesaid reasons, we are of the view that the order which was passed by the District Magistrate was manifestly in accordance with law and did not call for any interference by the learned Single Judge in the exercise of the writ jurisdiction under Article 226 of the Constitution."

48. The learned Division Bench in **State of U.P. and others Vs. Mahipat Singh (supra)** relied on high authority of this Court to reiterate that the fundamental right of life and liberty vouchsafed by Article 21 of the Constitution Of India did not bring the right to hold a firearm within its embrace.

49. The legal position which can be distilled from the preceding narrative is this. The learned Single Judges' in **Ram Chandra Yadav (supra), Bhoore Singh (supra), Indal Singh (supra), and Mahipat Singh (supra)** essentially held that refusal of an arms license on the foot that the applicant did not face any threat to life and property was arbitrary and illegal. The said judgments then mandamused the licensing authority to grant the arms license. It also follows from these decisions that denial of an arms license is not an option with the licensing authority when it finds that there is no threat to an applicant's life and property.

50. The entitlements so created in favour of an applicant for an arms license virtually negated the discretion vested in the licensing authority by law. The restrictive conditions for grant of firearm license created by legislative enactments and government policy, yielded to a liberal regime espoused in court rulings. This position of law created by the said judgments entered by learned Single Judges' was reversed by the proposition of law propounded by the learned Division Bench in **State of U.P. Vs. Mahipat Singh (supra).**

51. The learned Division Bench by its judgment in **State of U.P. Vs. Mahipat Singh (supra**) restored the discretion of the licensing authority vested in it by statute and policy. The limited scope of the judicial review in such matters is reiterated. Primacy is given to the threat assessment made by the competent authorities. Absence of danger to life and liberty of an applicant for firearms license, can be a valid and lawful reason for refusal of the firearm license. As a sequitor, lack of genuine requirement may result in denial of an arms license. Mere desire to hold an arms license is distinguishable from a genuine requirement to possess a firearm. It is the latter requirement that has to be enquired into by the licensing authority.

52. However the above holding in **State of U.P. Vs. Mahipat Singh (supra)** was caveated by emphasizing that the discretion of the licensing authority cannot be exercised arbitrarily. A perverse or an illegal decision of the authority can be judicially reviewed.

53. These illustrative examples will help. Special consideration claimed for obtaining license like threats arising from the very nature of business, profession, job or otherwise has to be clearly stated by the applicant in the application form. The same should be specifically enquired into and reflected in police reports and ought to be searchingly examined by the licensing authority. Vitiated threat

appreciations or where specific threats are ignored by the police authority must also be duly scrutinized by the licensing authority.

54. The order declining the application for arms should reflect due application of mind to all relevant considerations.

55. The judgements rendered by the learned Single Judges' in **Ram Chandra Yadav (supra), Bhoore Singh (supra), Indal Singh (supra**) and **Kammod (supra), Brij Nandan (supra), Arvind Kumar (supra), Kailash Nath (supra)** and **Rana Pratap (supra)** are contrary to law laid down by the learned Division Bench in **State of U.P. Vs. Mahipat Singh (supra).** The judgment of the learned Division Bench rendered in **State of U.P. Vs. Mahipat Singh (supra)** relevant provisions of the Arms Act, 1959, the applicable Arms Rules and the Government Order dated 08.11.2018 were not referred to the learned Single Judges' in **Bhoore Singh (supra), Indal Singh (supra), Kammod Singh (supra).** Hence all the said Single Judges' judgments are per incuriam and do not constitute binding precedents.

56. The impugned order shall now be considered in light of above narrated legal and constitutional perspectives established by various judgments of this Court.

57. The impugned order dated 05.07.2021 passed by the licensing authority as seen earlier records that the petitioner does not fall in the category of various persons who are entitled to arms license by virtue of the office they hold and the duties they discharge. The threat assessment to the life and property of the petitioner was made by professional police agencies. According to the police authorities, the petitioner does not face any danger to his life and property. The licensing authority agreed with the recommendation of the police authorities to deny the arms license to the petitioner. The licensing authority then recorded its independent satisfaction on the issue. The said line of enquiry led the licensing authority to find that the petitioner did not have a genuine requirement of an arms license.

58. In the wake of such findings the licensing authority rejected the application for grant of arms license.

59. The material before the licensing authority was of a credible nature. No challenge has been laid to impeach the credibility of the material before the licensing authority including the police reports and reports of the revenue authority. The impugned order reflects due application of mind to all relevant considerations.

60. The order passed by the licensing authority is well reasoned. No special requirement for obtaining the license which was claimed but overlooked has been brought out in the pleadings or shown from the records. A point needs to be noted. The petitioner pleads in the writ petition that he is a grain merchant and has appended his application form. However the column pertaining to occupation has been left blank in the said application form. Perversity in the findings or procedural impropriety while passing the impugned order are not disclosed from the pleadings and the records. The conclusions reached by the licensing authority are reasonable. The impugned order is consistent with the mandate of the Act and the Rules requirements of the Government Order dated 08.11.2018. The impugned order also accords well with the law laid down by Division Bench of this Court in **Jitendra Singh (supra)**, and also the pronouncement of the learned Division Bench in **State of U.P. and others Vs. Mahipat Singh (supra).**

61. There is no infirmity in the impugned order dated 05.07.2021.

62. The writ petition is liable to be dismissed and is dismissed.

(2021)11ILR A617
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.10.2021

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.

Writ C No. 29878 of 2010

Smt. Savita ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rishi Kant Rai, Sri P.K. Rai

Counsel for the Respondents:
C.S.C., Sri Anuj Kumar

A. Civil Law - U.P. Zamindari Abolition and Land Reforms Act, 1950 – Sections 142, 143, 157-A & 331-A – Land purchased from persons belonging to Scheduled Castes – No permission u/s 157A was taken – Nature of land – Determination thereof, whether it is abadi land or agricultural land – Requirement of referring matter for a decision as to whether the land was agricultural or it was abadi – No reference was made – Consequence – Held, the Court dealing with the case was duty bound to refer the matter under Section 331A of the Act of 1950 for framing an issue as to whether the land was of an agricultural nature or not and thereafter an adjudication was to be made by the Assistant Collector Incharge as to what exactly was the nature of the land – High Court set aside the impugned order, which declared the sale-deed null and void and vested the property in State. (Para 4 and 5)

Writ petition allowed. (E-1)

Cases relied on :-

1. Haroon Ahmad & anr. Vs St. of U.P. & ors.; 2012 (4) ADJ 179

2. Lalita Singh Vs St. of U.P. & ors.; 2017 LawSuit(All) 2749.

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

1. The petitioner purchased 275 Sq. Metres of land in Plot No.369 from Jaipal, Harpal and Bhopal sons of Late Sri Jahariya by a sale-deed dated 19.07.2008. Thereafter a notice was issued to the petitioner asking her to explain as to why the sale-deed be not considered null and void and her property be vested in the State as the property was purchased by the petitioner from persons belonging to Scheduled Castes and no permission under Section 157A of the U.P. Zamindari Abolition and Land Reforms Act, 1950 (hereinafter referred to as "Act of 1950") was taken. By the order dated 23.05.2009, the sale-deed of the Plot No.369 Area 275.80 Sq. Metres was declared null and void and the property was vested in the State. Petitioner thereafter filed a Revision and when the Revision was also dismissed, the instant writ petition has been filed.

2. Learned counsel for the petitioner has made the following submissions:-

(i) Petitioner did not receive any notice before the initiation of the case by which the land was to be vested in the State under Sections 166/167 of the Act of 1950.

(ii) Petitioner has submitted that before the Courts below, she had stated that the Plot when was purchased, was in the shape of abadi and that the stamp duty which was levied on the sale-deed, was also such as was leviable on a property of commercial nature.

(iii) It has been submitted by the learned counsel for the petitioner that before the Revisional Court, it was vehemently argued that as per the provisions of Section 331A of the Act of 1950, the question as to whether the property was agricultural or abadi had to be considered by the Assistant Collector and only thereafter it

could be ascertained as to whether the land was of an agricultural nature or it was an abadi.

(iv) Learned counsel for the petitioner further submitted that if the land in question was abadi then the provisions of Section 157A of the Act of 1950 would not apply.

(v) Learned counsel for the petitioner submitted that when a bhumidar with transferable rights has been given the right to use the land in the manner as is proper under Section 142 of the Act of 1950 then it could not be said that when there was no declaration under Section 143 of the Act of 1950, the land had continued to be an agricultural land, despite the fact that it was being used as Abadi.

(vi) It has further been submitted that the method of conversion of a land from agricultural to abadi was not confined only to the provisions of Section 143 of the Act of 1950. He submits that if a controversy arose in any proceeding before a Court that whether the land was agricultural or it was abadi and a definite case was made out that there was a dispute with regard to the land being abadi or agricultural then the only course open to the Court was to refer the matter under Section 331A of the Act of 1950 to the Assistant Collector In-charge of the Sub-Division for a decision as to whether the land was agricultural or it was abadi.

(vii) In support of his submissions, learned counsel for the petitioner relied upon the judgements of this Court passed in ***Haroon Ahmad and Another Vs. State of U.P. and Others*** reported in ***2012 (4) ADJ 179*** and ***Lalita Singh Vs. State of U.P. and Others*** reported in 2017 ***LawSuit(All) 2749.***

(viii) Learned counsel for the petitioner, therefore, submits that in the absence of any reference being made to the Assistant Collector In-charge of the Sub-Division under Section 331A of the Act of 1950, the Courts below erred in holding that the land was an agricultural one. Under such circumstances, he submits that the orders impugned cannot be sustained in the eyes of law and are liable to be set aside.

3. Learned Standing Counsel, however, in reply submitted that as no declaration with regard to the fact that the land was abadi was made under Section 143 of the Act of 1950 then definitely the land had to be treated as agricultural and when there was no permission taken by the purchasers as also by the sellers, the sale-deed had to be declared void and the land had to be vested in the State.

4. Having heard the learned counsel for the petitioner and the learned Standing Counsel for the State-Respondents and also after going through the judgements cited above, this Court is of the view that when during any proceeding a controversy arises as to whether a particular land is a land which is of agricultural nature as is defined under Section 3(14) of the Act of 1950 or whether it was an abadi and when there was no declaration under Section 143 of the Act of 1950 then the Court dealing with the case was duty bound to refer the matter under Section 331A of the Act of 1950 for framing an issue as to whether the land was of an agricultural nature or not and thereafter an adjudication was to be made by the Assistant Collector In-charge as to what exactly was the nature of the land. In the absence of any reference by the relevant authority to the Assistant Collector and in the absence of any decision by the Assistant Collector, this Court is of the view that the orders impugned cannot be sustained in the eyes of law and are liable to be set aside.

5. The writ petition is, accordingly, allowed. The orders dated 11.09.2009 passed by Additional Commissioner, Meerut Division, Meerut in Revision No.62/2008-09, Smt. Savita

Vs. State of U.P. and Others and the order dated 23.05.2009 passed by Additional Collector (Administration), Meerut in Case No.8, under Sections 166/167 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 are set aside.

(2021)11ILR A619
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.10.2021

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE MRS. SADHNA RANI (THAKUR), J.

Writ C No. 45366 of 2017
connected alongwith
Writ C No. 50958 of 2017

Smt. Sushma Devi & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Sanjeev Singh, Sri Pramod Kumar Srivastava, Sri Shashi Nandan

Counsel for the Respondents:
C.S.C., Sri Madan Mohan Srivastava, Sri Ashok Khare

A. Municipal Law – Executive decision – Scope of Judicial review –Interference, when warranted – Held, it is settled principle that within the limited scope of the judicial review, the decision of the Executives cannot be overturned on the basis of that being an incorrect decision – The Court will be slow to interfere in such matters relating to administrative functions unless decision is tainted by any vulnerability like illegality, irrationality and procedural impropriety – Satisfaction of the authority can be interfered with only if the satisfaction recorded is demonstratively perverse based on no evidence, misreading of evidence or which a reasonable man could not form or that the person concerned was not given due opportunity resulting in prejudice. (Para 14 and 15)

B. Municipal Law – Constitution of India – Article 243-Q and 243-X – UP Municipalities Act, 1916 – S. 3(2) – GO dated 10.11.2014 – Upgradation of the Nagar Panchayat to Nagar Palika Parishad – Relevant criteria – Application – The percentage of employment in non-agricultural activities and the economic importance are also the important factors which have to be taken into consideration by the Governor for upgradation of the transitional area to an urban area – Held, from the material on record and even from the stand of the petitioners herein, it cannot be said that the Nagar Panchayat Bharwari which was a transitional area had not seen changes/increase in the population, revenue generation, employment opportunities and economic activities during the course of time. (Para 17)

Writ petitions dismissed. (E-1)

Cases relied on :-

1. State of NCT of Delhi & anr. Vs Sanjeev @ Bittoo; (2005) 5 SCC 181

(Delivered by Hon'ble Mrs. Sunita Agarwal, J.
&
Hon'ble Mrs. Sadhna Rani (Thakur), J.)

1. Heard Sri Sanjeev Singh, Sri Pramod Kumar Srivastava, Sri Rama Shanker Mishra learned Advocates for the petitioners, Sri Manish Goel learned Additional Advocate General assisted by Sri A.K. Goel learned Additional Chief Standing Counsel for the State-respondents, Sri Madan Mohan Srivastava learned Advocate for the Nagar Palika Parishad and perused the record.

2. By means of the abovenoted writ petitions, the petitioners seek for quashing of the notification dated 26.10.2016 issued under Section 4 of the Uttar Pradesh Municipalities Act, 1916 (hereinafter referred to as "the Act,

1916"); alongwith the decision for rejection of their objections dated 13.1.2017 as also the final notification issued under sub-section (2) of Section 3 of the Act, 1916.

Further prayer is to issue a mandamus commanding the respondents not to treat the Nagar Panchayat Bharwari, Kaushambi as upgraded Nagar Palika Parishad, Bharwari, Kaushambi as the conditions of the Government Order dated 10.11.2014 had not been met while issuing the final notification under Section 3(2) of the Act, 1916.

The petitioners herein (in both the writ petitions) are mostly Gram Pradhans of the respective Village Panchayat and some are villagers of different villages.

3. The challenge to the notification for upgradation of the Nagar Panchayat to Nagar Palika Parishad is based on the plea of violation of the mandatory conditions of the Government Order dated 10.11.2014.

4. It is argued by Sri Sanjeev Singh, Sri Pramod Kumar Srivastava and Sri Rama Shanker Mishra learned Advocates for the petitioners that the Government Order dated 10th November, 2014 had been issued for laying down the criteria for categorization of the Nagar Palika Parishads as well as for upgradation of the Nagar Panchayats to Nagar Palika Parishads. In Para '3(Ka)' of the Government Order, three categories of Nagar Palika Parishads had been provided with the condition for their categorization based on the Annual income, population and density of population per square kilometer of the concerned local body (Nagar Palika Parishad).

The table in Para '3(Kha)' has been placed before us to assert that the decision for upgradation of a Nagar Panchayat to Nagar Palika Parishad would require fulfillment of the criterias in the above noted Para '3' of the Government Order. For determination of the population/density of population, Census of the year 2011 was to be taken into consideration as per Para '5' of the Government Order dated 10.11.2014. As per the aforesaid table provided in Para '3(Ka)' of the Government Order dated 10.11.2014, for category 'III', (which is applicable in the matter of the Nagar Panchayat Bharwari), the minimum yearly income as required was Rs. 60 Lacs to Rs. 1.75 crores and the minimum population criteria was more than 1 Lac and less than 1.50 Lacs whereas the density of the population was minimum 6266 per square kilometer. The upgradation of the Nagar Panchayat to that of the Nagar Palika Parishad could be done only on fulfillment of the above criterias and not otherwise.

It is contended that on a R.T.I. information dated 16.9.2017 received by one person Sri Shankar Lal, it was reflected that the receipt of the Nagar Panchayat, i.e. yearly income of the Nagar Panchayat Bharwari was only Rs. 25,17,140/- for the financial year 2014-15, Rs. 30,23,201/- for the financial year 2015-16 and Rs. 23,09,957/- for the financial year 2016-17. As regards the population, as per the census of the year 2011, the population of the Nagar Panchayat Bharwari was only 98352, less than 1 Lac. As per the final notification dated 1.9.2017 itself, the total area of the Nagar Palika Parishad being 7422.5805 hectares, the density of the population as per census of the year 2011, would be 1325 persons per square kilometers which further supports that the criteria determined in the Government Order dated 10th November, 2014 were not fulfilled. It is then contended that even if, the total population of the Nagar Panchayat Bharwari was taken as 1,08,000 as indicated in the final notification, it could not meet the minimum criteria of density of population being 6266 per square kilometer for upgradation as Nagar Palika Parishad as the population density per square kilometer would

be only approximately 1450 per square kilometers in that case. Apart from above two objections, no other grounds narrated in the writ petition have been pressed before the Court to challenge the notification in question.

5. Sri Manish Goel learned Additional Advocate General assisted by Sri A.K. Goel learned Additional Chief Standing Counsel for the State-respondents, on the other hand, submits that the Government Order dated 10.11.2014 was merely a guideline and the decision of the Governor for upgradation of the Nagar Panchayat to Nagar Palika Parishad is based on all other criterias not only income and population as provided in Article 243-Q(2) of the Constitution of India. Even otherwise, objections were invited from all concerned by issuance of a notification dated 26th October, 2016 under Section 4 of the Act, 1916, which was published in the daily newspaper "Dainik Jagran" on 12th November, 2016 and was also pasted on the 'Notice Board' in the office of the Collector, Kaushambi and the offices of the Tehsils Chayal and Sirathu on 8.11.2016. Number of objections had been received in the office of respondent no. 1 and they were forwarded to the District Magistrate, Kaushambi. Full opportunity was provided to the objectors by the District Magistrate, Kaushambi and by the order dated 14.12.2016, all the objections were decided and forwarded to the respondent no. 1, wherein approval was given on 13.1.2017. The order passed by the District Magistrate, Kaushambi rejecting the objections has also been appended with the writ petition. The final notification, thus, had been issued after disposal of the objections in writing.

It is then contended that all the requirements in respect of the upgradation of the Nagar Panchayat to Nagar Palika Parishad had been fulfilled and the constitution of Nagar Palika Parishad Bharwari, District Kaushambi was for the better development of the area concerned. As regards the plea of the petitioners regarding non-fulfillment of the criteria regarding minimum income of the Nagar Panchayat for upgradation, Article 243-X has been placed before the Court to submit that the income of a 'Municipality' includes its annual income from the levy/collection of the taxes, duties, tolls and fees as also the grant-in-aid received by the Municipality from the consolidated funds of the State or any other funds received by it under the Central sponsored scheme.

The contention is that as per the mandate of Article 243-X, the funds of Municipality is created for crediting all moneys received by or on behalf of the Municipalities. The contention of the petitioners, thus, that yearly income of the Nagar Panchayat Bharwari was below the limit (1.75 crores) is incorrect.

The photo copy of the income chart appended as Annexure C.A.-'7' to the counter affidavit has been placed before the Court to assert that the annual income of the Nagar Panchayat Bharwari for the financial year 2013-14 was Rs. 4,26,85,979/-, year 2014-15 was Rs. 4,51,67,043/- and for the year 2015-16 it was Rs. 4,11,74,242/-, which has been intimated by the Executive Officer, Nagar Panchayat Bharwari, Kaushambi.

6. It is then contended that the information under R.T.I. Act provided by the Clerk of the Accountant was misleading and the concerned Clerk was not competent to provide any information under the R.T.I. Act. Wrong information having been provided on behalf of the Executive Officer, Nagar Panchayat Bharwari, Kaushambi containing incorrect data cannot be believed.

As regards the dispute relating to the population, it is contended that after completion of the due process, the figures pertaining to the

population of the Nagar Panchayat Bharwari had been placed before the State Government. It is lastly contended that only few of the petitioners herein had filed objections which had been dealt with and the issues raised herein had not been raised by them in their objections. The present writ petitions have been filed only with a view to stall the process of upgradation for personal benefit and motivated minds of the petitioners who are making all efforts to save their Pradhanships of the respective villages.

7. Considering the said submissions, we may firstly note the relevant provisions pertaining to the upgradation of the Nagar Panchayat to Nagar Palika Parishad. The Constitution of the Municipalities is governed by the provisions of the Constitution under Article 243-Q which reads as under:-

*"**243Q. Constitution of Municipalities**.- (1) There shall be constituted in every State,-*

(a) a Nagar Panchayat (by whatever name called) for a transitional area, that is to say, an area in transition from a rural area to an urban area;

(b) a Municipal Council for a smaller urban area; and

(c) a Municipal Corporation for a larger urban area,

in accordance with the provisions of this Part:

Provided that a Municipality under this clause may not be constituted in such urban area or part thereof as the Governor may, having regard to the size of tile area and the municipal services being provided or proposed to be provided by an industrial establishment in that area and such other factors as he may deem fit, by public notification, specify to be an industrial township.

(2) In this article, "a transitional area", "a smaller urban area" or "a larger urban area" means such area as the Governor may, having regard to the population of the area, the density of the population therein, the revenue generated for local administration, the percentage of employment in non agricultural activities, the economic importance or such other factors as he may deem fit, specify by public notification for the purposes of this Part."

As provided therein, there are various factors which have to be taken into consideration by the Governor for declaration of a transitional area, small urban area, larger urban area. The Nagar Panchayat as per Article 243-Q(1)(a) is a transitional area, i.e. an area in transition from a rural area to an urban area. For upgradation of a transitional area to a small urban area (Municipal Council) as has been done by the notification in question, the Governor was required to have regards to various factors which are:-

(i) population of the area;

(ii) the density of the population of the area;

(iii) the revenue generated for local administration;

(iv) the percentage of employment in non-agricultural activities;

(v) the economic importance;

(vi) or such other factors as he may deem fit.

The population or density of the population of the area and the revenue generated

for local administration are only two of the various factors which were required to be considered by the Governor.

8. Article 243-X is further relevant to understand the meaning of the words "revenue generated for local administration" as indicated in Article 243-Q.

Article 243-X is reproduced for ready reference:-

*"**243X. Power to impose taxes by, and Funds of, the Municipalities.**- The Legislature of a State may, by law,-*

(a) authorise a Municipality to levy, collect and appropriate such taxes, duties, tolls and fees in accordance with such procedure and subject to such limits;

(b) assign to a Municipality such taxes, duties, tolls and fees levied and collected by the State Government for such purposes and subject to such conditions and limits;

(c) provide for making, such grants-in-aid to the Municipalities from the Consolidated Fund of the State; and

(d) provide for constitution of such Funds for crediting all moneys received, respectively, by or on behalf of the Municipalities and also for the withdrawal of such moneys therefrom,

as may be specified in the law."

A careful reading of Article 243-X(a-d) shows that the Legislature of the State, by law, has to provide for constitution of funds of the Municipality for crediting all moneys received either by or on behalf of the Municipalities. It shall also make legislation for providing grant-in-aid to the Municipalities from the consolidated funds of the State and authorise or assign to the Municipality to levy such taxes, duties, tolls and fees collected by it and by the State Government for the purpose and subject to such conditions and limits, as may be specified in the legislation of the State.

9. Learned Additional Advocate General submits that the phrase "the revenue generated for local administration" as occur in Article 243-Q would include the funds provided by the State/Centre under different schemes, including grant-in-aid to the Municipalities from the consolidated funds of the State as also the taxes, duties, tolls, fees levied/collected either by it or by the State Government. All these funds collectively would constitute the revenue of the Municipality and the stand of the petitioners that only the income generated by the Municipality for a financial year from the levy/collection of taxes, duties, tolls and fees would be the factor or criteria as per Para 3(Ka) of the Government Order dated 10.11.2014, is a wrong interpretation of the language employed therein.

10. Having carefully gone through the constitutional provisions and the language of the Government Order dated 10.11.2014, we are afraid to accept the submissions of the learned Advocates for the petitioners that the income of the Municipality (Nagar Panchayat Bharwari) as indicated in the R.T.I. Information, was less than Rs. 1.75 cores. The certificate of the Executive Officer, Nagar Panchayat Bharwari, Kaushambi appended as Annexure C.A.-'7' to the counter affidavit clearly indicates the income/revenue generated by the Nagar Panchayat being much more that the minimum prescribed limit.

11. In the rejoinder affidavit, only this much is stated that the document appended as Annexure C.A.-'7' does not bear the date on which the authority concerned had signed or prepared it. The said statement would not be a plausible objection. The denial of the stand of

the respondent regarding incorrect information being provided by the Clerk of the Accountant in the office of the Executive Officer, Nagar Panchayat, Bharwari is also vague.

This apart, the person who had obtained the alleged information namely one Sri Shankar Lal is not before us. We, therefore, cannot place reliance on the information received by some other person from the office of the Nagar Panchayat Bharwari which had not been signed by the Executive Officer, Nagar Panchayat Bharwari, Kaushambi. The stand of the respondent that the Clerk of the Accountant was not the competent authority or the Public Information Officer is also substantiated from a perusal of the R.T.I. information appended as Annexure '5' to the writ petition.

12. We, therefore, cannot take exception to the stand of the respondent that the income of Nagar Panchayat Bharwari was much more than the limits prescribed by the Government Order dated 10.11.2014.

13. As regards the population criteria, we may note that the figures provided in the preliminary notification under Section 4(1) of the Act, 1916 shows the population of each village which were to be included for upgradation of the Nagar Palika Parishad, Bharwari, District Kaushambi. No objection whatsoever had been taken by any of the petitioners regarding the figures mentioned therein. Further, the population density or the population as per the Census of the year 2011 was taken as one of the criteria for creation of the Nagar Palika Parishad but there are other important factors which were to be taken into consideration by the Governor. Apart from this fact that the Census of the year 2011 was taken into consideration in the year 2017 to assess the population density. There is nothing on record which would indicate that there was no increase in the population of the village Panchayat in the intervening period (for five years).

14. Lastly, while considering all the above arguments, we must remind ourselves to the scope of judicial review to an executive decision within the scope of Article 226 of the Constitution of India. It is settled principle that within the limited scope of the judicial review, the decision of the Executives cannot be overturned on the basis of that being an incorrect decision. The Court can only examine as to whether there was flaw in the decision making process. If two views are possible, the view taken by the competent authority/Executive will not be upset on the ground that the Court thinks that the other (better) view ought to have been taken. This is not in the province of the writ court.

15. It is trite law that exercise of power, whether legislative or administrative, will be set aside if there is manifest error in exercise of such power or the exercise of the power is manifestly arbitrary. The Court will be slow to interfere in such matters relating to administrative functions unless decision is tainted by any vulnerability like illegality, irrationality and procedural impropriety. Whether action falls within any of the categories has to be established, mere assertion in that regard would not be sufficient. The satisfaction of the authority can be interfered with only if the satisfaction recorded is demonstratively perverse based on no evidence, misreading of evidence or which a reasonable man could not form or that the person concerned was not given due opportunity resulting in prejudice. To that extent, objectivity is inbuilt in the subjective satisfaction of the authority. [Reference **State of NCT of Delhi and another vs. Sanjeev Alias Bittoo1]**

16. As demonstrated before us, no flaw could be found in the decision making process as the notification under Section 4(1) of the Act, 1916 was issued to invite objections from all concerned. The final notification was issued only after disposal of the objections by a written order. Under the scheme of the Constitution, a large amount of latitude within the four corners

of the Article 243-Q(2) has been made available to the State in determining as to which category of the Municipality is to be constituted for an area, under the Act. The parameters within which the Governor is to notify an area as a Municipality under Article 243-Q refers to various factors including the population density and income/revenue generated by the Municipality, which are the subject matter of dispute in the present petition.

17. As has been noted above, the "Nagar Panchayat" under the scheme of the Constitution is a transitional area, an area which is in transition from a rural area to an urban area. There cannot be a dispute or doubt that the population density of the concerned area is increasing day by day. The "revenue generated for the local administration" is also variable depending upon the income which also include the income generated from the State funds under the schemes floated in the concerned area. The percentage of employment in non-agricultural activities and the economic importance are also the important factors which have to be taken into consideration by the Governor for upgradation of the transitional area to an urban area (small urban area as in this case). From the material on record and even from the stand of the petitioners herein, it cannot be said that the Nagar Panchayat Bharwari which was a transitional area had not seen changes/increase in the population, revenue generation, employment opportunities and economic activities during the course of time.

18. The contention of the learned Advocates for the petitioners that the transition of the Nagar Panchayat Bharwari to a smaller urban area (Municipal Council), i.e. Nagar Palika Parishad would run against the spirit of the constitution is, thus, found wholly misconceived.

19. We may note that there is no basis of the contention of the petitioners that the upgradation of the Nagar Panchayat Bharwari will affect the lives and livelihood of its denizens rather the stand of the respondent that the creation of the Nagar Palika Parishad, Bharwari would provide better prospects for development as the scope of implementation of the Government scheme in a Nagar Palika Parishad would be expanded. There cannot be a doubt that the upgradation is for the public benefit.

20. Considering the above, we do not find it a fit case for exercise of judicial review within the scope of Article 226 of the Constitution of India, as for any alternative view taken by this Court, the decision of the State for the upgradation of the Nagar Panchayat Bharwari to Nagar Palika Parishad, Bharwari cannot be upset on the plea of it being against the Constitutional scheme. The notification dated 26.10.2016 cannot be held unconstitutional on the plea of the petitioners herein and the material on record.

The writ petitions are, thus, found devoid of merits and hence **dismissed.**

(2021)11ILR A625
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.10.2021

BEFORE

THE HON'BLE ANIL KUMAR OJHA, J.

Criminal Appeal No. 2320 of 1981

Soran & Ors. ...Appellants (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri D.K. Singh, Sri Pushpendra Singh Yadav, Sri Anshuman Singh, Sri Rajesh Kumar Singh

Counsel for the Respondents:
A.G.A.

(A) Criminal Law - The Indian Penal Code, 1860 - Sections 148, 450, 376 & 376 read with Section 149 - The Code of criminal procedure,

1973 - Sections 161 & 313 - appeal against conviction - there cannot be implicit reliance on the evidence of victim of rape, it should be subject to judicial scrutiny - prosecution cannot seek to prove a fact during trial through a witness which such witness had not stated to police during investigation, evidence of that witness regarding the said improvement cannot be relied upon . (Para - 14,18)

Appeal against five appellants abated - appeal of only surviving appellant i.e. appellant no. 2 to be considered - informant lodged an F.I.R. - appellants armed with guns and country made pistol entered into his house - caught hold the informant - committed gang rape with the wife of informant and his sister-in-law (Bhabhi) - appellants convicted - hence appeal.(Para - 4)

HELD:- Evidence of PW2 (appellant no.2) not consistent and therefore, unreliable. The fact of light of lantern at the time of alleged incident was introduced for the first time before the court, which comes in the category of improvement, hence, it cannot be relied upon as a source of light . Incident allegedly took place in the night and there was no source of light at the time of alleged incident. Victim is a married lady. No corroborative medical evidence with regard to rape. Appellant no. 2 entitled to benefit of doubt. (Para - 15,18,22,23)

Criminal Appeal allowed. (E-7)

List of Cases cited:-

1. Raja & ors. Vs St. of Karn., (2016) 10 SCC 506

2. Rohtas Vs St. of Har. (2016) 6 SCC 589

3. RudrappaRamappaJainpur Vs St. of Karn., (2004) 7 SCC 422

4. Vimal Suresh Kamble Vs Chaluverapinake, (2003) 3 SCC 175

(Delivered by Hon'ble Anil Kumar Ojha, J.)

1. Heard Sri Rajesh Kumar Singh, Advocate, holding brief of Sri D. K. Singh, learned counsel for the appellant, Sri Ashish Mani Tripathi, learned A.G.A. for the State and perused the record.

2. This appeal relates to year 1981 and the same is 40 years old. During the pendency of the appeal, the appellant no. 1 Soran, appellant no. 3 Sudhar Singh, appellant no. 4 Ganesh, appellant no. 5 Shyam Lal & appellant no. 6 Ajai Pal have died. Hence, appeal against the aforesaid five appellants was abated vide order dated 06.07.2020 passed by this Court.

Thus, the appeal of only surviving appellant i.e. appellant no. 2 Bhoorey is to be considered.

3. Challenge in this appeal is the judgment and order dated 22.09.1981 passed by IV Additional Sessions Judge, Etah in S.T. No. 232 of 1981 (State v. Soran and 5 others), arising out of Case Crime No. 174 of 1980, under Section 148, 450, 376 and 376 read with 149 of I.P.C., P.S. Jaithara, District Etah whereby learned IV Additional Sessions Judge, Etah has convicted and sentenced the appellants Soran, Bhoorey, Sughar Singh, Ganesh, Shyam Lal and Ajai Pal to undergo rigorous imprisonment of one year, four years, seven years, and seven years under Section 148, 450, 376 & 376 read with Section 149 of I.P.C. respectively with the direction that all the sentences shall run concurrently.

4. Shorn of unnecessary details, the case of the prosecution is that informant Ajay Pal lodged an F.I.R. at P.S. Jaithara, District Etah on 01.07.1980 at 12:05PM, stating therein that on 30.06.1980 or 01.07.1980, at about 09:00 hours in the night, appellants Soran, Bhorey, Ganesh, Sughar Singh, Ajai Pal and Shyam Lal armed with guns and country made pistol entered into his house and caught hold the informant and committed gang rape with the wife of informant and his sister-in-law (Bhabhi). On hue and cry, witnesses Bhaw Singh, Mahavir, Shaitan and several other villagers came on the spot, then the appellants fled from there leaving the victims and informant.

5. On the written statement, submitted by the informant, a case was registered against the appellants under Section 376 I.P.C., P.S. Jaithara, District Etah.

6. Investigating officer, investigated the case, recorded the statement of witnesses, prepared the site plan, fard of two petticoats, fard of lantern, got the medico-legal of victims done and after collection of evidence, filed charge sheet against the appellants Soran, Bhoorey, Sughar Singh, Ganesh, Shyam Lal and Ajai Pal.

7. The then III Additional Munsif Magistrate took cognizance on 29.10.1980 and on 05.06.1981 III Additional Munsif Magistrate, Etah committed the case of appellants to the court of Sessions for trial. The then IV Additional Sessions Judge, Etah on 25.07.1981 framed the charges against the appellants Soran, Bhoorey, Sughar Singh, Ganesh, Shyam Lal and Ajai Pal under Section 148 and 450 of I.P.C. He further separately framed charges against Soran, Ganesh and Shyam Lal under Section 376 I.P.C. and 376 of I.P.C. read with Section 149 I.P.C. He further separately framed charges against the appellant Ajai Pal, Bhoorey and Sughar Singh under Section 376 I.P.C. and 376 read with 149 I.P.C.

8. Prosecution was directed to adduced evidence against the appellants, to prove the charges against them. Prosecution produced PW1 Ajay Pal, informant of the case, he supported the prosecution story. PW2 and PW3 are the victims of the alleged incident, they have also supported the prosecution case. PW4 I.O. Bhurey Singh Tyagi has proved site plan Ex. Ka-3, charge sheet Ex. Ka-4 and Fard Lantern Ex. Ka-5. PW5 Dr. Sabira Goyal has proved the medico legal report of victims as Ex. Ka-6 & Ex. Ka-7. PW6 CP. Prabhu Dayal has proved written report Ex. Ka-1, Rapat No. 15 Ex. Ka-9.

9. After conclusion of evidence, statement of appellant under Section 313 was recorded. Appellant Bhoorey denied the evidence and stated that he has been implicated owning to enmity. Further stated that appellant Soran is his brother. Soran is cultivating the field of Sharda. He further stated that they have been falsely implicated because Soran is witness against the informant Ajay Pal in the case of Sharda.

10. After hearing the learned counsel for the prosecution and defence, learned IV Additional Sessions Judge, Etah convicted and sentenced the appellants as above.

11. Aggrieved by the aforesaid judgment passed by learned IV Additional Sessions Judge, Etah the appellants preferred this appeal before this Court.

12. Submission of the learned counsel for the appellant is that the prosecution has made improvements with regard to source of light at the time of alleged incident. It is a case of gang rape but there is no mark of injury either external or internal on the person of both the victims, which falsifies the allegation of gang rape by the appellants. Statement of victim (PW2) against appellant Bhoorey is contradictory. There is no report on file with regard to stains on the petticoat of the victims. Whole prosecution story is improbable and appellant Bhoorey is entitled to benefit of doubt.

13. Per contra, learned A.G.A. opposed the above submission and contended that the prosecution has been able to establish its case beyond reasonable doubt against the appellant Bhoorey. There is no merit in the appeal and the same deserves dismissal.

14. In ***Raja and others v. State of Karnataka (2016) 10 SCC 506***, Hon'ble Apex Court has held as follows:

".....It was exposited that insofar as the allegation of rape is concerned, the evidence of the prosecutrix must be examined as that of a injured witness whose presence at the spot is probable but it can never be presumed that her statement should always without exception, be taken as gospel truth.

The essence of this verdict which has stood the test of time proclaims that though generally the testimony of a victim of rape or non- consensual physical assault ought to be accepted as true and unblemished, it would still be subject to judicial scrutiny lest a casual, routine and automatic acceptance thereof results in unwarranted conviction of the person charged."

Thus, law on the point is that there cannot be implicit reliance on the evidence of victim of rape, it should be subject to judicial scrutiny. In view of the law laid down in above citation, evidence of PW2 Victim is being examined and evaluated.

15. PW2 Victim in her examination in chief has stated that appellant Bhoorey along with other appellants Ganeshh and Shyam Lal committed rape with her. She in her cross-examination at page 22 of the paper book again stated that the appellant Bhoorey committed rape. She was specifically asked in para no. 9 whether appellant Soran committed rape or appellant Bhoorey, then this witness explicitly replied that appellant Soran committed rape, thus, the statement of PW2 victim is inconsistent with regard to appellant Bhoorey. The relevant portion of evidence of victim PW2 is quoted hereinbelow:

"…अगर दरोगा ने बयान में लिखा है की सोरन गनेश व श्याम लाल ने मेरे साथ बुरा काम किया तो आज मैं सोरन के स्थान पर भूरे का नाम भूल कर ले रही होगी क्योकि साल भर हो गया। छः मुलजिमान थे। तीन तीन एक साथ बुरा काम किया।

फिर पूछने पर कि श्याम लाल व गनेश के अलावा तुम्हारे साथ सोरन ने बुरा काम या भूरे ने तो गवाह ने कहा सोरन ने।

Thus, the evidence of PW2 victim is self contradictory as at one place she says that appellant Bhoorey committed rape upon her when she was specifically asked whether Soran committed rape or Bhoorey committed rape, she categorically stated that Soran committed rape upon her.

In view of the above discussion, I am of the considered opinion that the evidence of PW2 qua the appellant Bhoorey is not consistent and therefore, unreliable.

16. Learned counsel for the appellant submitted that the evidence of victim is not supported by medical evidence. PW2 Victim has stated in her cross-examination at page no. 21 of the paper book, that while committing rape her bangles were broken but the bangles could not be produced before the court.

PW2 has specifically deposed before the court that three persons committed rape upon her but there is no injury either external or internal, on the person of victim.

17. PW5 Dr. Sabira Goyal has stated in her evidence that hymen was old torn, there was no mark of injury on external or internal part of the body. No opinion about rape can be given as she is habitual to sexual intercourse.

18. Learned counsel for the appellant further submitted that the incident took place in the night at 09:00PM, source of light was neither stated in the F.I.R. nor in statement of complainant under Section 161 Cr.P.C. For the first time lantern was introduced in the court. PW1 Ajai Pal in his examination in chief has stated that there was light of lantern. He recognized the accused persons in the aforesaid

light. In his cross-examination, this witness has stated that he told about light to the scribe but he cannot tell the reason why light of lantern was not written in the F.I.R. This witness has further stated that he told the investigating officer about lantern but why the investigating officer has not mentioned about the lantern in the statement, he cannot tell the reason. This fact was confronted to investigating officer PW4 who specifically stated in his statement at page 29 of the paper book, that the complainant did not told him about the light of lantern at the time of incident.

The fact which is introduced for the first time in the court cannot be relied upon, it comes in the category of improvement and consequently contradiction, so presence of lantern at the time of alleged incident as source of light cannot be accepted.

Hon'ble Apex Court in ***Rohtas v. State of Haryana (2016) 6 SCC 589,*** has held that the prosecution cannot seek to prove a fact during trial through a witness which such witness had not stated to police during investigation, evidence of that witness regarding the said improvement cannot be relied upon.

Following other authorities can be cited on the above point: ***Rudrappa Ramappa Jainpur v. State of Karnataka, (2004) 7 SCC 422 and Vimal Suresh Kamble v. Chaluverapinake, (2003) 3 SCC 175.***

Evidence of PW1, mentioned at page 16 of the paper book with regard to introduction of lantern for the first time before the court, is quoted hereinbelow:

"यह सही है कि सोरन भूरे का सागा भाई है। सुघर सिंह सोरन का खानदानी भाई है। घटना के समय लालटेन जल रही थी। यह बात मैंने रिपोर्ट में लिखायी थी। लिखायी मैंने जरूर थी अगर रिपोर्ट में यह बात लालटेन वाली नहीं लिखी है तो कारण नहीं बता सकता। रिपोर्ट पढ़कर मुझे सुनाई थी। उसमें लालटेन जलने की बात पढ़कर सुनाई थी या नहीं ध्यान नहीं है। एक साल की बात हो गयी।

दरोगा जी ने मेरा बयान थाने पर लिया था। दरोगा को बता दिया था की लालटेन जल रही थी। दरोगा ने अगर नही लिखा तो कारण नही बता सकता।"

Factum of light of lantern at the time of incident was also asked to Investigating Officer, who stated that complainant did not tell him about the light of lantern at the time of allged incident. Relevant portion of PW4 I.O. is also quoted hereinbelow:

"वादी ने मुझे नही बताया था कि घटना के समय मौके पर लालटेन जल रही थी"

Thus, in view of the above law laid down by Hon?ble Apex Court in ***Rohtas v. State of Haryana (Supra)*** the fact of light of lantern at the time of alleged incident was introduced for the first time before the court, which comes in the category of improvement, hence, it cannot be relied upon as a source of light.

19. The next submission of the learned counsel for the appellant is that the fard was prepared of petticoat of the victim but no report regarding stain of semen or spermatozoa is available on record.

20. Learned counsel for the appellant next submitted that the appellant Soran and Bhoorey are real brothers and it is highly improbable that a brother will commit rape in front of his real brother. They are not beasts and can't commit rape one after another with one victim. Therefore, the statement of PW2 victim is highly improbable.

21. From the perusal of record it is clear that six persons were convicted in the present

case. All the six persons filed appeal before this Court. During pendency of appeal five appellants i.e. appellant no. 1 Soran, appellant no. 3 Sudhar Singh, appellant no. 4 Ganesh, appellant no. 5 Shyam Lal & appellant no. 6 Ajai Pal have died and appeal against the aforesaid five appellants was abated vide order dated 06.07.2020 by this Court. Thus, the appeal of only surviving appellant i.e. appellant no. 2 Bhoorey has been considered.

22. There is allegation of rape against appellant Bhoorey. The evidence of PW2 against the appellant Bhoorey is unreliable because when she was categorically asked whether Soran committed rape or Bhoorey, she replied that Soran committed rape upon her. Soran and Bhoorey are the real brothers. Incident allegedly took place in the night and there was no source of light at the time of alleged incident. Victim is a married lady. There is no corroborative medical evidence with regard to rape.

23. In view of the above facts and circumstances, I am of the considered opinion that appellant no. 2 is entitled to benefit of doubt, accordingly the appeal of the appellant no. 2 Bhoorey succeeds and deserves to be allowed.

24. Appeal is accordingly, **allowed.**

25. The judgment and order dated order dated 22.09.1981 passed by IV Additional Sessions Judge, Etah in S.T. No. 232 of 1981 (State v. Soran and 5 others), arising out of Case Crime No. 174 of 1980, under Section 148, 450, 376 and 376 read with 149 of I.P.C., P.S. Jaithara, District Etah, qua the appellant no. 2 Bhoorey is set-aside. Appellant no. 2 Bhoorey is acquitted of the charges leveled against him. His bail bonds are canceled and sureties are discharged.

26. Copy of this judgment be certified to the court below for compliance. Lower court record be transmitted to the District Court, concerned.

(2021)11ILR A630
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 11.11.2021

BEFORE

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

Service Single No. 26228 of 2021
connected with
Service Single 26204 of 2021

Chandani Devi & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Vinay Misra, Nazmul Hasan

Counsel for the Respondents:
C.S.C.

A. Service Law – Deployment of teachers for non-educational purposes - The Right of Children to Free and Compulsory Education Act, 2009 - Section 27 - The rule and the exception both in Section 27 of the Act of 2009 are very clear. The provisions of Section 27 generally puts in place a strict prohibition on deployment of teachers on non-teaching duties and then carves out exceptions in favour of certain classes of duties to which the rule prohibiting their deployment would not apply. Election to local authorities, the State Legislature and the Parliament are one of those exceptions. **The exception, prima facie, is not couched in words that would limit the exception coming alive only after an election notification is issued, and not earlier.** (Para 13)

The literal rule or the golden rule of construction is the preferred rule and where the language of the statute is unambiguous, the rule is always a safe guide. The statute is to be read as it is, and not what it ought to be. It is in cases of ambiguities or a literal reading, leading to an absurd conclusion, that one

has to look to other rules of construction like the rule in *Heydon's* (1584) 76 ER 637 *case*. (Para 13)

B. The legislature in its wisdom has thought that teachers can be spared for the performance of the solemn duty, where any work relating to elections is concerned but not for other purposes.

In the present case, though the Court, accords with the opinion of the learned Single Judge in *Kanika Banshiwal* but observing expressions of contrary and clear opinions by the Division Benches in *Sunita Sharma* and *Uttar Pradeshiya Prathmik Shikshak Sangh*, and the learned Single Judges in *Kuldip Singh, Ramji Mishra* on one hand and *Kanika Banshiwal* on the other, does not consider it proper to enter judgment, upholding one or the other view, sitting singly. Therefore, refers the matter to a larger Bench, where this difference of opinion may be resolved. (Para 14)

The following questions are referred for consideration by a larger Bench:

(1). Whether the provisions of Section 27 of the Right of Children to Free and Compulsory Education Act, 2009 permit the deployment of teachers to do any kind of **duties relating to elections before the issue of an election notification relating to a Local Body, a State Assembly or the Parliament under appropriate provisions of the law?**

(2). Whether **before or after the issue of notifications** relating to elections to a Local Body, a State Assembly or the Parliament, can teachers be deployed to any kind of election-related work **on teaching days or during teaching hours?** (Para 15)

Matter referred to larger bench. (E-4)

Precedent discussed:

1. Sunita Sharma Advocate High Court Vs St. of U.P. & 3 ors. , 2015 (3) ALJ) 519 (Para 4)

2. Uttar Pradeshiya Prathmik Shikshak Sangh & 3 ors. Vs St. of U.P. & 7 ors., Public Interest Litigation (PIL) No. 36449 of 2016, decided on 08.08.2016 (Para 7)

3. Election Commission of India Vs St. Mary's School & ors., (2008) 2 SCC 390 (Para 7)

4. Kuldip Singh Vs St. of U.P. & 3 ors., Writ-A No. 8516 of 2021, decided on 24.08.2021 (Para 8)

5. Ramji Mishra Vs St. of U.P. through Additional Chief Secretary, Basic Education & ors., Service Single No. 16754 of 2021 (Para 8)

6. Kanika Banshiwal & 3 ors. Vs St. of U.P. & 5 ors., 2021 SCC OnLine All 755 (Para 11)

7. Heydon's case, (1584) 76 ER 637 (Para 13)

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

Heard Mr. Vinay Misra, learned Counsel for the petitioners, Mr. Gaus Beg, learned Counsel appearing for the Basic Shiksha Adhikari and Mr. Ram Pratap Singh Chauhan, the learned Additional Chief Standing Counsel appeaing for the State-respondent.

2. The petitioners are Assistant Teachers working in various Basic Shiksha Parishad Schools in the District of Barabanki. They have been detailed to work as Booth Level Officers by the Sub-Divisional Officers of Tehsils - Fatehpuri, Haidergarh and Nawabganj, District - Barabanki. acting on the orders of the District Magistrate, Barabanki, who is the District Electoral Officer.

3. The submission of learned Counsel for the petitioners is that the petitioners are teachers engaged in teaching children in the age group of 6-14 years, for whom right to free and compulsory education is a fundamental right guaranteed under Article 21A of the Constitution. The Right of Children to Free and Compulsory Education Act, 20091 has been enacted to further the purpose of Article 21A. Learned Counsel for the petitioners has drawn the attention of the Court to Section 27 of the last mentioned statute, which prohibits deployment of teachers for non educational purpose. Section 27 of the Act of 2009 reads :

27. Prohibition of deployment of teachers for non-educational purposes.--No teacher shall be deployed for any non-educational purposes other than the decennial population census, disaster relief duties or duties

relating to elections to the local authority or the State Legislatures or Parliament, as the case may be.

4. It is submitted that in order to give effect to the provisions of Section 27 and to ensure that these are not bogged down by Administrative Authorities, or for that matter, the Election Commission, to subserve their purpose of engaging as many hands in the process of election, this Court, from time to time, has prohibited deployment of teachers in connection with election duties. In this connection, reference has been made to the decision of this Court in **Sunita Sharma Advocate High Court v. State of U.P. & 3 others2.**

5. On the other hand, Mr. Rahul Shukla, learned Counsel appearing on behalf of the Basic Shiksha Adhikari, Mr. Kaushalendra Yadav, learned Counsel appearing for the Election Commission and Mr. Ram Pratap Singh, the learned Additional Chief Standing Counsel appearing for the State-respondents submit in one voice that provisions of Section 27 of the Act of 2009 carve out a definitive exception to the rule against deployment of teachers for non-educational purpose and one of those exceptions is the deployment of teachers in connection with elections of a Local Authority, a State Legislature and the Parliament.

6. In **Sunita Sharma** *(supra)* a Division Bench of this Court leaned in favour of placing a liberal construction upon the provisions of Section 27 of the Act of 2009 and frowned upon the practice of deploying teachers in connection with election duties. It was held there :

The right of children to free and compulsory education between the age of six to fourteen has been statutorily recognized in Section 3(1) of the Right of Children to Free and Compulsory Education Act, 20091. This is in pursuance of the fundamental right conferred by Article 21-A of the Constitution of India. The Act provides in Chapter IV the responsibilities of schools and teachers. Section 27 specifically contains a prohibition on the deployment of teachers for non-educational purposes. Under Section 27, no teacher shall be deployed for any non-educational purposes other than the decennial population census, disaster relief duties or duties relating to elections to the local authority, or to the State Legislatures or Parliament, as the case may be. In view of this statutory prohibition, it is clearly unlawful and ultra vires on the part of the State to requisition the services of teachers for carrying out the verification of eligible card holding families. The right to free and compulsory education for children below the age of 14 is a constitutionally protected entitlement which is statutorily recognized in the Act. The State is not powerless, if it requires hands for completing the work of verification by recruiting contract employees or making suitable alternate arrangements, but such arrangements cannot involve the deployment of teachers. The duties of teachers is simply to teach students. Their status cannot be reduced to that of a ministerial employee of the State. It is no answer to state, as the District Supply Officer has in the counter affidavit, that the teachers are called upon to do the work of verification as and when they are free from school duties. A teacher after the completion of the hours of work in a school is expected to spend time in preparing for the classes for the next day and to pursue his or her own process of enhancing knowledge and learning to impart education to the children. It requires no stretch of imagination to hold that burdening a teacher with duties, after school hours in carrying out ministerial duties, such as the verification of eligible families, would only detract from her ability and capacity to teach students. It is time for the State to realise, if it is serious about implementing the right to free and compulsory education for children between ages of six to fourteen in the State of Uttar Pradesh

that teachers cannot be treated in such a casual and callous manner. The civility of a society is defined with reference to the value it places on education and the respect which it holds for its teachers. Those may be traditional values but fortunately, some values are eternal. The position of a teacher is a critical element in dispensing education which must be recognized, protected and observed. Such action which has been taken by an officer of the State is clearly in violation of the duty cast upon the State. In fact, on a reading of the circular issued by the Chief Secretary on 23 January 2015, it is clear that no direction was contained therein to requisition the services of teachers. The Chief Secretary had, therefore, carefully not issued any such direction. What the District Administration has done is to follow a convenient method of requisitioning the services of teachers without the authority of law and, as we have noted earlier, it is in clear defiance of the mandate contained in Section 27 of the Act. The State must cease and desist from resorting to such unlawful behaviour.

7. In **Uttar Pradeshiya Prathmik Shikshak Sangh & 3 others v. State of U.P. & 7 others3** following the decision of the Supreme Court in **Election Commission of India v. St. Mary's School & others4** it was directed :

Learned counsel for the respondents submit that they shall put the teaching staff on duty on non-teaching days and within non-teaching hours, as observed by the Supreme Court in the aforementioned paragraph. Their submission is recorded and accepted.

8. Again, in **Kuldip Singh v. State of U.P. & 3 others5** a learned Single Judge of this Court, sitting at Allahabad, following the decision of the Division Bench in **Sunita Sharma** held :

In view of the law already settled, the authorities of the State would not be justified in allocating election work to the petitioners, who are specifically engaged for imparting education.

9. In **Ramji Mishra v. State of U.P. through Additional Chief Secretary, Basic Education & others6** a reasoned interim order was made. The learned Single Judge has observed thus :

5. It has been submitted that the revision of the voter-list does not fall in any of those categories because that does not relate to decennial population census and as the elections have not yet been notified, therefore, the deployment, as directed, is illegal and is in the teeth of the provisions of Section 27 of the RTE Act, 2009. In support of the aforesaid submission, reliance has also been placed on a Division Bench decision of this Court in **Sunita Sharma v. State of U.P. and others : 2015 (3) ESC 1289 (All) (DB).**

10. A perusal of most of these decisions by different Single Judges, some of which are reasoned interim orders, show that the decision of the Division Bench in **Sunita Sharma** has been construed in a manner that the deployment of teachers in connection with election duties is to be largely eschewed. A definition has somewhere been carved out to the effect that obligation under the exception envisaged under Section 27 for teachers commences where the election notification is issued and not before that. In some other cases, to give effect to the wider purpose of the Act of 2009, directions have been made not to deploy teachers to election duty on teaching days or during teaching hours, confining their deployment to non teaching days and on teaching days, to non teaching hours.

11. Mr. Kaushalendra Yadav, learned Counsel appearing for the Election Commission and Mr. Rahul Shukla, learned Counsel appearing for the Basic Shiksha Adhikari

dispute the soundness of these authorities and say that the terms of Section 27 of the Act of 2009 do not admit of any such exception. The Statute is to be understood and read for what it says, unless there be ambiguity about the rule engrafted there or the exception to the rule. In support their contention, Mr. Shukla and Mr. Yadav have drawn the attention of the Court to a recent decision of a learned Single Judge of this Court sitting at Allahabad in **Kanika Banshiwal & 3 others v. State of U.P. and 5 others7**. In the said decision, the learned Judge has considered the Division Bench decision in **Sunita Sharma** as also the judgment in **Uttar Pradeshiya Prathmik Shikshak Sangh** *(supra)* and analysed the provisions of Section 27 of the Act of 2009 carefully. In **Kanika Banshiwal** *(supra)*, it has been held :

The words used in Section 27 of the Act of 2009 are 'duties relating to elections'. Article 324(1) of the Constitution of India deals with the superintendence, direction, and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice President held under this Constitution treating them to be vested in a commission referred to in this Constitution as the Election Commission.

Meaning and import of the words used in Section 27 of the Act of 2009 'relating to' have been interpreted by the High Court of Madras in case of State Wakf Board, Madras vs. Abdul Azeez Sahib and Others, AIR 1968 Madras 79 (81), wherein it is held that 'in relation to' are words of comprehensiveness which might both have a direct significance as well as indirect significance, dependent on the context. They are not words of restrictive content and ought not to be so construed.

Similarly, use of word 'and', between control of the preparation of electoral rolls for and the conduct of all elections in Article 324(1) means that preparation of electoral rolls is a prelude to conduct of elections. Thus, when given comprehensive and inclusive meaning means that preparation of electoral rolls is included in duties relating to elections.

Thus, when words used in Section 27 of the Act 2009 'relating to' are construed in terms of the law laid down by Division Bench of Madras High Court, then there is no iota of doubt that the word 'relating to' has to be given a comprehensive meaning and will include all the works relating to election where elections are notified or not and **cannot be given retrospective (sic) meaning as has been sought to be given by a co-ordinate Bench in case of Shri Krishan vs. State of U.P. and 4 Others (Writ-A No.18683 of 2019) and thus where elections are notified or not, duties of a teacher can be deployed in terms of the provisions contained in Section 27 of the Act of 2009 even for works in relations to election which in my opinion includes preparation of electoral rolls as provided under Article 324 of the Constitution of India.** Therefore, no fault can be attributed to the deployment of the petitioners in relations to the election work.

(emphasis by Court)

12. A perusal of the decision in **Kanika Banshiwal** shows that the Court has leaned in favour of reading the provisions of Section 27 of the Act of 2009, going by the literal rule of construction and has carefully avoided resort to the mischief rule. The words "relating to" employed in Section 27, where exceptions to the rule in the Section last mentioned are carved out for deployment in connection with elections, have been regarded as wide enough to arm the authorities charged with the conduct of elections to deploy teachers relating to any kind of work concerning elections. The earlier decisions by other learned Single Judge, holding that the exception would apply once elections are notified, has not been approved as the correct interpretation of the provisions of Section 27.

13. Generally speaking, in the opinion of this Court, the literal rule or the golden rule of construction is the preferred rule and where the language of the statute is unambiguous, the rule is always a safe guide. The statute is to be read as it is, and not what it ought to be. It is in cases of ambiguities or a literal reading, leading to an absurd conclusion, that one has to look to other rules of construction like the rule in **Heydon's8** case. To my understanding, the rule and the exception both in Section 27 of the Act of 2009 are very clear. The provisions of Section 27 generally puts in place a strict prohibition on deployment of teachers on non-teaching duties and then carves out exceptions in favour of certain classes of duties to which the rule prohibiting their deployment would not apply. Election to local authorities, the State Legislature and the Parliament are one of those exceptions. The exception, *prima facie*, is not couched in words that would limit the exception coming alive only after an election notification is issued, and not earlier.

14. It is well known and acknowledged that elections to these respective bodies, which form the government in a democracy, are the most solemn of duties for every citizen. There could be citizens engaged in kinds of avocations, who, under the law, cannot be spared even for the purpose of elections. So far as teachers are concerned, the legislature in its wisdom has not thought that they cannot be spared for the performance of the solemn duty, where any work relating to elections is concerned. For other purposes, they have been spared. Notwithstanding the opinion of this Court, which accords with the opinion of the learned Single Judge in **Kanika Banshiwal** there being expressions of contrary and clear opinions by the Division Benches in **Sunita Sharma** and **Uttar Pradeshiya Prathmik Shikshak Sangh**, and the learned Single Judges in **Kuldip Singh, Ramji Mishra** on one hand and **Kanika Banshiwal** on the other, it would not be proper for me sitting singly to enter judgment, upholding one or the other view. The approved and sound course is to refer the matter to a larger Bench, where this difference of opinion may be resolved.

15. In the circumstances, the following questions are referred for consideration by a larger Bench :

(1). Whether the provisions of Section 27 of the Right of Children to Free and Compulsory Education Act, 2009 permit the deployment of teachers to do any kind of duties relating to elections before the issue of an election notification relating to a Local Body, a State Assembly or the Parliament under appropriate provisions of the law?

(2). Whether before or after the issue of notifications relating to elections to a Local Body, a State Assembly or the Parliament, can teachers be deployed to any kind of election-related work on teaching days or during teaching hours?

16. Let the papers of both these cases be placed before His Lordship, the Hon'ble The Chief Justice for constituting a larger Bench by the Office, at the earliest.

(2021)11ILR A635
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.10.2021

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Writ A No. 15093 of 2020

Devendra Kumar Sharma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Bhawani Prasad Shukla

Counsel for the Respondents:
C.S.C.

A. Service Law – Pension and Gratuity – Pendency of Criminal Case - Civil Service Regulations,1956 - Article 351 & 351-A - Mere pendency of criminal case or disciplinary proceedings is not sufficient to withhold or withdraw pension. Article 351 confers power upon the State Government to withhold or withdraw pension of a pensioner on two grounds; the pensioner is convicted of serious crime; secondly, he is guilty of grave misconduct; but not otherwise. Article 351-A empowers the Governor to withhold or withdraw a pension or a part of it permanently or for specified period and order recovery from pension for pecuniary loss caused to the Government if the pensioner in departmental proceedings or in judicial proceedings, has been found: (i) guilty of grave misconduct or (ii) to have caused pecuniary loss to Government by misconduct or negligence during his service. (Para 15, 17, 20)

B. Words and Phrases – '*serious crime*' - The expression 'serious crime' has to be understood in the context of service jurisprudence involving the Government servant. It may be any act or omission which in the opinion of the competent authority is serious enough and calls for punitive action in terms of Article 351. It has no bearing with the quantum of sentence but with the nature of the offence and the degree of involvement of the Government servant in the commission or omission of the crime which is relevant to determine whether the act of the employee falls in the ambit of 'serious crime'. (Para 16, 23)

It is evident that to withhold the full pension or any part of pension, the crime of which the pensioner, is charged must be a 'serious crime'. If the crime alleged against the pensioner, does not fall within the ambit of 'serious crime', the Governor or the State Government cannot withhold the pension or any part of it or gratuity of the pensioner. (Para 21)

The competent authority while withholding the gratuity and pension of the pensioner should apply its mind to determine the nature of crime. It should be born in mind that whether the complaint and charge-sheet against the pensioner was filed during the service period, and if the allegations in the complaint and charges against the petitioner fall within the ambit of 'serious offence', then how and in what contingency, the pensioner was allowed to continue in employment even though the department knew of the pendency of criminal case against the pensioner, and whether in such circumstances, it would be appropriate to withhold gratuity and pension of the pensioner on the ground of pendency of criminal case against him. (Para 24)

C. The stage of passing the order under Article 351/351-A by the competent authority arises only on the conclusion of the proceedings and not during the pendency of disciplinary or judicial proceedings. If the competent authority concludes that the pensioner is guilty of grave misconduct or is convicted of 'serious crime' or has caused pecuniary loss to the Government, the consequence u/Article 351/351A would follow. The opinion of the competent authority would be final and the pensioner has to wait till the conclusion of disciplinary or judicial proceeding. **The cause of action to the Government servant of taking remedy would arise after the order is passed by the competent authority upon conclusion of the proceedings/enquiry and not during pendency of the proceedings or enquiry.** (Para 18)

The Court should constraint to interfere with the finding of the competent authority unless the finding is without application of mind or is based on irrelevant considerations or is perverse or is otherwise not sustainable in law. (Para 22, 25)

D. Explanation (b) appended to Article 351-A - Criminal proceedings shall be deemed to be instituted on the date on which complaint is made, or a charge-sheet is submitted to the criminal Court. (Para 19)

In the present case, the competent authority had knowledge about the filing of charge-sheet against the petitioner in the criminal case on 2.2.2011, and he was allowed to continue in service thereafter for about 09 years till retirement i.e. 31.12.2020; therefore, this Court believes that the competent authority was of the opinion that the nature of crime was not that of a 'Serious Offence' so as to warrant any disciplinary proceeding against petitioner, and accordingly, he was allowed to continue in service. (Para 26, 27)

It passed only one-line order that "10% gratuity and final pension of the petitioner is withheld due to pendency of criminal case". The impugned order does not reflect any application of mind by the competent authority nor there is any finding that the offence alleged against the petitioner falls within the category of 'serious crime' to entitle it to invoke the power u/Article 351 of Civil Service Regulations. (Para 26)

Writ petition allowed. (E-4)

Precedent followed:

1. Shivagopal & ors. Vs St. of U.P. & ors. , 2019 (5) ADJ 441 (FB) (Para 12)

Present petition assails order dated 17.11.2020, passed by Superintendent of Police, Baghpat.

(Delivered by Hon'ble Saral Srivastava, J.

1. Heard learned counsel for the petitioner and learned Standing Counsel for the respondent nos. 1 to 5.

2. The petitioner, through the present writ petition, has assailed the order dated 17.11.2020, passed by respondent no.2-Superintendent of Police, Baghpat, by which he has refused to grant final pension and full gratuity to the petitioner on the ground of pendency of criminal case against him.

3. Brief facts of the case are that the petitioner was appointed as Constable (Civil Police), Uttar Pradesh on 13.08.1980 and retired on 31.12.2020.

4. It appears that during service on 07.12.2010, an FIR under Section 324/506 I.P.C. was registered against the petitioner on the complaint of his brother, namely, Ratan Kumar Sharma with an allegation that the petitioner and his family members along with some other anti-social elements came to his house and had beaten him and his family members. In the said incident, the daughter of the complainant had suffered injuries.

5. According to the petitioner, the charge sheet in the said criminal case was submitted by the police on 02.02.2011 under Sections 324/506 I.P.C. against him and his wife, and due to the pendency of the said criminal case, his final pension and full gratuity have not been disbursed, rather he had been sanctioned the provisional pension and 90% of the gratuity.

6. In the counter affidavit filed by the respondents, in paragraph no.5, it is stated that the petitioner had been awarded adverse entry by the punishment order No.Da-8/2001, dated 15.05.2001 of Senior Superintendent of Police, District Dehradun, and order No.Na-242/2010 dated 31.01.2011 of Deputy Inspector General of Police, District Meerut. Besides the above, a criminal case being Case Crime No.1787 of 2010, under Sections 324/506 I.P.C., P.S. Sihanigate, District Ghaziabad is also registered against the petitioner, which is pending before the Court of Chief Judicial Magistrate-III, Ghaziabad.

7. In paragraph no.11 of the counter affidavit, It is stated that Government Order No.Sa-3-1713/Das-87-933/89, dated 28.07.1980 provides that during the pendency of criminal proceedings or any judicial proceedings, only provisional pension is paid and payment of gratuity is withheld.

8. Challenging the aforesaid order, learned counsel for the petitioner submitted that the order impugned withholding 10/% gratuity and not granting full pension to the petitioner on the ground of pendency of criminal case is not sustainable for the reason that the gratuity, as well as full pension, can be withheld only when an employee is guilty of grave misconduct or convicted of 'serious offence'.

9. He submits that the authority has to apply its mind and record a *prima facie* satisfaction that the criminal charge leveled against the petitioner will fall within the ambit of 'serious crime', and once that be so, only then the authority can withhold the payment of gratuity and full pension. Accordingly, he submits that the impugned order does not reflect any application of mind by the authority or any finding of the authority recording *prima facie* satisfaction that the charges leveled against the petitioner fall within the ambit of 'serious crime'. Thus, he submits that it is a fit case where the authority should be directed to release the full gratuity and re-fix the final pension along with interest.

10. *Per-contra*, learned Standing Counsel would contend that the authorities are well within their domain to withhold the gratuity and refuse to grant full pension because of Article 351-A of Civil Service Regulation. He submits that admittedly, a criminal case under Sections 324/506 I.P.C. is pending against the petitioner in which charge sheet had been submitted on 02.02.2011, therefore, the authorities have rightly withheld 10% gratuity and granted provisional pension instead of full pension.

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

12. Before dealing with the contentions advanced by both the counsels, it would be apt to refer to the judgment of Full Bench of this Court in the case of ***Shivagopal and others Vs. State of U.P. and others, reported in 2019 (5) ADJ 441 (FB),*** wherein this Court considered the question (i) whether the government servant is entitled to full pension and gratuity on and during the pendency of judicial proceedings; (ii) whether the government servant is entitled to full pension/death-cum-retirement gratuity before the conclusion of the disciplinary proceedings/or judicial proceedings and final orders being passed thereon by the competent authority.

13. In this regard, relevant paragraph nos.31, 36, 37, 38, 39 & 40 of the Full Bench judgment are reproduced here-in-below:

"31. On plain reading, Article 351 confers power upon the State Government of withholding or withdrawing pension or any part of it, if the pensioner be convicted of 'serious crime' or be guilty of grave misconduct. In other words the State Government can withhold or withdraw pension on two grounds: (i) convicted of serious crime; (ii) guilty of grave misconduct; but not otherwise. In other words mere pendency of criminal case or disciplinary proceedings is not sufficient to withhold/or withdraw pension under Article 351.

36. Expression 'serious crime' would include offences having dangerous possible consequences. Black Law Dictionary defines serious offence as violation of law that is significant in effect and carries more than a six months punishment.

37. Section 2 (54) of Juvenile Justice Act, 2015, defines 'serious offence':

"serious offences" includes the offences for which the punishment under the India Penal Code or any other law for the time being in force, is imprisonment between three to seven years."

38. The expression 'judicial proceedings' includes civil cases, plausible civil cases where pension can be withheld/withdrawn would include matrimonial disputes, succession cases, right and entitlement of spouses and their children, domestic violence, civil death etc. involving the government servant.

39. The expression 'serious crime' has to be understood in the context of service jurisprudence involving the government servant. It may be any act or omission which in the opinion of the competent authority is serious enough and calls for punitive action in terms of

Article 351. It has no bearing with the quantum of sentence but with the nature of the offence and the degree of involvement of the government servant in the commission/omission of the crime.

40. Article 351-A empowers the Governor to withhold or withdraw pension or a part of it permanently or for specified period and order recovery from pension for pecuniary loss caused to the Government if the pensioner in departmental proceedings or in judicial proceedings, has been found: (i) guilty of grave misconduct or (ii) to have caused pecuniary loss to Government by misconduct or negligence during his service. The proviso to the Article spells out the circumstances/ conditions in which the departmental proceedings/judicial proceedings is required to be instituted for the purpose of withholding/withdrawing pension. Article 351-A reads thus:-

"351-A [substituted vide notification dated 6 September 1961]. The Governor reserves to himself the right of withholding or withdrawing a pension or any part of it, whether permanently or for a specified period and the right of ordering the recovery from a pension of the whole or part of any pecuniary loss caused to Government, if the pensioner is found in departmental or judicial proceedings to have been guilty of grave misconduct, or to have caused pecuniary loss to Government by misconduct or negligence, during his service, including service rendered on re-employment after retirement:

Provided that-

(a) such departmental proceedings, if not instituted while the officer was on duty either before retirement or during reemployment-

(i) shall not be instituted save with the sanction of the Governor.

(ii) shall be in respect of an event which took place not more than four years before the institution of such proceeding; and

(iii) shall be conducted by such authority and in such place or places as the Governor may direct and in accordance with the procedure applicable to proceedings on which an order of dismissal from service may be made.

(b) Judicial proceedings, if not instituted while the officer was on duty either before retirement or during re-employment, shall have been instituted in accordance with sub-clause (ii) of clause (a); and

(c) the Public Service Commission, U.P. shall be consulted before final orders are passed.

[Provided further that of the order passed by the Governor relates to a cash dealt with under the Uttar Pradesh Disciplinary Proceedings,(Administrative Tribunal) Rules, 1947, it shall not be necessary to consult Public Service Commission].

Explanation-For the purposes of this article-

(a) Departmental proceeding shall be deemed to have been instituted when the charges framed against the pensioner are issued to him or, if the officer has been placed under suspension from an earlier date, on such date ; and

(b) judicial proceedings shall be deemed to have been instituted:

(i) in the case of criminal proceedings, on the date on which complaint is made, or a charge-sheet is submitted, to a criminal Court ; and

(ii) in the case of civil proceedings, on the date on which the plaint is presented or, as the case may be, an application is made to Civil Court.

Note- As soon as proceedings of the nature referred to in this article are instituted the authority which institutes such proceedings shall without delay intimate the fact to the Audit Officer concerned."

14. The Full Bench also considered the question, the stage at which the government servant is entitled to the full pension or the

gratuity. In this regard, relevant paragraph nos. 66, 67 & 69 of the judgment is reproduced here-in-below:-

"66. The question that arises is whether the government servant/pensioner can seek intervention at a stage before the competent authority has had the occasion to pass appropriate order upon conclusion of the disciplinary/ judicial proceedings/or enquiry by Administrative Tribunal. We are of the opinion that such a course is not available to the pensioner and if allowed would entail serious consequences, otherwise not mandated by the Regulations. It is not open to the government servant/pensioner, in view of the conjoint reading of the Articles to preempt the pending proceedings/enquiry by walking away with pension/gratuity without awaiting the outcome/conclusion of the disciplinary/judicial proceedings/enquiry. The competent authority upon conclusion of the proceedings would be in a position to apply its mind on the outcome of the proceedings/enquiry and pass order thereon either withholding/withdrawing/ reduction of pension or directing recovery of pecuniary loss from pension under Articles 351/ 351-A of the Civil Service Regulations.

67. Article 351-AA/919-A came to be incorporated later (1980), the rule making authority was fully aware of the existing provisions, in particular, Article 351/351-A, but the rule making authority, in view of the plain and unambiguous language used therein (Article 351-A), while incorporating Article 351-AA/919-A, did not consider it appropriate to mandate the release of full pension/gratuity to the government servant until conclusion of the proceedings. The entitlement to provisional pension and deferment of gratuity during pendency of the proceedings was not made subject to any further conditions at that stage. The stage was deferred until orders thereon was required to be passed by the competent authority recording satisfaction or otherwise upon conclusion of proceedings/enquiry.

69. It, therefore, follows that the stage of passing appropriate order under Article 351/351-A by the competent authority is mandated at the conclusion of the proceedings and certainly not at the stage during pendency of the disciplinary/judicial proceedings.The cause to the pensioner would arise after the order is passed by the competent authority upon conclusion of the proceedings and findings returned thereon. In the opinion of the competent authority if the pensioner is guilty of grave misconduct, or convicted of serious crime, or caused pecuniary loss, the consequence under Article 351/351-A would follow. The government servant/ pensioner would have to wait until such an order is passed before claiming full pension and gratuity. In other words the cause to the government servant of taking remedy would arise after order of the competent authority is passed upon conclusion of the proceedings/enquiry and not during pendency of the proceedings/enquiry."

15. It would be apt to refer to para no.31 of the Full Bench judgment where it is held that Article 351 confers power upon the State Government to withhold or withdraw pension of a pensioner on two grounds; the pensioner is convicted of serious crime; secondly, he is guilty of grave misconduct; but not otherwise. The Full Bench further clarified that mere pendency of criminal case or disciplinary proceedings is not sufficient to withhold or withdraw pension under Article 351.

16. Para no.39 of the judgement deals with the expression 'serious crime'. The Full Bench noted that the expression 'serious crime' has to be understood in the context of service jurisprudence involving the government servant. It may be any act or omission which in the

opinion of the competent authority is serious enough and calls for punitive action in terms of Article 351. The Full Bench noted that it has no bearing with the quantum of sentence but with the nature of the offence and the degree of involvement of the government servant in the commission or omission of the crime which is relevant to determine whether the act of the employee falls in the ambit of 'serious crime'.

17. It would be relevant to have a glance at Article 351-A which empowers the Governor to withhold or withdraw a pension or a part of it permanently or for specified period and order recovery from pension for pecuniary loss caused to the Government if the pensioner in departmental proceedings or in judicial proceedings, has been found: (i) guilty of grave misconduct or (ii) to have caused pecuniary loss to Government by misconduct or negligence during his service.

18. The Full Bench has held in para-69 of the judgment that the stage of passing the order under Article 351/351-A by the competent authority arises only on the conclusion of the proceedings and not during the pendency of disciplinary or judicial proceedings. If the competent authority concludes that the pensioner is guilty of grave misconduct or is convicted of serious crime or has caused pecuniary loss to the government, the consequence under Article351/351A would follow. Consequently, the cause of action to the government servant of taking remedy would arise after the order is passed by the competent authority upon conclusion of the proceedings/enquiry and not during pendency of the proceedings or enquiry.

19. In the context of the present case, it is also pertinent to notice explanation (b) appended to Article 351-A which defines when the judicial proceedings shall be deemed to have been instituted. According to which, criminal proceedings shall be deemed to be instituted on the date on which complaint is made, or a charge-sheet is submitted to the criminal Court.

20. From the conjoint reading of Articles 351 & 351-A of Civil Service Regulations, it is explicit that one of the conditions in which the State Government/Governor can withhold or withdraw pension or part thereof, whether permanently or for a specified period or to order recovery from a pension of the whole or part of any pecuniary loss caused to the Government if the pensioner is convicted of 'serious crime'. Besides it, there are several other instances, which have no relevance in the context of the present case.

21. Thus, from the aforesaid deliberation, it is evident that to withhold the full pension or any part of pension, the crime of which the pensioner is charged must be a 'serious crime'. If the crime alleged against the pensioner, does not fall within the ambit of 'serious crime', the Governor or the State Government cannot withhold the pension or any part of it or gratuity of the pensioner.

22. Though, the Full Bench has held in para nos.-66 to 69 of the judgment that the cause of action to the pensioner would arise after the order is passed by the competent authority upon conclusion of the proceedings and findings returned thereon, but the Full Bench in para no.31 of the judgment has observed that mere pendency of criminal case or disciplinary proceedings is not sufficient to withhold or withdraw pension under Article 351 of Civil Service Regulations.

23. Further, in para no. 39 of the judgment it has been observed that the expression 'serious crime' in the context of service jurisprudence involving the government servant refers to any act or omission which in the opinion of the competent authority is serious enough and calls for punitive action in terms of Article 351. It

further holds that the quantum of sentence is not relevant but the nature of the offence and the degree of involvement of the government servant in the commission or omission of the crime is relevant.

24. Since, the Full Bench in para no.31 of the judgment has held that mere pendency of criminal case or disciplinary proceedings is not sufficient to withhold or withdraw pension under Article 351 of the Civil Service Regulations and further elaborated expression 'serious crime' in para no.39 of the judgment, therefore, from the conjoint reading of the aforesaid two paragraphs of the judgment, it can be safely culled out that the competent authority while withholding the gratuity and pension of the pensioner should apply its mind to see whether the nature of crime in which the pensioner is involved comes within the ambit of 'serious crime' or not. In doing so, the competent authority must also bear in mind that whether the complaint and charge sheet against the pensioner was filed during the service period, and if the allegations in the complaint and charges against the petitioner fall within the ambit of 'serious offence' which is unbecoming of a Government Servant, then how and in what contingency, the pensioner was allowed to continue in employment even though the department knew of the pendency of criminal case against the pensioner, and whether in such circumstances, it would be appropriate to withhold gratuity and pension of the pensioner on the ground of pendency of criminal case against him.

25. Once, the competent authority on the subjective satisfaction of the case holds in the light of paragraph nos. 31 & 39 of the full Bench Judgment and observation made above that the crime which is alleged against the pensioner falls within the ambit of 'serious crime', the opinion of the competent authority would be final and the pensioner has to wait till the conclusion of disciplinary or judicial proceeding, and the Court should constraint to interfere with the finding of the competent authority unless the finding is without application of mind or is based on irrelevant considerations or is perverse or is otherwise not sustainable in law.

26. Now, coming to the facts of this case, the competent authority had knowledge about the filing of charge sheet against the petitioner in the criminal case on 02.02.2011, and the petitioner was allowed to continue in service thereafter for about 09 years till retirement i.e. 31.12.2020; yet it passed only one-line order that "10% gratuity and final pension of the petitioner is withheld due to pendency of criminal case". The impugned order does not reflect any application of mind by the competent authority nor there is any finding that the offence alleged against the petitioner falls within the category of 'serious crime' to entitle it to invoke the power under Article 351 of Civil Service Regulations.

27. This Court in normal circumstances would have remanded the matter to the competent authority, but considering the fact that the charge sheet in the criminal case had been filed on 02.02.2011 and the petitioner was allowed to continue in service thereafter about 09 years till retirement, i.e, 31.12.2020, therefore, this Court believes that the competent authority was of the opinion that the nature of crime in which the petitioner has been charge-sheeted is not 'Serious Offence' so as to warrant any disciplinary proceeding against the petitioner, and accordingly, he was allowed to continue in service uninterruptedly till retirement. Therefore, in view of paragraph-31 of the Full Bench judgment of this Court in the case of ***Shivagopal & others (supra)***, this Court believes that the order impugned is not sustainable and is, accordingly, set aside with the direction to the respondents to release 10% unpaid gratuity and fix and pay final pension including arrears to the petitioner within three

months from the date of production of a certified copy of this order.

28. Consequently, for the reasons given above, the writ petition is allowed with no orders as to cost.

(2021)11ILR A643
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.11.2021

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE VIKAS BUDHWAR, J.

Writ A No. 15281 of 2021

No. 6647364-A Ex-Hav Clerk (Stores) Ram Naresh Ram ...Petitioner
Versus
The U.O.I. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Satyajit Mukerji

Counsel for the Respondents:
A.S.G., Sri Sanjay Kumar Om

A. Service Law - Armed Forces – Promotion – Armed Forces Tribunal Act, 2007: Section 14.

Armed Forces Tribunal Act, 2007 - Section 30 – Maintainability – Though u/s 30 no person has a right of appeal against the final order or decision of the Tribunal to the Supreme Court other than those falling u/s 30(2) of the Act, but it is statutory appeal which lies to the Supreme Court. Thus, against the impugned order the petitioner has a right of appeal before the Hon'ble Supreme Court u/s 30 read with Section 31 of the Act. (Para 9)

The scheme of Section 31 being that an application for grant of a certificate must first be moved before the Tribunal, before the aggrieved party can approach Supreme Court for the grant of leave to file an appeal. The purpose underlying the provision appears to be that if the Tribunal itself grants a certificate of fitness for filing an appeal, it would be unnecessary for the aggrieved party to approach Supreme Court for a leave to file such an appeal. An appeal by certificate would then be maintainable as a matter of right in view of Section 30 which uses the expression "an appeal shall lie to the Supreme Court". (Para 2)

The controversy involved before the Tribunal in the present case was w.r.t. the rejection of statutory complaint and setting aside the annual confidential report of the petitioner for the year 1988 and promotion to him to the rank of Naib Subedar from ante date of seniority alongwith all consequential benefits. (Para 10)

Writ petition dismissed leaving it open for the petitioner to file an appeal before the Hon'ble Supreme Court in accordance with the provisions of The Armed Forces Tribunal Act, 2007. (Para 11) (E-4)

Precedent followed:

1. U.O.I. & ors. Vs Major General Shri Kant Sharma & anr., (2015) 6 SCC 773 (Para 2)

Precedent distinguished:

1. Balkrishna Ram Vs U.O.I. & anr., (2020) 2 SCC 442 (Para 3)

Present petition assails order 05.02.2018, passed by the Armed Forces Tribunal, Regional Bench, Lucknow.

(Delivered by Hon'ble Surya Prakash Kesarwani, J.
&
Hon'ble Vikas Budhwar, J.)

1. Heard Sri Satyajit Mukerji, learned counsel for the petitioner and Sri Sanjay Kumar Om, learned Central Government standing counsel.

2. Against the impugned order dated 05.02.2018 in O.A. No.160 of 2016, passed by the Armed Forces Tribunal, Regional Bench, Lucknow, under Section 14 of the Armed Forces

Tribunal Act 2007, the petitioner has a right of Appeal under Section 30 of the Act before the Supreme Court. In the case of **Union of India & Ors. Vs. Major General Shri Kant Sharma & Anr. (2015) 6 SCC 773**, Hon'ble Supreme Court held as under :

*"33. **Statutory Remedy***

In Union of India vs. Brigadier P.S. Gill, (2012) 4 SCC 463, this Court while dealing with appeals under Section 30 of the Armed Forces Tribunal Act following the procedure prescribed under Section 31 and its maintainability, held as follows:

"8. Section 31 of the Act extracted above specifically provides for an appeal to the Supreme Court but stipulates two distinct routes for such an appeal. The first route to this Court is sanctioned by the Tribunal granting leave to file such an appeal. Section 31(1) in no uncertain terms forbids grant of leave to appeal to this Court unless the Tribunal certifies that a point of law of general public importance is involved in the decision. This implies that Section 31 does not create a vested, indefeasible or absolute right of filing an appeal to this Court against a final order or decision of the Tribunal to this Court. Such an appeal must be preceded by the leave of the Tribunal and such leave must in turn be preceded by a certificate by the Tribunal that a point of law of general public importance is involved in the appeal.

9. The second and the only other route to access this Court is also found in Section 31(1) itself. The expression "or it appears to the Supreme Court [pic]that the point is one which ought to be considered by that Court" empowers this Court to permit the filing of an appeal against any such final decision or order of the Tribunal.

10. A conjoint reading of Sections 30 and 31 can lead to only one conclusion viz. there is no vested right of appeal against a final order or decision of the Tribunal to this Court other than those falling under Section 30(2) of the Act. The only mode to bring up the matter to this Court in appeal is either by way of certificate obtained from the Tribunal that decided the matter or by obtaining leave of this Court under Section 31 for filing an appeal depending upon whether this Court considers the point involved in the case to be one that ought to be considered by this Court.

11. An incidental question that arises is : whether an application for permission to file an appeal under Section 31 can be moved directly before the Supreme Court without first approaching the Tribunal for a certificate in terms of the first part of Section 31(1) of the Act?

12. In the ordinary course the aggrieved party could perhaps adopt one of the two routes to bring up the matter to this Court but that does not appear to be the legislative intent evident from Section 31(2) (supra). A careful reading of the section shows that it not only stipulates the period for making an application to the Tribunal for grant of leave to appeal to this Court but also stipulates the period for making an application to this Court for leave of this Court to file an appeal against the said order which is sought to be challenged.

13. It is significant that the period stipulated for filing an application to this Court starts running from the date beginning from the date the application made to the Tribunal for grant of certificate is refused by the Tribunal. This implies that the aggrieved party cannot approach this Court directly for grant of leave to file an appeal under Section 31(1) read with Section 31(2) of the Act.

14. The scheme of Section 31 being that an application for grant of a certificate must first be moved before the Tribunal, before the aggrieved party can approach this Court for the grant of leave to file an appeal. The purpose underlying the provision appears to be that if the Tribunal itself grants a certificate of fitness for filing an appeal, it would be unnecessary for the aggrieved party to approach this Court for a

leave to file such an appeal. An appeal by certificate would then be maintainable as a matter of right in view of Section 30 which uses the expression "an appeal shall lie to the Supreme Court". That appears to us to be the true legal position on a plain reading of the provisions of Sections 30 and 31."

Thus, we find that though under Section 30 no person has a right of appeal against the final order or decision of the Tribunal to this Court other than those falling under Section 30(2) of the Act, but it is statutory appeal which lies to this Court.

34. The aforesaid decisions rendered by this Court can be summarised as follows:

(i) The power of judicial review vested in the High Court under Article 226 is one of the basic essential features of the Constitution and any legislation including Armed Forces Act, 2007 cannot override or curtail jurisdiction of the High Court under Article 226 of the Constitution of India.(Refer: L. Chandra and S.N. Mukherjee).

(ii) The jurisdiction of the High Court under Article 226 and this Court under Article 32 though cannot be circumscribed by the provisions of any enactment, they will certainly have due regard to the legislative intent evidenced by the provisions of the Acts and would exercise their jurisdiction consistent with the provisions of the Act.(Refer: Mafatlal Industries Ltd.).

(iii)When a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation. (Refer: Nivedita Sharma).

(iv) The High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance. (Refer: Nivedita Sharma).

35. Article 141 of the Constitution of India reads as follows: "Article 141. Law declared by Supreme Court to be binding on all courts.- The law declared by the Supreme Court shall be binding on all courts within the territory of India."

36. In Executive Engineer, Southern Electricity Supply Company of Orissa Limited (SOUTHCO) this Court observed that it should only be for the specialised tribunal or the appellate authorities to examine the merits of assessment or even the factual matrix of the case.

In Chhabil Dass Agrawal this Court held that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.

In Cicily Kallarackal this Court issued a direction of caution that it will not be a proper exercise of the jurisdiction by the High Court to entertain a writ petition against such orders against which statutory appeal lies before this Court.

In view of Article 141(1) the law as laid down by this Court, as referred above, is binding on all courts of India including the High Courts.

*37. **Likelihood of anomalous situation***

If the High Court entertains a petition under Article 226 of the Constitution of India against order passed by Armed Forces Tribunal under Section 14 or Section 15 of the Act bypassing the machinery of statute i.e. Sections 30 and 31 of the Act, there is likelihood of anomalous situation for the aggrieved person in praying for relief from this Court.

Section 30 provides for an appeal to this Court subject to leave granted under Section 31 of the Act. By clause (2) of Article 136 of the Constitution of India, the appellate jurisdiction of this Court under Article 136 has been excluded in relation to any judgment, determination, sentence or order passed or made by any court or Tribunal constituted by or

under any law relating to the Armed Forces. If any person aggrieved by the order of the Tribunal, moves before the High Court under Article 226 and the High Court entertains the petition and passes a judgment or order, the person who may be aggrieved against both the orders passed by the Armed Forces Tribunal and the High Court, cannot challenge both the orders in one joint appeal. The aggrieved person may file leave to appeal under Article 136 of the Constitution against the judgment passed by the High Court but in view of the bar of jurisdiction by clause (2) of Article 136, this Court cannot entertain appeal against the order of the Armed Forces Tribunal. Once, the High Court entertains a petition under Article 226 of the Constitution against the order of Armed Forces Tribunal and decides the matter, the person who thus approached the High Court, will also be precluded from filing an appeal under Section 30 with leave to appeal under Section 31 of the Act against the order of the Armed Forces Tribunal as he cannot challenge the order passed by the High Court under Article 226 of the Constitution under Section 30 read with Section 31 of the Act. Thereby, there is a chance of anomalous situation. Therefore, it is always desirable for the High Court to act in terms of the law laid down by this Court as referred to above, which is binding on the High Court under Article 141 of the Constitution of India, allowing the aggrieved person to avail the remedy under Section 30 read with Section 31 Armed Forces Act."

38. The High Court (Delhi High Court) while entertaining the writ petition under Article 226 of the Constitution bypassed the machinery created under Sections 30 and 31 of Act. However, we find that Andhra Pradesh High Court and the Allahabad High Court had not entertained the petitions under Article 226 and directed the writ petitioners to seek resort under Sections 30 and 31 of the Act. Further, the law laid down by this Court, as referred to above, being binding on the High Court, we are of the view that Delhi High Court was not justified in entertaining the petition under Article 226 of the Constitution of India.

39. For the reasons aforesaid, we set aside the impugned judgments passed by the Delhi High Court and upheld the judgments and orders passed by the Andhra Pradesh High Court and Allahabad High Court. Aggrieved persons are given liberty to avail the remedy under Section 30 with leave to appeal under Section 31 of the Act, and if so necessary may file petition for condonation of delay to avail remedy before this Court.

3. Learned counsel for the petitioner has relied upon a recent judgment of Hon'ble Supreme Court in the case of **Balkrishna Ram Vs. Union of India and Anr. (2020) 2 SCC 442.**

4. We have perused the judgment of Hon'ble Supreme Court in the case of **Balkrishna Ram (supra)** and we find that in paragraphs 2, 14 and 19, Hon'ble Supreme Court has observed as under :-

"2. One of the issues raised in this appeal is ***whether an appeal against an order of a single judge of a High Court deciding a case related to an Armed Forces personnel pending before the High Court is required to be transferred to the Armed Forces Tribunal or should be heard by the High Court.***

14. It would be pertinent to add that the principle that the High Court should not exercise its extraordinary writ jurisdiction when an efficacious alternative remedy is available, is a rule of prudence and not a rule of law. The writ courts normally refrain from exercising their extraordinary power if the petitioner has an alternative efficacious remedy. The existence of such remedy however does not mean that the jurisdiction of the High Court is ousted. At the same time, it is a well settled principle that such jurisdiction should not be exercised when there

is an alternative remedy available ***Union of India vs. T.R. Varma AIR 1957 SC 882. The rule of alternative remedy is a rule of discretion and not a rule of jurisdiction.*** *Merely because the Court may not exercise its discretion, is not a ground to hold that it has no jurisdiction. There may be cases where the High Court would be justified in exercising its writ jurisdiction because of some glaring illegality committed by the AFT. One must also remember that the alternative remedy must be efficacious and in case of a Non Commissioned Officer (NCO), or a Junior Commissioned Officer (JCO); to expect such a person to approach the Supreme Court in every case may not be justified. It is extremely difficult and beyond the monetary reach of an ordinary litigant to approach the Supreme Court. Therefore, it will be for the High Court to decide in the peculiar facts and circumstances of each case whether it should exercise its extraordinary writ jurisdiction or not. There cannot be a blanket ban on the exercise of such jurisdiction because that would effectively mean that the writ court is denuded of its jurisdiction to entertain such writ petitions which is not the law laid down in L. Chandra Kumar (supra).*

19. In our view, it is not necessary to indicate in the order of discharge whether such consideration took place or not. From the records of the case, we find that before discharge, the name of the appellant was considered for two categories but unfortunately the appellant could not meet the height criteria for appointment to either of the posts. Thus, this clearly shows that his case was considered as per the extant policy but he was not fit for appointment. In this view of the matter, we find no merit in the appeal, and hence it is dismissed. Pending application(s) if any, stand(s) disposed of."

5. The judgment in the case of **Balkrishna Ram (supra)** and judgment in the case of **Major General Shri Kant Sharma (supra)** both were rendered by Division Benches of Hon'ble Supreme Court. In the case of **Major General Shri Kant Sharma (supra)** the question consdiered by Hon'ble Supreme Court was as under :

"Whether the right of appeal under Section 30 of the Armed Forces Tribunal Act, 2007 against an order of Armed Forces Tribunal with the leave of the Tribunal under Section 31 of the Act or leave granted by the Supreme Court, or bar of leave to appeal before the Supreme Court under Article 136(2) of the Constitution of India, will bar the jurisdiction of the High Court under Article 226 of the Constitution of India regarding matters related to Armed Forces. ?"

6. The aforesaid question was specifically answered by Hon'ble Supreme Court in the aforequoted paragraphs 37, 38, 39 of the judgment.

7. The controversy involved before the Hon'ble Supreme Court in the case of **Balkrishna Ram (supra)** is reflected from the paragraph 2 of the aforequoted paragraph of the judgment which indicates that the question involved was *"whether an appeal against an order of a single judge of a High Court deciding a case related to an Armed Forces personnel* ***pending before the High Court is required to be transferred to the Armed Forces Tribunal or should be heard by the High Court. ?"***

8. The question so framed was answered by Hon'ble Supreme Court with the observations made in paragraph 14 as aforequoted and ultimately the appeal was dismissed with the observations made in paragraph 19 of the judgment.

9. The question with respect to the interpretation of Section 30 of the Armed Forces Tribunal Act, 2007 was directly and essentially in issue and consideration by Hon'ble Supreme

Court **Union of India & Ors. Vs. Major General Shri Kant Sharma & Anr (supra)** and it was held that no person has a right of appeal against the final order or decision of the Tribunal to the Supreme Court other than those falling under Section 30(2) of the Act, but it is statutory appeal which lies to the Supreme Court. Thus, against the impugned order the petitioner has a right of appeal before the Hon'ble Supreme Court under under Section 30 read with Section 31 of the Act. The judgment of Hon'ble Supreme Court in the case of **Balkrishna Ram (supra)** reiterates the well settled principle of law with regard to the extraordinary and discretionary jurisdiction of High Court under Article 226 of the Constitution of India.

10. The controversy involved before the Tribunal in the present set of facts was with regard to the rejection of statutory complaint and setting aside the annual confidential report of the petitioner for the year 1988 and promotion to him to the rank of Naib Subedar from ante date of seniority alongwith all consequential benefits.

11. Considering the facts and circumstances of the case and the impugned order of Tribunal, we do not find any good reason to exercise our discretion to entertain the present writ petition particularly in view of the law laid down by Hon'ble Supreme Court in the case of **Union of India & Ors. Vs. Major General Shri Kant Sharma & Anr (supra).** Consequently and without expressing any opinion on merits of the claim of the petitioner, the writ petition is **dismissed** leaving it open for the petitioner to file an appeal before the Hon'ble Supreme Court in accordance with the provisions of The Armed Forces Tribunal Act, 2007.

(2021)11ILR A648
ORIGINAL JURISDICTION
CIVIL SIDE

DATED: ALLAHABAD 05.10.2021

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ A No. 13256 of 2021
connected with
Writ C Nos. 14759 of 2019 and 17749 of 2019 and 17779 of 2019

Vijay Bahadur & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Yogesh Kumar Saxena

Counsel for the Respondents:
C.S.C.

A. Service Law – Employment – Salary/wages – Eviction - Societies Registration Act,1860 - Section 13 – The Society which managed the affairs of the hospital (The Georgina McRobert Memorial Hospital, Kanpur Nagar) dissolved and as a result the lease granted in favour of the Society was cancelled. In pursuance to this, petitioners (employees of the hospital) of Writ – A No. 13256 of 2021 were directed to vacate the premises by the impugned order.

Societies Registration Act, 1860 - Section 13 – No approval is required from the Sub-Registrar and any dispute among the governing body members or the members of the Society is to be referred to the Principal Court of original Civil jurisdiction of the District, in which the chief building of the Society is situated and that Court alone shall pass such order in the matter as it may deem fit. (Para 18)

As of today legally there is no Society in existence from the date of passing of the resolution dissolving the Society and there being no challenge before the Principal Court of original civil jurisdiction, Court held that the Writ-C No. 14759 of 2021 could not have been filed by the petitioners, who have no locus, specially petitioner no. 1 (which stands dissolved), Petitioner No 2, Petitioner No 5 and Petitioner No 6 (who are neither the members nor members of Board of Governors) and with regard to the other persons i.e. Petitioners nos. 3 and 4 the only recourse open

was to approach the Principal Court of original civil jurisdiction, which has admittedly not been done. (Para 21)

B. Once the Lease has come to an end and there is no challenge to the cancellation of Lease, the Licencee on his own cannot have an enforceable right in respect of property rights. It is clear is that the State Government has taken a decision to take over the Hospital and to construct a multi-speciality Hospital. The legal status of the petitioners of writ petition no 13256/21, even as per their own showing is that of a licencee of the Society which was the lessee of the land which is a Nazul Land, the Lessor being the State. (Para 23, 24)

The writ petition being Writ-A No. 13256 of 2021 is disposed off with directions that the petitioner shall approach the District Magistrate by filing their representation, which shall be considered by the District Magistrate, Kanpur either himself or through a Committee to be appointed by him with regard to the arrears of wages claimed by them and with regard to their occupation on the land of the Society. This measure is being directed only on humanitarian grounds as the petitioners do not have any legal rights over property. (Para 25, 27, 28)

Writ-C No. 14759 of 2021 is dismissed. Writ-A No. 13256 of 2021 is disposed off with directions. Writ-C No. 17749 of 2019 and Writ-C No. 17779 of 2019 are rendered infructuous. All the rights can be agitated only before the principal Court of original civil jurisdiction. (Para 30) (E-4)

Precedent followed:

1. C/M Maharshi Kapil Muni Shiksha Samiti & anr. Vs State of U.P. & anr., Writ-C No. 19885 of 2020, decided on 08.12.2020 (Para 18)

Present petition assails order dated 24.08.2021.

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. Heard Shri Y.K. Saxena, Advocate appearing on behalf of petitioner in Writ-A No. 13256 of 2021 as well as in Writ-C No. 14759 of 2021 as well as Shri M.C. Chaturvedi, learned Additional Advocate General assisted by Shri Naushad Siddiqui, learned Standing Counsel on behalf of State.

2. The present writ petition has been filed by the 22 persons claiming themselves to be the employees of The Georgina McRobert Memorial Hospital, 14/112, Civil Lines, Kanpur Nagar. In the present writ petition, the petitioners have alleged and argued that the petitioners are the employees, who were not being paid their salaries and the second claim of the petitioners is that by virtue of their employment, they are entitled to retain the properties in their occupation in the premises 14/112, Civil Lines, Kanpur Nagar, from which they have been threatened to be evicted and as such have approached this Court.

3. As the issue raised in the present writ petition are intrinsically linked to Writ-C No. 14759 of 2021, Writ-C No. 17749 of 2019 and Writ-C No. 17779 of 2019, this Court vide order passed on 30th September, 2021 had directed the matter to be listed along with

4. In terms of the said directions, the matter are listed. As the claim made in the petition cannot be decided without deciding the issues raised in the other writ petition, i:e Writ-C No. 14759 of 2021 as such the said writ petition is also being disposed off by means of the present order.

5. The facts that emerge on account of dispute in between the parties is that a Society in the name of The Georgina McRobert Memorial Hospital, 14/112, Civil Lines, Kanpur Nagar. was registered on 30th November, 1919 under the U.P. Societies Registration Act. to manage and run a prestigious hospital, namely The Georgina McRobert Memorial Hospital at Kanpur providing one of the best medical facilities to the residents of Kanpur. The Society has its own bye-laws. In terms of the bye-laws of the Society, the Board of Governors were

managing the affairs, consisting of 11 Governors. With the passage of time, the society could not manage the affairs of the Hospital effectively and the whole purpose of the society got adversly effected, however, as the society was in possession of huge piece of land and building and the society was on verge of financial bankruptcy, the land sharks and unsocial elements found the assets of the society an easy prey . As with the passage of time, three members of the Board of Governors left Kanpur or died, disputes arose amongst the remaining eight members ,initially the dispute related to induction and resignations of two members namely Mr.Ananad Swaroop and Mr. Nitin Gupta,which resulted in various litigation upto this Court in a second series of attempt by the minority group of members in Board of Governors, to out number the majority group of five members,proposed to hold a meeting for inducting three persons namely Kamal Bhatia,Navin Darolia and Sandeep Kansal, who claimed to be reputed residents of Kanpur and proposed to donate Rs. 25 Lakhs each to the Hospital on their being inducted as members of the society and also being inducted to the Board of Governor.

6. In a meeting convened on 14.3.2019, they were made the Members/Governors of the Society. It was alleged by majority faction of the society that no verification of the said three persons with regards to their antecedents was recorded and no notice of the said meeting was given to the rest of members of the Board.

7. The said three persons inducted are, the petitioner no. 2, petitioner no. 5 and the petitioner no. 6 in Writ-C No. 14759 of 2021.

8. After the induction of three member a list of members of the Board of Governors was filed with the Deputy Registrar ,the said list and induction of the three persons was opposed by existing Board of Governors who filed objections before the Registrar complaining of the manner, in which the meeting was conducted and the three persons were coopted. The deputy registrar by his notice dated on 25.3.2019 called upon the parties to appear before him and to submit their response. The said hearing came to be challenged in Writ Petition No. 12530 of 2019, which was disposed off vide order dated 11.4.2019, directing the Deputy Registrar to pass final orders in regard to the dispute raised by the Board of Governors.

9. In terms of the directions given, an order came to be passed on 10.5.2019 holding that the induction of three persons was arbitrary and the meeting held on 14.3.2019 was held to be bad in law.

10. The said order dated 10.5.2019 was challenged by one Sandeep Kansal and another vide W.P.no 17779 of 2021. Similar writ petition was also filed by Society through its secretary Kamal Bhatia and five persons challenging the order dated 10.5.2019 vide Writ-C No. 17749 of 2019. In one of the writ petition being Writ-C No. 17749, as an interim measure, only to protect the interest and running of the Hospital, this Court passed an order on 3.7.2019 permitting the petitioners of Writ-C No. 17749 of 2019 to operate bank accounts to meet the expenses of the Hospital.No order was passed reviving the quashed resolution dated 14.3.2019.

11. The facts emerge, that the three persons who were elected in the meeting dated 14.3.2019 lost their claim as the resolution dated 14.3.19 stood set aside vide order dated 10.5.2019 which is challenged in the Writ-C No. 17749 of 2019 and Writ-C No. 17779 of 2019 pending before this Court.

12. As the strength of the Board of Governors had fallen to Eight members, five of the remaining Board of Members finding it difficult to run the Hospital, wrote a letter to the

Secretary on 8.1.2021 seeking to convene a meeting, the agenda being the dissolving the Society. In the explanatory statement of said agenda, it was recorded that the Society was found with an object to taken over the Hospital from Sir Alexander, however, despite running the Hospital for 100 years, in the last two years, the Hospital was on the verge of being shut down and the Society was unable to meet its liabilities and obligations even with regard to the payment of the electricity bills, etc. A decision was to be taken with regard to the closure of the Society.

13. The Secretary, the petitioner no. 3 in Writ-C No. 14759 of 2021, wrote a letter that he was no more the Secretary of the Society and as such the requisition letter was wrongly sent to him and he also informed that as the disputes with regard to the membership is pending before the High Court in Writ-C No. 17749 of 2019 and Writ-C No. 17779 of 2019, it would be improper to call a meeting as proposed. In any event, a meeting came to be held on 14th February, 2021, wherein a decision was taken by five members present, four in person and one through power of attorney out of the Eight members, to dissolve the Society under the provisions of Societies Registration Act and a laudable agenda was passed to donate the entire assets of the Society, after meeting out its liabilities and obligations, to the Government of Uttar Pradesh for establishing a multi-speciality hospital for the people of Kanpur.

14. The Deputy Registrar, Firms, Societies and Chits, Kanpur, proceeded to pass an order dated 25.2.2021, taking into account the resolution dated 14th February, 2021 accepting the same wrote a letter to the District Magistrate for taking effective steps in pursuance to the resolution and in pursuance to the donation of the property in favour of the State of U.P.

15. After a series of communication, the State Government took a decision on 26.7.2021, whereby the Nazul lease granted in favour of the Society was cancelled and it was directed that the records be amended to incorporate the following "Un-awantit Sarkari Bhumi', simultaneously therewith, an order was passed constituting of a Committee of three persons, namely, the ADM (City), Chief Medical Officer and Additional District Magistrate Sadar to act as administrators for running of the affairs. In the said order, it was recorded that the State Government has approved the actions.

16. In pursuance to the action taken by the State Government cancelling the lease granted in favour of the Society, notices were issued to the petitioners of Writ-A No. 13256 of 2021 directing them to vacate the premises vide order dated 24.8.2021, against which the petitioners of Writ-A No. 13256 of 2021 have filed the present writ petition alleging that on the one hand, they have not been paid their wages and on the other hand they are being threatened with forcible eviction. The allegations is that the petitioners have not been paid the amount of their wages since long.

17. The facts that emerge and recorded above are that five of the Eight members of Board of Governors representing three-fifth of the total strength of the remaining members passed a resolution dissolving the Society in terms of the mandate of Section 13 of the Act. Section 13 of the Societies Registration Act is quoted hereinbelow:-

"13. Provision for dissolution of societies and adjustment of their affairs.--Any number not less than three-fifths of the members of any society may determine that it shall be dissolved, and thereupon it shall be dissolved forthwith, *or at the time then agreed upon, and all necessary steps shall be taken for the disposal and settlement of the property of the society, its claims and liabilities, according to the rules of the said society applicable thereto, if*

*any, and, if not, then as the governing body shall find expedient provided that, **in the event of any dispute arising among the said governing body or the members of the society, the adjustment of its affairs shall be referred to the principal Court of original civil jurisdiction** of the district in which the chief building of the society is situate; and the Court shall make such order in the matter as it shall deem requisite:*

*Provided that no society shall be dissolved unless three-fifths of the members shall have expressed **a wish for such dissolution by their votes delivered in person, or by proxy, at a general meeting convened for the purpose:***

Provided that 1[whenever any Government] is a member of, or a contributor to, or otherwise interested in any society registered under this Act, such society shall not be dissolved 2[without the consent of the Government of the 3[State] of registration]."

18. This Court in the case of ***C/M Maharshi Kapil Muni Shiksha Samiti and Another Vs. State of U.P. and Another, Writ-C No. 19885 of 2020,*** decided on 8.12.2020 has already held that in terms of the requirement of Section 13 of the Societies Registration Act, no approval is required from the Sub-Registrar and any dispute among the governing body members or the members of the Society is to be referred to the Principal Court of original Civil jurisdiction of the District, in which the chief building of the Society is situate and that Court alone shall pass such order in the matter as it may deem fit.

19. From the facts it is clear that a prestigious Society owing valuable piece of land in the heart of city of Kanpur Nagar is being attempted to be taken over through back door entries and finally a resolution has been passed dissolving the Society in terms of Section 13 of the Act, as such from the date of passing of the resolution,legally there is no Society left. It is also borne from the records that no proceedings have been initiated before the principal Court of original civil jurisdiction in respect of any dispute in between the members of the Society or the governing body. On the face of the resolution, the same has been passed in accordance with Section 13 and any dispute in that regard can only be entertained by the principal Court of original civil jurisdiction.

20. There being no such dispute raised, it is not understandable as to how a dissolved Society could file Writ-C No. 14759 of 2021 and how the petitioner no. 2 of Writ-C No. 14759 of 2021 can claim himself to be the Secretary of the Society,once, his membership through a resolution has been set aside vide order dated 10.5.19 he is legally not even a member and consequently he can't claim to be a secretary. In any view the contention in Writ Petition No. 14759/2021 is that Section 13 providing for three-fifth members has to be read in consonance with the requirement of strength provided in bye laws of the society which argument merits outright rejection as the statutory provision will prevail over bye-laws.

21. As of today legally there is no Society in existence from the date of passing of the resolution dissolving the Society and there being no challenge before the Principal Court of original civil jurisdiction, I have no hesitation in holding that the Writ-C No. 14759 of 2021 could not have been filed by the petitioners, who have no locus, specially petitioner no. 1(which stands dissolved),Petitioner No 2,Petitioner No 5 and Petitioner No 6 (who are neither the members nor members of Board of Governors) and with regard to the other persons i:e Petitioners nos 3 and 4 the only recourse open was to approach the Principal Court of original civil jurisdiction, which has admittedly not been done.

22. The other fact that is clear from the whole narrative is that the cancellation of the Nazul lease has not been challenged and only the order communicating the cancellation of the

Nazul lease is under challenge, as the same was done through the order dated 17.6.2021 by the State Government.

23. It is also clear is that the State Government has taken a decision to take over the Hospital and to construct a multi-speciality Hospital.

24. The legal status of the petitioners of writ petition no 13256/21, even as per their own showing is that of a licencee of the Society which was the lessee of the land which is a Nazul Land, the Lessor being the State. Once the Lease has come to an end and there is no challenge to the cancellation of Lease,the Licencee on his own cannot have an enforceable right in respect of property rights.

25. In view of the fact that the Government has taken a decision to take over the Hospital, the assets and liabilities have to be taken simultaneously,As the petitioners of Writ-A No. 13256 of 2021 were the employees of the dissolved Society, this Court expects that the State shall take into account the services rendered by them and shall take a decision with regard to the payment of their dues, to which they claim.

26. It is made clear that this Court has not gone into the merits of the claim of the employees with regard to their wages.

27. As the Society has been dissolved, the land of the Society stands vested in the State after the cancellation of the lease and the administration is now with the committee constituted by the District Magistrate, this Court directs that the Committee constituted by the District Magistrate vide order dated 26.7.2021 shall take into consideration the contentions of the workers and if required the District Magistrate will pass requisite orders keeping in view the welfare of the employees.

28. The writ petition being Writ-A No. 13256 of 2021 is disposed off with directions that the petitioner shall approach the District Magistrate by filing their representation, which shall be considered by the District Magistrate, Kanpur either himself or through a Committee to be appointed by him with regard to the arrears of wages claimed by them and with regard to their occupation on the land of the Society. This measure is being directed only on humanitarian grounds as the petitioners do not have any legal rights over property.

29. In the peculiar facts of the case following directions are issued:

i) The Chief Secretary, State of UP is directed to take all requisite measures to expeditiously establish a multi speciality hospital over the land in question in terms of decision of the State Government and to ensure that the valuable assets as handed over by the erstwhile society to the State in terms of their resolution are not frittered away.

ii)The District Magistrate, shall take immediate steps to take control of the properties and administration of the hospital and all its activities.

iii)The District Magistrate is directed to constitue a committee comprising of reputed Doctors and administrative officers for ensuring the running of hospital and allied services till finalization and establishment of Multi Speciality Hospital as already decided by the State.

iv) The District Magistrate shall take into consideration the welfare of the employees of the erstwhile society in respect of their claims against the society and shall also consider either employing/absorbing, continuing them in running of Hospital administration in the light of directions given above.

v) The District Magistrate shall consider the issue of occupation of premises by the employees of the erstwhile society and shall

also consider relocating them to an alternative property elsewhere.

vi) The District Magistrate is authorised to use such other measures as may be required to execute the directions given herein above.

30. It is clarified that the petitioners no 3 and petitioner no 4 of Writ-C No. 14759 of 2021 will be at liberty to approach the Principal Court of original civil jurisdiction in accordance with law, if so advised, the other Petitioners in the said petition shall also be at liberty to avail their remedies before Civil Court in accordance with law if so advised.

31. The writ petition being Writ-C No. 14759 of 2021 is dismissed and Writ-A No. 13256 of 2021 is disposed off in terms of the order passed above.

32. In view of the order passed above, Writ-C No. 17749 of 2019 and Writ-C No. 17779 of 2019 are rendered infructuous as pleaded in paragraph no. 40 of Writ Petition No. 14759 of 2021 and as I have held that all the rights can be agitated only before the principal Court of original civil jurisdiction, however, no orders are being passed in the said two cases as I have not heard the learned counsels in the said cases. The said two petitions shall be placed before the appropriate court.

(2021)11ILR A654
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.10.2021

BEFORE

THE HON'BLE SUNEET KUMAR, J.

Writ A No. 7140 of 2021

Saurabh Kumar Pandey ...Petitioner
Versus
R.B.I. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Lavlesh Kumar Shukla

Counsel for the Respondents:
C.S.C., Sri Pranjal Mehrotra

A. Employment/Service Law – Termination - Bombay Public Trust Act, 1950 - Banking Regulation Act, 1949 - Section 22; Constitution of India - Article 12.

Constitution of India: u/Art. 226 - Writ jurisdiction - Maintainability – The private banks would be amenable to the writ jurisdiction for breach of any of the statutory provision under which it is incorporated or bound to be governed, but the services of the employee of a private bank is contractual and governed as per the Rules framed by the Bank/ employer. In the instant case, petitioner is governed by Discipline and Appeal Rules, and the Code of Conduct, as applicable on the employees of the Bank. (Para 7)

Respondent-bank is a private sector bank duly incorporated and having licence under Banking Regulation Act, 1949. Reserve Bank of India is entrusted with the full responsibility for supervising and regulating the banks, including, private banks. U/s 22 of the Act, 1949, private banks are required to obtain licence from RBI to carry out the banking business in India. Petitioner does not dispute that the conditions of service governing the petitioner are not statutory. The terms and conditions of employment are purely contractual governed under rules framed by the Bank. (Para 6, 15)

B. For a public law remedy enforceable u/Article 226, the action of a person or the authority need to fall in the realm of public law. The question is required to be determined in each case. (Para 13)

A private company carrying on banking business as a scheduled bank, cannot be termed as an institution or company carrying on any statutory or public function. A private body or a person may be amenable to writ jurisdiction only where it may become necessary to compel such body or association to enforce any statutory obligations or such obligations of public nature casting positive obligation upon it. The statutory

provisions governing a private bank is merely regulatory. To put it differently a company engaged in banking business is not required to perform public function, nor essential governmental function is placed upon it. (Para 8)

The private bank is not imparting public duty. Even if it is assumed that a private bank is imparting public duty, the act complained of must have direct nexus with the discharge of public duty. It is undisputedly a public law action which confers a right upon the aggrieved to invoke extraordinary writ jurisdiction u/Article 226 for a prerogative writ. **Individual wrongs or breach of mutual contracts without having any public element as its integral part cannot be rectified through petition u/Art. 226.** Wherever Courts have intervened in exercise of jurisdiction u/Art. 226, either the service conditions were regulated by statutory provisions or the employer had the status of 'State' within the expansive definition u/Art. 12 or it was found that the action complained of has public law element. (Para 14)

Writ petition dismissed.(E-4)

Precedent cited:

1. M/s Pearson Drums & Barrels Pvt. Ltd. Vs The General Manager, Consumer Education Cell of Reserve Bank of India & ors., WPA No. 21710 of 2017, decided on 10.03.2021 (Para 5)

2. Roychan Abraham Vs St. of U.P. & ors., 2019 (3) ADJ 391 (FB) (Para 5)

Precedent followed:

1. Federal Bank of India Vs Sagar Thomas & ors., (2003) 10 SCC 733 (Para 8)

2. Janet Jeyapaul Vs SRM University & ors. (2015) 16 SCC 530 (Para 9)

3. R.V. Panel on Takeovers and Mergers, ex parte Datafin Plc & anr. (Norton Opax Plc & anr. intervening), (1987) 1 All ER 564 (Para 9)

4. Anandi Mukta-Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust & ors. Vs V.R. Rudani & ors., (1989) 2 SCC 691 (Para 10)

5. Zee Telefilms Ltd. & anr. Vs U.O.I. & ors., (2005) 4 SCC 649 (Para 12)

6. St. of U.P. & anr. Vs Johri Mal, 2004 (4) SCC 714 (Para 13)

Present petition assails order dated 31.03.2021, passed by Senior Group Manager, Employee Relations, IndusInd Bank Limited, Corporate Office Human Resources Department, Mumbai.

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

1. Heard Sri Lavlesh Kumar Shukla, learned counsel for the petitioner and Sri Pranjal Mehrotra, learned counsel appearing for the respondents.

2. Petitioner, by means of the instant petition, is assailing the order dated 31 March 2021, passed by second respondent, Senior Group Manager, Employee Relations, IndusInd Bank Limited, Corporate Office Human Resources Department, Mumbai1, terminating the services of the petitioner.

3. Learned counsel appearing for the respondents, at the outset, submits that the writ petition against an employer, a private bank, would not be maintainable. It is urged that service contract of a private bank employee cannot be enforced in writ jurisdiction.

4. Facts, briefly stated, is that petitioner was appointed Associate Service Delivery Manager, a Class-III post, on 29 October 2018 by the respondent Bank. On a complaint filed by a customer, a disciplinary enquiry came to be instituted against the petitioner by issuing a charge sheet on 01.02.2021. Petitioner responded by filing written statement/defence to the fourth respondent, enquiry officer/Branch Manager; IndusInd Bank Limited, Branch Robertsganj, District Sonbhadra. The inquiry officer, on completion of the enquiry, forwarded

the enquiry report. Petitioner came to be terminated by the impugned order. The enquiry was initiated against the petitioner for breach of Discipline and Appeal Rules and Code of Conduct, as applicable to the employees of the Bank. It is noted in the impugned order that petitioner has a remedy of appeal before Zonal H.R. Partner, New Delhi. The appeal was to be made within 30 days of receipt of the order.

5. It is urged by learned counsel for the petitioner that Bank is "State' within the meaning of Article 12 of the Constitution of India; it is performing public duty; Bank, though private, is amenable to writ jurisdiction under Article 226, falling within the expression "other authorities'; petitioner was not granted opportunity of hearing; the impugned order is arbitrary and has been passed without following principles of natural justice. Reliance has been placed on the decisions rendered in **M/s Pearson Drums & Barrels Pvt. Ltd. Vs. The General Manager, Consumer Education Cell of Reserve Bank of India and others2 and Roychan Abraham Vs. State of U.P. and others3**

6. It is not disputed by the learned counsel for the petitioner that respondent-bank is a private sector bank duly incorporated and having licence under Banking Regulation Act, 19494. Reserve Bank of India5 is entrusted with the full responsibility for supervising and regulating the banks, including, private banks. Under Section 22 of the Act, 1949, private banks are required to obtain licence from RBI to carry out the banking business in India. On specific query, learned counsel for petitioner is unable to show that service conditions of the petitioner is governed under any statutory Rules applicable to the employees of a private bank.

7. The private banks would be amenable to the writ jurisdiction for breach of any of the statutory provision under which it is incorporated or bound to be governed, but the services of the employee of a private bank is contractual and governed as per the Rules framed by the Bank/ employer. In the instant case, petitioner is governed by Discipline and Appeal Rules, and the Code of Conduct, as applicable on the employees of the Bank.

8. Whether a private company engaged in banking business performs public function, in other words, does banking business as a scheduled bank involve public law element was considered by the Supreme Court in **Federal Bank Ltd. Vs. Sagar Thomas and others6**, the Court held that a private company carrying on banking business as a scheduled bank, cannot be termed as an institution or company carrying on any statutory or public function. A private body or a person may be amenable to writ jurisdiction only where it may become necessary to compel such body or association to enforce any statutory obligations or such obligations of public nature casting positive obligation upon it. The statutory provisions governing a private bank is merely regulatory. To put it differently a company engaged in banking business is not required to perform public function, nor essential governmental function is placed upon it.

9. Supreme Court in **Janet Jeyapaul Vs. SRM University and others7** , quoted with approval the following extract from the decision of the English court in **R. v. Panel on Takeovers and Mergers, ex parte Datafin Plc and another (Norton Opax Plc and another intervening8):**

"In determining whether the decisions of a particular body were subject to judicial review, the court was not confined to considering the source of that body's powers and duties but could also look to their nature. Accordingly, if the duty imposed on a body, whether expressly or by implication, was a public duty and the body was exercising public law functions the court had jurisdiction to

entertain an application for judicial review of that body's decisions....."

10. In **Anandi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and others Vs. V.R. Rudani and others9** the question before the Supreme Court was as to whether mandamus can be issued at the instance of an employee (teacher) against a Trust registered under Bombay Public Trust Act, 1950, which was running educational institutions. The main legal objection of the Trust while opposing the writ petition of their employee was that since the Trust is not a statutory body, hence, it cannot be subject of writ jurisdiction of the High Court.

11. The Supreme Court on the question of maintainability of the writ petition for writ of mandamus as against the management of the college held as under:

"15. If the rights are purely of a private character no mandamus can issue. If the management of the college is purely a private body with no public duty mandamus will not lie. These are two exceptions to mandamus. But once these are absent and when the party has no other equally convenient remedy, mandamus cannot be denied."

12. The issue as to whether a private body, though not 'State' within the meaning of Article 12 of the Constitution, would be amenable to the writ jurisdiction of the High Court under Article 226 was examined by the Constitution Bench in **Zee Telefilms Ltd. and another Vs. Union of India and others10**. The question that fell for consideration was whether Board of Control for Cricket in India11 falls within the definition of 'State'. The ratio laid down in **Anandi Mukta** was approved, but on the facts of the case, Supreme Court, by majority held that BCCI does not fall within the purview of the term 'State' but clarified that when a private body exercises public function even if it is not a State, the aggrieved person has a remedy not only under the ordinary law but also under the Constitution, by way of a writ petition under Article 226. Para 31 of **Zee Telefilm** reads thus:

"31. Be that as it may, it cannot be denied that the Board does discharge some duties like the selection of an Indian cricket team, controlling the activities of the players and others involved in the game of cricket. These activities can be said to be akin to public duties or State functions .... Under the Indian jurisprudence there is always a just remedy for the violation of a right of a citizen. Though the remedy under Article 32 is not available, an aggrieved party can always seek a remedy under the ordinary course of law or by way of a writ petition under Article 226 of the Constitution, which is much wider than Article 32."

13. In **State of U.P. and another Vs. Johri Mal12,** the Supreme Court held that for a public law remedy enforceable under Article 226, the action of a person or the authority need to fall in the realm of public law. The question is required to be determined in each case.

"The legal right of an individual may be founded upon a contract or a statute or an instrument having the force of law. For a public law remedy enforceable under Article 226 of the Constitution, the actions of the authority need to fall in the realm of public law -be it a legislative act or the State, an executive act of the State or an instrumentality or a person or authority imbued with public law element. The question is required to be determined in each case having regard to the nature of and extent of authority vested in the State."

14. The private bank, as held in **Federal Bank Ltd. (supra)** is not imparting public duty. Even if it is assumed that a private bank is imparting public duty, the act complained of

must have direct nexus with the discharge of public duty. It is undisputedly a public law action which confers a right upon the aggrieved to invoke extraordinary writ jurisdiction under Article 226 for a prerogative writ. Individual wrongs or breach of mutual contracts without having any public element as its integral part cannot be rectified through petition under Article 226. Wherever Courts have intervened in exercise of jurisdiction under Article 226, either the service conditions were regulated by statutory provisions or the employer had the status of 'State' within the expansive definition under Article 12 or it was found that the action complained of has public law element.

15. On specific query, learned counsel for the petitioner does not dispute that the conditions of service governing the petitioner are not statutory. The terms and conditions of employment are purely contractual governed under rules framed by the Bank.

16. In view thereof, the preliminary objection raised by learned Counsel for the respondent that the writ petition against the impugned termination order would not lie within the domain of writ jurisdiction under Article 226 of the Constitution of India is sustained and upheld.

17. The writ petition is, accordingly, dismissed, being not maintainable.

18. Dismissal of the writ petition, however, shall not preclude the petitioner to take remedy against the impugned order before the appropriate authority/forum, if so advised, in accordance with law.

19. No Cost.

(2021)11ILR A658
ORIGINAL JURISDICTION
CIVIL SIDE

DATED: ALLAHABAD 24.09.2021

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.

Writ A No. 5418 of 2019
connected with
Writ A Nos. 15523 of 2019 and 2593 of 2021

C/M Manorama Kanya Junior High School, Moradabad & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Prabhakar Awasthi

Counsel for the Respondents:
C.S.C., Sri Shyam Krishna Gupta

A. Service Law – Education – Abolition of posts of Clerk and Class IV employees - Uttar Pradesh Junior High Schools (Payment of Salaries of Teachers and other Employees) Act, 1978 - Section 9 - Uttar Pradesh Recognized Basic Schools (Junior High Schools) (Recruitment and Condition of Service of Ministerial Staff and Group `D' Employees) Rules, 1984 - Right of Children to Free and Compulsory Education (RTE) Act, 2009 - Sections 19, 25 & 27 - Constitution of India - Article 21-A.

The GO dated 15.01.2019 completely omits to consider the requirement of services of Class III and Class IV employees in junior high schools and makes no provision for such services. It is also silent about the manner in which such services would be provided in the school in the absence of these employees.

Constitution of India - Article 21-A - Quality Education cannot be provided without caring to provide for necessary supporting services and staff in keeping with the requirements of Schedule. Basic ingredients and requirements of Schedule to the Act of 2009 have been completely overlooked by the State. This shows complete lack of application of mind on the part of the State Government. The failure has direct adverse consequence for the existence of schools. The functioning of these institutions would get paralyzed

in absence of supporting staff. This non-consideration renders the impugned policy of the State wholly irrational, arbitrary and frustrate the very object sought to be achieved by 86th Constitutional Amendment, the Act of 2009 and the policy of State for strengthening the school network. **A rational policy cannot exist without caring for concerns essential for smooth functioning.** All vacancies accruing on the posts of Clerk and Class IV employee in schools are lying vacant since 15.01.2019 without any alternative mechanism provided for by the State for catering to service hitherto provided by them. **The fundamental right of children in schools are, therefore, compromised rendering the impugned action wholly arbitrary and unconstitutional.** (Para 29, 31, 33)

B. Schedule appended to Sections 19 & 25 of the Act of 2009 - The emphasis in the Act of 2009 is w.r.t. teaching activities and therefore strength of teachers has been specified. It does not mean that the requirement of supporting clerical and class-IV staff either vanishes or schools can provide quality education in its absence.

It appears that while issuing the GO dated 15.1.2019 the State has not cared to examine the Schedule in its entirety which includes various other essentials for a school. It has merely noticed the part of Schedule which specifies the teacher strength and has jumped to the conclusion that all other posts in the school has been rendered redundant. No alternative mechanism has been suggested in GO dated 15.1.2019 to cater to needs of services and supporting staff to the schools. Need of clerical and Class-IV employees is inbuilt in the present concept of school itself. (Para 30, 31, 32)

C. Right of Children to Free and Compulsory Education (RTE) Act, 2009: Section 27 - No teacher engaged in the school shall be deployed for non-educational purposes. The students coming to school are also not expected to perform the work of sweeping the floors and cleaning the toilets etc. in the school. (Para 20 to 22)

D. Uttar Pradesh Junior High Schools (Payment of Salaries of Teachers and other Employees) Act, 1978 - Uttar Pradesh Recognized Basic Schools (Junior High Schools) (Recruitment and Condition of Service of Ministerial Staff and Group 'D' Employees) Rules, 1984 - Even prior to introduction of Article 21-A, the State was conscious of its obligation to support the cause of education and, therefore, with an intent to regulate appointment of teachers as well as Clerks and other supporting staff in privately managed aided junior high schools it enacted the Rules of 1978 and also the Rules of 1984. These rules have withstood the test of times over the last several decades. **With the introduction of Article 21-A as also the Act of 2009 the State is expected to improve the setup already available with the school and not to curtail it.** (Para 23)

The GO dated 15.1.2019, insofar as it declares Class-III and Class-IV posts in junior high schools to be a *dead cadre*, is found to be wholly arbitrary, irrational, suffering from non application of mind and violative of Articles 14 & 21-A of the Constitution of India as also in teeth of the Act of 2009. The GO to that extent, accordingly, stands quashed. (Para 34)

Writ petitions allowed. (E-4)

Present petitions challenge Government Order dated 15.01.2019.

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. This bunch of writ petitions involves common questions of law and have been heard together. With the consent of learned counsel for the parties they are being disposed of by this common judgment at the admission stage itself. Writ Petition No.5418 of 2019, in which the Government Order dated 15.01.2019 is challenged, is taken as the lead case.

2. I have heard Sri Prabhakar Awasthi, learned counsel for the petitioner in the leading case and Sri Neeraj Tripathi, learned Additional Advocate General assisted by Sri Vineet Pandey, learned Chief Standing Counsel for the State and its authorities.

3. The question that arises for consideration in this bunch of cases is whether

the posts of Clerk and Class IV employee, already created in privately managed recognized junior high schools (hereinafter referred to as "schools'), are no longer required and, therefore, are liable to be abolished by declaring such posts as *dead-cadre?* Consequential refusal by the State authorities to fill up such posts is also assailed.

4. The petitioner in the leading writ petition is the Committee of Management of Manorama Kanya Junior High School, Linepar, Moradabad. It has established a junior high school which is duly recognized by the District Basic Education Officer, Moradabad. The institution is receiving aid from State for payment of salary to its teaching and non-teaching staff in accordance with provisions of Uttar Pradesh Junior High Schools (Payment of Salaries of Teachers and other Employees) Act, 1978 (hereinafter referred to as "Act of 1978'). The recruitment of teachers in the institutions is regulated by the Uttar Pradesh Recognized Basic Schools (Junior High Schools) (Recruitment and Conditions of Service of Teachers) Rules, 1978 (hereinafter referred to as "Rules of 1978'). Recruitment of Clerical and Class IV Staff in the Junior High School is regulated by the Uttar Pradesh Recognized Basic Schools (Junior High Schools) (Recruitment and Conditions of Service of Ministerial Staff and Group "D' Employees) Rules, 1984 (hereinafter referred to as "Rules of 1984').

5. In the leading petition there existed a sanctioned post of Clerk which was occupied by one Suresh Gupta. He retired on 31.12.2016. As per the requirement in law the petitioner institution intimated vacancy to the District Basic Education Officer, Moradabad for proceeding with recruitment. The request in that regard was not considered and the petitioner had to approach this Court by filing Writ Petition No.11182 of 2018. A direction was issued to the District Basic Education Officer concerned to consider grant of permission to fill up the post. The permission, however, came to be declined by the District Basic Education Officer vide his order dated 18.03.2019, on the ground that new appointments on Clerical and Class-IV posts in junior high schools are no longer possible in view of the Government Order dated 15.01.2019.

6. The Government Order dated 15.01.2019 has determined the strength of teaching and non-teaching staff in schools supposedly in consonance with the provisions contained in the Right of Children to Free and Compulsory Education (RTE) Act, 2009 (hereinafter referred to as "Act of 2009'). It records that post of teaching and non-teaching staff in non-governmental primary and junior high schools (Hindi and English medium) were sanctioned earlier vide Government Orders dated 02nd July, 1990 and 08th May, 2013 but necessity has now arisen for a fresh determination of strength of teaching and non-teaching staff on account of promulgation of the Act of 2009.

7. Following posts were created in schools vide Government Order dated 02nd July, 1990:

(a) Headmaster- one post;
(b) Assistant Teacher- four posts (including one post of teacher in Science and one in Language);
(c) Clerk- one post; and
(d) Class-IV - one post.

8. With reference to Sections 19 and 25 of the Act of 2009, as also the Schedule appended thereto, it is recorded in the Government Order dated 15.01.2019 that as the posts of Clerk and Class IV employee are not included in the Schedule, therefore, there exists no justification to retain these posts in the schools. Sections 19 and 25 of the Act of 2009 alongwith Schedule since are relied upon by the State respondents as

the reason for issuing Government Order dated 15.01.2019, therefore, such provisions are reproduced hereinafter:

"19. Norms and standards for school.--(1) No school shall be established, or recognised, under section 18, unless it fulfils the norms and standards specified in the Schedule.

Where a school established before the commencement of this Act does not fulfil the norms and standards specified in the Schedule, it shall take steps to fulfil such norms and standards at its own expenses, within a period of three years from the date of such commencement.

(3) Where a school fails to fulfil the norms and standards within the period specified under sub-section (2), the authority prescribed under sub-section (1) of section 18 shall withdraw recognition granted to such school in the manner specified under sub-section (3) thereof.

(4) With effect from the date of withdrawal of recognition under sub-section (3), no school shall continue to function.

(5) Any person who continues to run a school after the recognition is withdrawn, shall be liable to fine which may extend to one lakh rupees and in case of continuing contraventions, to a fine of ten thousand rupees for each day during which such contravention continues.

25. Pupil-Teacher Ratio.--(1) 1[Within three years] from the date of commencement of this Act, the appropriate Government and the local authority shall ensure that the Pupil-Teacher Ratio, as specified in the Schedule, is maintained in each school.

(2) For the purpose of maintaining the Pupil-Teacher Ratio under sub-section (1), no teacher posted in a school shall be made to serve in any other school or office or deployed for any non-educational purpose, other than those specified in section 27.

THE SCHEDULE

(*See* sections 19 and 25)

NORMS AND STANDARDS FOR A SCHOOL

Sl. No.	Item	Norms and Standards	
1.	Numbers of teachers:		
	(*a*) For first class to fifth class	Admitted children	Number of teachers
		Up to Sixty	Two
		Between sixty-one to ninety	Three
		Between Ninety-one to one hundred and twenty	Four
		Between One hundred and twenty-one to two hundred	Five
		Above One hundred and fifty children	Five plus one Head-teacher
		Above Two hundred children	Pupil-Teacher Ratio (excluding Head-teacher) shall not exceed forty.
	(*b*) For sixth class to eighth class	(*1*) At least one teacher per class so that there shall be at least one teacher each for—	
		(*i*) Science and Mathematics;	
		(*ii*) Social Studies;	
		(*iii*) Languages.	
		(*2*) At least one teacher for every thirty-five children.	
		(*3*) Where admission of children is above one hundred—	
		(*i*) a full time head-teacher;	
		(*ii*) part time instructors for—	
		(*A*) Art Education;	
		(*B*) Health and Physical Education;	
		(*C*) Work Education.	
2.	Building	All-weather building consisting of—	
		(*i*) at least one class-room for every teacher and an office-cum-store-cum-Head teacher's room;	
		(*ii*) barrier-free access;	
		(*iii*) separate toilets for boys and girls;	
		(*iv*) safe and adequate drinking water facility to all children;	
		(*v*) a kitchen where mid-day meal is cooked in the school;	
		(*vi*) Playground;	
		(*vii*) arrangements for securing the school building by boundary wall or fencing.	
3.	Minimum number of working days/instructional hours in an academic year	(*i*) two hundred working days for first class to fifth class;	
		(*ii*) two hundred and twenty working days for sixth class to eighth class;	
		(*iii*) eight hundred instructional hours per academic year for first class to fifth class;	
		(*iv*) one thousand instructional hours per academic year for sixth class to eighth class.	
4.	Minimum number of working hours per week for the teacher	forty-five teaching including preparation hours.	
5.	Teaching learning equipment	Shall be provided to each class as required.	
6.	Library	There shall be a library in each school providing newspaper, magazines and books on all subjects, including story-books.	
7.	Play material, games and sports equipment	Shall be provided to each class as required.	

9. Referring to the above provisions, the Government Order further records that since large number of institutions have already been established in the State including institutions recognized by the C.B.S.E. and I.C.S.E. Boards it has resulted in decline of strength of students in the schools. It is for the above reasons that strength of teaching and non-teaching staff has been redetermined in keeping with the Schedule appended to Sections 19 and 25 of the Act of 2009. Only three posts of Assistant Teachers are retained in each institution and where the students' strength is more than 100 a full time post of Headmaster has been retained. The student teacher ratio is fixed as 35:1 and the teaching post(s) sanctioned earlier, in excess of such ratio, is required to be discontinued. Para 7 of the Government Order dated 15.01.2019 is relevant for the present purposes and is reproduced hereinafter:

"7- उपर्युक्त संदर्भ में मुझे यह भी कहने का निर्देश हुआ है कि चूँकि निःशुल्क एवं अनिवार्य बाल शिक्षा अधिकार अधिनियम-2009 के मान एवं मानकों के अंतर्गत शिक्षणेत्तर कर्मचारियों के पद अनुमन्य नहीं किये गये है और प्रदेश में संचालित 45625 परिषदीय उच्च प्राथमिक विद्यालयों (कक्षा-6 से कक्षा-8) में समूह 'ग' एवं 'घ' के पद सृजित नहीं किये गये है। अतः निःशुल्क एवं अनिवार्य बाल शिक्षा अधिकार अधिनियम- 2009 के मान एवं मानकों के अनुरूप ही मान्यता प्राप्त अशासकीय विद्यालयों के अंतर्गत स्वीकृत समूह 'ग' एवं 'घ' के शिक्षणेत्तर पदों को एतद्द्वारा इस प्रतिबंध के साथ मृत संवर्ग घोषित किया जाता है कि इन पदो पर वर्तमान समय में कार्यरत कार्मिक अपनी सेवानिवृत्ति तक यथावत कार्यरत रहेगें, तथा उनकी सेवानिबृत्ति मृत्यु अथवा किसी अन्य कारण से पद रिक्त होने पर उनके द्वारा धारित पद स्वयंमेव समाप्त समझे जायेंगे। मृतक आश्रितों के नियमानुसार समायोजन के प्रकरणों में शिक्षणेत्तर पदों पर उक्तानुसार समाप्त होने विषयक प्रतिबंध मण्डलीय समिति द्वारा शिथिलनीय होगें।

कृपया उपर्युक्त आदेशों का कड़ाई से अनुपालन किया जाना सुनिश्चित करें, तथा कृत कार्यवाही से अवगत कराये।"

10. According to the respondent State since no post of Clerk and Class-IV employee is included in the Schedule to Section 19 and 25 of the Act of 2009, as such it would be presumed that such posts are not to be created/retained in the schools imparting education to students in the age group of 11 to 14.

11. Sri Prabhakar Awasthi, appearing for the petitioner contends that the policy contained in Government Order dated 15.01.2019 is wholly irrational and is based on complete misconstruction of the provisions of Act of 2009. He places reliance upon the 86th Amendment to the Constitution of India whereby Article 21-A has been inserted to provide for fundamental right to education for children between 6 to 14 years. It is urged that the State is under constitutional obligation to provide free and compulsory education to all children in the age group of 6 to 14 years in such manner as the State may, by law, determine. It is in furtherance of Article 21-A that the Act of 2009 has been promulgated.

12. It is contended that Schedule to Sections 19 and 25 only lays down the minimum norms and standard for a school for different classes of institutions and refers only to the teaching staff. It is also submitted that the Act of 2009 nowhere provides that there would be no necessity of Clerical and Class-IV employee in the schools or that the posts already created in the schools for them be abolished. It is then argued that a Class-IV employee performs various essential works like gardener, sweeper, watchman etc. without whom any school cannot function. Similarly, a clerical employee would equally be necessary for proper maintenance of records of school and process salary and other

bills etc. It is further urged that the Government Order dated 15.01.2019 absolutely omits to address these important requirements of school and shows complete insensitivity on part of the State to the cause of education in school. Sri Awasthi further argues that the State may have the right to determine strength of teaching and non-teaching staff depending upon the requirement in each school, but without undertaking a comprehensive exercise to assess the actual requirement of a school, on the basis of objective criteria, the abolition of posts only on the ground that the Schedule to Section 19 and 25 of the Act of 2009 do not include posts of Clerk, would be arbitrary.

13. On behalf of the respondent State Sri Neeraj Tripathi, learned Additional Advocate General states that the object behind issuance of the Government Order dated 15.01.2019 is merely to regulate the schools in conformity with the provisions of the Act of 2009, and since the Schedule omits to provide for engagement of Clerical and Class-IV employee, therefore, the State has rightly treated such posts to be dead-cadre. It is also submitted that creation or abolition of posts being a matter of policy needs no interference under Article 226 of the Constitution of India.

14. It is in the context of the above arguments that the issue formulated above falls for determination by this Court.

15. By adding Article 21-A in the Constitution the Parliament recognized the fundamental right to education for children in the age group of 6-14 years by providing compulsory free education as a building block to quality elementary education with focus on making the child free of fear, trauma and anxiety through child friendly centric learning. The fact that such a fundamental right has been incorporated almost after 50 years of advent of Indian Republic highlights the importance of education as a tool for securing justice, liberty and equality guaranteed to its citizens. The State is, therefore, under constitutional obligation to provide for free and compulsory education to children between the age of 6 to 14 years.

16. The schools consist of classes 6 to 8. The students in these classes are usually in the age group of 11 to 14 years and are expected to be provided quality education necessary for fulfilling the obligation created under Article 21-A. The Schedule lays down the norms and standards for such a school. In addition to the teaching staff it provides for all weather building consisting of atleast one classroom for every teacher and an office-cum-store-cum-head teacher's room; barrier free access; separate toilets for boys and girls; safe and adequate drinking water facility to all children; a kitchen where mid-day-meal is cooked in the school; playground; arrangement for securing the school building by boundary wall or fencing. It also provides for teaching learning equipment and a library providing newspaper, magazines and books on all subjects, including story books. The schedule also provides for play material, games and sports equipment etc.

17. The State being enjoined with the responsibility of providing schools to all its children in the age group of 11-14 years will have to necessarily take into account the norms and standards fixed for it in the Schedule and determine its requirements accordingly. A school is not just the teacher and students. It means a school building secured by a boundary, toilets, provision of drinking water, kitchen, playground, teaching learning equipments, library with newspapers, magazines and books on all subjects including story books.

18. The need to have a school building secured by a boundary by wall or fence would also include services of a person to act as Watchman/Chowkidar. Someone will have to

open the gates of school in the morning and close it after school hours, clean the toilets, arrange for clean drinking water, ensure upkeep of playground and sweep the floors etc. etc. These services are an integral part of the school and in the absence of any class IV employee it would be difficult to imagine as to how these services would be provided in a school.

19. Similarly, the school has also to maintain various records including details of students in various registers, documents relating to date of birth of students enrolled in the school, maintaining records of attendance of students as also the teachers and staff, maintaining service books of teachers and staff, maintaining and operating accounts of school, processing admission and also preparing transfer certificate, undertaking various purchases of equipments, sport goods, books, stationery and maintaining its records etc. etc. In the absence of a separate Librarian the work of library can also be looked after by the clerical staff.

20. It is also to be kept in mind that the Act of 2009 specifically provides vide section 27 of the Act of 2009 that no teacher engaged in the school shall be deployed for non-educational purposes. The students coming to school are also not expected to perform the work of sweeping the floors and cleaning the toilets etc. in the school. The Government Order dated 15.01.2019 completely omits to consider the requirement of services in the school as per the Schedule. The Government Order makes no provision for such services. It is also silent about the manner in which such services would be provided in the school in the absence of a Class IV employee. A period of more than two years have expired since the issuance of Government Order, dated 15.1.2019 but no alternative mechanism appears to have been worked out to cater to such services.

21. The State Government considering the above requirements had therefore created one post of Clerk and a Class IV employee in each of the schools. This skeleton staff was provided for in each institution for the last several decades. Provision also existed in applicable laws for creating additional posts of Clerks and Class IV employees, depending upon requirement of extra hands in the school. Government Orders also exist for such purposes.

22. A school to be established as per Schedule must provide for necessary infrastructure and services so that quality education be provided to its students. The concern of the State does not end with creation of posts for the teachers alone. Its concern also is to provide for other supporting staff in the form of Clerks and Peons.

23. Even prior to introduction of Article 21-A, the State was conscious of its obligation to support the cause of education and, therefore, with an intent to regulate appointment of teachers as well as Clerks and other supporting staff in privately managed aided junior high schools it enacted the Rules of 1978 and also the Rules of 1984. These enactments provided the statutory regimen for establishment of junior high schools and also appointments of teachers and other staff, including clerical and Class-IV staff. These rules have withstood the test of times over the last several decades. With the introduction of Article 21-A as also the Act of 2009 the State is expected to improve the setup already available with the school and not to curtail it.

24. Since the State was taking upon itself the obligation of making payment of salary to such staff, it also imposed restrictions on creation of new post(s) of teachers and other employees and by virtue of section 9 of the Act of 1978, no institution could create a new post of

teacher or other employee, except with the previous approval of the Director or such other officer, as may be empowered by a general or special order in that behalf by the Director.

25. It was in the above context that the various Government Orders came to be issued from time to time creating post of teachers and clerical and Class-IV staff in these schools. Vide Government Order issued on 02.07.1990 the power of granting recognition to such institutions was vested with different authorities, depending upon the nature of the institutions. Necessary conditions to be fulfilled by these institutions were also specified.

26. Some of the conditions of recognition required that the school must provide for necessary facilities before recognition is granted to it and are reproduced:-

"जूनियर हाई स्कूल के मान्यता की शर्तें

सामान्य शर्तें- (1) मान्यता तभी प्रदान की जायेगी जब प्रस्तावित उस क्षेत्र में संस्था की वास्तविक आवश्यकता हो और उस क्षेत्र की वर्तमान संस्थाओं के स्तर तथा दक्षता पर प्रस्तावित संस्था के कारण प्रतिकूल प्रभाव पड़ने की संभावना न हो। उदाहरणार्थ एक जूनियर हाई स्कूल की आवश्यकता पर विचार करते समय यह देखना आवश्यक होगा कि-

(ख) प्रत्येक मान्यता प्राप्त विद्यालय के लिए ऐसे भवन, शौचालय, खेलकूद के मैदान एवं साज-सज्जा की, जो परिषद् द्वारा विनिर्दष्ट विशिष्टियों के अनुसार ही व्यवस्था करनी होगी तथा साफ और हवादार भवन का निर्माण स्वास्थप्रद स्थान पर एवं वातावरण में किए जाने की व्यवस्था की जायेगी।"

27. The Government Order dated 02.07.1990 was followed by subsequent order, wherein also requirement of teaching and non-teaching staff was acknowledged and necessary provisions in that regard were incorporated in the policies. In almost all the aided recognized junior high schools post in the clerical cadre and class-IV cadre have been created and the necessary staff has also been provided.

28. The schools, which have been functioning in the above background, ought to have been provided better infrastructure in terms of building, teachers and necessary staff once the right to education was added as a fundamental right in the constitution. There was a greater emphasis laid on the schools in the State to provide necessary amenities to such students in the age group of 6 to 14 years. It is in furtherance of the above objective that the Act of 2009 was enacted by the Parliament.

29. The Act of 2009 takes care of children and special attention is given to the children belonging to weaker section and disabled children falling in the tender age of 6 to 14 years. When the children come to school they have to be provided basic amenities with reference to their special needs in the schools. The State has also introduced a scheme for providing Mid-Day-Meal etc. A school cannot run without essential support system which cannot be provided without having any clerical and class IV staff, particularly when no alternative arrangement is provided for. All schools in the State of U.P. have been denied permission to fill up the posts of Clerk and Class IV employee upon acrual of vacancy since 15.1.2019. Nothing is brought on record to show that an alternative mechanism has been worked out while abolishing such posts. Hearing in this bunch of petitions was deferred on previous occasion to enable the State to examine these aspects, and to revisit the decision, if required, but the authorities of State have not been able to show that any comprehensive assessment of schools requirement was made or any alternative plan was conceived or formulated.

30. The only justification for issuing the Government Order dated 15.01.2019 is the Schedule appended to Sections 19 and 25 of the Act of 2009. It appears that while issuing the Government Order dated 15.01.2019 the State has not cared to examine the Schedule in its entirety. It has merely noticed the part of Schedule which specifies the teacher strength and has jumped to the conclusion that all other posts in the school has been rendered redundant. In the opinion of the Court this is not a correct construction of the Schedule.

31. The Schedule will have to be read in its entirety. As is already observed it includes various other essentials for a school. It is not just providing of school building but the concern of State extends to its smooth functioning also. No thought is given as to how the toilets would be cleaned when separate toilets are to be provided for boys and girls. It has also not been considered as to how the floors would be cleaned, records would be maintained, library would be run, basic amenities in the form of drinking water etc. would be provided. These are essential elementary concerns to be thought of, cared about and appropriately addressed by the State. A rational policy cannot exist without caring for these concerns. Such concerns are otherwise implicit in the Schedule and its non-consideration would render the policy wholly unworkable and frustrate the very object sought to be achieved by 86th Constitutional Amendment, the Act of 2009 and the policy of State for strengthening the school network.

32. The emphasis in the Act of 2009 is with regard to teaching activities and therefore strength of teachers has been specified. It does not mean that the requirement of supporting clerical and class-IV staff either vanishes or schools can provide quality education in its absence. No alternative mechanism has been suggested in the Government Order dated 15.01.2019 to cater to needs of services and supporting staff to the schools. Need of clerical and Class-IV employees is inbuilt in the present concept of school itself. The argument of Sri Awasthi that a comprehensive exercise to assess the actual requirement of school, on the basis of objective criteria has not been undertaken is found to have substance in the face of any contra material produced by the State. The further argument that abolition of posts based upon unilateral reading of schedule is wholly flawed and arbitrary is also worth acceptance.

33. This Court is at a loss to understand as to how the State proposes to come up with a policy of providing quality education to its children in schools without caring to provide for necessary supporting services and staff in keeping with the requirements of Schedule. The Government Order is otherwise silent on the aspect as to how the requirement of supporting staff would be met in the schools. While referring to the Schedule to the Act of 2009 the basic ingredients and requirements of it, noticed earlier, have been completely overlooked by the State. This shows complete lack of application of mind on the part of the State Government to the requirements of school for providing quality education. The failure on the part of the State to advert to this crucial aspect of the matter has direct adverse consequence for the existence of schools. In absence of supporting staff in these institutions, there functioning itself would get paralyzed. This non-consideration renders the impugned policy of the State wholly irrational and arbitrary. It, therefore, cannot withstand the test of judicial scrutiny. All vacancies accruing on the posts of Clerk and Class IV employee in schools are lying vacant since 15.1.2019 without any alternative mechanism provided for by the State for catering to service hitherto provided by them. The fundamental right of children in schools are, therefore, compromised rendering the impugned action wholly arbitrary and unconstitutional.

34. Consequently, the Government Order dated 15.01.2019, insofar as it declares Class-III and Class-IV posts in junior high schools to be a dead

cadre, is found to be wholly arbitrary, irrational, suffering from non application of mind and violative of Articles 14 & 21-A of the Constitution of India as also in teeth of the Act of 2009. The Government Order to that extent, accordingly, stands quashed. All consequential orders passed in the present bunch of writ petitions passed on different dates, declining permission to fill up the posts of Clerks and Class IV employees following the said Government Order, under challenge in the present bunch of petitions, are also quashed.

35. As a consequence, the post in Class III and Class IV cadre, already sanctioned vide Government Order dated 2nd July, 1990, shall continue to exist and it shall be open to the private management to make appointments against it by following the procedure laid down in the Rules of 1984.

36. Writ petitions, accordingly, are allowed. No order is passed as to costs.

(2021)11ILR A667
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.10.2021

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.

Writ A No. 5389 of 2017

Murari Lal Rathore @ Murari Lal ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vishnu Gupta, Sri Shiv Om Vikram Singh, Sri Siddhartha Srivastava, Sri Virendra Kumar Gupta

Counsel for the Respondents:
C.S.C., Sri Ramesh Chandra Singh

A. Service Law – Dismissal - U.P. Government Servant (Discipline & appeal) Rules, 1991: First Proviso to Rule-7 (xii); Constitution of India: Clause (a) to the second proviso to Article 311(2) - Mere conviction in a criminal case would not lead to automatic dismissal from service of the government servant. Since clause (a) to the second proviso to Article 311(2) of the Constitution of India as also first proviso to rule-7(xii) of the Rules of 1991 are exception to the normal rule of holding inquiry against the government servant and even opportunity of hearing is not required to be given to him, therefore, **the disciplinary authority has to scrupulously examine the conduct of the government servant which led to his conviction before exercising such jurisdiction. The nature of guilt established as also the possible defence available to the government servant are aspects which requires consideration at the level of the disciplinary authority. In the event these aspects are omitted from consideration, the order of dismissal itself would be rendered without jurisdiction.** (Para 9, 11, 14)

Since the conduct of the petitioner leading to his conviction has not been examined by the disciplinary authority within the laid down parameter as such the order of dismissal, as affirmed in appeal and revision cannot be sustained. Orders impugned dated 01.12.2016, 21.12.2016 and 18.3.2016 accordingly are liable to be quashed. (Para 18)

Ordinarily, when such orders are quashed a liberty ought to be granted to the disciplinary authority to pass a fresh order while considering relevant factors i.e. conduct of the employee, gravity of charges and the materials available against him etc. This course, however, would not be desirable or even permissible in the facts of the present case since the petitioner has attained the age of superannuation on 31.12.2018 and the contract of employment has come to an end. (Para 19)

B. Unless there exists an enabling provision either in the applicable service rules or any other provision of law it would not be open for the disciplinary authority to pass an order in respect of contract of service after the employee has attained the age of superannuation. (Para 24)

It is apparent that since the petitioner has attained the age of superannuation and no provision in law is shown which permits the disciplinary authority to examine the conduct of an employee, now, so as to pass an order of punishment, there would be no

purpose in remitting back the matter to the disciplinary authority for a fresh consideration of petitioner's conduct leading to his conviction. Such a course would be legally impermissible. (Para 26)

The relief to be granted to the petitioner in such circumstances will have to be determined by this Court in view of what has been observed in para-127 of the Constitution Bench judgment in *Tulsiram Patel (infra).* The Court will have the jurisdiction to pass necessary order in respect of the penalty, which in its opinion would be just and proper in the circumstances of the case. (Para 27)

In the present case the petitioner has been dismissed from service on 18.3.2016 and has attained the age of superannuation on 31.12.2018. He has admittedly not worked during this period. The proceedings against the petitioner, consequent upon his conviction in an offence u/s 307 I.P.C. cannot be said to be without jurisdiction or arbitrary, on facts. The order of dismissal has been found wanting on account of non-consideration of petitioner's conduct leading to his conviction and has been set aside, for such reasons. The petitioner would be entitled to all service and retiral benefits including continuity excluding salary between 18.3.2016 to 31.12.2018 by applying the principles of 'no work no pay'. It is however reiterated that the period between 18.3.2016 to 31.12.2018 shall be counted for payment of retiral benefits. (Para 28)

Writ petition allowed. (E-4)

Precedent followed:

1. U.O.I. Vs Tulsiram Patel, AIR 1985 SC 1416 (Para 2)

2. Divisional Personal Officer, Southern Railway Vs Chillappa, 1976 (3) SCC 190 (Para 2)

3. Mahendra Kumar Vs U.O.I. & ors., Writ Petition No. 27271 of 2014, decided on 12.09.2018 (Para 4)

4. Bhagirathi Jena Vs Board of Directors, O.S.F.C. & ors., (1999) 3 SCC 666 (Para 20)

5. Dev Prakash Tewari Vs Uttar Pradesh Cooperative Institutional Service Board Lucknow & ors., (2014) 7 SCC 260 (Para 21)

6. State Bank of Patiala & anr. Vs Ram Niwas Bansal (dead) through legal representatives, (2014) 12 SCC 106 (Para 22)

7. State of Assam & ors. Vs Padma Ram Borah, AIR 1965 S.C. 473 (Para 23)

8. Bhagirathi Singh Vs St. of U.P. & ors., 2018 (8) ADJ 538 (Para 25)

Precedent distinguished:

1. St. of U.P. & ors. Vs Prem Milan Tiwari Constable, 2015 (3) ADJ 407 (Para 3)

Present petition assails orders dated 01.12.2016, 21.12.2016 and 18.03.2016.

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. Petitioner substantively held the post of Assistant Development Officer, Panchayat and was posted at Agra. An order of dismissal came to be passed against him on account of his conviction in Sessions Trial No.455 of 2008 (State Vs. Murari Lal Rathore), vide judgment dated 31.10.2015. This order has been affirmed in departmental Appeal and Revision and is assailed in this writ petition primarily on the ground that there is no conscious application of mind on part of the disciplinary authority to the conduct of petitioner which led to his conviction.

2. Learned counsel for the petitioner places reliance upon the judgment of the Supreme Court in the case of Union of India Vs. Tulsiram Patel, AIR 1985 SC 1416, as also judgment of this Court in Service Single No. 5907 of 2009. Reliance is also placed upon the judgment of Supreme Court in Divisional Personal Officer, Southern Railway Vs. Chillappa, 1976(3) SCC 190 to submit that the impugned orders are wholly unsustainable.

3. On behalf of respondents, reliance is placed upon Para-11 of a Division Bench Judgment of this Court in State of U.P. and others Vs. Prem Milan Tiwari Constable, 2015 (3) ADJ 407 which is reproduced hereinafter:-

"We are of the view that the principle of law which has been laid down by the Supreme

Court in the decision in S. Nagoor Meera and recently in B. Jagjeevan Rao's case, (supra) must govern the facts of the present case. The respondent was a constable in the police and was convicted of a heinous crime punishable under Section 302 of the Penal Code read with Sections 120B and 149. Can the State be compelled or required to take back in service such a person, pending the disposal of the appeal ? Plainly not. The learned counsel appearing on behalf of the respondent sought to distinguish those two decisions on the ground that the employee had been convicted of offences under the Prevention of Corruption Act 1988 where the conduct had a direct bearing on the service of the employee as an officer of the State. In our view, this would not make any difference to the construction of clause (a) of the second proviso to Article 311. What clause (a) of the second proviso does is to stipulate that the requirement of clause (2) of holding an inquiry consistent with the principles of natural justice would not apply where a person is dismissed, removed or reduced in rank on the ground of conduct which had led to his conviction on a criminal charge. In the present case, the respondent was a constable in the police. He was found guilty after a session's trial of an offence punishable under Section 302 read with Section 120B of the Penal Code. In such a case, clause (a) of the second proviso to Article 311 (2) would clearly stand attracted. The State cannot be regarded as having acted with perversity in dismissing a person who has been convicted of a serious offence of the nature involved in pursuance of the provisions of the second proviso to Article 311 (2) and, as in the present case, under Rule 8(2)(a) which is pari materia. The learned Single Judge, with respect, was in error in holding that there was no application of mind to the conduct which has led to the conviction. The conduct of the respondent which has led to the conviction of a charge under Section 302 cannot, by any circumstance, be regarded as warranting any treatment other than the punishment of dismissal under clause (a) of the second proviso to Article 311 (2) or under Rule 8(2)(a). Ultimately, as has been held by the Supreme Court until the conviction is set aside by an appellate or higher court, it would not be advisable to retain such a person in service. If he succeeds in the appeal or in any other proceeding, the matter can always be reviewed in such a manner that he would not suffer any prejudice."

4. Reliance is also placed by the learned Standing Counsel upon the judgment of this Court in Writ Petition No. 27271 of 2014 (Mahendra Kumar Vs. Union of India and others) decided on 12.9.2018.

5. Learned counsel for the petitioner, in reply, submits that the Division Bench judgment in the case of Prem Milan Tiwari (supra) is distinguishable on facts and has no applicability in this case since the petitioner therein was a constable punished of an offence under Section 302 read with 120-B I.P.C., which is not the case here. It is also stated that the judgment in the case of Mahendra Kumar (supra) merely examined as to whether suspension of sentence during the pendency of appeal would entitle the dismissed employee to reinstatement in service. It is further urged that as the petitioner has attained the age of superannuation on 31.12.2018, therefore, the authorities ought not be permitted to even revisit the issue now and the petitioner be held entitled to all service and retiral benefits.

6. Learned counsel for the petitioner has placed before the Court the conviction order to submit that cross first information reports were lodged in respect of the incident in question wherein the place of occurrence was the house of petitioner Murari Lal Rathore. In his defence it is pointed out that petitioner's son was attacked at his house and he sustained gun shot injuries. Contention is that petitioner and other

family members only acted in self defence and that the implication of petitioner in criminal case is wholly false and concocted.

7. I have heard Sri Siddharth Srivastava, learned counsel for the petitioner and Sri Sharad Chandra Upadhyay, learned State counsel for the respondents and have perused the materials on record.

8. The order of conviction passed in S.T. No. 455 of 2008, dated 31.10.2015, is on record of the petition as Annexure-5. From its perusal it transpires that Case Crime No. 152 of 2006 under Sections 307 and 504 I.P.C. was lodged against the petitioner in which he has been convicted with life imprisonment together with penalty of Rs. 20,000/-. A Criminal Appeal No. 4975 of 2015 is instituted against the order of conviction in which the petitioner has been enlarged on bail. Cross cases were registered from both the sides and the Sessions Court has clearly recorded that the place of alleged occurrence of offence is the residential house of the petitioner Murari Lal Rathore. A further finding is returned that on some issue the parties entered into an altercation which converted into a free fight. Petitioner's defence that he was not the aggressor and was was attacked by the other faction is yet to be examined in pending criminal appeal although the petitioner's plea that his actions were all in self defence has not been accepted by the trial judge. Since the appeal is pending consideration before this Court therefore this court is not required to make any observation in respect of the petitioner's defence or the merits of the conclusion drawn by the trial judge as the issues are yet to be examined in appeal.

9. What is required to be seen in the facts of the present case is as to whether dismissal from service would be a necessary consequence of petitioner's conviction in the aforesaid case or requires a conscious application of mind on part of the disciplinary authority to the conduct of the petitioner which led to his conviction?

10. The order of dismissal merely records that petitioner has been convicted to imprisonment of life in S.T. No. 455 of 208 and is incarcerated in jail therefore in view of the Government Order dated 12.10.1979, the petitioner is being dismissed from service from the date of his incarceration in jail i.e. 31.10.2015.

11. The issue as to whether conviction in a criminal case would automatically lead to dismissal of the employee from service has been examined in the case of Tulsiram Patel (supra) while interpreting clause (a) to the second proviso of Article 311 (2) of the Constitution of India in following words:-

"127. Not much remains to be said about clause (a) of the second proviso to Article 311(2). To recapitulate briefly, where a disciplinary authority comes to know that a government servant has been convicted on a criminal charge, it must consider whether his conduct which has led to his conviction was such as warrants the imposition of a penalty and, if so, what that penalty should be. For that purpose it will have to peruse the judgment of the criminal court and consider all the facts and circumstances of the case and the various factors set out in Challappan case [(1976) 3 SCC 190 : 1976 SCC (L&S) 398 : (1976) 1 SCR 783] . This, however, has to be done by it ex parte and by itself. Once the disciplinary authority reaches the conclusion that the government servant's conduct was such as to require his dismissal or removal from service or reduction in rank he must decide which of these three penalties should be imposed on him. This too it has to do by itself and without hearing the concerned government servant by reason of the exclusionary effect of the second proviso. The disciplinary authority must, however, bear in

mind that a conviction on a criminal charge does not automatically entail dismissal, removal or reduction in rank of the concerned government servant. Having decided which of these three penalties is required to be imposed, he has to pass the requisite order. A government servant who is aggrieved by the penalty imposed can agitate in appeal, revision or review, as the case may be, that the penalty was too severe or excessive and not warranted by the facts and circumstances of the case. If it is his case that he is not the government servant who has been in fact convicted, he can also agitate this question in appeal, revision or review. If he fails in the departmental remedies and still wants to pursue the matter, he can invoke the court's power of judicial review subject to the court permitting it. If the court finds that he was not in fact the person convicted, it will strike down the impugned order and order him to be reinstated in service. Where the court finds that the penalty imposed by the impugned order is arbitrary or grossly excessive or out of all proportion to the offence committed or not warranted by the facts and circumstances of the case or the requirements of that particular government service the court will also strike down the impugned order. Thus, in Shankar Dass v. Union of India [(1985) 2 SCC 358 : 1985 SCC (L&S) 444] this Court set aside the impugned order of penalty on the ground that the penalty of dismissal from service imposed upon the appellant was whimsical and ordered his reinstatement in service with full back wages. It is, however, not necessary that the court should always order reinstatement. The court can instead substitute a penalty which in its opinion would be just and proper in the circumstances of the case."

(emphasis supplied)

12. Even before it, the Supreme Court in Divisional Personal Officer, Southern Railway (supra) observed as under in para-9:-

"9. In the instant case we are concerned only with clause (i) of Rule 14 of the Rules of 1968 which runs thus:

"Notwithstanding anything contained in Rules 9 to 13:

(1) where any penalty is imposed on a railway servant on the ground of conduct which has led to his conviction on a criminal charge, the disciplinary authority may consider the circumstances of the case and make such orders thereon as it deems fit."

The word "penalty' imposed on a railway servant, in our opinion, does not refer to a sentence awarded by the court to the accused on his conviction, but though not happily worded it merely indicates the nature of the penalty imposable by the disciplinary authority if the delinquent employee has been found guilty of conduct which has led to his conviction on a criminal charge. Rule 14 of the Rules of 1968 appears in Part IV which expressly contains the procedure for imposing penalties. Furthermore, Rule 14 itself refers to Rules 9 to 13 which contain the entire procedure for holding a departmental inquiry. Rule 6 of Part III gives the details regarding the major and minor penalties. Finally Rule 14(i) merely seeks to incorporate the principle contained in proviso (a) to Article 311(2) of the Constitution which runs thus:

"(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inqury in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges and where it is proposed, after such inquiry, to impose on him any such penalty, until he has been given a reasonable opportunity of making representation on the penalty proposed, but only on the basis of the evidence adduced during such inquiry:

Provided that this clause shall not apply--

(a) where a person is dismissed or removed or reduced in rank on the ground of

conduct which has led to his conviction on a criminal charge."

An analysis of the provisions of Article 311(2)(a) extracted above would clearly show that this constitutional guarantee contemplates three stages of departmental inquiry before an order of dismissal, removal or reduction can be passed, namely, (i) that on receipt of a complaint against a delinquent employee charges should be framed against him and a departmental inquiry should be held against him in his presence; (ii) that after the report of the departmental inquiry is received, the appointing authority must come to a tentative conclusion regarding the penalty to be imposed on the delinquent employee; and (iii) that before actually imposing the penalty a final notice to the delinquent employee should be given to show cause why the penalty proposed against him be not imposed on him. Proviso (a) to Article 311(2), however, completely dispenses with all the three stages of departmental inquiry when an employee is convicted on a criminal charge. The reason for the proviso is that in a criminal trial the employee has already had a full and complete opportunity to contest the allegations against him and to make out his defence. In the criminal trial charges are framed to give clear notice regarding the allegations made against the accused, secondly, the witnesses are examined and cross-examined in his presence and by him; and thirdly, the accused is given full opportunity to produce his defence and it is only after hearing the arguments that the Court passes the final order of conviction or acquittal. In these circumstances, therefore, if after conviction by the Court a fresh departmental inquiry is not dispensed with, it will lead to unnecessary waste of time and expense and a fruitless duplication of the same proceedings all over again. It was for this reason that the founders of the Constitution thought that where once a delinquent employee has been convicted of a criminal offence that should be treated as a sufficient proof of his misconduct and the disciplinary authority may be given the discretion to impose the penalties referred to in Article 311(3), namely, dismissal, removal or reduction in rank. It appears to us that proviso (a) to Article 311(2) is merely an enabling provision and it does not enjoin or confer a mandatory duty on the disciplinary authority to pass an order of dismissal, removal or reduction in rank the moment an employee is convicted. This matter is left completely to the discretion of the disciplinary authority and the only reservation made is that departmental inquiry contemplated by this provision as also by the Departmental Rules is dispensed with. In these circumstances, therefore, we think that Rule 14(i) of the Rules of 1968 only incorporates the principles, enshrined in proviso (a) to Article 311(2) of the Constitution. The words "where any penalty is imposed" in Rule 14(i) should actually be read as "where any penalty is imposable", because so far as the disciplinary authority is concerned it cannot impose a sentence. It could only impose a penalty on the basis of the conviction and sentence passed against the delinquent employee by a competent court. Furthermore the rule empowering the disciplinary authority to consider circumstances of the case and make such orders as it deems fit clearly indicates that it is open to the disciplinary authority to impose any penalty as it likes. In this sense, therefore, the word "penalty" used in Rule 14(i) of the Rules of 1968 is relatable to the penalties to be imposed under the Rules rather than a penalty given by a criminal court."

13. Respondents have invoked first proviso to Rule-7 (xii) of the U.P. Government Servant (Discipline & Appeal) Rules, 1991 which is similar to clause (a) to the second proviso to Article 311 (2) of the Constitution of India. Relevant portion of rule of the Rules of 1991 is reproduced:-

"7. Procedure for imposing major penalties. -

(xi) The disciplinary authority, if it considers it necessary to do so, may, by an order appoint a Government servant or a legal

practitioner, to be known as "Presenting Officer" to present on its behalf the case in support of the charge.

(xii) The Government servant may take the assistance of any other Government servant to present the case on his behalf but not engage a legal practitioner for the purpose unless the Presenting Officer appointed by the disciplinary authority is a legal practitioner of the disciplinary authority having regard to the circumstances of the case so permits :

Provided that this rule shall not apply in following cases :

(i) Where any major penalty is imposed on a person on the ground of conduct which has led to his conviction on a criminal charge; or

(ii) Where the disciplinary authority is satisfied that for reason to be recorded by it in writing, that it is not reasonably practicable to hold an inquiry in the manner provided in these rules; or

(iii) Where the Governor is satisfied that, in the interest of the security of the State, it is not expedient to hold an inquiry in the manner provided in these rules."

14. The authoritative pronouncement of law by Supreme Court in Tulsi Ram Patel (supra) is consistently followed and it is by now well settled that mere conviction in a criminal case would not lead to automatic dismissal from service of the government servant. Since clause (a) to the second proviso to Article 311(2) of the Constitution of India as also first proviso to rule-7 (xii) of the Rules of 1991 are exception to the normal rule of holding inquiry against the government servant and even opportunity of hearing is not required to be given to him, therefore, the disciplinary authority has to scrupulously examine the conduct of the government servant which led to his conviction before exercising such jurisdiction. The nature of guilt established as also the possible defence available to the government servant are aspects which requires consideration at the level of the disciplinary authority. In the event these aspects are omitted from consideration, the order of dismissal itself would be rendered without jurisdiction.

15. Sri Shadra Chandra Upadhyay, learned State Counsel has however placed reliance upon the judgment of Division Bench of this Court in Prem Milan Tiwari (supra) to submit that where offence is so glaring and admits of no second opinion, the dismissal of employee from service would clearly be justified.

16. The Division Bench in Prem Milan Tiwari (supra) was confronted with a case where the dismissed employee was a constable and was convicted of an offence under Section 302 I.P.C. It was in that context that the court observed that clause (a) to the second proviso to Article 311(2) of the Constitution of India would be attracted and unless the conviction is reversed in appeal, the relief of reinstatement in service would be impermissible.

17. The judgment in Prem Milan Tiwari (supra) is on the facts of its own and does not lay down any proposition of law distinct from what is laid down by the Supreme Court in the case of Tulsiram Patel (supra). The facts of the present case are moreover not similar to the facts of the case in Prem Milan Tiwari (supra).

18. Since the conduct of the petitioner leading to his conviction has not been examined by the disciplinary authority within the laid down parameter as such the order of dismissal, as affirmed in appeal and revision cannot be sustained. Orders impugned dated 1.12.2016, 21.12.2016 and 18.3.2016 accordingly are liable to be quashed.

19. Ordinarily, when such orders are quashed a liberty ought to be granted to the disciplinary authority to pass a fresh order while

considering relevant factors i.e. conduct of the employee, gravity of charges and the materials available against him etc. This course, however, would not be desirable or even permissible in the facts of the present case since the petitioner has attained the age of superannuation on 31.12.2018 and the contract of employment has come to an end.

20. Sri Siddharth Srivastava, learned counsel for the petitioner has placed reliance upon the judgment of Supreme Court in Bhagirathi Jena Vs. Board of Directors, O.S.F.C. And others, (199) 3 SCC 666 wherein the Supreme Court has observed as under in paras 6 & 7:-

"6. It will be noticed from the abovesaid regulations that no specific provision was made for deducting any amount from the provident fund consequent to any misconduct determined in the departmental enquiry nor was any provision made for continuance of departmental enquiry after superannuation.

7. In view of the absence of such provisions in the abovesaid regulations, it must be held that the Corporation had no legal authority to make any reduction in the retiral benefits of the appellant. There is also no provision for conducting a disciplinary enquiry after retirement of the appellant and nor any provision stating that in case misconduct is established, a deduction could be made from retiral benefits. Once the appellant had retired from service on 30.6.95, there was no authority vested in the Corporation for continuing the departmental enquiry even for the purpose of imposing any reduction in the retiral benefits payable to the appellant. In the absence of such authority, it must be held that the enquiry had lapsed and the appellant was entitled to full retiral benefits on retirement."

21. Again in Dev Prakash Tewari Vs. Uttar Pradesh Cooperative Institutional Service Board Lucknow and others, (2014) 7 SCC 260, the Supreme court has observed as under in para Nos. 6 to 9:-

"6. An occasion came before this Court to consider the continuance of disciplinary inquiry in similar circumstance in Bhagirathi Jena case [Bhagirathi Jena v. Orissa State Financial Corpn., (1999) 3 SCC 666 : 1999 SCC (L&S) 804] and it was laid down as follows: (SCC pp. 668-69, paras 5-7)

"5. Learned Senior Counsel for the respondents also relied upon clause (3)(c) of Regulation 44 of the Orissa State Financial Corporation Staff Regulations, 1975. It reads thus:

"44. (3)(c) When the employee who has been dismissed, removed or suspended is reinstated, the Board shall consider and make a specific order:

(i) Regarding the pay and allowances to be paid to the employee for the period of his absence from duty, and

(ii) Whether or not the said period shall be treated as a period on duty.'

6. It will be noticed from the abovesaid Regulations that no specific provision was made for deducting any amount from the provident fund consequent to any misconduct determined in the departmental enquiry nor was any provision made for continuance of the departmental enquiry after superannuation.

7. In view of the absence of such a provision in the abovesaid Regulations, it must be held that the Corporation had no legal authority to make any reduction in the retiral benefits of the appellant. There is also no provision for conducting a disciplinary enquiry after retirement of the appellant and nor any provision stating that in case misconduct is established, a deduction could be made from retiral benefits. Once the appellant had retired from service on 30-6-1995, there was no authority vested in the Corporation for continuing the departmental enquiry even for the

purpose of imposing any reduction in the retiral benefits payable to the appellant. In the absence of such an authority, it must be held that the enquiry had lapsed and the appellant was entitled to full retiral benefits on retirement."

7. In a subsequent decision of this Court in U.P. Coop. Federation case [U.P. Coop. Federation Ltd. v. L.P. Rai, (2007) 7 SCC 81 : (2007) 2 SCC (L&S) 598] on facts, the disciplinary proceeding against employee was quashed by the High Court since no opportunity of hearing was given to him in the inquiry and the management in its appeal before this Court sought for grant of liberty to hold a fresh inquiry and this Court held that charges levelled against the employee were not minor in nature, and therefore, it would not be proper to foreclose the right of the employer to hold a fresh inquiry only on the ground that the employee has since retired from the service and accordingly granted the liberty sought for by the management. While dealing with the above case, the earlier decision in Bhagirathi Jena case [Bhagirathi Jena v. Orissa State Financial Corpn., (1999) 3 SCC 666 : 1999 SCC (L&S) 804] was not brought to the notice of this Court and no contention was raised pertaining to the provisions under which the disciplinary proceeding was initiated and as such no ratio came to be laid down. In our view the said decision cannot help the respondents herein.

8. Once the appellant had retired from service on 31-3-2009, there was no authority vested with the respondents for continuing the disciplinary proceeding even for the purpose of imposing any reduction in the retiral benefits payable to the appellant. In the absence of such an authority it must be held that the enquiry had lapsed and the appellant was entitled to get full retiral benefits.

9. The question has also been raised in the appeal with regard to arrears of salary and allowances payable to the appellant during the period of his dismissal and up to the date of reinstatement. Inasmuch as the inquiry had lapsed, it is, in our opinion, obvious that the appellant would have to get the balance of the emoluments payable to him."

22. In State Bank of Patiala and another Vs. Ram Niwas Bansal (dead) through legal representatives (2014) 12 SCC 106, the Supreme Court has observed in Para Nos. 14, 15 and 31 as under:-

"14. The three issues that eminently emerge for consideration are:

(i) whether the employer Bank could have, in law, passed an order of dismissal with retrospective effect;

(ii) whether the delinquent officer stood superannuated after completion of thirty years, as provided under the Regulations, on 25-2-1992; and

(iii) whether the legal heirs of the deceased employee are entitled to get the entire salary computed till the actual passing of the order of dismissal, that is, 22-11-2001 or for that matter till the date of superannuation, that is, 25-2-1992.

15. Regard being had to the nature of controversy, we shall proceed to deal with the first point first, that is, whether the order of removal could have been made with retrospective effect. Mr Patwalia, learned Senior Counsel appearing for the employee, has submitted that the disciplinary authority could not have passed an order of removal by making it operational from a retrospective date. He has commended us to a three-Judge Bench decision in R. Jeevaratnam v. State of Madras [R. Jeevaratnam v. State of Madras, AIR 1966 SC 951] . In the said case, the appellant therein instituted a suit for a declaration that the order of dismissal from service was illegal and void. The trial court dismissed the suit and the said decree was affirmed in appeal by the High Court. One of the contentions raised before this Court was that the order of dismissal dated 17-10-1950 having been passed with retrospective

effect i.e. 29-5-1949, was illegal and inoperative. This Court opined that an order of dismissal with retrospective effect is, in substance, an order of dismissal as from the date of the order with the superadded direction that the order should operate retrospectively as from an anterior date. The two parts of the order are clearly severable. Assuming that the second part of the order is invalid, there is no reason why the first part of the order should not be given the fullest effect. The said principle has been followed in Gujarat Mineral Development Corpn. v. P.H. Brahmbhatt [(1974) 3 SCC 601 : 1974 SCC (L&S) 102] .

31. In the case at hand, the said stage is over. The Full Bench on the earlier occasion had already rendered a verdict that serious prejudice had been caused and, accordingly, had directed for reinstatement. The said direction, if understood and appreciated on the principles stated in B. Karunakar [ECIL v. B. Karunakar, (1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704] , is a direction for reinstatement for the purpose of holding a fresh enquiry from the stage of furnishing the report and no more. In the case at hand, the direction for reinstatement was stayed by this Court. The Bank proceeded to comply with the order of the High Court from the stage of reply of enquiry. The High Court by the impugned order [Ram Niwas Bansal v. State Bank of Patiala, (2002) 2 SLR 375 (P&H)] had directed payment of back wages to the delinquent officer from the date of dismissal till passing of the appropriate order in the disciplinary proceeding/superannuation of the petitioner therein whichever is earlier. The Bank has passed an order of dismissal on 22-11-2001 with effect from 23-4-1985. The said order, as we perceive, is not in accord with the principle laid down by the Constitution Bench decision in B. Karunakar [ECIL v. B. Karunakar, (1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704] , for it has been stated there that in case of non-furnishing of an enquiry report the court can deal with it and pass an appropriate order or set aside the punishment and direct reinstatement for continuance of the departmental proceedings from that stage. In the case at hand, in the earlier round the punishment was set aside and direction for reinstatement was passed. Thus, on the face of the said order it is absolutely inexplicable and unacceptable that the Bank in 2001 can pass an order with effect from 23-4-1985 which would amount to annulment of the judgment [Ram Niwas Bansal v. State Bank of Patiala, (1998) 4 SLR 711 : (1998) 119 PLR 768] of the earlier Full Bench. As has been held by the High Court in the impugned judgment [Ram Niwas Bansal v. State Bank of Patiala, (2002) 2 SLR 375 (P&H)] that when on the date of non-furnishing of the enquiry report the delinquent officer was admittedly not under suspension, but was in service and, therefore, he would continue in service till he is dismissed from service in accordance with law or superannuated in conformity with the Regulations. How far the said direction is justified or not or how that should be construed, we shall deal with while addressing the other points but as far as the order of removal being made retrospectively operational, there can be no trace of doubt that it cannot be made retrospective."

23. In State of Assam and others Vs. Padma Ram Borah, AIR 1965 S.C. 473, the Constitution Bench of Supreme Court has observed as under in Para-7:-

"7. Let us proceed on the footing, as urged by learned counsel for the appellant, that the order dated December 22, 1960 itself amounts to an order retaining the respondent in service till departmental proceedings to be drawn up against him are finalised. We shall also assume that the finalisation of the departmental proceedings mentioned in the order is a public ground on which the respondent could be retained in service. As the

order was passed by the State Government itself, no. question of taking its sanction arises and we think that the High Court was wrong in holding that the absence of sanction from the state Government made the order bad. Therefore, the effect of the order dated December 22, 1960 was two-fold : firstly, it placed the respondent under suspension and secondly, it retained the respondent in service all departmental proceedings against him were finalised. We treat the order as an order under Fundamental Rule 56 which order having been made before January 1, 1961, the date of respondent's retirement, cannot be bad on the ground of retrospectivity. Then, we come to the order dated January 6, 1961. That order obviously modified the earlier order of December 22, 1960 inasmuch as it fixed a period of three months from January 1, 1961 or till the disposal of the departmental proceedings, whichever is earlier, for retaining the respondent in service. The period of three months fixed by this order expired on March 31, 1961. Thus the effect of the order of January 6, 1961 was that the service of the respondent would come to an end on March 31, 1961 unless the departmental proceedings were disposed of at a date earlier than March 31, 1961. It is admitted that the departmental proceedings were not concluded before March 31, 1961. The clear effect of the order of January 6, 1961 therefore was that the service of the respondent came to an end on March 31, 1961. This was so not because retirement was automatic but because the State Government had itself fixed the date up to which the service of the respondent would be retained. The State Government made no. further order before March 31, 1961, but about a month on so after passed an order on May 9, 1961 extending the service of the respondent for a further period of three months with effect from April 1, 1961. We do not think that the State Government had any jurisdiction to pass such an order on May 9, 1961. According to the earlier order of the State Government itself, the service of the respondent had come to an end on March 31, 1961. The State Government could not by unilateral action create a fresh contract of service to take effect from April 1, 1961. If the State Government wished to continue the service of the respondent for a further period, the State Government should have issued a notification before March 31, 1961. In R. T. Rangachari v. Secretary of State 64 Ind App 40 : 1937 AIR(PC) 27) their Lord- ships of the Privy Council were dealing with a case in which a Sub-Inspector of Police was charged with certain irregular and improper conduct in the execution of his duties. After the Sub-Inspector had retired on invalid pension and his pension had been paid for three months, the matter was re-opened and an order was made removing the Sub-Inspector from service as from the date on which he was invalided. Lord Roche speaking for the Board said :

"It seems to require no. demonstration that an order purporting to remove the appellant from the service at a time when, as their Lordships hold, he had for some months duly and properly ceased to be in the service, was a mere nullity and cannot be sustained."

The position is the same here. The respondent had ceased to be in service on March 31, 1961 by the very order of the State Government. Art. order of retention in service passed more than a month thereafter, was a mere nullity and cannot be sustained."

24. A conspectus of above observations made by the Supreme Court would clearly reveal that unless there exists an enabling provision either in the applicable service rules or any other provision of law it would not be open for the disciplinary authority to pass an order in respect of contract of service after the employee has attained the age of superannuation.

25. This Court in Bhagirathi Singh Vs. State of U.P. and others, 2018 (8) ADJ 538 has also observed as under in Para-18:-

" 18. It is settled legal position that the employer and employee relationship is dependant only upon the contract of employment. The moment, the contract comes to end as the person is retired from service on attaining certain age under the rules, the relationship comes to an end. In the event of employer of employee relationship coming to an end, the rules have to specifically provide for continuation of proceedings in the first instance and that too with the sanction of higher authorities in the second instance because it will be seen as exceptional circumstance where disciplinary authority would record that for reasons genuine and convincing the disciplinary proceedings could not be concluded and, therefore, it is required that the proceedings be continued even after retirement, but there is no such provision under the rules governing the disciplinary proceedings. In this context, learned counsel for the respondent could not point out any rule, circular or executive instructions even, which may provide for continuance of disciplinary proceedings even after the retirement of the petitioner or any other employee of the corporation. Then again, the question will be that how a punishment is to be imposed as the punishment is awarded only against an employee unless and until employer and employee relationship exists, the order of punishment upon a retired employee cannot be imposed except otherwise provided under the rules. Even in matters of recovery, it is not open for the department to deduct any amount from retiral dues in absence of any rules giving any such authorization. "

26. From the above discussions, it is apparent that since the petitioner has attained the age of superannuation and no provision in law is shown which permits the disciplinary authority to examine the conduct of an employee, now, so as to pass an order of punishment, there would be no purpose in remitting back the matter to the disciplinary authority for a fresh consideration of petitioner's conduct leading to his conviction. Such a course would be legally impermissible.

27. The relief to be granted to the petitioner in such circumstances will have to be determined by this Court in view of what has been observed in para-127 of the Constitution Bench judgment in Tulsiram Patel (supra). The Court will have the jurisdiction to pass necessary order in respect of the penalty, which in its opinion would be just and proper in the circumstances of the case.

28. In the facts of the present case the petitioner has been dismissed from service on 18.3.2016 and has attained the age of superannuation on 31.12.2018. He has admittedly not worked during this period. The proceedings against the petitioner, consequent upon his conviction in an offence under Section 307 I.P.C. cannot be said to be without jurisdiction or arbitrary, on facts. The order of dismissal has been found wanting on account of non-consideration of petitioner's conduct leading to his conviction and has been set aside, for such reasons. The petitioner would be entitled to all service and retiral benefits including continuity excluding salary between 18.3.2016 to 31.12.2018 by applying the principles of 'no work no pay'. It is however reiterated that the period between 18.3.2016 to 31.12.2018 shall be counted for payment of retiral benefits.

29. Writ petition accordingly succeeds and is allowed in terms of the above orders/ directions. Orders dated 1.12.2016, 21.12.2016 and 18.3.2016 stands quashed.

30. No order is passed as to costs.

(2021)11ILR A679
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.09.2021

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.

Writ A No. 2430 of 2021
and other connected cases

Ragini Dwivedi & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Prabhakar Awasthi, Sri Brijesh Kumar, Sri Brijesh Dubey, Sri Shivendu Ojha

Counsel for the Respondents:
C.S.C., Sri A.K.S., Sri A.K.S. Parihar, Sri Anil Kumar Singh, Sri Akash Rai

A. Service Law – Education – Appointment - Judges cannot take on the role of experts in academic matters. Unless, the candidate demonstrates that the key answers are patently wrong on the face of it, the courts cannot enter into the academic field, weigh the pros and cons of the arguments given by both sides and then come to the conclusion as to which of the answers is better or more correct. (Para 21, 23)

This caution gets clearly attracted in the facts of the present case inasmuch as opinion of experts is based on credible material and cannot be said to be absolutely without any basis. Which author is correct on the subject is not for the Court to determine, at the first instance. Unless the answers relied upon by the Board are found to be patently erroneous or without any basis the interference on part of the Court would clearly not be warranted. (Para 29)

When there are conflicting views, then the court must bow down to the opinion of the experts. Judges are not and cannot be experts in all fields and, therefore, they must exercise great restraint and should not overstep their jurisdiction to upset the opinion of the experts. (Para 21, 23)

In such view of the matter this Court is not inclined to arrogate to itself the role of expert in the subject so as to judge whether the opinion expressed by team of experts is correct or not**.** (Para 29)

B. Factual aspects raised at the time of hearing need not be examined in the absence of any specific pleading and opportunity to the Board to submit its reply in the matter. Petitioners urge that in different examinations the Board has given different answers to the same questions. Attention of the Court has not been invited to any factual plea in that regard in the writ petitions and such arguments have been raised only during the course of arguments. However, Court observed that such aspects are required to be carefully scrutinized by the Board while accepting correctness of the answer to a particular question. **The Board must remain consistent and its answers cannot vary to a question in different examinations. Greater care ought to be taken for ensuring its credibility as a recruitment body.** Sanskrit is otherwise a scientific language and does not admit of scope for confusion and that the opinion of experts must be based on authentic texts. (Para 28)

In the facts of the present case the recruitment has concluded and selected candidates have apparently joined against the advertised vacancies. **The selected candidates have otherwise not been noticed in the instant writ proceedings nor are they represented.** Any interference in the matter, at this stage, may otherwise adversely effect the cause of dispensation of education in large number of institutions where the selected candidates may have joined by now and are working. (Para 29)

Writ petitions dismissed. (E-4)

Precedent followed:

1. Ran Vijay Singh & ors. Vs St.of U.P. & ors., (2018) 2 SCC 357 (Para 21)

2. Rishal & ors. Vs Rajasthan Public Service Commission & ors., (2018) 8 SCC 81 (Para 22)

3. Uttar Pradesh Public Service Commission through its Chairman & anr. Vs Rahul Singh & anr. (2018) 7 SCC 254 (Para 23)

4. Kanpur University Vs Samir Gupta, (1983) 4 SCC 309 (Para 23)

Precedent cited:

1. Ranjeet Kumar Singh & ors.Vs St. of U.P. & ors., 2012 (30) ADJ 242 (Para 24)

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. This bunch of writ petitions are at the instance of unsuccessful candidates who had applied for appointment to the post of Trained Graduate Teacher (Male) in Sanskrit against advertisement no.01/2016, issued by the U.P. Secondary Education Service Selection Board, Allahabad (hereinafter referred to as 'Board'). They assert that their merit has not been correctly evaluated as answers relied upon by Board to some of the questions are wrong and consequentially the select list suffers from patent illegality. A prayer is also made to direct the Board to reassess or re-evaluate questions on the basis of correct answers.

2. It is contended that most of the petitioners have fallen short by one (1) or two (2) marks and since large number of vacancies are still available, therefore, the Board be directed to award them correct marks for the answers given by the petitioners in light of the materials placed before the Board and also this Court.

3. Respondent Board, on the other hand, has filed an affidavit in the leading writ petition annexing a chart as Annexure-1 to contend that model answers have been worked out on the basis of opinion of experts and, therefore, the award of marks to candidates in the examination suffers from no illegality.

4. Answers to fourteen (14) questions in the examination are disputed by the petitioners on the ground that they are wrong. To the extent of seven (7) out of these fourteen questions the Board has found substance in the challenge laid and those questions are deleted on the basis of expert opinion obtained and marks for these seven questions have been equally distributed to all candidates. Grievance, therefore, survives only in respect of seven questions.

5. At the outset, it would be worth noticing that written examination was conducted for the recruitment on 09.03.2019 and the first answer key was published on 26.03.2019. Objections were invited from the candidates between 27.03.2019 and 03.04.2019. After considering the objections raised a revised answer key was published on 25.10.2019. It appears that the corrected answer key published on 25.10.2019 was questioned in Writ Petition No.19059 of 2019, wherein a counter affidavit was invited from the Board. The Board appears to have called for a fresh opinion of experts in respect of the disputed questions and final answer key has been published on 12.02.2020, which is the basis of award of marks to the candidates.

6. Out of the seven (7) disputed questions it transpires that no objections were filed in respect of three of them, namely question nos.28, 73 and 80 of Booklet Series A despite opportunity given in that regard by the Board. Challenge to correctness of model answers in these three questions need not be entertained, directly in writ proceedings, when no such challenge was laid before the Board. The first of the remaining four disputed questions is question no.46 of the Booklet Series A. Option (D) was disclosed to be correct answer in the first answer key but after the candidates objected to it the Board declared the answer to be wrong and proposed to delete the question. However, without there being any fresh opportunity of objection to the candidates or any order of the Court the Board unilaterally proceeded to change the answer to this question as option (A). Question no.46 of the Booklet Series A correspondes to question nos.16, 105 and 73 of

the Booklet Series B, C and D respectively, and is quoted below:

46– निम्नलिखित में से शुद्ध वाक्य है
(ए)ष्पुत्रः मातरं स्मरति
(बी) पुत्रः मात्रं स्मरति
(सी) पुत्रः मातारं स्मरति
(डी) पुत्रः मातु स्मरति

7. The next disputed question is question no.8 of Booklet Series A, corresponding to question nos.103, 67 and 35 of the Booklet Series B, C and D respectively. The Board consistently held option (B) to be the correct answer in all the model answers. Petitioners, however, submit that correct answer is option (C). Question no.8 of the Booklet Series A reads as under:

8– ''कोडन्यो हुतवहात् ् प्रभर्वाते दुग्धम्'' यह वाक्य अभिज्ञान शाकुन्तल में कहा है
(ए) अनसूया (बी) प्रियंवदा
(सी) कण्वशिष्यः (डी) दुर्वासा"

8. Similarly, question no.68 of Booklet Series A, corresponding to question nos.38, 2 and 95 of the Booklet Series B, C and D respectively, reads as under:

68– कादम्बरी नायिका है
(ए) स्वकीया
(बी) परकीया
(सी) मानिनी
(डी) इनमें से कोई नहीं"

9. The last question objected to by the petitioners is question no.101 of Booklet Series A [question nos.71, 35 and 3 of the Booklet Series B, C and D respectively] which reads as under:

101– ''हितान्न यः संश्रृणते स किं प्रभुः'' इसमें '' हितात्'' पद में किस सूत्र से पन्चमी विभक्ति है?
(ए) भीत्रार्थानां भयहेतु
(बी) अपादाने पन्चमी
(सी) आख्यातोपयोगे
(डी) वारणार्थानामीप्सितः

10. In the affidavit filed by the Board the opinion of experts has been annexed alongwith materials, which have been placed before the Court, for arriving at its conclusion. In respect of question no.46 initially options (A) and (D) were both found to be correct but as per the revised expert opinion the correct answer is option (A). The experts report is also annexed alongwith the affidavit. With reference to question no.8 the experts have referred to the commentary on Kalidas Granthawali by Dr. Rewa Prasad Dwivedi published by Kashi Hindu Vishwavidyalaya, and Acharya Sitaram Chaturvedi published by Chaukhamba Granthmala to arrive at the conclusion that Priyamvada is the author of the quoted sentence. It is with reference to the above materials that the Board contends that its answer (B) Priyamvada as author of statement is correct. As against it the petitioners rely upon Abhigyan Shakuntlam written by Dr. Kapil Dev Dwivedi in which this very statement is attributed to Anusuiya. To similar effect are the commentary on Abhigyan Shakuntalam by Dr. Shiv Balak Dwivedi as also Abhigyan Shakuntalam published by Bhartiya Vidya Santhan, Varanasi. It is stated that in class 11th Sanskrit also the statement is attributed to be of Anusuiya. The petitioners, moreover, contend that the Board itself in 2009 and 2021 examination has held Anusuiya to be the author of statement and, therefore, a different answer to the same question by the same Board in a different exam would be impermissible. It is alleged that this creates confusion and also discourages sincere students as despite having given correct answer they are not awarded marks.

11. In respect of question no.68 the Board has found option (B) to be the correct answer whereas petitioners submit that option (A) and

(B) both are the correct answers inasmuch as the Kadambari's character is distinct before and after marriage. It is urged that before marriage she is Swakiya and after marriage she is Parkiya and since marital status is not disclosed in the question, therefore, options (A) and (B) both are correct. In respect of such contention petitioners rely upon Kadambari written by Shri Krishna Mohan Thakkur; Kadambari Kathamukham written by Dr. Anurag Shukla; and Shuknasopdesh published by Ram Narayan Lal Vijay Kumar.

"

12. The correct answer to question no.101 as per the Board is option (C), whereas according to petitioners correct answer is option (B) as per the book Sanskrit Vyakaran Praveshika written by Dr. Babu Ram Saxena and Kiratararjunoyam written by Dr. Ram Sewak Dubey.

13. Question nos.18, 32, 33, 58, 66, 70 & 118 of Booklet Series-A have already been deleted.

14. Learned counsel for the respondent Board points out that after declaration of result of written examination the panel for interview has prepared on 16.01.2021 and the final select list has also been forwarded to the concerned District Inspector of Schools for issuing appointment to the selected candidates. It is also pointed out that selected candidates are otherwise not represented and, therefore, no interference in the matter is called for.

15. On behalf of petitioners it is urged in response to the above objection that more than 150 vacancies are still available and, therefore, petitioners' claim can be considered against such vacant posts even without disturbing the selected candidates.

16. Hearing in this bunch of petitions was concluded on 16.08.2021 and the matter was posted for orders on 19.08.2021. Learned counsel for the respondent Board on 17.08.2021 placed before the Court a communication as per which recommendations for appointment had been made against all advertised vacancies. However, on behalf of the petitioners a letter of State dated 13.08.2021 was produced to contend that certain vacancies are still available with the respondents. In order to ascertain the correctness of such assertion the proceedings were adjourned with an intent to obtain specific instructions from State as to whether any vacancy still remains or not?

17. Written instructions have been produced by Sri Sharad Chandra Upadhyaya, learned State Counsel, dated 26.08.2021, as per which 552 posts of Trained Graduate Teacher in Sanskrit (Male Category) and 35 posts in Female Category, totalling 587 posts were advertised vide advertisement no.01/2016. After holding of the written test and interview select list of 587 candidates was published on 06.01.2021. Panel of selected candidates, institution-wise, was also sent to District Inspector of Schools on 15.01.2021. It has been stated that as of now no vacancy survives as selected candidates have been adjusted against all vacancies. It has further been stated that the select penal has been drawn in excess of the advertised vacancy in accordance with rules and in the event any selected candidate does not join, the vacancy is supposed to be filled from the list of surplus candidates already provided by the Board. The Special Secretary of the State, accordingly, has informed that no vacancy is now available against which petitioners' claim could be considered.

18. It is in the context of above factual scenario that the issue needs to be resolved by this Court.

19. I have heard Sri Shivendu Ojha, Sri Brijesh Dubey and other learned counsels for the

petitioners, Sri Sharad Chandra Upadhaya, learned State Counsel, Sri A. K. S. Parihar, Sri Akash Rai and Sri Anil Kumar Singh for the respondent Board and have perused the materials brought on record.

20. Before proceeding to discuss the rival submissions advanced it would be appropriate to bear in mind the note of caution indicated by the Supreme Court in various judgments restricting the scope of enquiry by the Writ Court in a case where correctness of experts' opinion is questioned before it. This would help the Court in appreciating the scope of arguments advanced before the Court regarding correctness of the answer key.

21. In Ran Vijay Singh and others vs. State of Uttar Pradesh and others, (2018) 2 SCC 357, the Supreme Court observed as under in paragraph nos.30 to 32:

"30. The law on the subject is therefore, quite clear and we only propose to highlight a few significant conclusions. They are:

30.1. If a statute, Rule or Regulation governing an examination permits the re-evaluation of an answer sheet or scrutiny of an answer sheet as a matter of right, then the authority conducting the examination may permit it;

30.2. If a statute, Rule or Regulation governing an examination does not permit re-evaluation or scrutiny of an answer sheet (as distinct from prohibiting it) then the court may permit re-evaluation or scrutiny only if it is demonstrated very clearly, without any "inferential process of reasoning or by a process of rationalisation" and only in rare or exceptional cases that a material error has been committed;

30.3. The court should not at all re-evaluate or scrutinise the answer sheets of a candidate--it has no expertise in the matter and academic matters are best left to academics;

30.4. The court should presume the correctness of the key answers and proceed on that assumption; and

30.5. In the event of a doubt, the benefit should go to the examination authority rather than to the candidate.

31. On our part we may add that sympathy or compassion does not play any role in the matter of directing or not directing re-evaluation of an answer sheet. If an error is committed by the examination authority, the complete body of candidates suffers. The entire examination process does not deserve to be derailed only because some candidates are disappointed or dissatisfied or perceive some injustice having been caused to them by an erroneous question or an erroneous answer. All candidates suffer equally, though some might suffer more but that cannot be helped since mathematical precision is not always possible. This Court has shown one way out of an impasse -- exclude the suspect or offending question.

32. It is rather unfortunate that despite several decisions of this Court, some of which have been discussed above, there is interference by the courts in the result of examinations. This places the examination authorities in an unenviable position where they are under scrutiny and not the candidates. Additionally, a massive and sometimes prolonged examination exercise concludes with an air of uncertainty. While there is no doubt that candidates put in a tremendous effort in preparing for an examination, it must not be forgotten that even the examination authorities put in equally great efforts to successfully conduct an examination. The enormity of the task might reveal some lapse at a later stage, but the court must consider the internal checks and balances put in place by the examination authorities before interfering with the efforts put in by the candidates who have successfully participated in the examination and the examination authorities.

The present appeals are a classic example of the consequence of such interference where there is no finality to the result of the examinations even after a lapse of eight years. Apart from the examination authorities even the candidates are left wondering about the certainty or otherwise of the result of the examination -- whether they have passed or not; whether their result will be approved or disapproved by the court; whether they will get admission in a college or university or not; and whether they will get recruited or not. This unsatisfactory situation does not work to anybody's advantage and such a state of uncertainty results in confusion being worse confounded. The overall and larger impact of all this is that public interest suffers."

(Emphasis supplied)

22. In Rishal and others vs. Rajasthan Public Service Commission and others, (2018) 8 SCC 81, the Supreme Court again observed as under in paragraph nos.19, 24 and 26:

"19. The key answers prepared by the paper-setter or the examining body is presumed to have been prepared after due deliberations. To err is human. There are various factors which may lead to framing of the incorrect key answers. The publication of key answers is a step to achieve transparency and to give an opportunity to candidates to assess the correctness of their answers. An opportunity to file objections against the key answers uploaded by examining body is a step to achieve fairness and perfection in the process. The objections to the key answers are to be examined by the experts and thereafter corrective measures, if any, should be taken by the examining body. In the present case, we have noted that after considering the objections final key answers were published by the Commission thereafter several writ petitions were filed challenging the correctness of the key answers adopted by the Commission. The High Court repelled the challenge accepting the views of the experts. The candidates still unsatisfied, have come up in this Court by filing these appeals.

24. The learned counsel for the appellants have also pointed out several other questions in Paper 1 which according to the learned counsel for the appellants have not been correctly answered by the Expert Committee. We have considered few more questions as pointed out and perused the answers given by the Expert Committee and we are of the view that no error can be found with the answers of the Expert Committee with regard to three more questions which have been pointed out before us. The Expert Committee, constituted to validation of answer key, has gone through every objection raised by the appellants and has satisfactorily answered the same. The Commission has also accepted the report of the Expert Committee and has proceeded to revise the result of 311 appellants before us. We, thus, are of the view that report of the Expert Committee which has been accepted by the Commission need to be implemented.

26. The questions having been deleted from the answers, the question paper has to be treated as containing the question less the deleted questions. Redistribution of marks with regard to deleted questions cannot be said to be arbitrary or irrational. The Commission has adopted a uniform method to deal with all the candidates looking to the number of the candidates. We are of the view that all the candidates have been benefited by the redistribution of marks in accordance with the number of correct answers which have been given by them. We, thus, do not find any fault with redistribution of marks of the deleted marks (sic questions). The High Court has rightly approved the said methodology."

23. Yet, again in Uttar Pradesh Public Service Commission through its Chairman and another vs. Rahul Singh and another, (2018) 7 SCC 254, the Apex Court reiterated the principles laid down in Kanpur University vs.

Samir Gupta, (1983) 4 SCC 309 to observe as under in paragraph nos.12 to 14:

"12. The law is well settled that the onus is on the candidate to not only demonstrate that the key answer is incorrect but also that it is a glaring mistake which is totally apparent and no inferential process or reasoning is required to show that the key answer is wrong. The constitutional courts must exercise great restraint in such matters and should be reluctant to entertain a plea challenging the correctness of the key answers. In *Kanpur University case [Kanpur University v. Samir Gupta*, (1983) 4 SCC 309] , the Court recommended a system of:

(1) moderation;

(2) avoiding ambiguity in the questions;

(3) prompt decisions be taken to exclude suspected questions and no marks be assigned to such questions.

13. As far as the present case is concerned, even before publishing the first list of key answers the Commission had got the key answers moderated by two Expert Committees. Thereafter, objections were invited and a 26-member Committee was constituted to verify the objections and after this exercise the Committee recommended that 5 questions be deleted and in 2 questions, key answers be changed. It can be presumed that these Committees consisted of experts in various subjects for which the examinees were tested. Judges cannot take on the role of experts in academic matters. Unless, the candidate demonstrates that the key answers are patently wrong on the face of it, the courts cannot enter into the academic field, weigh the pros and cons of the arguments given by both sides and then come to the conclusion as to which of the answers is better or more correct.

14. In the present case, we find that all the three questions needed a long process of reasoning and the High Court itself has noticed that the stand of the Commission is also supported by certain textbooks. When there are conflicting views, then the court must bow down to the opinion of the experts. Judges are not and cannot be experts in all fields and, therefore, they must exercise great restraint and should not overstep their jurisdiction to upset the opinion of the experts."

(Emphasis supplied)

24. On behalf of the petitioners reliance is placed upon judgment of this Court in Ranjeet Kumar Singh and others vs. State of U.P. and others, 2012 (30 ADJ 242, wherein following observations have been made in paragraph nos.55, 56 and 59:

"55. The aforesaid observations apply with full force to the cases in hand also. For the fault of Selection Board in selecting Papers Setters, who have not discharged their duties efficiently, honestly and by meticulous care and caution by framing paper sets of questions and answers, the studious and meticulous intelligent students cannot be made to suffer sheer on account of their capacity and intelligence of having correct information and knowledge. Can it be said that an examining body even if ask a question and treat a patently perverse answer to be correct as a model answer, yet the Court would not interfere on the sheer pretext that it would amount to crossing the border line of Experts' opinion in academic matters. For example, if a question is asked as to when the Constitution of India was adopted and enforced by the people of India and instead of 26.1.1950, the correct answer is taken as 15.8.1947, shall Court refuse to interfere only for the objection raised by Examining body that it is the opinion of Subject Experts in the matter and in such academic matter, the Court should not interfere. The answer would be obviously "No". Such a preliminary objection is bound to be rejected. If this kind of fault committed by Selection Board is allowed to remain untouched, this Court would be failing in its Constitutional obligation to prevent arbitrariness, illegality in the matter

of right of consideration for employment as it would amount to an arbitrary kind of selection denying equal opportunity of employment to all concerned and would be infringing Article 14 and 16 read with Article 21 of Constitution.

56. Now remains the question as to how and in what manner, relief is to be granted. It is true that while entertaining this writ petition, this Court directed that any further action by the respondents would be subject to result of this writ petition. (See order dated 7.10.2010 passed by this Court in Writ Petition No. no 61659 of 2010), the fact remains that these writ petitions were filed after declaration of final result when petitioners were declared unsuccessful. The appointment of all selected candidates have already been made as told in para 16 of counter affidavit. The appointment and selection, though already made, have not been questioned. The persons already appointed are not before this Court. Petitioners, after appearing in written test, were well aware about the alleged mistakes and inaccuracies in multiple choices given in respect to above questions. It cannot be assumed that they could not have visualised that on account of wrong choice or wrong answers or wrong questions, they may suffer in preparation of ultimate merit list. They chose to wait not only till interview is held but even till final result is declared. It is true that normally a candidate does not come to file an academic litigation or a futile litigation and it is only when a cause of action arises, he comes to the Court to challenge an illegality which has already been committed but then all other attending circumstances have to be seen.

59. Looking to over all factors and circumstances and discussion as above, in my view, the ends of justice would meet by disposing of all these writ petitions with the following directions:

(i) Petitioners' answer-sheets in respect to above seven questions shall be examined in the manner as adjudicated above (summarised in para 41) and their marks in written test would be determined accordingly.

(ii) In case, it is found that petitioners or any one or more of them have secured total marks more than last selected and appointed person, they shall be given appointment.

(iii) The above appointments will be made against the advertised vacancies on the post of Trained Graduate Teachers. The persons already appointed in service shall not be made to suffer in any manner, except to the extent one or more of the petitioners on account of increase in his total marks is required to be appointed and in that case, persons last in merit would have to suffer and their appointments, if already made, shall be terminated. I am constrained to give this direction for the reason that vacancies of Teachers advertised for selection are pursuant to requisitions received from the individual secondary institutions and, therefore, only those vacancies which were requisitioned and advertised in the above selection can be made to be governed by this judgment and the subsequent and other vacancies not included in the above selection cannot be taken into consideration to give benefit to any of petitioners by protecting the appointments already made.

(iv) The appointment, if any, made pursuant to this order of petitioners, for the purpose of actual payment of salary shall take effect from the date of appointment but for the purpose of pay fixation, seniority etc. it shall relate back from the date the person lower in merit to the respective petitioner was appointed. If there is no person lower in merit to petitioner(s) and he/they are last in merit, then this date would the same as the person next above these petitioner(s).

(v) Petitioners shall be entitled to cost which I quantify to Rs. 10,000/- for each set of writ petition against U.P. Secondary Education Service Selection Board.

(vi) Selection Board, respondent no. 2, is directed to find out the person(s) responsible for committing the aforesaid errors/ mistakes/ blunders in setting of question papers with

multiple choice answers and to take appropriate action against them in accordance with law. It shall be at liberty to recover the amount of cost it has to pay under this judgement from such persons found responsible as above. "

25. In the facts of the present case the records reveal that the Board had initially published its answer key on 26.03.2019 against which objections were invited from the candidates. These objections were considered and revised answer key was published on 25.10.2019. It appears that after the Writ Petition No.19059 of 2019 was filed before this Court, in which reply was called for, the Board undertook a fresh exercise to get its answers verified by a team of specialists on the subject. Vide affidavit filed before this Court on 15.08.2021 the Board has placed on record the opinion of experts in respect of each disputed question. Elaborate arguments have been advanced and various materials have been placed on behalf of the petitioners to contend that opinion expressed by experts is at variance with the authentic text/materials available on the subject.

26. On behalf of the petitioners it was extraneously urged by the petitioners that correct answer to question no.8 of Booklet Series A is option (A) whereas according to experts' opinion the correct answer is option (B). Materials have been placed in the form of various texts to show that conclusion drawn by the experts on the subject is incorrect. The Board alongwith its affidavit has relied upon "Kalidas Granthawali published by Kashi Hindu Vishwavidyalaya' as also the publication namely "Kalidas Granthawali written by Acharya Sitaram Chaturvedi'. On behalf of petitioners also various texts have been produced.

27. Similarly, in respect of question nos.46, 68 and 101 of Booklet Series A also the experts have taken a particular view for which various materials have been placed before the Court by the petitioners.

28. It has also been urged on behalf of the petitioners that in different examinations the Board has given different answers to the same questions. Attention of the Court has not been invited to any factual plea in that regard in the writ petitions and such arguments have been raised only during the course of arguments. Factual aspects raised at the time of hearing need not be examined in the absence of any specific pleading and opportunity to the Board to submit its reply in the matter. However, it would be appropriate to observe that such aspects are required to be carefully scrutinized by the Board while accepting correctness of the answer to a particular question. The Board must remain consistent and its answers cannot vary to a question in different examinations. Greater care ought to be taken for ensuring its credibility as a recruitment body. Sanskrit is otherwise a scientific language and does not admit of scope for confusion and that the opinion of experts must be based on authentic texts.

29. In the facts of the present case the recruitment has concluded and selected candidates have apparently joined against the advertised vacancies. The selected candidates have otherwise not been noticed in the instant writ proceedings nor are they represented. Any interference in the matter, at this stage, may otherwise adversely effect the cause of dispensation of education in large number of institutions where the selected candidates may have joined by now and are working. In such view of the matter this Court is not inclined to arrogate to itself the role of expert in the subject so as to judge whether the opinion expressed by team of experts is correct or not. While taking such view, this Court is conscious of the caution sounded by the Supreme Court in such matters according to which judges cannot take on the role of experts in academic matters. It is

otherwise settled that unless candidate demonstrates that the key answers are patently wrong, on the face of it, the Court ought not to enter into academic field by weighing the pros and cons of the arguments advanced by both sides and then come to the conclusion as to which of the answers is better or more correct. This caution gets clearly attracted in the facts of the present case inasmuch as opinion of experts is based on credible material and cannot be said to be absolutely without any basis. Which author is correct on the subject is not for the Court to determine, at the first instance. Unless the answers relied upon by the Board are found to be patently erroneous or without any basis the interference on part of the Court would clearly not be warranted.

30. In such circumstances, this Court is not inclined to evaluate merits of the respective arguments advanced by counsels for the parties, with reference to the literature placed on the subject so as to determine whether or not the model answer key contains correct answers.

31. In view of the deliberations and discussions made above, all the writ petitions fail and are dismissed. No order is passed as to costs.

(2021)11ILR A688
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.09.2021

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.

Writ A No. 5235 of 2021

C/M S.M. National Inter College, Machhati Ghazipur & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Hritudhwaj Pratap Sahi, Sri Samarath Singh, Sri Sankalp Narayan, Sri Awanish Kumar Rai, Sri B.K. Singh

Counsel for the Respondents:
C.S.C., Sri Kushmondeya Shahi

A. Service Law – Suspension – Payment of Salary - Intermediate Education Act, 1921 - Section 16G – It is apparent that power to place a Head of institution or teacher under suspension is with the Management and not the Manager. Unless a resolution is passed by the Managing Committee an order of suspension cannot be passed. In the present case, Inspector has admitted that at the time when he considered the question of approval to the order of suspension a resolution dated 03.01.2021 of the Managing Committee had been placed before him. This resolution will have the effect of ratifying the decision of Manager to place the private respondent under suspension. **Since the Inspector has failed to take into consideration the subsequent ratification of Manager's decision by the Management of the Institution, nor the law relating ratification has been examined as such the finding in the order of Inspector that suspension order is without jurisdiction cannot be sustained.** (Para 8)

Intermediate Education Act, 1921 - Regulation 39 in Chapter 3 – This provision does not interfere with the right of minority institution to place a teacher under suspension but merely regulates the exercise of such power in such a manner so as to protect the right of teacher from arbitrary exercise of power by the management. (Para 10)

Minority Institution in the name of discipline and fundamental right of administration and management cannot be given right to hire and fire of its teachers and that conferring of regulatory power with the educational authorities for ensuring guarantee of freedom from arbitrariness to teachers would not amount to violating the right of minority institution to manage its institution. (Para 13)

Impugned order quashed. Matter remitted. Private respondent was allowed to continue at work as well as held entitled to payment of salary. (E-4)

Precedent followed:

1. National Institute of Technology & ors. Vs Pannalal Chaudhary, AIR 2015 SC 2846 (Para 3)

2. All Saints High School, Hyderabad & ors. Vs St.of A.P. & ors., AIR 1980 SC 1042 (Para 11)

3. Frank Public School Employees' Association Vs U.O.I. & ors., 1986 (4) SCC 707 (Para 12)

4. Y Theclamma Vs U.O.I. & ors., 1987 (2) SCC 516 (Para 12)

Precedent distinguished:

1. C/M Clancy Intermediate College Vs St. of U.P. & ors. (Writ Petition No. 15765 of 2016) (Para 2)

Precedent cited:

1. Ms. G. Vallikumari Vs Andhra Education Society & ors., 2010 (2) SCC 497 (Para 4)

Present petition assails order dated 16.03.2021 (disapproving proposed suspension), passed by District Inspector of Schools as well as orders dated 28.01.2021 and 22.02.2021 (which direct payment of salary).

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. This petition is by the minority institution challenging an order of the District Inspector of Schools, Ghazipur dated 16.03.2021 disapproving the proposed suspension of private respondent as also the orders dated 28.01.2021 and 22.02.2021, which direct payment of salary to be released to the private respondent. The order disapproving the suspension dated 16.03.2021 records that the Manager of the institution had placed the private respondent under suspension on 31.12.2020, whereas the resolution of the Managing Committee to place him under suspension was passed on 03.01.2021. The Inspector, therefore, has observed that on the date of passing of the order of suspension there was no valid resolution by the Managing Committee and, therefore, the order of Manager was without jurisdiction.

2. The aforesaid order is assailed on various grounds. It is urged that being a minority institution the Inspector has no authority to disapprove the resolution for placing private respondent under suspension as the right of minority institution to manage its affairs are infringed. Reliance is placed upon a judgment of this Court in C/M Clancy Intermediate College Vs. State of U.P. and others (Writ Petition No. 15765 of 2016). Learned counsel for the petitioner further submits that after the order of suspension was passed by the Manager a valid resolution was passed by the Managing Committee on 03.01.2021, which has the effect of ratifying the earlier order of Manager. This resolution was also on record before the Inspector.

3. In support of plea of ratification Sri Sankalp Narain, learned counsel for the petitioner has placed reliance upon a judgement of Supreme Court in National Institute of Technology and others Vs. Pannalal Chaudhary, AIR 2015 SC 2846, in which Supreme Court has observed as under in para 34 to 40:-

"34. That apart, the issue in question could be examined from yet another angle by applying the law relating to "Ratification" which was not taken note of by the High Court.

35. The expression ?Ratification? means ?the making valid of an act already done?. This principle is derived from the Latin maxim ?ratihabitio mandato aequiparatur? meaning thereby ?a subsequent ratification of an act is equivalent to a prior authority to perform such act.? It is for this reason; the ratification assumes an invalid act, which is retrospectively validated.

36. The expression ?ratification? was succinctly defined by the English Court in one

old case, Hartman Vs. Hornsby reported in 142 Mo 368 44 SW 242, 244 as under:

?Ratification? is the approval by act, word, or conduct, of that which was attempted (of accomplishment), but which was improperly or unauthorisedly performed in the first instance.'

37. The law of ratification was applied by this Court in Parmeshwari Prasad Gupta Vs. U.O.I (1973) 2 SCC 543. In that case, the Chairman of the Board of Directors had terminated the services of the General Manager of a Company pursuant to a resolution taken by the Board at a meeting. It was not in dispute that the meeting had been improperly held and consequently the resolution passed in the said meeting terminating the services of General Manager was invalid. However, the Board of Directors then convened subsequent meeting and in this meeting affirmed the earlier resolution, which had been passed in improper meeting. On these facts, the Court held,

Even if it be assumed that the telegram and the letter terminating the services of the appellant by the Chairman was in pursuance of the invalid resolution of the Board of Directors passed on 16-12-1953 to terminate his services, it would not follow that the action of the Chairman could not be ratified in a regularly convened meeting of the Board of Directors. The point is that even assuming that the Chairman was not legally authorised to terminate the services of the appellant, he was acting on behalf of the Company in doing so, because, he purported to act in pursuance of the invalid resolution. Therefore, it was open to a regularly constituted meeting of the Board of Directors to ratify that action which, though unauthorised, was done on behalf of the Company. Ratification would always relate back to the date of the act ratified and so it must be held that the services of the appellant were validly terminated on 17-12-1953.

38. This view was approved by this Court in High Court of Judicature for Rajasthan Vs. P.P. Singh & Anr. (2003) 4 SCC 239.

39. The aforesaid principle of law of ratification was again applied by this Court in Maharashtra State Mining Corpn. Vs. Sunil (2006) 5 SCC 96. In this case, the respondent was an employee of the appellant Corporation. Consequent to a departmental enquiry, he was dismissed by the Managing Director of the appellant. The respondent then filed a writ petition before the High Court. During the pendency of the writ petition, the Board of Directors of the appellant Corporation passed a resolution ratifying the impugned action of the Managing Director and also empowering him to take decision in respect of the officers and staff in the grade of pay the maximum of which did not exceed Rs. 4700 p.m. Earlier, the Managing Director had powers only in respect of those posts where the maximum pay did not exceed Rs.1900 p.m. The respondent at the relevant time was drawing more than Rs.1800 p.m. Therefore, at the relevant time, the Managing Director was incompetent to dismiss the respondent. Accordingly, the High Court held the order of dismissal to be invalid. The High Court further held that the said defect could not be rectified subsequently by the resolution of the Board of Directors. The High Court set aside the dismissal order and granted consequential relief. The appellant then filed the appeal in this Court by special leave. Justice Ruma Pal, speaking for three- Judge Bench, while allowing the appeal and setting aside of the Court held as under :

The High Court rightly held that an act by a legally incompetent authority is invalid. But it was entirely wrong in holding that such an invalid act could not be subsequently ?rectified? by ratification of the competent authority. Ratification by definition means the making valid of an act already done. The principle is derived from the Latin maxim ratihabitio mandato aequiparatur, namely, ?a subsequent ratification of an act is equivalent to a prior authority to perform such act.? Therefore,

ratification assumes an invalid act which is retrospectively validated.

In the present case, the Managing Director?s order dismissing the respondent from service was admittedly ratified by the Board of Directors unquestionably had the power to terminate the services of the respondent. Since the order of the Managing Director had been ratified by the Board of Directors such ratification related back to the date of the order and validated it.

40. Applying the aforementioned law of ratification to the facts at hand, even if we assume for the sake of argument that the order of dismissal dated 16.08.1996 was passed by the Principal & Secretary who had neither any authority to pass such order under the Rules nor there was any authorization given by the BOG in his favour to pass such order yet in our considered view when the BOG in their meeting held on 22.08.1996 approved the previous actions of the Principal & Secretary in passing the respondent's dismissal order dated 16.08.1996, all the irregularities complained of by the respondent in the proceedings including the authority exercised by the Principal & Secretary to dismiss him stood ratified by the Competent Authority (Board of Governors) themselves with retrospective effect from 16.8.1996 thereby making an invalid act a lawful one in conformity with the procedure prescribed in Rules."

4. Per contra, Sri Kushmondeya Shahi, learned counsel for the respondents in support of his plea that Inspector has jurisdiction to disapprove the suspension has placed reliance upon a judgment of the Supreme Court in Ms. G. Vallikumari Vs. Andhra Education Society and others 2010 (2) SCC 497. Delhi School Education Act fell for consideration before the Court and is reproduced hereinafter:-

"8(4). Where the managing committee of a recognised private school intends to suspend any of its employees, such intention shall be communicated to the Director and no such suspension shall be made except with the prior approval of the Director:

Provided that the managing committee may suspend an employee with immediate effect and without the prior approval of the Director if it is satisfied that such immediate suspension is necessary by reason of the gross misconduct within the meaning of the Code of Conduct prescribed under section 9, of the employee:

Provided further that no such immediate suspension shall remain in force for more than a period of fifteen days from the date of suspension unless it has been communicated to the Director and approved by him before the expiry of the said period."

5. The Supreme Court after consideration all judgments on the point observed as under in para 12:-

12. The prepositions which can be culled out from the above noted two judgments are:

(i) Section 8(1), (3), (4) and (5) of the Act do not violate the right of the minorities to establish and administer their educational institutions. However, Section 8(1) interferes with the said right of the minorities and is, therefore, inapplicable to private recognized aided/unaided minority educational institutions.

(ii) Section 12 of the Act, which makes the provisions of Chapter IV of the Act inapplicable to unaided private recognized minority educational institutions is discriminatory except to extent of Section 8(2). In other words, Chapter IV of the Act except Section 8(2) is applicable to private recognized aided as well as unaided minority educational institutions and the concerned authorities of the education department are bound to enforce the same against all such institutions."

6. I have heard Sri Sankalp Narain, learned counsel for the petitioner and Sri Kushmondeya

Shahi, learned counsel for the respondents and persued the materials placed on records. The first question that falls for determination in the facts of the case is as to whether the order of inspector can be sustained only on the ground that no resolution was passed by the Managing committed for placing the private respondent under suspension when the order of suspension itself was passed by the Manager.

7. Admittedly the institution herein is recognized under the provisions of the Intermediate Education Act, 1921. Section 16G of the Act regulates the conditions of service of Head of the institution, teacher and other employees. Sub-section 5 to 7 of the aforesaid provision are relevant for the present purposes and are reproduced hereinafter:-

"(5) No Head of Institution or teacher shall be suspended by the Management, unless in the opinion of the Management, -

(a) the charges against him are serious enough to merit his dismissal, removal or reduction in rank; or

(b) his continuance in office is likely to hamper or prejudice the conduct of disciplinary proceedings against him; or

(c) any criminal case for an offence involving moral turpitude against him is under investigation, inquiry or trial.

(6) Where any Head of Institution or teacher is suspended by the Committee of Management, it shall be reported to the Inspector within thirty days from the date of the commencement of the Uttar Pradesh Secondary Education Laws (Amendment) Act, 1975, in case the order of suspension was passed before such commencement, and within seven days from the date of the order of suspension in any other case, and the report shall contain such particulars as may be prescribed and be accompanied by all relevant documents.

(7) No such order of suspension shall, unless approved in writing by the Inspector, remain in force more than sixty days form the date of commencement of the Uttar Pradesh Secondary Education Laws (Amendment) Act, 1975, or as the case may be, from the date of such order, and the order of the Inspector shall be final and shall not be questioned in any Court."

8. From the bare provisions quoted above, it is apparent that power to place a Head of institution or teacher under suspension is with the Management and not the Manager. Unless a resolution is passed by the Managing Committee an order of suspension cannot be passed. In the facts of the present case, however, Inspector has admitted that at the time when he considered the question of approval to the order of suspension a resolution dated 03.01.2021 of the Managing Committee had been placed before him. This resolution is not disputed. This resolution will have the effect of ratifying the decision of Manager to place the petitioner under suspension in light of the law laid down by the Supreme Court in the case of National Institute of Technology (Supra). Para 40 of the judgment in National Institute of Technology (Supra) effectively demolishes the reasoning assigned by the Inspector for passing his order. Since the Inspector has failed to take into consideration the subsequent ratification of Manager's decision by the Management of the Institution, nor the law relating ratification has been examined as such the finding in the order of Inspector that the suspension order is without jurisdiction cannot be sustained.

9. So far as petitioner's plea of interference in the right of minority institution to manage its affairs is concerned it would be worth noticing that the power under the Act is vested with the Inspector to pass an appropriate order in the matter of approval to suspension. Such exercise of power is not unguided. The exercise of power by the Inspector under Section 16 G (7) is regulated by Regulation 39 contained in Chapter

3 of the Intermediate Education Act, 1921, which is reproduced hereinafter:-

"39. (a) The report regarding the suspension of the head of institution or of the teacher to be submitted to the Inspector under sub-section (6) of Section 16-G shall contain the following particulars and be accompanied by the following document-

(a) the name of the persons suspended along with, particulars of the (posts including grades) held by him since the date of his original appointment till the time of suspension including particulars as to the nature of tenure held at the time of suspension, e.g., temporary permanent or officiating :

(b) a certified copy of the report on the basis of which such person was last confirmed or allowed to cross efficiency bar, whicheveiy later;

(c) details of all the charges on the basis of which such person was suspended;

(d) certified copies of the complaints, reports and inquiry report, if any, of the inquiry officer on the basis of which such person was suspended;

(e) certified copy of the resolution of the Committee of Management suspending such person;

(f) certified copy of the order of suspension issued to such person;

(g) in case such person was suspended previously also, details of the charges, on which and the period for which he was suspended on previous occasions accompanied by certified copies of the orders on the basis ot which he was re-instated.

(2) An employee other than a head of institution or a teacher may be suspended by the appointing authority on any of the grounds specified in Clauses (a) to (c) of sub-section (5) of Section 16-G."

10. The above provision does not interfere with the right of minority institution to place a teacher under suspension but merely regulates the exercise of such power in such a manner so as to protect the right of teacher from arbitrary exercise of power by the management.

11. Sri Sankalp Narain, learned counsel for the petitioner has fairly placed before the Court the judgment of the Supreme Court in the case of All Saints High School, Hyderabad and ors. Vs. State of Andhra Pradesh and ors., AIR 1980 SC 1042, wherein the Supreme Court observed as under in paragraph 14 and 15:-

"Section 3 (3) (a) provides that no teacher employed in any private educational institution shall be placed under suspension except when an inquiry into the gross misconduct of such teacher is contemplated. Section 3 (3) (b) provides that no such suspension shall remain in force for more than a period of two months and if the inquiry is not completed within that period the teacher shall, without prejudice to the inquiry, be deemed to have been restored as a teacher. The proviso to the sub-section confers upon the competent authority the power, for reasons to be recorded in writing, to extend the period of two months for a further period not exceeding two months if, in its opinion, the inquiry could not be completed within the initial period of two months for reasons directly attributable to the teacher.

With respect, I find it difficult to agree with Brother Fazal Ali that these provisions are violative of article 30(1). The question which one has to ask oneself is whether in the normal course of affairs, these provisions are likely to interfere with the freedom of minorities to administer and manage educational institutions of their choice. It is undoubtedly true that no educational institution can function efficiently and effectively unless the teachers observe at least the commonly accepted norms of good behaviour. Indisciplined teachers can hardly be expected to impress upon the students the value

of discipline, which is a sine qua non of educational excellence. They can cause incalculable harm not only to the cause of education but to the society at large by generating a wrong sense of values in the minds of young and impressionable students. But discipline is not to be equated with dictatorial methods in the treatment of teachers. The institutional code of discipline must therefore conform to acceptable norms of fairness and cannot be arbitrary or fanciful. I do not think that in the name of discipline and in the purported exercise of the fundamental right of administration and management, any educational institution can be given the right to 'hire and fire' its teachers. After all, though the management may be left free to evolve administrative policies of an institution, educational instruction has to be imparted through the instrumentality of the teachers; and unless, they have a constant assurance of justice, security and fair play it will be impossible for them to give of their best which alone can enable the institution to attain the ideal of educational excellence. Section 3 (3) (a) contains but an elementary guarantee of freedom from arbitrariness to the teachers. The provision is regulatory in character since it neither denies to the management the right to proceed against an erring teacher nor indeed does it place an unreasonable restraint on its power to do so. It assumes the right of the management to suspend a teacher but regulates that right by directing that a teacher shall not be suspended unless an inquiry into his conduct is contemplated and unless the inquiry is in respect of a charge of gross misconduct. Fortunately, suspension of teachers is not the order of the day, for which reason I do not think that these restraints which bear a reasonable nexus with the attainment of educational excellence can be considered to be violative of the right given by Art.30(1). The limitation of the period of suspension initially to two months, which can in appropriate cases be extended by another two months, partakes of the same character as the provision contained in section 3 (3) (a). In the generality of cases, a domestic inquiry against a teacher ought to be completed within a period of two months or say, within another two months. A provision founded so patently on plain reason is difficult to construe as an invasion of the right to administer an institution, unless that right carried with it the right to maladminister. I therefore agree with Brother Kailasam that sections 3 (3) (a) and 3 (3) (b) of the Act do not offend against the provisions of Art.30(1) and are valid."

(Emphasis Supplied)

12. Similar view has been expressed by the Supreme Court in Frank Anthony Public School Employees' Association Vs. Union of India and ors., 1986 (4) SCC 707 and again in Y Theclamma Vs. Union of India and ors., 1987 (2) SCC 516, wherein the Supreme Court observed as under in para 12:-

"It cannot be doubted that although disciplinary control over the teachers of a minority educational institution is with the management, regulations can be made for ensuring proper conditions of service for the teachers and also for ensuring a fair procedure in the matter of disciplinary action. As the Court laid down in Frank Anthony Public School's case, the provision contained in sub-s. (4) of s. 8 of the Act is designed to afford some measure of protection to the teachers of such institutions without interfering with the managements' right to take disciplinary action. Although the Court in that case had no occasion to deal with the different ramifications arising out of sub-s. (4) of s. 8 of the Act, it struck a note of caution that in a case where the management charged the employee with gross miscon- duct, the Director is bound to accord his approval to the suspension. It would be seen that the endeavour of the Court in all the cases has been to strike a balance between the constitutional obligation to

protect what is secured to the minorities under Art.30(1) with the social necessity to protect the members of the staff against arbitrariness and victimisation."

13. In view of the authoritative pronouncement by the Supreme Court that Minority Institution in the name of discipline and fundamental right of administration and management cannot be given right to hire and fire of its teachers and that conferring of regulatory power with the educational authorities for ensuring guarantee of freedom from arbitrariness to teachers would not amount to violating the right of minority institution to manage its institution. The argument that exercise of power by the Inspector violates the constitutional guarantee cannot be accepted. So far as judgment of this Court in Clancy Intermediate College (Supra) is concerned the judgment of the Supreme Court in All Saints High School (Supra) was not considered and the observations made in the context of dismissal were made applicable in a case of suspension also. In view of what has been observed by the Supreme Court in the case of All Saints High School (Supra), Frank Anthony Public School (Supra) and Y. Theclamma (Supra) it is difficult to accept petitioner's argument that the order of Inspector violates right of minority institution to manage its affairs.

14. During the course of hearing it is otherwise brought to the notice of the Court that some of the issues relating to validity of the appointment offered to private respondent, as also the grant of approval by the competent authority were not placed before the management which led to various action having been initiated against the private respondent. This contention however is disputed on behalf of the private respondent on the ground that same Manager had challenge the approval order of the private respondent and, therefore, his argument now that theses records were not available cannot be accepted. These aspects, however, need not engage this Court any further in view of the fact that issue relating to legality of suspension has to be examined by the inspector, afresh. In such circumstances order passed by the Inspector dated 16.03.2021 cannot be sustained and is quashed. The Inspector shall revisit the matter in light of relevant provisions and in accordance with law within a period of two months from the date of presentation of a copy of this order. Both the parties shall appear before the Inspector on 05.10.2021 along with their records and the Inspector shall be at liberty to fix early date for hearing in the matter. It is clarified that till a fresh decision is taken in accordance with law the private respondent shall be allowed to continue and shall also be entitled to payment of salary.

(2021)11ILR A695
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.10.2021

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE PIYUSH AGRAWAL, J.

Special Appeal Defective No. 821 of 2021

State of U.P. & Ors. ...Appellants
Versus
Sadanand ...Respondent

Counsel for the Appellants:
Sri Anand Kumar Ray, Addl. C.S.C.

Counsel for the Respondent:
Sri Anil Babu

A. Civil Law – Condonation of delay - The law of limitation undoubtedly binds everybody including the Government.

In a matter of condonation of delay when there was no gross negligence or deliberate inaction or lack of bona fide, a liberal concession has to be adopted to advance substantial justice…The claim on account of

impersonal machinery and inherited bureaucratic methodology of making several notes cannot be accepted in view of the modern technologies being used and available. The Government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. **Condonation of delay is an exception and should not be used as an anticipated benefit for Government departments.** The law shelters everyone under the same light and should not be swirled for the benefit of a few. (Para 6)

B. Where there are such inordinate delays that the Government or State authorities coming before us must pay for wastage of judicial time which has its own value. Such costs can be recovered from the officers responsible. (Para 7)

For non application of mind and causing unnecessary wastage of time of the Government machinery as well as this Court, the authority concerned is burdened with cost of Rs.1,00,000/-. Out of the said amount, 50 per cent, i.e., 50,000/- shall be paid to the respondent by way of demand draft within one month. The rest of the amount shall be deposited by the officer concerned with the U.P. State Legal Services Authority. The amount imposed shall be recovered from the guilty officer(s)/official(s), who have shown non application of mind in filing the present appeal with such an inordinate delay of 15 years. (Para 8)

Appeal alongwith delay condonation application dismissed. (E-4)

Precedent followed:

1. St. of M.P. Vs Bherulal, (2020) 10 SCC 654 (Para 6)

Present appeal assails order dated 04.08.2006, passed by learned Single Judge.

(Delivered by Hon'ble Rajesh Bindal, C.J.)

1. Present intra-Court appeal has been filed against the order dated August 4, 2006 passed by learned Single Judge. The appeal is delayed by 15 years 26 days. Though an application seeking condonation of delay has been filed, but the reasons assigned therein explaining the delay cannot possibly be accepted from the State for filing the appeal after more than a period of 15 years.

2. Hence, we do not find it appropriate to record the grounds stated in the application.

3. Another relevant fact is that the order dated May 1, 2018 has been referred to by the learned counsel for the respondents passed in Writ-A No. 68253 of 2020 wherein an identical controversy was involved and an order passed by the authority concerned therein declining benefit to the petitioner with reference to the same Government Order dated June 12, 1998 was set aside. The aforesaid order was upheld by Hon'ble the Supreme Court vide order dated September 30, 2019 passed in Special Leave Petition (Civil) Diary No. 30203 of 2019.

4. The aforesaid facts are not disputed by learned counsel for the appellants.

5. From the narration of facts, it is evident that there is no application of mind by any of the authority concerned before taking decision to file the appeal in a case after more than 15 years, resulting in unnecessary wastage of time of different officers of the Government and also of this Court.

6. Hon'ble the Supreme Court in **State of Madhya Pradesh Vs. Bherulal (2020) 10 SCC 654,** deprecating the practice of Government and its authorities of filing the appeals/petitions without caring for the period of limitation prescribed therefor, observed as under:

"2. We are constrained to pen down a detailed order as it appears that all our counseling to Government and Government authorities have fallen on deaf ears i.e., the Supreme Court of India cannot be a place for the Governments to walk in when they choose ignoring the period of limitation prescribed. We

have raised the issue that if the Government machinery is so inefficient and incapable of filing appeals/petitions in time, the solution may lie in requesting the Legislature to expand the time period for filing limitation for Government authorities because of their gross incompetence. That is not so. Till the Statute subsists, the appeals/petitions have to be filed as per the Statues prescribed.

3. No doubt, some leeway is given for the Government inefficiencies but the sad part is that the authorities keep on relying on judicial pronouncements for a period of time when technology had not advanced and a greater leeway was given to the Government (Collector, Land Acquisition, Anantnag & Anr vs. Mst. Katiji & Ors. (1987) 2 SCC 107). This position is more than elucidated by the judgment of this Court in Office of the Chief Post Master General & Ors. v. Living Media India Ltd. & Anr. (2012) 3 SCC 563 where the Court observed as under:

"12) It is not in dispute that the person(s) concerned were well aware or conversant with the issues involved including the prescribed period of limitation for taking up the matter by way of filing a special leave petition in this Court. They cannot claim that they have a separate period of limitation when the Department was possessed with competent persons familiar with court proceedings. In the absence of plausible and acceptable explanation, we are posing a question why the delay is to be condoned mechanically merely because the Government or a wing of the Government is a party before us.

Though we are conscious of the fact that in a matter of condonation of delay when there was no gross negligence or deliberate inaction or lack of bonafide, a liberal concession has to be adopted to advance substantial justice, we are of the view that in the facts and circumstances, the Department cannot take advantage of various earlier decisions. The claim on account of impersonal machinery and inherited bureaucratic methodology of making several notes cannot be accepted in view of the modern technologies being used and available. The law of limitation undoubtedly binds everybody including the Government.

13) In our view, it is the right time to inform all the government bodies, their agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bonafide effort, there is no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree of procedural red- tape in the process. The government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as an anticipated benefit for government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few." *(emphasis added)*

7. The Court, in para-7, further observed:

"7. We are thus, constrained to send a signal and we propose to do in all matters today, where there are such inordinate delays that the Government or State authorities coming before us must pay for wastage of judicial time which has its own value. Such costs can be recovered from the officers responsible."

(emphasis added)

8. In view of above, for non application of mind and causing unnecessary wastage of time of the Government machinery as well as this Court, the authority concerned is burdened with cost of ₹ 1,00,000/-. Out of the said amount, 50 per cent, i.e., 50,000/- shall be paid to the respondent by way of demand draft within one month. The rest of the amount shall be deposited by the officer concerned with the U.P. State Legal Services Authority. The amount imposed shall be recovered from the guilty officer(s)/official(s), who have shown non

application of mind in filing the present appeal with such an inordinate delay of 15 years.

9. Compliance report about recovery of the cost shall be filed before the Registrar General of this Court within a period of six months. In case of failure, the matter shall be listed before this Court.

10. The appeal, along with delay condonation application, are dismissed in the manner hereinabove.

(2021)11ILR A698
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.10.2021

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.

Writ A No. 54836 of 2017

Shiv Nath Singh ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Dinesh Kumar Yadav, Sri Ashok Khare, Sri Rajeshwar Prasad Sinha, Sri Siddharth Khare

Counsel for the Respondents:
A.S.G.I., Sri Gyan Prakash Shrivastava

A. Service Law – Dismissal - Kashi Gomti Sanyukt Gramin Bank (Officers and Employees) Service Regulations, 2010 - Regulations 18, 20, 27 & 42 - A specific transaction may give rise to different nature of misconduct, for different officials, depending upon their duties and nature of responsibility. **Even imposition of separate penalty, arising out of similar charge can also be justified depending upon nature of duties and responsibilities to be performed. If the nature of charges were not exactly identical or substantially similar then no fault can be found with imposition of separate penalty.** (Para 13)

Kashi Gomti Sanyukt Gramin Bank (Officers and Employees) Service Regulations, 2010: Regulations 42 - In view of the fact that charges of misconduct attributed to petitioner are distinct and much more serious, holding of a separate enquiry against him would not be bad. Even otherwise, Service Regulations of 2010 merely enables holding of common enquiry on the basis of an order passed by the Chairman and is neither mandatory nor can be claimed as a matter of right. (Para 18)

As per Regulation 42, holding of common enquiry is left to the discretion of the Chairman, if he is of the opinion that having regard to the facts and circumstances of the case where competent authority in respect of both the officer and employee are not the same may also direct the competent authority in respect of the officer to conduct enquiry against him involved in the matter. **The provision doesn't suggest that it is mandatory or obligatory for the disciplinary authority or the enquiry officer to necessarily conduct a common enquiry just because transactions constituting substance of charge is one of the same. It is always open for the employer to determine whether a common enquiry ought to be conducted in the matter or not.** (Para 19)

The plea of prejudice will have to be necessarily established by the employee if he has to successfully contend that non holding of common enquiry has affected outcome of disciplinary proceedings. No such prejudice is shown to have occurred in the facts of the present case. Substance of charge otherwise was distinct. (Para 19)

B. No violation of Principles of Natural Justice - In the present case the disciplinary authority appears to have taken note of the findings returned by the Enquiry Officer with an intent to form his prima facie satisfaction for issuing show cause notice while specifying the proposed punishment. The object of notice apparently was to acquaint the delinquent employee with the findings of the Enquiry Officer so that he may submit his explanation considering the fact that the charges were serious against bank employee. The course adopted in that regard cannot be said to be violative of principles of natural justice. **It is held that the show cause notice is not vitiated for the reasons urged by the petitioner.** (Para 25)

Though it is urged that enquiry is not fair and proper but no specific ground is substantiated to support the petitioner's challenge in that regard. A detailed departmental enquiry has been conducted and petitioner has been furnished all materials that have relied upon against him and that he has been given right to cross-examine the witnesses. The finding returned by the Enquiry Officer on the basis of materials placed on record against the petitioner otherwise is not shown to be perverse or erroneous. (Para 20)

Sufficiency or otherwise of the evidence need not be commented upon by this Court once material in respect of the conclusions drawn is otherwise reflected on record. (Para 14)

The test to withstand enquiry is preponderance of probability on the admitted material placed on record. On such yardstick if the facts of the present case are examined it is abundantly clear that **enquiry conducted against the petitioner is fair and transparent and is in accordance with the principles of natural justice wherein the charges are found proved.** (Para 20)

C. Proportionality of punishment - Law is settled that distinct allegations against employee charged in the same transaction would be justified being based on a valid classification and no perversity or arbitrariness can be alleged in the process. Proportionality of punishment imposed as also the plea of discrimination based upon the punishment awarded to other official (Branch Manager), who has been let off with lesser punishment. The charge on part of the Branch Manager is clearly distinct from such serious charges levelled against the petitioner. There was no allegation of fraudulent withdrawal of money from other account holders. **It is settled that in respect of same transaction distinct punishment can always be imposed upon delinquent employee based upon the nature of guilt attributed and established on part of the employee concerned.** (Para 26)

Writ petition dismissed. (E-4)

Precedent followed:

1. Neeraj Kumar Dixit Vs U.O.I. & ors., 2014 (3) ADJ 586 (Para 13)

2. Tara Chand Vyas Vs Chairman and Disciplinary Authority, (1997) 4 SCC 565 (Para 15)

3. Chairman and Managing Director, United Commercial Bank & ors.Vs P.C. Kakkar, (2003) 4 SCC 364 (Para 16)

4. UCO Bank & anr. Vs Rajinder Lal, (2007) 6 SCC 694 (Para 17)

5. Bolaram Bardoloi Vs Lakhimi Gaolia Bank & ors., (2021) 3 SCC 806 (Para 23)

6. Chief General Manager, State of India Vs V.P. Srivastava, Civil Appeal No. 4755 of 2021, decided on 12.08.2021 (Para 24)

Precedent distinguished:

1. H.P. State Electricity Board Limited Vs Mahesh Dahiya, (2017) 1 SCC 768 (Para 8 (iv))

2. Smt. Manjesh Kumari Vs State of U.P. & ors.being, Writ Petition No. 16829 of 2018, decided on 03.09.2021 (Para 22)

Present petition challenges order of dismissal dated 09.06.2017.

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. Petitioner was employed as Office Assistant in Kashi Gomti Sanyukt Gramin Bank, Branch Gohana, District Mau. On 25.04.2014 he was placed under suspension alongwith one Chandra Bhanu Singh, Assistant Manager, posted in the same branch. Services of petitioner were governed by Kashi Gomti Sanyukt Gramin Bank (Officers and Employees) Service Regulations, 2010. A charge sheet was issued to petitioner on 07.11.2014 levelling following charges:

"1. निष्ठापूर्वक अपने कर्तव्यों एवं दायित्वों का निर्वहन न करना।

2. बैंक ग्राहकों के खातों में निजी लाभ एवं शाखा के अन्य कार्मिकों को लाभ पहुँचाने के उद्देश्य से धोखाधड़ी एवं कपटपूर्ण प्रवृष्टियॉ करना।

3. बैंक के ग्राहकों एवं बैंक के विश्वास को भंग करते हुए बैंक के ऊपर जानबूझकर आर्थिक क्षति का भार खड़ा करना।

4. काशी गोमती संयुक्त ग्रामीण बैंक (अधिकारी एवं कर्मचारी) सेवा विनियम 2010 के विनियम 18, 20 एवं 27 का उल्लंघन करना।

5. बैंक कर्मचारी होने जैसा कार्य न करना।"

2. Particulars of charges were enclosed with the charge sheet, according to which, petitioner unauthorizedly withdrew a sum of Rs.2,25,000/- from saving bank account no.201400262, belonging to Lavtu Ram, on 24.01.2014 and again on 28.01.2014 a sum of Rs.1,36,789/- was transferred from his account to the account of Chandra Bhanu Singh, who was working as Assistant Manager, in his COD Account No.4020020112. This was done without knowledge and consent of account holder. After complaint of account holder Lavtu Ram the petitioner withdrew a sum of Rs.3,62,000/- from account of one Jai Karan Ram bearing no.201400188 and deposited it in the account of Lavtu Ram on 07.02.2014. It was found that in all three transactions the transfer vouchers, signatures of account holder and details varied. The account holders Lavtu Ram and Jai Karan Ram disputed their signatures on the documents used for such transfer of funds. The act of withdrawing Rs.3,62,000/- from account of Jai Karan Ram was a fraudulent transaction performed by the petitioner for causing loss to the bank and also breached the trust reposed by account holders in the bank and its authorities. It was also found that the amounts deposited in the account of Assistant Manager Chandra Bhanu Singh was diverted in his provident fund loan account. These transactions were allegedly performed by the petitioner.

3. The second incident/transaction was of withdrawing Rs.2,05,000/- on 04.02.2014 and Rs.27,000/- on 06.02.2014 from the accounts of Jai Prakash Yadav and Imtiyaz Ahmad and depositing it in the account of petitioner without consent and knowledge of the account holder. These transactions were absolutely fraudulent, without consent of the account holders and allegedly breached the trust imposed by the bank in the petitioner.

4. The third charge was of unauthorized withdrawal of Rs.604 expenditure towards news account.

5. The charges were denied by the petitioner and a detailed enquiry followed which has culminated in submission of enquiry report dated 30.09.2015, contained in Annexure-17 to the writ petition.

6. On the first charge the Enquiry Officer held that transfer of funds from the saving bank account of account holder without his consent and knowledge, and transferring it to the account of Chandra Bhanu Singh is clearly a deliberate and intentional act contrary to the service rules and the specific instructions of the bank, and is wholly unbecoming of a bank employee in view of the regulations 18, 20 and 27 of the Service Regulations of 2010. The second charge of transferring funds in the account of petitioner himself, in similar fashion, is also found violative of regulation 27. The third charge was also found proved. In view of such conclusions drawn the enquiry report was forwarded to the disciplinary authority by the Enquiry Officer.

7. A show cause notice thereafter was issued to petitioner on 10.03.2016. The disciplinary authority after examining the charges and evidences led in the enquiry prima facie found the charges to be proved. The show cause notice also indicated the punishment proposed to be given to the petitioner. A reply to such notice was submitted on 11.04.2016. The disciplinary authority, however, did not find substance in the defence of the petitioner to the

show cause notice and vide order impugned dated 09.06.2017 dismissed the petitioner from service. Aggrieved by the order of dismissal the petitioner is before this Court.

8. Order of dismissal is assailed on the following grounds:

(i) It is urged that enquiry was initiated in respect of the same transaction against three persons, namely, the petitioner, Chandra Bhanu Singh and Brijendra Kumar Singh, Branch Manager, but instead of holding a composite enquiry separate enquiries were conducted which has resulted in distinct punishment being offered to the officers charged of misconduct in respect of the same transaction.

(ii) It is also contended that enquiry proceedings were not conducted in a fair and transparent manner, particularly on account of distinct enquiries being conducted against officers charged of same misconduct and the account holders were also not produced in evidence.

(iii) It is next contended that show cause notice issued to petitioner on 11.03.2016 was a farce as the disciplinary authority had already made up its mind to dismiss the petitioner even before issuing the show cause notice.

(iv) A grievance is also raised about denial of opportunity to make representation against the findings of Enquiry Officer which has resulted in denial of fair opportunity to the petitioner. Reliance is placed upon para 26 of the judgment of Supreme Court in the case of H P State Electricity Board Limited vs. Mahesh Dahiya, (2017) 1 SCC 768.

(v) It is lastly urged that punishment imposed upon the petitioner is excessive and is also discriminatory inasmuch as the Branch Manager Brijendra Kumar Singh for his misconduct based on same transaction has been awarded punishment of reduction by one stage in time scale of pay, with cumulative effect, while petitioner has been dismissed from service.

9. A counter affidavit has been filed on behalf of the respondent Bank disputing the assertions made in the writ petition. It is submitted on behalf of the respondents that a fair and transparent process was evolved for enquiry and that holding of separate enquiry has neither vitiated the enquiry proceedings nor any prejudice was otherwise caused to the petitioner for such reasons. It is also urged that transactions may have been same but the charges against the petitioner are separate and distinct from the charges levelled against the Branch Manager, which is essentially in nature of supervisory lapse whereas petitioner's act is deliberate and intentional with an intent to defraud the bank/account holders and to derive unfair advantage. It is also pointed out that Chandra Bhanu Singh, who was also a beneficiary of transaction has also been dismissed from service. It is also argued that considering seriousness of charges levelled against the petitioner as also the materials placed before the enquiry to prove petitioner's guilt no interference in the writ petition is warranted.

10. I have heard Sri Ashok Khare, learned Senior Counsel assisted by Sri D. K. Yadav for the petitioner, Sri Gyan Prakash Srivastava, learned counsel for the respondent Bank and have perused the materials brought on record.

11. So far as the first submission advanced on behalf of the petitioner is concerned, records clearly reveal that the transaction giving rise to the disciplinary proceedings against three officers/employees of the bank were same, but the charges were distinct. The charge sheet issued to Chandra Bhanu Singh has not been placed on record but it is admitted that he was also dismissed from Service. The petitioner has essentially sought parity with Brijendra Kumar Singh and his charge sheet has also been brought

on record vide counter affidavit in which particulars of incident is the same. However, the charges against Brijendra Kumar Singh are clearly distinct as would be apparent from comparison of Annexure-2 to the writ petition and Annexure-2 to the counter affidavit. Though the same transactions formed the basis of disciplinary action against both but the charges against Branch Manager were clearly distinct. The specific charges against the Branch Manager were as under:

"1. निष्ठापूर्वक अपने कर्तव्यों एवं दायित्वों का निर्वहन न करना।

2. काशी गोमती संयुत ग्रामीण बैंक (अधिकारी एवं कर्मचारी) सेवा विनियम 2010 के विनियम 18, 20 एवं 27 का उल्लंघन करना।

3. बैंक अधिकारी होने जैसा कार्य न करना।"

12. There was no charges against Brijendra Kumar Singh, Branch Manager, of fraudulent conduct by wrongfully withdrawing amounts from the saving accounts of account holders and crediting it in the account of petitioner and Chandra Bhanu Singh. The charges of loss of confidence for causing financial loss to the bank is also not the charge against the Branch Manager. The petitioner cannot assert that merely because transaction giving rise to distinct charge was the same, therefore, non-holding of composite enquiry has caused any prejudice to the petitioner. The object of disciplinary enquiry is to ascertain facts with an object to determine whether charges against delinquent employee are proved or not? Procedure for enquiry is by now well established to enable the delinquent employee to defend himself in a fair and transparent enquiry proceedings. Unless delinquent employee can demonstrate that holding of separate enquiry has actually prejudiced the employee on account of reasons as contradictory conclusions etc. on the same issue or any other specific prejudice is shown the holding of separate enquiries in itself may not be bad.

13. A Division Bench of this Court in Neeraj Kumar Dixit vs. Union of India and others, 2014 (3) ADJ 586 had occasion to examine a similar issue and proceeded to hold as under in paragraph nos.16 to 19 of the judgment:

"16. In light of the aforesaid facts, we have examined the next contention of the petitioner that holding of separate enquiry has prejudiced him. It is admitted that the charge levelled against the petitioner, of unauthorizedly sanctioning overdraft, without any existing arrangement and approval of competent authority, is specific to petitioner himself. This charge is not levied against any other officer. The petitioner is a field officer and the nature of duties assigned to him is separate and distinct. The other officers, senior to the petitioner, essentially had supervisory functions to perform and the fact of purchase of bills had been clearly intimated by them to the higher authorities. In such circumstances, the petitioner cannot claim that he is similarly placed, merely because the transaction, giving rise to the misconduct, is the same.

17. A specific transaction may give rise to different nature of misconduct, for different officials, depending upon their duties and nature of responsibility. Even imposition of separate penalty, arising out of similar charge can also be justified depending upon nature of duties and responsibilities to be performed. The Apex Court in Akhilesh Kumar Singh vs. State of Jharkhand reported in (2008) 2 SCC 74 observed that quantum of punishment imposed on a delinquent employee by the appointing authority, however, depends upon several factors. Conduct of delinquent officer as also the nature of charges, play a vital role in this behalf.

18. In a subsequent decision of the Apex Court in Administrator, Union Territory of Dadra and Nagar Haveli vs. G.M. Lad reported

in (2010) 5 SCC 775, which related to levy of different punishments against different officers subjected to a joint enquiry was also held to be valid. It was held that if the nature of charges were not exactly identical or substantially similar then no fault can be found with imposition of separate penalty.

19. Since in the present case, the nature of duty of the petitioner as well as charges levelled against him is different, therefore, the petitioner cannot claim parity with others. We, therefore, cannot accept the argument of Sri Khare that petitioner was discriminated on account of imposition of penalty of dismissal."

14. In the facts and circumstances of the present case also a detailed departmental enquiry has been conducted against the petitioner in which all materials in support of the charges levelled against him has been furnished to him and he has been given the right to cross-examine the witnesses. The allegation that saving bank accounts of other persons were operated and funds were diverted to the account of petitioner and a fellow bank employee is an extremely serious charge, which are found proved against the petitioner. The Enquiry Officer has categorically found that without consent and knowledge of account holder Lavtu Ram the petitioner credited amount in the account of fellow bank employee Chandra Bhanu Singh and that upon objection raised by Lavtu Ram in respect of such fraudulent transaction the petitioner debited account of one Jai Karan Ram on 07.02.2014 again without his consent and knowledge. The account holders Lavtu Ram and Jai Karan Ram have denied their signatures on debit vouchers of the respective account. Signatures on the debit vouchers have also not matched with admitted signatures of the account holders. The diversion of funds for adjusting provident fund loan account of Chandra Bhanu Singh and another employee resulting in customers being defrauded of an amount of Rs.3,62,000/- without their consent and knowledge is found proved. The conclusions drawn by the Enquiry Officer are clearly shown to be based on materials on record. Sufficiency or otherwise of the evidence need not be commented upon by this Court once material in respect of the conclusions drawn is otherwise reflected on record. Petitioner's reply that postings were done on the asking of Chandra Bhanu Singh has been disbelieved for valid reasons. The further defence that petitioner was not aware of the incorrect description in the transfer vouchers has also been disbelieved with a categorical finding returned that posting in ME 2/24-27 was by the petitioner himself.

15. In Tara Chand Vyas v. Chairman and Disciplinary Authority, (1997) 4 SCC 565, the Supreme Court observed as under in para 3:

"3. Shri B.D. Sharma, learned counsel for the petitioner, contends that for proof of the charges none of the witnesses was examined nor any opportunity was given to cross-examine them and the petitioner has disputed his liability. As a consequence, the entire enquiry was vitiated by manifest error apparent on the face of the record. We find no force in the contention. The thrust of the imputation of charges was that he had not discharged his duty as a responsible officer to safeguard the interest of the Bank by securing adequate security before the grant of the loans to the dealers and had not ensured supply of goodsto the loanees. It is based upon the documentary evidence which has already been part of the record and copies thereof had been supplied to the petitioner. Under those circumstances, we do not think that there is any manifest error apparent on the face of the record warranting interference.------"

(Emphasis supplied)

16. In Chairman & Managing Director, United Commercial Bank and others vs. P. C. Kakkar, (2003) 4 SCC 364, the standard of

honesty and integrity required from a bank officer has been emphasized in para 14, which is reproduced hereinafter:

"14. A bank officer is required to exercise higher standards of honesty and integrity. He deals with the money of the depositors and the customers. Every officer/employee of the bank is required to take all possible steps to protect the interests of the bank and to discharge his duties with utmost integrity, honesty, devotion and diligence and to do nothing which is unbecoming of a bank officer. Good conduct and discipline are inseparable from the functioning of every officer/employee of the bank. As was observed by this Court in Disciplinary Authority-cum-Regional Manager vs. Nikunja Bihari Patnaik, it is no defence available to say that there was no loss or profit resulted in case, when the officer/employee acted without authority. The very discipline of an organization more particularly a bank is dependent upon each of its officers and officers acting and operating within their allotted sphere. Acting beyond one's authority is by itself a breach of discipline and is a misconduct. The charges against the employee were not casual in nature and were serious. These aspects do not appear to have been kept in view by the High Court."

(Emphasis supplied)

17. Similar view has been expressed in UCO Bank and another vs. Rajinder Lal Copoor, (2007) 6 SCC 694.

18. In view of the fact that charges of misconduct attributed to petitioner are distinct and much more serious, holding of a separate enquiry against him would not be bad. Even otherwise, Service Regulations of 2010 merely enables holding of common enquiry on the basis of an order passed by the Chairman and is neither mandatory nor can be claimed as a matter of right. Regulation 42 of the Regulations of 2010 is relevant for the present purposes and is reproduced hereinafter:

"42. Common enquiry. - Notwithstanding anything contained in these regulations, if two officers in different grades or an officer and an employee are involved jointly in an incident and disciplinary proceedings are sought to be instituted against both of them and the Chairman is of the opinion that having regard to the facts and circumstances of the case, the Competent Authority in respect of both the officer and employee should be the same, the Chairman may direct that the Competent Authority in respect of the officer shall be held into the charges against both of them."

19. The above provision clearly reveals that holding of common enquiry is left to the discretion of the Chairman, if he is of the opinion that having regard to the facts and circumstances of the case where competent authority in respect of both the officer and employee are not the same may also direct the competent authority in respect of the officer to conduct enquiry against him involved in the matter. The above extracted provision does not suggest that it is mandatory or obligatory for the disciplinary authority or the enquiry officer to necessarily conduct a common enquiry just because transactions constituting substance of charge is one of the same. It is always open for the employer to determine whether a common enquiry ought to be conducted in the matter or not. The plea of prejudice will have to be necessarily established by the employee if he has to successfully contend that non holding of common enquiry has affected outcome of disciplinary proceedings. No such prejudice is shown to have occurred in the facts of the present case. Substance of charge otherwise was distinct. The argument of Sri Khare that non holding of common enquiry has vitiated the enquiry proceedings, therefore, must fail.

20. The second limb of petitioner's submission that disciplinary enquiry was not fair

and proper on account of non holding of common enquiry is again not liable to be accepted in view of the findings specifically returned while answering the previous issue formulated for consideration in the matter. The disciplinary enquiry has been initiated in accordance with Regulations of 2010 and the procedure stipulated therein has been followed. Though it is urged that enquiry is not fair and proper but no specific ground is substantiated to support the petitioner's challenge in that regard. It is otherwise not disputed that petitioner has been furnished all materials that have relied upon against him and that he has been given right to cross-examine the witnesses. The finding returned by the Enquiry Officer on the basis of materials placed on record against the petitioner otherwise is not shown to be perverse or erroneous. The test to withstand enquiry is preponderance of probability on the admitted material placed on record. On such yardstick if the facts of the present case are examined it is abundantly clear that enquiry conducted against the petitioner is fair and transparent and is in accordance with the principles of natural justice wherein the charges are found proved. The second contention advanced on behalf of the petitioner is also liable to be rejected.

21. Sri Ashok Khare, learned senior counsel for the petitioner has laid much emphasis in his argument that the disciplinary authority had formed opinion to dismiss the petitioner on the basis of findings returned by the Enquiry Officer without right of representation to the petitioner to object to the enquiry report. This contention is advanced with reference to the specific assertions made in the show cause notice, which would suggest that disciplinary authority examined report of the Enquiry Officer and had referred to the charges as also the evidence adduced before indicating proposed punishment to be awarded to the petitioner. Reliance is heavily placed upon para 26 of the judgment of the Supreme Court in the case of Mahesh Dahiya (supra), which is reproduced hereinafter:

"26. Both the learned Single Judge and the Division Bench have heavily relied on the fact that before forwarding the copy of the report by letter dated 02.04.2008 the Disciplinary Authority-cum-Whole Time Members have already formed an opinion on 25.02.2008 to punish the writ petitioner with major penalty which is a clear violation of principle of natural justice. We are of the view that before making opinion with regard to punishment which is to be imposed on a delinquent, the delinquent has to be given an opportunity to submit the representation/reply on the inquiry report which finds a charge proved against the delinquent. The opinion formed by the Disciplinary Authority-cum-Whole Time Members on 25.02.2008 was formed without there being benefit of comments of the writ petitioner on the inquiry report. The writ petitioner in his representation to the inquiry report is entitled to point out any defect in the procedure, a defect of substantial nature in appreciation of evidence, any misleading of evidence both oral or documentary. In his representation any inputs and explanation given by the delinquent are also entitled to be considered by the Disciplinary Authority before it embarks with further proceedings as per statutory rules. We are, thus, of the view that there was violation of principle of natural justice at the level of Disciplinary Authority when opinion was formed to punish the writ petitioner with dismissal without forwarding the inquiry report to the delinquent and before obtaining his comments on the inquiry report. We are, thus, of the view that the order of the High Court setting aside the punishment order as well as the Appellate order has to be maintained."

22. Reliance is also placed upon a judgment of this Court in Smt. Manjesh Kumari vs. State of U.P. and others being Writ Petition

No.16829 of 2018, decided on 03.09.2021, in which judgment of the Supreme Court in Mahesh Dahiya (supra) has been relied upon in following words:

"The essence of Mahesh Dahiya is a reiteration of the well settled principle that the delinquent employee is entitled to an opportunity to establish and prove before the Disciplinary Authority that the findings of guilt as recorded by the Enquiry Officer are not liable to be accepted. That is the quintessential purpose for the Disciplinary Authority being required to forward a copy of the enquiry report to the employee. At that stage and before the employee has had an occasion to respond to the report, the Disciplinary Authority must establish that the issue of guilt was one which is open for consideration and dependent upon the response that the employee is yet to furnish. The Authority in any case cannot proceed as if the issue is already predetermined. That would clearly render the opportunity of hearing as provided to the employee wholly otiose and meaningless. The question of punishment which is liable to be ultimately imposed likewise must be one which is established to be an issue which awaits consideration of the reply of the employee. A delinquent employee must not get the impression that his furnishing of a reply to the show cause notice will be an empty formality and the delinquent employee facing what the Supreme Court chose to describe as the "impenetrable fortress of prejudged opinion" in Oryx Fisheries Private Limited Vs. Union of India [(2010) 13 SCC 427]. If these inherent inhibitions were to be ignored it would inevitably lead to an allegation of bias being levelled on the part of the Disciplinary Authority.

Tested in the above light, it is manifest that the impugned action of the respondents cannot be sustained. The Disciplinary Authority had not only prejudged the issue of guilt but also the quantum of punishment which was liable to be imposed. In view of the aforesaid, this Court is of the firm opinion that the matter would have to be remitted to the Disciplinary Authority to redraw proceedings from the stage of receipt of the enquiry report and the issuance of the show cause notice forwarding the same to the petitioner. "

23. On behalf of the respondent Bank, however, reliance is placed upon subsequent judgment of the Supreme Court in Bolaram Bardoloi vs. Lakhimi Gaolia Bank and others, (2021) 3 SCC 806. In para 7 of the judgment the Supreme Court has been pleased to recognize the right of the disciplinary authority to arrive at a tentative conclusion of proposed punishment while enclosing copy of the enquiry report in following words:

"7. The appellant was working as a Manager of the respondentbank. A perusal of the charges, which are held to be proved by the Enquiry Officer, reveal that he has sanctioned and disbursed loans without following the due procedure contemplated under law and also there are allegations of misappropriation, disbursing loans irregularly in some instances to (a) units without any shop/business; (b) more than one loan to members of same family etc. The Enquiry Officer, after considering oral and documentary evidence on record, has held that all the charges are proved. Based on the findings recorded by Enquiry Officer, the disciplinary authority has tentatively decided to impose punishment of compulsory retirement. Disciplinary authority has issued show cause notice dated 30.07.2005 by enclosing a copy of the enquiry report. In response to the show cause notice, the appellant has submitted his comments vide letter dated 16.08.2005 indicating that due to work pressure some operational lapses have occurred. Further he has also pleaded that if the bank has sustained any loss due to his fault, he is ready to bear such loss from his own source. After filing the response to the show cause

notice, order is passed by disciplinary authority imposing punishment of compulsory retirement. After Enquiry Officer records his findings, it is always open for the disciplinary authority to arrive at tentative conclusion of proposed punishment and it can indicate to the delinquent employee by enclosing a copy of the enquiry report. Though the learned counsel for the appellant has argued that even before tentative conclusion is arrived at by the disciplinary authority, the enquiry report has to be served upon him, but there is no such proposition laid down in the judgment of this Court in the case of Managing Director, ECIL, Hyderabad (supra). In the aforesaid judgment of this Court it is held that delinquent employee is entitled to a copy of the enquiry report of the enquiry officer before the disciplinary authority takes a decision on the question of guilt of the delinquent. Merely because a show cause notice is issued by indicating the proposed punishment it cannot be said that disciplinary authority has taken a decision. A perusal of the show cause notice dated 30.07.2005 itself makes it clear that along with the show cause notice itself enquiry report was also enclosed. As such, it cannot be said that the procedure prescribed under the rules was not followed by respondentbank. We are of the view that the judgment of this Court in the case of Managing Director, ECIL, Hyderabad (supra) is not helpful to the case of the appellant. Further, it is well settled that if the disciplinary authority accepts the findings recorded by the Enquiry Officer and passes an order, no detailed reasons are required to be recorded in the order imposing punishment. The punishment is imposed based on the findings recorded in the enquiry report, as such, no further elaborate reasons are required to be given by the disciplinary authority. As the departmental appeal was considered by the Board of Directors in the meeting held on 10.12.2005, the Board's decision is communicated vide order dated 21.12.2005 in Ref. No.LGB/I&V/Appeal/31/02/200506. In that view of the matter, we do not find any merit in the submission of the learned counsel for the appellant that orders impugned are devoid of reasons."

The Court also observed as under in para 8:

"8. Even, the last submission of the learned counsel for the appellant that the punishment imposed is disproportionate to the gravity of charges, also cannot be accepted. The charges framed against the appellant in the departmental enquiry are serious and grave. If we look at the response, in his letter dated 16.08.2005, to the show cause notice issued by the disciplinary authority, it is clear that he has virtually admitted the charges, however, tried to explain that such lapses occurred due to work pressure. Further he went to the extent of saying - he is ready to bear the loss suffered by the bank on account of his lapses. The manager of a bank plays a vital role in managing the affairs of the bank. A bank officer/employee deals with the public money. The nature of his work demands vigilance with the inbuilt requirement to act carefully. If an officer/employee of the bank is allowed to act beyond his authority, the discipline of the bank will disappear. When the procedural guidelines are issued for grant of loans, officers/employees are required to follow the same meticulously and any deviation will lead to erosion of public trust on the banks. If the manager of a bank indulges in such misconduct, which is evident from the charge memo dated 18.06.2004 and the findings of the enquiry officer, it indicates that such charges are grave and serious. Inspite of proved misconduct on such serious charges, disciplinary authority itself was liberal in imposing the punishment of compulsory retirement. In that view of the matter, it cannot be said that the punishment imposed in the disciplinary proceedings on the appellant, is disproportionate to the gravity of charges. As such, this submission of the learned counsel for the appellant also cannot be accepted."

24. The judgments of the Supreme Court in Mahesh Dahiya (supra) and Bolaram Bardoloi (supra) have again been examined by the Supreme Court in Chief General Manager, State of India vs. V. P. Srivastava being Civil Appeal No.4755 of 2021, decided on 12.08.2021 and the judgment in Mahesh Dahiya (supra) has been distinguished as laying down law on facts of its own. The Court proceeded to observe as under:

"We have also gone through the objections taken by the respondent in the departmental appeal. We find no grounds of any procedural irregularity vitiating the inquiry. As observed earlier, the respondent had cross examined witnesses also. The order of the Appellate Authority adequately notices that the opening of the account of M/s. Sunrise International was not bona fide, because the introducer of the account had deposed in the inquiry that he did not know the proprietor of M/s. Sunrise International and he had introduced the accounts at the behest of the respondent. Similarly in the case of M/s. Sharda Transport Company, the respondent admitted that the procedures for opening an account were not followed by him and they were not even complied with subsequently.

Mahesh Dahiya (supra), relied upon by Shri Mishra, is distinguishable on its own facts. A decision to terminate had already been taken without having the benefit of comments from the delinquent and because of which it was held that issuance of the notice for termination on a preconceived opinion was bad in the law. In that context it was held that there was violation of the principle of natural justice by the disciplinary authority when opinion was formed to punish without forwarding the inquiry report to the delinquent for obtaining his comments.

In Allahabad Bank (supra), after recording that a writ court should be slow in interfering with finding of facts recorded in departmental proceedings on the basis of evidence available on record, it was concluded that there had been grave procedural irregularities in the conduct of the proceedings as the delinquent was not given a fair chance to lead evidence in defence. It was in that background that this Court came to the conclusion that failure to deal with the objections to the inquiry report by the disciplinary authority would vitiate the final order.

At this stage, we consider it very necessary to take note of certain observations in Boloram (supra) with regard to the post that the respondent held, of public trust, dealing with public money as follows :

"13. The manager of a bank plays a vital role in managing the affairs of the bank. A bank officer/employee deals with the public money. The nature of his work demands vigilance with the inbuilt requirement to act carefully. If an officer/employee of the bank is allowed to act beyond his authority, the discipline of the bank will disappear. When the procedural guidelines are issued for grant of loans, officers/employees are required to follow the same meticulously and any deviation will lead to erosion of public trust on the banks. If the Manager of a bank indulges in such misconduct, which is evident from the charge memo dated 18.06.2004 and the findings of the enquiry officer, it indicates that such charges are grave and serious. In spite of proved misconduct on such serious charges, disciplinary authority itself was liberal in imposing the punishment of compulsory retirement. In that view of the matter, it cannot be said that the punishment imposed in the disciplinary proceedings on the appellant, is disproportionate to the gravity of charges. As such, this submission of the learned counsel for the appellant also cannot be accepted." In the result, the order of the High Court is held to be not sustainable and is set aside. The appeal is allowed."

25. In the facts of the present case the disciplinary authority appears to have taken note

of the findings returned by the Enquiry Officer with an intent to form his prima facie satisfaction for issuing show cause notice while specifying the proposed punishment. The object of notice apparently was to acquaint the delinquent employee with the findings of the Enquiry Officer so that he may submit his explanation considering the fact that the charges were serious against bank employee. The course adopted in that regard cannot be said to be violative of principles of natural justice in view of what has been observed by the Supreme Court in the case of Bolaram Bardoloi (supra). The judgment in the case of Mahesh Dahiya (supra) has otherwise been found to be on facts of its own and has been distinguished by the Supreme Court in the case of Chief General Manager, State Bank of India (supra).

In light of the above discussions it is held that the show cause notice is not vitiated for the reasons urged by the petitioner and the challenge laid in that regard accordingly fails.

26. This takes the Court to the last issue i.e. proportionality of punishment imposed as also the plea of discrimination based upon the punishment awarded to Branch Manager Brijendra Kumar Singh, who has been let off with lesser punishment. It has already been noticed that the charge against the Branch Manager and the petitioner were quite distinct. There was no allegation of fraudulent withdrawal of money from other account holders and the charge on part of the Branch Manager is clearly distinct from such serious charges levelled against the petitioner. It is otherwise settled that in respect of same transaction distinct punishment can always be imposed upon delinquent employee based upon the nature of guilt attributed and established on part of the employee concerned. Law is settled that distinct allegations against employee charged in the same transaction would be justified being based on a valid classification and no perversity or arbitrariness can be alleged in the process.

27. In view of the above deliberations and discussions, this petition fails and is, accordingly, dismissed.

(2021)11ILR A709
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.09.2021

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.

Writ A No. 46063 of 2014

Kaushal Kishore & Ors. ...Petitioners
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Ashish Kumar Ojha, Sri Radha Kant Ojha

Counsel for the Respondents:
C.S.C.

A. Service Law – Parity in pay scale - U.P. Jail Ministerial and Commercial Service Rules, 1983 - Uttar Pradesh Karagar Prashasan Evam Sudhar Vibhag Pravidhik (Samuh "Ga") Seva Niyamavali, 2011 - The doctrine of equal pay for equal work, as adumbrated u/Article 39(d) of the Constitution of India read with Article 14 thereof, cannot be applied in a vacuum. The constitutional scheme postulates equal pay for equal work for those who are equally placed in all respects. Possession of a higher qualification has all along been treated to be a valid basis for classification of two categories of employees. (Para 10)

The principle of 'equal pay for equal work' should not be applied in a mechanical or casual manner. Classification made by a body of experts after full study and analysis of the work should not be disturbed except for strong reasons which indicate the classification made to be unreasonable. Inequality of the men in different groups excludes applicability of

the principle of 'equal pay for equal work' to them. (Para 10)

Constitution of India: Article 14 - Question of violation of Article 14 of the Constitution of India on the part of the State would arise only if the persons are similarly placed. Equality clause contained in Article 14, in other words, will have no application where the persons are not similarly situated or when there is a valid classification based on a reasonable differentia. (Para 10)

It is abundantly clear that classification based upon higher qualification for allowing higher salary to an employee performing similar work would be permissible. Therefore, the respondents would clearly be justified in denying equal pay to petitioners at par with those Instructors, who possess qualification of three year diploma. It is otherwise a matter of policy for the State to prescribe as to what would be the scale of pay admissible to an employee based upon his qualification. The Rules of 2011 are otherwise not under challenge. The mere fact that such distinction did not exist in the earlier rules of 1983 would also not constitute any valid basis to challenge prescription of different wages in the given instance. It is otherwise not the case of the petitioners that their salary is reduced consequent upon substitution of earlier rules with the Rules of 2011. (Para 11)

The rejection of petitioners' claim for parity in pay scale is neither found to be arbitrary nor violative of principles of 'equal pay-for equal work'. (Para 12)

Writ petition allowed. (E-4)

Precedent followed:

1. U.P. State Sugar Corporation Ltd. & anr. Vs Sant Raj Singh & ors., (2006) 9 SCC 82 (Para 10)

Present petition assails order dated 27.05.2014, passed by Department of Jail Administration.

(Delivered by Hon'bel Ashwani Kumar Mishra, J.)

1. Challenge in this writ petition is laid to an order passed by the department of Jail Administration, dated 27th May, 2014 (contained in Annexure 12 to the writ petition); whereby petitioners claim for higher wages admissible to Instructors is declined and the classification based on qualification for prescribing different scale of pay is upheld.

2. Petitioners were appointed as Instructors to teach various vocational subjects to Prisoners in the Jail and are working since long. Petitioner No. 1 was appointed as Instructor in 1997; Petitioner No. 2 was appointed to the same post in 1992; Petitioner No. 3 was appointed in 1995; Petitioner No. 4 was appointed in 1987 and Petitioner No. 5 was appointed in 1982, respectively. There services were earlier governed by the provisions of the U.P. Jail Ministerial and Commercial Service Rules, 1983. Eligibility for appointment to the post of Instructor has been specified in Part IV of the Rules of 1983. For Instructors in different trades, the qualification prescribed was Diploma and Practical Knowledge of three years. Reference can be had to the qualification of Tailor Master, which reads as under:-

"**8–टेलर मास्टर**–मान्यता प्राप्त संस्था से टेलरिंग में डिप्लोमा और तीन वर्ष का अभ्यासिक ज्ञान।"

3. Similar qualifications have been specified for other trades also. All the petitioners possess requisite qualification as per the requirement contained in the Rules of 1983. They were also paid salary as per the scale of pay prescribed for them.

4. In the year 2011, the Rules of 1983 stood substituted by a new set of Rules known as "Uttar Pradesh Karagar Prashasan Evam Sudhar Vibhag Pravidhik (Samuh "Ga") Seva Niyamavali, 2011'. The educational qualification for appointment under the new rules is distinct from what was specified earlier. In the service rules different scale of pay has been prescribed for same post, depending upon the qualification

possessed by the Instructor. Lower scale of pay i.e. 3050-4590 with Grade Pay of Rs. 1900 is prescribed for Instructors possessing qualification of High School or one year diploma; whereas in respect of candidates possessed two years diploma with High School, the scale of pay is Rs. 4000-6000 with corresponding Grade Pay of Rs. 4200. In cases where the qualification possessed by Instructor is Three Year Diploma, the pay scale prescribed is Rs. 5000-8000 with corresponding Grade Pay of Rs. 4200. No such distinction existed in the earlier Rules of 1983. Petitioners, therefore, approached this Court with the grievance that their scale of pay ought to be at par with other Instructors notwithstanding difference in their educational qualification. Grievance in that regard was raised before this Court in writ petition no. 53679 of 2012, which came to be disposed of directing the Secretary of the Department concerned to examine such claim. Order passed by this Court on 19.10.2012 in the aforesaid writ petition is reproduced hereinafter:-

"Heard learned counsel for the petitioners.

The petitioners claim that they are working as Instructor in different Central Jails situate within the State of U.P.

It is contended that after enforcement of U.P. Karagar Prashasan Evam Sudhar Vibhag Pravidhik (Samuh 'G') Seva Niyamavali, 2011 (for short Rules 2011), two different pay scales have been prescribed for the post of Instructors and persons lesser qualified and junior to the petitioners have been placed in the higher pay scale, but the petitioners are placed in the lower pay scale for no rhyme or reason.

From a perusal of pleadings, it appears that petitioners have made representation with respect to their grievances and anomaly in accordance with Rule 2011.

Considering the facts, writ petition stands disposed of with the liberty to the petitioners to make a fresh individual representation with respect to their grievances before respondent no. 1, Secretary Jail, Government of U.P., Lucknow along with a certified copy of this order within a period of three weeks from today and, in case, any such representation is made, the concerned authority shall decide the same by means of a reasoned and speaking order in accordance with law within a further period of two months from the date of making of the representation."

5. Contempt petition was also filed and ultimately by the order impugned dated 27th May, 2014 claim of the petitioners for scale of pay at par with other Instructors who possessed three years diploma is rejected by the State Government. Order impugned records that distinction in the scale of pay based upon the qualification of Instructor is a valid classification and, therefore, petitioners are not entitled to parity with the Instructors who have higher qualification.

6. Learned counsel for the petitioners submits that denial of pay scale admissible to an Instructor of Rs. 5000-8000 with corresponding Grade Pay of Rs. 4200 to the petitioners in the facts and circumstances is arbitrary.

7. It is also urged that denial of equal wages in the facts of the present case would amount to violating the principles of equal pay for equal work as all the petitioners are performing duties similar to what is being performed by the Instructors possessing diploma of three years. It is also stated that the amended rules can only apply prospectively and the employees engaged previously cannot be discriminated in the matter of fixation of pay scale as it would amount to retrospectively implementing the rules of 2011 for which there exists no stipulation in the rules itself.

8. A counter affidavit has been filed justifying the rejection of petitioners claim on the ground that classification based on higher

qualification for higher salary in the same cadre and class of employment would be permissible.

9. The question that falls for determination in this petition, therefore, is as to whether the State would be justified in fixing higher scale of pay for same category of employees, performing similar work, merely on the strength of their higher qualification?

10. Controversy raised in the present writ petition is no longer *res-integra*, inasmuch as, in a series of judgments the Supreme Court has upheld the classification based on qualification for the purposes of fixation of salary to the employees performing similar work. In U.P. State Sugar Corporation Ltd. and another Vs. Sant Raj Singh and others, (2006) 9 SCC 82, the Supreme Court was confronted with the similar issue and the doctrine of "equal pay-for equal work' came to be examined where difference in salary was justified on the basis of higher qualification of the employee performing same work. In paragraphs 16 to 22, the issue has been examined threadbare by the Supreme Court in following words:-

"16. The doctrine of equal pay for equal work, as adumbrated under Article 39(d) of the Constitution of India read with Article 14 thereof, cannot be applied in a vacuum. The constitutional scheme postulates equal pay for equal work for those who are equally placed in all respects. Possession of a higher qualification has all along been treated by this Court to be a valid basis for classification of two categories of employees.

17. In State of *J&K v. Triloki Nath Khosa* [(1974) 1 SCC 19 : 1974 SCC (L&S) 49] the validity of such a classification came to be considered before this Court. Chandrachud, J. (as the learned Chief Justice then was), opined: (SCC p. 30, para 19)

"Formal education may not always produce excellence but a classification founded on variant educational qualifications is, for purposes of promotion to the post of an Executive Engineer, to say the least, not unjust on the face of it and the onus therefore cannot shift from where it originally lay."

18. Krishna Iyer, J. supplemented, stating: (SCC pp. 40-41, para 54)

"The social meaning of Articles 14 to 16 is neither dull uniformity nor specious 'talentism'. It is a process of producing quality out of larger areas of equality extending better facilities to the latent capabilities of the lowly. It is not a methodology of substitution of pervasive and slovenly mediocrity for activist and intelligent--but not snobbish and uncommitted--cadres. However, if the State uses classification casuistically for salvaging status and elitism, the point of no return is reached for Articles 14 to 16 and the Court's jurisdiction awakens to deaden such manoeuvres. The soul of Article 16 is the promotion of the common man's capabilities, overpowering environmental adversities and opening up full opportunities to develop in official life without succumbing to the sophistic argument of the elite that talent is the privilege of the few and they must rule, wriggling out of the democratic imperative of Articles 14 and 16 by the theory of classified equality which at its worst degenerates into class domination."

19. In State of *M.P. v. Pramod Bhartiya* [(1993) 1 SCC 539 : 1993 SCC (L&S) 221 : (1993) 23 ATC 657] referring to the provisions of Section 2(h) of the Equal Remuneration Act, 1976 this Court stated: (SCC p. 547, para 13)

"13. It would be evident from this definition that the stress is upon the similarity of skill, effort and responsibility when performed under similar conditions. Further, as pointed out by Mukharji, J. (as he then was), in Federation of All India Customs and Excise Stenographers [Federation of All India Customs and Central Excise Stenographers v. Union of India, (1988) 3 SCC 91 : 1988 SCC (L&S) 673 : (1988) 7 ATC

591] the quality of work may vary from post to post. It may vary from institution to institution. We cannot ignore or overlook this reality. It is not a matter of assumption but one of proof. The respondents (original petitioners) have failed to establish that their duties, responsibilities and functions are similar to those of the non-technical lecturers in technical colleges. They have also failed to establish that the distinction between their scale of pay and that of non-technical lecturers working in technical schools is either irrational and that it has no basis, or that it is vitiated by mala fides, either in law or in fact (see the approach adopted in Federation case [Federation of All India Customs and Central Excise Stenographers v. Union of India, (1988) 3 SCC 91 : 1988 SCC (L&S) 673 : (1988) 7 ATC 591])."

20. Yet again in *Shyam Babu Verma v. Union of India* [(1994) 2 SCC 521 : 1994 SCC (L&S) 683 : (1994) 27 ATC 121] a three-Judge Bench of this Court opined: (SCC p. 525, para 9)

"The nature of work may be more or less the same but scale of pay may vary based on academic qualification or experience which justifies classification. The principle of "equal pay for equal work' should not be applied in a mechanical or casual manner. Classification made by a body of experts after full study and analysis of the work should not be disturbed except for strong reasons which indicate the classification made to be unreasonable. Inequality of the men in different groups excludes applicability of the principle of "equal pay for equal work' to them."

21. In Govt. of W.B. v. Tarun K. Roy [(2004) 1 SCC 347 : 2004 SCC (L&S) 225] it was clearly laid down that the holders of a higher qualification can be treated to be a separate class, holding: (SCC p. 356, para 20)

"20. Question of violation of Article 14 of the Constitution of India on the part of the State would arise only if the persons are similarly placed. Equality clause contained in Article 14, in other words, will have no application where the persons are not similarly situated or when there is a valid classification based on a reasonable differentia."

The said decision has been noticed by another Bench of this Court in *M.P. Rural Agriculture Extension Officers Assn. v. State of M.P. [*(2004) 4 SCC 646 : 2004 SCC (L&S) 667] stating: (SCC p. 656, para 22)

"22. Furthermore, as noticed hereinbefore, a valid classification based on educational qualification for the purpose of grant of pay has been upheld by the Constitution Bench of this Court in P. Narasing Rao [State of Mysore v. P. Narasing Rao, (1968) 1 SCR 407 : AIR 1968 SC 349] ."

22. The first respondent admittedly did not possess the requisite qualification. He merely claimed a higher scale of pay only because Shri B.P. Srivastava and Shri Shyam Sunder Shukla had been paid. It has not been disputed before us that the case of Shri Srivastava stood on a different footing and his scale of pay had to be protected in terms of Section 16 of the Act. So far as Shri Shyam Sunder Shukla is concerned, we may proceed on the basis that the Corporation took a wrong decision. The said decision, however, was not questioned by the first respondent before the High Court. No foundational facts had been placed before the High Court in relation thereto. We would not like to enter into the controversy as to whether his case could have been considered by the Committee or on what basis the Committee considered the cases of seven candidates and granted higher scales of pay to four candidates as the validity thereof is not in question. Assuming that the Corporation was wrong, the same by itself would not clothe the first respondent even (sic with a) legal right to claim a higher scale of pay. On what basis the Selection Committee selected four employees out of the seven is not known. Three persons admittedly were not selected. If the plea put forward by the respondent is accepted, these

employees also would be entitled to the same scale of pay as given to the said Shri Shukla, although they have been found to be not fit therefor. Educational qualification was made the basis for a valid classification in the matter of payment of salary in a particular scale of pay by the Wage Board itself. Only in the year 1989, such a classification was obliterated. The first respondent had been granted the benefit of the recommendations of the Third Wage Board also. It was a matter of policy decision for the Corporation to consider as to whether a particular category of employees should be taken outside the purview of the pay scales recommended by the Wage Board and place them in a higher scale of pay. We, therefore, cannot accept the contention of Shri Dwivedi that only because no such qualification was prescribed at the time of recruitment, the classification made on that basis would be bad in law. Even otherwise the said contention is not correct as the scale of pay was determined by the award of the Wage Board."

11. In view of what has been observed above, it is abundantly clear that classification based upon higher qualification for allowing higher salary to an employee performing similar work would be permissible. It is otherwise a matter of policy for the State to prescribe as to what would be the scale of pay admissible to an employee based upon his qualification. The Rules of 2011 are otherwise not under challenge. Since the classification based on higher qualification for prescribing different pay scale to employees performing similar work is permissible, the respondents would clearly be justified in denying equal pay to petitioners at par with those Instructors, who possess qualification of three year diploma. The mere fact that such distinction did not exist in the earlier rules of 1983 would also not constitute any valid basis to challenge prescription of different wages for employees performing similar work on account of variation in their qualification. It is otherwise not the case of the petitioners that their salary is reduced consequent upon substitution of earlier rules with the Rules of 2011.

12. For the reasons recorded above, the rejection of petitioners' claim for parity in pay scale is neither found to be arbitrary nor violative of principles of "equal pay-for equal work' and consequently the challenge laid to the order dated 27th May, 2014 fails. The writ petition, accordingly, is dismissed. No order is passed as to costs.

(2021)11ILR A714
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.10.2021

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE JAYANT BANERJI, J.

Special Appeal Defective No. 646 of 2021

UPPCL & Ors. ...Appellants
Versus
Anil Kumar Sharma & Anr. ...Respondents

Counsel for the Appellants:
Sri Abhishek Srivastava, Sri Krishna Agarawal, Sr. Advocate Sri G.K. Singh

Counsel for the Respondents:
C.S.C., Sri R.K. Mishra

A. Service Law – Pension – Departmental proceedings after retirement - Civil Service Regulations - Article 351-AA & 919-A - Electricity Supply Act, 1948 - Section 5 - Uttar Pradesh Electricity Reforms Transfer Scheme, 2000 - Uttar Pradesh State Electricity Board (Officers and Servants) (Conditions of Service) Regulations 1975 - Uttar Pradesh Electricity Reforms Act, 1999 - Sub-sections (1) and (2) of Section 23 - U.P. Rajya Vidyut Utpadan Nigam Absorption Regulations, 2006 - Constitution of India - Article 300-A.

The learned Judge rightly proceeded with the matter without there being proper reliefs sought (i.e. quashing the departmental proceedings or challenging the suspension order dated 22.11.2018) in the petition and without calling for a detailed counter affidavit - It is evident from the record that the issue of payment of pension and other retiral dues or the entitlement thereof is intrinsically linked to the departmental proceedings that were initiated against the petitioner-respondent. The validity of the sanction accorded by the MD of the UPPCL is an issue of jurisdiction which goes to the root of the matter and, therefore, the consideration of the case on the limited aspect of the validity of the sanction is appropriate. Whether the cause to sanction existed, could only have been seen after analyzing whether departmental proceedings could be deemed to have been instituted in view of the Explanation to **Article 351-A of the CSR**.

The appellant-respondents had filed a short counter affidavit and a compilation of several documents pertaining to the departmental proceedings and judgments of various courts. It has not been pointed out what other document was required to be 'filed' for adjudication apart from what was already on record of the writ petition. Under the circumstances, the learned Judge had correctly proceeded to decide the case on the basis of material on record. (Para 11, 14, 15)

B. The Managing Director of the UPPCL was competent to sanction departmental proceedings under the provisions of Article 351-A of the CSR - The learned Judge held that on the date of his retirement on 31.12.2018, the petitioner was neither under suspension nor any chargesheet was served upon him or issued to him as the suspension order dated 22.11.2018 stood revoked vide order dated 28.12.2018 and as the chargesheet admittedly was served after the date of retirement, thus, no proceeding could have been initiated against the petitioner except with sanction of the 'Governor' and after satisfying the test of clause (i) to (iii) of proviso (a) to Article 351-A of the CSR. (Para 8)

The authority to the 'Governor' has been given by means of a proviso. However, **Article 309 of Constitution, itself enables Acts of the appropriate Legislature to regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State, which is subject to the provisions of the Constitution of India and qualified by the proviso.** (Para 30)

In terms of sub-clause (10) of clause 6 of the Transfer Scheme, the Regulations of 1975 would, *mutatis mutandis*, apply to the personnel of UPPCL/PVVNL. Accordingly, **the reference to the 'Governor' of the State appearing in Article 351-A of the CSR, would, in the case of the appellant-respondents, be referable to the 'Managing Director' of the UPPCL.** (Para 23, 26)

On record is the so-called 'sanction' accorded by the MD of UPPCL to the departmental proceedings to be initiated against the petitioner-respondent. Taking into account the provisions of the Supply Act of 1948, the Regulations of 1975, the Reforms Act and the Transfer Scheme, it is clear that UPPCL and PVVNL are separate corporate entities and are entitled to conduct their business by means of duly passed resolutions in the meetings of the Board of Directors. It is reiterated that the UPPCL is empowered to frame Regulations relating to conditions of service of its personnel under sub-clause (10) of Clause 6 of the Transfer Scheme and till such time the Regulations are not framed, the Regulations framed by the erstwhile Board (including the Regulations of 1975) shall *mutatis mutandis* apply.

Therefore, the finding of the learned Judge cannot be sustained, whereby it was held that the resolution authorising the Managing Director to exercise the powers relating to Article 351-A of the CSR cannot be accepted as the CSR can be modified/amended by amendment in the CSR in respect of the service in the State and not by issuance of Circulars or Company resolutions. (Para 32)

Thus, under the circumstances, **there was no occasion to obtain sanction of the Governor and no question of delegation of power by the Governor in favour of the MD of the UPPCL for the MD to exercise his discretion to sanction in exercise of power Article 351-A of the CSR.** The sanctioning authority specified as 'Governor' in the CSR can be read as 'Managing Director' of a corporation. (Para 34)

C. Initiating the departmental proceedings against the petitioner-respondent in view of Article 351-A of the CSR was not justified – The alleged 'sanction' for departmental proceedings

granted by the Managing Director of UPPCL under Article 351-A of the CSR is no sanction in the eyes of law and is, therefore, declared invalid. However, this cannot preclude the appellant-respondents from instituting departmental proceedings after obtaining a valid sanction if so permissible in law. But till a valid sanction is granted for departmental proceedings, the directions issued by the learned Judge for payments of retiral dues, etc. calls for no interference. (Para 50, 51)

1) A legal fiction is created only for some definite purpose and it is to be limited for the purpose for which it was created and should not be extended beyond that legitimate field. The appellant-respondents have proceeded on the presumption that once the respondent-petitioner was placed under suspension during the period of his service then, even if the suspension is revoked prior to retirement, the provisions of Explanation (a) of the CSR would enure to their benefit. In our opinion, this presumption and interpretation is fallacious. For Explanation (a) of the CSR to be applicable the incumbent must be under suspension from a date prior to his retirement and continue to be under suspension till the date of his retirement. (Para 39, 40)

The learned Judge was justified in holding that on the date of his retirement on 31.12.2018, the respondent-petitioner was not under suspension and, so as a corollary, departmental proceedings could not be deemed to have been instituted against the respondent-petitioner. (Para 41)

2) The validity of "sanction" depends on the applicability of mind by the sanctioning authority to the facts of the case as also the material and evidence collected during investigation, it necessarily follows that the sanctioning authority has to apply its own independent mind for the generation of genuine satisfaction whether prosecution has to be sanctioned or not. (Para 46, 47, 48)

Clause (a) (i) of the first proviso to Article 351-A of the CSR places a complete bar on institution of departmental proceedings without the sanction of the Governor (in the present case, the MD of UPPCL). That is to say that **the authority has to apply its mind and deliberate on the matter, on the basis of the facts appearing on record, whether to grant sanction or not, for institution of departmental proceedings.**

Therefore, the import of the word 'sanction' so appearing actually indicates a decision authorising departmental proceedings after consideration of the material on record and application of mind thereon. It does not mean that the sanctioning authority has to see the material and evidence threadbare and pass judgment. The authority has only to be satisfied that the basis for departmental proceedings exist entailing sanction. (Para 44)

Therefore, in the present case, the MD was required to consider, prima facie, not only the charges framed and the evidence available, but also whether the departmental proceedings were in respect of an event which took place not more than four years before the institution of the proceedings {Clause (a) (ii) of the first proviso to Article 351-A of the CSR}. The contents of the first charge-sheet reveal that it pertains to an alleged mis-conduct of the petitioner at the time of his initial appointment. Therefore, there cannot be any valid sanction to the departmental proceedings in respect of the first charge-sheet against the petitioner. The consolidated notings pertained to both the charge-sheets and a single signature of the sanctioning authority appears at the end, which without anything further, cannot imply sanction. (Para 44)

Sanction of the departmental proceeding, does not ex-facie disclose that the MD had applied its mind to the material on record in the light of the first proviso to Article 351-A of the CSR and had sanctioned departmental proceedings. The sanction as envisaged in Article 351-A of the CSR dons the MD of UPPCL with the mantel of the Governor to accord sanction to such departmental proceedings after noticing that the ingredients for institution of such departmental proceedings exist. Here the MDhas neither accepted the proposal for departmental enquiry nor has approved or sanctioned the departmental enquiry. He had just put his signature on the page, which by itself cannot be taken as grant of sanction in view of the fact situation of the instant case. (Para 49)

D. Words and Phrases – *'authority of law'* - While strictly interpreting the phrase 'authority of law' as used in Article 300-A of the Constitution of India, in view of the fact that Article 351-A of the CSR prescribes for deprivation of property of a citizen, and

in that sense it is an 'ex-proprietary' legislation, it was held that **any liberal interpretation given to a law which is basically 'ex-proprietary' in nature would be in clear violation of Article 300-A of the Constitution of India and would militate against the spirit of that Article.** (Para 8)

'mutatis-mutandis' **-** The expression "mutatis-mutandis", itself implies applicability of any provision with necessary changes in points of detail. The rules which are adopted, as has been done in the present case, make the principles embodied in the rules applicable and not the details pertaining to particular authority or the things of that nature. (Para 25)

'sanction' **-** In the ninth edition of the Black's Law Dictionary the verb 'sanction' is defined as to approve, authorize or support. (Para 44)

Appeal dismissed. (E-4)

Precedent followed:

1. Prahlad Sharma Vs St. of U.P. ors., (2004) 4 SCC 113 (Para 12)

2. Rajeev Kumar Jauhar Vs St. of U.P., (2007) 2 AWC 1726 (Para 12)

3. Bengal Immunity Co. Ltd. Vs St. of Bihar, AIR 1955 SC 661 (Para 39)

4. State of Bihar & anr. Vs P.P. Sharma, IAS & anr., 1992 Supp (1) SCC 222 (Para 46)

5. Manshukhlal Vithaldas Chauhan Vs State of Gujarat, (1997) 7 SCC 622 (Para 47)

6. State (Anti-Corruption Branch), Govt. of NCT of Delhi & anr. Vs Dr. R.C. Anand & anr., (2004) 4 SCC 615 (Para 48)

Precedent distinguished:

1. Dr. Hira Lal Vs St. of Bihar & ors., (2020) 4 SCC 346 (Para 13)

2. St.of U.P. & ors. Vs Z.U. Ansari, (2016) 16 SCC 768 (Para 12, 28)

Present appeal challenges judgment and order dated 23.07.2021, passed by learned Single Judge.

(Delivered by Hon'ble Jayant Banerji, J.)

1. The application seeking exemption for filing the certified copy of the order is allowed.

2. The appellant-respondents have filed this intra court appeal against the judgement and order of the learned Judge dated 23.7.2021 passed in Writ-A No. 6544 of 2021 (Anil Kumar Sharma Vs. State of U.P. and others) by means of which the writ petition has been allowed holding that denial of pension to the petitioner as well as continuation of departmental proceedings against him by taking recourse to Article 351-A of the Civil Service Regulations1 is arbitrary.

Background of the case:

3. The aforesaid writ petition was filed seeking directions to the respondents to pay the retiral benefits like Gratuity, G.P.F., Leave Encashment etc. and arrears of pension alongwith interest and to pay the regular pension to the petitioner as and when it is due. Further relief was sought for granting provisional pension.

4. The case of the respondent-petitioner in the writ petition was that he was initially appointed on 4.6.1974 on a permanent regular post of Patrolman and was lastly promoted to the post of Junior Engineer in the year 2014. He retired on 31.12.2018 from the post of Junior Engineer from the office of the Superintendent Engineer, Vidyut Vitaran Mandal, Amroha, after attaining the age of superannuation. He did not receive any retiral benefits/dues like GPF, gratuity, leave encashment, pension or even provisional pension. It was submitted that while in service he was suspended by means of the order dated 22.11.2018 passed by the Managing Director of the Paschimanchal Vidyut Vitaran Nigam Limited2 on a solitary complaint but, by an order dated 28.12.2018, he was reinstated in

service and on 31.12.2018, he retired. Prior to his suspension, a two member committee was constituted for inquiring into the matter, which found no evidence against him. It was stated that post retirement, two chargesheets were served on the petitioner on 7.11.2019 against which the petitioner submitted his reply/explanation on 21.12.2019. On 22.5.2020, the statement of the petitioner was recorded by the inquiry officer, who submitted his report to the higher authority, who was not satisfied with the inquiry report and a re-inquiry was ordered. The petitioner was again asked to submit his statement along with evidence and his statement was again recorded on 23.9.2020. It was stated that the proceedings were pending before the Authorities and he was not being paid his retiral dues despite repeated representations.

5. From perusal of the order-sheet of the writ petition, it appears that on the request of the parties, on 15.7.2021, the learned Judge directed the case to be listed on the next day, that is, 16.7.2021. On 16.7.2021, after hearing the learned counsel for the petitioner and the learned counsel appearing for the respondent nos. 2 and 3, a part of the order was dictated but, subsequently, on request made by the learned counsel for the respondents the learned Judge permitted them to make a mention in the open Court on 22.7.2021. On 22.7.2021, the matter was taken up on board, the learned counsel were heard and the case was directed to be listed on the next date (23.7.2021) for further arguments. On 23.7.2021, after hearing the learned counsel for the parties, the impugned judgement and order was passed.

6. From the record of the writ petition it appears that on 16.7.2021, a compilation running into 112 pages was filed on behalf of the respondent nos. 4 to 6 enclosing copies of various judgements, inquiry reports, suspension order and records of the departmental proceedings/correspondence. It also appears from the record that that a 'short counter affidavit' running into 162 pages was filed on behalf of the respondent nos. 4 to 6.

7. Before the learned Judge, it was submitted that on the basis of the preliminary inquiry, the petitioner was placed under suspension by an order dated 22.11.2018. The suspension order was revoked on 28.12.2018 specifying that it was being revoked on the account of retirement of the petitioner which was on 31.12.2018. It was submitted by the respondents therein that sanction was accorded by the Managing Director for continuing disciplinary proceedings against the petitioner. By a letter dated 1.5.2019, a show cause notice was served on the petitioner along with two chargesheets. That in terms of circular of the Board dated 21.6.1991 and a resolution of the Board of Directors dated 2.8.2007, the Managing Director was authorized to grant sanction as envisaged under Regulation 351-A of the Civil Service Regulations. It was submitted therein that the petitioner was not entitled to payment of pension and at best he could apply for provisional pension in accordance with Article 351-AA and 919-A of the CSR.

8. The learned Judge, while noticing that the main prayer of the petitioner being for payment of pension, observed that it was intrinsically linked to the pending disciplinary proceedings against the petitioner and the same could not be decided without considering the merit of the pending disciplinary proceedings viz.-a-viz. the bar created under Article 351-A of the CSR. The Court, further, observed that the validity of the departmental proceedings were considered in the light of the specific defence taken by the counsel for the respondents justifying the withholding of the pension in view of the pending departmental proceedings. While strictly interpreting the phrase 'authority of law' as used in Article 300-A of the Constitution of

India, in view of the fact that Article 351-A of the CSR prescribes for deprivation of property of a citizen, and in that sense it is an 'ex-propriatory' legislation, the learned Judge held that any liberal interpretation given to a law which is basically 'ex-propriatory' in nature would be in clear violation of Article 300-A of the Constitution of India and would militate against the spirit of that Article. The learned Judge, thus held that on the date of his retirement on 31.12.2018, the petitioner was neither under suspension nor any chargesheet was served upon him or issued to him as the suspension order dated 22.11.2018 stood revoked vide order dated 28.12.2018 and as the chargesheet admittedly was served after the date of retirement, thus, no proceeding could have been initiated against the petitioner except with sanction of the Governor and after satisfying the test of clause (i) to (iii) of proviso (a) to Article 351-A of the CSR.

9. Further, discarding the contention of the learned counsel for the respondents that in view of the relevant circulars and the resolution of the Board of Directors of the company, the word 'Governor' specified under Article 351-A of the CSR was substituted by the 'Board' and thereafter by the 'Managing Director', the learned Judge held that the CSR has been framed in pursuance of the powers conferred under Article 309 of the Constitution of India and can be modified/amended only by the amendment in the CSR and not by issuance of circular or by a company resolution and, therefore, the sanctioning authority specified as 'Governor' in the CSR cannot be read as 'Managing Director' of a corporation except when it is amended in accordance with law. The learned Judge, thus, held that no disciplinary proceeding was instituted against the petitioner prior to the date of his retirement and no sanction of Governor as required under Article 351-A of the CSR exists for initiating disciplinary proceedings against the petitioner after his retirement. A mandamus was accordingly issued.

10. We have heard Shri G.K. Singh, learned Senior Advocate assisted by Shri Abhishek Srivastava and Shri Krishna Agrawal for the appellants; Shri R.K. Mishra for the respondent no. 1; and the learned Standing Counsel for the proforma respondent no. 2 and perused the record.

Submissions of the learned counsel:

11. The contention of the learned Senior Advocate appearing for the appellant-respondents is that in the writ petition, there was no prayer for quashing the departmental proceedings or challenging the order dated 22.12.2018, whereby, the suspension of the petitioner was conditionally revoked. Therefore, the Court ought not to have dwelt on the issue of the validity of the sanction and the enquiry proceeding itself, without calling upon the appellant-respondents to file a comprehensive counter affidavit. He contends that the order of suspension was passed and the charge-sheet was issued by the competent authority and that due sanction as envisaged under Article 351-A of the CSR was granted by the Managing Director of the Uttar Pradesh Power Corporation Limited3. He contends that there was adequate material on record to demonstrate that PVVNL is a company subsidiary to UPPCL and incorporated under the Companies Act, 1956. UPPCL was itself incorporated as a company pursuant to Section 13 of Chapter IV of the Uttar Pradesh Electricity Reforms Act, 19994. It is contended that licence has already been granted by the Uttar Pradesh Regulatory Commission (established under Section 3 of the Reforms Act) to PVVNL under sub-section (5) of Section 13 of the Reforms Act. It is stated that U.P. State Electricity Board was constituted under Section 5 of the Electricity Supply Act, 19485. Under Section 23 of the Reforms Act, the Board's properties,

powers, functions, duties and personnel were transferred and vested in the State Government pursuant to sub-section (1) thereof. Thereafter, the same have been re-vested by the State Government in the UPPCL in accordance with a Scheme known as the Uttar Pradesh Electricity Reforms Transfer Scheme, 20006. It is contended that the Transfer Scheme was framed pursuant to sub-section (4) of Section 23 of the Reforms Act. Under sub-section (7) of Section 23 of the Reforms Act, the terms and conditions of the transferred personnel are to be determined in accordance with the Transfer Scheme. It is contended that the petitioner-respondent was transferred and absorbed in UPPCL in terms of the Transfer Scheme. That under sub-clause (10) of clause 6 of the Transfer Scheme, till such time Regulations governing the conditions of service of personnel transferred under the Transfer Scheme are framed, the existing service conditions of the Uttar Pradesh State Electricity Board7 shall *mutatis mutandis* apply. It is contended that the Uttar Pradesh State Electricity Board (Officers and Servants) (Conditions of Service) Regulations, 19758 govern the conditions of service of officers and servants of the Board and since fresh Regulations are yet to be framed, the Regulations of 1975 govern the service conditions of the personnel employed under the UPPCL and PVVNL. He contends that in view of the Regulation of 1975, the authority competent to sanction departmental proceedings post retirement of the petitioner-respondent is the Managing Director of UPPCL. That after the constitution of the UPPCL and the vesting of properties etc. of the Board by the State Government under the provisions of the Reforms Act, the UPPCL and the PVVNL, being Companies incorporated under the Companies Act, are corporate and independent entities entitled to take decisions and delegate powers by way of resolutions passed in meetings of the Board of Directors of the respective Companies. He contends that no statutory amendment is required in Article 351-A of the CSR for replacing the word "Governor" by the "Managing Director". It is his further contention that the order revoking the suspension of the petitioner-respondent on 28.12.2021 was conditional and given the provisions of Article 351A of the CSR, since the petitioner-respondent was placed under suspension prior to date of his retirement, departmental proceedings were deemed to have been instituted against the petitioner-respondent prior to his retirement. It is, therefore, contended that on both counts, the learned Judge has not decided the writ petition correctly.

12. In support of his contentions, the learned counsel has relied upon judgments of the Supreme Court in the case of **Prahlad Sharma vs. State of U.P. & Ors.9** and **State of Uttar Pradesh & Ors. vs. Z.U. Ansari10** as well as a Division Bench judgment of this Court in **Rajeev Kumar Jauhar vs. State of U.P.11.**

13. Shri R.K. Mishra, learned counsel for the petitioner-respondent has vehemently argued that under the facts and circumstances of the present case, the pension of the petitioner-respondent cannot be withheld and administrative Circulars and resolutions do not have the force of law and as such the learned Judge has correctly decided the writ petition. In support of his argument, the learned counsel has referred to a judgment of the Supreme Court in the case **Dr. Hira Lal vs. State of Bihar & Ors.12.**

Discussion:

14. While considering the judgment passed by the learned Judge, we deem it fit to proceed with the discussion on the following points :-

(i) Whether the learned Judge ought not to have proceeded with the matter without there being proper reliefs sought in the petition

and without calling for a detailed counter affidavit?

(ii) Whether the Managing Director of the UPPCL was competent to sanction departmental proceedings under the provisions of Article 351-A of the CSR? And,

(iii) Whether the appellant-respondents were justified in initiating the departmental proceedings against the petitioner-respondent in view of Article 351-A of the CSR?

Point No.(i)

15. As far as the first point is concerned, it is evident from the record that the issue of payment of pension and other retiral dues or the entitlement thereof is intrinsically linked to the departmental proceedings that were initiated against the petitioner-respondent. The validity of the sanction accorded by the Managing Director of the UPPCL is an issue of jurisdiction which goes to the root of the matter and, therefore, the consideration of the case by the learned Judge on the limited aspect of the validity of the sanction is appropriate. Whether the cause to sanction existed, could only have been seen after analyzing whether departmental proceedings could be deemed to have been instituted in view of the Explanation to Article 351-A of the CSR. As stated above, the appellant-respondents had filed a short counter affidavit and a compilation of several documents pertaining to the departmental proceedings and judgements of various courts. It has not been pointed out what other document was required to be 'filed' for adjudication apart from what was already on record of the writ petition. Under the circumstances, the learned Judge had correctly proceeded to decide the case on the basis of material on record.

Point No.(ii)

16. Coming to the second point regarding the competence of the Managing Director of UPPCL to sanction the departmental proceedings, the background leading to the constitution of the corporate entities, namely, UPPCL and PVVNL is required to be seen.

17. Under the Supply Act of 1948, the State Electricity Boards were required to be constituted under Section 5 thereof. The term of office and conditions of service of the members of the Board were specified in Section 8 and removal or suspension of members of the Board was provided in Section 10. The Board was ordained to be a body corporate, by the name notified, under Section 12 having perpetual succession and a common seal with power to acquire and hold property both movable and immovable and could sue and be sued by the said name. Section 79 of the Supply Act of 1948 enabled the Board, by notification in the official gazette, to make Regulations with respect to the matters specified therein, sub-section (c) of which reads as follows:-

"79. Power to make regulations.- The Board may, by notification in the Official Gazette, make regulations not inconsistent with this Act and the rules made thereunder to provide for all or any of the following matters, namely : -

(a) .....

(b) .....

(c) the duties of officers and other employees of the Board, and their salaries, allowances and other conditions of service;

.....

.....

....."

18. The Regulations of 1975 were made in exercise of the power conferred by sub-section (c) of Section 79 of Supply Act of 1948 on the Board. Regulation 2 of the Regulations of 1975 reads as follows:-

"2. All matters relating to conduct and discipline (including matters relating to

punishment) and to termination, reversion and compulsory retirement of persons appointed:

(a) to the Board,

(b) Government servants who were originally employed under the State Government and after resignation were absorbed in the service of the Board in pursuance of State Government order No.3670-E/71-XXIII-PB, dated July 1, 1971, the Board may initiate or recommence any disciplinary proceedings in respect of their acts and omissions during the period when they were employed under the State Government except in cases where disciplinary proceedings were finally concluded on merits while they were so employed under the Government.

(c) Such servants of the Board as are workman employed in any industrial establishment under the control of the Board, notwithstanding any thing contained in any other law for the time being in force;

shall be regulated *mutatis mutandis* and subject to any other regulation for the time being inforce (including Regulations 1-A and above and 3, 4 and 6 below) by rules and orders for the time being in force and applicable to corresponding categories of Government Servants under the rule making control of the Governor of Uttar Pradesh with the substitution of references in such rules to the Governor or the State Government by reference to the Board." (emphasis supplied)

19. Relevant provisions of Section 23 of the Reforms Act are as follows:-

"23. Transfer of the Board's properties, powers, functions, duties and personnel. - (1) On and from the date specified in a transfer scheme, prepared and notified by the State Government, to give effect to the objects of this Act, hereinafter referred to as the appointed date in this Act, all properties, and all interests, rights and liabilities of the Board therein shall vest in the State Government.

(2) The properties, interest, rights and liabilities vested in the State Government under sub-section (1), shall be revested by the State Government, in the Power Corporation and in a generating company in accordance with the transfer scheme so notified along with such other property, interest, rights and liabilities of the State Government, as may be specified in such scheme, on such terms and conditions as may be determined by the State Government.

.....

(4) The State Government may, after consultation with the generating company or the power corporation, hereinafter referred to in this section as transferor, may, require transferor to draw up a transfer scheme to vest in a person hereinafter referred to in this section as transferee, any of the functions including distribution function, property, interest, right or liability which may have been vested in the transferor under this section and notify the same as statutory transfer scheme under this Act. The transfer scheme to be notified under this sub-section shall have the same effect as the transfer scheme under sub-section (2).

.....

(7) The State Government, may provide in any of the transfer schemes framed under this section for the transfer of personnel to the Power Corporation or a company subsidiary to the Power Corporation or a generating Company, on the vesting of properties, rights and liabilities in the Power Corporation or a company subsidiary to the Power Corporation or a generating company, as a part of the undertakings transferred under this section and on such transfer the personnel shall hold office or service under the Power Corporation or a company subsidiary to it or a generating company, as the case may be, on terms and conditions that may be determined in accordance with the transfer scheme subject however to the following namely :

(a) terms and conditions of service of the personnel shall not be less favourable to the terms and conditions which were applicable to them immediately before the transfer;

(b) the personnel shall have continuity of service in all respects; and

(c) all benefits of service accrued before the transfer shall be fully recognised and taken into account for all purposes including the payment of any or all terminal benefits :

Provided that, notwithstanding anything contained in any other law for the time being in force, and except as provided in the transfer scheme and in this Act, the transfer shall not confer any right on the personnel so transferred to any compensation or damages :

Provided further that the posts in the Board of all the personnel whose services are to be so transferred shall stand abolished with effect from the date of transfer.

Explanation. - For the purposes of this section and the transfer scheme, the expression "personnel" means all persons who on the appointed date are the employees of the Board and who under the transfer scheme are given the option to join service under the control of the transferee."

20. In exercise of powers conferred under sub-sections (1) and (2) of Section 23 of the Reforms Act, the Transfer Scheme was framed. Under sub-clause (h) of Clause 2 of the Transfer Scheme, the transferree has been defined to mean the UPPCL, the U.P. Rajya Vidyut Utpadan Nigam Limited13 and the U.P. Jal Vidyut Utpadan Nigam Limited, in whom the undertaking or undertakings are vested in terms of the provisions of sub-sections (2) and (7) of Section 23 of the Reforms Act. With regard to transfer of personnel, sub-clause (1) of clause 6 of the Transfer Scheme makes it subject to the terms and conditions contained in sub-section (7) of Section 23 of the Reforms Act. Sub-clause (5) of Clause 6 of the Transfer Scheme reads as follows:-

"The personnel classified in Schedule-G shall transferred to and absorbed in UPPCL on as is where is basis, namely, that they will continue to serve in the place where they are posted on the date of the transfer and they will become an employee of UPPCL."

21. Schedule-G of the Transfer Scheme names the Units wherein the personnel of the specified offices of the Board alongwith all personnel of subordinate offices and Units of the Board would stand transferred to UPPCL on the date of the transfer.

22. Sub-clause (10) of Clause 6 of the Transfer Scheme reads as follows:-

"Subject to the provisions of the Act and this Scheme, the Transferree shall frame regulations governing the conditions of service of personnel transferred to the transferee under this Scheme and till such time, the existing service conditions of the Board shall *mutatis mutandis* apply."

23. On consideration of the aforesaid provisions of the Supply Act of 1948, Regulations of 1975, Reforms Act, and the Transfer Scheme, it is evident that the conditions of service of officers and servants of the Board and the UPPCL/PVVNL are regulated by the Regulation of 1975 which is in force as provided under sub-clause (10) of Clause 6 of the Transfer Scheme framed under the Reforms Act, and, by rules and orders for the time in force and applicable to the corresponding categories of government servants under the rule making control of the Governor of Uttar Pradesh with the substitution of references in such rules to the Governor or the State Government by reference to the Board / UPPCL / PVVNL.

24. It is pertinent to mention here that in the Electricity Act, 2003, the Reforms Act is

saved by virtue of sub-section (3) of Section 185 thereof.

25. The term "*mutatis mutandis*' has been explained by the Supreme Court in the case of **Prahlad Sharma** (supra). In that case before the Supreme Court, challenge was made to a judgment and order passed by the High Court which had allowed the writ petition preferred by the appellant. The Managing Director of the U.P. State Agro Industrial Corporation had imposed the penalty of dismissal against **Prahlad Sharma**. The appellate authority of the Corporation had partly allowed the appeal and ordered reinstatement with observations. Against the order of the appellate authority directing reinstatement, the Corporation invoked the revisional power of the State by filing a revision under Rule 13 of the Government Servant (Discipline and Appeal) Rules, 199914 which was allowed. The High Court observed that by means of a resolution, the Corporation had *mutatis mutandis* adopted the Rules, 1999 and hence the State Government had power to entertain the revision under Rule 13 of the Rules, 1999. The order of the High Court as well as the order passed by the State Government in revision were set aside by the Supreme Court after analysing the term "*mutatis mutandis*' appearing in the resolution of the Corporation whereby the Rules, 1999 were adopted. The Supreme Court observed as follows:-

"11. The expression "mutatis-mutandis", itself implies applicability of any provision with necessary changes in points of detail. The rules which are adopted, as has been done in the present case, make the principles embodied in the rules applicable and not the details pertaining to particular authority or the things of that nature. In the present case, we find that the High Court has found that the U.P. Rules of 1999 have been adopted mutatis-mutandis. Therefore, in our view, the revisional power which has been vested in the state government in respect of the employees of the State may be exercisable by an authority parallel or corresponding thereto in the Corporation in regard to employees of the Corporation.."

26. Therefore, in terms of sub-clause (10) of clause 6 of the Transfer Scheme, the Regulations of 1975 would, *mutatis mutandis*, apply to the personnel of UPPCL / PVVNL. Accordingly, the reference to the Governor of the State appearing in Article 351-A of the CSR, would, in the case of the appellant-respondents, be referable to the Managing Director of the UPPCL.

27. Another judgment cited by the learned counsel for the appellant-respondents in the matter of **Rajeev Kumar Jauhari** (supra) can be referred with profit. In that case, the issue was before the High Court whether the U.P. Rajya Vidyut Utpadan Nigam Absorption Regulations, 2006 framed by the UPRVUNL was illegal, arbitrary and ultra vires. One of the issues urged on behalf of the petitioner therein was that UPRVUNL can only change the conditions of service by framing statutory Regulations and not the Regulations, which are non-statutory. While rejecting that argument, the Court observed as follows:

"32. Sri Khare lastly sought to argue that Section 23(7) of the Reforms Act, 1999 read with Clause 3 (10) of the Transfer Scheme, 2000 use the word 'Regulation' and therefore, UPRVUNL can only change the condition of service by framing statutory Regulations and not the Regulations, which are non statutory In our view, this submission is to be noted for rejection only. UPRVUNL is not a statutory body, but a Company registered under the Companies Act. It is not disputed that the employment and contract of the petitioners which was earlier with a statutory autonomous body, namely, UPSEB, stood transferred to UPRVUNL and now it is UPRVUNL, who is empowered to determine the

conditions of service of its employees. The manner in which such provision can be made would be governed by the Article of Association of such Company and when the Company itself is not statutory, to expect such company to frame statutory Regulations for governing its employees is wholly untenable. The effect of transfer of service from statutory body to a non statutory body, namely, a company registered under the Company Act, would deprive the statutory protection available to the employees and now the matter would be governed by ordinary law of contract. Normally, the transfer of contract involves the consent of the employees also, but in the present case, the petitioner's contract has been transferred to UPRVUNL by statute itself and, therefore, the employees have no role and their consent is not required. The only rider on the power of transferee employer is that the service condition whenever changed would not be less beneficial and will not deprive past benefits accrued to the transferred employees before transfer, that is, to the extent provided under Section 23(7) of the Reforms Act, 1999. The protection under Section 23(7) neither continue the status of the transferred employee with the new companies as statutory nor otherwise has any other role except to prevent employer from exercising its ordinary powers available in Common Law, which would be contrary to the protection given under Section 23(7) of the Reforms Act, 1999. For all other purposes, the transferee company is free to formulate its policies and enter into contract or lay down terms and conditions of its employees in the manner, it find best suited for the efficient functioning of the company. Merely for the reason that the State Government is 100% share holder of the company does not identify the company itself with the State Government. In Shrikant v. Vasantrao15, the Court held in para 24 (sic) that in the matter of a company where the entire share capital is held by the State Government, yet it cannot be identified with the State Government and is always entitled to act and proceed in a manner a company function. This principle was recognized as long back as in 1970 also by a Constitution Bench in R.C. Cooper v. Union of India16, and at page 584, the Apex Court held- "A company registered under the Companies Act is a legal person, separate and distinct from its individual members. Property of the Company is not the property of the shareholders. A shareholder has merely an interest in the Company arising under its Article of Association measured by a sum of money for the purpose of liability, and by a share in the profit. "

.....

34. Thus we hold that a Company can determine terms and conditions of its employees as provided under Article of Association but since the Article of Association of a Company is neither a Rule nor Regulation and has no statutory force the conditions determined thereunder would also be not statutory. The UPRVUNL thus have the power to determine terms and conditions of its employees by making provisions in exercise of powers under provisions of Article of Association read with Companies Act."

28. Another case that was cited by the learned counsel for the appellant-respondents was a judgment of the Supreme Court in the case of **Z.U. Ansari** (supra). The issue therein was whether the powers vested in a Governor for sanctioning departmental proceedings by Regulation made under Article 309 of the Constitution of India can be delegated to a Minister under Rules for Allocation of Business framed under Article 166(3) of the Constitution of India. However, no reliance can be placed upon that case inasmuch as due to the difference in opinion between the two Judges, the matter was referred to a Larger Bench.

29. Reference, at this stage, may be made to Article 309 of the Constitution of India:

"309. Recruitment and conditions of service of persons serving the Union or a State :

Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State:

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act."

30. Under Article 309 of the Constitution, authority has been given to the Governor of the State or to such person, he may direct in the case of service and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of person appointed, to such service and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under that Article, and any rules so made shall have effect subject to the provisions of any such Act. However, the authority to the Governor has been given by means of a proviso. Article 309 itself enables Acts of the appropriate Legislature to regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State, which is subject to the provisions of the Constitution of India and qualified by the proviso.

31. Article 351-A of the CSR reads as follows:

"351-A. The Governor reserves to himself the right of withholding or withdrawing a pension or any part of it, whether permanently or for a specified period and the right of ordering the recovery from a pension of the whole or part of any pecuniary loss caused to Government, if the pensioner is found in departmental or judicial proceedings to have been guilty of grave mis-conduct, or to have caused, pecuniary loss to government by misconduct or negligence, during his service, including service rendered on re-employment after retirement;

Provided that--

(a) such departmental proceedings, if not instituted while the officer was on duty either before retirement or during re-employment--

(i) shall not be instituted save with the sanction of the Governor,

(ii) shall be in respect of an event which took place not more than four years before the institution of such proceedings, and

(iii) shall be conducted by such authority and in such place or places as the Governor may direct and in accordance with the procedure applicable to proceedings on which an order of dismissal from service may be made.

(b) judicial proceedings, if not instituted while the officer was on duty either before retirement or during re-employment, shall have been instituted in accordance with sub-clause (ii) of clause (a), and

(c) the Public Service Commission, U.P., shall be consulted before final orders are passed.

Provided further that of the order passed by the Governor relates to a cash dealt with under the Uttar Pradesh Disciplinary Proceedings, (Administrative Tribunal) Rules, 1947, it shall not be necessary to consult Public Service Commission.

Explanation-- For the purposes of this article--

(a) departmental proceedings shall be deemed to have been instituted when the charges framed against the pensioner are issued to him, or, if the officer has been placed under suspension from an earlier date, on such date; and

(b) judicial proceedings shall be deemed to have been instituted :

(i) in the case of criminal proceedings, on the date on which a complaint is made, or a charge-sheet is submitted to a criminal court; and

(ii) in the case of civil proceedings, on the date on which the plaint is presented or, as the case may be, an application is made, to a civil court.

Note:- As soon as proceedings or the nature referred to in this article are instituted the authority which institutes such proceedings shall without delay intimate the fact to the Audit Officer concerned."

32. On record is the so-called 'sanction' accorded by the Managing Director of UPPCL to the departmental proceedings to be initiated against the petitioner-respondent. Therefore, taking into account the provisions of the Supply Act of 1948, the Regulations of 1975, the Reforms Act and the Transfer Scheme, it is clear that UPPCL and PVVNL are separate corporate entities and are entitled to conduct their business by means of duly passed resolutions in the meetings of the Board of Directors. It is iterated that the UPPCL is empowered to frame Regulations relating to conditions of service of its personnel under sub-clause (10) of Clause 6 of the Transfer Scheme and till such time the Regulations are not framed, the Regulations framed by the erstwhile Board (including the Regulations of 1975) shall *mutatis mutandis* apply. Therefore, the finding of the learned Judge cannot be sustained, whereby it was held that the resolution authorising the Managing Director to exercise the powers relating to Article 351-A of the CSR cannot be accepted as the CSR can be modified/amended by amendment in the CSR in respect of the service in the State and not by issuance of Circulars or Company resolutions.

33. The judgment cited by the learned counsel for the petitioner-respondent in the matter of **Dr. Hira Lal** is not applicable under the facts and circumstances of the present case. That judgment refers to administrative Circulars and a Government resolution issued by the State of Bihar for withholding part of pension, whereas the Bihar Pension Rules 1950 did not prohibit payment of full pension and gratuity to a retired government servant against whom criminal proceedings were pending. The Supreme Court noticed that the Bihar Pension Rules were amended on 19.07.2012 by the Governor of Bihar in exercise of powers under Article 309 of the Constitution. It was held that the pension amount that was withheld after superannuation of the officer till 19.07.2012 is liable to be paid to the appellant. In that case before the Supreme Court, the authority of any Corporation to frame Regulations by means of resolutions was not in issue and, therefore, the aforesaid case is distinguishable on facts and is of no assistance to the petitioner-respondent.

34. Thus, under the circumstances, there was no occasion to obtain sanction of the Governor and no question of delegation of power by the Governor in favour of the Managing Director of the UPPCL for the Managing Director to exercise his discretion to sanction in exercise of power Article 351-A of the CSR. Moreover, with regard to the case in hand, given the statutory provisions narrated above, the observation of the learned Judge that the sanctioning authority specified as 'Governor' in the CSR cannot be read as 'Managing Director' of a corporation except when it is amended in accordance with law cannot be

sustained. Therefore, the judgment and order of the learned Judge, to this extent, is **set aside.**

Point No. (iii)

35. Now we may examine the third point that whether the appellant-respondents were justified in initiating the departmental proceedings against the petitioner-respondent in view of Article 351-A of the CSR.

36. The order of suspension dated 22.11.2018 as well the order dated 22.12.2018 conditionally reinstating the respondent-petitioner are on record of the writ petition. It is admitted that the age of superannuation of the respondent-petitioner was 31.12.2018. The order of suspension of 22.11.2018 was passed by the Managing Director, PVVNL, Meerut in his capacity as the Competent Authority. The letter dated 22.12.2018 whereby the suspension of the respondent-petitioner was conditionally revoked, which appears on page 214 of the affidavit, is an office memorandum signed by the Managing Director of PVVNL, Meerut in which the allegations against the respondent-petitioner are cited and the second paragraph of the office memorandum, which is the operative part, is as follow:-

"श्री अनिल कुमार तत्कालीन अवर अभियन्ता (निलम्बित), विद्युत नगरीय वितरण खण्ड-अष्ठम, नोएडा सम्बद्ध सम्प्रति विद्युत वितरण मण्डल, अमरोहा के दिनांक 31.12.2018 को सेवानिवृत्त होने के दृष्टिगत एतदद्वारा सेवा में पुर्नपदस्थापित कर कार्यालय मुख्य अभियन्ता (वितरण), मुरादाबाद क्षेत्र, मुरादाबाद में इस प्रतिबन्ध के साथ तैनात किया जाता है कि प्रचलित जांच प्रक्रिया में जो भी निर्णय लिया जायेगा, उन पर लागू होगा।"

"Shri Anil Kumar, former Junior Engineer (under suspension), Electricity Urban Distribution Division- 8, NOIDA, presently attached to Electricity Distribution Division, Amroha, in view of his retirement on 31.12.2018, is hereby restored to his post in service and is being posted in the office of the Chief Engineer (Distribution), Moradabad Circle, Moradabad with the condition that in the ensuing inquiry proceeding whatever decision is taken, it would be applicable to him."

(translated to English by Court)

37. It is an admitted fact that no chargesheet was served upon the petitioner before his retirement on 31.12.2018. Therefore, it is required to be seen whether the condition imposed in the revocation of suspension of the petitioner, by means of the office memorandum dated 22.12.2018 could be construed as deemed suspension.

38. Article 351-A of the CSR enables the Governor to withhold or withdraw a pension or any part of it, whether permanently or for a specified period, and, of ordering the recovery from a pension of the whole or part of any pecuniary loss caused to Government, if the pensioner is found in the departmental or judicial proceedings to have been guilty of grave misconduct, or to have caused, pecuniary loss to Government by misconduct or negligence during his service, including service rendered on re-employment after retirement. This enabling provision is qualified by the first proviso, Clause (a) of which provides three mandatory conditions, in order to institute departmental proceedings, if not instituted while the officer was on duty either before retirement or during re-employment. The first condition prohibits the institution of such departmental proceedings save with the sanction of the Governor. The second condition is that the departmental proceedings should be in respect of an event which took place not more than four years before the institution of such proceedings. The third condition is that such departmental proceedings should be conducted by such authority and in such place or places as the

Governor may direct and in accordance with the procedure applicable to the proceedings on which the order of dismissal from service may be made. The purport of Clause (a) of the first proviso is that each of the aforesaid three conditions have to be satisfied for instituting departmental proceedings where the employed person has retired. Explanation (a) to the Article 351-A of the CSR creates a legal fiction with regard to the date of institution of disciplinary proceedings, the purport of which is that the departmental proceedings shall be deemed to have been instituted when (i) the charges framed against the pensioner are issued to him, or, (ii) if the officer has been placed under suspension from an earlier date, on such date.

39. There is no dispute about the fact that the stringent provisions of Article 351-A of the CSR purport to enable the authority concerned to impose major penalty on a pensioner whereby the pensioner is visited with grave civil consequences. As such, given the mandate of Article 300-A of the Constitution of India there is little scope of interpreting the provisions of Article 351-A of the CSR liberally or equitably. The appellant-respondents have proceeded on the presumption that once the respondent-petitioner was placed under suspension during the period of his service then, even if the suspension is revoked prior to retirement, the provisions of Explanation (a) of the CSR would enure to their benefit. In our opinion, this presumption and interpretation is fallacious. It has been held by the Supreme Court that a legal fiction is created only for some definite purpose and it is to be limited for the purpose for which it was created and should not be extended beyond that legitimate field17. For Explanation (a) of the CSR to be applicable the incumbent must be under suspension from a date prior to his retirement and continue to be under suspension till the date of his retirement.

40. To further test the extent of operability of the aforesaid Explanation (a), a situation may arise where the charges framed against a pensioner are issued to him during his service and thereafter, those charges are withdrawn conditionally prior to his retirement and a fresh chargesheet is issued after retirement, and it is claimed by the employer that since charges framed against the pensioner were issued on a date prior to his retirement, therefore, the departmental proceedings would be deemed to have been instituted. That situation also would result in absurdity which cannot be the purpose of the legal fiction created in Explanation (a) to Article 351-A of the CSR.

41. Under the circumstances, we find that the learned Judge was justified in holding that on the date of his retirement on 31.12.2018, the respondent-petitioner was not under suspension and, so as a corollary, departmental proceedings could not be deemed to have been instituted against the respondent-petitioner.

42. We may now proceed to look into the three conditions appearing in Clause (a) of the first proviso to Article 351-A of the CSR, having regard to the fact situation of the present case. Annexure No. 2 to the writ petition was a letter dated 5.11.2019 issued to the respondent-petitioner by the Inquiry Officer-cum-Superintendent Engineer stating that the copies of the approved charge-sheets were being enclosed and directing that detailed and clear reply/submissions to the charge-sheets along with the evidence be submitted within 15 days of the receipt of the letter. A perusal of the enclosures to the aforesaid letter dated 5.11.2019 reveals that it contains note sheets containing office orders and other enclosures. The office comments and orders are on consecutive pages which also includes narration of two charge-sheets. The first charge-sheet appears on page 94 of the affidavit filed alongwith this appeal. The first charge against the respondent-petitioner is that he had concealed correct facts and had obtained appointment under the dying in harness

rules to the post of Patrolman and joined on 04.06.1975 by playing fraud. That he was well aware that minimum age of appointment was 18 years whereas the entries in the service book and the date of birth reflected in his High School certificate was 15.12.1958 and at the time of his appointment, his age was less by 1 year 6 months and 11 days than the minimum prescribed age and that he was not eligible for the post. The second charge is that the respondent-petitioner and his brother Yogendra Sharma, by concealing material facts, both obtained appointment under the dying in harness rules whereas only one person of the family could be granted appointment. The second charge-sheet contains five charges, each of which pertain to theft of electricity and other charges, apparently pertaining to his periods of posting from 1.10.2017 to 2.1.2018 and from 3.1.2018 to 20.11.2018.

On perusal of the aforesaid note sheet it appears that the notings/comments therein and narration of the charge-sheets were made with a view to obtain sanction of the competent authority for departmental proceedings.

43. On page 98 of the affidavit is a note put up by various officials for obtaining sanction for departmental proceedings. However, a fresh proposal was sought as is evinced from a hand written note on that page of 12.4.2019. Thereafter, a fresh note dated 15.4.2019 was put up in which it was stated that the authority who could grant sanction for departmental proceedings against the retired respondent-petitioner, was the Managing Director of UPPCL in view of Article 351-A of the CSR. The last paragraph of this note that appears on page 99 of the affidavit is marked on the margin with the Devanagari alphabet "क". After referring to the two charge-sheets, the aforesaid last paragraph on page 99 of the affidavit states that after obtaining sanction under Article 351-A of the CSR from the Managing Director of the UPPCL, the same be sent to the Managing Director under the directions of the Corporation with regard to the final proceedings against the respondent-petitioner, and that the matter be placed as soon as possible before the Director of UPPCL. Below this note, there is a handwritten note of an Under Secretary dated 5.4.2019 stating "कृपया उपरोक्तत पाश्तोकित अंश 'क' पर विचार कर प्रवन्ध निदेशक महोदया का अनुमोदन प्राप्त करना चाहे।" Translated it reads to the effect that please deliberate over the aforesaid part marked as "क" and obtain the sanction of the Managing Director. Below this note are several signatures, apparently by some officials, as well as the signature of the Managing Director of UPPCL which was appended on 24.4.2019. It is clear from this document that the signature of the Managing Director of UPPCL, who is the Authority competent to sanction the disciplinary proceedings under condition (i) of Clause (a) of the first proviso to Article 351-A of the CSR, has been made only on the basis of bald signatures of subordinate officials and some brief recommendations. There appears nothing on record to demonstrate that the Managing Director of the UPPCL had accorded sanction either by approving the note put before him or by recording sanction. The signature of the Managing Director appears to have been made by the authority as a perfunctory duty rather than as a mark of sanction after due application of mind.

It is noticed that in the notings there is no discussion or deliberation whatsoever with regard to the fact whether the departmental proceedings against the petitioner could be instituted in view of the first proviso to Article 351-A of the CSR. The 'comments and orders' appearing on the note sheets are mere narrations of the undated complaint received against the petitioner with regard to his initial appointment, the misconduct committed by him by illegally energizing tubewells, etc.; the various letters

issued by the authorities; and the narration of the two charge-sheets along with the evidence pertaining to each charge-sheet. It was, therefore, incumbent on the Managing Director to apply her mind to the fact whether departmental proceedings could be initiated against the petitioner in view of the first proviso to Article 351-A, which, was evidently not done.

44. In the ninth edition of the Black's Law Dictionary the verb 'sanction' is defined as to approve, authorize or support. Clause (a)(i) of the first proviso to Article 351-A of the CSR places a complete bar on institution of departmental proceedings without the sanction of the Governor (in the present case, the Managing Director of UPPCL). That is to say that the authority has to apply its mind and deliberate on the matter, on the basis of the facts appearing on record, whether to grant sanction or not, for institution of departmental proceedings. Therefore, the import of the word 'sanction' so appearing actually indicates a decision authorising departmental proceedings after consideration of the material on record and application of mind thereon. It does not mean that the sanctioning authority has to see the material and evidence threadbare and pass judgement. The authority has only to be satisfied that the basis for departmental proceedings exist entailing sanction. Therefore, in the present case, the Managing Director was required to consider, prima facie, not only the charges framed and the evidence available, but also whether the departmental proceedings were in respect of an event which took place not more than four years before the institution of the proceedings {Clause (a) (ii) of the first proviso to Article 351-A of the CSR}. The Managing Director, while according sanction, may direct that the departmental proceedings shall be conducted by which authority and in which place or places {Clause (a) (iii) of the first proviso to Article 351-A of the CSR}, the mandate, however, being that the departmental proceedings shall be conducted in accordance with the procedure applicable to proceedings on which an order of dismissal from service may be made.

The contents of the first charge-sheet reveal that it pertains to an alleged mis-conduct of the petitioner at the time of his initial appointment. Therefore, there cannot be any valid sanction to the departmental proceedings in respect of the first charge-sheet against the petitioner. The consolidated notings pertained to both the charge-sheets and a single signature of the sanctioning authority appears at the end, which without anything further, cannot imply sanction.

45. The word 'sanction' has been used in statutes on criminal law, for example, in Section 197 of the Code of Criminal Procedure and in Section 19 of the Prevention of Corruption Act. Though seeking aid of statutes pertaining to criminal law in interpreting a word in service law is fraught with pitfalls, however, for want of other appropriate aids to construction, some judgements may be referred to.

46. In the case of **State of Bihar and another Vs. P.P. Sharma, IAS and another,18** while referring to the sanction for prosecution to be accorded under Section 197 of the Cr.P.C., this Court held as follows:

"67. It is equally well settled that before granting sanction the authority or the appropriate Government must have before it the necessary report and the material facts which prima facie establish the commission of offence charged for and that the appropriate Government would apply their mind to those facts. The order of sanction only is an administrative act and not a quasi-judicial one nor is a lis involved. Therefore, the order of sanction need not contain detailed reasons in support thereof as was contended by Sri Jain. But the basic facts that constitute the offence must be apparent on the

impugned order and the record must bear out the reasons in that regard. The question of giving an opportunity to the public servant at that stage as was contended for the respondents does not arise. Proper application of mind to the existence of prima facie evidence of the commission of the offence is only a precondition to grant or refuse to grant sanction."

47. Similarly, in the case of **Manshukhlal Vithaldas Chauhan Vs. State of Gujrat19,** the Court has held as under:

"19. Since the validity of "sanction" depends on the applicability of mind by the sanctioning authority to the facts of the case as also the material and evidence collected during investigation, it necessarily follows that the sanctioning authority has to apply its own independent mind for the generation of genuine satisfaction whether prosecution has to be sanctioned or not. The mind of the sanctioning authority should not be under pressure from any quarter nor should any external force be acting upon it to take decision one way or the other. Since the discretion to grant or not to grant sanction vests absolutely in the sanctioning authority, its discretion should be shown to have not been affected by any extraneous consideration. If is shown that the sanctioning authority was unable to apply its independent mind for any reason whatsoever or was under an obligation or compulsion or constraint to grant the sanction, the order will be bad for the reason that the discretion of the authority "not to sanction" was taken away and it was compelled to act mechanically to sanction the prosecution."

48. While considering the requisites of validity sanction under Section 19 under the Prevention of Corruption Act, 1988, the Supreme Court in the case of **State (Anti-Corruption Branch), Govt. of NCT of Delhi and another** Vs. Dr. R.C. Anand and another20, opined that the sanctioning authority has only to see whether the facts disclosed in the complaint prima facie disclose commission of an offence or not, and, that all the relevant facts has been considered by the sanctioning authority which implies application of mind. The Supreme Court went on to observe that the order of sanction must ex-facie disclose that the sanctioning authority had considered the evidence and other material placed before it.

49. A perusal of page 99 of this appeal on which reliance is placed by the appellant in an attempt to show sanction of the departmental proceeding, does not ex-facie disclose that the Managing Director had applied its mind to the material on record in the light of the first proviso to Article 351-A of the CSR and had sanctioned departmental proceedings. The sanction as envisaged in Article 351-A of the CSR dons the Managing Director of UPPCL with the mantel of the Governor to accord sanction to such departmental proceedings after noticing that the ingredients for institution of such departmental proceedings exist. It should not be, as in the manner it appears on the record of the present case. Here the Managing Director has neither accepted the proposal for departmental enquiry nor has approved or sanctioned the departmental enquiry. He had just put his signature on the page, which by itself cannot be taken as grant of sanction in view of the fact situation of the instant case.

Conclusion:

50. Having considered the case in its entirety and after perusal of the record, in our opinion on the basis of the discussion above, the alleged sanction for departmental proceedings granted by the Managing Director of UPPCL under Article 351-A of the CSR is no sanction in the eyes of law and is, therefore, declared invalid.

51. However, this cannot preclude the appellant-respondents from instituting

departmental proceedings after obtaining a valid sanction if so permissible in law. But till a valid sanction is granted for departmental proceedings, the directions issued by the learned Judge for payments of retiral dues, etc. calls for no interference.

52. Subject to the above, the appeal is **dismissed.**

(2021)11ILR A733
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.11.2021

BEFORE

THE HON'BLE RAJAN ROY, J.
THE HON'BLE MANISH KUMAR, J.

Special Appeal Defective No. 360 of 2021

Rasool Ahmad ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Anuj Dayal, Manish Srivastava, Mukesh Kumar

Counsel for the Respondents:
C.S.C.

A. Service Law – Pension – Corruption - Prevention of Corruption Act, 1988 - Sections 7 & 13 - Civil Services Regulation - Regulation 351 - Regulation 351 provides that future good conduct is an implied condition of ever grant of a pension. The State Government reserve to themselves the right of withholding or withdrawing a pension or any part of it, if the pensioner be convicted of serious crime or be guilty of grave misconduct. The decision of the State Government on any question of withholding or withdrawing the whole or any part of pension under the Regulation shall be final and conclusive. (Para 7)

B. The seriousness of the crime is to be determined not merely with reference to quantum of sentence but with the nature of the offence and the degree of involvement of a government servant therein. (Para 8)

The writ court has not discussed the term 'serious crime' in the light of the facts of the case in detail. It has opined that the concerned authority has already done so. The writ court seems to have been persuaded by the fact that **the petitioner was found guilty of corruption under the provisions of the Act, 1988 which for a government servant was apparently a serious crime.** (Para 9)

In the case at hand, the complainant as is borne out from the appellate court's judgment, was a small farmer who was claiming his right under the revenue laws for getting his land measured as the land as shown in the record was more whereas the land/plot on the spot was less. The Revenue Inspector authorized the petitioner-appellant before us, Rasool Ahmad, who was Lekhpal at the relevant time for measurement of the allotted plot and the complainant met the appellant herein several times but the appellant demanded Rs. 400/- as bribe and ultimately, he agreed for an amount of Rs. 300/-. (Para 11)

The petitioner was a government servant who was under obligation to perform his duty but he demanded bribe for carrying out his rightful obligations. **The seriousness of the offence is apparent on the face of the record. Merely because, the concerned authority who has passed the order u/Regulation 351 as well as the writ court have not discussed this aspect of the matter in detail, there can be no ground for allowing the appeal of the appellant against the order of the writ court. The facts of the case speak for themselves and do not need any further elaboration.** (Para 11)

Appeal dismissed. (E-4)

Precedent followed:

1. Shivgopal Vs St. of U.P., 2019 (37) LCD 1859 (Para 4)

Present appeal assails order dated 11.08.2021, passed by writ court.

(Delivered by Hon'ble Rajan Roy, J.
&

Hon'ble Manish Kumar, J.)

(C.M. Application No. 127746 of 2021)

1. This is an application seeking condonation of delay in filing the appeal.

2. Heard.

3. The cause shown for the delay in filing the appeal is sufficient. The application is allowed and the delay in filing the appeal is condoned.

(Special Appeal Defective no.360 of 2021)

4. This is an intra-court appeal against the judgment dated 11.08.2021 passed by the writ court. The facts of the case in brief are that the petitioner herein who was working as Lekhpal in the Revenue Department of Government of Uttar Pradesh was tried for the offence under Section 7 read with Section 13 of the Prevention of Corruption Act, 1988 (in short "the Act, 1988') wherein he was convicted by the trial court vide judgment dated 17.08.2013 and sentenced to undergo imprisonment of one year with fine of Rs.2,000/-. He preferred an appeal against the said judgment under the provisions of the Code of Criminal Procedure which was dismissed on 06.09.2014. Consequent thereto, an order was passed under Regulation 351 of the Civil Services Regulation as applicable in the State of Uttar Pradesh withholding the entire pension of the petitioner. This order was dated 25.05.2017 which was communicated to the petitioner by another order dated 26.05.2017. Both these orders were put to challenge by the petitioner in Writ Petition No.7896 (S/S) of 2018. The writ petition has been dismissed vide order dated 11.08.2021 and it is this judgment which is the subject matter of this intra-court appeal. Before the writ court, the case of the petitioner-appellant was that Regulation 351 Civil Services Regulation applies only in the case of serious offences and a full bench judgment of this Court in the case of **''Shivagopal vs. State of U.P.'** reported in 2019 (37) LCD 1859 has explained as to what is meant by the term "serious crime' as used in Regulation 351. Learned counsel for the petitioner relied upon paragraph no.39 of the said judgment which reads as under:

"39. The expression 'serious crime' has to be understood in the context of service jurisprudence involving the government servant. It may be any act or omission which in the opinion of the competent authority in serious enough and calls for punitive action in terms of Article 351. It has no bearing with the quantum of sentence but with the nature of the offence and the degree of involvement of the government servant in the commission/ omission of the crime."

5. It is contended that seriousness of the crime does not depend upon the quantum of sentence but it is concerned with the nature of the offence and the degree of involvement of the government servant in the commission/ omission of the crime. Learned counsel invited our attention to the orders which were the subject matter of the writ petition to contend that the said order was passed under Regulation 351 only on account of conviction of the petitioner in the criminal case as referred hereinabove without considering the seriousness of the crime which was *sine qua non* for withholding of entire pension of the petitioner under Regulation 351. He then took us through the judgment of the writ court and contended that even the writ court did not consider the alleged seriousness of the crime but presumed that the same had been considered by the competent authority which, in fact, it had not done. These are the only two points which have been pressed by learned counsel for the appellant before us.

6. Regulation 351 reads as under

"351. Future good conduct is an implied condition of ever grant of a pension. The State Government reserve to themselves the right of withholding or withdrawing a pension or any part of it, if the pensioner be convicted of serious crime or be guilty of grave misconduct.

The decision of the State Government on any question of withholding or withdrawing the whole or any part of pension under this regulation shall be final and conclusive."

7. Regulation 351 provides that future good conduct is an implied condition of ever grant of a pension. The State Government reserve to themselves the right of withholding or withdrawing a pension or any part of it, if the pensioner be convicted of serious crime or be guilty of grave misconduct. The decision of the State Government on any question of withholding or withdrawing the whole or any part of pension under the Regulation shall be final and conclusive.

8. Paragraph 39 of the full bench decision in **Shivagopal's case (supra)** has already been quoted by us hereinabove, according to which, the seriousness of the crime is to be determined not merely with reference to quantum of sentence but with the nature of the offence and the degree of involvement of a government servant therein.

9. When we peruse the orders passed by the concerned authority forfeiting the entire pension of the petitioner, we do not find a detailed and reasoned consideration as to the seriousness of the crime and the said order proceeds on the premise of his conviction under the Act, 1988. Possibly, the fact that the petitioner was a government servant, a Lekhpal, who had taken bribe from a small farmer and was convicted by the trial court prevailed upon the concerned authority in passing the said order but the authority should have discussed the matter in the light of the term "serious crime' as used in Regulation 351 in greater detail than what has been done. Thereafter, when we peruse the order of the writ court, we find that the writ court has also not discussed the term "serious crime' in the light of the facts of the case in detail. It has opined that the concerned authority has already done so. The writ court also seems to have been persuaded by the fact that the petitioner was found guilty of corruption under the provisions of the Act, 1988 which for a government servant was apparently a serious crime.

10. Now, when we consider the conviction of the petitioner-appellant under Section 7 read with Section 13 of the Act, 1988 in the light of the appellate court's judgment as the trial court judgment is not before us and has not been filed, we find that the complainant Vedram moved an application before the Superintendent of Police, Prevention of Corruption Organization, Lucknow, alleging therein that he is a small farmer in Village Virahimpur, Police Station Pali, Tehsil Sahabad District Hardoi. He got an allotment of land bearing no.154. The area of the allotted land was lesser than the mentioned in the document, therefore, he moved an application for its inspection and measurement before the Sub-Divisional Magistrate, Sahabad. On this application, the Sub Divisional Magistrate, Sahabad, ordered for measurement of the said plot to Tehsildar, Sahabad. On 05.12.1992, the complainant again moved an application to this effect to the Tehsildar Sahabad on which the Bhumi Nirikshak was directed to measure the land and to handover the possession of the land to the complainant. On 05.12.1992, Bhumi Nirikshak authorized the appellant Rasool Ahmad, who was Lekhpal at the relevant time for the measurement of the allotted plot and the complainant several times met Rasool Ahmad but he made a demand of Rs.400/- as bribe and ultimately he agreed for an amount of Rs.300/-. The complainant, in the presence of one Avadhesh Singh and Rampal,

gave Rs.100/- to the appellant about one and half month prior to the incident. Even thereafter he continued his demand for remaining bribe of Rs.200/- and declined to measure the plot unless the said amount is paid to him. The complainant was not willing to give the bribe, therefore, he reported this matter to the Superintendent of Police, Prevention of Corruption Organization, Lucknow, and thereafter, a trap was laid after completing all formalities. On 30.03.1993 near sweat shop of Jaideo Pandit situated in Tehsil Sahabad, the present appellant was arrested in trap proceedings and four treated notes of Rs.50/- each were recovered from his possession. The post trap formalities were also completed. After investigation of the case, the charge sheet was filed against the appellant. Thereafter, the trial was held in which the offence with which the petitioner was charged under Section 7 read with Section 13 of the Act, 1988, was proved. The appeal against the said conviction has been dismissed as already noticed. We may mention at this stage that as per appellate court's judgment dated 06.09.2014, learned counsel for the petitioner-appellant did not press the appeal on merits but contended that the incident had taken place in the year 1993 and the appellant has already undergone the trauma of criminal appeal for about 21 years, he was aged 65 years, the only allegation is of receiving bribe of Rs.200/-, a petty amount, for which the appellant has already undergone detention of about two months and in these circumstances it was submitted that the appellant may be sentenced with the period already undergone by him. The contention was repelled by the appellate court and his conviction as also sentence by the trial court was maintained in appeal.

11. The State of Uttar Pradesh is largely an agrarian State. Lekhpals have been assigned duties under the revenue laws relating to measurement etc of land. They provide requisite assistance to higher authorities in this regard. Most of the farmers in the State are small or marginal. In the case at hand, the complainant as is borne out from the appellate court's judgment, was a small farmer who was claiming his right under the revenue laws for getting his land measured as the land as shown in the record was more whereas the land/ plot on the spot was less. The Revenue Inspector authorized the petitioner-appellant before us, Rasool Ahmad, who was Lekhpal at the relevant time for measurement of the allotted plot and the complainant met the appellant herein several times but the appellant demanded Rs.400/- as bribe and ultimately, he agreed for an amount of Rs.300/-. It has come in the order of the appellate court in the criminal appeal that the complainant in the presence of one Avadhesh Singh and Rampal gave Rs. 100/- to the appellant. Even thereafter the appellant continued to demand the remaining bribe of Rs.200/- and declined to measure the plot unless the said amount is paid to him. The court only empathizes with the humiliation and trauma which the said small farmer/ complainant must have undergone that too for claiming his rights under the law and not for any illegal act. The petitioner was a government servant who was under obligation to perform his duty but he demanded bribe for carrying out his rightful obligations. The seriousness of the offence is apparent on the face of the record. Merely because, the concerned authority who has passed the order under Regulation 351 has not discussed this aspect of the matter in detail and the writ court may also not have done so accordingly, can be no ground for allowing the appeal of the appellant against the order of the writ court. The facts of the case speak for themselves and do not need any further elaboration. Corruption is the bane of our society. One who suffers corruption alone can feel the pinch of it. As already stated, small farmers, when they are compelled to pay bribe in the manner in which the appellant compelled the complainant, it is most unfortunate thing to happen even after 75 years of independence.

Seriousness of the crime being self-evident and apparent and as we have considered the same, none of the grounds raised by the appellant's counsel before us persuade us to take any other view of the matter.

12. Accordingly, we **dismiss** this appeal.

(2021)11ILR A737
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.08.2021

BEFORE

THE HON'BLE MUNISHWAR NATH BHANDARI, A.C.J.
THE HON'BLE ANIL KUMRA OJHA, J.

Special Appeal Defective No. 343 of 2021
connected with other cases

Abhishek Srivastava & Ors. ...Appellants
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellants:
Sri Santosh Kumar Tripathi, Sri Naresh Chandra Rajvanshi(Senior Advocate)

Counsel for the Respondents:
C.S.C.

A. Service Law – Education – Appointment/Selection – Challenge to answer key - The writ petitions were filed to challenge the answer key published on 5.8.2020 in reference to the examination conducted on 6.1.2019. It was for the selection on the post of Assistant Teacher. Taking into consideration the limited jurisdiction of the High Court, the learned Single Judge did not find a case for acceptance of the arguments for challenge to the answer key. Present appeals have been preferred to challenge the judgment and have been pressed by the appellants in reference to correctness of the answer of six questions leaving others. In one appeal, argument has been raised in reference to two questions alleging them to be out of syllabus. (Para 5, 6)

Jurisdiction of this Court to examine the correctness of the answer – After the judgment in the case of *Ran Vijay Singh* (infra), the jurisdiction of this Court is very limited in the case.

The law on the subject is quite clear and few significant conclusions are: (Para 7)

(i) If a statute, Rule or Regulation governing an examination permits the re-evaluation of an answer sheet or scrutiny of an answer sheet as a matter of right, then the authority conducting the examination may permit it;

(ii) **If a statute, Rule or Regulation governing an examination does not permit re-evaluation or scrutiny of an answer sheet (as distinct from prohibiting it) then the Court may permit re-evaluation or scrutiny only if it is demonstrated very clearly, without any "inferential process of reasoning or by a process of rationalisation" and only in rare or exceptional cases that a material error has been committed;** (Para 7, 8, 13, 17)

(iii) The Court should not at all re-evaluate or scrutinize the answer sheets of a candidate - it has no expertise in the matter and academic matters are best left to academics;

(iv) The Court should presume the correctness of the key answers and proceed on that assumption; and (Para 7, 9)

(v) In the event of a doubt, the benefit should go to the examination authority rather than to the candidate. (Para 7, 9, 19, 23, 31, 34)

The Hon'ble Court observes that only one question (Question No. 60) out of 6, deserves consideration and a *prima facie* case is made out by the appellants as none of the options provided the correct answer, but for the remaining 5 questions appeals would be governed by the judgment of the Apex Court in the case of *Ran Vijay Singh* (infra). (Para 35, 37, 42)

As far as 2 questions being out of syllabus are concerned Court observed that according to the appellants, both the questions were not falling in the subject of Chemistry and, therefore, they were out of syllabus but the fact that syllabus was not only having subject of Chemistry but 'General Science and Science

in Daily Life' and both the questions are covered by that topic. Thus, Court held that concerned questions (Question Nos. 71 and 79) were not out of syllabus and respondents cannot be directed to ignore both the questions. (Para 36)

B. It is stated that selections have already been finalized followed by appointments but merely for that reason, the candidates having a case in their favour cannot be deprived to get benefit. Keeping in mind that selections have already been completed followed by appointments, direction in these appeals would apply only to those candidates who have raised the issue by maintaining a writ by now and not to any other candidate. The benefit to the candidates therein also would be if they are short of one mark because the value of each question is of one mark. If with award of one mark to any of the litigants till date before Allahabad High Court, they find place in the merit, then the respondents would give them appointment, subject to satisfaction of other conditions, if any. If any of the litigant till date are short by two marks in the merit, they would not be entitled to any benefit of this judgment. (Para 38, 40, 41)

Appeals disposed off. (E-4)

Precedent followed:

1. Ran Vijay Singh & ors. Vs St. of U.P. & ors., (2018) 2 SCC 357 (Para 7)

Present appeal challenges judgment and order dated 07.05.2021, passed by learned Single Judge.

(Delivered by Hon'ble Munishwar Nath Bhandari, A.C.J.
&
Hon'ble Anil Kumar Ojha, J.)

1. Exemption application is allowed in all the appeals.

2. The appellants are exempted from filing certified copy of the impugned judgment and order dated 07.05.2021 passed by the learned Single Judge.

3. Heard Sri Vishesh Rajvanshi, Sri Satyendra Chandra Tripathi, Amit Kumar Singh Bhadauriya, Sri Arun Kumar Dubey, Sri Ritesh Srivastava, Sri Navin Kumar Sharma, Sri Anurag Agrahari, Sri Rahul Kumar Mishra, Sri Seemant Singh, Sri Sidharth Mishra, Sri Ram Chandra Solanki, Sri Javed Raza, Sri Anurag Tripathi, Sri Surendra Nath Chauhan, Sri Satya Prakash Singh, Sri Ashok Kumar Dwiwedi, Sri Shiv Sagar Singh and Sri Chetan Chatterjee, learned counsels for the appellants and Sri M.C. Chaturvedi, learned Additional Advocate General, Sri Suresh Singh, learned Additional Chief Standing Counsel, Sri Pankaj Rai, learned learned Additional Chief Standing Counsel, Sri Rajiv Singh, learned learned Standing Counsel for the respondent-State.

4. By this batch of appeals, challenge is made to the judgment dated 07.05.2021 by which the batch of writ petitioners was dismissed.

5. The writ petitions were filed to challenge the answer key published on 05.08.2020 in reference to the examination conducted on 06.01.2019. It was for the selection on the post of Assistant Teacher. It was pursuant to the notification dated 01.12.2018 to invite applications for the selection. The batch of writ petitions in these appeals was in second round of litigation to challenge the answers selected by the respondents. The first bunch of writ petitions was decided by a detailed order. The learned Single Judge, however, considered the arguments again in reference to challenge to the correctness of the answers selected by the respondents.

6. Taking into consideration the limited jurisdiction of the High Court, the learned Single Judge did not find a case for acceptance of the arguments for challenge to the answer key. These appeals have been preferred to challenge the judgment and has been pressed by the appellants in reference to correctness of the answer of six questions leaving others. In one

appeal, argument has been raised in reference to two questions alleging them to be out of syllabus.

7. The first issue for our consideration would be about jurisdiction of this Court to examine the correctness of the answer. The legal position in that regard is elaborately dealt with by the Apex Court in catena of judgments and for that recent judgment is the case of '**Ran Vijay Singh and others vs. State of U.P and others' (2018) 2 SCC 357**. The Apex Court has referred the earlier judgments and summarized the legal proposition in the following terms:

"30. The law on the subject is therefore, quite clear and we only propose to highlight a few significant conclusions. They are: (i) If a statute, Rule or Regulation governing an examination permits the re-evaluation of an answer sheet or scrutiny of an answer sheet as a matter of right, then the authority conducting the examination may permit it; (ii) ***If a statute, Rule or Regulation governing an examination does not permit re-evaluation or scrutiny of an answer sheet (as distinct from prohibiting it) then the Court may permit re-evaluation or scrutiny only if it is demonstrated very clearly, without any "inferential process of reasoning or by a process of rationalisation" and only in rare or exceptional cases that a material error has been committed; (iii) The Court should not at all re-evaluate or scrutinize the answer sheets of a candidate - it has no expertise in the matter and academic matters are best left to academics; (iv) The Court should presume the correctness of the key answers and proceed on that assumption; and (v) In the event of a doubt, the benefit should go to the examination authority rather than to the candidate.***

31. On our part we may add that sympathy or compassion does not play any role in the matter of directing or not directing re-evaluation of an answer sheet. If an error is committed by the examination authority, the complete body of candidates suffers. The entire examination process does not deserve to be derailed only because some candidates are disappointed or dissatisfied or perceive some injustice having been caused to them by an erroneous question or an erroneous answer. All candidates suffer equally, though some might suffer more but that cannot be helped since mathematical precision is not always possible. This Court has shown one way out of an impasse - exclude the suspect or offending question.

32. It is rather unfortunate that despite several decisions of this Court, some of which have been discussed above, there is interference by the Courts in the result of examinations. This places the examination authorities in an unenviable position where they are under scrutiny and not the candidates. Additionally, a massive and sometimes prolonged examination exercise concludes with an air of uncertainty. While there is no doubt that candidates put in a tremendous effort in preparing for an examination, it must not be forgotten that even the examination authorities put in equally great efforts to successfully conduct an examination. The enormity of the task might reveal some lapse at a later stage, but the Court must consider the internal checks and balances put in place by the examination authorities before interfering with the efforts put in by the candidates who have successfully participated in the examination and the examination authorities. The present appeals are a classic example of the consequence of such interference where there is no finality to the result of the examinations even after a lapse of eight years. Apart from the examination authorities even the candidates are left wondering about the certainty or otherwise of the result of the examination - whether they have passed or not; whether their result will be approved or disapproved by the Court; whether they will get admission in a college or University or not; and whether they will get recruited or not. This unsatisfactory situation

does not work to anybody's advantage and such a state of uncertainty results in confusion being worse confounded. The overall and larger impact of all this is that public interest suffers".

8. The judgment in the case of **Ran Vijay Singh** (supra) was given after referring to the earlier judgments wherein it was held that the answer key should be assumed to be correct unless it is proved to be wrong with strong reasoning based on material. It should demonstrated very clearly to be wrong that is to say, it must be such that no reasonable person would accept the answers selected by the examining body. The learned Single Judge has considered the judgment aforesaid in detail and otherwise we find that after the judgment in the case of **Ran Vijay Singh** (supra), the jurisdiction of this Court is very limited in the case.

9. With the aforesaid, we would like to examine the questions against which objections have been raised but keeping in mind the ratio propounded by the Apex Court in the case of **Ran Vijay Singh** (supra) and more specifically para 30 of the said judgment quoted above. As per the judgment of the Apex Court in the case of **Ran Vijay Singh** (supra), Court is to presume the correctness of answer key and proceed on that assumption. In the event of any doubt, benefit should go to the examination authority rather than to the candidate. It is with a rider that the Court should not re-evaluate or scrutinize the answer-sheet of the candidate as it has no expertise in the matter. The academic matters are best left to the academics.

10. The first question on which doubts has been raised is Question No. 47. Learned counsel for the appellants submit that option No.1 was wrongly taken to be the correct answer to Question no. 47. According to the appellants, option No.3 or option No.4 was the correct answer. To examine the issue aforesaid, question No. 47 with four options is quoted as under:

"47. In India, poverty is estimated on the basis of;

(1) household consumption expenditure

(2) per capita income

(3) per capita expenditure

(4) None of the above"

11. According to the appellants, option No.3 is the correct answer and few appellants have preferred option No. 4 to be correct. They have produced material to reflect that correct answer is option No.3 i.e. *"per capita expenditure"' or "none of the above"*. We would be referring to the material relied by the appellants. The material relied by the appellant does not clearly show option No.3 or 4 to be correct. The expert has also given its opinion about the correctness of option No.1. As far as the appellants are concerned, they have relied on extracts of certain books which is Class 9th Secondary Education Textbook and N.C.E.R.T. Textbook-2017. The extract of both the books is quoted hereunder:-

"निर्धनता रेखा

निर्धनता पर चर्चा केंद्र में सामान्यतया 'निर्धनता रेखा' की अवधारणा होती है। निर्धनता के आकलन की एक सर्वमान्य सामान्य विधि आय अथवा उपभोग स्तरों पर आधारित है। किसी व्यक्ति को निर्धन माना जाता है यदि उसकी आय या उपभोग स्तर किसी ऐसे 'न्यूनतम स्तर' से नीचे गिर जाए जो मूल आवश्यकताओं के एक दिन हुए समूह को पूर्ण करने के लिए आवश्यक है। मूल आवश्यकताओं को पूर्ण करने के लिए आवश्यक वस्तुएँ विभिन्न कालों एवं विभिन्न देशों में भिन्न है। अतः काल एवं स्थान के अनुसार निर्धनता रेखा भिन्न हो सकती है प्रत्येक देश एक काल्पनिक रेखा का प्रयोग करता है, जिसे विकास एवं उसके स्वीकृत न्यूनतम सामाजिक

मानदंडो के वर्तमान स्तर के अनुरूप माना जाता है। उदाहरण के लिए, अमेरिका में उस आदमी को निर्धन माना जाता है जिसके पास कार नहीं है, जबकि भारत मे अब भी कार रखना विलासिता मानी जाती है।

भारत मे निर्धनता रेखा का निर्धारण करते समय जीवन निर्वाह के लिए खाद्य आवश्यकता, कपडों, जूतों, ईधन और प्रकाश, शैक्षिक एवं चिकित्सा संवंधी आवश्यकताओं आदि पर विचार किया जाता है। इन भौतिक मात्राओं को रूपयों में उनकी कीमतों से गुणा कर दिया जाता है। निर्धनता रेखा का आकलन करते समय खाद्य आवश्यकता के लिए वर्तमान सूत्र वांछित कैलोरी आवश्यकताओं पर आधारित है। खाद्य वस्तुएँ जैसे- अनाज, दालें, सब्जियाँ, दूध, तेल, चीनी आदि मिलकर इस आवश्यक कैलोरी की पूर्ति करती हैं। आयु, लिंग, काम करने की प्रकृति आदि के आधार पर कैलोरी आवश्यकताएँ बदलती रहती है। भारत में स्वीकृत कैलोरी आवश्यकता ग्रामीण क्षेत्रों मे 2400 कैलोरी प्रतिव्यक्ति प्रतिदिन एवं नगरीय क्षेत्रों में 2100 कैलोरी प्रति व्यक्ति प्रतिदिन है। चूँकि ग्रामीण क्षेत्रों में रहने वाले लोग अधिक शारीरिक कार्य करते हैं, अतः ग्रामीण क्षेत्रों में कैलोरी आवश्यकता शहरी क्षेत्रों की तुलना में अधिक मानी गई है। अनाज आदि के रूप में इन कैलोरी आवश्यकताओं को खरीदने के लिए प्रतिव्यक्ति मौद्रिक व्यय को, कीमतों में वृद्धि को ध्यान में रखते हुए, समय-समय पर संशोधित किया जाता है।

इन परिकल्पनाओं के आधार पर वर्ष 2011-12 में किसी व्यक्ति के लिए निर्धनता रेखा का निर्धारण ग्रामीण क्षेत्रों में 816 रूपये प्रतिमाह और शहरी क्षेत्रों में 1000 रूपये प्रतिमाह किया गया था। कम कैलोरी की आवश्यकता के बावजूद शहरी क्षेत्रों के लिए उच्च राशि निश्चित की गई, क्योकि शहरी क्षेत्रों में अनेक आवश्यक वस्तुओं की कीमतें अधिक होती है। इस प्रकार, वर्ष 2011-12 में ग्रामीण क्षेत्रों में रहने वाला पाँच सदस्यों का परिवार निर्धनता रेखा के नीचे होगा, यदि उसकी आयु लगभग 4,080 रूपये प्रतिमाह से कम है इसी तरह के परिवार को शहरी क्षेत्रों में अपनी मूल आवश्यकताएँ पूरा करने के लिए कम से कम 5,000 रूपये प्रतिमाह की आवश्यकता होगी। निर्धनता रेखा का आकलन समय-समय पर (सामान्यतः हर पाँच वर्ष पर) प्रतिदर्श सर्वेक्षण के माध्यम से किया जाता है। **यह सर्वेक्षण राष्ट्रीय प्रतिदर्श सर्वेक्षण संगठन** अर्थात नेशनल सैंपल सर्वे ऑर्गनाईजेशन (एन.एच.एस.ओ.) द्वारा कराए जाते है, तथापि विकासशील देशो के बीच तुलना करने के लिए विश्व बैंक जैसे अनेक अंतर्राष्ट्रीय संगठन निर्धनता रेखा के लिए एक समान मानक का प्रयोग करते है, जैसे SI.9 (2011 पी.पी.पी.) प्रतिव्यक्ति प्रतिदिन के समतुल्य न्यूनतम उपलब्धता के आधार पर। "

12. As against it, the respondents have relied on a book written by P.K. Dhar. The relevant portion of that book is also quoted hereunder:-

"While fixing the poverty line, consumption of food is considered as the most important criteria but along with it some non food items such as clothing and shelter are also included.

However, in India we determine our poverty line on the basis of private consumption expenditure for buying both food and non-food items. Thus it is observed that in India, poverty line is the level of private consumption expenditure which normally ensures a food basket that would ensure the required amount of calories."

13. Perusal of the material relied by the appellants does not show an error on the face of it. The opinion of the expert is in favour of the examination authority. We have referred the judgment of the Apex Court defining the jurisdiction of the High Court for causing interference in the answers set by the examining body followed by an expert opinion. The Courts are having very limited jurisdiction. The interference in the answer can be made when it is palpably wrong. We do not find answer to Question No. 47 selected by the examining body to be wrong on the face of it. The opinion of

expert can not otherwise be ignored by the High Court unless material brought by party shows opinion to be wrong. The material relied by the expert shows basis to select answer No.1 to be correct. It shows per capita expenditure to be basis to estimate the poverty. Thus, we are unable to accept the argument of learned counsel for the appellants in regard to correctness of answer of Question No. 47.

14. The next question is Question No. 48 and the same is quoted hereunder:

"48. Who among the following was the first President of the Constituent Assembly of India?

(1) Dr. Sachchidananda Sinha
(2) Dr. Rajendra Prasad
(3) Dr. B.R. Ambedkar
(4) Prof. H.C. Mookerjee"

15. The answer selected by the examining body is option No.1. According to the appellants, option No.2 is the correct answer. It is submitted that Dr. Rajendra Prasad was the first President of the Constituent Assembly of India. The appellants had rightly opted for option No.2 as the correct answer. The respondents have wrongly taken option No. 1 to the aforesaid question to be the correct answer.

16. Both the parties have produced materials to press their argument. The issue aforesaid has otherwise been considered by the learned Single Judge and found Dr. Sachhidanand Sinha to be the first President of Constituent Assembly of India. It was only for some time and the first permanent President of Constituent Assembly of India was Dr. Rajendra Prasad. It is not in dispute that the charge of the post of the President of Constituent Assembly of India was first held by Dr. Sachhidanand Sinha. In view of the above, the option selected by the respondents cannot be said to be erroneous on the face of record. At this stage, learned counsel for the appellant made reference of the material to show that State Government itself selected option No. 2 to be the correct answer in subsequent examination. The answer to one and the same question could not have been two different answers in different selections. A reference of the information collected under Right to Information Act, 2005 from the Parliament has also been given. The first President of Constituent Assembly of India is shown to be Dr. Rajendra Prasad.

17. We have considered the submissions of the respective parties and find that the post of the President of Constituent Assembly of India was held by Dr. Sachhidanand Sinha and it was thereafter taken by Dr. Rajendra Prasad. The difference pointed out by the respective parties is that Dr. Sachhidanand Sinha was the first President of Constituent Assembly of India only for a small period while the first President of Constituent Assembly of India for five years was Dr. Rajendra Prasad. The perusal of the question does not refer to as to who was the first permanent President of Constituent Assembly of India. Accordingly, the answer selected by the respondents cannot be said to be palpably wrong.

18. The information received by the appellants from the Parliament in reference to the first President of Constituent Assembly of India. It may be ignoring the period of presidentship of Dr. Sachhidanand Sinha. In any case, the question was not as to who was the first President of Constituent Assembly of India for five years. It may be a case of doubt about the answer selected by the examination authority.

19. In view of the judgment of the Apex Court in the case of **Ran Vijay Singh** (supra), benefit of doubt is to be given to the examination authority. Thus, we are unable to accept the argument of learned counsel for the appellant to interfere in the finding of the learned Single Judge.

20. The other question is Question No. 54 and is quoted hereunder for ready reference:

"54. Disability to read and write is;
(1) autism
(2) dyslexia
(3) dyspraxia
(4) apraxia"

21. The material has been produced by the appellant to show that option No.3 selected by the respondents was not correct rather none of the answers were correct. Learned counsel for the appellant have made reference of C.B.S.E. handbook of Inclusive Education, 2020 apart from Diploma Hand Book and Physical Education Class 11 Handbook. The reference of question papers of different courses have also been given.

22. The word "dyslexia" means reading disorder and not writing whereas the answer selected by the examination authority is disability to read and write. As against the material referred by the appellants, respondents have referred to a book published by "White Swan Foundation'. There, "dyslexia" is reflected to be disability to read and write. The expert opinion also shows "dyslexia" to be disability of reading and writing.

23. In view of the above, we would go with the expert opinion in the light of the judgment of the Apex Court in the case of '**Ran Vijay Singh and others vs. State of U.P and others' 2018 (2) SCC 357.** It lays down the parameters for the Courts for exercise of the jurisdiction. Para 30 of the judgment (supra) has been quoted earlier and cover the issue. In case of doubt, benefit has to be given to the examiner and accordingly we do not find any reason to cause interference in the finding of the learned Single Judge in reference to answer to Question No. 54.

24. Now comes Question No. 60 and is quoted hereunder:

"60. Educational administration provides appropriate education to appropriate student by appropriate teacher by which they can able to become the best by using available maximum resources" This definition is given by;
(1) S.N. Mukherjee
(2) Carnbell
(3) Welfare Grahya
(4) Dr. Atmanand Mishra"

25. The answer selected by the respondents is option no.3 whereas none of the answer is correct, according to the appellants. The material used by the expert and produced even by the respondents shows that name of the author is not correctly mentioned. The name of the author is "Graham Balfour" whereas it is mentioned as "Welfare Grahya". In view of the aforesaid, learned counsel for the appellants submit that option No.3 was wrongly selected by the respondents to be the correct answer. The material relied by the appellants is the Educational Administration and Health Education. Relevant part of the document is quoted hereunder:

"Educational administration is to enable the right pupils to receive the right education from the right teachers, at a cost within the means of the state under conditions which will enable the pupils best to profit by their training-Graham Belfour"

26. It is also Educational Administration handbook by Graham Balfour and the same is also quoted hereunder:

"Graham Balfour
Educational Administration
Two Lectures Delivered Before the University of Birmingham in February, 1921"

27. Learned counsel for the non-appellant could not contest the issue. It is submitted that the correct answer to Question No. 60 is "Graham Balfour' and answer No. 3 is close to the aforesaid, thus, taken it to be the correct answer. We find that correct name of the author has not been given in any of the option. In those circumstances, respondents could not have taken option No.3 to be the correct answer when the name of the author is "Graham Balfour" and not "Welfare Grahya".

28. In view of the aforesaid, we find substance in the argument of learned counsel for the appellants as otherwise it could not be contested by the non-appellant looking to the name given in option No.3, different than the name exist in the books even referred by the expert. During the course of argument also, the material relied by the respondents shows the correct name to be "Graham Balfour" whereas the option taken by the respondents is "Welfare Grahya". The selection of option No.3 suffers from the error on the fact of it thus, could not be contested by the non-appellant and, therefore, we cause interference in the judgment of the learned Single Judge in regard to answer to Question No.60. The appropriate direction would be given at the end of the judgment in reference to Question No.60.

29. The dispute on the answer to Question No.106 has also been raised and for ready reference, it is quoted hereunder:

"106. Who was the originator of a cult named "Nath Panth'?

(1) Matsyendranath
(2) Gorakhnath
(3) Shri Nath
(4) Vasav"

30. The correct answer selected by the respondents was option No.1 whereas according to the appellants, option No.2 is the correct answer. Learned counsel for the appellants has made reference to the Lecturer Screening Exam-2018 to show "Gorakhnath" to be the originator of Nath Panth. The other material referred by them also shows "Gorakhnath" to be the originator as against the aforesaid, the respondents have also referred a book where the originator of Nath Panth is shown to be "Matsyendranath".

31. In view of the above, both the parties could refer to the material to show their answers to be correct. The material produced by the respondents shows option No.1 of the answer key to be correct while the material produced by the appellants shows option No. 2 to be the correct answer. According to the expert, the correct answer is "Matsyendranath" in reference to the book relied by him. In view of the materials produced by both the parties, issue remains under doubt but in view of the judgment of the Apex Court in the case of **Ran Vijay Singh** (supra), we would accept the opinion given by the expert by extending benefit of doubt to the examiner. Accordingly, we do not find reason to cause interference in the finding recorded by the learned Single Judge.

32. The answer to Question No. 111 is also required to be examined and accordingly the said question is also quoted hereunder:

"111. Central Glass and Ceramic Research Institute is located at:-

(1) Agra
(2) Khurja
(3) Kanpur
(4) Ferozabad"

33. The question quoted above refers to Central Glass and Ceramic Research Institute (hereinafter referred to as "Institute"). The correct answer taken by the respondents is option No.2 as a unit of the Institute exist at Khurja, Bulandshahar while the headquarter of

the Institute is at Kolkata. According to the opinion given by the expert, Central Glass and Ceramic Research Institute exist even at Khurja and thus they have rightly selected option No.2 to be the correct answer. It is doubted by the appellants. The Institute is located at Kolkata with its unit at Khurja. According to the expert, when part of the Institute or a branch of the Institute exist at Khurja, the respondents have rightly selected it to be the correct answer.

34. To support the argument aforesaid, reference of a book titled as *"Uttar Pradesh: Ek Samagra Adhyayan"* is given. In the said book, location of the Institute is shown at Khurja. In view of the above, we do not find any reason to cause interference in the finding of the learned Single Judge, it is when there is again doubt about the answer and benefit is to go to examination authority.

35. The finding aforesaid has been recorded in reference to the objection raise by the appellants to six questions and according to us, out of six questions, only Question No.60 deserves consideration and a *prima facie* a case is made out by the appellants but for the remaining questions, we govern these appeals by the judgment of the Apex Court in the case of **Ran Vijay Singh** (supra).

36. The further issue for consideration is in reference to Question Nos. 71 and 79. In some appeals, challenge to those questions have been made showing it to be out of syllabus. Learned Single Judge has dealt with the issue in reference to the syllabus and found that both the questions were not out of syllabus. The learned Single Judge found both the questions are covered by the topic "General Science/Science in Daily Life". We do not find any error in the finding recorded by the learned Single Judge as both the questions fall under the subject referred to above. According to the appellants, both the questions were not falling in the subject of Chemistry and, therefore, they were out of syllabus. The argument aforesaid was raised in ignorance of the fact that syllabus was not only having subject of Chemistry but General Science and Science in Daily Life. Thus, we do not find that Question Nos. 71 and 79 were out of syllabus so as to direct the respondents to ignore both the questions.

37. As an outcome of the discussion aforesaid, we find reason to cause interference in the judgement of the learned Single Judge limited to Question No. 60 and not for in any other questions for which objections have been raised by the appellants.

38. It is stated that selections have already been finalized followed by appointments but merely for that reason, the candidates having a case in their favour cannot be deprived to get benefit. Keeping in mind that selections have already been completed followed by appointments, direction in these appeals would apply only to those candidates who have raised the issue by maintaining a writ by now and not to any other candidate. The benefit to the candidates therein also would be if they are short of one mark because the value of each question is of one mark.

39. The matter is not referred to the expert for its examination finding that answer to Question No.60 was not correctly selected. The issue could not even be contested by the respondents thus to avoid further delay in the matter, we direct the respondents to take a decision appropriately to award one mark to the litigants till date.

40. To avoid any complication, the non-appellants can give value of one mark to the litigants for Question No.60 which otherwise can be with deletion to increase the value of all the questions proportionately but then it may open a Pandora and this Court do not intend to

disturb the appointments already made thus direction is kept limited to the writ petitioners. If with award of one mark to any of the litigants till date before Allahabad High Court, they find place in the merit, then the respondents would give them appointment, subject to satisfaction of other conditions, if any.

41. The exercise aforesaid would not effect in any manner the selection or appointments already made. The benefit would be given to the appellants and the writ petitioners, if they are short of one mark and not otherwise. If any of the litigant till date are short by two marks in the merit, they would not be entitled to any benefit of this judgment.

42. With the aforesaid direction, all the appeals are disposed of after causing interference in the impugned judgment limited to Question No. 60.

(2021)11ILR A746
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.10.2021

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE JAYANT BANERJI, J.

Special Appeal No. 174 of 2020

Rambir Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Suresh Chandra Dwivedi, Sri Siddharth Khare, Sri Ashok Khare(Senior Adv.)

Counsel for the Respondents:
C.S.C., C.S.C. Sri Ankit Gaur

A. Service Law – Appointment - Payment of Salary - U.P. Intermediate Education Act, 1921 - Regulations framed under the Act of 1921 - Regulation 101 of Chapter III - An appointment without prior approval u/Regulation 101 would be a nullity in so far as it purports to bind the State Government to grant aid to the institution concerned for payment of salary. (Para 16)

The decision in the case of *Pawan Kumar Misra* (infra), in which it was held that anything done without "prior approval" is a nullity, would have to be read in terms of the judgment of the SC (*State of U.P. Vs Principal Abhay Nandan Inter College & ors.*, AIR 2021 SC 4968), that is to say, an appointment without prior approval u/Regulation 101 would be a nullity in so far as it purports to bind the State Government to grant aid to the institution concerned for payment of salary. **The appointment made by the Principal of the Institution, and the Manager of the institution having forwarded the papers for approval of the appointment of the appellant-petitioner, would not be a nullity so far as the institution is concerned.** (Para 11, 16)

Neither the appellant-petitioner nor the institution concerned have any right to claim government aid for salary & ors. dues of the appellant-petitioner. **Since the appellant-petitioner has been found suitable for the post by the management and was appointed without "prior approval", the appointment would not be valid only as far as any right to claim aid u/Regulation 101 of Chapter III of the Regulation framed under the Act of 1921 is concerned.** Accordingly, the judgment of the learned Judge is upheld. However, this will not stand in the way of appellant-petitioner claiming entitlement to pay & ors. dues from the management itself. (Para 17)

Appeal dismissed. (E-4)

Precedent followed:

1. Jagdish Singh Vs St. of U.P. & ors., 2006 (3) ESC 2055 (Para 8)

2. Kailash Prasad Vs St. of U.P. & ors., 2008 (1) ESC 532 (Para 8)

3. Pawan Kumar Misra Vs Joint Director of Education, Azamgarh, 2017(12) ADJ 516 (Para 11)

4. Dhruv Kumar Pandey Vs St. of U.P. & ors., 2020 (4) ADJ 599 (Para 12)

5. State of U.P. Vs Principal Abhay Nandan Inter College & ors., AIR 2021 SC 4968 (Para 17)

Present appeal challenges judgment and order dated 27.10.2017, passed by learned Single Judge.

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

1. Heard Shri Ashok Khare, learned Senior Advocate assisted by Shri Siddharth Khare, for the appellant and learned Standing Counsel for the respondents.

2. This intra-court appeal has been filed challenging the judgement dated 27.10.2017, passed by a learned Judge of this Court in Writ-A No. 38251 of 2000 (Rambir Singh and another Vs. State of U.P. and others).

3. The case of the appellant-petitioner is that for being appointed as class IV employee in Janta Inter College, Saroorpur, Meerut (hereinafter referred to as the Institution), which is a recognized and aided institution under the provisions of the U.P. Intermediate Education Act, 19211, he applied pursuant to an advertisement published in a newspaper on 21.1.1996 by the Principal of the institution. It was stated that four class IV posts had fallen vacant in the institution for various reasons and alongwith him, 18 other candidates had applied. The appellant- petitioner was found suitable, as a result of which, an appointment letter was issued by the Principal on 14.2.1996 in his favour appointing him on class IV post in the pay scale of Rs. 750-940. He submitted a joining report on 23.7.1996 which was duly accepted by the Principal on the same day. For necessary approval of the appointment, the Manager of the institution, by means of letter dated 26.2.1996 forwarded all relevant papers to the District Inspector of Schools2. It is alleged that the DIOS did not communicate any decision on that letter.

4. It is stated that thereafter, the DIOS, after being satisfied that the appointment of the appellant-petitioner was made in accordance with law passed an order fixing salary of the petitioners in the pay scale of Rs. 750-910 in the month of February 1999. The endorsement made in his service book under the signature of the DIOS and the Finance Officer has also been referred to. However, after more than five months when salary bills of the appellant-petitioner was presented in the month of June 1999, an endorsement was made that until further orders of the DIOS the salary was being stopped. After repeated enquiries by the Principal it was revealed that an enquiry was being conducted regarding appointment of the appellant-petitioner and so the salary had been withheld. Accordingly, the writ petition was filed seeking mandamus for ensuring payment of salary. Counter and rejoinder affidavits were exchanged. In the counter affidavit, it is stated that the approval letter that was made available by the Principal was found to be fabricated and on the basis of that document, the Principal obtained the salary from January 1999 to May 1999. On the basis of a complaint in June 1999, the payment of salary was stopped under order of the DIOS. It is further stated that the appellant-petitioner filed the writ petition in which an order was passed to file a counter affidavit and for payment of salary.

5. By means of the impugned judgement, the learned Judge dismissed the writ petition holding that, (a) there was no material available showing compliance of requirement of "prior approval" of the DIOS as contemplated in Regulation 101 of Chapter III of the Regulations framed under the Act of 1921 before making appointment of the petitioner; and (b) there was nothing on record to show that the appointment was made after a valid advertisement of vacancies. Relying upon two Division Bench judgements of this Court for payment of salary from State Exchequer, mandamus was declined.

6. It is the contention of Sri Ashok Khare, learned Senior Advocate appearing for the appellant-petitioner that "prior approval" for appointment was not necessary under the facts and circumstances of the case. He contends that once the financial approval regarding the appointment has been accorded by the competent authority, it would be deemed that approval had been granted and as such the requirement of "prior approval" is rendered otiose. That when salary was not being paid to the appellant-petitioner, the writ petition was filed and by an interim order dated 29.8.2000, the Court directed that he shall be allowed to continue to work and shall be paid salary. On 13.9.2002, the writ petition was admitted and notices were issued with a direction that in case the respondents failed to comply with the interim order, it would amount to gross contempt and they shall be dealt with as may be warranted under law. He contends that on 14.7.2003, a letter was issued by the DIOS to the Principal granting financial approval with regard to the appointment of the appellant-petitioner and therefore, the respondents cannot refuse salary to the appellant-petitioner.

7. Learned Standing Counsel on the other hand has opposed the appeal stating that the financial approval granted by the DIOS on 14.7.2003 was in compliance of the interim order passed in the writ petition. Therefore, no benefit would accrue to the appellant-petitioner from the financial approval so granted. It is further contended that the prior approval of the DIOS is a condition precedent imposed by the Regulation 101 which was never granted.

8. The learned Judge has referred to the judgements of two coordinate Benches of this Court in the matter of **Jagdish Singh Vs. State of U.P. and others3** and **Kailash Prasad Vs. State of U.P. and others4** wherein, it has been held that prior approval of the DIOS is mandatory and violation thereof renders the appointment null and void.

9. Regulation 101 of Chapter III of the Regulation as amended on 2.2.1995 reads as under:-

"101- नियुक्ति प्राधिकारी, निरीक्षक के पूर्वानुमोदन के सिवाय किसी मान्यता सहायता प्राप्त संस्था के शिक्षणेत्तर पद की किसी रिक्ति को नहीं भरेगा1

प्रतिबन्ध यह है कि जमादार के पद की रिक्त को निरीक्षक द्वारा भरने की अनुमति दी जा सकती है"1

10. We have perused the aforesaid two judgements cited by the learned Judge and concur with the view expressed therein. Merely because, as argued in the instant case, the appellant-petitioner was granted financial sanction by the DIOS, would not eclipse the requirement of prior approval as contemplated in Regulation 101 of Chapter III of the Regulations framed under the Act of 1921.

11. After considering the case of **Jagdish Singh (supra)**, another division Bench of this Court in the case of **Pawan Kumar Misra Vs. Joint Director of Education, Azamgarh5** dismissed the petition holding that Regulation 101 uses expression "prior approval" and not "approval", and therefore, anything done without "prior approval" is a nullity.

12. In another case of **Dhruv Kumar Pandey Vs. State of U.P. and others;6** another coordinate Bench of this Court while dismissing an intra-court appeal challenging an order of a learned Judge dismissing challenge to an order dated 15.7.2019, passed by the District Inspector of Schools, Basti, whereunder the approval to the appointments of the writ-petitioners had been declined, the court observed as follows:-

"28. It is therefore seen that under the scheme provided for in terms of Regulations 101 to 107, the DIOS, before proceeding to direct the appointing authority i.e. the management or the Principal of the institution, to fill up any vacancy by direct recruitment, would be required to

consider not only the claims of the dependents of the deceased employee of the institution concerned but also the claims of the dependents of the deceased employees of all recognized and aided institutions in the district. This object, as envisaged under the regulations, is for providing immediate succour to claims for appointment on compassionate grounds and the same would stand totally frustrated in case the institution is permitted to proceed with the selection process without any intimation of the occurrence of the vacancy to the Inspector.

29. We may also observe that in terms of the statutory scheme governing the appointments to posts in recognized and aided institutions, as per the terms of the Act 1921 and payment of salaries against the said posts in terms of the U.P. Act No. 24 of 1971, a statutory duty is cast upon the educational authorities to ensure that the appointments are made taking into consideration the provisions under the Act, 1921 and the regulations framed thereunder governing the procedure for appointments and also to ensure that the filling up of the vacancy is in fact necessary taking into consideration the norms fixed by the State Government. The financial approval required under the U.P. Act No. 24 of 1971 for the purposes of ensuring payment of salaries is to be granted after examining all the aforementioned aspects.

30. The 'prior approval' which is contemplated under Regulation 101 before issuance of an order of appointment is therefore required to be granted by the DIOS after examining the proceedings relating to the appointment and verifying as to whether the appointment was required as per the norms fixed by the State Government and being satisfied that the same had been made after following the prescribed procedure in a fair manner. It is only thereafter that the Inspector is to accord prior approval whereafter the order of appointment is to be issued by the appointing authority i.e. the Committee of Management or the Principal of the institution as the case may be".

13. In a recent judgement delivered on 27.9.2021, the Supreme Court, in **Civil Appeal No. 865 of 20217** considered a judgement of a Division Bench of this Court dated 19.11.2018 which had held that Regulation 101 of Chapter III of the Regulation, as amended in 2013, framed under the Act of 1921, is unconstitutional. The case of the State Government before the Supreme Court was that appointments of class IV employees by the management of various institutions were made contrary to the policy decision taken by the State Government on 23.1.2008 and the recommendation made by the 6th Central Pay Commission in the month of March 2008, to the effect that it would only be appropriate to have "outsourcing" of Class IV employees instead seeking any new recruitment. Regulation 101 was amended on 31.12.2009. Taking into consideration the recommendations made by the Sixth Central Pay Commission, Government Orders were issued on 8.9.2010 and 6.1.2011 making it applicable to all the Government departments and aided schools. Thus, the State Government decided not to go in for fresh recruitment of Class IV employees and further directed that any arrangement concerning the post to be vacated may be made only through "outsourcing". Following the said decision, Regulation 101 was once again amended by Government Order dated 4.9.2013, which was notified on 24.4.2014. The amended Regulation as quoted in the judgement of the Supreme Court is as follows:-

"AMENDED REGULATION:

101. The appointing authority, except for the prior approval of the inspector, shall not fill any vacant post of non-teaching staff (clerical cadre) in any recognised or aided institution; with the restriction that the District Inspector of Schools shall make available the total number of vacancies to the Director of Education (Secondary Education) and also put forth justification for filling of the posts,

showing the strength of the students in the institution. On receipt of the order from Director of Education (Secondary Education), the District Inspector of Schools shall give permission to the appointing authority for filling the said vacancies (except the vacancies of Class-IV posts) and while giving the permission, he shall ensure compliance of the 5 reservation rules specified by the government as also of the prescribed norms in justification for the posts. With respect to the Class-IV vacancies, arrangements shall be made by way of outsourcing only; but the relevant rules, 1981, as amended from time to time, for recruitment of dependants of teaching or non-teaching staff of the nongovernment aided institutions dying in harness shall be applicable in relation to the appointments to be made on the vacant posts of Class-IV category."

14. The Supreme Court, while observing that prior to the amendment aforesaid, Regulation 101 imposed strict compliance of getting "prior approval", held that the exercise done by the High Court in interpreting "outsourcing' ought to have been avoided as it stands outside the scope of judicial review, being in realm of policy. The Supreme Court allowed the appeals and set aside the judgement of the High Court, holding that the management of the institutions, having appointed persons and found them suitable, while creating a situation which could have been avoided, will have to take up their responsibility and the State Government cannot be made to continue the appointments by making a contribution towards their salary by way of aid. It was held by the Supreme Court that the respondents/writ petitioners and **similarly placed persons who are recruited by the institutions including the respondents shall be continued with the same scale of pay as if they are recruited prior to 8.9.20108** for which, the entire disbursement will have to be made by the institutions alone. The directions given by the Supreme Court in State of U.P. and others Vs. Principal Abhay Nandan Inter College (supra) are extracted below:-

"RELIEF:-

54.We have one more issue to be considered before our conclusion. That is, whether the institutions should be held responsible, with respect to the interest of those who were recruited though contrary to the Impugned Regulation or not. These persons are innocent civilians who got embroiled in the legal battle initiated by the management and made to fight as front-line soldiers. It is the management which found these persons suitable to hold the post. Therefore, this court will have to apply the theory of justice and adopt a problem-solving approach. Having appointed persons and found them suitable, while creating a situation which could have been avoided, the managements will have to take up their responsibility. If imparting education is seen to be in public interest, such institutions have duties to their employees as well. Certainly, the appellants cannot be made to continue them by making a contribution towards their salary by way of aid.

55.We may also note that even the Division Bench in its own wisdom has observed that the impugned Regulation can only be applied to the aided institutions alone. This finding has not been challenged seriously before us. We are conscious of the legal position governing equity when pitted against law. Though both can travel in the same channel, their waters do not mix very often.

56.Having found that the appellants are justified in passing the relevant Government Order followed by the impugned Regulation, we do not wish to impose any further liability on them. On the contrary, we do feel that institutions should be held responsible for the judicial adventurism undertaken.

57.However, we would also like to observe that the appellants will have to seriously consider paragraph 3.72 and 3.83 of the Seventh

Central Pay Commission. We expect the appellants to create an adequate mechanism to see to it that the persons employed by the process of "Outsourcing" are not exploited in any manner.

58.Accordingly, we have no difficulty in setting aside the judgment of the Division Bench dated 19.11.2018 and the consequential orders passed while upholding the impugned Regulation. The appeals are allowed with the following directions:

(i) The respondents/writ petitioners in Civil Appeal No 2753 of 2021 are directed to be confirmed by granting adequate approval as Class "IV" employees, having given prior approval.

(ii) **The respondents/writ petitioners and similarly placed persons who are recruited by the institutions including the respondents shall be continued with the same scale of pay as if they are recruited prior to 08.09.2010 for which the entire disbursement will have to be made by the institutions alone.**

(iii) The appellants shall undertake the necessary exercise to see to it that there is a mechanism available for the proper implementation of "Outsourcing" with specific reference to the conditions of service of those who are employed while taking note of the recommendations made in the Seventh Central Pay Commission".

(emphasis supplied)

15. In the present case, as is evident from the letter of the DIOS dated 14.7.2003, the appellant-petitioner's salary was approved for the post of Assistant Clerk (Class IV employee) with a condition that such appointment would be subject to the decision of the writ petition. The decision of the DIOS dated 14.7.2003 is itself based on the interim order dated 13.9.2002 passed by the writ court.

16. The decision in the case of **Pawan Kumar Misra (supra)**, in which it was held that anything done without "prior approval" is a nullity, would therefore, have to be read in terms of the aforesaid judgement of the Supreme Court, that is to say, an appointment without prior approval under Section 101 of the Regulation would be a nullity in so far as it purports to bind the State Government to grant aid to the institution concerned for payment of salary. The appointment made by the Principal of the Institution, and the Manager of the institution having forwarded the papers for approval of the appointment of the appellant-petitioner, would not be a nullity so far as the institution is concerned.

17. Under the circumstances and in view of the settled law on the question, neither the appellant-petitioner nor the institution concerned have any right to claim government aid for salary and others dues of the appellant-petitioner. Since the appellant-petitioner has been found suitable for the post by the management and was appointed without "prior approval", the appointment would not be valid only as far as any right to claim aid under Regulation 101 of Chapter III of the Regulation framed under the Act of 1921 is concerned. Accordingly, the judgement of the learned Judge is upheld. However, this will not stand in the way of appellant-petitioner claiming entitlement to pay and others dues from the management itself in terms of judgement of the Supreme Court in the case of **State of U.P. and others Vs. Principal Abhay Nandan Inter College and others (supra).**

18. Subject to above, the appeal is **dismissed.**

(2021)11ILR A751
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 26.11.2021

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE MANISH KUMAR, J.

Criminal Appeal No. 256 of 2010

Sandeep @ Pintu ...Appellant

Versus

State of U.P. ...Respondent

Counsel for the Appellant:
Vinod Kumar Yadav, Anil Kumar Tiwari, Jitendra Mohan, Krishna Bhushan Tripathi, Manjusha Kapil, Pawan Nigam, Rakesh Kumar Nayak

Counsel for the Respondent:
Govt. Advocate

A. Criminal Law – Circumstantial Evidence - Dying declaration – Indian Penal Code,1860 - Sections 302/34 & 307; Indian Evidence Act, 1872 - Sections 8 & 27.

Validity and the authenticity of the oral dying declaration - **It is not always necessary that a dying declaration should be certified by a doctor before reliance could be placed on the same. But then in the absence of any such certificate, the courts should be satisfied that from the material on record it is safe to place reliance on such uncertified declaration.** (Para 24)

In the present case, the information/intimation given by the injured Aditya Kumar (deceased) is an oral dying declaration as the reproduction of the exact words at every stage of trial and nothing could be brought out in the cross-examination of PW. 2 to doubt the truthfulness and veracity of his statement. (Para 28)

Even though an oral dying declaration can form basis of conviction in a given case, but such a dying declaration has to be trustworthy and free from every blemish and inspire confidence. The reproduction of the exact words of the oral declaration in such cases is very important. (Para 25)

An oral dying declaration can form a basis of conviction, if the same is established trustworthy and free from every blemish and inspires confidence. In the present case, the information given by the injured to his brother/PW-2/complainant, was narrated in the FIR, in the statement and in the cross examination, by reproduction of exact words and the same was also not impeached at the time of cross examination. (Para 26)

The dying declaration should be of such a nature as to inspire full confidence and in its truthfulness and correctness and must qualify triple test that statement of deceased was not as a result of either tutoring or prompting or a product of imagination. In the present case, it is nowhere the case of the prosecution that the oral dying declaration of the deceased is a result of either tutoring or prompting or a product of imagination. Hence, the oral dying declaration inspire full confidence in its truthfulness and correctness. (Para 29)

B. The accused cannot be unpunished particularly when the bloodstains were found of human origin, though the blood group could not be determined as by the time the bloodstains were examined by the Forensic Science Laboratory, they (bloodstains) were disintegrated. (Para 31)

It is an undisputed position in the present case, as per the FSL report that the blood was disintegrated, though the blood group could not be determined but the blood which was found on the clothes of the appellant was human blood. (Para 32)

C. Indian Evidence Act: Section 8 - Admissibility of the recovery memo as an admissible piece of evidence - **Recovery made on the pointing out of the accused person would be admissible u/s 8 of the Evidence Act, 1872.** (Para 33)

If for the sake of argument, it is accepted that the recovery alleged is not admissible u/s 27 of the Evidence Act, yet the pointing out of the accused leading to recovery may be a conduct admissible u/s 8 of the Evidence Act. (Para 22, 33)

D. Nothing has been tried to improve in the prosecution case. In the present case, the version of the FIR, the examination in chief of PW-2 (complainant/brother of the deceased) and in the cross examination, the version is the same about the dying declaration and except that the father was also present when the statement was given. (Para 34, 35)

E. Motive - It is not necessary that in every case some motive must be alleged or proved before recording any conviction against any accused person, where the prosecution evidence is trustworthy, proving the allegation of prosecution and which inspires confidence in truthfulness of the prosecution case and in the unimpeachable evidence of the prosecution the question of motive remains no more essential or relevant. In the present case, the other evidence is corroborating with the prosecution story. (Para 38)

Appeal dismissed. (E-4)

Precedent followed:

1. Chacko Vs St. of Kerala, (2003) 1 SCC 112 (Para 24)

2. Darshana Devi Vs St. of Pun., 1996 SCC (Cri) 38 (Para 19)

3. Laxman Vs St. of Mah., AIR 2002 SC 2973 (Para 19)

4. Prabhu Dayal Vs St. of Raj., 2008 2 JIC 642 (SC) (Para 23)

5. Himachal Pradesh Administration Vs Shri Om Prakash, (1972) 1 SCC 249 (Para 22)

6. Jagdish Narain & anr. Vs St. of U.P., 1996 SCC (Cri) 565 (Para 20)

7. Prakash Chand Vs State (Delhi Administration), 1979 SCC (Cri) 656 (Para 22)

8. A.N. Venkatesh & anr. Vs St. of Karn., 2005 SCC (Cri) 1938 (Para 22)

Precedent distinguished:

1. Nawab Singh & ors. Vs St. of U.P., 2008 (1) ALJ (NOC) 89 (All.) (Para 16)

2. Surinder Kumar Vs St. of Hary., (2011) 10 SCC 173 (Para 16)

3. Sampat Babso Kale & anr. Vs St. of Mah., (2019) 4 SCC 739 (Para 16)

4. Balaji Vs St. of Mah., (2019) 15 SCC 575 (Para 17)

5. St.of Guj.Vs Mohan Bhai Raghubhai Patel & anr., (1992) Supp (3) SCC 87 (Para 17)

6. St. of Mah. Vs Sanjay S/o Digambar Rao Rajhans, (2004) 13 SCC 314 (Para 17)

Precedent cited:

1. Gurcharan Singh & anr. Vs St. of Pun., AIR 1956 SC 460 (Para 13)

Present appeal challenges judgment and order dated 16.01.2010, passed by Additional Sessions Judge, Ambedkar Nagar.

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

1. This criminal appeal has been filed by the appellant against the judgment and order dated 16.01.2010 passed by the Additional Sessions Judge, Ambedkar Nagar in Sessions Trial No. 24 of 2003, arising out of Crime No. 192 of 2002 under Section 302/34 of the Indian Penal Code *(hereinafter referred to as, the IPC)*, registered at Police Station Kotwali Tanda, District Ambedkar Nagar convicting the appellant Sandeep @ Pintu and sentencing him for imprisonment for life.

2. Heard Shri Anil Kumar Tiwari, learned counsel for the appellant and Shri Umesh Verma, learned AGA for the State and perused the impugned judgment and order passed by the trial court and also the lower court record.

3. As per the prosecution case, on 02.09.2002, an FIR was lodged by the complainant, who is the brother of the injured/deceased under Section 307 IPC which was subsequently, converted to Section 302 IPC on 03.09.2002 against the appellant and one unknown person stating therein, that on 02.09.2002, his younger brother Aditya Kumar left the home at 8.00 PM for attending some party. At around 9.45 PM, he came home with injuries on his body and on inquiring about the injuries, it was told by him that "right now Sandeep @ Pintu (present appellant) and one unknown person stabbed him by knife near Atithi Villa". There were injuries on the chest and other parts of the body of the injured.

4. After investigation, the charge sheet was filed under Section 302/34 IPC in the Court against the present appellant and one accused person namely, Saurabh Srivastava.

5. The trial court framed charges against the co-accused Saurabh Srivastava and Sandeep @ Pintu (present appellant) under Section 302/34 IPC. The accused persons denied the charges and claimed to be tried.

6. The prosecution in order to prove its case examined Atul Kumar Gupta, the friend of the deceased as PW-1, Kamlesh Kumar, the complainant and the brother of the deceased-Aditya Kumar as PW-2, Anil Kumar Gupta, owner of the Juice Corner as PW-3, Vijay Shanker Singh, witness of recovery as PW-4, Kaushal Kishore, witness of recovery as PW-5, Inspector Sarnath Singh as PW-6, Dr. Atal Verma as PW-7, SI J.K. Singh as PW-8, SI Ramesh Chand as PW-9.

7. As documentary evidence, the prosecution has proved a copy of the FIR as exhibit Ka-1, Chik Shankhya 125/02 as exhibit Ka-15, Report No. 42 for lodging the FIR and registering the Case Crime No. 192 of 2002 in Rojnamacha Aam as exhibit Ka-16-carbon copy, Report No. 20 in Rojnamcha Aam for conversion of the case from Section 307 to Section 302 IPC as exhibit Ka-17-carbon copy, site plan as exhibit Ka-8, the blood-stained and plain soil and two pairs of slippers recovered as exhibit ka-2, the inquest report as exhibit Ka-9, photo of the body of the deceased challan nash, namoona mohar letter by CMO as exhibit Ka 10 and ka-14 respectively. The post mortem report prepared by Dr. Atal Verma in his hand writing and signature as exhibit Ka-7, the recovery memo of the knife recovered used in the crime as exhibit Ka-3, recovery memo of recovery of one pant, t-shirt (blood stained) as exhibit Ka-17. The recovery of blood stained one pant and t-shirt as exhibit Ka-4, the site plan of the place of recovery of knife recovered as exhibit Ka-5, the Charge sheet as exhibit Ka-6 and the FSL report as exhibit Ka-18.

8. The statements of the accused persons were recorded under Section 313 of the Code of Criminal Procedure *(in short, the Cr.P.C.)* wherein, they had denied the commission of crime and stated that the case has been registered falsely due to enmity and in connivance with the conspiracy of the persons against the appellant and also denied the recovery. It is not the case of the appellant that the trial court, while affording opportunity to the accused under Section 313 Cr.P.C. has not questioned him on any aspect of the evidence that would have caused any prejudice to him. It is equally not the case of the appellant that any material has gone unnoticed as he has not led any evidence in defence. The accused persons were asked to give defence evidence but they did not choose to adduce any.

9. The trial court on the appreciation of evidence before it found that the FIR was lodged promptly by the complainant on the basis of the information given by the victim-deceased which fact was duly proved by the oral testimony of P.W-2. The trial court treated the statement of victim/deceased to PW.2/brother, as oral dying declaration.

10. According to the trial court that the injuries of the victim deceased as stated about by PW. 2 is corrroborated by the post-mortem report as proved in evidence by PW 7- Dr. Atal Verma.

11. The trial court did not accept the argument that the victim/deceased with injuries on his person could not walk down to his house which is hardly 300-400 metres/121 steps away from the place of incident.

12. The trial court also found that nothing could be shown from the cross-examination of the witnesses to doubt their testimony, the recoveries of the knife and blood-stained items were also found to be proved.

13. The co-accused Saurabh Srivastava was though acquitted by the trial court but on the

ground that his name was not taken by the victim-deceased nor by his brother PW. 2, therefore, the trial court extended him the benefit of doubt. Even otherwise it is well settled in the case of ***Gurcharan Singh and Anr. vs. State of Punjab [AIR 1956 SC 460]*** that a co-accused acquitted on the strength of same set of facts and evidence does not entail a consequence of parity where the benefit of doubt is extended to the co-accused on some clinching distinction, as is the case at hand.

14. The evidence of the case proved against the accused convicted and sentenced him as mentioned above.

15. Learned counsel for the appellant has submitted that due to several injuries inflicted upon the body of the Aditya Kumar, it was improbable for him to go home on his own and it was also not possible to state anything to his brother as recorded in the FIR and from the place of incident till the house of injured, even no trail of blood was found.

16. It is further contended that before treating any statement as a dying declaration, the mental and physical health is to be certified by a doctor but in the present case, the same was not done. In support of his submission, learned counsel for the appellant has relied on the judgments rendered by the Hon'ble Supreme Court in the cases of **Nawab Singh Vs. Others Vs. State of Uttar Pradesh [2008 (1) ALJ (NOC) 89 (ALL.)] , Surinder Kumar Vs. State of Haryana [(2011) 10 SCC 173] and Sampat Babso Kale and another Vs. State of Maharashtra [(2019) 4 SCC 739].**

17. Learned counsel for the appellant next argued that the recovery made is not admissible under Section 27 of the Evidence Act, 1872 for the reason that the human blood found on the clothes of the appellant was not matched with the blood sample of the deceased. It is further contended that the prosecution has failed to allege or prove any motive for the appellant to commit the crime and in support of his submission, relied upon para no. 19 of the judgment of Hon'ble Supreme Court in the case of ***Balaji Vs. State of Maharashtra [(2019) 15 SCC 575]***. Learned counsel for the appellant has further relied upon para no. 5 of the judgment rendered by Hon'ble Supreme Court in the case of ***State of Gujarat Vs. Mohan Bhai Raghbhai Patel and another [(1992) Supp (3) SCC 87].*** Learned counsel for the appellant has also relied upon the para no. 5 of the judgment in the case of ***State of Maharashtra Vs. Sanjay S/o Digambar Rao Rajhans [(2004) 13 SCC 314]*** rendered by Hon'ble Supreme Court to support his case on the above aspect.

18. On the other hand, learned AGA conceding the fact that the case, at hand, is a case of circumstantial evidence has ably demonstrated that the last oral dying declaration of the deceased has since been corroborated by the witness (P.W. 2) word by word, therefore, the prosecution has discharged the burden of proof beyond reasonable doubt. It has been further submitted that the FIR was lodged by PW 2 naming the appellant in pursuance of the statement/information given by his brother Aditya Kumar (deceased), immediately after the occurrence, falls under the purview of oral dying declaration and an oral dying declaration can form basis of conviction, provided the same is reliable in evidence. The creditworthiness of the oral dying declaration was well tested in the trial and reproduction of the exact words in the oral testimony of P.W.-2 have sanctified its truthfulness beyond a reasonable doubt.

19. The aforesaid dying declaration has not been impeached during the cross examination of the PW -2. In support of his submissions, learned AGA has relied upon the judgment of Hon'ble the Apex Court in the case of ***Darshana Devi Vs. State of Punjab [1996 SCC (Cri) 38].*** In the light

of the judgment of the Apex Court, it is argued that the veracity of dying declaration is to be tested on triple test i.e. the dying declaration is not as a result of either tutoring or prompting or a product of imagination and in support of his submissions, relied upon the judgment in the case of ***Laxman Vs. State of Maharashtra [AIR 2002 SC 2973].*** It has further been argued by learned AGA that doubting the prosecution case by the appellant that the injured/ deceased-Aditya Kumar could not reach his home on his own is against the weight of evidence on record and is wholly misplaced. In support of the judgment impugned, learned AGA has relied upon the statement of Investigating Officer (PW 8), who had made a statement that the blood stains were found on the wall of the house and when the same may be read along with the statement of the PW 2, it is clear that the oral testimony of P.W. 2 lends complete support to the credence of P.W. 8 that the blood stains were found on the stairs and wall of the house linking the trail upto the place of occurrence, as mentioned in the site plan.

20. It is further submitted that the statement given by the Investigating Officer is an admissible piece of evidence as the same is not on the basis of hearsay but the Investigating Officer recorded the same after he had observed the blood on the stairs and wall while preparing the site plan. In support of his submissions, he relied upon the judgment rendered by Hon'ble Supreme Court in the case of ***Jagdish Narain and anothers Vs. State of Uttar Pradesh [1996 SCC (Cri) 565].*** Taking us through the suggestions made to PW-2 that he was not at home when his injured brother reached home, meaning thereby, reaching of the injured at home was not disputed or denied but the doubt or dispute which was suggested regarding the presence of PW-2 at home during night hours rather lends support to the case of prosecution about reaching of the deceased at home on his own.

21. Learned AGA has submitted that the oral testimony of the doctor who conducted the post-mortem, in his cross examination, has not suggested anything that the injured was not in a position to reach home on his own and was unable to state anything. The injuries mentioned in the post-mortem report would not alone discredit the last oral dying declaration unless the defence had succeeded to fish out any doubt in the cross-examination. Learned AGA has further submitted that as per the site plan, it has specifically been shown that the trail of blood was found on the road from the place of incident till the house of the injured and his physical condition to make the last oral declaration being doubtless has rightly been construed in view of the evidence on record.

22. It is further contended that the recovery was not disputed and the same has been proved but the submissions raised before this Court that the recovery made is not admissible under Section 27 of the Evidence Act, 1872 is also unacceptable. It was submitted that if for the sake of argument, it is accepted that the recovery alleged is not admissible under Section 27 of the Evidence Act, yet the pointing out of the accused leading to recovery may be a conduct admissible under Section 8 of the Evidence Act, and in support of his submissions learned AGA has relied upon several judgments reported in ***Himachal Pradesh Administration vs. Shri Om Prakash [(1972) 1 SCC 249], Prakash Chand vs. State (Delhi Administration) [1979 SCC (Cri) 656], A.N. Venkatesh and another vs. State of Karnataka [2005 SCC (Cri) 1938].***

23 It is further contended that the submissions of the learned counsel for the appellant that the human blood found on the clothes of the appellant was not matched with the blood of the deceased; in certain cases, where the blood is disintegrated and matching of the same is not possible and it could not give any advantage to the accused. In the FSL report, it has specifically been mentioned that the blood was disintegrated and in support of his

submissions relied upon the judgment of Hon'ble Supreme Court in the case of ***Prabhu Dayal vs. State of Rajasthan [2018 2 JIC 642 (SC)].***

24. After hearing the learned counsel for the respective parties and examining the lower court record, as per the prosecution story, naming the appellant in the FIR along with an unknown person was on the basis of the statement made by the injured Aditya Kumar (deceased) to the complainant/PW-2. It is to be seen whether such a revelation may be treated as oral dying declaration or not. The argument put-forth by learned counsel for the appellant that the doctor had not certified the medical condition of the injured to give dying declaration, is wholly misplaced and the judgments relied upon are inapplicable in the facts and circumstances of the present case. The argument advanced by learned counsel for the appellant on the strength of the judgment in the case of ***Chacko vs. State of Kerala [(2003) 1 SCC 112].*** The relevant extract of the case of ***Chacko (supra)*** is being reproduced hereinbelow:-

"Having heard learned counsel for the parties and perused the records, we find it difficult to accept the prosecution case based on the dying declaration allegedly made by the deceased. As pointed out by the learned counsel for the appellant, it is very difficult to accept the prosecution case that the deceased who was of about 70 years, and had suffered 80% burns could make a detailed dying declaration after 8 to 9 hours of the burning giving minute particulars as to the motive, the manner in which she suffered the injuries. This, in our opinion, itself creates a doubt in our mind apart as to the genuineness of the declaration [See : Munnu Raja & Anr. vs. State of Madhya Pradesh, (AIR 1976 SC 2199 para 6)]. Further in the absence of any certificate by a competent doctor as to the mental and physical condition of the deceased to make such a dying declaration, we think it is not safe to rely on the same. We are aware of the judicial pronouncements of this Court that it is not always necessary that a dying declaration should be certified by a doctor before reliance could be placed on the same. But then in the absence of any such certificate, the courts should be satisfied that from the material on record it is safe to place reliance on such uncertified declaration. (emphasis laid by us) [See : Ram Bai vs. State of Chhattisgarh (2002 (8) SCC 83)]. In the instant case it is not as if the doctor was not available. As a matter of fact, PW-3 who treated the deceased in the first instance was available at the time when the deceased allegedly made the dying declaration, still we find he has neither given a certificate as to the condition of the deceased nor has he attested the said document. That apart, a perusal of the dying declaration as per Ex. P-4 shows that the contents of the documents are so arranged so as to accommodate the space which is above the thumb impression which we think is not a normal way of recording a statement if the same was genuine. This is also a ground to suspect the genuineness of the document. Then again as complained by the learned counsel for the appellant, we notice that on 28.7.1996 at about 5.30 p.m. the Police had known that it was the appellant who had committed this crime but in the inquest report which was drawn on 29.7.1996 in Column No.12 corresponding to the name of the suspect, it is specifically mentioned 'No' meaning thereby that the officer who drew this document did not have the knowledge that it is the appellant who had caused the injury. This is the very same person (PW-5) who has scribed Ex. P-4. The above factor coupled with the manner in which the incident has been recorded in Ex. P-4 certainly creates a grave doubt in our mind as to the genuineness of the dying declaration Ex. P-4. The fact that PW-3, the doctor, had recorded that "patient conscious, talking" in the wound certificate by itself would not in any manner further the prosecution case as to the condition

of the patient to make the dying declaration nor does his oral evidence as also that of the investigating officer made in the court for the first time would in any manner improve the prosecution case."

25. With the aforesaid judgment cited by the learned counsel for the appellant, the judgment cited by the learned AGA in the case of ***Darshna Devi (supra)*** relating to the validity and the authenticity of the oral dying declaration is also to be seen and the relevant para is being quoted hereinbelow:-

"There is variance in the statements of the two witnesses with regard to the exact words allegedly used by the deceased. According to PW 2, the deceased had stated that the appellant had sprinkled kerosene on him when he was lying asleep and had burnt him, while Lachhmi Devi, PW 1 did not attribute any such statement to the deceased. PW 1 reiterated in her cross-examination "all that Madan Lal told me was that he had been burnt by Darshana Devi by sprinkling koresene" Even though an oral dying declaration can form basis of conviction in a given case, but such a dying declaration has to be trustworthy and free from every blemish and inspire confidence. The reproduction of the exact words of the oral declaration in such cases is very important. The difference in the exact words of the declaration in this case detract materially from the value of the oral dying declaration." (emphasis laid by us)

26. After going through the submissions and the judgments of the Hon'ble Supreme Court, it has come out that an oral dying declaration can form a basis of conviction, if the same is established trustworthy and free from every blemish and inspires confidence. The reproduction of the exact words of the oral dying declaration in such cases is very important and here the information given by the injured to his brother/PW-2/complainant narrated in the FIR, in the statement and in the cross examination, by reproduction of exact words and the same was also not impeached at the time of cross examination.

27. The witness reproduced in the exact words used by his deceased brother in all the places i.e. in the FIR, statement and at the time of cross-examination. For convenience, the same is quoted below:-

"कि मुझे अभी अतिथि विला के पास संदीप उर्फ़ पिंटू व उनको एक अज्ञात साथी ने चाकू मार दिया है"

28. Similarly, the case law in the case of ***Chako (supra)*** relied by the learned counsel for the appellant has held that in absence of any certificate by a competent doctor as the mental and physical condition of the deceased to make such a dying declaration, is not safe to rely but it can be acted upon in absence of any such certificate, if the Court would be satisfied that from the material on record, it is safe to place reliance on such uncertified declaration. In the present case, the information/intimation given by the injured Aditya Kumar (deceased) is an oral dying declaration as the reproduction of the exact words at every stage of trial and nothing could be brought out in the cross-examination of PW. 2 to doubt the truthfulness and veracity of his statement.

29. As per the judgment of Hon'ble Supreme Court in the case of ***Laxman (supra)***, the dying declaration should be of such a nature as to inspire full confidence and and in its truthfulness and correctness and must qualify triple test that statement of deceased was not as a result of either tutoring or prompting or a product of imagination. Here in the present case, it is nowhere the case of the prosecution that the oral dying declaration of the deceased is a result of either tutoring or prompting or a product of

imagination. Hence, the oral dying declaration inspire full confidence in its truthfulness and correctness.

30. At the same time, the material on record i.e. the recovery of blood stained clothes and the FSL Report pointing out that the blood was found on the clothes of the appellant was a human blood. The submission on behalf of the appellant that the injured Aditya Kumar could not reach his house on his own and was also not in a position to state anything and there is no blood found in between the place of incident and the house of the injured makes the prosecution story false. The submission put-forth by learned counsel for the appellant are untenable. As per the site plan prepared by the Investigating Officer the blood trail was found from the place of incident to the house of injured Aditya Kumar. This falsifies the argument of learned counsel for the appellant that no blood trail was found rather it lends support to the prosecution case, as an independent circumstance that the deceased had gone to his house from the place of incident. The Investigating Officer while preparing the site plan has shown blood stains on the walls of the house which is admissible as per the law settled by the Hon'ble Apex Court and PW 2 had also made a statement that the blood was there on the walls of his house, it also lends support to the prosecution case. Apart from that, at the time of cross examination, no such suggestion was made to the Doctor that the injured could not be in a position to reach his home with injuries on his body.

31. As far as the submissions that the blood found on the clothes of the appellant were not matched with the blood of the deceased is of no avail as per the law settled by the Hon'ble Apex Court in the case of ***Prabhu Dayal (Supra)***. The relevant extract is being quoted hereinbelow:-

"The reports of the Forensic Science Laboratory as well as those of the Ballistic Experts have been perused by us. The Forensic Science Laboratory report discloses that the samples collected from the scene of the offence had bloodstains of human origin. However, since the bloodstains were disintegrated by the time the bloodstains were examined by the Forensic Science Laboratory, the blood group could not be determined. For the same, the accused cannot be unpunished, more particularly when the bloodstains were found of human origin. (emphasis laid by us)

In State of Rajasthan v. Teja Ram, (1999) 3 SCC 507, this Court concluded that even when the origin of the blood cannot be determined, it does not necessarily prove fatal to the case of the prosecution. In that case, the murder weapons had been recovered with blood on them, and the origin of the blood on one of the weapons could not be determined. Therein, the Court held as follows:

"25. Failure of the serologist to detect the origin of the blood due to disintegration of the serum in the meanwhile does not mean that the blood stuck on the axe would not have been human blood at all. Sometimes it happens, either because the stain is too insufficient or due to haematological changes and plasmatic coagulation that a serologist might fail to detect the origin of the blood. Will it then mean that the blood would be of some other origin? Such guesswork that blood on the other axe would have been animal blood is unrealistic and far-fetched in the broad spectrum of this case. The effort of the criminal court should not be to prowl for imaginative doubts. Unless the doubt is of a reasonable dimension which a judicially conscientious mind entertains with some objectivity, no benefit can be claimed by the accused.

26. Learned counsel for the accused made an effort to sustain the rejection of the abovesaid evidence for which he cited the decisions in Prabhu Babaji Navle v. State of Bombay [AIR 1956 SC 51 : 1956 Cri LJ 147] and Raghav Prapanna Tripathi v. State of U.P.

[AIR 1963 SC 74 : (1963) 1 Cri LJ 70] In the former, Vivian Bose, J. has observed that the chemical examiner's duty is to indicate the number of bloodstains found by him on each exhibit and the extent of each stain unless they are too minute or too numerous to be described in detail. It was a case in which one circumstance projected by the prosecution was just one spot of blood on a dhoti. Their Lordships felt that "blood could equally have spurted on the dhoti of a wholly innocent person passing through in the circumstances described by us earlier in the judgment". In the latter decision, this Court observed regarding the certificate of a chemical examiner that inasmuch as the bloodstain is not proved to be of human origin the circumstance has no evidentiary value "in the circumstances" connecting the accused with the murder. The further part of the circumstance in that case showed that a shirt was seized from a dry cleaning establishment and the proprietor of the said establishment had testified that when the shirt was given to him for dry cleaning, it was not bloodstained.

27. We are unable to find out from the aforesaid decisions any legal ratio that in all cases where there was failure of detecting the origin of the blood, the circumstance arising from recovery of the weapon would stand relegated to disutility. The observations in the aforesaid cases were made on the fact situation existing therein. They cannot be imported to a case where the facts are materially different."

32. From perusal of the above judgment, it is clear where the blood stains were disintegrated by lapse of time the blood stains were examined by the FSL, as it is in the present case, the blood group could not be determined. For the same, the accused could not be unpunished, more particularly, when the blood stains found were of human origin and it is an undisputed position in the present case, as per the FSL report that the blood was disintegrated and the blood which was found on the clothes of the appellant was human blood.

33. As far as the contention raised by learned counsel for the appellant regarding admissibility of the recovery memo as an admissible piece of evidence, it is also not accepted as per law laid down by the Hon'ble Supreme Court, where the recovery made on the pointing out of the accused person would be admissible under Section 8 of the Evidence Act, 1872. The relevant extracts of the judgments are quoted hereinbelow:-

Para 14 of the judgment rendered in the case of ***Himachal Pradesh Administration (supra)*** is quoted hereinbelow, for ready reference:-

"14. In the Full Bench judgment of seven Judges in Sukhan v. The Crown, which was approved by the Privy Council in Pulkuri Kotayya's case, Shadi Lal, C.J., as he then was speaking for the majority pointed out that the expression 'fact' as defined by Sec. 3 of the Evidence Act includes not only the physical fact which can be perceived by the senses but also the psychological fact or mental condition of which any person is conscious and that it is in the former sense that the word used by the Legislature refers to a material and not to a mental fact. <u>It is clear therefore that what should be discovered is the material fact and the information that is admissible is that which has caused that discovery so as to connect the information and the fact with each other as the 'cause and effect'.</u> That information which does not distinctly connect with the fact discovered or that portion of the information which merely explains the material thing discovered is not admissible under Sec. 27 and cannot be proved. <u>As explained by this Court as well as by the Privy Council, normally Sec. 27 is brought into operation where a person in police custody produces from some place of concealment some object said to be connected with the, crime of which the informant is the accused. The concealment of the fact which is not known to the police is what is discovered by the</u>

information and lends assurance that the information was true. No witness with whom some material fact, such as the weapon of murder, stolen' 'property or other in eliminating article is not hidden sold or kept and which is unknown to the Police can be said to be discovered as a consequence of the information furnished by the accused. These examples however are only by way of illustration and are not exhaustive. What makes the information leading to the discovery of the witness admissible is the discovery from him of the thing sold to him or hidden or kept with him which the police did not know until the. information was furnished to them by the accused. A witness cannot be said to be discovered if nothing is to be found or recovered from him as a consequence of the information furnished by the accused and the information which disclosed the identity of the witness will not be admissible. (emphasis laid by us) But even apart from- the admissibility of the information under Sec. 27, the evidence of the Investigating Officer and the panchas that the accused had taken them to P.W. 11 and pointed him out and as corroborated by P.W. 11 himself would be admissible under Sec. 8 of the Evidence Act as conduct of the accused."

Para 8 of the judgment rendered by Hon'ble Supreme Court in the case of ***Prakash Chand (supra)*** is reproduced hereinbelow, for ready reference:-

"8. It was contended by the learned Counsel for the appellant that the evidence relating to the conduct of the accused when challenged by the Inspector was inadmissible as it was hit by Section 167 Criminal Procedure Code. He relied on a decision of the Andhra Pradesh High Court in D. V. Narasimhan v. State.(1) We do not agree with the submissions of Shri Anthony. There is a clear distinction between The conduct of a person against whom an offence is alleged, which is admissible under Section 8 of the Evidence Act, if such conduct is influenced by any fact in issue or relevant fact and the statement made to a Police officer in the course of an investigating which is hit by Section 162 Criminal Procedure Code. What is excluded by Section 162 Criminal Procedure Code is the statement made to a Police officer in the course of investigation and not the evidence relating to the conduct of an accused person (not amounting to a statement) when confronted or questioned by a Police officer during the course of an investigation. For example, the evidence of the circumstance, simpliciter, that an accused person led a Police officer and pointed out the place where stolen articles or weapons which might have been used in the commission of the offence were found hidden, would be admissible as conduct, under Section 8 of the Evidence Act, irrespective of whether any statement by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 of the Evidence Act (emphasis laid by us) (vide Himachal Pradesh Administration v. Om Prakash)."

Para 9 of the judgment rendered by Hon'ble Supreme Court in the case of ***A.N.Venkatesh (supra),*** is reproduced hereinbelow, for ready reference:-

"9. By virtue of Section 8 of the Evidence Act, the conduct of the accused person is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. The evidence of the circumstance, simplicitor, that the accused pointed out to the police officer, the place where the dead body of the kidnapped boy was found and on their pointing out the body was exhumed, would be admissible as conduct under Section 8 irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 or not as held by this Court in Prakash Chand Vs. State (AIR 1979 SC 400). Even if we hold that the disclosure statement made by the accused appellants(Ex. P14 and P15) is not admissible under Section 27 of the Evidence Act, still it is relevant under Section 8. (emphasis laid by us)

The evidence of the investigating officer and PWs 1, 2, 7 and PW4 the spot mazhar witness that the accused had taken them to the spot and pointed out the place where the dead body was buried, is an admissible piece of evidence under Section 8 as the conduct of the accused. Presence of A-1 and A-2 at a place where ransom demand was to be fulfilled and their action of fleeing on spotting the police party is a relevant circumstance and are admissible under Section 8 of the Evidence Act."

34. Learned counsel for the appellant has further submitted that the prosecution has improved its case and has placed reliance upon para 19 of the judgment rendered in the case of ***Balaji (supra)***, which is being reproduced hereunder for ready reference:-

"19. Having regard to the aforementioned discussion and other material on record, we find that the origin and genensis of the prosecution is shrouded in mystery; the prosecution has tried to improve its case from stage to stage. In our considered opinion, the prosecution has not proved its case beyond reasonable doubt against the accused. Hence, benefit of doubt will go in favour of the accused."

35. The case of ***Balaji (supra)*** relied above is also not applicable for the reason that in the said case the prosecution has improved its case from stage to stage whereas in the present case, the version of the FIR, the examination in chief of PW-2 (complainant/brother of the deceased) and in the cross examination, the version is the same about the dying declaration and except that the father was also present when the statement was given. Nothing has been tried to improve in the prosecution case.

36. The submission raised by learned counsel for the appellant regarding no motive was attributed against the appellant and in support of his submissions, placed reliance upon para 5 of the judgment rendered by Hon'ble Supreme Court in the case of ***State of Gujarat (supra),*** which is being quoted hereunder for ready reference:-

"5. In this case we find absolutely no motive for accused 1 to cause the death of the deceased. According to the prosecution, accused 1's younger brother was having illicit intimacy with accused 2 with the connivance of accused 1 and the deceased was objecting to the same. In such a situation it is rather opposed to human nature to suggest that accused 1 would think of causing the death of the deceased. According to the witnesses, particularly P.W. 2, the deceased was found under a mattress and accused 1 was pressing the same on her and in the process he also got burns. The High Court has rightly observed that the culprits who had decided to put an end to the life of the deceased would never go to the extent of extinguishing the fire after throwing a mattress on her, and in this view, according to the High Court, the prosecution has not proved beyond reasonable doubt that this was a case of homicide and not suicide. In this context it is also pertinent to note that in the earlier stages the deceased did not implicate the accused. Even when the Doctor P.W. 10 asked her she did not give any reply and it is only at a later stage she came out with this story. According to the prosecution case, the occurrence took place in the bathroom and the deceased stated in Ex. P. 58 that she was filling the water tank in the bathroom and that accused 1 came and poured kerosene. But panchnama of the scene of occurrence does not make any mention about kerosene in the bathroom but kerosine was found outside the bathroom. The clothes of accused 2, who was holding the deceased when accused 1 poured kerosene did not show any smell of kerosene. Therefore, it becomes doubtful whether accused 2 held the deceased in the manner alleged. The High Court has adverted to number of these details and

doubted the prosecution case. The High Court has rightly held that these features would not lend any corroboration to the dying declaration but, on the other hand, cause suspicion. There is no other corroboration coming forth. The conduct of the accused in throwing the mattress over the burning woman is an important circumstance which creates a doubt about the prosecution version. Having regard to these circumstances the High Court has given the benefit of doubt to the accused. We have also gone through the details of the dying declaration recorded by the police officer. We are unable to persuade ourselves to disagree with the findings of the High Court particularly when this is an appeal against acquittal. We do not find any strong ground as laid down by this Court in some of the cases cited above which warrants interference. The appeal is accordingly dismissed."

37. Learned counsel for the appellant has also relied upon the para 5 of the judgment in the case of ***State of Maharashtra (supra)*** rendered by Hon'ble Supreme Court, which is being reproduced hereunder for ready reference:-

"5. Excepting the alleged statements of the deceased and the statement of the accused in the Court, there is no direct evidence relating to the occurrence, though it happened on a public road in a busy locality. No motive had been established. The circumstances emerging from record would reveal that the incident must have been a sudden affair. It looks mysterious as well. In the alleged dying declaration given to the Executive Magistrate, she stated that the accused quarrelled with her for no reason. That means, it was a sort of petty quarrel, if we go by that dying declaration. However, in Ext.39 which is said to be her earliest revelation, it is mentioned that the accused was doubting her character which goes contrary to the version recorded by the Executive Magistrate. The conduct of the accused soon after and subsequent to the incident does not in any way point to his guilt. At this stage, it should also be noted that the accused, who remained in the hospital for about 11 hours after the dying declaration was recorded by the Executive Magistrate, was not interrogated or arrested, though by that time the incriminating evidence was said to be available with the police. He was allowed to be discharged at 2.30 p.m. and was arrested only at 7.20 p.m. These factors ought to be kept in view in testing the prosecution case. We must also have regard to the fact that this is an appeal against acquittal and this Court ought not to interfere unless the Court is convinced that the decision of the High Court is vitiated by perversity, wrong legal approach or non consideration of material evidence. If two views are reasonably possible, this Court cannot but uphold the verdict of acquittal."

38. The arguments raised is that the prosecution failed to allege or prove any motive for the appellant against the victim. It is not necessary that in every case some motive must be alleged or proved before recording any conviction against any accused person, where the prosecution evidence is trustworthy, proving the allegation of prosecution and which inspires confidence in truthfulness of the prosecution case and in the unimpeachable evidence of the prosecution the question of motive remains no more essential or relevant. The judgment relied by learned counsel for the appellant in the case of ***State of Gujarat (supra)*** is not applicable in the present case as in the said case that features would not lend any corroboration to the dying declaration, on the other hand, cause suspicion. There is no other corroborating coming forth whereas in the present case, the other evidence is corroborating with the prosecution story. The judgment in the case of ***State of Maharashtra (supra)*** relied by learne4d counsel for the appellant is also not applicable in the present case as there is mysterious and suspicious

circumstances and it has been held that there is no element of doubt that Exhibit -86 is a manipulated document introduced by an overzealous Investigating Officer to buttress the prosecution case.

39. In view of the discussions held above, we find that there is no merit in the contentions raised by the learned counsel for the appellant. The prosecution proved its case beyond reasonable doubt against the appellant and nothing could be shown so as to call for interference in the judgment of learned trial court. In the result, the appeal is ***dismissed.***

(2021)11ILR A764
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 10.11.2021

BEFORE

THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Criminal Appeal No. 311 of 2020

Arman Khan ...Appellant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Appellant:
Suhail Kashif, Nadeem Murtaza

Counsel for the Respondents:
Govt. Advocate, Ram Naresh Yadav, Vineet Kumar Chaurasia

A. Criminal Law – Bail - Schedule Caste and Schedule Tribes (Prevention of Atrocities) Act, 1989 - Sections 3(2)(v) & 14-A(2) - Indian Penal Code - Section 302 - Code of Criminal Procedure, 1973 -Sections 161 & 439.

The learned trial judge while passing the impugned order has discussed all the parameters settled by the Hon'ble Apex Court in multiple number of cases and there is no wrong or fault in passing the impugned order against the accused person. Moreover, the offence with which the accused-appellant is arraigned is serious enough and punishable u/s 302 I.P.C. in case the same is proved by cogent evidence before the trial judge, capital punishment or life imprisonment is warranted. **The accused and witnesses are native of the same village, therefore, possibility of tampering with the evidence and adversely influencing the witnesses cannot be ruled out.** (Para 19, 20)

B. Individual liberty cannot be accentuated to such an extent or elevated to such a high pedestal which would bring in anarchy or disorder in the society. The complainant and the other witnesses in case of release of the accused-appellant shall always be in the danger of their life as the accused with a view to save himself would have cause to vanish the evidence and even witnesses against him. (Para 21)

Appeal rejected. Criminal Misc. Application u/s 389, Cr.P.C. rejected. (E-4)

Precedent followed:

1. Prahlad Singh Bhati Vs NCT Delhi & anr., (2001) 4 SCC 280 (Para 13)

2. Ranjit Singh Vs St. of M.P. & ors., (2013) 16 SCC 797 (Para 19)

3. Ash Mohammad Vs Shiv Raj Singh @ Lalla Babu & anr., (2012) 9 SCC 446 (Para 21)

Present appeal challenged bail rejection order dated 24.01.2020, passed by learned Special Judge (S.C./S.T. Act)/Additional Sessions Judge, Barabanki.

(Delivered by Hon'ble Vikas Kunvar Srivastav, J.)

1. The present Criminal Appeal is moved under Section 14-A(2) of the Schedule Caste and Schedule Tribes (Prevention of Atrocities) Act, 1989 against the bail rejection order dated 24.01.2020 passed by learned Special Judge (S.C/S.T. Act)/Additional Sessions Judge, Barabanki in Case Crime No.09/2020, under Section 302 of I.P.C. and Sections 3(2)(v) of the S.C./S.T. Act, Police Station Loni Katra, District Barabanki seeking bail.

2. Learned counsel for the appellant Sri Suhail Kashif, Advocate and learned A.G.A. for the State Sri Anurag Singh Chauhan, Advocate are present in the Court.

3. Heard the learned counsel for the appellant, learned A.G.A. for the State and perused the record.

4. The prosecution case in brief is that the informant/complainant of the case informed in writing to the local police station i.e. Police Station Loni Katra, District Barabanki that his son, namely, Kuldeep aged about 18 years in the evening of 05.01.2020, after having dinner, left the house but did not return. He could not be traced out despite immense search since night up to next morning. His phone number 7390081077 did not response being switched off on repeated dialing. In the morning of 06.01.2020 at about 09:00 A.M., a girl namely Sadhna D/o Sanjai Rawat when went to graze the grass from the grove of Mohd. Hanif, she found the dead body of the Kuldeep fell face down on the earth. She rushed up to the house of informant and told about the dead body of the deceased-Kuldeep. When the informant with his family members reached on the said grove, they found the dead body of the Kuldeep lying on earth and there was a cut injury at the left side of the neck. The informant suspected some unknown persons who killed his son by cutting throat and throwing the dead body in the grove of the Mohd. Hanif.

5. The information was registered as Case Crime No.09/2020, under Section 302 of I.P.C. and Sections 3(2)(v) of the S.C./S.T. Act, Police Station Loni Katra, District Barabanki, the police started investigation and sent the body for post mortem.

6. Learned A.G.A. for the State has filed the counter affidavit and produced the case diary before the Court, wherein, the statement recorded by the Investigating Officer of witnesses, namely, Ram Naresh (complainant / father of the deceased) and Ms.Kumari Sarita (Sister of the deceased) and some independent witnesses, namely, Ram Kishore Rawat, Bablu Rawat and etc.

7. From the statements of the witnesses recorded by the Investigating Officer, it comes out that prosecution has made up a case against present accused-appellant on the basis of two last seen witnesses connecting him from the offence. The sister of the deceased stated to the informant of the case after the cremation of the deceased that in the night of 05.01.2020 at about 08:00 P.M. to 09:00 P.M., a phone call was attended by the deceased, who respond the caller that he is just coming and when he was intercepted by the sister, not to go without having dinner, he told, will come back soon as Arman is calling him. This statement of father was recorded on 08.01.2020 and supported by the sister's statement that she was told by the deceased that telephone call was of Arman, who asked the deceased to come out of the home.

8. Another independent witness of last seen, Ram Kishore Rawat stated that in the night of 05.01.2020 at about 08:00 P.M. when he was standing in front of his house he saw the deceased-Kuldeep passing through the Roza Road, talking on his mobile phone and the accused-Arman was also going just behind him. He has also stated that accused-Arman and deceased-Kuldeep were swarm friends and used to work together wiring work in four wheelers. They used to be together mostly. This witness suspected that Arman might have committed murder of deceased-Kuldeep.

9. Independent witness, Bablu Rawat has also affirmed the aforesaid statement, on the basis whereof, the accused was arrested and on his information and leading, the murder weapon i.e. blood stained knife, rod of shocker of motor

cycle with stain of blood, broken mobile phone, battery of the phone and a sim card, were recovered and the same were identified by the father of the deceased.

10. The prosecution has collected the call record from the two phone numbers, one belonging to the deceased bearing phone number 7390081077 and another phone number 9305896702 identified to be of accused-Arman as it was attended by him on a random call made to him by the Investigating Officer.

11. Post mortem of the dead body of deceased-Kuldeep was performed between 4:00 P.M. to 5:00 P.M. on 06.01.2020. On the perusal of post mortem report, annexure no.3, the possible time of death is reported before one and half day approximately. It relates the time between 08:00 P.M. to 09:00 P.M. in the night of 05.01.2020 when the accused was last seen with the deceased when he was alive.

12. Perused the order of the Court passed over the bail application, moved on behalf of accused-appellant-Arman Khan before the trial judge, Special Court (S.C/S.T. Act)/Additional Sessions Judge, Barabanki, who rejected the same vide his order dated 24.01.2020 giving rise to the filing of appeal under Section 14-A(2) of the Schedule Caste and Schedule Tribes (Prevention of Atrocities) Act, 1989.

13. The moot question in the appeal is that whether learned trial court has passed the impugned order wrongly and the accused-appellant had suitable cause for grant of bail during the pendency of the trial. There is principle of law established by Hon'ble the Apex Court. In the case of ***Prahlad Singh Bhati Vs. NCT, Delhi and Another*** reported in ***(2001) 4 SCC 280,*** Hon'ble the Apex Court in para 8 has held as under:-

"8. The jurisdiction to grant bail has to be exercised on the basis of well settled principles having regard to the circumstances of each case and not in an arbitrary manner. While granting the bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character, behaviour, means and standing of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public or State and similar other considerations. It has also to be kept in mind that for the purposes of granting the bail the Legislature has used the words "reasonable grounds for believing" instead of "the evidence" which means the court dealing with the grant of bail can only satisfy it as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not excepted , at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt."

14. In view of the above, this is to be seen that whether the prosecution has made out a strong prima facie case against the accused-appellant which shows his complicity in the commission of the offence satisfactorily. The case before the trial judge and involved in this appeal put forth by the prosecution is simply based on statement of witnesses Ram Kishore Rawat and Bablu Rawat recorded under Section 161 Cr.P.C. with regard to seeing the deceased alongwith accused-appellant-Arman Khan in the night of 05.01.2020 when he was alive. Just after that the dead body of the deceased-Kuldeep was discovered in the grove of Mohd. Hanif in the village. The statement of this witness was connected with the statement of sister of the deceased, who stated that in the evening of 05.01.2020 at about 08:00 P.M., when her

brother, the deceased-Kuldeep was on dinner, he attended a call from Arman, calling him to come at a place.

15. The dead body of the deceased was found in the grove lying on the earth with cut injury on the left side of the neck and the post mortem report reveals the anti mortem injuries which are being given hereunder:-

"1) A L.W. 6cm x 2.0cm around over top of Head, scalp deep, 14 cm. above from large of (Lt.) ear.

2) ALW 3.0cm x 1.0cm present over top of Head scalp deep 2cm around 10cm. Injury No.(1), larger & larches ent.

3) A lacerated wound 5.0cm x 2.0cm present over frond of upper neck 5.0cm above from sidetrack.

4) A lacerated wound 2.0 cm. x 1.0 cm bone deep present over (Lt) shoulder rigor 7.0cm below from tie of (Lt.) shoulder joint.

5) A lacerated wound 2.0cm x 1.0 cm present over (Lt) scapula rigor bone deep 5.0cm medial to injury no. (4)

6) A lacerated wound 3.0cm x 1.00cm present over (Lt) sidetrack Thorne cavity deep below from injury no.(5)."

16. The articles stained with blood recovered from the house of accused-appellant, thus, prima facie found linked from the anti mortem injuries found on the person of dead body.

17. All the lacerated wounds are suggestive of causing death due to hemorrhage. The arrest and recovery memo made by the police after the arrest of the accused on the prima facie evidence of his complicity in the offence lead the recovery of murder weapon i.e. blood stained knife, rod of shocker of motor cycle with stain of blood, broken mobile phone, battery of the phone and a sim card, identified by the complainant as of the deceased. The call details from the telecom department, which is electronic evidence to corroborate the statement made by the sister of the deceased about receiving call from Arman in the evening of 05.01.2020, asking the deceased to come out and accompany him is discussed in the impugned order.

18. Further, the statement of independent witnesses Ram Kishore Rawat and Bablu Rawat make possible and reliable the statement of sister of the deceased namely Kumari Sarita given to the police under Section 161 Cr.P.C. that call from Arman was attended on phone by the deceased as they were friends and work together of wiring of four wheelers and thus used to remain with each other mostly. Thus, there is no impossibility in the statement of relative witnesses and no contradiction with the statement of independent witness, therefore, prima facie case from statement against the complicity of the accused was sufficiently established by the prosecution. The motive, as also sufficiently explained by the prosecution that both i.e. the accused and the deceased were liking a same girl, for the reason of which, the accused thrashed against the deceased.

19. The parameters for grant of bail under Section 439 Cr.P.C. have been settled by Hon'ble the Apex Court in multiple number of cases, one of them is ***Ranjit Singh Vs. State of Madhya Pradesh and Others*** reported in ***(2013) 16 SCC 797*** relying on the other supreme court cases on the subject. In para 20 and 21, it is held:-

"20. In Chaman Lal v. State of U.P.[1], this Court, while dealing with an application for bail, has stated that certain factors are to be borne in mind and they are: -

".... (i) the nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence,

(ii) reasonable apprehension of tampering with the witness or apprehension of

threat to the complainant, and (iii) prima facie satisfaction of the court in support of the charge."

21. In Prasanta Kumar Sarkar v. Ashis Chatterjee[2], this Court, while emphasizing on the exercise of discretionary power generally has to be done in strict compliance with the basic principles laid down in plethora of decisions of this Court, has observed as follows: -

"9... among other circumstances, the factors which are to be borne in mind while considering an application for bail are:

i) whether there is any prima facie or reasonable ground to be believed that the accused had committed the offence;

ii) nature and gravity of the accusation;

iii) severity of the punishment in the event of conviction;

iv) danger of the accused absconding or fleeing, if released on bail;

v) character, behavior, means, position and standing of the accused;

vi) likelihood of the offence being repeated;

vii) reasonable apprehension of the witnesses being influenced;

and

viii) danger, of course, of justice being thwarted by grant of bail."

20. The learned trial judge while passing the impugned order has discussed all these things and there is no wrong or fault in passing the impugned order against the accused person. Moreover, the offence with which the accused-appellant is arraigned is serious enough and punishable under Section 302 I.P.C. in case of proving the same by cogent evidence before the trial judge, capital punishment or life imprisonment is warranted. The accused and witnesses are native of the same village, therefore, possibility of tampering with the evidence and adversely influencing the witnesses cannot be ruled out.

21. Moreover, the complainant and the other witnesses in case of release of the accused-appellant shall always be in the danger of their life as the accused with a view to save himself would have cause to vanish the evidence and even witnesses against him. Hon'ble the Supreme Court in case of ***Ash Mohammad Vs. Shiv Raj Singh @ Lalla Babu and Another reported in (2012) 9 SCC 446*** has held in para 18 and 19, which is quoted below:-

"18. It is also to be kept in mind that individual liberty cannot be accentuated to such an extent or elevated to such a high pedestal which would bring in anarchy or disorder in the society. The prospect of greater justice requires that law and order should prevail in a civilized milieu. True it is, there can be no arithmetical formula for fixing the parameters in precise exactitude but the adjudication should express not only application of mind but also exercise of jurisdiction on accepted and established norms. Law and order in a society protect the established precepts and see to it that contagious crimes do not become epidemic. In an organized society the concept of liberty basically requires citizens to be responsible and not to disturb the tranquility and safety which every well-meaning person desires. Not for nothing J. Oerter stated:

"Personal liberty is the right to act without interference within the limits of the law."

19. Thus analyzed, it is clear that though liberty is a greatly cherished value in the life of an individual, it is a controlled and restricted one and no element in the society can act in a manner by consequence of which the life or liberty of others is jeopardized, for the rational collective does not countenance an anti-social or anti-collective act."

22. On the basis of aforesaid discussions, the Criminal Appeal arising out of impugned order dated 24.01.2020 rejecting the appellant's bail application, preferred under Section 14-A(2) of the Schedule Caste and Schedule Tribes

(Prevention of Atrocities) Act, 1989 for no force to be allowed, hence, the appeal is rejected. The Criminal Misc. Application No.20452 of 2020 under Section 389 Cr.P.C. shall also stands ***rejected*** in view of the rejection of the appeal.

23. However, learned trial court is directed to conclude the trial expeditiously, if possible, within one year from the date certified copy of the order is produced before it.

(2021)11ILR A769
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.10.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

Criminal Appeal No. 544 of 2010

Raggu Baniya @ Raghwendra ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Anupam Lahoriya, Sri Amit Tripathi, Sri Prashant Kumar Srivastava

Counsel for the Respondent:
A.G.A.

A. Criminal Law – Rape – Code of Criminal Procedure, 1973 - Sections 313 & 376 - Indian Penal Code, 1860 - Sections 375 & 376 - The courts shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen. It is true that in a rape case the accused could be convicted on the sole testimony of the prosecutrix, if it is capable of inspiring of confidence in the mind of the court. If the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix. (Para 9, 22)

B. For maintaining the conviction u/s 376 Cr.P.C., medical evidence has to be in conformity with the oral testimony. In our finding, the medical evidence goes to show that doctor did not find any sperm. The doctor opined that no signs of forcible sexual intercourse were found. This was also based on the finding that there were no internal injuries on the girl who was minor girl. The factual data also goes to show that there are several contradictions in the examination-in-chief as well as cross examination of the witnesses. (Para 23 to 28)

Hon'ble High Court examined the evidence of the prosecutrix on which reliance is placed by trial court and whether it inspires confidence or not so as to sustain the conviction of accused. And held that the chain of incident goes to show that the prosecutrix was raped as would be clear from the provision of S.375 read with S.376 of IPC. Learned Trial Judge has given finding as to fact as to how commission of offence u/s 376 IPC was made out in the present case, but further has not put any question in the statement recorded u/s 313 Cr.P.C., 1973 of the accused relating to rape or statement which is against him. The accused has been convicted for life. The judgment and order impugned is reversed and the accused is convicted for period undergone. (Para 22, 28, 29, 30)

Appeal partly allowed. (E-4)

Precedent followed:

1. Sadashiv Ramrao Hadbe Vs St. of Mah., 2006 (10) SCC 92 (Para 6, 8, 9)

2. Manne Siddaiah @ Siddiramulu Vs St. of A.P., 2000 (2) Alld (Cri) (Para 6, 8)

3. Rafiq Vs St. of U.P., AIR 1981 SC page 559 (Para 21)

4. Nawab Khan Vs State, 1990 Cri.L.J. Page 1179 (Para 21)

5. Bharvada Bhogin Bhai Hirji Bhai Vs St. of Guj., AIR 1983 SC page 753 (Para 21)

6. Ganesan Vs State Represented by its Inspector of Police, Criminal Appeal No. 680 of 2020 (Arising from S.L.P. (Criminal) No. 4976 of 2020) (Para 22)

7. Bhaiyamiyan @ Jardar Khan & anr.r Vs St. of M.P., 2011 SCW 3104 (Para 28)

Present appeal challenges judgment and order dated 08.12.2009, passed by Additional Session Judge, Special Court (Dakaity Affected Area), District Kanpur Dehat.

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
Hon'ble Ajai Tyagi, J.)

1. By way of this appeal, the appellant has challenged the Judgment and order dated 08.12.2009 passed by Additional Session Judge, Special Court (Dakaity Affected Area), District Kanpur Dehat in S.T. No.68 of 2009, State v. Raggu Baniya @ Raghvendra, (arising out of Case Crime No.413 of 2008), under Sections 376 of IPC, Police Station Ghatampur, District Kapur Dehat whereby the accused-appellant was convicted under Section 376 IPC and sentenced to imprisonment for life imprisonment with fine of Rs.5,000/-, and in case of default of payment of fine, to undergo further rigorous imprisonment for six months.

2. The brief facts as per prosecution case are that on 24.8.2008 at about 9:00 a.m., the prosecutrix was going alone from her house to break the cucumber in the field of Bhaiyadin Yadav, when she reached, accused- Raggu Baniya @ Raghwendra son of Chandra Pal Sankhwar who had caught hold of her with bad intention and he committed rape with her and on the sound of her screaming, complainant with his brother (Baburam) came running to the place of the incident and tried to nab the accused, but accused ran away from the place of offence. The complainant reached the police station for reporting the said incident as a case of rape. Sub Inspector Ramraj Shukla, Chauki Incharge registered the First Information Report and started the investigation, visited the spot (namely place of offence), prepared site plan, recorded statements of the prosecutrix and witnesses and after completing investigation submitted charge sheet against the accused.

3. The prosecution so as to bring home the charges examined five witnesses, namely:-

1.	Prosecutrix	P.W.1
2.	Sukhram(Father)	P.W.2
3.	Dr. Geeta Yadav (Doctor)	P.W.3
4.	Sughar Singh Sachan (Chief Pharmacist)	P.W.4
5.	Ramraj Shukla (Chauki Prabhari)	P.W.5

4. In support of the ocular version of the witnesses, following documents were produced and contents were proved by leading evidence:

1.	F.I.R.	Ext. Ka-10
2.	Written report	Ext. Ka-2
3.	Recovery memo of Cloth	Ext. Ka-7
4.	Statement of Pinki (prosecutrix)	Ext. Ka-1
5.	Injury Report	Ext. Ka-3
6.	Supplementary Report	Ext. Ka-4
7.	Injury Report	Ext. Ka-5
8.	Charge Sheet Mool	Ext. Ka-9
9.	Site Plan with Index	Ext. Ka-8

5. Heard Shri Amit Tripathi, learned counsel for the appellant and learned AGA for the State and also perused the record.

6. Learned counsel for appellant has relied on the following decisions of the Apex Court rendered in the case of **Sadashiv Ramrao Hadbe Vs. State of Maharashtra, 2006(10)SCC 92** and the judgment of High Court of Andhra Pradesh in the case of **Manne Siddaiah @ Siddiramulu Vs. State of Andhra Pradesh, 2000(2) Alld(Cri)** so as to contend

and submit that in fact no case is made out so as to convict the accused under Section 376 I.P.C. and the prosecutrix has roped in the accused with ulterior motive i.e. because of dispute between her father (Sukhram) and the accused and in the alternative contends that reliance on the aforesaid decision is placed so as to demonstrate that life imprisonment is too harsh a punishment.

7. It is submitted by learned counsel for the State that the judgment of learned Trial Judge cannot be found fault with.

8. Learned counsel for the appellant Shri Amit Tripathi has stated that the accused is in jail since 24.8.2008. The accused who at the time of incident was a young age of 19 years he should be given chance of rehabilitation. Learned counsel for appellant has relied on the decision of **Sadashiv Ramrao Hadbe Vs. State of Maharashtra (supra)** and has submitted that she presses for clean acquittal of the accused. The appellant has been in jail since 24.08.2008. In support of his submission, he presses into service the judgment in the case of **Manne Siddaiah @ Siddiramulu (supra)** rendered by Andhra Pradesh High Court, though it is a judgment of Single Bench, i.e. by Justice B. Sudershan Reddy (as he then was). Learned counsel has relied on findings returned in paragraphs 14 and 15 of the said judgment, which lay down as follows :-

"14. In nutshell the version given by P.W.5 is not supported by even P.Ws. 1 and 2. P.W.1 in his evidence in categorical terms states that he caught hold of the appellant herein as his wife informed him that the appellant has raped her. P.W.5 in her evidence does not state that she has informed P.W.1 about the rape at any time. These major inconsistencies and contradictions in the evidence of material witnesses - P.Ws. 1, 2 and 5 create a lot of suspicion and doubt about the prosecution case. Added to that, P.W.10 - the Civil Assistant Surgeon who examined P.W.5, in her evidence clearly states that she did not find any external injuries on the body of P.W.5. She has also not noticed any semen and spermatozoa in the vaginal slides.

15. In the aforesaid circumstances, it would not be safe to convict the appellant herein on mere suspicion. The inconsistencies and contradictions noticed above are fatal to the case of the prosecution and create any amount of doubt. Obviously, it is the appellant who is entitled for the benefit of doubt.

9. Learned counsel for appellant presses into service the judgment in the case of **Sadashiv Ramrao Hadbe Vs. State of Maharashtra (supra)** more particularly observations in paras 9, 10, 11 of the said judgment, which are verbatim reproduced as follows :-

"9. It is true that in a rape case the accused could be convicted on the sole testimony of the prosecutrix, if it is capable of inspiring of confidence in the mind of the court. If the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix. The courts shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen.

10. In the present case there were so many persons in the clinic and it is highly improbable the appellant would have made a sexual assault on the patient who came for examination when large number of persons were present in the near vicinity. It is also highly improbable that the prosecutrix could not make any noise or get out of the room without being assaulted by the doctor as she was an able bodied person of 20 years of age with ordinary

physique. The absence of injuries on the body improbablise the prosecution version.

11. The counsel who appeared for the State submitted that the presence of semen stains on the undergarments of the appellant and also semen stains found on her petticot and her sari would probablise the prosecution version and could have been a sexual intercourse of the prosecutrix.

12. It is true that the petticot and the underwear allegedly worn by the appellant had some semen but that by itself is not sufficient to treat that the appellant had sexual intercourse with the prosecutrix. That would only cause some suspicion on the conduct of the appellant but not sufficient to prove that the case, as alleged by the prosecution."

10. We are unable to convince ourselves with the submission made by learned AGA for State that the prosecutrix has been a victim of atrocity as well as rape and, therefore, the accused should not be leniently dealt with.

11. We have been taken through the evidence and the deposition mainly of prosecution witnesses and judgment of Trial Court. We have read the same and are discussing the same.

12. PW-1, namely, the prosecutrix has been examined on oath who was made to understand that she was in a court of law, she understood the importance of her testimony, she understood why she was summoned to the Court where she answered that as the accused had committed bad work with her, she was summoned and that she was capable of answering or the questions. According to her, when she was 11 years of age and when she went with Pooja (sister of accused) for eating cucumber in the field of Bhaiyadin. Raghvendra-accused sent his sister from the field of Bhaiyadin to fetch water. When she also tried to leave the place, he conveyed that he would give her cucumber, he took her to the maize field, she started screaming but the accused forcibly shut her mouth by cloth and he had forcible intercourse. She was brought to the police station by her grand father. She was hospitalized for three days. She was taken to the hospital by her grand father and the police personnel. Her statement under Section 164 Cr.P.C. was recorded before the concerned Magistrate. In her cross examination, she stated that on the date or day of incident she did not go to the school as it was a Sunday. She was playing at her home and when Pooja came, her grand-father and father were not in the house. Her grand-father had gone just three fields ahead of Bhaiyadin's field (the place of incidence). The incident occurred when Pooja called the prosecutrix at 9.00 a.m.

13. Sukhram, was examined as PW-2, who is the uncle of the prosecutrix,who had given the FIR. The prosecutrix was bleeding and so he took her on his shoulder and took her to police station and from there she was taken to hospital. She was hospitalized in Urshila Hospital, Kanpur, where she was hospitalized for three days. PW-2 when he was in his field, he heard the screaming of a girl, she was not able to speak because her mouth was forcibly shut by cloth. He brought the prosecutrix to their home and at 12.30 he took her to the police station.

14. Dr. Geeta Yadav, PW-3 in her ocular version mentioned that hyman was ruptured and was bleeding the vaginal smear for the determination of the age of the prosecutrix was prepared. The matter was sent to the Radiologist and the injured, she was kept in emergency ward. Doctor in her ocular version did not give any finding of opinion about the sexual intercourse or rape committed on the prosecutrix. The prosecutirx was sent for getting her age examined by the C.M.O., Kanpur Nagar. The Injury, according to the doctor could be caused even otherwise then rape the hyman may ruptured not be because of the rap.

15. As far as PW-4, Chief Pharmacist is concerned, he is also a medical officer and he was summoned so as to prove the medico legal cases. The prosecutrix was referred to Kanpur accept the records he did not throw much light on the other facts.

16. PW-5 is the Officer who had conducted the investigation.

17. We now would to sift the evidence threadbare of the prosecution story, the evidence led and discussed before the trial court and appreciated as by the learned Trial Judge.

18. Provision of Section 376 I.P.C. read as follows :

"376. Punishment for rape.--

(1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the women raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both: Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

(2) Whoever,--

(a) being a police officer commits rape--

(i) within the limits of the police station to which he is appointed; or

(ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or

(iii) on a woman in his custody or in the custody of a police officer subordinate to him; or

(b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or

(c) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a woman's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or

(d) being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or

(e) commits rape on a woman knowing her to be pregnant; or

(f) commits rape on a woman when she is under twelve years of age; or

(g) commits gang rape, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine: Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years. Explanation 1.--Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section. Explanation 2.--"Women's or children's institution" means an institution, whether called an orphanage or a home for neglected woman or children or a widows' home or by any other name, which is established and maintained for the reception and care of woman or children. Explanation 3.--"Hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation."

19. In respect of the victim, the doctor in medical report has opined as under :-

"In the x-Ray of both wrist A.P., all eight carpal bones were found present. The lower epiphyses of both wrist joints have not fused. In the x-Ray of both elbow joints, all the bony epiphyses around both elbow joints had fused

In her supplementary report, lady doctor opined that no spermatozoa was seen by her. According to physical appearance, age of the prosecutrix was 15 to 16 years. No definite opinion about rape was given"

20. The evidence as discussed by learned Judge discusses all the aspects and he has held that the mere fact that no external marks of injury wew found by itself would not throw the testimony of the prosecutrix over board as it has been found that at the time of occurrence as she was a minor girl. We also do not give any credence to that fact and would like to go through the merits of the matter.

21. As far as the commission of offence under Section 376 IPC is concerned, the learned Judge has relied on the judgments of **(1) Rafiq Versus State of U.P., AIR 1981 SC page 559, (2) Nawab Khan Versus State, 1990 Cri.L.J. Page 1179 and the judgment in (3) Bharvada Bhogin Bhai Hirji Bhai Versus State of Gujarat, AIR 1983 SC page 753.**

22. We venture to discuss the evidence of the prosecutrix on which reliance is placed by trial court and whether it inspires confidence or not so as to sustain the conviction of accused. There were concrete positive signs from the oral testimony of the prosecutrix as regards the commission of forcible sexual intercourse. In case of **Ganesan Versus State Represented by its Inspector of Police, Criminal Appeal No. 680 of 2020 (Arising from S.L.P. (Criminal) No.4976 of 2020)** decided on 14.10.2020 wherein the principles of accepting the evidence of the minor prosecutrix or the prosecutrix are enshrined the words may be that her testimony must be trustworthy and reliable then a conviction based on sole testimony of the victim can be based. In our case when we rely on the said decision, it becomes clear that the testimony of the prosecutrix can be said to be that of a sterling witness and the medical evidence on evaluation prove the fact that case is made out against the accused.

23. Though the evidence of Dr. Geeta Yadav, Medical Officer, PW-3, Mahila Hospital Kanpur Dehat who medically examined the prosecutrix on 22.10.2009, Auxiliary and public hair was not present. The breasts was not developed. The height of prosecutrix was 131 c.m. and her weight was 23 kg., teeth were present in her mouth. There was no injury on the breast. There was no injury and bleeding on the vaginal but hymen was torn and heeled vagginal smear was collected and was sent to the Pathologist. No living or dead spermatozoa were found in the vaginal smear. As per medical examination report no external or internal injury were visible on the whole body of the prosecutrix. On perusal of the medical report it appears that the victim was about 11 years old at the time of incident.

24. In the x-ray examination, both wrist A.P., all eight carpal bones were found present. Lower epiphyses of both writst joints were not fused. All the bony epiphyses around both elbow joints were fused. In the supplementary report, the doctor opined **that no spermatozoa was seen** by her and according to the physical appearance, age of the victim was appearing to be 15 to 16 years and no definite opinion about rape could be given.

25. As far as the medical evidence is concerned, there are three facts which emerge. Firstly, no injury was found on the person of the victim. We are not mentioning that there must be any corroboration in the prosecution version and medical evidence. The judgment of the Apex Court rendered in the case of **Bharvada Bhogin**

Bhai Hirji Bhai Versus State of Gujarat, AIR 1983 SCC page 753, which is a classical case reported way back in the year 1983, on which reliance is placed by the learned Session Judge would be helpful to the prosecution. The medical evidence should show some semblance of forcible intercourse, the prosecutrix was gagged and hospitalised for three days even if we go as per the version of the prosecutrix that the accused had gagged her mouth for ten minutes and had thrashed her on ground, there would have been some injuries to the fully grown lady on the basis of the body.

26. In our finding, the medical evidence goes to show that doctor did not find any sperm. The doctor opined that no signs of forcible sexual intercourse were found. This was also based on the finding that there were no internal injuries on the girl who was minor girl.

27. The factual data also goes to show that there are several contradictions in the examination-in-chief as well as cross examination of the witnesses. The prosecutrix in her examination-in-chief, she states that incident occurred at about 9:00 a.m. but nowhere in her ocular version or the FIR, she has mentioned that she was going to the fields to eat cucumber.

28. For maintaining the conviction under Section 376 Cr.P.C., medical evidence has to be in conformity with the oral testimony. We may rely on the judgment rendered in the case of **Bhaiyamiyan @ Jardar Khan and another Versus State of Madhya Pradesh, 2011 SCW3104.** The chain of incident goes to show that the prosecutrix was raped as would be clear from the provision of section 375 read with Section 376 of IPC.

29. The judgment relied on by the learned counsel for the appellant will also permit us to concur with the judgment impugned of the learned Trial Judge where no perversity has crept in. Learned Trial Judge has given any finding as to fact as to how commission of offence under Section 376 IPC was made out in the present case, but the learned Judge further has not put any question in the statement recorded under Section 313 Criminal Procedure Code, 1973 of the accused relating to rape or statement which is against him.

30. In view of the facts and evidence on record, we are convinced that the accused has been convicted for life, hence, the judgment and order impugned is reversed and the accused is convicted for period undergone. The accused appellant, if not wanted in any other case, be set free forthwith.

31. Appeal is **partly allowed** accordingly.

32. A copy of this judgment be sent to the Law Secretary, State of U.P. who shall impress upon the District Magistrates of all the districts in the State of U.P. to reevaluate the cases for remission after 14 years of incarceration as per mandate of Sections 432 and 433 of Cr.P.C. even if appeals are pending in the High Court.

33. The accused, if not wanted in any other case, may be released forthwith.

34. We are thankful to learned counsel for the parties for ably assisting this Court.

35. Record be sent to Session Court.

(2021)11ILR A775
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.11.2021

BEFORE

THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Habeas Corpus No. 23362 of 2020

Km. Hashmi ...Applicant

Versus

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

Counsel for the Applicant:
Girish Kumar Pande, Prashant Pandey

Counsel for the Respondents:
G.A.

Civil Law - Constitution of India - Article 226 - Habeas Corpus Petition - Habeas Corpus petition moved by father of the alleged detenue - To set up the minority of his daughter, petitioner took reliance on Aadhar Card wherein, date of birth is mentioned as 12.05.2004 - Petitioner concealed educational certificate of the school first attended by detenue where the date of birth recorded was 5.4.2001- Detenue was recovered by police on 17.11.2020, statement of the detenue under Sections 161 and 164 of the Cr.P.C. were recorded – Before Magistrate detenue, being major, opted to go with the family members of the opposite party no.3, Vineet Kumar & desired not to go with her parents – Concealing all these facts petition was filed - Held - writ of mandamus cannot be issued against the private opposite party for the release of alleged detenue - petition suffers from the concealment of material facts like the date of birth of the alleged detenue entered into her school records which she attended first, recovery of girl by the police, recording of her statement under Section 164 Cr.P.C. before the Magistrate, when she was produced before him - detenue by virtue of a judicial order was set free to go wherever she wants and opted to go with opposite party no.3, Vineet Kumar with whom she wanted to marry. (Para 24, 30)

Dismissed. (E-5)

Cases Relied on:

1. Dr. Vijay Kumar Kathuria Vs St. of Har. & ors. (1983) 3 SCC 333

2. S.P. Chengalvaraya Naidu (dead) by Lrs. VsJagannath (dead) by Lrs. & ors. (1994) 1 SCC 1

3. Union of India & ors. Vs Muneesh Suneja (2001) 3 SCC 92

4. Lata Singh Vs St. of U.P. & ors. AIR 2006 SC 2522

5. Sohan Lal Vs U.O.I. AIR 1957 SC 529

(Delivered by Hon'ble Vikas Kunvar Srivastav, J.)

1. The present writ petition of Habeas Corpus is moved by the petitioner-Usman, father of the alleged detenue, "Kumari Hashmi" aged about 16 years, r/o Village Sarawan, P.S. Itaunja, Distict- Lucknow. In addition, State of U.P. and Station Officer, Police Station-Itaunja, District-Lucknow, the private Opposite Party-Vineet Kumar S/o Sukhdev R/o Village Sarawan, Police Station-Itaunja, District-Lucknow is also made opposite party.

2. In brief, the facts emerging from the pleadings of the writ petition reveals that the daughter of the next friend, "Usman' lodged an F.I.R. in local Police Station Itaunja, District-Lucknow on 13.11.2020 at 7:19 p.m. stating therein, his 16 years' old daughter left the home at about 4:00 p.m. on 12.11.2020 for going to her maternal uncle's home at Village Darauna, P.S.- Itaunja, Lucknow but she did not reach there and he came to know from the whispers amongst native villagers that one Vineet Kumar, opposite party no.3, resident of the same village enticed and taken away his minor daughter and kept detained her in some lonely place, which is not known to the petitioner and his family members. The complainant/petitioner has further stated in the said F.I.R. that opposite party no.3, Vineet Kumar and his family members are not permitted him to meet the alleged detenue.

3. To set up the minority of his daughter, the petitioner-Usman has taken reliance on Aadhar Card wherein, date of birth is mentioned as 12.05.2004, which is made Annexure-2 to the petition. Being helpless to see or meet his daughter, the alleged detenue, opted to file the instant petition in hand. The entire petition is directed against the opposite party no.3 for the violation of fundamental right of petitioner and that of the alleged detenue. On the basis of facts

stated in the petition, following reliefs are sought:-

"(i) Issue a writ, order or direction in the nature of Habeas Corpus directing opposite party no.3 to produce the detenue before this Hon'ble Court and set her free from his illegal detention forthwith.

(ii) Issue a writ, order or direction in the nature of mandamus directing the the opposite party no.3 to set free the detenue from his illegal detention frothwith.

(iii) Issue any other order or direction which this Hon'ble Court may deem just and proper in the circumstances of the case in favour of the petitioner.

(iv) Allow writ petition with cost in favour of the petitioners against opposite parties."

4. Counter affidavit on behalf of the State is filed on 14.12.2020/17.12.2020. In para-3 of the counter affidavit, it is stated that the petitioner "Usman' filed an FIR on 13.11.2020 in Police Station Itaunja, District Lucknow against the opposite party no.3, "Vineet Kumar' whereupon Case Crime No.317 of 2020 under Sections 363 and 366 of Indian Penal Code was registered. The informant-complainant in the said FIR stated that opposite party no.3 has enticed his minor daughter and taken her away with him. The victim girl was recovered on 17.11.2020, the informant of the case, the next friend-Usman was called on and his daughter, the alleged detenue, Km. Hashmi was sent for medical examination, where she refused to undergo the medical examination. On the basis of educational certificate from the school first attended by her, the date of birth was found recorded 5.4.2001, according to which, the age of the victim on the date of incident was 19 years 7 months. Further, the statements of the victim under Sections 161 and 164 of the Cr.P.C. were recorded, that she left the home on her own. The Magistrate finding her an adult person set her free to go wherever she wants, she opted to go with the family members of the opposite party no.3, Vineet Kumar. She being an adult desired not to go with her parents. In support of the facts alleged in para-3 of the counter affidavit, learned A.G.A. placed the case diary before the court for perusal and also made relevant extracts from case diary Annexures to the counter affidavit. The counter affidavit is duly sweared on by Sub Inspector, Ameer Bahadur Singh, Police Station- Itaunja, District-Lucknow, the Investigating Officer of the case.

5. To controvert the facts arisen from the para-3 of the counter affidavit of the state, a rejoinder affidavit by the petitioner is also filed, sweared on by the petitioner's (next friend-"Usman'). Para-4 of the rejoinder affidavit is relevant here, which runs as under:-

"4. That in reply to the contents of para 3 of the counter affidavit only this much is admitted that petitoner lodged the report on 13-11-2020 at Police Station Itaunja Distt. Lucknow for enticing away his daughter/detenue Km. Hashmi by Vineet Kumar s/o Sukhdev R/O Vill Sarawan, Police Station Itaunja District Lucknow which was registered at Case Crime No.317/2020 U/Ss 363/366 I.P.C. and rest of the contents are denied. In fact petitioner was not called by the police nor he went there neither met to the Detenue. It is also submitted that any documentary evidence regarding age of the detenue has not been filed with the Counter Affidavit and detenue is minor. For ascertaining the age of the detenue her medical examination is necessary."

6. Countering the para-9 of the counter affidavit filed on behalf of the State, stating that the alleged detenue being major as her age assessed on the basis of date of birth entered in her school record first attended being 5.4.2001, para-10 of the rejoinder affidavit is relevant to be quoted hereunder:-

"10. That contents of para 9 of Counter Affidavit are wrong hence denied and contents of para 6 of our writ petition are reiterated. It is also submitted that any school certificate regarding date of birth of the deteneu has not been filed with the Counter Affidavit."

7. Heard learned counsel for the petitioner, Shri Girish Kumar Pandey, Advocate and Learned Additional Government Advocate for the State, Sri Balkeshwar Srivastava, Advocate.

The girl (alleged detenue) is an adult, the law relating the manner of assessing the age in given facts.

8. Learned counsel for the petitioner insisted on the basis of Aadhar Card made Annexure-2 to the petition issued in favour of the alleged detenue that she is minor in age as date of birth mentioned therein 12.5.2004. Whereas, learned A.G.A. on behalf of the State argued that learned counsel for the petitioner has suppressed the fact with regard to the date of birth recorded in the records of the school first attended by the alleged detenue i.e., 5.4.2001, as such, on the date of alleged incident she was major. The writ petition is liable to be dismissed, for the reason of suppression of fact and fraud committed upon court by concealment of necessary facts. It is further argued that learned counsel for the petitioner has not denied anywhere in the petition that his daughter, the alleged detenue has not attended any school and she is uneducated. He further submitted that Aadhar card is not a recognized document under law, so as to accept as proof of age.

9. Learned A.G.A. further objected the maintainability of the writ petition on the ground that the entire petition is oriented against the private opposite party-Vineet Kumar. A writ in the nature of mandamus on the ground of the opposite party no.3, violating the fundamental right of the alleged detenue and her family members including the petitioner under Article 21 of the Constitution of India. This is established principle of law that a mandamus cannot be issued against a private individual, petition is not directed for any action of violation of fundamental right by the State opposite parties, namely opposite party no.1 and 2, therefore, petition under Article 226 of the Constitution of India is not maintainable and deserves to be dismissed.

10. Learned A.G.A. further submitted that the Investigating Officer of the Case Crime No.317 of 2020 instituted on the F.I.R. dated 13.11.2020 lodged by the detenue's father "Usman', has sworn the rejoinder affidavit and denied even the recovery of the alleged detenue on 17.11.2020 and proceedings thereafter. In every proceeding the petitioner, Usman, his wife both were present and in their knowledge the statement under Section 164 Cr.P.C. before the Magistrate was recorded, wherein she stated her desire not to go with her family members and desired to marry Vineet Kumar, opposite party no.3. The Magistrate set her free at liberty to go wherever, she wants and thus a final report was submitted by the police in the case with closure. However, learned counsel for the petitioner denies as to the information of recovery of the girl as well as the further proceeding before the Magistrate and setting the alleged detenue free at liberty to go anywhere, she wants.

11. Learned A.G.A. submitted that petition is also not maintainable as the alleged detenue living with opposite party no.3, "Vineet Kumar' in pursuant to her setting free by the Magistrate finding her adult in age and she on her own opted to choose Vineet Kumar.

12. In the light of arguments over the facts coming out from the pleadings on record reveals that when the petition of Habeas Corpus is presented as fresh before the Court on 1.12.2020, the learned A.G.A. on behalf of the

State informed the court about recording of statement of victim under Section 164 Cr.P.C. before the Magistrate in the court. Order dated 1.12.2020 is quoted hereunder:

"Learned counsel for the applicant and learned AGA are present.

Learned AGA states that the alleged detenu has been recovered and she has given her statement under Section 164 Cr.P.C. before the Magistrate also.

Learned counsel for the applicant states that he has no information about the said fact, he wants time to confirm.

Learned AGA is directed to submit his instructions/counter affidavit within three weeks.

List this case after three weeks."

13. The petitioner pursuant to order neither on 1.12.2020, despite he was informed by the learned A.G.A. as to the latest update in the case lodged by him under Sections 363, 366 I.P.C. did not move any amendment application to meet out the said information nor proceeded to the court of Magistrate. The detailed fact in further update of the proceeding, is submission of final report of closure though revealed in the counter affidavit. The petitioner again denies to be in knowledge of the said fact in the rejoinder affidavit and did not bring on record any protest petition against the said final report lodged in the concerned court by him. The inaction on the part of the petitioner, thus implies the information was well within his knowledge since before the date of filing the petition and he is willingly and knowingly suppressed the fact for coming before the court, so as to relief of Habeas Corpus. He seems to have approached the court seeking relief based on equity not with clean hands.

14. The relevant extracts from the case diary showing the proceeding after the institution of Case Crime No.317 of 2020 based on F.I.R. lodged on 13.11.2020 reveal, pursuant to the recovery of the girl on 17.11.2020, recording of statement by the Investigating Officer under Section 161 Cr.P.C. and sending the alleged detenue for medical examination is done in the presence of her parents. Her denial to undergo the medical examination, the production of the detenue before the court of Magistrate for getting recorded her statement under Section 164 Cr.P.C., the assessment of age by the Magistrate on the basis of date of birth entered in school record, the order of the Magistrate setting free the alleged detenue at liberty to go wherever she wants, all are made annexures to the counter affidavit. Further, the case diary is placed before the court for perusal of the said facts and proceeding referred in annexures. It is absolutely clear that alleged detenue stated before the court of Magistrate in her statement under Section 164 Cr.P.C. that she has studied only upto Class-I in Prathamik Vidyalaya, Sarawan, where her date of birth is entered as 5.4.2001. The case diary being a document required under law to be prepared by the police officer while investigating a case is a document prepared in its routine course of business by the police official who is a public officer. The acts and proceeding entered by such officer is case diary unless contrary is proved, shall be presumed to be correct.

15. From Section 114 of the Indian Evidence Act, 1872- "Provisions for presumption of the court with regard to the existence of the certain facts.", the relevant portion with illustration is reproduced hereunder:-

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

Illustrations

The Court may presume--

(a) .....

(b) .....

(c).....

(d).....

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

(f) That the common course of business has been followed in particular cases."

16. Thus, there is a strong presumption of correctness of the document bearing the entry of the date of birth of the alleged detenue, issued by school first attended namely "Primary School Sarawan" having been prepared in common course of business to be followed by a school. Since the said entry is not rebutted by the petitioner by alleging contrary to this even in his rejoinder affidavit, shall be presumed correct. Likewise, the case diary which is prepared by a police officer (a public officer) in common course of business shall be presumed that proper procedure have been followed and judicial order passed by the Magistrate for release of the detenue setting her free to go anywhere, she wants, all are genuinely and correctly performed in the presence and notice of the complainant of the case on whose instance the proceeding is launched.

17. For assessing the age of the victim of an alleged offence or of any person alleged to be a "victim' of the offence or under unlawful detention as complained in the writ of habeas Corpus is necessary to be stated with proof of age as recognized under the provisions of law. In case of obscurity as to the age the same requires to be ascertained in accordance with the procedure established under law or on the basis of document legally certifying the age or date of birth. If a person is claiming another to be a minor, he has burden to establish the age of that another, for the purpose of seeking relief based on age. The age of the victim of an offence or age of offender, if they are alleged to be a minor shall be ascertained on the basis of procedure envisaged under Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 read with the Rule 12 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (56 of 2000) (as amended by the Amendment Act 33 of 2006), which runs as under:-

"12. Procedure to be followed in determination of Age.— *(1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.*

(2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

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

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

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

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

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment

of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

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

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of section 7A, section 64 of the Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed off cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law."

18. As such, the certificate of date of birth as recorded in the school first attended, the Primary School, Sarawan is a document recognized by law for determination of age of the alleged detenue. In the aforesaid rules of Juvenile Justice Act, 2015, Aadhar Card is not enumerated as a document recognized for the determination of age. Even Aadhar Card is not notified by any official gazette to be a document recognized for determination of age, as such, the Aadhar Card to setup the age of minority on the basis of date of birth entered therein, is of no weight. Moreover, in the presence of a recognized documents the certificate issued from the school first attended having date of birth 5.4.2001, the Adhar Card is of no evidentiary value to prima facie establish the age of the alleged detenue.

The right of a major girl

19. The Court of Magistrate before whom the alleged detenue was produced for recording statement under Section 164 Cr.P.C. has also relied on the school certificate having date of birth as 5.4.2001 of the alleged detenue and treated her a major girl. Accordingly, the court set her at liberty to go whereever she wants. Consequent upon the said order, the Investigating Officer let the alleged detenue to go with whom she wanted to go. This order was not challenged anywhere, despite in the knowledge of the petitioner's, (next friend). This inaction to challenge the proceeding implies strongly that the writ petition is moved with suppression of facts and concealment of essential information, do not deserve to be entertained as petition did not come with clean hands.

Suppression of facts by the petitioner.

".....even a tiny bit of deceit is dishonorable when it's used for selfish or cowardly reasons."

- Jeanne Birdsall (An American writer, author of the book- The Penderwicks)

20. The petitioner next friend, father of the alleged detenue knowing very well that her daughter being major, an adult who went with

the opposite party No.3 on her own as they wanted to marry each other. Knowingly, concealed the material facts of the proceeding as disclosed on the very first date the case was taken as fresh and thereafter in the counter affidavit filed by the State opposite parties. The willful concealment of the facts of which the petitioner had knowledge since before filing of the petition seeking relief of Habeas Corpus is malafide. As such, a fraud is committed upon the court for the purpose of seeking advantage by the petitioner, (next friend). He did not come before the court with clean hands.

21. In a case of ***Dr. Vijay Kumar Kathuria Vs. State of Haryana & Ors.1***, it is held that false representation and reckless allegation made before the Court by the petitioner, such conduct, disentitled to getting any relief from the court comes within the term "Fraud' upon the court.

22. In ***S.P. Chengalvaraya Naidu (dead) by Lrs. Vs.Jagannath (dead) by Lrs. & Ors.2,*** Hon'ble Supreme Court held as under:

"A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. A litigant, who approaches the Court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds vital document in order to gain advantage on other side then he would be of playing fraud on the court as well as on the opposite party."

23. Hon'ble Apex Court in the another case of ***Union of India & Ors. Vs. Muneesh Suneja3*** has held that *"non disclosure of material fact is fatal to the petition".*

24. In view of the above case laws, the petition moved by the petitoner's next friend the father of the alleged detenue, "Usman' suffers from willful suppression of material fact and misrepresentation for getting undue advantage to get the issuance of the writ in the nature of habeas corpus seeking production of alleged detenue who by virtue of a judicial order was set free to go wherever she wants and opted to go with opposite party no.3, Vineet Kumar with whom she wanted to marry. The petition deserves to be dismissed on this count alone.

Apprehension of the petitioner as to communal tension in the garb of a threat, if the alleged detenue is not handed over to him.

25. Para 11 of the petition runs as under:-

*"11. That Detenue belongs to **Muslim** community and O.P. No. 3 belongs to **Hindu** community and there is every possibility for communal tension is prevailing in the village"*

26. Thrust of issuing a writ of habeas corpus is also upon an unfounded apprehension in the garb of an implied threat of communal tension in the village as the alleged detenue and opposite party no.3 belong to different religions namely Muslim and Hindu respectively. The alleged detenue being an adult herself desired to go with the Opposite party no.3-Vineet Kumar to whom she wanted to marry and therefore, it would be relevant to cite here the judgment of Hon'ble Supreme Court in the case of ***Lata Singh Vs. State of U.P. & Others4*** has held as under:

".....This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such inter-caste or inter-religious marriage the maximum they can do is that they can cut off social relations with the son or the daughter, but they cannot give threats or commit

or instigate acts of violence and cannot harass the person who undergoes such inter-caste or interreligious marriage. We, therefore, direct that the administration/police authorities throughout the country will see to it that if any boy or girl who is a major undergoes inter-caste or inter-religious marriage with a woman or man who is a major, the couple are not harassed by any one nor subjected to threats or acts of violence, and any one who gives such threats or harasses or commits acts of violence either himself or at his instigation, is taken to task by instituting criminal proceedings by the police against such persons and further stern action is taken against such persons as provided by law."

27. In the circumstances of the case merely on the apprehension in the garb of an implied threat of communal tension in the village for the reason of different religions of the couples, no writ of habeas corpus can be issued in favour of the petitioner next friend, "Usman', father of the alleged detenue. The local police need to be directed to ensure peace and tranquility in the locality and to maintain the law and order.

Writ of mandamus against a private individual.

28. Moreover, the petition not having been directed against the state and/or the public officer of the State though they are arrayed opposite party no.1 and 2 and only directed against a private individual for the relief of mandamus seeking release of alleged detenue, who is a major girl and willingly reside with opposite party no.3 may not be issued, for the reason writ of mandamus cannot be issued directing against the private individuals in a writ of Habeas Corpus moved under Article 226 of the constitution of India. It has assumed the shape of litigation between two private individuals for the breach of fundamental rights.

29. A writ cannot lie against the private person, where he violates fundamental rights that are enshrined under Article 17, 23 and 29 of the Constitution of India. However, writ may be issued against the private person, if it is found that the act of the person is in collusion with a public authority, reliance placed on the judgment of Hon'ble Apex Court in the case of ***Sohan Lal Vs. Union of India5*** in which it is held *"There is no evidence and no finding of the High Court that the appellant was in collusion with the Union of India or that he had knowledge that the eviction of Jagan Nath was illegal. Normally, a writ of mandamus does not issue to or an order in the nature of mandamus is not made against a private individual. Such an order is made against a person directing him to do some particular thing, specified in the order, which appertains to his office and is in the nature of a public duty (Halsbury's Laws of England Vol. 11, Lord Simonds Edn. p. 84). If it had been proved that the Union of India and the appellant had colluded, and the transaction between them was merely colourable, entered into with a view to deprive Jagan Nath of his rights, jurisdiction to issue a writ to or make an order in the nature of mandamus against the appellant might be said to exist in a Court."*

30. In view of the above facts, where the pleadings made in the writ petition nowhere state about the private opposite party no.3 being in collusion with the police authorities or any public officer with regard to any act or omission, therefore, opposite party no.3 being a private individual does not fall within the ambit of word "STATE". The writ of mandamus in all the circumstances cannot be issued against the opposite party no.2 for the release of alleged detenue. The petition suffers from the concealment of material facts like the date of birth of the alleged detenue entered into her school records which she attended first, the recovery of girl by the police and proceedings adopted. thereafter, recording her statement under Section 161 Cr.P.C. by the Investigating Officer and recorded under Section 164 Cr.P.C.

before the Magistrate, when she was produced before him.

31. With these observations, the writ petition is **dismissed.**

32. The Director General of Police, U.P. is required to direct the Opposite party no.2 to keep vigil over the society in the locality and to ensure that the couple are not harassed by anyone, nor subjected to threats or acts of violence and anyone who gives threats or harasses or commits act of violence either himself or at his instigation, is taken to task by instituting criminal proceedings by the police against such persons and further stern action taken against such persons as provided in the law, in compliance of the direction of Hon'ble Apex Court given in the case of *Lata Singh **(Supra).***

33. Further, the Director General of Police and the local police officers shall also ensure the law and order as well peace and tranquility in the locality, so as to eradicate apprehension if any as raised by the petitioner.

34. The Deputy Registrar (Criminal) to communicate the order of the Court promptly to the Director General of Police, Uttar Pradesh.

(2021)11ILR A784
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.10.2021

BEFORE

THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Habeas Corpus Writ Petition No. 9 of 2020

Reshu @ Nitya (minor) & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Rajeev Sawhney, Sri Rajiv Lochan Shukla, Sri Ramanuj Yadav, Sri Virendra Kumar Yadav, Sri M.D. Mishra

Counsel for the Respondents:
G.A., Sri Abhinav Gaur, Sri Ankur Verma, Sri Manoj Kumar Rajvanshi, Sri Prakash Chandra Yadav, Sri Anoop Trivedi

Civil Law - Custody of minor Constitution of India - Art.226 - Writ of Habeas corpus - Petition for - Custody of minor - Paternal grand-parents seeking custody of corpus, a girl child aged about 3 years from her maternal grandfather - mother of corpus, upon being seriously ill, was taken away by the respondent (maternal grandfather of corpus) along with the minor child, for medical treatment - mother died on 31.07.2019 - since then corpus is under the care and custody of her maternal grandfather - FIR u/s 498A, 304B IPC & Section 3/4 Dowry Prohibition Act, 1961, lodged in which petitioner /Paternal grand-parents named as accused & criminal proceedings still pending - Held - custody of minor with respondent (maternal grandfather of corpus) cannot in any manner be said to amount to an illegal and improper detention - child from her infancy, living with her maternal grandfather - father who is claiming custody is named as an accused in a criminal case relating to the death of the mother of the corpus, is a relevant factor

Dismissed . (E-5)

Cases Relied on:

1. Tejaswini Gaud Vs Shekhar Jagdish Prasad Tewari & ors. (2019) 7 SCC 42

2. Kumari Palak (Minor) & anr. Vs Raj Kumar

3.Vishwakarma & ors. (Habeas Corpus Writ Petition No. 61687 of 2016, dt 12.04.2017)

4. Neelam Vs Man Singh 2014 SCC OnLine P&H 25034

5. Smt. Anjali Kapoor Vs Rajiv Baijal (2009) 7 SCC 322

6. Athar Husain Vs Syed Siraj Ahmed & ors. (2010) 2 SCC 654

7. Shayamrao Maroti Korwate Vs Deepak Kisanrao Tekram (2010) 10 SCC 314

8. Nil Ratan Kundu & anr. Vs Abhijit Kundu (2008) 9 SCC 413

9. Syed Saleemuddin Vs Dr. Rukhsana & ors. (2001) 5 SCC 247

10. Kirtikumar Maheshankar Joshi Vs Pradip Kumar Karunashankar Joshi (1992) 3 SCC 573

11. Vaibhavi Sharma (Minor) & anr. Vs St. of U.P. & ors. 2020 (12) ADJ 654

12. Vahin Saxena (Minor Corpus) & anr. Vs St. of U.P. & ors. 2021 SCC OnLine All 593

13. Mohammad Ikram Hussain Vs St. of U.P. & ors. AIR 1964 SC 1625

14. Kanu Sanyal Vs District Magistrate Darjeeling (1973) 2 SCC 674

15. Nithya Anand Raghvan Vs State (NCT of Delhi) & anr. (2017) 8 SCC 454

16. Sumedha Nagpal Vs State of Delhi (2000) 9 SCC 745

17. Rosy Jacob Vs Jacob A.Chakramakkal (1973) 1 SCC 840

18. Elizabeth Dinshaw Vs Arvand M. Dinshaw (1987) 1 SCC 42

19. Muthuswami Chettiar Vs K.M.Chinna Muthuswami Moopanar AIR 1935 Mad 195

20. Re: McGrath (infants) [1893] 1 Ch. 143 C.A.

21. Re O. (an infant) [1965] 1 Ch. 23 C.A.

22. Walker Vs Walker & Harrison 1981 New Ze Recent Law 257

23. Thrity Hoshie Dolikuka Vs Hoshiam Shavaksha Dolikuka (1982) 2 SCC 544

24. Mausami Moitra Ganguli Vs Jayant Ganguli (2008) 7 SCC 673

25. Gaurav Nagpal Vs Sumedha Nagpal (2009) 1 SCC 42

26. Gaytri Bajaj Vs Jiten Bhalla (2012) 12 SCC 471

27. Vivek Singh Vs Romani Singh (2017) 3 SCC 231

28. Rachhit Pandey (Minor) & anr. Vs St. of U.P. & 3 ors. 2021 (2) ADJ 320

29. Master Manan @ Arush Vs St. of U.P. & ors. 2021 (5) ADJ 317

30. Krishnakant Pandey (Corpus) & ors. Vs St. of U.P. & ors. (2021) 2 AWC 1053 All

(Delivered by Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard Sri M.D.Mishra along with Sri Ramanuj Yadav, learned counsel for the petitioners, Sri Vinod Kant, learned Additional Advocate General, appearing along with Ms. Sushma Soni, learned Additional Government Advocate for the State respondents and Sri Anoop Trivedi, learned Senior Counsel assisted by Sri Ankur Verma, learned counsel for respondent no. 4.

2. The present habeas corpus petition was initially filed by the paternal grand-parents, arrayed as petitioner nos. 2 and 3, seeking custody of the petitioner no. 1, corpus, a minor child stated to be of age about 19 months at that point of time, who was said to be with the respondent no. 4, her maternal grand-father.

3. The pleadings in the petition are indicative of the fact that the petitioner no.1, corpus, was born on 04.06.2018 from the wedlock of the son of the petitioner nos. 3 and 4 and the daughter of respondent no. 4. It is stated that the mother of the petitioner no. 1 was seriously ill, thereafter she along with the petitioner no. 1 went away along with the respondent no. 4 for medical treatment and subsequently she died on 31.07.2019 due to

acute cardiac respiratory arrest and after her death the petitioner no. 1 is in the custody of respondent no. 4. It is contended that despite requests, the respondent no. 4 is not handing over the custody of the petitioner no. 1 to the petitioner nos. 2 and 3 and that the same amounts to illegal detention.

4. A counter affidavit has been filed on behalf of the respondent no. 4 wherein it is pointed out that the respondent no. 4 was forced into bringing his daughter back due to continuous torture and cruelty inflicted upon her by the in-laws, which resulted in her death, and the newly born girl child, the petitioner no. 1, is under the care of the respondent no. 4 since the death of her mother. It is stated that the respondent no. 4, who is the maternal grand-father of the petitioner no. 1, is providing good care to her and it cannot be said that she is under any kind of illegal custody. It is, at this stage, as reflected from the order-sheet, that an application seeking impleadment of the father of the petitioner no. 1 (corpus) was moved, which was allowed on 14.02.2020 and he was permitted to be impleaded as a petitioner in the case.

5. A supplementary counter affidavit was filed on behalf of the respondent no. 4 containing assertions with regard to the harassment of the daughter of respondent no. 4 for dowry and torture and cruelty inflicted upon her which ultimately resulted in her death. Particulars of a criminal complaint and an FIR dated 12.2.2020, lodged under Sections 498-A, 304-B IPC and Section 3/4 Dowry Prohibition Act, 1961 in which the petitioner nos. 2, 3 and 4 (i.e. father and the paternal grand parents of the corpus), are named as accused, have also been mentioned.

6. A rejoinder affidavit and a supplementary rejoinder affidavits have been filed on behalf of the petitioners disputing the assertions made in the counter affidavit and the supplementary counter affidavit, respectively, and reiterating the claim with regard to custody and guardianship of the petitioner no. 1, corpus.

7. Learned counsel for the petitioners has sought to contend that the petitioner no. 1 being a minor child, in the absence of her mother, the petitioner no. 2, her father, who is the only surviving parent, would be her natural guardian, as per Section 6 of the Hindu Minority and Guardianship Act, 19561 and accordingly the respondent no. 4 is not entitled to retain her custody and that the same is illegal. In support of his submissions, reliance has been placed upon the decisions in **Tejaswini Gaud Vs. Shekhar Jagdish Prasad Tewari and others2 and Kumari Palak (Minor) and another Vs. Raj Kumar Vishwakarma and others3.**

8. Controverting the aforesaid assertions, learned Senior Counsel appearing for the respondent no. 4 has submitted that the admitted facts of the case are that the petitioner no. 1 is a minor girl child of age about three years and that she is under the care and custody of respondent no. 4, her maternal grand-father, ever since she was an infant of less than two years of age when the mother was tortured for dowry and forced to go to her parental home along with the minor child.

9. It is further submitted that subsequent to the death of her mother on account of the torture and cruelty inflicted upon her, the minor child is under the care and custody of respondent no. 4 which can in no manner be held to be illegal. Pointing out to the fact that the petitioner nos. 2, 3 and 4 are named accused in the FIR relating to offence of dowry death inflicted upon the mother of the corpus and are facing criminal trial, it is submitted that it would be totally against the interest of the minor child to grant her custody to the said petitioners. To support his submissions, reliance is placed upon the

decisions in **Neelam Vs. Man Singh4, Smt. Anjali Kapoor Vs. Rajiv Baijal5, Athar Husain Vs. Syed Siraj Ahmed and others6, Shayamrao Maroti Korwate Vs. Deepak Kisanrao Tekram7, Nil Ratan Kundu and another Vs. Abhijit Kundu8, Syed Saleemuddin Vs. Dr. Rukhsana and others9, Kirtikumar Maheshankar Joshi Vs. Pradip Kumar Karunashankar Joshi10, Vaibhavi Sharma (Minor) and another Vs. State of U.P. and others11, and Vahin Saxena (Minor Corpus) and another Vs. State of U.P. and others12.**

10. Heard learned counsel for the parties and perused the record.

11. In a petition seeking a writ of habeas corpus in a matter relating to a claim for custody of a child, the principal issue which is to be taken into consideration is as to whether from the facts of the case, it can be stated that the custody of the child is illegal.

12. The writ of habeas corpus is a prerogative writ and an extraordinary remedy. It is a writ of right and not a writ of course and may be granted only on reasonable ground or probable cause being shown, as held in **Mohammad Ikram Hussain vs. State of U.P. and others13** and **Kanu Sanyal vs. District Magistrate Darjeeling14**. The observations made in the Constitution Bench decision in the case of **Kanu Sanyal** (supra) with regard to the nature and scope of a writ of habeas corpus are being extracted below.

"4. It will be seen from this brief history of the writ of habeas corpus that it is essentially a procedural writ. It deals with the machinery of justice, not the substantive law. The object of the writ is to secure release of a person who is illegally restrained of his liberty. The writ is, no doubt, a command addressed to a person who is alleged to have another person unlawfully in his custody requiring him to bring the body of such person before the Court, but the production of the body of the person detained is directed in order that the circumstances of his detention may be inquired into, or to put it differently, "in order that appropriate judgment be rendered on judicial enquiry into the alleged unlawful restraint". The form of the writ employed is "We command you that you have in the King's Bench Division of our High Court of Justice-immediately after the receipt of this our writ, the body of A.B. being taken and detained under your custody-together with the day and cause of his being taken and detained to undergo and receive all and singular such matters and things as our court shall then and there consider of concerning him in this behalf". The italicized words show that the writ is primarily designed to give a person restrained of his liberty a speedy and effective remedy for having the legality of his detention enquired into and determined and if the detention is found to be unlawful, having himself discharged and freed from such restraint. The most characteristic element of the writ is its peremptoriness and, as pointed out by Lord Halsbury, L.C. in Cox v. Hakes (supra), "the essential and leading theory of the whole procedure is the immediate determination of the right to the applicant's freedom and his release, if the detention is found to be unlawful. That is the primary purpose of the writ; that is its substance and end."

13. The exercise of the extraordinary jurisdiction for issuance of a writ of habeas corpus would, therefore, be seen to be dependent on the jurisdictional fact where the applicant establishes a prima facie case that the detention is unlawful. It is only where the aforementioned jurisdictional fact is established that the applicant becomes entitled to the writ as of right.

14. The object and scope of a writ of habeas corpus in the context of a claim relating to custody of a minor child fell for consideration

in **Nithya Anand Raghvan Vs. State (NCT of Delhi) and another15,** and it was held that the principal duty of the court in such matters is to ascertain whether the custody of the child is unlawful and illegal and whether the welfare of the child requires that his present custody should be changed and the child be handed over to the care and custody of any other person.

15. Taking a similar view in the case of **Syed Saleemuddin vs. Dr. Rukhsana and others9,** it was held that in a habeas corpus petition seeking transfer of custody of a child from one parent to the other, the principal consideration for the court would be to ascertain whether the custody of the child can be said to be unlawful or illegal and whether the welfare of the child requires that the present custody should be changed. It was stated thus:-

"11...it is clear that in an application seeking a writ of Habeas Corpus for custody of minor children the principal consideration for the Court is to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that present custody should be changed and the children should be left in care and custody of somebody else. The principle is well settled that in a matter of custody of a child the welfare of the child is of paramount consideration of the Court..."

16. The question of maintainability of a habeas corpus petition under Article 226 of the Constitution of India for custody of a minor was examined in **Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and others2**, and it was held that the petition would be maintainable where detention by parents or others is found to be illegal and without any authority of law and the extraordinary remedy of a prerogative writ of habeas corpus can be availed in exceptional cases where ordinary remedy provided by the law is either unavailable or ineffective. The observations made in the judgment in this regard are as follows:-

"14. Writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from an illegal or improper detention. The writ also extends its influence to restore the custody of a minor to his guardian when wrongfully deprived of it. The detention of a minor by a person who is not entitled to his legal custody is treated as equivalent to illegal detention for the purpose of granting writ, directing custody of the minor child. For restoration of the custody of a minor from a person who according to the personal law, is not his legal or natural guardian, in appropriate cases, the writ court has jurisdiction.

x x x

19. Habeas corpus proceedings is not to justify or examine the legality of the custody. Habeas corpus proceedings is a medium through which the custody of the child is addressed to the discretion of the court. Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise a writ will not be issued. In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody. In view of the pronouncement on the issue in question by the Supreme Court and the High Courts, in our view, in child custody matters, the writ of habeas corpus is maintainable where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law.

20. In child custody matters, the ordinary remedy lies only under the Hindu

Minority and Guardianship Act or the Guardians and Wards Act as the case may be. In cases arising out of the proceedings under the Guardians and Wards Act, the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. There are significant differences between the enquiry under the Guardians and Wards Act and the exercise of powers by a writ court which is of summary in nature. What is important is the welfare of the child. In the writ court, rights are determined only on the basis of affidavits. Where the court is of the view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court. It is only in exceptional cases, the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus."

17. In the case of **Smt. Anjali Kapoor Vs. Rajiv Baijal5**, where the custody of a minor child was being claimed by the father being natural parent from the maternal grand-mother, the mother having died in child birth, it was held that taking proper care and attention in upbringing of the child is an important factor for granting custody of child and on facts, the child having been brought up by the grand-mother since her infancy and having developed emotional bonding, the custody of the child was allowed to be retained by the maternal grand-mother. While considering the competing rights of natural guardianships vis-a-vis welfare of the child, the test for consideration by the Court was held to be; what would best serve the welfare and interest of the child. Referring to the earlier decisions in **Sumedha Nagpal Vs. State of Delhi16, Rosy Jacob Vs. Jacob A.Chakramakkal17, Elizabeth Dinshaw Vs. Arvand M. Dinshaw18, and Muthuswami Chettiar Vs. K.M.Chinna Muthuswami Moopanar19**, it was also held that welfare of child prevails over legal rights of parties while deciding custody of minor child. The observations made in the judgment in this regard are as follows:-

"14. The question for our consideration is, whether in the present scenario would it be proper to direct the appellant to hand over the custody of the minor child Anagh to the respondent.

15. Under the Guardians and Wards Act, 1890, the father is the guardian of the minor child until he is found unfit to be the guardian of the minor female child. In deciding such questions, the welfare of the minor child is the paramount consideration and such a question cannot be decided merely based upon the rights of the parties under the law. (See ***Sumedha Nagpal v. State of Delhi16*** (SCC p. 747, paras 2 & 5).

16. In ***Rosy Jacob v. Jacob A. Chakramakkal17***, this Court has observed that:

"7...the principle on which the court should decide the fitness of the guardian mainly depends on two factors: (i) the father's fitness or otherwise to be the guardian, and (ii) the interests of the minors."

This Court considering the welfare of the child also stated that: (SCC p. 855, para 15)

"15....The children are not mere chattels: nor are they mere playthings for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society...."

17. In ***Elizabeth Dinshaw v. Arvand M. Dinshaw18,*** this Court has observed that

whenever a question arises before court pertaining to the custody of the minor child, the matter is to be decided not on consideration of the legal rights of the parties but on the sole and predominant criterion of what would best serve the interest and welfare of the child.

18. At this stage, it may be useful to refer to the decision of the Madras High Court, to which reference is made by the High Court in the case of ***Muthuswami Moopanar19,*** wherein the Court has observed, that, if a minor has for many years from a tender age lived with grandparents or near relatives and has been well cared for and during that time the minor's father has shown a lack of interest in the minor, these are circumstances of very great importance, having bearing upon the question of the interest and welfare of the minor and on the bona fides of the petition by the father for their custody. In our view, the observations made by the Madras High Court cannot be taken exception to by us. In fact those observations are tailor-made to the facts pleaded by the appellant in this case. We respectfully agree with the view expressed by the learned Judges in the aforesaid decision."

18. In **Anjali Kapoor** (supra), it was held that ordinarily, under the Guardian and Wards Act, 189020, the natural guardians of the child have the right to the custody of the child, but that right is not absolute and the courts are expected to give paramount consideration to the welfare of the minor child.

19. The question as to how the court would determine what is the benefit of the child was considered in ***Re: McGrath (infants)21*** and it was observed by ***Lindley L.J.***, as follows :-

"...The dominant matter for the consideration of the court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded."

20. The issue as to welfare of the child again arose in ***Re O. (an infant)22*** where ***Harman L.J.***, stated as follows :-

"It is not, I think, really in dispute that in all cases the paramount consideration is the welfare of the child but that, of course, does not mean you add up shillings and pence, or situation or prospects. What you look at is the whole background of the child's life and the first consideration you have to take into account when you are looking at his welfare is; who are his parents and are they ready to do their duty."

21. The question as to what would be the dominating factors while examining the welfare of a child was considered in **Walker Vs. Walker & Harrison23**, and it was observed that while material considerations have their place, they are secondary matters. More important are stability and security, loving and understanding care and guidance, and warm and compassionate relationships which are essential for the development of the child's character, personality and talents. It was stated as follows :-

"Welfare is an all-encompassing word. It includes material welfare; both in the sense of adequacy of resources to provide a pleasant home and a comfortable standard of living and in the sense of an adequacy of care to ensure that good health and due personal pride are maintained. *However, while material considerations have their place they are secondary matters. More important are the stability and the security, the loving and understanding care and guidance, the warm and compassionate relationships that are essential for the full development of the child's own character, personality and talents."*

22. In the context of consideration of an application by a parent seeking custody of a child through the medium of a habeas corpus proceeding, it has been stated in **American Jurisprudence, 2nd Edn. Vol. 3924** as follows :-

"...An application by a parent, through the medium of a habeas corpus proceeding, for custody of a child is addressed to the discretion of the court, and custody may be withheld from the parent where it is made clearly to appear that by reason of unfitness for the trust or of other sufficient causes the permanent interests of the child would be sacrificed by a change of custody. In determining whether it will be for the best interest of a child to award its custody to the father or mother, the court may properly consult the child, if it has sufficient judgment."

23. The question of a claim raised by maternal grand-father for guardianship of a minor child whose mother had died after giving birth to the child was subject matter of consideration in **Shyamrao Maroti Karwate Vs. Deepak Kisanrao Tekham25,** and reiterating that in the matter of custody of a minor child, paramount consideration is welfare of minor and not rights of parents or relatives, it was held that the appointment of the maternal grand-father as guardian, was justified. Referring to the judgments in **Gaurav Nagpal Vs. Sumedha Nagpal26, and Anjali Kapoor Vs. Rajiv Baijal5,** it was stated as follows :-

"17. In ***Gaurav Nagpal v. Sumedha Nagpal26***, this Court held: (SCC p. 57, para 51)

"51. The word "welfare' used in Section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the court as well as its physical well-being. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the court exercising its parens patriae jurisdiction arising in such cases."

18. In the light of the above background, let us consider whether the custody of the minor is to be entrusted with the maternal grandfather as ordered by the District Court or with the father as directed by the High Court.

19. We have already referred to the fact that on 23-3-2003, after giving birth to the child, the mother died and the child was taken by the maternal grandfather. The maternal grandfather filed a petition for custody on 7-8-2003 and the father also made a similar petition for custody on 15-10-2003. Before the District Judge, it was highlighted that immediately after the death of his wife, the respondent husband married another woman and also has a son from his second marriage. Though the exact date of marriage is not mentioned anywhere, the fact remains that within a period of one year after the death of Kaveri, daughter of the appellant herein, the respondent husband married another woman. It is also highlighted by the appellant that the respondent is working as an Operator in Maharashtra State Electricity Board at a distance of 90 km from his residence. It is further stated that the place where the respondent is residing is a rural village and there is lack of better educational facilities.

20. It is the claim of the maternal grandfather that he is a pensioner getting sizeable income by way of pension and other retiral benefits and also owns agricultural properties. It is his further claim that he is living with his wife i.e. maternal grandmother of the child and other relatives such as sons and a daughter. It is also his claim that he is residing in a taluk centre where good educational facilities are available.

21. Though several allegations have been made by the parties against each other, we

feel that in the absence of any specific finding by the courts below on either of them, it is unnecessary to refer to the same.

22. It is true that under the 1890 Act, the father is the guardian of the minor child until he is found unfit to be a guardian of the minor. In deciding such question, this Court consistently held that the welfare of the minor child is the paramount consideration and such a question cannot be decided merely on the basis of the rights of the parties under the law. This principle is reiterated in ***Anjali Kapoor v. Rajiv Baijal5.***

23. Though the father is the natural guardian in respect of a minor child, taking note of the fact that welfare of the minor to be of paramount consideration inasmuch as the respondent father got married within a year after the death of his first wife Kaveri and also having a son through the second marriage, residing in a rural village, working at a distance of 90 km and of the fact that the child was all along with the maternal grandfather and his family since birth, residing in a taluka centre where the child is getting good education, we feel that the District Judge was justified in appointing the appellant maternal grandfather as guardian of the minor child till the age of 12 years. The High Court reversed the said conclusion and appointed the father of the child as his guardian."

24. It may be apposite, at this stage, to refer to the law relating to guardians and wards, which is governed in terms of the Guardian and Wards Act, 189020 and an order with regard to guardianship upon an application filed by a person claiming entitlement may be passed under the aforesaid enactment.

25. The GWA consolidates and amends the law relating to guardians and wards. Section 4 of the Act defines "minor" as "a person who has not attained the age of majority". "Guardian" means "a person having the care of the person of a minor or his property, or of both his person and property". "Ward" is defined as "a minor for whose person or property, or both, there is a guardian". Sections 5 to 19 of the Act relate to appointment and declaration of guardians.

26. Section 7 thereof deals with "power of the court to make order as to guardianship" which reads as under:

"7. Power of the court to make order as to guardianship.--(1) Where the court is satisfied that it is for the welfare of a minor that an order should be made--

(a) appointing a guardian of his person or property, or both, or

(b) declaring a person to be such a guardian, the court may make an order accordingly.

(2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the court.

(3) Where a guardian has been appointed by will or other instrument or appointed or declared by the court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act."

27. Section 8 of the Guardian and Wards Act, 1890 enumerates persons entitled to apply for an order as to guardianship. Section 9 empowers the Court having jurisdiction to entertain application for guardianship. Sections 10 to 16 deal with procedure and powers of court.

28. Section 17 is another material provision and may be reproduced hereunder:

"**17. Matters to be considered by the court in appointing guardian.**--(1) In appointing or declaring the guardian of a minor, the court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minor, the court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the court may consider that preference.

....

(5) The court shall not appoint or declare any person to be a guardian against his will."

29. The Hindu Minority and Guardianship Act, 19561 was enacted to amend and codify certain parts of the law relating to minority and guardianship among Hindus. The Act is supplemental to the Guardians and Wards Act, and in terms of Section 2 thereof its provisions are in addition to and not in derogation to the Guardians and Wards Act.

30. Section 4 of the HMGA defines "minor" as "a person who has not completed the age of eighteen years". "Guardian" means "a person having the care of the person of a minor or of his property or of both his person and property", and includes a "natural guardian". "Natural guardian" means any of the guardians mentioned in Section 6 of the HMGA.

31. Section 6 enacts as to who can be said to be a "natural guardian". It reads thus:

"**6. Natural guardians of a Hindu minor**.--The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are--

(a) in the case of a boy or an unmarried girl--the father, and after him, the mother:

Provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

(b) in the case of an illegitimate boy or an illegitimate unmarried girl--the mother, and after her, the father;

(c) in the case of a married girl--the husband:

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section--

(a) if he has ceased to be a Hindu, or

(b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi).

Explanation.--In this section, the expressions "father' and "mother' do not include a stepfather and a stepmother."

32. Section 8 thereof enumerates powers of a natural guardian and Section 13 deals with welfare of a minor, and the same read as under :-

"**8. Powers of natural guardian.--**

(1) The natural guardian of a Hindu minor has power, subject to the provisions of this section, to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realisation, protection or benefit of the minor's estate; but the guardian can in no case bind the minor by a personal covenant.

(2) The natural guardian shall not, without the previous permission of the court,--

(a) mortgage or charge, or transfer by sale, gift, exchange or otherwise, any part of the immovable property of the minor; or

(b) lease any part of such property for a term exceeding five years or for a term extending more than one year beyond the date on which the minor will attain majority.

(3) Any disposal of immovable property by a natural guardian, in contravention of sub-section (1) or sub-section (2), is voidable at the instance of the minor or any person claiming under him.

(4) No court shall grant permission to the natural guardian to do any of the acts mentioned in sub-section (2) except in the case of necessity or for an evident advantage to the minor.

(5) The Guardians and Wards Act, 1890 (8 of 1890), shall apply to and in respect of an application for obtaining permission of the court under sub-section (2) in all respects as if it were an application for obtaining the permission of the court under section 29 of that Act, and in particular--

(a) proceedings in connection with the application shall be deemed to be proceedings under that Act within the meaning of section 4A thereof;

(b) the court shall observe the procedure and have the powers specified in sub-sections (2), (3) and (4) of section 31 of that Act; and

(c) an appeal shall lie from an order of the court refusing permission to the natural guardian to do any of the acts mentioned in sub-section (2) of this section to the court to which appeals ordinarily lie from the decisions of that court.

(6) In this section "court" means the city civil court or a district court or a court empowered under section 4A of the Guardian and Wards Act, 1890 (8 of 1890), within the local limits of whose jurisdiction the immovable property in respect of which the application is made is situate, and where the immovable property is situate within the jurisdiction of more than one such court, means the court within the local limits of whose jurisdiction any portion of the property is situate.

13.Welfare of minor to be paramount consideration.-(1) In the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.

(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor."

33. The provision with regard to making of an application regarding claims based on entitlement of guardianship is under the GWA and under Section 12 thereof the court is empowered to make interlocutory orders for protection of a minor including an order for

temporary custody and protection of the person or property of the minor.

34. The aforestated provisions make it clear that in a matter of custody of a minor child, the paramount consideration is the "welfare of the minor" and not rights of the parents or relatives under a statute which are in force. The word "welfare" used in Section 13 of the HMGA has to be construed liberally and must be taken in its widest sense.

35. The subject matter relating to custody of children during the pendency of the proceedings under the Hindu Marriage Act, 195527 is governed in terms of the provisions contained under Section 26 thereof. The aforesaid section applies to "any proceeding" under the HMA and it gives the power to the court to make provisions in regard to: (i) custody, (ii) maintenance, and (iii) education of minor children. For this purpose the court may make such provisions in the decree as it may deem just and proper and it may also pass interim orders during the pendency of the proceedings and all such orders even after passing of the decree.

36. The provisions under Section 26 of the HMA were considered in **Gaurav Nagpal v Sumedha Nagpal26,** and it was held as follows:-

"42. Section 26 of the Hindu Marriage Act, 1955 provides for custody of children and declares that in any proceeding under the said Act, the Court could make, from time to time, such interim orders as it might deem just and proper with respect to custody, maintenance and education of minor children, consistently with their wishes, wherever possible."

37. While determining whether father or mother should get the custody of a minor child, in **Thrity Hoshie Dolikuka Vs. Hoshiam Shavaksha Dolikuka28,** it was held that the only consideration for the court in such matters should be the welfare and interest of the minor. It was stated thus :-

"17. The principles of law in relation to the custody of a minor appear to be well-established. It is well-settled that any matter concerning a minor, has to be considered and decided only from the point of view of the welfare and interest of the minor. In dealing with a matter concerning a minor, the Court has a special responsibility and it is the duty of the Court to consider the welfare of the minor and to protect the minor's interest. In considering the question of custody of a minor, the Court has to be guided by the only consideration of the welfare of the minor."

38. Further, referring to para 428 of **Halsbury's Laws of England, 3rd Edn., Vol. 2129, in Thrity Hoshie Dolikuka's case,** it was observed as follows :-

"18. In **Halsbury's Laws of England, 3rd Edn., Vol. 21,** the law is succinctly stated in para 428 at pp. 193-94 in the following terms:

"428. I*nfant's welfare paramount.*--In any proceedings before any court, concerning the custody or upbringing of an infant or the administration of any property belonging to or held on trust for an infant or the application of the income thereof, the court must regard the welfare of the infant as the first and paramount consideration, and must not take into consideration, whether from any other point of view, the claim of the father, or any right at common law possessed by the father in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father. This provision applies whether both parents are living or either or both is or are dead.

Even where the infant is a foreign national, the court, while giving weight to the views of the foreign court, is bound to treat the welfare of the infant as being of the first and paramount consideration whatever orders may have been made by the courts of any other country."

39. Examining the factors to be considered in matters relating to custody of a minor child, in **Mausami Moitra Ganguli Vs. Jayant Ganguli30,** it was held that better financial resources, love for child, or statutory rights are no doubt relevant but welfare of the child would be paramount. It was observed as follows :-

"19. The principles of law in relation to the custody of a minor child are well settled. It is trite that while determining the question as to which parent the care and control of a child should be committed, the first and the paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute. Indubitably, the provisions of law pertaining to the custody of a child contained in either the Guardians and Wards Act, 1890 (Section 17) or the Hindu Minority and Guardianship Act, 1956 (Section 13) also hold out the welfare of the child as a predominant consideration. In fact, no statute, on the subject, can ignore, eschew or obliterate the vital factor of the welfare of the minor.

20. The question of welfare of the minor child has again to be considered in the background of the relevant facts and circumstances. Each case has to be decided on its own facts and other decided cases can hardly serve as binding precedents insofar as the factual aspects of the case are concerned. It is, no doubt, true that father is presumed by the statutes to be better suited to look after the welfare of the child, being normally the working member and head of the family, yet in each case the court has to see primarily to the welfare of the child in determining the question of his or her custody. Better financial resources of either of the parents or their love for the child may be one of the relevant considerations but cannot be the sole determining factor for the custody of the child. It is here that a heavy duty is cast on the court to exercise its judicial discretion judiciously in the background of all the relevant facts and circumstances, bearing in mind the welfare of the child as the paramount consideration."

40. The principles as to custody and upbringing of a minor as delineated in **para 809** of ***Halsbury's Laws of England*** **4th Edn., Vol. 1329,** were also referred in **Mausami Moitra Ganguli** and it was stated thus:-

"22. In ***Halsbury's Laws of England*** **(4th Edn.,Vol. 13),** the law pertaining to the custody and maintenance of children has been succinctly stated in the following terms:

*"809. Principles as to custody and upbringing of minor*s.--Where in any proceedings before any court, the custody or upbringing of a minor is in question, the court, in deciding that question, must regard the welfare of the minor as the first and paramount consideration, and must not take into consideration whether from any other point of view the claim of the father in respect of such custody or upbringing is superior to that of the mother, or the claim of the mother is superior to that of the father. In relation to the custody or upbringing of a minor, a mother has the same rights and authority as the law allows to a father, and the rights and authority of mother and father are equal and are exercisable by either without the other."

41. The principles in relation to custody of a minor child again came up for consideration in **Gaurav Nagpal Vs. Sumedha Nagpal26**, and it was reiterated that the paramount consideration in such matters would be 'welfare of the child'

and not rights of parents under a statute for the time being in force. The court would have to give due weightage to the child's ordinary comfort, contentment, health, education, intellectual development, and favourable surroundings but over and above physical comfort, moral and ethical values would also have to be given importance. It was stated thus :-

"50. When the court is confronted with conflicting demands made by the parents, each time it has to justify the demands. The court has not only to look at the issue on legalistic basis, in such matters human angles are relevant for deciding those issues. The court then does not give emphasis on what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of the minor. As observed recently in Mausami Moitra Ganguli30, the court has to give due weightage to the child's ordinary contentment, health, education, intellectual development and favourable surroundings but over and above physical comforts, the moral and ethical values have also to be noted. They are equal if not more important than the others.

51. The word "welfare" used in Section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the court as well as its physical well-being. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the court exercising its parens patriae jurisdiction arising in such cases."

42. A similar view was taken in **Gaytri Bajaj Vs. Jiten Bhalla31**, and it was held that in a matter relating to child custody, the welfare, interest and desire of child has to be given paramount importance. It was observed as follows :-

"14. From the above it follows that an order of custody of minor children either under the provisions of the Guardians and Wards Act, 1890 or the Hindu Minority and Guardianship Act, 1956 is required to be made by the court treating the interest and welfare of the minor to be of paramount importance. It is not the better right of either parent that would require adjudication while deciding their entitlement to custody. The desire of the child coupled with the availability of a conducive and appropriate environment for proper upbringing together with the ability and means of the parent concerned to take care of the child are some of the relevant factors that have to be taken into account by the court while deciding the issue of custody of a minor. What must be emphasised is that while all other factors are undoubtedly relevant, it is the desire, interest and welfare of the minor which is the crucial and ultimate consideration that must guide the determination required to be made by the court."

43. The question with regard to custody of a minor was again subject matter of consideration in **Vivek Singh vs. Romani Singh32**, and it was observed that welfare of the child would be the prime consideration and psycho-social as also physical development of child for shaping of an independent personality would be of foremost concern of court as parens patriae in deciding grant of custody of a child. It was observed as follows :-

"12. We understand that the aforesaid principle is aimed at serving twin objectives. In the first instance, it is to ensure that the child grows and develops in the best environment. The best interest of the child has been placed at the vanguard of family/custody disputes according the optimal growth and development of the child primacy over other considerations. The child is often left to grapple with the breakdown of an adult institution. While the parents aim to ensure that the child is least

affected by the outcome, the inevitability of the uncertainty that follows regarding the child's growth lingers on till the new routine sinks in. The effect of separation of spouses, on children, psychologically, emotionally and even to some extent physically, spans from negligible to serious, which could be insignificant to noticeably critical. It could also have effects that are more immediate and transitory to long lasting thereby having a significantly negative repercussion in the advancement of the child. While these effects do not apply to every child of a separated or divorced couple, nor has any child experienced all these effects, the deleterious risks of maladjustment remains the objective of the parents to evade and the court's intent to circumvent. This right of the child is also based on individual dignity.

13...It has been emphasised by this Court also, time and again, following observations in ***Bandhua Mukti Morcha v. Union of India33.***

"4. The child of today cannot develop to be a responsible and productive member of tomorrow's society unless an environment which is conducive to his social and physical health is assured to him. Every nation, developed or developing, links its future with the status of the child. Childhood holds the potential and also sets the limit to the future development of the society. Children are the greatest gift to humanity. Mankind has the best hold of itself. The parents themselves live for them. They embody the joy of life in them and in the innocence relieving the fatigue and drudgery in their struggle of daily life. Parents regain peace and happiness in the company of the children. The children signify eternal optimism in the human being and always provide the potential for human development. If the children are better equipped with a broader human output, the society will feel happy with them. Neglecting the children means loss to the society as a whole. If children are deprived of their childhood -- socially, economically, physically and mentally -- the nation gets deprived of the potential human resources for social progress, economic empowerment and peace and order, the social stability and good citizenry. The Founding Fathers of the Constitution, therefore, have emphasised the importance of the role of the child and the need of its best development."

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15. It hardly needs to be emphasised that a proper education encompassing skill development, recreation and cultural activities has a positive impact on the child. The children are the most important human resources whose development has a direct impact on the development of the nation, for the child of today with suitable health, sound education and constructive environment is the productive key member of the society. The present of the child links to the future of the nation, and while the children are the treasures of their parents, they are the assets who will be responsible for governing the nation. The tools of education, environment, skill and health shape the child thereby moulding the nation with the child equipped to play his part in the different spheres aiding the public and contributing to economic progression. The growth and advancement of the child with the personal interest is accompanied by a significant public interest, which arises because of the crucial role they play in nation building."

44. In somewhat similar set of facts, in the case of Nil **Ratan Kundu and another vs. Abhijit Kundu8**, where the custody of a minor was sought in the background of the pendency of a criminal case under Sections 498 and 304 I.P.C. against the father charging him of causing the death of a minor's mother, it was held that the paramount consideration in such matters would be the welfare of the child, and the court, exercising

'parens patriae' jurisdiction, must give due weightage to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings as well as physical comfort and moral values and the character of the proposed guardian is also required to be considered. It was held that the pendency of a criminal case, wherein the father has been charged of causing the death of the minor's mother, was a relevant factor required to be considered before an appropriate order could be passed.

45. Referring to the legal position under the **English Law, American Law** and the **Indian Law in Nil Ratan Kundu's** case, it was observed as follows :-

"English Law

24. In **Halsbury's Laws of England, 4th Edn., Vol. 24, Para 511 at p. 21729, i**t has been stated:

"511. ... Where in any proceedings before any court the custody or upbringing of a minor is in question, then, in deciding that question, the court must regard the minor's welfare as the first and paramount consideration, and may not take into consideration whether from any other point of view the father's claim in respect of that custody or upbringing is superior to that of the mother, or the mother's claim is superior to that of the father." (emphasis supplied)

It has also been stated that if the minor is of any age to exercise a choice, the court will take his wishes into consideration. (Para 534, p. 229).

25. Sometimes, a writ of habeas corpus is sought for custody of a minor child. In such cases also, the paramount consideration which is required to be kept in view by a writ court is "welfare of the child".

26. In ***Habeas Corpus*, Vol. I, p. 58134**, Bailey states:

"The reputation of the father may be as stainless as crystal; he may not be afflicted with the slightest mental, moral or physical disqualifications from superintending the general welfare of the infant; the mother may have been separated from him without the shadow of a pretence of justification; and yet the interests of the child may imperatively demand the denial of the father's right and its continuance with the mother. The tender age and precarious state of its health make the vigilance of the mother indispensable to its proper care; for, not doubting that paternal anxiety would seek for and obtain the best substitute which could be procured yet every instinct of humanity unerringly proclaims that no substitute can supply the place of her whose watchfulness over the sleeping cradle, or waking moments of her offspring, is prompted by deeper and holier feeling than the most liberal allowance of nurses' wages could possibly stimulate."

It is further observed that an incidental aspect, which has a bearing on the question, may also be adverted to. In determining whether it will be in the best interest of a child to grant its custody to the father or mother, the court may properly consult the child, if it has sufficient judgment.

27. In ***McGrath (infants)21*, Lindley, L.J.** observed :

"...The dominant matter for the consideration of the court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense. The moral or religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded." (emphasis supplied)

American Law

28. The law in the United States is also not different. In **American Jurisprudence, 2nd Edn. Vol. 3924**, it is stated:

"As a rule, in the selection of a guardian of a minor, the best interest of the child is the paramount consideration, to which even the rights of parents must sometimes yield." (emphasis supplied)

In Para 148, pp. 280-81, it is stated:

"Generally, where the writ of habeas corpus is prosecuted for the purpose of determining the right to custody of a child, the controversy does not involve the question of personal freedom, because an infant is presumed to be in the custody of someone until it attains its majority. The Court, in passing on the writ in a child custody case, deals with a matter of an equitable nature, it is not bound by any mere legal right of parent or guardian, but is to give his or her claim to the custody of the child due weight as a claim founded on human nature and generally equitable and just. Therefore, these cases are decided, not on the legal right of the petitioner to be relieved from unlawful imprisonment or detention, as in the case of an adult, but on the Court's view of the best interests of those whose welfare requires that they be in custody of one person or another; and hence, a court is not bound to deliver a child into the custody of any claimant or of any person, but should, in the exercise of a sound discretion, after careful consideration of the facts, leave it in such custody as its welfare at the time appears to require. In short, the child's welfare is the supreme consideration, irrespective of the rights and wrongs of its contending parents, although the natural rights of the parents are entitled to consideration.

An application by a parent, through the medium of a habeas corpus proceeding, for custody of a child is addressed to the discretion of the court, and custody may be withheld from the parent where it is made clearly to appear that by reason of unfitness for the trust or of other sufficient causes the permanent interests of the child would be sacrificed by a change of custody. In determining whether it will be for the best interest of a child to award its custody to the father or mother, the Court may properly consult the child, if it has sufficient judgment." (emphasis supplied)

29. In ***Howarth v. Northcott35***, it was stated:

"In habeas corpus proceedings to determine child custody, the jurisdiction exercised by the Court rests in such cases on its inherent equitable powers and exerts the force of the State, as parens patriae, for the protection of its infant ward, and the very nature and scope of the inquiry and the result sought to be accomplished call for the exercise of the jurisdiction of a court of equity."

It was further observed:

"The employment of the forms of habeas corpus in a child custody case is not for the purpose of testing the legality of a confinement or restraint as contemplated by the ancient common law writ, or by statute, but the primary purpose is to furnish a means by which the court, in the exercise of its judicial discretion, may determine what is best for the welfare of the child, and the decision is reached by a consideration of the equities involved in the welfare of the child, against which the legal rights of no one, including the parents, are allowed to militate." (emphasis supplied)

It was also indicated that ordinarily, the basis for issuance of a writ of habeas corpus is an illegal detention; but in the case of such a writ issued out for the detention of a child, the

law is concerned not so much with the illegality of the detention as with the welfare of the child.

Indian Law

30. The legal position in India follows the above doctrine. There are various statutes which give legislative recognition to these well-established principles. It would be appropriate if we examine some of the statutes dealing with the situation. The Guardians and Wards Act, 1890 consolidates and amends the law relating to guardians and wards...

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39. The principles in relation to custody of a minor child are well settled. In determining the question as to who should be given custody of a minor child, the paramount consideration is the "welfare of the child" and not rights of the parents under a statute for the time being in force."

46. In the aforementioned decision of **Nil Ratan Kundu** (supra) the principles governing custody of minor children were stated as follows :-

"52. In our judgment, the law relating to custody of a child is fairly well settled and it is this : in deciding a difficult and complex question as to the custody of a minor, a court of law should keep in mind the relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a human problem and is required to be solved with human touch. A court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the court is exercising parens patriae jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the court must consider such preference as well, though the final decision should rest with the court as to what is conducive to the welfare of the minor.

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56. In ***Rosy Jacob17,*** this Court stated :

"15... The contention that if the husband [father] is not unfit to be the guardian of his minor children, then, the question of their welfare does not at all arise is to state the proposition a bit too broadly and may at times be somewhat misleading."

It was also observed that the father's fitness has to be considered, determined and weighed predominantly in terms of the welfare of his minor children in the context of all the relevant circumstances. The father's fitness cannot override considerations of the welfare of the minor children.

57. In our opinion, in such cases, it is not the "negative test" that the father is not "unfit" or disqualified to have custody of his son/daughter that is relevant, but the "positive test" that such custody would be in the welfare of the minor which is material and it is on that basis that the court should exercise the power to grant or refuse custody of a minor in favour of the father, the mother or any other guardian.

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67. Before about a century, in ***Besant v. G. Narayaniah36***, under an agreement, custody of two minor sons was with the mother who was staying in England. The father who was residing in Madras instituted a suit for custody of his sons asserting that he was the natural guardian of the minors and was entitled to have custody of both his sons. The trial court decreed the suit which was confirmed by the High Court. The Judicial Committee of the Privy Council held that under the Hindu Law, the father was the natural guardian of his children during their minority. But it was stated that the infants did not desire to return to India and no order directing the defendant mother to send minors to India could have been lawfully made by an Indian court. Upholding the contention, allowing the appeal and dismissing the suit, Their Lordships observed that it was open to the plaintiff father to apply to His Majesty's High Court of Justice in England for getting the custody of his sons:

"*...If he does so, the interests of the infants will be considered and care will be taken to ascertain their own wishes on all material points.*" (Besant case [(1913-14) 41 IA 314] , IA p. 324) (emphasis supplied)

Since it was not done, the decree passed by both the courts was liable to be set aside."

47. Considering the facts of the case in particular the allegations against the respondent and pendency of a criminal case for an offence punishable under Section 498-A IPC, it was observed in the decision in the case of **Nil Ratan Kundu** that one of the matters which is required to be considered by a court of law is 'character' of the proposed guardian and that the same would be a relevant factor. It was observed thus :-

"63. In our considered opinion, on the facts and in the circumstances of the case, both the courts were duty-bound to consider the allegations against the respondent herein and pendency of the criminal case for an offence punishable under Section 498-A IPC. One of the matters which is required to be considered by a court of law is the "character" of the proposed guardian. In ***Kirtikumar10***, this Court, almost in similar circumstances, where the father was facing the charge under Section 498-A IPC, did not grant custody of two minor children to the father and allowed them to remain with the maternal uncle.

64. Thus, a complaint against the father alleging and attributing the death of the mother, and a case under Section 498-A IPC is indeed a relevant factor and a court of law must address the said circumstance while deciding the custody of the minor in favour of such a person. To us, it is no answer to state that in case the father is convicted, it is open to the maternal grandparents to make an appropriate application for change of custody. Even at this stage, the said fact ought to have been considered and an appropriate order ought to have been passed."

48. In an earlier decision in the case of **Kirtikumar Maheshankar Joshi vs. Pradipkumar Karunashanker Joshi10**, where in almost similar circumstances the father was facing a charge under Section 498-A I.P.C., it was held that though the father being a natural guardian, has a preferential right to the custody of the children, but in the facts and circumstances of the case, it would not be in the interest of the children to hand over their custody to the father.

49. It is, therefore, seen that in an application seeking a writ of habeas corpus for custody of a minor child, as is the case herein, the principal consideration for the court would be to ascertain whether the custody of the child can be said to be unlawful and illegal and whether the welfare of the child requires that the

present custody should be changed and the child should be handed over in the care and custody of somebody else other than in whose custody the child presently is.

50. Proceedings in the nature of habeas corpus may not be used to examine the question of the custody of a child. The prerogative writ of habeas corpus, is in the nature of extraordinary remedy, and the writ is issued, where in the circumstances of a particular case, the ordinary remedy provided under law is either not available or is ineffective. The power of the High Court, in granting a writ, in child custody matters, may be invoked only in cases where the detention of a minor is by a person who is not entitled to his/her legal custody.

51. A writ of habeas corpus, is employed in certain cases, to enable a party to enforce a 'right to control' - arising out of a domestic relationship, especially to enable a parent to get custody and control of a child, alleged to be detained by some other person. The Courts, however, do not go further in these cases than to enquire what is in the best interest of the child, and unless it appears to be for the interest of the child, an order remanding him to custody may not be granted. A claim for guardianship or custody, in a writ of habeas corpus, may not be held to be an absolute right, and would yield to what would appear to be in the interest of the child. In such cases it is not a question of liberty but of nurture and care.

52. While examining the competing rights with regard to guardianship vis-a-vis welfare of the child, the predominant test for consideration would be - what would best serve the welfare and interest of the child. The interest of the child would prevail over legal rights of the parties while deciding matters relating to custody. The court, exercising parens patriae jurisdiction, would be required to give due weightage to factors such as child's comfort, contentment, health, education, intellectual development and favourable surroundings as well as physical comfort and moral values - paramount consideration being the welfare of the child.

53. The welfare of a child in the context of claims relating to custody/guardianship, would have to be considered in its widest amplitude. It may include material welfare - in the sense of adequacy of resources to provide a pleasant home and a comfortable standard of living. However, the material considerations, though having their place,would be secondary. More important would be the stability and security, loving and understanding care and guidance, and warm and compassionate relationships - which are essential for the psycho-social as also physical development of the child and for shaping of an independent personality.

54. In a case where facts are disputed and a detailed inquiry is required, the court may decline to exercise its extraordinary jurisdiction and may direct the parties to approach the appropriate court. The aforementioned legal position has been considered in a recent judgement of this Court in **Rachhit Pandey (Minor) And Another vs. State of U.P. and 3 others37, Master Manan @ Arush Vs. State of U.P. and others38** and **Krishnakant Pandey (Corpus) and others Vs. State of U.P. and others39.**

55. The judgment in the case of **Tejaswini Gaud** which is sought to be relied on behalf of the petitioners, has already been considered in the preceding paragraphs and it has been noticed that while examining the question of maintainability of habeas corpus petition under Article 226 for custody of a minor, it was held that the petition would be maintainable where the detention by parents or others is found to be illegal and without any authority of law and that the said remedy can be availed in exceptional cases where ordinary remedy provided by the law is either unavailable or ineffective.

56. The other judgment in the case of **Kumari Palak (Minor) and another Vs. Raj Kumar Vishwakarma and others3** upon which reliance has been placed on behalf of the petitioners, is distinguishable on facts, inasmuch as it was a case where the father of the minor girl of age about three and half years, who had sought to claim her custody, had been acquitted in the criminal trial, and the Court upon taking into consideration the aforesaid facts and that the mother was no longer alive and that the father was ready to provide his daughter all love, care and affection, granted custody of the minor daughter to the father.

57. The present habeas corpus petition principally seeks to raise claims with regard to guardianship and custody of the petitioner no. 1 (corpus) who is girl child stated to have been born on 04.06.2018 and presently aged about three years. It is not disputed that the mother of the petitioner no. 1, upon being seriously ill was taken away by the respondent no. 4 along with the minor child for medical treatment and she died on 31.07.2019 and since then the petitioner no. 1 is under the care and custody of the respondent no. 4, her maternal grand-father. The lodging of the FIR under Sections 498-A, 304-B IPC and Section 3/4 Dowry Prohibition Act, 1961, in which the petitioner nos. 2, 3 and 4, are named as accused and the pendency of the criminal proceedings are reflected from the records.

58. The aforementioned facts do not indicate that the custody of the minor with the respondent no. 4 can in any manner be said to amount to an illegal and improper detention. The child from her infancy, when she was of a tender age, appears to be living with her maternal grand-father. This together with the fact that the father who is claiming custody is named as an accused in a criminal case relating to the death of the mother of the corpus, would also be a relevant factor. The other considerations which would have a material bearing would be the necessity of the child being provided loving and understanding care, guidance and a warm and compassionate relationship in a pleasant home, which are essential for the development to the child's character and personality.

59. It would be relevant to bear in mind that in deciding questions relating to custody of a minor child, as in the present case, the paramount consideration would be welfare of the minor and not the competing rights with regard to guardianship agitated by the parties for which the proper remedy would be before the appropriate statutory forum.

60. This Court, in the facts of the case, is not inclined to exercise its extraordinary jurisdiction under Article 226 of the Constitution of India, to entertain the petition for a writ of habeas corpus.

61. The petition stands dismissed accordingly.

(2021)11ILR A804
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.09.2021

BEFORE

THE HON'BLE GAUTAM CHOWDHARY, J.

Habeas Corpus Writ Petition No. 285 of 2021

Master Abeer Tyagi ...Petitioner
Versus
Mr. Varun Tyagi & Ors. ...Respondents

Counsel for the Petitioner:
Sri Prabhav Srivastava, Sri Anurag Bhatt

Counsel for the Respondents:
A.G.A., Sri Sumit Daga, Sri A.C. Srivastava, Sri R.P. Singh Chandel

Constitution of India, Art. 226 - Habeas Corpus writ petition - Guardian and Wards Act, 1890 - Petitioner mother seeking direction to the father to produce corpus of her minor child - Relying upon Manuj Sharma Vs. State of U.P. and others [2019 (4) ADJ 840] held habeas corpus writ petition not maintainable - However granted liberty to the petitioner to avail the remedy before the civil court concerned

Dismissed. (E-5)

List of Cases cited:

1. Manuj Sharma Vs St. of U.P. & ors. [2019 (4) ADJ 840]

(Delivered by Hon'ble Gautam Chowdhary, J.)

1. Heard learned counsel for the petitioner, Sri Pankaj Srivastava, Sri C.B. Singh, Sri Madnesh Prakash, learned A.G.A. for the State and Sri Sumit Daga, learned counsel for the opposite parties no. 1, 2 and 3 and perused the record.

2. This petition has been filed with a prayer to issue a writ in the nature of habeas corpus directing and commanding the respondents to produce the corpus (petitioner No. 1) from unlawful, astonishingly harmful an illegal custody of Respondent No. 1, 2 and 3 and set him liberty with his mother.

3. From the perusal of the Paragraph No. 24 of the Habeas Corpus writ petition it transpires that the matter is already pending before the appropriate Court for redressal of ward custody, which is quoted below:

"That thereafter, the mother/legal guardian of the petitioner also filed an application on 26/8/2020, under section 6 of the Hindu Minority and Guardianship Act, 1956 read with Section 7 and 25 of the Guardians and Wards Act, 1890 seeking custody of the Petitioner before Family Court, Ghaziabad. The mother/legal guardian has also been threatened for life by Respondent No. 1,2 and 3 and as mentioned above on 25.4.2020, has also been forcefully thrown out from her matrimonial home."

4. On the other hand learned A.G.A. has placed the reliance upon the case of **Manuj Sharma Vs. State of U.P. and others [2019 (4) ADJ 840] by Hon. Pritinker Diwaker and Raj Beer Singh, JJ decided on 12.4.2019 at para Nos. 8 to 28,** which is quoted below:

"8. Habeas corpus "ad subjiciendum" means "that you have the body to submit or answer" which is called as Festinum Remedium - A speedy remedy, which has been sought by the petitioner in this instant case.

9. Habeas Corpus is Latin for "you have the body". The writ is referred to in full in legal texts as habeas corpus ad subjiciendum or more rarely ad subjiciendum et recipiendum. It is sometimes described as the "great writ". It is considered as a most expeditious remedy available under the law.

10. The meaning of the term habeas corpus is "you must have the body". Halsbury in his Laws of England, 4th Edition, observed as follows: -

"The writ of habeas corpus ad subjiciendum which is commonly known as the writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from the unlawful or unjustifiable detention whether in prison or in private custody. It is a prerogative writ by which the queen has a right to inquire into the laws for which any of her subjects are deprived of their liberty."

11. In Corpus Juris Secundum, the nature of the writ of habeas corpus is summarized thus:

"The writ of habeas corpus is a writ directed to the person detaining another, commanding him to produce the body of the prisoner at a designate time and place with the day and cause of his caption and detention to do, submit to, and receive whatsoever the court or judge awarding the writ shall consider in that behalf. 'Habeas corpus' literally means "have the body". By this writ, the court can direct to have the body of the person detained to be brought before it in order to ascertain whether the detention is legal or illegal. Such is the predominant position of the writ in the Anglo-Saxon Jurisprudence."

12. In the Constitutional and Administrative Law by Hood Phillips and Jackson it was stated as under: - (Relied upon by the Supreme Court in the matter of Surinderjit Singh Mand and another v. State of Punjab and another3, to highlight the importance and significance of personal liberty, specially with reference to unlawful detention.) "10. The legality of any form of detention may be challenged at common law by an application for the writ of habeas corpus. Habeas corpus was a prerogative writ, that is, one issued by the King against his officers to compel them to exercise their functions properly. The practical importance of habeas corpus as providing a speedy judicial remedy for the determination of an applicant's claim for freedom has been asserted frequently by judies (sic) and writers. Nonetheless, the effectiveness of the remedy depends in many instances on the width of the statutory power under which a public authority may be acting and the willingness of the courts to examine the legality of decision made in reliance on wide-ranging statutory provision. It has been suggested that the need for the "blunt remedy' of habeas corpus has diminished as judicial review has developed into an ever more flexible jurisdiction. Procedural reform of the writ may be appropriate, but it is important not to lose sight of substantive differences between habeas corpus and remedies under judicial review. The latter are discretionary and the court may refuse relief on practical grounds; habeas corpus is a writ of right, granted ex debito justitiae."

13. Lord Halsbury LC in Cox v. Hates4 held that "the right to an instant determination as to lawfulness of an existing imprisonment" is the substantial right made available by this writ.

14. Likewise in Barnardo v. Ford5 the writ of habeas corpus has been described as a writ of right which is to be granted ex debito justitiae. Though a writ of right, it is not a writ of course. The applicant must show a prima facie case of his unlawful detention. Once, however, he shows such a case and the return is not good and sufficient he is entitled to this writ as a matter of right.

15. In R. v. Secy. of State for Home Affairs6, it has been held that a person is not entitled to be released on a petition of habeas corpus if there is no illegal restraint. "The question for a habeas corpus court is whether the subject is lawfully detained. If he is, the writ cannot issue, if he is not, it must issue."

16. Likewise in Cox v. Hakes7 it has been held that the writ of habeas corpus is an effective means of immediate release from unlawful detention, whether in prison or private custody. Physical confinement is not necessary to constitute detention. Control and custody are sufficient.

17. A Constitution Bench judgment of the Supreme Court in the matter of Kanu Sanyal v. District Magistrate, Darjeeling and others8 traced the history, nature and scope of the writ of habeas corpus. It has been held by Their Lordships that it is a writ of immemorial antiquity whose first threads are woven deeply

"within the seamless web of history and untraceable among countless incidents that constituted a total historical pattern of Anglo-Saxon jurisprudence". Their Lordships further held that the primary object of this writ is the immediate determination of the right of the applicant's freedom and that was its substance and its end. Their Lordships further explaining the nature and scope of a writ of habeas corpus held as under: -

"The writ of habeas corpus is essentially a procedural writ. It deals with the machinery of justice, not the substantive law. The object of the writ is to secure release of a person who is illegally restrained of his liberty. The writ is, no doubt, a command addressed to a person who is alleged to have another person unlawfully in his custody requiring him to bring the body of such person before the Court, but the production of the body of the person detained is directed in order that the circumstances of his detention may be inquired into, or to put it differently, "in the order that appropriate judgment be rendered on judicial enquiry into the alleged unlawful restrain". But the writ is primarily designed to give a person restrained of his liberty a speedy and effective remedy for having the legality of his detention enquired into and determined and if the detention is found to be unlawful, having himself discharged and freed from such restraint. The most characteristic element of the writ is its peremptoriness. The essential and leading theory of the whole procedure is the immediate determination of the right to the applicant's freedom and his release, if the detention is found to be unlawful. That is the primary purpose of the writ, that is its substance and end. The production of the body of the person alleged to be wrongfully detained is ancillary to this main purpose of the writ. It is merely a means for achieving the end which is to secure the liberty of the subject illegally detained."

18. In the matter of Union of India v. Yamnam Anand M. alias Bocha alias Kora alias Suraj and another9,while explaining the nature of writ of habeas corpus, Their Lordships of the Supreme Court held that though it is a writ of right, it is not a writ of course and the applicant must show a prima facie case of his unlawful detention. Paragraph 7 of the report states as under: -

"7. Article 21 of the Constitution having declared that no person shall be deprived of life and liberty except in accordance with the procedure established by law, a machinery was definitely needed to examine the question of illegal detention with utmost promptitude. The writ of habeas corpus is a device of this nature. Blackstone called it "the great and efficacious writ in all manner of illegal confinement". The writ has been described as a writ of right which is grantable ex debito justitiae. Though a writ of right, it is not a writ of course. The applicant must show a prima facie case of his unlawful detention. Once, however, he shows such a cause and the return is not good and sufficient, he is entitled to this writ as of right."

19. A writ of habeas corpus is not to be issued as a matter of course. Clear grounds must be made out for issuance of such writ. (See Dushyant Somal v. Sushma Somal10)

20. In the matter of Usharani v. The Commissioner of Police, Bangalore and others11, the writ of habeas corpus has been defined very lucidly as under: -

"The claim (for habeas corpus) has been expressed and pressed in terms of concrete legal standards and procedures. Most notably, the right of personal liberty is connected in both the legal and popular sense with procedures upon the Writ of habeas corpus. The writ is simply a judicial command directed to a specific jailer directing him or her to produce the named

prisoner together with the legal cause of detention in order that the legal warrant of detention might be examined. The said detention may be legal or illegal. The right which is sought to be enforced by such a writ is a fundamental right of a citizen conferred under Article 21 of the Constitution of India.

11. The ancient prerogative writ of habeas corpus takes its name from the two mandatory words "habeas" and "corpus". "Habeas Corpus" literally means "have his body". The general purpose of these writs as their name indicates was to obtain the production of the individual before a Court or a Judge. This is a prerogative process for securing the liberty of the subject by affording an effective relief of immediate release from unlawful or unjustifiable detention, whether in prison or in private custody. This is a writ of such a sovereign and transcendent authority that no privilege of power or place can stand against it. It is a very powerful safeguard of the subject against arbitrary acts not only of private individuals but also of the executive, the greatest safeguard for personal liberty, according to all constitutional jurists. The writ is a prerogative one obtainable by its own procedure. ... In our country, it is this prerogative writ which has been given a constitutional status under Articles 32 and 226 of the Constitution. Therefore, it is an extraordinary remedy available to a citizen of this country, which he can enforce under Article 226 or under Article 32 of the Constitution of India."

21. Thus, the writ of habeas corpus is a process by which a person who is confined without legal justification may secure a release from his confinement. The writ is, in form, an order issued by the High Court calling upon the person by whom a person is alleged to be kept in confinement to bring such person before the court and to let the court know on what ground the person is confined. If there is no legal justification for the detention, the person is ordered to be released. However, the production of the body of the person alleged to be unlawfully detained is not essential before an application for a writ of habeas corpus can be finally heard and disposed of by the court. {See: Kanu Sanyal (supra).}

22. In Nithya Anand Raghavan v. State of NCT of Delhi and others12, it has been observed by the Apex Court:

"44. The present appeal emanates from a petition seeking a writ of habeas corpus for the production and custody of a minor child. This Court in Kanu Sanyal v. District Magistrate, Darjeeling & Ors., (2001) 5 SCC 247, has held that habeas corpus was essentially a procedural writ dealing with machinery of justice. The object underlying the writ was to secure the release of a person who is illegally deprived of his liberty. The writ of habeas corpus is a command addressed to the person who is alleged to have another in unlawful custody, requiring him to produce the body of such person before the Court. On production of the person before the Court, the circumstances in which the custody of the person concerned has been detained can be inquired into by the Court and upon due inquiry into the alleged unlawful restraint pass appropriate direction as may be deemed just and proper. The High Court in such proceedings conducts an inquiry for immediate determination of the right of the person's freedom and his release when the detention is found to be unlawful.

45. In a petition for issuance of a writ of habeas corpus in relation to the custody of a minor child, this Court in Sayed Saleemmuddin v. Dr. Rukhsana and Ors., (2001) 5 SCC 247, has held that the principal duty of the Court is to ascertain whether the custody of child is unlawful or illegal and whether the welfare of the child requires that his present custody

should be changed and the child be handed over to the care and custody of any other person. While doing so, the paramount consideration must be about the welfare of the child. In the case of Mrs. Elizabeth (supra), it is held that in such cases the matter must be decided not by reference to the legal rights of the parties but on the sole and predominant criterion of what would best serve the interests and welfare of the minor. The role of the High Court in examining the cases of custody of a minor is on the touchstone of principle of parens patriae jurisdiction, as the minor is within the jurisdiction of the Court (see Paul Mohinder Gahun Vs. State of NCT of Delhi & Ors., (2004) 113 Delhi Law Time 823, relied upon by the appellant). It is not necessary to multiply the authorities on this proposition.

47. In a habeas corpus petition as aforesaid, the High Court must examine at the threshold whether the minor is in lawful or unlawful custody of another person (private respondent named in the writ petition). For considering that issue, in a case such as the present one, it is enough to note that the private respondent was none other than the natural guardian of the minor being her biological mother. Once that fact is ascertained, it can be presumed that the custody of the minor with his/her mother is lawful. In such a case, only in exceptionable situation, the custody of the minor (girl child) may be ordered to be taken away from her mother for being given to any other person including the husband (father of the child), in exercise of writ jurisdiction. Instead, the other parent can be asked to resort to a substantive prescribed remedy for getting custody of the child."

23. Further, in Syed Saleemuddin v. Dr. Rukhsana and Ors.13, it has been observed by the Supreme Court:

"11. From the principles laid down in the aforementioned cases it is clear that in an application seeking a writ of Habeas Corpus for custody of minor children the principal consideration for the Court is to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that present custody should be changed and the children should be left in care and custody of somebody else. The principle is well settled that in a matter of custody of a child the welfare of the child is of paramount consideration of the Court. Unfortunately, the Judgment of the High Court does not show that the Court has paid any attention to these important and relevant questions. The High Court has not considered whether the custody of the children with their father can, in the facts and circumstances, be said to be unlawful. The Court has also not adverted to the question whether for the welfare of the children they should be taken out of the custody of their father and left in the care of their mother. However, it is not necessary for us to consider this question further in view of the fair concession made by Shri M.N. Rao that the appellant has no objection if the children remain in the custody of the mother with the right of the father to visit them as noted in the judgment of the High Court, till the Family Court disposes of the petition filed by the appellant for custody of his children."

24. Having considered the aforesaid judgments of the Supreme Court and the principles laid down in the aforestated cases for grant of writ of habeas corpus, it appears that the condition precedent for instituting a petition seeking writ of habeas corpus is the person for whose release, the writ of habeas corpus is sought, must be in detention and he must be under detention by the authorities or by any private individual. It is his detention which gives the cause of action for maintaining the writ of habeas corpus. If the allegations in the writ of habeas corpus read as a whole do not disclose the detention, in other words, if there is no

allegation of illegal detention, the writ petition seeking writ of habeas corpus is liable to be rejected summarily. Such writ is available against any person who is suspected of detaining another unlawfully and the habeas corpus Court must issue it, if it is shown that the person on whose behalf it is asked for is unlawfully deprived of his liberty. The writ can be addressed to any person whatever - an official or a private individual - who has another in his custody.

25. In view of the principles of law laid down by various Courts, if facts of the present case are seen, it is apparent that the petitioner has failed to demonstrate that his two minor children are illegally detained by his wife (respondent no.7). The limited contention of the petitioner is about the welfare of his children, which according to his own assessment, can be better if children would be with him. We are afraid, this self-appreciated statement of the petitioner will not give him any benefit in the present case. The mere fact that the financial condition of the petitioner is superior than that of respondent no.7, does not give him any right for issuance of writ of habeas corpus. If financial position is the only criteria, then in every case, a person who is financially strong would claim custody of child. If a mother is struggling for her rights along with her children, even assuming that she is financially weak, she cannot be deprived of her children just because her husband is a moneyed man. The judgments relied upon by counsel for the petitioner are of no help to him. Even otherwise, in the case in hand, age of the second child of the petitioner and respondent no.7 is just about 2 1/2 years and, we do not wish to separate the small baby from her mother as well as her sister.

26. From the pleadings of the parties and after hearing the arguments, it appears that various allegations are levelled by the parties against each other. It further appears that the parties have not made any effort for amicable settlement and are approaching the Court by filing one case after another. We hope that some efforts would be made by the parties for amicable settlement and, according to us, that would be actual welfare of the children.

27. In view of the aforesaid, in our considered opinion, the petition has no substance, as no ground whatsoever has been made for issuance of writ of habeas corpus. Accordingly, we decline to exercise the jurisdiction for issuance of writ of habeas corpus.

28. The writ petition is, accordingly, dismissed. However, dismissal of writ petition shall not preclude the petitioner from seeking remedy available to him in law. Any observation made by this Court, while deciding this writ petition, shall not come in the way of either party."

5. Considering the submissions made by learned counsel for the petitioners, learned A.G.A. and from the perusal of the case law cited by learned A.G.A. it transpires that this habeas corpus writ petition under Article 226 of Constitution of India is not maintainable. However, the petitioner is free to avail the remedy before the civil court concerned.

6. Accordingly, this petition is hereby dismissed.

(2021)11ILR A810
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.09.2021

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Habeas Corpus Writ Petition No. 576 of 2021

Smt. Deepmala Giri & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Arya Suman Pandey, Sri Avnish Kumar Rai

Counsel for the Respondents:
A.G.A.

Constitution of India, Article 226 - Habeas corpus - Maintainability – Petitioner no. Dharmendra Bharti filed petition alleging illegal detention of corpus (a major girl) by her father - On notice being issued corpus brought before the Court not by corpus father to whom notice was issued to produce the corpus but by by petitioner no.2 Dharmendra Bharti himself - Held- Corpus not in illegal custody of opposite party, father of corpus, as alleged - Habeas corpus petition not maintainable. (Para 7, 8) (E-5)

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard Sri Avnish Kumar Rai learned counsel for the petitioners and learned AGA for the State.

2. This habeas corpus writ petition has been filed with a prayer to issue a writ, order or direction in the nature of Habeas Corpus commanding the respondent no.4 to produce the petitioner no.1 forthwith, who is under illegal detention of respondent no.4 before this Hon'ble Court and her custody be given to the petitioner no.2 forthwith by this Hon'ble Court and she may be set at liberty.

3. This Court vide order dated 24.8.2021 passed the following order:-

"1. Sri Arya Suman Pandey, learned counsel for the petitioner.

2. Issue notice to respondent no. 4 through C.J.M, Ghazipur for production of corpus of petitioner no. 1 - Smt. Deepmala Giri on or before the next date. Petitioner to take steps to supply copy of the writ petition to the Registry during course of the day for taking necessary steps.

3. List on 2.9.2021."

4. Today when the case is taken up, learned counsel for the petitioners Sri Avnish Kumar Rai submits that petitioner no.1 Deepmala Giri daughter of Sri Anjani Kumar Giri is present before this Court, but she has been brought before this Court by petitioner no.2 Dharmendra Bharti and not by her father Anjani Kumar Giri respondent no.4 to whom notice was issued by this Court to produce the corpus.

5. On being asked by this Court from petitioner no.1 Deepmala Giri as to who has brought her before this Court, she has stated that she has been brought by petitioner no.2 Dharmendra Bharti before this Court. On being further asked from petitioner no.1 as to what is her age, she has stated that her date of birth is 1.8.1997 and her age is 24 years, therefore she is major. She has further stated that she is graduate.

6. Sri Avnish Kumar Rai, learned counsel for the petitioners further submits that petitioner no.2 Dharmendra Bharti is also present before this Court. When this Court asked the petitioner no.2 whether he has produced the petitioner no.1 before this Court, he has stated that the father of petitioner no.1 refused to produce petitioner no.1 before this Court, therefore petitioner no.1 Deepmala Giri came to Allahabad with him from District Ghazipur.

7. Learned AGA has pointed out that corpus petitioner no.1 Deepmala Giri is present before this Court and she has been brought before this Court by petitioner no.2 Dharmendra Bharti, therefore, she is not in illegal custody of respondent no.4 Anjani Kumar Giri, father of the corpus and hence, this habeas corpus writ petition is not maintainable.

8. In view of the above, this habeas corpus writ petition is not maintainable as the petitioner

no.1 is not in illegal custody of respondent no.4. Accordingly, the writ petition is **dismissed** as not maintainable.

9. Petitioner no.1 Deepmala Giri is major, therefore she is free to go wherever and with whomsoever she wants to go on her own sweet will.

(2021)11ILR A812
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.09.2021

BEFORE

THE HON'BLE GAUTAM CHOWDHARY, J.

Habeas Corpus Writ Petition No. 615 of 2021

Master Parth & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Ajay Vikram Yadav, Sri Sunil Kumar Singh

Counsel for the Respondents:
A.G.A.

Civil Law - Custody of Minor - Constitution of India, Article 226 - Habeas Corpus Writ Petition - extraordinary jurisdiction - Maintainability - habeas corpus is very extraordinary jurisdiction to be exercised in such cases where the illegal confinement of the corpus is established - Where the court is of the view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court - welfare of the child has to be determined owing to the facts and circumstances of each case and the Court cannot take a pedantic approach (Para 5, 7, 9)

Mother alleged that the child was abducted from the her house by child father - no F.I.R. against the said incident lodged - after a lapse of three months Habeas Corpus petition filed – Held - dispute is between father and mother - Both are natural guardians of the child - proper remedy does not lie before High Court Court - matter is of the civil nature which can be determined only by the civil court at appropriate forum

Dismissed. (E-5)

List of Cases cited:

1. Smt. Meenakshi & anr. Vs St. of U.P. & 8 ors. 2020 12 ADJ 254

2. Tejaswini Gaud & ors. Vs Shekhar Jagdish Prasad Tewari & ors. (2019) 7 SCC 42

3. Manuj Sharma Vs St. of U.P. & ors. 2019(4) ADJ 840 (DB)

(Delivered by Hon'ble Gautam Chowdhary, J.)

1. Heard learned counsel for the petitioners and Shri Pankaj Srivastava, Shri C.B. Singh and Shri Rakesh Chandra Srivastava, learned A.G.A. for the State.

2. This writ petition has been filed with the following prayer :-

"(i) a writ, order or direction in the nature of Habeas Corpus commanding the respondents to produce the corpus/ petitioner no.1 before this Hon'ble Court and set him at liberty/ custody of petitioner no.2 forthwith;

(ii) any other writ, order or direction which this Hon'ble Court deems fit and

(iii) Award cost of writ petition as well as compensation to the petitioners throughout."

3. The brief facts of the case are that the marriage of the petitioner no.2 was solemnized with the respondent no.4, according to the Hindu rites and rituals on 14.12.2012 and out of wedlock of the petitioner no.2 and the respondent no.4, a baby/ son (petitioner no.1) was born to them who is presently aged about four years. Thereafter some dispute arose

between the parties and the respondent no.4, hence a case under section 13B of the Hindu Marriage Act was filed. In paragraph 9 of the said divorce petition, specific averment was made in respect of corpus that he will reside with the petitioner no.2 and the divorce petition was filed with mutual consent of the parties before Principal Judge, Family Court, Firozabad who allowed the same vide judgment and order dated 25.02.2020.

4. Submission of learned counsel for the petitioners is that as per judgment and order of the Family Court, the petitioner no.1 was living in the custody of petitioner no.2 but all of a sudden on 20.5.2021 when the petitioner no.2 went outside the house, the respondent no.4 reached to the parental house of the petitioner no.2 and forcefully abducted the corpus. He further submits that several efforts in order to get the child back were made but the petitioner no.2 did not return the child and therefore the corpus is illegally detained under the custody of petitioner no.2 and hence, this writ petition is being filed.

5. In support of his contention learned counsel for the petitioner has specifically placed reliance upon the paragraph 28 of the judgment passed by this Court in the case of **(Smt. Meenakshi And Another Vs. State of U.P. and 8 Others) 2020 12 ADJ 254** which are quoted herein below:-

*"28. In the same vain are the remarks of the Supreme Court in **Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and others, (2019) 7 SCC 42**. In Tejaswini Gaud, it has been held by their Lordships of the Supreme Court:*

***"35. The welfare of the child has to be determined owing to the facts and circumstances of each case and the Court cannot take a pedantic approach.** In the present case, the first respondent has neither abandoned the child nor has deprived the child of a right to his love and affection. The circumstances were such that due to illness of the parents, the appellants had to take care of the child for some time. Merely because, the appellants being the relatives took care of the child for some time, they cannot retain the custody of the child. It is not the case of the appellants that the first respondent is unfit to take care of the child except contending that he has no female support to take care of the child. The first respondent is fully recovered from his illness and is now healthy and having the support of his mother and is able to take care of the child."."*

6. Learned A.G.A. on the other hand submits that though the child was abducted from the parental house of petitioner no.2 but no F.I.R. against the said incident was lodged, and after a lapse of three months this petition has been filed at a belated stage which transpires that there is no urgency of exercising this extraordinary jurisdiction in the present matter. He further submits that the proper remedy is before the civil court under the Guardians and Wards Act, 1890.

7. Learned A.G.A. has also placed reliance on the judgements of :-

(i) Tejaswini Gaud and Others Vs. Shekhar Jagdish Prasad Tewari and Others (2019) 7 SCC 42 :-

"20. In child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be. In cases arising out of the proceedings under the Guardians and Wards Act, the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. There are significant differences between the enquiry

under the Guardians and Wards Act and the exercise of powers by a writ court which is of summary in nature. What is important is the welfare of the child. In the writ court, rights are determined only on the basis of affidavits. ***Where the court is of the view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court. It is only in exceptional cases, the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus."***

(ii) Manuj Sharma Vs. State of U.P. and Others [2019(4) ADJ 840 (DB)]. The paragraphs 8-28 of the judgement are relevant which are quoted as under :-

"8. Habeas corpus "ad subjiciendum" means "that you have the body to submit or answer" which is called as Festinum Remedium - A speedy remedy, which has been sought by the petitioner in this instant case.

9. Habeas Corpus is Latin for "you have the body". The writ is referred to in full in legal texts as habeas corpus ad subjiciendum or more rarely ad subjiciendum et recipiendum. It is sometimes described as the "great writ". It is considered as a most expeditious remedy available under the law.

10. The meaning of the term habeas corpus is "you must have the body". ***Halsbury in his Laws of England****, 4th Edition, observed as follows: -*

"The writ of habeas corpus ad subjiciendum which is commonly known as the writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from the unlawful or unjustifiable detention whether in prison or in private custody. It is a prerogative writ by which the queen has a right to inquire into the laws for which any of her subjects are deprived of their liberty."

11. In ***Corpus Juris Secundum****, the nature of the writ of habeas corpus is summarized thus:*

"The writ of habeas corpus is a writ directed to the person detaining another, commanding him to produce the body of the prisoner at a designate time and place with the day and cause of his caption and detention to do, submit to, and receive whatsoever the court or judge awarding the writ shall consider in that behalf. 'Habeas corpus' literally means "have the body". By this writ, the court can direct to have the body of the person detained to be brought before it in order to ascertain whether the detention is legal or illegal. Such is the predominant position of the writ in the Anglo-Saxon Jurisprudence."

12. In the Constitutional and Administrative Law by Hood Phillips and Jackson it was stated as under: - (Relied upon by the Supreme Court in the matter of ***Surinderjit Singh Mand and another v. State of Punjab and another****, to highlight the importance and significance of personal liberty, specially with reference to unlawful detention.)*

"10. The legality of any form of detention may be challenged at common law by an application for the writ of habeas corpus. Habeas corpus was a prerogative writ, that is, one issued by the King against his officers to compel them to exercise their functions properly. The practical importance of habeas corpus as providing a speedy judicial remedy for the determination of an applicant's claim for freedom has been asserted frequently by judies (sic) and writers. Nonetheless, the effectiveness of the remedy depends in many instances on the width of the statutory power under which a

public authority may be acting and the willingness of the courts to examine the legality of decision made in reliance on wide-ranging statutory provision. It has been suggested that the need for the "blunt remedy' of habeas corpus has diminished as judicial review has developed into an ever more flexible jurisdiction. Procedural reform of the writ may be appropriate, but it is important not to lose sight of substantive differences between habeas corpus and remedies under judicial review. The latter are discretionary and the court may refuse relief on practical grounds; habeas corpus is a writ of right, granted ex debito justitiae."

13. Lord Halsbury LC in ***Cox v. Hates*** *held that "the right to an instant determination as to lawfulness of an existing imprisonment" is the substantial right made available by this writ.*

14. Likewise in Barnardo v. Ford the writ of habeas corpus has been described as a writ of right which is to be granted ex debito justitiae. Though a writ of right, it is not a writ of course. The applicant must show a prima facie case of his unlawful detention. Once, however, he shows such a case and the return is not good and sufficient he is entitled to this writ as a matter of right.

15. In ***R. v. Secy. of State for Home Affai****rs, it has been held that a person is not entitled to be released on a petition of habeas corpus if there is no illegal restraint. "The question for a habeas corpus court is whether the subject is lawfully detained. If he is, the writ cannot issue, if he is not, it must issue."*

16. Likewise in ***Cox v. Hakes*** *it has been held that the writ of habeas corpus is an effective means of immediate release from unlawful detention, whether in prison or private custody. Physical confinement is not necessary to constitute detention. Control and custody are sufficient.*

17. A Constitution Bench judgment of the Supreme Court in the matter of ***Kanu Sanyal v. District Magistrate, Darjeeling and others*** *traced the history, nature and scope of the writ of habeas corpus. It has been held by Their Lordships that it is a writ of immemorial antiquity whose first threads are woven deeply "within the seamless web of history and untraceable among countless incidents that constituted a total historical pattern of Anglo-Saxon jurisprudence". Their Lordships further held that the primary object of this writ is the immediate determination of the right of the applicant's freedom and that was its substance and its end. Their Lordships further explaining the nature and scope of a writ of habeas corpus held as under: -*

"The writ of habeas corpus is essentially a procedural writ. It deals with the machinery of justice, not the substantive law. The object of the writ is to secure release of a person who is illegally restrained of his liberty. The writ is, no doubt, a command addressed to a person who is alleged to have another person unlawfully in his custody requiring him to bring the body of such person before the Court, but the production of the body of the person detained is directed in order that the circumstances of his detention may be inquired into, or to put it differently, "in the order that appropriate judgment be rendered on judicial enquiry into the alleged unlawful restrain". But the writ is primarily designed to give a person restrained of his liberty a speedy and effective remedy for having the legality of his detention enquired into and determined and if the detention is found to be unlawful, having himself discharged and freed from such restraint. The most characteristic element of the writ is its peremptoriness. The essential and leading theory of the whole procedure is the immediate determination of the right to the applicant's freedom and his release, if the detention is found to be unlawful. That is the primary purpose of

the writ, that is its substance and end. The production of the body of the person alleged to be wrongfully detained is ancillary to this main purpose of the writ. It is merely a means for achieving the end which is to secure the liberty of the subject illegally detained."

18. In the matter of ***Union of India v. Yamnam Anand M. alias Bocha alias Kora alias Suraj and another****,while explaining the nature of writ of habeas corpus, Their Lordships of the Supreme Court held that though it is a writ of right, it is not a writ of course and the applicant must show a prima facie case of his unlawful detention. Paragraph 7 of the report states as under: -*

"7. Article 21 of the Constitution having declared that no person shall be deprived of life and liberty except in accordance with the procedure established by law, a machinery was definitely needed to examine the question of illegal detention with utmost promptitude. The writ of habeas corpus is a device of this nature. Blackstone called it "the great and efficacious writ in all manner of illegal confinement". The writ has been described as a writ of right which is grantable ex debito justitiae. Though a writ of right, it is not a writ of course. The applicant must show a prima facie case of his unlawful detention. Once, however, he shows such a cause and the return is not good and sufficient, he is entitled to this writ as of right."

19. A writ of habeas corpus is not to be issued as a matter of course. Clear grounds must be made out for issuance of such writ. (See ***Dushyant Somal v. Sushma Somal)***

20. In the matter of ***Usharani v. The Commissioner of Police, Bangalore and others, t****he writ of habeas corpus has been defined very lucidly as under: -*

"The claim (for habeas corpus) has been expressed and pressed in terms of concrete legal standards and procedures. Most notably, the right of personal liberty is connected in both the legal and popular sense with procedures upon the Writ of habeas corpus. The writ is simply a judicial command directed to a specific jailer directing him or her to produce the named prisoner together with the legal cause of detention in order that the legal warrant of detention might be examined. The said detention may be legal or illegal. The right which is sought to be enforced by such a writ is a fundamental right of a citizen conferred under Article 21 of the Constitution of India.

11. The ancient prerogative writ of habeas corpus takes its name from the two mandatory words "habeas" and "corpus". "Habeas Corpus" literally means "have his body". The general purpose of these writs as their name indicates was to obtain the production of the individual before a Court or a Judge. This is a prerogative process for securing the liberty of the subject by affording an effective relief of immediate release from unlawful or unjustifiable detention, whether in prison or in private custody. This is a writ of such a sovereign and transcendent authority that no privilege of power or place can stand against it. It is a very powerful safeguard of the subject against arbitrary acts not only of private individuals but also of the executive, the greatest safeguard for personal liberty, according to all constitutional jurists. The writ is a prerogative one obtainable by its own procedure. ... In our country, it is this prerogative writ which has been given a constitutional status under Articles 32 and 226 of the Constitution. Therefore, it is an extraordinary remedy available to a citizen of this country, which he can enforce under Article 226 or under Article 32 of the Constitution of India."

21. Thus, the writ of habeas corpus is a process by which a person who is confined without legal justification may secure a release

from his confinement. The writ is, in form, an order issued by the High Court calling upon the person by whom a person is alleged to be kept in confinement to bring such person before the court and to let the court know on what ground the person is confined. If there is no legal justification for the detention, the person is ordered to be released. However, the production of the body of the person alleged to be unlawfully detained is not essential before an application for a writ of habeas corpus can be finally heard and disposed of by the court. {See: ***Kanu Sanyal (supra).}***

22. In ***Nithya Anand Raghavan v. State of NCT of Delhi and others****, it has been observed by the Apex Court:*

"44. The present appeal emanates from a petition seeking a writ of habeas corpus for the production and custody of a minor child. This Court in Kanu Sanyal v. District Magistrate, Darjeeling & Ors., (2001) 5 SCC 247, has held that habeas corpus was essentially a procedural writ dealing with machinery of justice. The object underlying the writ was to secure the release of a person who is illegally deprived of his liberty. The writ of habeas corpus is a command addressed to the person who is alleged to have another in unlawful custody, requiring him to produce the body of such person before the Court. On production of the person before the Court, the circumstances in which the custody of the person concerned has been detained can be inquired into by the Court and upon due inquiry into the alleged unlawful restraint pass appropriate direction as may be deemed just and proper. The High Court in such proceedings conducts an inquiry for immediate determination of the right of the person's freedom and his release when the detention is found to be unlawful.

45. In a petition for issuance of a writ of habeas corpus in relation to the custody of a minor child, this Court in Sayed Saleemmuddin v. Dr. Rukhsana and Ors., (2001) 5 SCC 247, has held that the principal duty of the Court is to ascertain whether the custody of child is unlawful or illegal and whether the welfare of the child requires that his present custody should be changed and the child be handed over to the care and custody of any other person. While doing so, the paramount consideration must be about the welfare of the child. In the case of Mrs. Elizabeth (supra), it is held that in such cases the matter must be decided not by reference to the legal rights of the parties but on the sole and predominant criterion of what would best serve the interests and welfare of the minor. The role of the High Court in examining the cases of custody of a minor is on the touchstone of principle of parens patriae jurisdiction, as the minor is within the jurisdiction of the Court (see Paul Mohinder Gahun Vs. State of NCT of Delhi & Ors., (2004) 113 Delhi Law Time 823, relied upon by the appellant). It is not necessary to multiply the authorities on this proposition.

47. In a habeas corpus petition as aforesaid, the High Court must examine at the threshold whether the minor is in lawful or unlawful custody of another person (private respondent named in the writ petition). For considering that issue, in a case such as the present one, it is enough to note that the private respondent was none other than the natural guardian of the minor being her biological mother. Once that fact is ascertained, it can be presumed that the custody of the minor with his/her mother is lawful. In such a case, only in exceptionable situation, the custody of the minor (girl child) may be ordered to be taken away from her mother for being given to any other person including the husband (father of the child), in exercise of writ jurisdiction. Instead, the other parent can be asked to resort to a substantive prescribed remedy for getting custody of the child."

*23. Further, in **Syed Saleemuddin v. Dr. Rukhsana and Ors**., it has been observed by the Supreme Court:*

"11. From the principles laid down in the aforementioned cases it is clear that in an application seeking a writ of Habeas Corpus for custody of minor children the principal consideration for the Court is to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that present custody should be changed and the children should be left in care and custody of somebody else. The principle is well settled that in a matter of custody of a child the welfare of the child is of paramount consideration of the Court. Unfortunately, the Judgment of the High Court does not show that the Court has paid any attention to these important and relevant questions. The High Court has not considered whether the custody of the children with their father can, in the facts and circumstances, be said to be unlawful. The Court has also not adverted to the question whether for the welfare of the children they should be taken out of the custody of their father and left in the care of their mother. However, it is not necessary for us to consider this question further in view of the fair concession made by Shri M.N. Rao that the appellant has no objection if the children remain in the custody of the mother with the right of the father to visit them as noted in the judgment of the High Court, till the Family Court disposes of the petition filed by the appellant for custody of his children."

24. Having considered the aforesaid judgments of the Supreme Court and the principles laid down in the aforestated cases for grant of writ of habeas corpus, it appears that the condition precedent for instituting a petition seeking writ of habeas corpus is the person for whose release, the writ of habeas corpus is sought, must be in detention and he must be under detention by the authorities or by any private individual. It is his detention which gives the cause of action for maintaining the writ of habeas corpus. If the allegations in the writ of habeas corpus read as a whole do not disclose the detention, in other words, if there is no allegation of illegal detention, the writ petition seeking writ of habeas corpus is liable to be rejected summarily. Such writ is available against any person who is suspected of detaining another unlawfully and the habeas corpus Court must issue it, if it is shown that the person on whose behalf it is asked for is unlawfully deprived of his liberty. The writ can be addressed to any person whatever - an official or a private individual - who has another in his custody.

25. In view of the principles of law laid down by various Courts, if facts of the present case are seen, it is apparent that the petitioner has failed to demonstrate that his two minor children are illegally detained by his wife (respondent no.7). The limited contention of the petitioner is about the welfare of his children, which according to his own assessment, can be better if children would be with him. We are afraid, this self-appreciated statement of the petitioner will not give him any benefit in the present case. The mere fact that the financial condition of the petitioner is superior than that of respondent no.7, does not give him any right for issuance of writ of habeas corpus. If financial position is the only criteria, then in every case, a person who is financially strong would claim custody of child. If a mother is struggling for her rights along with her children, even assuming that she is financially weak, she cannot be deprived of her children just because her husband is a moneyed man. The judgments relied upon by counsel for the petitioner are of no help to him. Even otherwise, in the case in hand, age of the second child of the petitioner and respondent no.7 is just about 2 1/2 years and, we do not wish to separate the small baby from her mother as well as her sister.

26. From the pleadings of the parties and after hearing the arguments, it appears that various allegations are levelled by the parties against each other. It further appears that the parties have not made any effort for amicable settlement and are approaching the Court by filing one case after another. We hope that some efforts would be made by the parties for amicable settlement and, according to us, that would be actual welfare of the children.

27. In view of the aforesaid, in our considered opinion, the petition has no substance, as no ground whatsoever has been made for issuance of writ of habeas corpus. Accordingly, we decline to exercise the jurisdiction for issuance of writ of habeas corpus.

28. The writ petition is, accordingly, ***dismissed****. However, dismissal of writ petition shall not preclude the petitioner from seeking remedy available to him in law. Any observation made by this Court, while deciding this writ petition, shall not come in the way of either party."*

8. The same question was involved before the larger bench of this Court that whether the habeas corpus is maintainable or not.

9. Both the judgments very clearly demonstrates that it is not a proper forum to decide such cases and **the habeas corpus is very extraordinary jurisdiction to be exercised in such cases where the illegal confinement of the corpus is established**. In the present case the incident took place on 20.5.2021 where the son of petitioner no.2 was abducted by his father. The dispute is between father and mother. Both are the natural guardians of the child and therefore the proper remedy does not lie before this Court. This matter is of the civil nature which can be determined only by the civil court at appropriate forum.

10. Moreover, in the present case no F.I.R. was lodged with regard to incident which took place on 20.5.2021. That from perusal of the paragraph-9 of the application it transpires that this petition has been filed after the lapse of three months. The argument raised by the petitioner that while allowing the application 13B dated 25.2.2020 that it was settled between the parties that the child-Parth will remain with the mother which is not evident from the order passed by the court below, hence, this argument of the petitioner's counsel is not sustainable. The custody of the child can be claimed before the civil court at appropriate forum.

11. Moreover, the learned counsel for the petitioner relied upon the judgement of **Smt. Meenakshi And Another Vs. State of U.P. and 8 Others) 2020 12 ADJ 254**. The aforesaid judgement is based upon the judgement of **Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and others, (2019) 7 SCC 42.**

12. Now from perusal of this judgement paragraph 20 of the judgement clearly states that the writ of habeas corpus can be revoked only in extraordinary circumstances. The judgement also transpires that for the paramount welfare of the ward, the other things are also considered and in the present case the welfare of the child is to be examined, so at this stage the detailed consideration is required and the judgement itself says that in such cases where the court is of the view that detailed inquiry is required the Court may decline to exercise the extraordinary jurisdiction and direct the party to approach the civil court.

13. From perusal of these judgements the counsel for the petitioner failed to invoke any extraordinary jurisdiction in the present matter.

14. That after considering the aforesaid judgements and in view of the discussions made

above, this habeas corpus petition stands **dismissed.**

(2021)11ILR A820
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.09.2021

BEFORE

THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Habeas Corpus Writ Petition No. 1057 of 2019

Awanish Pandey & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Sanjay Mani Tripathi, Sri Adeel Ahmad Khan, Sri Prem Narain Singh, Sri Ravi Yadav, Sri Anil Kumar Srivastava

Counsel for the Respondents:
A.G.A., Anupama Tripathi, Sri Rakesh Kumar Tripathi

Civil Law - Custody of minor - Constitution of India, Art. 226 - Habeas corpus writ petition - pregorative writ of habeas corpus, is in the nature of extraordinary remedy, which should be used only when it can be held that the custody of the minor is illegal or unlawful - court, exercising `parens patriae' jurisdiction, must give due weight age to the moral values and the character of the proposed guardian- pendency of a criminal case, wherein the father has been charged of causing the death of the minor's mother, is a relevant factor required to be considered before an appropriate order could be passed (Para 8, 10)

Petition for custody of minor child sought by father from maternal grandfather - Father accused in pending criminal case u/s 498 & 304 I.P.C. & charged of causing the death of a minor's mother - Petitioner father not been able to point out as to how, the custody of the minor with his maternal grandfather can be said to be illegal or unlawful so as to persuade this Court to exercise its extraordinary prerogative jurisdiction for issuing a writ of habeas corpus - Not disputed that any rights with regard to guardianship or custody are to be agitated before appropriate forum (Para 11)

Dismissed. (E-5)

List of Cases cited:

1. Nil Ratan Kundu & anr. Vs Abhijit Kundu (2008) 9 SCC 413

2. Kirtikumar Maheshankar Joshi Vs Pradipkumar Karunashanker Joshi (1992) 3 SCC 573

3. Rachit Pandey (minor) & anr. Vs St. of U.P. & 3 ors. 2021 (2) ADJ 320

4. Nithya Anand Raghvan Vs State (NCT of Delhi) & anr. (2017) 8 SCC 454

5. Sayed Saleemuddin Vs Dr. Rukhsana & ors. (2001) 5 SCC 247

6. Tejaswini Gaud & ors. Vs. Shekhar Jagdish Prasad Tewari & ors. (2019) 7 SCC 42

(Delivered by Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard Sri Anil Kumar Srivastava, learned Senior Counsel assisted by Sri Prem Narain Singh, learned counsel for the petitioners and Sri Arvind Kumar, learned Additional Government Advocate appearing for the State-respondents. No one has appeared for the respondent no. 4, though the names of counsel are shown in the list.

2. The present petition for a writ of habeas corpus has been filed seeking custody of the petitioner n. 2, corpus, stated to be a minor of age about five years and ten months, by the petitioner no. 1 who asserts to be his father.

3. The facts as stated in the writ petition indicate that the petitioner no. 2 was born in the month of January, 2014 and on 11.05.2015, the

wife of the petitioner no. 1 i.e. the mother of the corpus, is stated to have committed suicide at the petitioner's home and thereafter an FIR was lodged against the petitioner no. 1 and other family members, registered as Case Crime No. 149 of 2015 under Section 498-A, 304-B IPC and 3/4 D.P.Act, Police Station Bahariya, District Prayagraj and the petitioner no. 1 was sent to jail on 17.05.2015.

4. It has further been stated that the respondent no. 4 filed a Habeas Corpus Writ Petition No. 45207 of 2015 (Om Prakash Mishra and another Vs. State of U.P. and others) and this Court, upon taking notice of the fact that the father of the corpus and other family members were in jail, passed an order dated 22.09.2015 granting custody of the minor child to the maternal grand-father, who is the respondent no.4 in the present case. The habeas corpus petition was subsequently dismissed as infructuous in terms of

5. Pleadings have been exchanged.

6. Learned Additional Government Advocate has pointed out that a copy of the First Information Report, which has been filed as annexure 1 to the writ petition, indicates that the same was lodged on 12.05.2015 under Sections 498-A, 304-B IPC and Section 3/4 of the Dowry Prohibition Act, 1961. In the said First Information Report, the petitioner no. 1 herein, is named as one of the accused. It is submitted that the First Information Report is in respect of an incident relating to the death of the wife of the petitioner no. 1 i.e. mother of the corpus, whose custody is being sought.

7. Learned Additional Government Advocate submits that petitioner no. 1 being the principal accused in the pending criminal case, the prayer of the petitioner no. 1 seeking custody of the minor child may be detrimental to his interest.

8. In somewhat similar set of facts, in the case of Nil Ratan Kundu and another vs. Abhijit Kundu1, where the custody of a minor was sought in the background of the pendency of a criminal case under Sections 498 and 304 I.P.C. against the father charging him of causing the death of a minor's mother, it was held that the paramount consideration in such matters would be the welfare of the child, and the court, exercising 'parens patriae' jurisdiction, must give due weightage to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings as well as physical comfort and moral values and the character of the proposed guardian is also required to be considered. It was held that the pendency of a criminal case, wherein the father has been charged of causing the death of the minor's mother, was a relevant factor required to be considered before an appropriate order could be passed. It was held as follows :-

"52. In our judgment, the law relating to custody of a child is fairly well settled and it is this: in deciding a difficult and complex question as to the custody of a minor, a court of law should keep in mind relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a human problem and is required to be solved with human touch. A court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the court is exercising parens patriae jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may

say, even more important, essential and indispensable considerations...

xxx

63. In our considered opinion, on the facts and in the circumstances of the case, both the courts were duty-bound to consider the allegations against the respondent herein and pendency of criminal case for an offence punishable under Section 498-A IPC. One of the matters which is required to be considered by a court of law is the "character" of the proposed guardian. In Kirtikumar, this Court, almost in similar circumstances where the father was facing the charge under Section 498-A IPC, did not grant custody of two minor children to the father and allowed them to remain with maternal uncle.

64. Thus, a complaint against the father alleging and attributing the death of mother, and a case under Section 498-A IPC is indeed a relevant factor and a court of law must address the said circumstance while deciding the custody of the minor in favour of such a person."

9. In an earlier decision in the case of **Kirtikumar Maheshankar Joshi vs. Pradipkumar Karunashanker Joshi2,** where in almost similar circumstances the father was facing a charge under Section 498-A I.P.C., it was held that though the father being a natural guardian, has a preferential right to the custody of the children, but in the facts and circumstances of the case, it would not be in the interest of children to hand over their custody to the father.

10. In a recent decision in **Rachit Pandey (minor) and another vs. State of U.P. and 3 others3** this Court after referring to the authoritative pronouncements in the case of **Nithya Anand Raghvan vs. State (NCT of Delhi) and another4, Sayed Saleemuddin vs. Dr. Rukhsana and others5 and Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and others6,** has held that in an application seeking a writ of habeas corpus for custody of a minor child, the principal consideration for the Court would be to ascertain whether the custody of the child can be said to be unlawful and illegal and whether the welfare of the child requires that the present custody should be changed and the child should be handed over in the care and custody of someone else other than in whose custody the child presently is. It was held that the pregorative writ of habeas corpus, is in the nature of extraordinary remedy, which may not be used to examine the question of custody of a child except where in the circumstances of a particular case, it can be held that the custody of the minor is illegal or unlawful.

11. Learned Senior Counsel appearing for the petitioners has not been able to point out as to how, in the facts and circumstances of the present case, the custody of the petitioner no. 2 with his maternal grand- father can be said to be illegal or unlawful so as to pursuade this Court to exercise its extraordinary prerogative jurisdiction for issuing a writ of habeas corpus. He has also not disputed that any rights with regard to guardianship or custody are to be agitated before the appropriate forum.

12. The habeas corpus petition stands dismissed accordingly.

(2021)11ILR A822
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 01.11.2021

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MRS. SAROJ YADAV, J.

Habeas Corpus Writ Petition No. 11132 of 2021

Sonu @ Mohd. Ishtiyaq ...Petitioner
Versus
U.O.I.& Ors. ...Respondents

Counsel for the Petitioner:
S. Malik-E- Ashtar Rizvi Anil Kumar Pandey

Counsel for the Respondents:
G.A., Asstt. Solicitor General, Chief Standing Counsel

National Security Act, 1980 – Section 3(2) - Constitution of India - Art. 22(5) - Detention order -delay in deciding detenue's representation against detention order - Held - Any unexplained delay would be a breach of constitutional imperative and it would render the continued detention of the detenu illegal - delay itself is not fatal, the delay which remains unexplained becomes unreasonable - It is not enough to say that the delay was very short - Even longer delay can as well be explained - So the test is not the duration or range of delay, but how it is explained by the authority concerned - explanation offered must be reasonable indicating that there was no slackness or indifference (Para 31)

Unexplained delay of four days in deciding detenue's representation on the part of the Central Government which infringed his fundamental right envisaged under Article 21 and 21(5) of the Constitution of India - In the affidavit filed on behalf of Union of India the delay on 19.06.2021 and 20.06.2021 has been explained, but the affidavit is silent on the delay of 21.06.2021 to 24.06.2021 - Held - on account of unexplained delay of four days on the part of Union of India, the continuation of the preventive detention sands vitiated - Order of detention, quashed. (Para 31, 32)

Allowed. (E-5)

List of Cases cited:

1. Rajammal Vs St.of T.N. & anr. (1991) 1 SCC 417

2. Mohinuddin @ Moin Master Vs D.M., Beed AIR 1987 SC 1977

3. Satyapriya Sonkar Vs Superintendent, Central Jail 2000 Cr.L.J. Allahabad (B.D.)

4. Kundanbhai Dulabhai Shaikh Vs Distt. Magistrate, Ahmedabad 1996 (3) SCC 194

5. K.M. Abdulla Kunhi Vs U.O.I. (1991) 1 SCC 476

6. Harish Pahwa Vs St. of U.P. & ors. A.I.R. 1981 SC 1126

7. Abdul Nasar Adam Ismail Vs. St. of Mah. (2013) 4 SCC 435

(Delivered by Hon'ble Mrs. Saroj Yadav, J.)

1. The instant Habeas Corpus petition has been filed under Article 226 of the Constitution of India by the detenue/petitioner Sonu @ Mohd. Ishtiyaq through his next friend/mother Shameem Bano to quash the impugned detention order passed by the respondent No.3 i.e. District Magistrate, Barabanki vide No.01/J.A./Ra.Su.Ka./2021 dated 11.04.2021, whereby the detention order has been passed exercising the power under Section 3(2) of the National Security Act, 1980 (in short 'NS Act') and directing to retain the petitioner/detenue under Section 3(2) of the NS Act as well as the impugned order dated 22.04.2021 passed by the respondent No.2, whereby the detention order has been approved by the State Government.

2. The pre-judicial activities of the petitioner/detenue necessitating the District Magistrate, Barabanki to pass the impugned detention order against him are detailed in grounds of detention. The facts relating to detention of the petitioner/detenue has been described in the 'grounds of detention' followed by detention order dated 11.04.2021 in short are as under:-

One Mr. Mahendra Singh, Sub Inspector, Police Station Ram Sanehi Ghat, District Barabanki has lodged a First Information Report against 22 named persons including the petitioner and about 150 unknown persons on 20.03.2021 at about 8:00 P.M. which was registered at Case Crime No.89 of 2021, under Sections 147, 148, 149, 323, 504, 506, 307, 332, 333, 336, 352, 427, 34 & 188 of the

Indian Penal Code (in short I.P.C.) and Section 7 of Criminal Law Amendment Act and Case Crime No.90 of 2011, under Section 3/25 of Arms Act, both are relating to Police Station Ram Sanehi Ghat, District Barabanki.

3. In the First Information Report it was alleged that on 19.03.2021 the complainant alongwith other police personnel were present at the gate of Tehsil Ram Sanehi Ghat to maintain law and order, the accused persons armed with deadly weapons and making protest against the policies of State Government and removal of illegal encroachment made in Tehsil compound tried to forcibly enter in Tehsil compound. When the police personnel tried to restrain them, they became aggressive and attacked upon the police personnel by lathi, danda, bricks, stones and sharp edged weapons. The accused persons assaulted the police personnel with an intention to commit their murder, hurled abuses and ripped their uniforms. They also caused damages to the vehicles. The extra police force was called only then the riot could be controlled. It has also been alleged that the police personnel caught hold 22 persons including the petitioner at the spot by using necessary force. From the possession of petitioner/detenue, a country made pistol of 12 bore and 2 live cartridges were recovered.

4. The impugned detention order dated 11.04.2021 depicts that the detention order was passed to maintain public order and public peace. In the grounds of detention it has also been mentioned that the in-charge Inspector of Ram Sanehi Ghat reported that in Tehsil Ram Sanehi Ghat some people were living after constructing the illegal houses on the Government land, whereas on the above Government land bearing Gata No. 776 and 777, which are adjacent to offices and official residences of Deputy Collector Ram Sanehi Ghat and Circle Officer were there. The persons who are living illegally in an unauthorized manner, have also constructed a passage unauthorizedly, which was being used by the persons of doubtfull category, causing danger to the Government records and other properties and also that the Government work was also being disturbed. It was also found that on the Government land some rooms were constructed unauthorizedly and they were used for "Offering Namaz". Tehsildar Ram Sanehi Ghat issued a notice in this regard, but no reply was received from the unauthorized occupants. Thereafter the Tehsildar Administration got constructed the wall and closed the unauthorized passage, but kept both the legal passages open which were already in existence. On 19.03.2021 after "Offering Namaz" the petitioner and his companions reached the spot armed with deadly weapons and they assaulted the police force. Many police personnel got injured and the public order got disturbed. The petitioner was arrested at the spot along with many other co-accused persons, the country made pistol was recovered form the possession of the petitioner in connection of which a separate proceedings under Section 25 of the Arms Act was registered.

5. In this matter the detention order was passed by the District Magistrate, Barabanki/Detaining Authority on 11.04.2021 on the basis of recommendation report of Additional Superintendent of Police (South), District Barabanki dated 09.04.2021, recommendation report of Circle Officer, Ram Sanehi Ghat, District Barabanki dated 09.04.2021 and recommendation report of Incharge Inspector Police Station Ram Sanehi Ghat District Barabanki dated 09.04.2021 alongwith the Dozier containing the papers, related to the Case Crime No.89 of 2021, under Sections 147, 148, 149, 323, 504, 506, 307, 332, 333, 336, 352, 427, 34 & 188 I.P.C.) and Section 7 of Criminal Law Amendment Act and Cases Crime No.90 of 2011, under Section 3/25 of Arms Act approved by the Superintendent of Police, District Barabanki on 10.04.2021.

6. The impugned order dated 11.04.2021 as well as other material on the basis of which the

detaining authority drew his subjective satisfaction was served on the detenue/petitioner on the same day i.e. 11.04.2021.

7. The perusal of the grounds of detention (annexure No.3) dated 11.04.2021 reveals that apart from grounds recorded by the detaining authority in clamping NSA on the detenue, the detaining authority also informed to the detenue about his right of making a representation to detaining authority, State Government, Advisory Board and Central Government. The detention of the petitioner / detenue was confirmed by the Advisory Board and thereafter the State Government vide order dated 2/3.06.2021 had extended the tentative period of detention w.e.f. 11.04.2021 for three months which was duly communicated to the detenue.

8. Heard Mr. Anil Kumar Pandey, learned counsel for the petitioner, Mr. S.P. Singh, learned A.G.A. for the State and Mr. Varun Pandey, learned counsel for the Union of India.

9. The petitioner/detenue challenged the impugned orders on many grounds, but during the arguments, the counsel for the petitioner pressed it on the ground of delay alone on the part of the State Government as well as the Union of India.

10. Learned counsel for the petitioner/detenue submitted that there was undue delay in disposal of the representation of the detenue/petitioner on the part of the Central Government, Ministry of Home Affairs, New Delhi as the representation of the petitioner/detenue dated 10.05.2021 has not been decided by the Union of India so far. However, the representation dated 18.05.2021 and that has been decided by the concerned authority on 25.06.2021 after a delay of more than a month. He further argued that no plausible explanation of delay in deciding the petitioner's representation has been given in the affidavit filed on behalf of the Union of India. The delay committed by the Union of India and deciding the detenue/petitioner representation has infringed fundamental rights of the detenue envisaged under Article 21 and 21(5) of the Constitution of India. On this count alone the impugned orders are liable to be quashed.

11. Learned counsel for the petitioner to support his arguments placed reliance on **Rajammal Vs. State of Tamil Nadu and another** : (1991) 1 SCC 417, **Mohinuddin @ Moin Master Vs. District Magistrate,** Beed : AIR 1987 SC 1977, **Satyapriya Sonkar Vs. Superintendent, Central Jail** : 2000 Cr.L.J. Allahabad (B.D.), **Kundanbhai Dulabhai Shaikh Vs. Distt. Magistrate, Ahmedabad** : 1996 (3) SCC 194, K.M. Abdulla Kunhi Vs. Union of India : (1991) 1 SCC 476 and **Harish Pahwa Vs. State of Uttar Pradesh and others** : A.I.R. 1981 SC 1126.

12. To the contrary, learned A.G.A. appearing on behalf of the State/respondent Nos. 2 to 8 argued that the procedure provided under the National Security Act has been followed perfectly. The detenue/petitioner was served the copy of the orders passed promptly. The State Government approved the detention order well within time as provided under Section 3(4) of NS Act. The State Government forwarded the copy of the detention order and other material to the Central Government within the time prescribed. He further submitted that the State Government forwarded the detention order and grounds of detention etc. to the U.P. Advisory Board (detentions) Lucknow within time from the date of actual detention as required under the provisions of Section 10 of the NS Act. The detenue/petitioner was heard in person through video conferencing by the Advisory Board and the Advisory Board sent its report alongwith opinion that there is sufficient cause for issuing the order of preventive detention to the petitioner within time as provided under Section

11(1) of the NS Act. The detention order was confirmed tentatively for three months from the date of actual detention and the copy of the same was served upon the detenue/petitioner.

13. He further submitted that the State Government rejected the representation of the petitioner without any delay and forwarded the representation of the petitioner to the Central Government along with parawise comments expeditiously within time. Hence the petition should be dismissed.

14. Mr. Varun Pandey, learned counsel for the Union of India -respondent No.1 has submitted that the representation of the detenue/petitioner was considered and rejected expeditiously without any unreasonable delay.

15. Considered the submissions of all the parties and gone through the impugned orders as well as material brought on record.

16. The counter affidavit dated 17.06.2021 filed by the District Magistrate, Barabanki in which, it has been stated that petitioner was instrumental in hatching the conspiracy as a consequence of which during the course of investigation under Section 120-B of I.P.C. has been added to the list of offences. The petitioner has been granted bail by the concerned Court. However to restrain the petitioner from creating trouble which may result in collapse of public order, proceedings under National Security Act had been invoked.

17. The detention order dated 11.04.2021 was approved by the State Government on 22.04.2021. The petitioner has stated in the writ petition that due to Covid-19 Pandemic the petitioner could not gave a representation against the aforesaid detention order dated 11.04.2021 within the prescribed time limit and he could gave his representation under Section 8 of National Security Act through the Superintendent of Jail District Barabanki to the Union of India, State Government and District Magistrate, Barabanki on 10.05.2021 that is why the respondent No.2 approved the illegal detention order dated 11.04.2021 vide impugned order 22.04.2021.

18. The Detaining Authority/ District Magistrate, Barabanki in the counter affidavit has denied this contention and submitted that necessary services were in operation during the Covid-19 period. Therefore, the plea of the petitioner is that he could not make representation within time is totally misconceived.

19. However, this reply of the detaining authority is not convincing because it is an open truth that in the month of April and May the Covid-19 pandemic was on its peak in the State of U.P., and in such circumstances to expect from a person detained in jail or from his relative/next friend to file a representation is beyond imagination.

20. Learned counsel for the petitioner during the argument submitted that he wants to press this writ petition mainly on the point of delay in the disposal of the representation of the petitioner.

21. The fact is that detention order was passed on 11.04.2021, the petitioner could not file representation against the same due to Covid-19 Pandemic as has been written by him in his petition and the detention order was approved by the State Government on 22.04.2021.

22. In the affidavit filed by the Detaining Authority/District Magistrate dated 17.06.2021 it has been stated that the sponsoring agency has filed a comprehensive police report and brought on record ample material which was sufficient for invocation of the National Security Act. In the

affidavit filed by the jailer District Jail, Barabanki it has been mentioned that detenue has been confined in the district jail, Sultanpur in Case Crime No.89 of 2021, under Sections 147, 148, 149, 323, 504, 506, 307, 332, 333, 336, 427, 34 & 188 of the Indian Penal Code (in short I.P.C.) and Section 7 of Criminal Law Amendment Act and Cases Crime No.90 of 2011, under Section 3/25 of the Arms Act, both are relating to Police Station Ram Sanehi Ghat, District Barabanki under order of learned Judicial Magistrate, Court No.27 w.e.f. 20.03.2021. The detention order dated 11.04.2021 alongwith all documents was served upon the detenue on 11.04.2021 and report was duly sent to the District Magistrate on the same day. On 22.04.2021 vide radiogram the State Government had approved the detention order and same was received on 22.04.2021 which was served upon the detenue on the same day and a information to this effect was also sent to the State Government on the same day. The Government Order dated 22.04.2021 by means of which the State Government had approved the detention order of the detenue had been received in jail on 04.5.2021 and the same was served upon him on the same day. The District Jail had received letter dated 17.05.2021 sent by the Advisory Board through State Government in which the date of proceedings before the same i.e. 20.05.2021 was informed. The letter dated 17.05.2021 was received to the jailor on the same day, which was served upon the detenue on the same day and detenue was produced before the Advisory Board through video conferencing on 20.05.2021 at 11:00 A.M.. The State Government vide order dated 03.06.2021 extended the detention order tentatively for three months which was received on 03.06.2021 and the same was served upon detenue on the same day. There was no laxity on the part of the jail authorities and the orders passed by the Competent Authority in context of detention.

23. In the affidavit filed by the Joint Secretary to Government of U.P. Home (Confidential) Department of U.P. Civil Secretariat, Lucknow, in this regard it has been stated that the detention order dated 11.04.2021, grounds for detention and all other connected documents forwarded by the District Magistrate, Barabanki vide its letter dated 11.04.2021 was received by the State Government on 13.04.2021. The State Government approved order of detention on 20.04.2021. The approval of the detention order was communicated to the petitioner through the District Authorities by the State Government through radiogram and letter both, dated 22.04.2021, which was within 12 days as required under Section 3(4) of the National Security Act.

24. It has further been stated that a copy of detention order, grounds of detention and all other connected documents received from the District Magistrate, Barabanki were also sent to the Central Government by speed post within seven days from the date of approval by the State Government as required under Section 3(5) of the National Security Act. Hence the provisions of Section 3(4), 3(5) of the National Security Act has been fully complied with. The petitioner appeared for personal hearing before the U.P. Advisory Board on the date fixed i.e. 20.05.2021. The U.P. Advisory Board heard the petitioner in person and submitted its report to the State Government that there is sufficient cause for the preventive detention of the petitioner under the National Security Act, 1980. This report was received in the concerned Section of the State Government on 29.05.2021 through the letter of Registrar, U.P. Advisory Board (detentions) letter dated 25.05.2021, well within seven weeks from the date of detention of the petitioner as provided under Section 11(1) of the National Security Act. It has further been stated that after receiving the report, the State Government once again examined afresh the entire case of the petitioner alongwith the opinion of the U.P. Advisory Board and took a decision to confirm the detention order and also for keeping the petitioner under detention for a

period of three months at first instance from the date of actual detention of the petitioner i.e. since 11.04.2021. The copy of the petitioner's representation dated 18.05.2021 along with parawise comments was received in the concerned section of the State Government on 14.06.2021 along with letter of District Magistrate, Barabanki dated 10.06.2021. The State Government sent copy of the representation and parawise comments there on, to the Central Government, New Delhi vide its letter dated 14.06.2021. Thereafter the concerned Section i.e. Home (Gopan) Anubhag (6) of the State Government examined the representation on 15.06.2021.

25. It has further been stated that Joint Secretary examined the representation on 16.06.2021, the Special Secretary examined the representation on 16.06.2021, the Secretary Government of U.P. examined the said representation on 17.06.2021, the Additional Chief Secretary Government of U.P., Lucknow examined the said representation on 17.06.2021. Thereafter file was submitted to the Higher Authorities for orders of the State Government. After due consideration the said representation was finally rejected by the State Government on 18.06.2021. The dates 19.06.2021 and 20.06.2021 were holidays on account of Saturday and Sunday. The information of rejection of representation was communicated to the petitioner through District Authorities, by the State Government radiogram dated 21.06.2021. The representation of the petitioner has been dealt with expeditiously at every stage.

26. Above facts shows that there was no delay on the part of the State Government.

27. Now comes the counter affidavit filed on behalf of Union of India i.e. an affidavit of Mrs. Meena Sharma, under Secretary in the Ministry of Home Affairs, Government of India, New Delhi. In her affidavit in this regard it has been stated that representation dated 10.05.2021 of the detenue or on his behalf has not been received in Section so far. However, the copy of the representation dated 18.05.2021 submitted by the Shameem Bano on behalf of her son Sonu @ Mohd. Ishtiyaq was received in the concerned section of the Ministry of Home Affairs on 18.05.2021. Accordingly, wireless message No. II/15028/63/2021-NSA dated 31.05.2021 was sent to the authorities concerned for seeking parawise comments of the detaining authority. Thereafter the District Magistrate, Barabanki vide letter dated 10.06.2021 sent a copy of parawise comments to the detaining authority and was was received in Section concerned of the Ministry of Home Affairs on 18.06.2021. The representation dated 18.05.2021 on behalf of the detenue along the parawise comments of the detaining authority was processed for consideration for Union of India, Home Secretary on 18.06.2021. Being aware of the effect and sensitivity of detention under the National Security Act and as per practice in vogue the representation was duly considered at various levels to ascertain the merit. Thereafter the Union Home Secretary having carefully gone through the material on record, including the order of detention, the grounds of detention, the representation of the detenue, parawise comments of the detaining authority thereon concluded that the detenue had failed to bring forth any material, cause shown in his representation to justify the revocation of the order by exercise of the powers of the Central Government under Section 14 of the National Security Act, 1980. He, therefore, rejected the representation and the detenue was informed vide wireless message II/15028/63/2021-NSA dated 25.06.2021. During the intervening period i.e. 19th and 20th June 2021 were holiday being Saturday and Sunday. It has

further been submitted that representation was examined with utmost care and caution with promptitude.

28. In the Case of **Rajammal Vs. State of Tamil Nadu and another : (1999) 1 SCC 417** the Hon'ble Apex Court in this regard has held as under:-

"9. The position, therefore, now is that if delay was caused on account of any indifference or lapse in considering the representation, such delay will adversely affect further detention of the prisoner. In other words, it is for the authority concerned to explain the delay, if any, in disposing of the representation. It is not enough to say that the delay was very short. Even longer delay can as well be explained. So the test is not the duration or range of delay, but how it is explained by the authority concerned."

29. In the case of **Harish Pahwa v. State of U.P. : AIR 1981 SC 1126**, the Apex Court in this regard held that :-

"In our opinion, the manner in which the representation made by the appellant has been dealt with reveals a sorry state of affairs in the matter of consideration of representation made by persons detained without trial. There is no explanation at all as to why no action was taken in reference to the representation on 4th , 5th and 25th of June, 1980. It is also not clear what consideration was given by the Government to the representation from 13th June 1980 to 16th June 1980 when we find that it culminated only in a reference to the Law Department nor it is apparent why the Law Department had to be consulted at all. Again, we fail to understand why the representation had to travel from table to table for six days before reaching the Chief Minister who was the only authority to decide the representation. We may make it clear, as we have done on numerous earlier occasions, that this Court does not look with equanimity upon such delays when the liberty of a person is concerned. Calling comments from other departments, seeking the opinion of Secretary after Secretary and allowing the representation to lie without being attended to is not the type of action which the State is expected to take in a matter of such vital import. We would emphasis that it is the duty of the State to proceed to determine representations of the character above mentioned with the utmost expedition, which means that the matter must be taken up for consideration as soon as such a representation is received and dealt with continuously (unless it is absolutely necessary to wait for some assistance in connection with it) until a final decision is taken and communicated to the detenu. This not having been done in the present case we have no option but to declare the detention unconstitutional. We order accordingly, allow the appeal and direct that the appellant be set at liberty forthwith.

Appeal allowed."

30. In the affidavit filed on behalf of Union of India the delay on 19.06.2021 and 20.06.2021 has been explained, but the affidavit is silent on the delay of 21.06.2021 to 24.06.2021. Thus delay of four days has not been explained.

31. Thus on account of unexplained delay of four days on the part of Union of India, the continuation of the preventive detention sands vitiated. In ***Abdul Nasar Adam Ismail Vs. State of Maharashtra (2013) 4 SCC 435*** the Apex Court in this regard held that:-

"16. .....Article 22(5) of the Constitution casts a legal obligation on the Government to consider the detenu's representation as early as possible. Though no time limit is prescribed for disposal of the representation, the constitutional imperative is

that it must be disposed of as soon as possible. There should be no supine indifference, slackness or callous attitude. Any unexplained delay would be a breach of constitutional imperative and it would render the continued detention of the detenu illegal. That does not, however, mean that every day's delay in dealing with the representation of the detenu has to be explained. The explanation offered must be reasonable indicating that there was no slackness or indifference. Though the delay itself is not fatal, the delay which remains unexplained becomes unreasonable. The court can certainly consider whether the delay was occasioned due to permissible reasons or unavoidable causes. It is not enough to say that the delay was very short. Even longer delay can as well be explained. So the test is not the duration or the range of delay, but how it is explained by the authority concerned. If the inter departmental consultative procedures are such that the delay becomes inevitable, such procedures will contravene the constitutional mandate. Any authority obliged to make order of detention should adopt procedure calculated towards expeditious consideration of the representation. The representation must be taken up for consideration as soon as such representation is received and dealt with continuously (unless it is absolutely necessary to wait for some assistance in connection with it) until a final decision is taken and communicated to the detenu."

32. In light of the aforesaid discussion, we allow this Habeas Corpus petition. The impugned order dated 11.04.2021 and 22.04.2021 and other consequential orders are hereby quashed. The petitioner shall be set at liberty forthwith unless required in any other case.

33. For the facts and circumstances of the case, there is no order as to costs.

(2021)11ILR A830
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 28.10.2021

BEFORE

THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Habeas Corpus Writ Petition No. 14986 of 2021

Smt. Suneeta ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Bhoopal Singh

Counsel for the Respondents:
G.A., Anand Kumar, Y.P. Singh

Constitution of India, Art.226 - Writ of Habeas Corpus - Illegal detention - Habeas Corpus writ petition filed by husband (Ram Mitra) for direction to the opposite parties (parents of detenue) to set free his wife (detenue) - alleged detenue was 17 years' old at the time of her marriage - alleged detenue when produced before Court stated she is not legally wedded & expressed her unwillingness to go with the alleged next friend (Ram Mitra) rather wants to reside with her parents in the parental house - Held - alleged detenue was 17 years' old at the time of her marriage and by reason of her minority, she was neither in capacity of giving her consent for marriage nor her wish to go with the petitioner – Detenue when produced before the Court attained majority but she does not ratify the alleged marriage - Held - writ of Habeas Corpus in said circumstances cannot be issued.

Dismissed. (E-5)

Cases Relied on :

1. Lata Singh Vs St. of U.P. & ors. AIR 2006 SC 2522

(Delivered by Hon'ble Vikas Kunvar Srivastav, J.)

1. The instant writ petition is filed for the issuance of writ, order or direction in the nature of Habeas Corpus thereby commanding the opposite parties no.1, 2 and 3 to produce the petitioner (detenue) before this Hon'ble Court and set free the petitioner with liberty to live with her husband namely Ram Mitra. It is further submitted that the life of the petitioner (detenue) as well as her child (foetus) which is growing in mother's womb is in danger in the house of opposite parties no.4 & 5 (the parents of detenue).

2. Pursuant to the order of the Court dated 22.10.2021, today Sri Awadesh Kumar Dwivedi, Sub Inspector of Police Station Motipur, District Bahraich authorized by opposite party no.3-Station House Officer, Police Station Motipur, District Bahraich produced the corpus, the alleged detenue, Smt. Suneeta before the Court.

3a. Learned counsel for the petitioner Sri Bhoopal Singh, Advocate and learned A.G.A. for the State Sri L.J. Maurya, Advocate are present in the Court.

3b. Learned counsel for the petitioner is present alongwith the alleged next friend of detenue, the husband of the alleged detenue namely Ram Mitra.

4. Heard the learned counsels. Perused the pleadings and annexures made evidences by the petitioner's next friend.

5. On perusal of the petition, pleading is found to the effect that the marriage of the petitioner (detenue) was solemnized with Ram Mitra (next friend) on 02.11.2020 at Arya Samaj Mandir, copy of marriage certificate is placed as annexure no.1 in the writ petition. The annexure no.7 i.e. School Leaving Certificate discloses the date of birth of alleged detenue as 16.06.2003. Therefore, relying on the date of birth, the alleged detenue was 17 years' old at the time of her marriage and by reason of her minority, she was neither in capacity of giving her consent for marriage nor her wish to go with the petitioner. The statement under Section 164 Cr.P.C. is also recorded on attaining the age of majority.

6. In the context of above facts and circumstances as revealed from the record and from the statement of the corpus-Smt. Suneeta, since she is adult, she has right to marry with a man of her choice and also to live with anyone of her choice, anywhere where she wants, therefore, her detention is not legal in view of the judgment of Hon'ble Apex Court in the case of **Lata Singh Vs. State of U.P. and Others reported in [AIR 2006 SC 2522]**. Hon'ble Apex Court in the case Lata Singh (supra) has held as under:

".....This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such inter-caste or inter-religious marriage the maximum they can do is that they can cut off social relations with the son or the daughter, but they cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter-caste or interreligious marriage. We, therefore, direct that the administration/police authorities throughout the country will see to it that if any boy or girl who is a major undergoes inter-caste or inter-religious marriage with a woman or man who is a major, the couple are not harassed by any one nor subjected to threats or acts of violence, and any one who gives such threats or harasses or commits acts of violence either himself or at his instigation, is taken to task by instituting criminal proceedings by the police against such persons and further stern action is taken against such persons as provided by law.

7. When the alleged detenue is produced before the Court in the presence of Ram Mitra,

she stated that she is not legally wedded. She further informs that she unwillingly has conceived a child from Ram Mitra but the child born died. The detenue further in clear and explicit words stated her unwillingness to go with the alleged next friend to his house. She wants to reside with her parents in the parental house. She does not ratify the marriage with Ram Mitra. The parents of alleged detenue are present in the Court today alongwith her. In the context of above statement as to the desire of alleged detenue, the Court considers on following legal aspects.

8. Under the Juvenile Justice (Care and Protection of Children) Act, 2015, school first attended and matriculation certificate is to be given priority beyond other evidences.

9. The only basis of claiming the marriage with the detenue by the next friend is in certificate issued by the Arya Samaj Temple. Irrespective of the genuineness of the said certificate, this would be important to consider here the age of detenue when she is alleged to have entered into marriage with the alleged next friend, Ram Mitra.

10. Section 11 of the Indian Contract Act states "every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject. For the easy reference, Section 11 of the Indian Contract Act, 1872 is quoted hereunder:-

"11. Who are competent to contract.-- Every person is competent to contract who is of the age of majority according to the law to which he is subject,1 and who is of sound mind and is not disqualified from contracting by any law to which he is subject. --Every person is competent to contract who is of the age of majority according to the law to which he is subject,1 and who is of sound mind and is not disqualified from contracting by any law to which he is subject."

11. In view of the aforesaid provisions of Contract Act, three points are to be kept in mind when enforceability of an agreement is considered-

(i) the person needs to be a major;

(ii) the person needs to be of sound mind; and

(iii) the person is not prohibited by law to enter into a contract.

12. What would be the age of majority which capacitates a person to contract is important to be kept in mind. The petitioner being a citizen of India, his/her age of majority would be considered under the Indian Majority Act, 1875, Section 3 of the said Act provides as below:

"3. Age of majority of persons domiciled in India.-

(1) Every person domiciled in India shall attain the age of majority on his completing the age of eighteen years and not before.

*(2) In computing the age of any person, the day on which he was born is to be included as a whole day and he shall be deem*ed to have attained majority at the beginning of the eighteenth anniversary of that day."

13. The petitioner's date of birth is admittedly 16.06.2003, as such on the date of agreement' dated 02.11.2020, she undoubtedly was a minor. The definitions given in Child Marriage Restraint Act, 1929 and Juvenile Justice (Care and Protection of Children) Act,

2015 such person is termed as child. Admittedly, the petitioner was minor as well as a child also when she allegedly entered into the agreement to marry on 02.11.2020. The law applicable to her being a Hindu, is "The Hindu Marriage Act, 1955". Section 5 (iii) of the said Act provides the marriageable age, according to which the marriage may be solemnized between any two Hindus, if the following conditions are fulfilled:-

"(iii) the bride groom has completed the age of twenty one years and the bride, the age of eighteen years at the time of the marriage."

14. Under both the Acts viz. The Hindu Marriage Act, 1955 and The Indian Contract Act, 1872 the petitioner had no legal capacity and competence to enter into the agreement to marry.

15. According to the Indian law, in marriage where either the woman is below the age of 18 years or the man is below the age of 21 years, such marriages, if solemnized even by the guardians becomes voidable under Section 5 of the Hindu Marriage Act at the instance of minor. He has option to ratify the marriage attaining the age of majority.

16. A criminal case i.e. F.I.R. No.443 of 2020, under Section 363 of the I.P.C., Police Station Motipur, District Bahraich is also pending against the alleged next friend as husband, Ram Mitra. The action of such proceeding against any criminal case cannot provide justification subsequently by any judicial order unless it is not concluded under the said criminal case.

17. A minor, if on attaining majority is willing to ratify the marriage and accepts his/her marital status and relations with the other party of the marriage, the marriage would subsist. In the present case, the detenue when alleged to have entered into marriage with the present next friend she was minor but when she is produced before the Court, has attained the majority. Being major, she does not ratify the alleged marriage nor her marital status with the alleged next friend namely Ram Mitra. Even she does not want to go with Ram Mitra aforesaid to cohabit with him. The writ of Habeas Corpus in said circumstances cannot be issued in favour of said Ram Mitra as husband for carrying of the alleged detenue "Suneeta' as his wife.

18. In view of the statement recorded in the Court of the detenue-Smt. Suneeta, the petition has no merit and, therefore, decided in terms of the statement.

19. Accordingly, the present writ petition is ***dismissed.***

20. The opposite party i.e. the officer attending the Court for production of the detenue namely Sri Awadesh Kumar Dwivedi, S.I. and Ms. Pratima Yadav, C.P. No.182082245 posted at Police Station Motipur, District Bahraich are discharged from attending the Court.

(2021)11ILR A833
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.10.2021

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE KRISHAN PAHAL, J.

First Appeal No. 400 of 2021

Roshni Tiwari ...Appellant
Versus
Balmukund Tiwari ...Respondent

Counsel for the Appellant:
Ms. Akansha Sharma

Counsel for the Respondents:

Sri Rajendra Prasad Tiwari, Sri Vinay Kumar Tiwari

Civil Law - Maintenance - Hindu Adoptions and Maintenance Act, 1956 - Sections 3(b) & 20(3) - Maintenance of unmarried daughter - an unmarried daughter is entitled for maintenance from her parents till she is unmarried, in case, she is unable to maintain herself out of her own earnings or other property - maintenance includes the reasonable expenses and incident to her marriage apart from food, clothing, residence, education and medical attendance and treatment (Para 7)

Appellant daughter had been left on her own by the father as soon as she attained majority - daughter pressed that her father should bear the expenses of her marriage as her mother has no such resources – father contested claim on ground that during pendency of application, daughter got job and is earning Rs 4500/ - Held - petty amount of Rs 4500/- being earned by the daughter cannot be a reason to reject her prayer for grant of maintenance towards marriage expenses- demand of Rs. 10 Lacs towards marriage expenses in the current scenario when the daughter is aged about 27-28 years cannot be said to unjustified or excessive - father directed to pay Rs. 10 Lacs in two installments each (Para 14, 15)

Allowed. (E-5)

(Delivered by Hon'ble Mrs. Sunita Agarwal, J.
&
Hon'ble Krishan Pahal, J.)

1. The present appeal is directed against the order of rejection of application of the daughter filed under Section 20(3) of the Hindu Adoptions and Maintenance Act, 1956 (hereinafter referred to as "the Act, 1956") seeking maintenance from her father. In the said application, she had claimed maintenance on two grounds; firstly that she had been doing nursing course and her mother had incurred huge expenditures in educating her. She was paying Rs. 3500/- per month towards fee and there was no other source of income. She, therefore, demanded the fee being paid by her for continuing the said course. Another ground to seek maintenance was that the applicant-daughter was of marriageable age and she needed money towards marriage expenses which was the responsibility of her father.

2. The said application filed on 7.5.2015 had been rejected vide order dated 6.10.2017 on the ground that the fee receipts which were submitted by the applicant for pursuing the nursing course were of the year 2012. By the time the case was decided, she had completed the nursing course. Further after completion of the said course, the appellant got a job from which she was earning Rs. 4500/- per month. It was also noted by the family court that an amount of Rs. 1000/- per month was being paid to the appellant till she attained the age of majority on 25.2.2011. As regards the claim of the appellant for marriage expenses, there is no whisper in the entire judgment.

3. The respondent namely Sri Balmukund Tiwari, father of the appellant is personally present in the Court. The personal presence of the appellant has been dispensed with by the order dated 20.10.2021.

4. Ms. Akanksha Sharma learned Advocate for the appellant, at the outset, states that the appellant though is pursuing a higher study course namely "Post Basic Nursing Training course" in a college at Bhopal wherein she had taken admission in the Academic session 2017-18 but she has decided not to pursue her prayer for grant of expenditures/fee incurred for the said course.

The contention is that the appellant is aged about 27-28 years and being of marriageable age, her mother is looking to the suitable proposals but none of them could be materialized for want of financial resources. The amount of Rs. 10 Lacs has been demanded by

the appellant towards the expenditures to be incurred in her marriage.

5. On a query made by the Court, Sri Rajendra Prasad Tiwari learned Advocate for the respondent-father states that an amount of Rs. 1000/- per month was being given towards maintenance to the appellant till she had attained majority on 25.2.2011. It is admitted that the respondent-father had not paid a single penny towards education of his daughter who had completed Nursing Course and is pursuing a "Post Basic Nursing Training course" in a college at Bhopal, from the finances initially arranged by her

The contention of the learned counsel for the respondent-father is that the appellant is self-sufficient as she has started earning after completion of the Staff Nursing Course. However, it is an admitted fact of the matter that the respondent is in the Government Department and he is working as Tube-Well Operator in the Irrigation Department. As per own admission of the respondent-father, he is receiving salary of Rs. 42,506/- per month, after deduction of the P.F. and other amount towards compulsory deductions. Whereas the appellant has no other source of income than her own earning, which according to the respondent itself is barely Rs. 4500/- per month. Out of the said earning the appellant is also incurring expenditures for payment of fee for pursuing higher study Nursing course and also bearing her daily expenditures.

As regards the decision of the family court, there is no deliberation on the issue of demand of the appellant for marriage expenses.

6. The claimant daughter is living with her mother for the last several years who has borne all her living expenses including education. The mother has managed to provide her daughter a good education. There was virtually no contribution of the father in the upbringing of his daughter. Meagre amount of Rs. 1000/- was paid under the order of the Court that too had been stopped as soon as she had attained majority, though the father was under obligation to pay the said amount to the claimant being his unmarried daughter. The respondent though is a Government employee did not volunteer to raise the maintenance amount to meet the requirement of his own child. The daughter had been left to live on her own. Apart from the claimant daughter, there are other male children of the respondent. The respondent though in his objection had alleged that the claimant is earning from the employment but he did not state that it was sufficient for her daughter. The maintenance does not mean the expenses sufficient for bare living or surviving but its object is to provide such means of sustenance with dignity which is befitting to the position and status of the parties. The living expenses is not the bare means of survival like food and clothings only. For a dignified living and to grow to become a responsible citizen, a child has to receive proper education. To be able to earn his livelihood, a child has to attain higher/vocational education.

7. On the maintainability of the application of the daughter to seek marriage expenses though there is no objection but we deem it fit and proper to consider the relevant provisions of the Act, 1956, quoted hereunder:-

***"Section 3(b). Maintenance" includes**-- (i) in all cases, provision for food, clothing, residence, education and medical attendance and treatment;*

(ii) in the case of an unmarried daughter, also the reasonable expenses of an incident to her marriage;

***Section 20. Maintenance of children and aged parents**:- (1) Subject to the provisions of this section a Hindu is bound, during his or*

her lifetime, to maintain his or her legitimate or illegitimate children and his or her aged or infirm parents.

(2) A legitimate or illegitimate child may claim maintenance from his or her father or mother so long as the child is a minor.

(3) The obligation of a person to maintain his or her aged or infirm parent or a daughter who is unmarried extends insofar as the parent or the unmarried daughter, as the case may be, is unable to maintain himself or herself out of his or her own earnings or other property.

Explanation: In this section "parent" includes a childless step-mother.

***Section 21. Dependants defined**:- For the purposes of this Chapter "dependants" means the following relatives of the deceased:*

(i) his or her father;

(ii) his or her mother;

(iii) his widow, so long as she does not re-marry;

(iv) his or her son or the son of his predeceased son or the son of predeceased son of his predeceased son, so long as he is a minor; provided and to the extent that he is unable to obtain maintenance, in the case of a grandson from his father's or mother's estate, and in the case of a great grand-son, from the estate of his father or mother or father's father or father's mother;

(v) his or her unmarried daughter, or the unmarried daughter of his predeceased son or the unmarried daughter of a predeceased son of his predeceased son, so long as she remains unmarried: provided and to the extent that she is unable to obtain maintenance, in the case of a grand-daughter from her father's or mother's estate and in the case of a great-grand-daughter from the estate of her father or mother or father's father or father's mother;

(vi) his widowed daughter: provided and to the extent that she is unable to obtain maintenance-

(b) from her son or daughter if any, or his or her estate; or

(c) from her father-in-law or his father or the estate of either of them;

(vii) any widow of his son or of a son of his predeceased son, so long as she does not remarry: provided and to the extent that she is unable to obtain maintenance from her husband's estate, or from her son or daughter, if any, or his or her estate; or in the case of a grandson's widow, also from her father-in-law's estate;

(viii) his or her minor illegitimate son, so long as he remains a minor;

(ix) his or her illegitimate daughter, so long as she remains unmarried.

***Section 23. Amount of maintenance:-** (1) It shall be in the discretion of the court to determine whether any, and if so what, maintenance shall be awarded under the provisions of this Act, and in doing so the court shall have due regard to the considerations set out in sub-section (2), or sub-section (3), as the case may be, so far as they are applicable.*

(2) In determining the amount of maintenance, if any, to be awarded to a wife, children or aged or infirm parents under this Act, regard shall be had to-

(a) the position and status of the parties;

(b) the reasonable wants of the claimant;

(c) if the claimant is living separately, whether the claimant is justified in doing

(d) the value of the claimant's property and any income derived from such property, or from the claimant's own earnings or from any other source;

(e) the number of persons entitled to maintenance under this Act.

(3) In determining the amount of maintenance, if any, to be awarded to a dependant under this Act, regard shall be had to-

(a) the net value of the estate of the deceased after providing for the payment of his debts;

(b) the provision, if any, made under a will of the deceased in respect of the dependant;

(c) the degree of relationship between the two;

(d) the reasonable wants of the dependant;

(e) the past relations between the dependant and the deceased;

(f) the value of the property of the dependant and any income derived from such property; or from his or her earnings or from any other source;

(g) the number of dependants entitled to maintenance under this Act."

A conjoined reading of Section 3(b) and Section 20(3) of the Act, 1956 indicates that an unmarried daughter is entitled for maintenance from her parents till she is unmarried, in case, she is unable to maintain herself out of her own earnings or other property. The maintenance includes the reasonable expenses and incident to her marriage apart from food, clothing, residence, education and medical attendance and treatment. The obligation cast under Section 20 of the Act, 1956 is on both the parents. A daughter can claim maintenance from either of her parents, in case, she is unable to maintain herself or is unable to bear the expenses related to her marriage.

8. In the instant case, the appellant daughter had been left on her own by the father as soon as she attained majority. Even prior to that, only Rs. 1000/- was being paid to her by the father towards living expenses. The mother (wife of the respondent) had been awarded maintenance in the proceeding under Section 125 Cr.P.C. where she was getting a petty amount of maintenance for herself and her children. Apart from the appellant, there were other two children of the respondent who were also looked after by his wife only.

9. The respondent admittedly did not bear the responsibility of education of his children including the appellant herein. Somehow the appellant had been able to educate herself with the help of her mother and completed vocational Nursing course. Though it was the responsibility of the father to bear expenses of education including higher education of his daughter but the appellant has given up the said claim.

10. The only claim being pressed by the appellant is that at least the father should bear the expenses of her marriage as her mother has no such resources.

11. There is no denial of the said fact. The only reason given by the respondent to contest the petition under Section 20(3) moved by his daughter is that she got a job during the pendency of the said application and is earning Rs. 4500/-.

12. No plausible explanation could be offered by the respondent father as to why he did not discharge his responsibility towards his children. He never looked after them nor offered any kind of financial support. When the claimant appellant has somehow managed to study, her claim for maintenance is being contested on the ground that she has started earning during pendency of the application.

13. Section 23 of the Act, 1956 as extracted above provides the criteria for fixing the quantum of maintenance which shows that a comparison of income of both the parties has to be made by the Court while determining the amount of maintenance. The criteria which are required to be kept in mind are the position and status of the parties and the claimants own earnings or earning from any other source. The reasonableness of the demand of the claimant and the reason why the claimant is living separately, is also to be seen while assessing whether the demand is justified or not.

14. Having gone through the provisions of the Act, 1956 as also the factual position with regard to income and the status of the parties, we are of the considered view that petty amount of Rs. 4500/- being earned by the appellant cannot be a reason to reject her prayer for grant of maintenance towards education expenses as also marriage expenses. However, noticing that the appellant has given up her claim for expenses towards her education and only demands marriage expenses, we are of the considered view that the demand of the appellant is perfectly justified. We cannot oblivious of the fact that the respondent had never discharged his responsibility towards his unmarried daughter and did not borne her education expenses. The demand of Rs. 10 Lacs towards marriage expenses in the current scenario when the appellant is aged about 27-28 years cannot be said to unjustified or excessive.

The family court while rejecting the application under Section 20(3) of Hindu Adoption and Maintenance Act, 1956 has simply ignored that the applicant had incurred all expenditures towards her education, in pursuing nursing course and at no point of time, during the entire period, till and after she attained majority, her education and living expenses were borne by the father. The family court had completely ignored that the appellant has a right to claim expenses towards performance of her marriage from her father under the statute.

15. For the aforesaid, while setting aside the order dated 6.10.2017 being unjustifiable and unreasonable, we direct the respondent-father to pay Rs. 10 Lacs by submitting the demand drafts before this Court in two installments.

The first installment of Rs. 5 Lacs shall be paid by the respondent-father within a period of one month from today, i.e. on 22.11.2021 by presenting a demand draft before this Court.

The remaining second installment of Rs. 5 Lacs shall be paid within a further period of two months by presenting another demand draft before this Court.

The disposal of the present appeal would be subject to the payment made by the respondent-father as per the above schedule.

List this matter on 23.11.2021 in the additional cause list for compliance of the above directions.

(2021)11ILR A839
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.08.2021

BEFORE

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

Second Appeal No. 895 of 1994

Jagdish Mani Tripathi ...Appellant
Versus
Brij Bhushan Tewari & Ors. ...Respondents

Counsel for the Appellant:
Sri Dinesh Dwivedi, Sri Ashok Pandey, Sri G.M. Tripathi, Sri Gambhir Tripathi, Sri Hausihla Prasad Mishra, Sri V.P.Tripathi

Counsel for the Respondents:
Sri U.S.M. Tripathi, Sri B.P.Tiwari, Sri Pahaloo, Sri Ram Suphal Shukla, Sri Manvendra Kumar

A. Civil Law – Indian Contract Act,1872 – Section 55 - Time whether of essence - Determination of - Section 55 of the Contract Act makes it dependent upon the intention of parties whether time is of the essence - intention has to be gathered from the terms of the contract, not just going by the letter of it, but by construing the contract as a whole - Court has to look to the pith and substance and decide as to whether time was or was not essential to the subsistence of the contract - consideration of surrounding circumstances may also be relevant in certain cases. (Para 15)

B. Civil Law - Indian Contract Act,1872 – Section 55 - provisions of Section 55 of the Contract Act about time being essence of the contract, making it voidable upon breach, would apply to a decree of Court founded on compromise in the same manner as any other contract (Para 35)

Allowed. (E-5)

Cases Relied on :

1. Tandra Venkata Subrahmanayam Vs Vegesana Viswanadharaju & anr. AIR 1968 AP 190

2. Nagoo & anr. Vs P.T. Shiv Dularey Dixit & ors. AIR 1955 All 665

3. Hansraj Sangechi & ors. Vs Jogeshar Prasad & anr. AIR 1925 Pat 691

4. Habib Mian & anr. Vs Mukhtar Ahmad & anr.AIR 1969 All 296 (FB)

5. Smt. Periyakkal & ors. Vs Smt. Dakshyani (1983) 2 SCC 127

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

This is a plaintiff's second appeal, arising from a suit for cancellation of sale deed.

2. The facts giving rise to this appeal, according to the plaintiff's case, are these :

The plaintiff Jagdish Mani Tripathi's father, Shiv Pujan Mani, was twice married. Jagdish Mani Tripathi was begotten of Shiv Pujan Mani's first wife. Jagdish Mani is the sole survivor and heir of Shiv Pujan. Shiv Pujan's first wife and Jagdish Mani's mother passed away and after her death, Shiv Pujan married Smt. Kailash Pati, who did not bear him any child. After Shiv Pujan's death, Kailash Pati would not inherit any estate in his agricultural holdings, and it all went to Jagdish Mani. But, after Shiv Pujan's death, Kailash Pati's disposition towards Jagdish Mani turned hostile and unfriendly. It is Jagdish Mani's case that fuelled by the hostility of a step relationship between parties, Smt. Kailash Pati, in conspiracy with members of her native family, devised various ways to harm him. She left her matrimonial home and went back to her parents' place. She sued Jagdish Mani for maintenance before the Court of the Munsif, Court No. 2, Deoria, instituting Original Suit No. 1154 of 1967 for the purpose. The suit aforesaid was decreed in favour of Smt. Kailash Pati. With the

assistance of one Virendra Mishra and others from her parents' family, she levied execution of the decree passed in Original Suit No. 1154 of 1967. The execution entailed attachment of Khasra No. 430, admeasuring 34 decimals and Khasra No. 457, admeasuring 58 decimals, situate at Village Basdila, Tappa Dhatura, Parghana Silhat, Teshil and District Deoria. The attached property was then brought to sale and Smt. Kailash Pati purchased that property herself in the auction sale. The facts about the institution of the suit last mentioned, the decree passed therein and the result of the execution is not in issue between parties.

3. The attachment and sale were both objected to by Jagdish Mani Tripathi, but his objections did not succeed. The auction sale was held and proceedings for delivery of possession to the auction purchaser were concluded. Jagdish Mani challenged the entire proceedings of the auction sale as materially irregular, asking them to be set aside through Original Suit No. 404 of 1980, that he instituted before the Court of Munsif, Court No. 8, Deoria. In the said suit, on 14.10.1983, a compromise was recorded between Jagdish Mani, the plaintiff of the suit and Smt. Kailash Pati, the defendant there. In terms of the said compromise, a decree was passed, embodying the following terms :

(I) That Smt. Kailash Pati is being entitled to receive from Jagdish Mani a sum of Rs. 8,000/- and in consideration thereof, the land comprising Plot Nos. 430 and 475 that she had purchased in the auction sale, would not be sold, encumbered or given away to any third party on a crop-share arrangement.

(II) That Smt. Kailash Pati's name would continue to be recorded over the Plot Nos. 430 and 475 for satisfaction's sake.

(III) That out of a sum of Rs. 8,000/-, a sum of Rs. 3,000/- have been received by Smt. Kailash Pati on the date of compromise, and the balance of Rs. 5,000/- would be paid by Jagdish Mani Tripathi to Smt. Kailash Pati up to 14.12.1983. If the balance sum of Rs. 5,000/- was not paid up to 14.12.1983, the compromise would be treated as cancelled.

(IV) That Jagdish Mani Tripathi would remain in possession of the plots/fields.

(V) That Jagdish Mani Tripathi would till the fields comprising the two plots and harvest crops, where for, he would take half of the required seeds and manure from Smt. Kailash Pati and in return, deliver up to her half the produce of the fields.

(VI) Once on 14.12.1983, Jagdish Mani pays the balance sum of Rs. 5,000/- in terms of the compromise to Smt. Kailash Pati, she would have no further right to execute the decree passed in Original Suit No. 1154 of 1967. Upon Smt. Kailash Pati's death, Jagdish Mani would perform her last rites and Shradh; and further Jagdish and his sons would take the land in dispute as heirs of Smt. Kailash Pati.

4. It is Jagdish Mani's case that Smt. Kailash Pati was paid the balance sum of Rs. 5000/- within the period of time before 14.10.1983 by the plaintiff, after calling her over to Village Basdila. However, for the reason that the compromise had fostered a beginning of good relations between parties, Jagdish Mani did not ask Smt. Kailash Pati for issuing him a receipt/written acknowledgement; he was desirous that the relationship between his stepmother and himself may remain cordial. However, Smt. Kailash Pati's blood relations, particularly, Virendra Mishra, defendant no. 2 to the suit and a respondent to this appeal was not happy about these good relations. Virendra Mishra was Smt. Kailash Pati's nephew (brother's son). He was on the lookout of an opportunity to wean her away from the new-

found bonds with her stepson, so as to reclaim the lands that Smt. Kailash Pati had given back to Jagdish Mani in compromise. Virendra Mishra took away Smt. Kailash Pati back to her kin, whereafter he said that the sum of Rs. 5000/- that Smt. Kailash Pati had received from Jagdish Mani without a receipt, she would not acknowledge. It is pleaded that after the sum of Rs. 5,000/- was paid within the period of time stipulated in the compromise, Smt. Kailash Pati had forsaken her dominion over the lands comprising the suit property. Jagdish Mani, on coming to know the aforesaid stand that Virendra Mishra had caused Smt. Kailash Pati to take, deposited the sum of Rs. 5,000/- to her credit in the bank. All his efforts to cajole Smt. Kailash Pati's conscience failed, and she sailed along with Virendra Mishra and her other kinsmen. She never came back to stay with her husband's family, including Jagdish Mani. She died in the month of April, 1985.

5. The news about her death was never conveyed by Virendra Mishra to Jagdish Mani. Jagdish Mani, upon coming to know of Smt. Kailash Pati's death, undertook her Shradh and the onerous ceremonies that it involves. In the meantime, Jagdish Mani came to know that Virendra Mishra, entering into a conspiracy with Smt. Kailash Pati, had caused her to execute a registered sale deed of the suit property in favour of a relative-defendant no. 1, Braj Bhooshan Tiwari vide registered sale deed dated 14.03.1985. Jagdish Mani's possession of the suit property was threatened by the defendants, which led him to institute the suit seeking cancellation of the registered sale deed dated 14.03.1985, executed by the late Smt. Kailash Pati in favour of Braj Bhooshan Tiwari, defendant-respondent no. 1. The suit was filed arraying Braj Bhooshan Tiwari as defendant no. 1 and Virendra Mishra as defendant no. 2. The suit aforesaid was instituted before the learned Munsif on 26.08.1985. The suit was contested by Braj Bhooshan Tiwari, who filed a written statement dated 22.07.1986, traversing the plaint allegations. The Trial Court framed the following issues (translated from Hindi to English vernacular) :

1. Whether the sale deed dated 14.03.1985 was liable to be cancelled on the grounds detailed in paragraph 15 of the plaint?

2. Whether the suit is undervalued?

3. Whether defendant no. 1 is a bona fide purchaser? If yes, its effect.

4. To what relief is the plaintiff entitled?

6. The parties went to trial and the learned Munsif held on Issue no. 1 in favour of the plaintiff and on Issue no. 4 against the defendant. He decreed the suit by his judgment and decree of September the 21st, 1987. Braj Bhooshan Tiwari, the defendant, appealed the decree to the learned District Judge vide Civil Appeal No. 270 of 1987. The appeal came up for determination before the learned IIIrd Additional District Judge, Deoria on 29.09.1987. He allowed the defendant's appeal, set aside the Trial Court's decree, reversed the same and dismissed the suit.

7. Jagdish Mani has put in issue the Lower Appellate Court's judgment and decree by means of the present appeal. He seeks restoration of the Trial Court's decree invoking this Court's jurisdiction under Section 100 of the Code of Civil Procedure, 19081.

8. This appeal was admitted to hearing vide order dated 18.10.1994, on what was indicated by the Court to be substantial questions of law carried in Grounds (a) and (b) set out in the memorandum of appeal. This Court, in the order dated 22.01.2020, extracted the substantial questions of law carried in

Ground Nos. (a) and (b) and framed an additional question before commencement of hearing on the said date. These figure in the order dated 22.01.2020. It was later on found by the Court, on a closer examination of the record, that what was described as Ground (a) and (b) in the Court's order dated 18.10.1994, referred to questions formulated in the memorandum of appeal as (a) and (b). Thus, bearing in mind the requirements of sub Section (4) of Section 100 CPC., the Court formally proceeded to frame those questions vide order dated 03.09.2020 and heard the appeal on Questions (a) and (b), besides the question that was formulated on 22.01.2020, and judgment was reserved. The appeal was posted for further hearing on 27.08.2020 and judgment was reserved again on 19.02.2021. The appeal has, therefore, been heard on the following substantial questions of law that would be denoted by letters (a), (b) and (c). These read:

(a) Whether the court below has completely misconstrued the provisions of section 55 of the Indian Contract Act, 1872 as to whether the time was the essence of the contract and whether the contract was voidable at the option of the promisee or not?

(b) Whether even if the condition in the agreement dated 14.10.1983 to the effect that the contract will be deemed to be cancelled if the appellant does not deposit Rs. 5000/- by 04.12.1983, is taken to imply that the time was the essence of the contract, the contract would become voidable at the option of the promisee and not void?

(c) Whether the provisions of Section 55 of the Indian Contract Act that provide that time should be of the essence, and about which Section 55 mandates that breach of the condition as to time renders the contract voidable, would apply to a decree of Court founded on compromise?

9. It must be recorded here that the respondents did not turn up at the hearing of the appeal and it was heard ex-parte.

10. Heard Mr. Haushila Prasad Mishra, learned Counsel for the appellant. The respondents have not answered the appeal.

11. The substantial question of law marked (a) has been formulated to examine whether Jagdish Mani's obligation to pay the balance of Rs. 5,000/- to Smt. Kailash Pati on 14.12.1983, in terms of the compromise decree dated 14.10.1983, carries a term that makes time the essence of contract; and if it does, would its breach make the contract underlying the compromise decree dated 14.10.1983 voidable at the instance of Smt. Kailash Pati?

12. It is submitted by Mr. Mishra, learned Counsel for the appellant, that the effect of provision of Section 55 of the Indian Contract Act, 18722 is not to make breach of every obligation to be performed at the covenanted time a ground to avoid the contract. It makes the breach of a term in the contract to do a certain thing or act before or at a particular time, a ground to avoid the contract, if on a construction of the true import of the contract, time is, expressly or by necessary implication, found to be of the essence. He submits that whether in a given case, time is of the essence, is a matter that has to be judged on the terms of the relevant contract, viewed in the entirety of the circumstances under which the parties have entered into it.

13. In support of the submission about this principle of law, Mr. Mishra placed reliance on the decision of the Andhra Pradesh High Court in **Tandra Venkata Subrahmanayam v. Vegesana Viswanadharaju & Another3.** He has drawn the attention of this Court to the holding in Paragraph No. 7 of the report, which reads :

7. In regard to the first contention, it cannot be in doubt that time can be made the essence of the contract by subsequent notice given by anyone of the parties to the contract, even though Section 55 of the Indian Contract Act does not provide for such a notice. It is of course necessary that if the notice wants time to be made essence of the contract it must expressly or by necessary implication say so. Any such notice ought to fix a reasonably long time requiring the other side to perform his part of the contract. The question whether the time prescribed in the notice is or is not of the essence of the contract would naturally depend upon the facts and circumstances of each case the mere fact that the notice gave a certain time to perform the contract would not necessarily lead to the conclusion that the time prescribed was the essence of the contract. In all such cases, the Court has to look to the pith and substance of the notice and not at the letter of the notice and decide as to whether time was or was not essential to the subsistence of the contract. The real intention of the party who gives notice must be clear from the notice itself. It may in certain cases be necessary to rely upon surrounding circumstances. Nevertheless one has to largely look to the notice itself.

14. Canvassing his case on this score, Mr. Mishra says that the terms of the compromise do not show that stipulation of the date, by which the balance of Rs. 5,000/- was covenanted to be paid by Jagdish Mani to Smt. Kailash Pati, made time the essence. The stipulation of the date, according to the learned Counsel for the appellant, was a clause to ensure that Smt. Kailash Pati was paid the balance of Rs. 5,000/- that was consideration for the compromise. The further stipulation in the compromise that is the event the balance of Rs. 5,000/- was not paid to Smt. Kailash Pati by 14.12.1983, the compromise would be treated as cancelled, is not decisive about time being of the essence. According to the learned Counsel for the appellant, a contract has to be read as a whole and in the circumstances in which it has been made. It is submitted by Mr. Mishra that a stipulation as to the time, or so to speak, a date by which the balance of Rs. 5,000/- had to be paid to Smt. Kailash Pati, is no more than a clause in terrorem.

15. This Court has considered the submissions advanced by learned Counsel for the appellant and perused the record. It is true that Section 55 of the Contract Act makes it dependent upon the intention of parties whether time is of the essence. That intention has to be gathered from the terms of the contract, not just going by the letter of it, but by construing the contract as a whole. The consideration of surrounding circumstances may also be relevant in certain cases. Here, there are circumstances attending the contract that make it imperative to look beyond the four corners of it. The most important circumstance is the relationship between parties in the transaction and the ensuing litigation that has given rise to the compromise decree. Jagdish Mani and Smt. Kailash Pati stand in the relationship of a stepson and stepmother. Admittedly, Jagdish Mani's father had married Smt. Kailash Pati after his first wife and Jagdish Mani's mother passed away. Smt. Kailash Pati remained issueless. She was somehow advised to claim maintenance from Jadgish Mani, which she did by a suit and succeeded in it. In execution of the decree passed in the maintenance suit, she brought the agricultural holdings left to Jagdish Mani by his father to sale and purchased these in the auction sale, though herself the decree holder. Jagdish Mani's endeavours to get the sale set aside on the execution side failed, and he brought Suit No. 404 of 1980 to set aside the auction sale. It was in this suit that the compromise subject matter of the present appeal was entered into between parties.

16. The terms of the compromise have to be considered in the background of the relationship between parties and the course of proceedings that have led to it. It has figured in the plaintiff's evidence that Jagdish Mani was

inclined to take care of his stepmother, but she went away to her native family after her husband's death and sued Jagdish Mani for maintenance. The transaction that has led to the compromise is not one that is commercial or mercantile between two strangers. It is not ex-facie based on a motivation to purchase agricultural land for Smt. Kailash Pati's need or to acquire that land for the purpose of agriculture. The motivation for Smt. Kailash Pati to make a move was to secure maintenance for herself, after her husband's death and that is what she wanted. This is more than evident from the fact that she sued for maintenance and secured a personal decree against Jagdish Mani to pay her maintenance. It was Jagdish Mani's failure to satisfy the decree that led her to levy of execution. That execution brought about an auction sale, where she purchased the suit property as an auction purchaser. The suit property or the agricultural land, thus, came to her not because she intended to buy or acquire that land, but, in due course of proceedings, for the enforcement of her maintenance decree. She wanted maintenance; not lands to do farming.

17. The next positive circumstance that points to Smt. Kailash Pati's intent vis-à-vis acquisition of the suit property is evident from the fact that she entered into a compromise in a suit brought by Jagdish Mani to set aside the auction sale as irregular, after it had already been confirmed in the execution proceedings. The way the law stands, it is but reasonable to expect that she would have been advised about the possible feeble chances of success for Jagdish Mani in his suit to set aside a confirmed auction sale. Still, she entered into a compromise with Jagish Mani.

18. The terms of the compromise read as a whole indicate that the motivation and the object for Smt. Kailash Pati was to secure maintenance for herself as means for sustenance. A careful look at the terms of the compromise show that she bargained a sum of Rs. 8,000/- for herself from Jagdish Mani to serve as some kind of corpus or contingency fund, or a lump sum that she intended to apply for some use best known to her. It then shows that she incorporated a term that would provide her with half the harvest of the fields, wherein she would invest half the inputs comprising the seeds and manure. This provision was made either to keep her granary well-supplied or again, to secure some money for herself from proceeds of sale of the crop coming to her share. This term also shows that she did not intend to dissociate with Jagdish Mani or her deceased husband's family; rather she made provision for a strong foothold for herself in her deceased husband's family, where her stepson would also be in touch with her.

19. There is then a clear provision in the compromise that once Jadgish Mani paid her the balance sum of Rs. 5,000/- on 14.12.1983, Smt. Kailash Pati would have no further right to execute the decree passed in her maintenance suit. There is then that term in the agreement, which shows that upon Smt. Kailash Pati's death, Jagdish Mani would perform her last rites and *Shradh*. The suit property would be inherited by Jagdish Mani and his sons as Smt. Kailash Pati's heirs, after she passed away. The aforesaid terms in the compromise do not show that Smt. Kailash Pati had any intention to own the land and deal with it. She wanted to own the land so as to continue her association with her deceased husband's family and her stepson, and also to secure out of it, some lump sum money and a regular share in the crop. She covenanted that the land would remain hers during her lifetime, despite Jagdish Mani paying her the balance sum of Rs. 5,000/- on 14.12.1983, and the suit property would pass on to Jagdish Mani and his sons as her heirs, upon her decease.

20. In view of all these telltale terms, the background in which the lis has arisen and the relationship between parties, it is difficult to

hold that Smt. Kailash Pati would have intended time to be the essence of the contract. In fact, read as a whole, the compromise, by stipulating the date by or on which the balance of Rs. 5,000/- had to be paid by Jagdish Mani, does not make time the essence. The essence is that Jagdish Mani would pay the balance to keep his association alive with Smt. Kailash Pati, provide her with her share in the crop by cultivating the land comprising the suit property and when life had ebbed out, render the spiritual duties of a son by performing her last rites. She even covenanted with Jagdish Mani to perform her Shradh to benefit her in the afterlife.

21. In the face of these terms carried in the compromise, to read, construe or understand it as a mere embodiment of adjustments of rights in a suit, a commercial transaction or a contract affecting disposition of property, where time is of the essence, would be doing great violence to what both parties intended. The two Courts of fact below have disbelieved the plaintiff's oral testimony that he paid the entire sum of Rs. 5,000/- to Smt. Kailash Pati at home, well before 14.10.1983. The sum of Rs. 1,000/- was +deposited with the Trial Court on 14.12.1983 and a further sum of Rs. 4,000/- on 11.07.1984. It has surprisingly not figured in judgments of both the Courts below whether this sum of money was withdrawn by Smt. Kailash Pati or not. That fact, though important, this Court does not wish to determine it with the onerous consequences of the remand, or even remitting that issue, inasmuch as the cause can be determined on wider principle.

22. It must be remarked here that where time is of the essence, the contract is voidable at the option of the promisee, and not void. The Trial Court, in holding Smt. Kailash Pati to be without authority to execute the impugned sale deed, was of opinion that the breach of the condition about time, though of essence, made the compromise voidable, and since no steps were taken by Smt. Kailash Pati to get the compromise avoided, it was still valid and binding on parties. The added reason for the Trial Court to think that the compromise was still valid and not avoided, was the fact that Smt. Kailash Pati was not proven to have refunded the sum of Rs. 3,000/- that she had admittedly received in terms of the compromise decree before she executed the impugned sale deed. In the opinion of the Trial Court, it was a step necessary to avoid the compromise.

23. The term in the compromise which says that Smt. Kailash Pati would have no further right to execute the decree passed in Original Suit No. 1154 of 1967, shows that all proceedings of the auction sale, through which she had got the suit property, stood set aside. This reasoning was adopted by the Trial Court because it thought that the execution of the decree in the maintenance suit being already concluded, a term in the compromise decree that said that Smt. Kailash Pati would have no further right to execute the decree, showed that all proceedings of the auction sale stood rescinded.

24. The Lower Appellate Court reversed the finding of the Trial Court that the compromise being voidable for non-performance of one of the covenants under it by Jagdish Mani, it could not be held void unless steps were taken to avoid it. The Lower Appellate Court, like the Trial Court, proceeded on the premise that payment of the balance of Rs. 5,000/- on or before 14.12.1983 was a part of the covenant that made time the essence. About this issue, both the Courts below are ad idem, and it is about this conclusion of the Courts below that this Court is unable to agree, for reasons already indicated. The findings of the Lower Appellate Court in reversing the Trial Court may be well-founded, if the premise that time is of the essence as held by both the Courts below were accepted. But, that is not so. The

Lower Appellate Court has reasoned differently to conclude that time is of essence. It has gone by the principle that wherever a decree is passed on the basis of compromise and one party does not fulfill his/her obligations under it, that party cannot take advantage of the decree.

25. The Lower Appellate Court, in support of its reasoning, has relied on the decision of a Division Bench of this Court in **Nagoo & Another v. P.T. Shiv Dularey Dixit & Others4** and further on a decision of the Patna High Court in **Hansraj Sangechi & Others v. Jogeshar Prasad & Another5.** The principles in Nagoo (supra) were laid down in the context of a suit for sale on a mortgage that was brought by the mortgagee after a compromise decree passed in an earlier suit by the mortgagor had led to a violation of terms about repayment of the mortgage debt in two installments on stipulated dates. The compromise decree passed in the earlier suit carried a term that in case of default of payment of the installments by the mortgager, his suit shall stand dismissed. The first of the two installments was paid on schedule, but the mortgager defaulted in making good the second installment. He deposited it a month after the scheduled date in Court. The mortgagee then sued on the original mortgage for the entire mortgage debt and not the abated sum settled through the compromise. The mortgagor contended that the compromise decree passed in his suit was still in force and the delay in remitting the second installment did not lead to the dismissal of the suit. It was held in **Nagoo** on two of the three points urged that are relevant, thus :

5. In this special appeal three points have been urged before us. It has been urged that the defendants, having paid one of the two instalments, it could not be said that the default clause of the compromise came into operation. In our opinion this contention has no force. The clause in the compromise that "in case of default of payment of the instalments mentioned above the plaintiffs' suit shall be deemed to be dismissed" clearly meant that if the defendants failed to pay either of the instalments within the time stipulated the plaintiffs' suit shall be deemed to be dismissed. The word "instalments' in the context meant either of the two instalments. If the meaning were as alleged by the appellants it would lead to a very strange result. The defendants could claim not to pay the second instalment at all after paying the first and yet say that the suit could not be deemed to be dismissed. We do not think that this could have been the intention of the parties.

6. The next point urged is that, even though the previous suit would be deemed to have been dismissed because of the non-payment of one of the instalments, nevertheless the amount due under the mortgage was settled between the parties to be a sum on Rs. 700 and that the plaintiff was bound by that settlement. Learned counsel has urged that the amount thus settled is res judicata between the parties in the present case. He has relied upon several decisions, viz. Maina Bibi v. Chaudhri Vakil Ahmad[I.L.R. 47 Alld. 250.] ,Raghunath Singh v. Sheo Pratapsingh[1929 A.L.J.R. 761.] ,Secretary of State for India v. Ateendranath Das [I.L.R. 63 Cal. 550.] and has referred to Spencer Bower on Res Judicata at pp. 23 and 24. In Maina Bibi v. Chaudhri Vakil Ahmad [I.L.R. 47 Alld. 250.] and Raghunath Singh v. Sheo Pratap Singh [1929 A.L.J.R. 761.] it was held that, even though a redemption suit was ultimately dismissed because the mortgage money was not paid by the mortgagor within the time allowed by the Court, yet the decisions on several issues decided by the Court in the suit were binding in a subsequent suit between the parties, where the same questions were agitated afresh. In the Secretary of State for India in Council v. Ateendranath Das [I.L.R. 63 Cal. 550.] it was held that

"a decree passed by consent is as effective a bar to a subsequent suit as one passed on contest, not only with reference to the conclusions arrived at in the previous suit, but also with regard to every step in the process of reasoning on which the said conclusions are founded."

7. There can be no doubt about these propositions. A judgment by consent or by default raises an estoppel just in the same way as a judgment after the Court has exercised a judicial discretion in the matter. The basis of the estoppel is that, when parties have once litigated a matter, it is but fair that litigation should come to an end. And, if they agree upon a result, or upon a verdict or upon a judgment, or upon a verdict and judgment, as the case may be, an estoppel is raised as to all the matters in respect of which an estoppel would have been raised by judgment if the lease had been fought out to the bitter end. The same proposition has been laid down in Spencer Bower on Res judicata:

"Any judgment or order which in other respects answers to the description of res judicata is none the less so because it was made in pursuance of the consent and agreement of the parties."

8. The case of a compromise falling through, however, by reason of the default of one of the parties in not carrying out its terms, is quite a different matter. In the case of a compromise the presumption is that it is arrived at because there has been a give and take between the parties. All the terms of a compromise are presumably to be taken together and unless the contrary is expressed in the compromise itself or necessarily implied in the circumstances of a particular case an individual term of the compromise cannot be, picked out by one party and the other party cannot be said to be bound by it in spite of the fact that the compromise, as a whole, he fallen through by default of the very party who wishes to take advantage of its terms. .....

26. In **Hansraj Sangechi** *(supra)* it was held :

2. It is contended that the learned District Judge by the order of the 19th September, and also by his order of the 13th September, allowed an extension of the time and that he had power so to order an extension, and therefore, the depositing of the decretal amount on the 22nd September fulfilled all the requirements of the agreement and the sale should have been set aside. In the order sheet there is no order for extension of time; there are orders that an inquiry should be made whether the amount had been deposited or not, and, when the appellant brought the money into Court and asked leave to deposit it, the learned District Judge allowed the deposit, but he did not express that by that deposit the terms of the agreement would be held to have been fulfilled. The question is whether the learned District Judge would in any case have jurisdiction to allow an extension of time having in view the terms of the agreement reached between the parties and whether time was of the essence of the contract. Several cases have been put before us in which it has been held that, where there has been a consent between the parties, the Court has power to grant relief against forfeiture and to extend the time for this purpose.

3. But the present case is not a case of relief against forfeiture. In the case of Kandarpa Nag v. Banwari Lal Nag [[1920] 33 C.L.J. 244 : 60 I.C. 864.] Mookerjee, Acting C.J., laid down, after considering the case-law on the subject the principle which governs cases like the present one. From the cases he examined he laid down the principle that time is of the essence of the agreement, when, in the course of proceedings by the judgment-debtor to set aside an execution sale, a compromise is made among the decree-

holder, judgment-debtor and execution purchaser that on payment of the judgment debt within a prescribed period, the sale shall stand cancelled, while upon failure to make such payment the sale shall stand confirmed. He said:

"in such cases as the parties intended in the first conception of the agreement to make time the essence of the contract, the Court would not be competent to extend the time except by consent of all the parties concerned."

27. The decision in **Nagoo** lays down a general principle that wherever an essential term of a compromise decree under which a party claims advantage is violated, that party cannot take advantage of the terms of compromise, which must be held to be rescinded. The compromise decree involved in **Nagoo**, as already said, was based on a statutory suit by the mortgagor, under Section 33 of the United Provinces Agriculturists Relief Act, 1934 brought for a declaration of the sum of money due to the mortgagee. The compromise on which the decree had followed had been settled at an abated figure of Rs. 700/- besides counsel fee, and it was expressed in the compromise to be payable in two installments on scheduled dates. The first was paid and in the second, there was a default. It was later on deposited in Court. In the mortgagee's suit, the compromise decree was held to have been rescinded, owing to the mortgager's default in keeping schedule. It was held on the first point that non-payment of one of the two installments would lead to a very strange result, as the defendant could claim not to pay the second installment at all after paying the first, and yet hold on to the decree. In substance, therefore, the Court held payment of the second installment strictly on schedule as an essential term of the compromise. The Court also opined that all the terms of the compromise are to be wholesomely adhered to, unless a contrary intent expressed in the compromise itself appears or one that is a necessary implication in the circumstances of a particular case. It is here where the general proposition that breach of any of the terms of the compromise decree leads to its rescission has to be differentially applied, depending on what is the nature of the lis, background of parties, the nature and purpose of the settlement.

28. **Nagoo** was a decision rendered in the context of a mortgage suit or a money claim. The purpose of the suit was to recover the mortgage debt. The purpose of the compromise decree earlier passed in the mortgager's suit was also to ensure timely payment of the mortgage debt in two installments and on schedule. In that context, there was nothing to derogate from the general principle that breach of conditions of a compromise decree must lead to its rescission. Further, **Nagoo** clearly acknowledges that there could be cases where the terms of the compromise could expressly admit of a different intention or it may be implied from the circumstances of a particular case. That different intention could be about one or the other term being adhered to differently or not strictly, depending on the circumstances of a particular case. The principle in **Nagoo** would, therefore, not apply to the present case, where, for reasons indicated, this Court has remarked that time was not of the essence of the contract embodied in the compromise decree. For the same reason, the decision of the Patna High Court in **Hansraj Sangechi** also is not attracted to the question involved here.

29. In this Court's opinion, on a proper construction of the terms of the compromise, time is not of the essence. And once time was not of the essence, the contract underlying the compromise decree must be held to be not voidable at the promisee's option.

30. The former part of substantial question of law (a) is **answered in the affirmative,** in the manner that time is held not to be of the essence;

and the latter part of it is **answered in the negative**, by holding that time being not of essence, the contract was not voidable at the option of the promisee.

31. In view of the answer to substantial question of law (a), substantial question of law (b) **need not be answered.**

32. Now, so far as substantial question of law (c) is concerned, the fact to be examined is whether the rule about time being essence of the contract, would apply to a decree of Court founded on compromise. In substance, here, this Court is required to examine whether the rule regarding time being essence of the contract would apply differently to a decree of Court founded on compromise; different from the way it applies to a case where the question arises in an action based on a contract inter partes without the decree of a Court being involved. This question has been examined in some measure while answering substantial question of law (a). The decision of the Division Bench in **Nagoo,** which comes close on facts to the principle that has bearing on this question, makes allowance for a contrary intention about one or the other term being not strictly followed, if that allowance is "expressed in the contract itself or necessarily implied in the circumstances", to borrow the words of the Division Bench. A stipulation as to time in a compromise on which a decree has followed cannot always be regarded as one that makes it of the essence.

33. There is a line of authority which does say that in a compromise arrived at during the course of execution proceedings, time is of the essence and the Court cannot extend that time stipulated in the compromise decree. One of the illustrations in this line of authority is **Hansraj Sangechi,** the relevant part of which has been extracted in the part of this judgment devoted to substantial question of law (a). It must be said that most of the authorities on this line arise from proceedings seeking extension of time by the Court that passed the decree, invoking provision of Section 148 CPC. Also, it cannot be ignored that the principle laid down in **Hansraj Sangechi** was in the context of proceedings for confirmation of sale, where a compromise arrived at between the decree holder, the judgment debtor and the auction purchaser, regarding payment due under the judgment to be made within a specified period of time, had been dishonoured. The compromise carried a term that the sale, upon default in keeping schedule, shall stand confirmed. It was in that limited context of proceedings for confirmation of sale that the principle in **Hanraj Sangechi** was laid down. A compromise decree embodying an underlying contract does not ipso facto lead to the conclusion that a term in the compromise about time on which a decree has followed, must always be regarded as one of essence. The general principles applicable to a contract would remain the same in construing the terms of a compromise decree. The principle that a compromise decree is not to be understood or construed fundamentally in a different way from any other contract is eloquently expressed in the judgment of the majority in the Full Bench decision of this Court in **Habib Mian & Another v. Mukhtar Ahmad & Another6**. Pathak, J. (as the learned Chief Justice of India then was) held :

5. I think it necessary at the outset to examine the provisions of the compromise decree and to ascertain how the several rights and liabilities between the parties have been distributed under the decree. In doing so, the principles of construction of a compromise decree must be borne in mind. There is authority for the proposition that a compromise decree is a creature of the agreement on which it is based and is subject to all the incidents of such agreement, that it is but a contract with the command of a Judge super-added to it and in construing its provisions the fundamental

principles governing the construction of contracts are applicable. Nagappa v. Venkat Rao [I.L.R. 24 Mad. 265.] , Amrit Sundari v. Sherajuddin [A.I.R. 1915 Cal. 464.] , Smith v. Kenny [A.I.R. 1924 Pat. 231.] and Jahuri Lal v. Kandhai Lal [A.I.R. 1935 Pat. 123.] .

6. One of the cardinal principles in the construction of contracts is that the entire contract must be taken as constituting an organic synthesis, embodying provisions which balance in the sum of reciprocal rights and obligations. It is through the prism of that principle that the terms of the compromise decree must be analysed.

34. If there is anything that makes a compromise decree different in construing the clause regarding time to be of the essence, it is that, that the Court which passed the decree gets the power, by virtue of making the agreement of parties its rule to extend the time that the parties had contracted. Here, that question does not arise, because it is not a case where the defaulting party has applied to the Court which passed the compromise decree to extend time stipulated in the compromise. It is a case where one of the parties involved says that time was never regarded by the parties to be of the essence. Nevertheless, the principle that the Court recording a compromise and passing a decree on its basis gets jurisdiction to extend time for the performance of a condition is the only change that comes to a contract on which a compromise decree has followed in the matter of application of the principle about time being of the essence. In this regard, the decision of the Supreme Court in **Smt. Periyakkal & Others v. Smt. Dakshyani7** is apposite. In **Periyakkal** *(supra)* it was held :

4. In the case before us, the situation is totally different. Unlike the case of Hukumchand v. Bansilal [AIR 1968 SC 86 : (1967) 3 SCR 695 : (1968) 2 SCJ 32] where there was a statutory compulsion to confirm the sale on the dismissal of the application under Order 21 Rule 90 and, therefore, postponement and further postponement of the confirmation of the sale could only be by the consent of the parties, in the case before us, there was no statutory compulsion to dismiss the application under Order 21 Rule 90 in the absence of an agreement between the parties. The court would have then decided the appeal arising out of the application on the merits. The parties, however, entered into a compromise and invited the court to make an order in terms of the compromise, which the court did. The time for deposit stipulated by the parties became the time allowed by the court and this gave the court the jurisdiction to extend time in appropriate cases. Of course, time would not be extended ordinarily, nor for the mere asking. It would be granted in rare cases to prevent manifest injustice. True the court would not rewrite a contract between the parties but the court would relieve against a forfeiture clause; And, where the contract of the parties has merged in the order of the court, the court's freedom to act to further the ends of justice would surely not stand curtailed. Nothing said in Hukumchand case [AIR 1968 SC 86 : (1967) 3 SCR 695 : (1968) 2 SCJ 32] militates against this view. We are, therefore, of the view that the High Court was in error in thinking that they had no power to extend time. Even so, Shri Javali submitted that this was not an appropriate case for granting any extension of time. We desire to express no opinion on that question. The High Court will decide that question. .....

35. The substantial question of law (c) would, therefore, have to be **answered in the affirmative,** in terms that the provisions of Section 55 of the Contract Act about time being essence of the contract, making it voidable upon breach, would apply to a decree of Court founded on compromise in the same manner as any other contract.

36. In view of the Court's answers to Questions (a) and (c), this appeal stands **allowed** with costs throughout. The decree of the Lower

Appellate Court is **set aside** and that of the Trial Court **restored**.

(2021)11ILR A851
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.09.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE SUBHASH CHAND, J.

First Appeal From Order No. 638 of 2021

Smt. Girija Singh @ Girija Devi & Ors.
...Appellants
Versus
National Insurance Co. Ltd. & Ors.
...Respondents

Counsel for the Appellants:
Sri Deepali Srivastava Sinha, Sri Vidya Kant Shukla

Counsel for the Respondents:
Sri Avdhesh Chandra Nigam

Civil Law - Motor Accident Claim - Motor Vehicles Act, 1988 - Section 168 - Compensation - appeal on behalf of claimants against quantum of compensation - deceased a retired Army Personnel, after retirement worked as defence security guard, getting salary of Rs. 37,039/- & pension of Rs. 15,069/- total income Rs. 52,108/- per month after all deductions - Tribunal assessed income Rs. 22,000/- on the basis of the ITR Form 16 of the assessment year 2013-14 - Tribunal halved total income on the ground that 50% liability of the deceased has been discharged as they have got their daughter married - Held - this finding untenable - Tribunal should have computed the income of the deceased on the basis of income which he was getting after retirement therefore monthly income of the deceased would be Rs. 37,039 - future prospects 15% - deceased left behind widow, one son & a married daughter - married daughter was not dependent on the deceased so 1/3rd should have been deducted for the personal expenses of the deceased - Multiplier applicable 9 - Amount under non-pecuniary head Rs. 70,000 - Total compensation Rs. 31,36,876 - rate of interest 7.5% (Para 14, 16)

Allowed. (E-5)

List of Cases cited:

1. Vimal Kanwar & ors Vs Kishore Dan ors. 2013 (3) TAC 6(SC)

2. National Insurance Co. Ltd. Vs Mannat Johal & ors. 2019 (2) T.A.C. 705 (S.C.).

3. New India Assurance Company Ltd. Vs Urmila Shukla & ors. LL 2021 SC 359

4. National Insurance Co. Ltd. Vs Mannat Johal & ors. 2019 (2) T.A.C. 705 (S.C.)

5. Smt. Hansagori P. Ladhani Vs The Oriental Insurance Company Ltd., 2007(2) GLH 291

6. Smt. Sudesna & ors. Vs Hari Singh & anr. Review Application No.1 of 2020 First Appeal From Order No.23 of 2001

7. Tej Kumari Sharma Vs Chola Mandlam M.S. General Insurance Co. Ltd. First Appeal From Order No.2871 of 2016 19.3.2021

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
&
Hon'ble Subhash Chand, J.)

1. Heard learned Counsel for the appellants and Sri Avdhesh Chandra Nigam for the respondents.

2. The instant appeal is at the behest of claimants against the award dated 10.2.2021 passed by Motor Accident Claims Tribunal, Gorakhpur, in M.A.C.P. No.519 of 2014.

3. The brief facts culled out from the record are that on 19.6.2014, deceased Vinod Kumar Singh along with his wife was going on

his motor cycle, being numbered as UP-53-BK-1402. At about 5.00 p.m. in the evening as he reached near Village Shahjanwa, a magic Jeep bearing no. UP-54-D-4093, which was being driven by its driver rashly and negligently, came from the wrong side and dashed the motorcycle of deceased - Vinod Kumar Singh. As a result of which, Vinod Kumar Singh and his wife both sustained injuries and Vinod Kumar succumbed to his injuries. The deceased was earlier in government job and had retired from Indian Army and was getting pension of Rs. 15,069/- per month and after retirement, he joined Defence Security Guard and was getting salary of Rs. 37,039/- per month. After his death, he left his widow, son and daughter. At the time of accident, he was aged 56 years. An F.I.R. of this incident was registered as case Crime No. 273 of 2014, under Sections 279/337/338/427/304-A IPC with the police station concerned. Accordingly, compensation is claimed.

4. On behalf of opposite party no.2, owner of the offending Jeep in his written statement averred that the accident was caused on account of the negligence on the part of the deceased himself. The driver of the offending Jeep was driving the Jeep proprly. The driver of the offending vehicle was having a valid and effective licence and the offending vehicle was also insured by opposite party no.2.

5. On behalf of the Insurance Company, opposite party no.3 in its written statement has averred that the offending vehicle was not insured and the driver of the offending vehicle was not having a valid and effective driving licence on account of which fundamental terms and conditions of the Insurance Company.

6. The Tribunal, after framing 5 issues, and taking evidence oral and documentary passed the award on 10.2.2021 and awarded a compensation for the amount of Rs. 11,01,000/- along with 7% simple interest on the amount from the date of claim petition up to the date of actual payment.

7. The instant appeal on behalf of the claimants has been preferred against the quantum of compensation. Learned Counsel for the appellant has contended that the deceased was retired Army Personnel and after his retirement, he was working in defence security guard under Defence Ministry and was getting salary of Rs. 37,039/- and pension of Rs. 15,069/- total income was Rs. 52,108/- per month after all deductions. This income is proved from the documentary and oral evidence. Moreover, Income-tax Form-16 was also filed before the Tribunal on behalf of the appellants to prove the income of previous year from the date of accident. The Tribunal has assessed the salary of the deceased on lower side in an arbitrary manner without recording any cogent reason. The Tribunal deducted half of the computed compensation on the sole ground that the deceased was discharged from half of the liability as he had married daughter and so the liability during his life time was discharged. It is submitted that this deduction is bad in the eye of law which is not supported from any authoritative pronouncement or law.

8. Learned Counsel for the respondent - Insurance Company on query could not bring home his submission that the income of the deceased was properly computed by the Tribunal and the Tribunal was not wrong to deduct the pension of the deceased from his income. It is submitted that the future prospect as granted by the Tribunal was 15%, but it should have been 10% as the deceased was above 55 years on the date of the accident and was within the age bracket of 56 - 60 years. The deceased has left behind widow, one son and a married daughter. The married daughter was not dependent on the deceased so 1/3rd should have been deducted for the personal expenses of the deceased in place of 1/4th as done by the Tribunal.

9. On behalf of the appellants to prove the income of the deceased PW1 - Girja Devi, PW4 - Vinay Kumar Gupta, PW3 - Lakshman Singh have been examined on oath.

10. PW4- Vinay Kumar Gupta is a Clerk in the office of Principal Controller of Defence Account, Allahabad, has proved the pension slip of deceased Vinod Kumar and deposed that Vinod Kumar Singh was getting pension of Rs.13,206/- per month in the month of May, 2014 and this certificate has been issued by the authorities of his department which he had brought and proved the same by producing the same.

11. PW3 - Lakshman Singh deposed so as to prove the salary slip of deceased Vinod Kumar Singh and deposed that deceased Vinod Kumar Singh was employed along with him in Defence Security Corps department, Gorakhpur. His pay slip for the month of May 2014 and June 2014 was produced by him along with covering letter of the department. As per the record, the salary of deceased Vinod Kumar Singh was Rs. 37,039/-. Photostat copy of original salary slip which was certified was filed by him before the Tribunal.

12. The salary slip of the deceased - Vinod Kumar Singh of the month of May, 2014, is paper no.47-C/3 and 47-C/4. It reflects the salary of deceased to be Rs. 37,039/-. The deductions which can be made from his salary is income-tax only as per decisions of Apex Court in **Vimal Kanwar and others Vs. Kishore Dan and others, 2013 (3) TAC 6(SC) and in National Insurance Co. Ltd. Vs. Mannat Johal and Others, 2019 (2) T.A.C. 705 (S.C.).**

13. So far as the pension of the deceased is concerned, in paper no. 92-ga, the pension of deceased is shown to be Rs. 13,206/-.

14. The Tribunal has computed the income of the deceased to be Rs. 22,000/- per month ignoring the documentary evidence about the payment which the deceased was getting before the accident. The Tribunal had assessed the income of the deceased Rs. 22,000/- on the basis of the Income-tax Return Form 16. The Income-tax Return Form-16, which is paper no.73-C concerns the assessment year 2013-14 annual salary of the deceased is shown Rs.2,82,068/-. On the basis of the Form-16, how the Tribunal has computed monthly income of the deceased to be Rs. 22,000/- is beyond comprehension. The Tribunal has again halved half of the total income after having computed the same on the ground that 50% liability of the deceased has been discharged as they have got their daughter married, this finding is untenable. The Tribunal should have computed the income of the deceased on the basis of income which he was getting after retirement in Defence Security Corps department, therefore, the monthly income of the deceased would be Rs. 37,039.00.

15. As far as future prospect is concerned, we are supported in our view by the decision of the Apex Court in **New India Assurance Company Ltd. Vs. Urmila Shukla and others, LL 2021 SC 359** and hold that the finding of the Tribunal as far as future prospect is concerned is just and proper.

16. Hence, the total compensation payable to the appellants is computed herein below:

i. Income Rs. 37,039/- per month.

ii. Percentage towards future prospects : 15% namely Rs. 5,556/- (round figure)

iii. Total income : Rs. 37,039 + 5,556 = Rs. 42,595/-

iv. Income after deduction of 1/3rd : Rs. 28,397/- (rounded up)

v. Annual income : Rs. 28,397 x 12 = Rs. 3,40,764/-

vi. Multiplier applicable : 9

vii. Loss of dependency: Rs. 3,40,764 x 9 = Rs. 30,66,876/-

viii. Amount under non-pecuniary head : Rs. 70,000/-

ix. Total compensation : Rs. 31,36,876/-

17. As far as issue of rate of interest is concerned, it should be 7.5% in view of the decision of the Apex Court in **National Insurance Co. Ltd. Vs. Mannat Johal and Others, reported in 2019 (2) T.A.C. 705 (S.C.)** wherein the Apex Court has held as under :

"13. The aforesaid features equally apply to the contentions urged on behalf of the claimants as regards the rate of interest. The Tribunal had awarded interest at the rate of 12% p.a. but the same had been too high a rate in comparison to what is ordinarily envisaged in these matters. The High Court, after making a substantial enhancement in the award amount, modified the interest component at a reasonable rate of 7.5% p.a. and we find no reason to allow the interest in this matter at any rate higher than that allowed by High Court."

18. No other grounds are urged orally when the matter was heard.

19. In view of the above, the appeal is partly allowed. Judgment and award passed by the Tribunal shall stand modified to the aforesaid extent. The respondent-Insurance Company shall deposit the amount within a period of 12 weeks from today with interest at the rate of 7.5% from the date of filing of the claim petition till the amount is deposited. The amount already deposited be deducted from the amount to be deposited.

20. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansagori P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291 and this High Court in** , total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount without producing the certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 (Smt. Sudesna and others Vs. Hari Singh and another) and in First Appeal From Order No.2871 of 2016 **(Tej Kumari Sharma v. Chola Mandlam M.S. General Insurance Co. Ltd.)** decided on 19.3.2021 while disbursing the amount.

21. This Court is thankful to both the learned Advocates for getting this matter disposed of during this pandemic.

(2021)11ILR A854
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.09.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE SUBHASH CHAND, J.

First Appeal From Order No. 649 of 2017

Smt. Vimla Sharma ...Appellant
Versus
Krishna Kumar & Anr. ...Respondents

Counsel for the Appellants:
Sri Ram Singh, Sri Amit Kumar Singh

Counsel for the Respondents:
Sri Rajkapoor Upadhyay, Sri Radhey Shyam, Sri N.K. Srivastava

Civil Law - Motor Accident Claim - Motor Vehicles Act, 1988 - Section 168 -

Enhancement of Compensation - deceased aged about 27 years, was teacher with income of Rs. 15,000/- per month, left behind him his mother - Tribunal not granted future loss of income - Tribunal granted multiplier of 12 considering the age of mother - *Held* - Court granted 50% addition towards future loss of income as the deceased was below age of 40 years & was in regular service - multiplier should be considered on the basis of the age of the deceased - multiplier of 17 as the deceased was in the age bracket of 26-30 (Para 9)

Allowed. (E-5)

List of Cases cited:

1. Sarla Verma & ors. Vs Delhi Transport Corporation & anr. 2009 Law Suit (SC) 613

2. National Insurance Co. Ltd. Vs Pranay Sethi & ors., 2017 0 Supreme (SC) 1050

3. General Manager, Kerala S.R.T.C., Trivandrum Vs Susamma Thomas & ors. (1994) 2 SCC 176

4. U.P.S.R.T.C. & ors. Vs Trilok Chandra & ors. (1996) 4 SCC 362

5. Sarla Dixit Vs Balwant Yadav AIR 1996 SC 1274

6. Hardeo Kaur Vs Rajasthan State Transport Cor. 1992 2 SCC 567

7. Puttamma Vs K.L.Narayana Reddy AIR 2014 SC 706

8. Raman Vs Uttar Haryana Bijli Vitran Nigam Ltd.

9. Bijoy Kumar Dugar Vs Bidyadhar Dutta 2006 (3) SCC 242

10. R.K.Malik Vs Kiran Pal AIR 2009 SC 2506

11. National Insurance Co.Ltd. Vs Pranay Sethi AIR 2017 SC 5157

12. Raj Rani Vs Oriental Insurance Co. Ltd. 2009 (13) SCC 654

13. Ritaben @ Vanitaben Wd/o. Dipakbhai Hariram & anr. Vs Ahmedabad Municipal Transport Service & anr. 1998 (2) G.L.H. 670

14. Munna Lal Jain & anr. Vs Vipin Kumar Sharma & ors. 2015 (6) SCALE 552

15. National Insurance Co. Ltd. Vs Mannat Johal & ors., 2019 (2) T.A.C. 705 (S.C.)

16. A.Vs Padma Vs Venugopal 2012 (1) GLH (SC), 442

17. Smt. Hansaguti P. Ladhani Vs The Oriental Insurance Co. Ltd. 2007(2) GLH 291

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
&
Hon'ble Subhash Chand, J.)

1. Heard learned counsel for the parties and perused the judgment and order impugned.

2. By way of this appeal, the claimants have challenged the judgment and order dated 26.11.2016 passed by Motor Accident Claims Tribunal/Additional District Judge, Court No.7, Aligarh (hereinafter referred to as 'Tribunal') in M.A.C.P. No. 02 of 2015 awarding sum of Rs.10,00,000/- as compensation to the claimants with interest at the rate of 7%.

3. The accident is not in dispute. The Insurance Company has not challenged the liability imposed on them. Hence, the only issue to be decided is, the quantum of compensation awarded. The details of facts except for deciding compensation are not narrated.

4. It is submitted that deceased-Pawan Sharma who was a teacher by profession left behind him his mother. He was 27 years of age on the date of accident namely on 12.12.2014. Learned counsel for the appellant does not dispute the decision of the Tribunal on the basis that the income was Rs.15,000/- per month but, disputes that despite the judgment of the Apex Court in **Sarla Verma and others Vs. Delhi Transport Corporation and Another, 2009**

LawSuit (SC) 613 & National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050, no future loss of income has been considered by the Tribunal though the deceased was serving in Shanti Niketan World School, P.A.C. Ramghat Road Aligarh as teacher (P.T.I. Post). It is submitted by learned counsel for the appellant that the Tribunal has not assigned any reason for non granting the future loss of income. The next contention is that the Tribunal has granted multiplier of 12 considering the age of mother and granted and has granted only Rs.10,000/- under the head of non pecuniary damages which is bad. Learned counsel for the appellant contend that the multiplier should be considered on the basis of the age of the deceased and it should be 17. It is further submitted that the amount under the head of non-pecuniary damages should be as per the decision of the Apex Court in **Pranay Sethi (Supra)**. It is also submitted by learned counsel for the appellant that the interest awarded by the Tribunal is on the lower side and is required to be enhanced.

5. Sri Radhey Shyam, learned Advocate appearing for Sri N.K. Srivastava, learned counsel for the respondent-Insurance Company has submitted that the award is of the year 2016, the Tribunal has considered the 2nd Schedule of Uttar Pradesh Motor Vehicles Rules and has considered the age of the mother for grant of compensation, hence, the award passed by the Tribunal cannot be found fault with.

6. The submission is that the Tribunal has not granted any amount towards future loss of income which has to be considered and grant of future prospects will have to be traced back and reference can be had to the decision in **General Manager, Kerala S.R.T.C., Trivandrum v. Susamma Thomas & Ors.,(1994) 2 SCC 176** wherein addition of future prospects was also calculated. The decision in **Susamma Thomas (Supra)** was referred in **U.P.S.R.T.C. & Ors. v. Trilok Chandra & Ors.(1996) 4 SCC 362** which have been considered by the Apex Court in **Sarla Dixit Versus Balwant Yadav AIR 1996 SC 1274** and the Apex Court has considered decision in **Hardeo Kaur V/s. Rajasthan State Transport Corporation, 1992 2 SCC 567**. The decision in **Sarla Dixit** has been considered to be good law in (1) **Puttamma Vs. K.L.Narayana Reddy, AIR 2014 SC 706 (2) Raman Vs. Uttar Haryana Bijli Vitran Nigam Limited, Bijoy Kumar Dugar Vs. Bidyadhar Dutta, 2006 (3) SCC 242 : (3) Sarla Verma (supra)(4)R.K.Malik Vs. Kiran Pal, AIR 2009 SC 2506 (5)National Insurance Company Limited Vs. Pranay Sethi, AIR 2017 SC 5157 Raj Rani Vs. Oriental Insurance Company Limited, 2009 (13) SCC 654.** We have gone through the decisions in those days referred to herein above and the judgment of Gujarat high court in **Ritaben alias Vanitaben Wd/o. Dipakbhai Hariram and Anr. v/s.Ahmedabad Municipal Transport Service & Anr., 1998 (2) G.L.H. 670,** wherein, the Court has observed as under:

"para-7: It is settled proposition of that the main anxiety of the Tribunal in such case should be to see that the heirs and legal representatives of the deceased are placed, as far as possible, in the same financial position, as they would have been, had there been no accident. It is therefore, an action based on the doctrine of compensation.

para-8: It may also be mentioned that perfect determination of compensation in such tortuous liability is, hardly, obtainable. However, the Tribunal is required to take an overall view of the facts and the relevant circumstances together with the relevant proposition of law and is obliged to award an amount of compensation which is just and reasonable in the circumstances of the case.

para-10: Even in absence of any other evidence an able bodied young man of 25 years, otherwise also presumed to earn an amount of

Rs.1000/- or more per month, on that basis the prospective income could be calculated by doubling the one prevalent on the date of the accident, which is required be divided by half, so as to reach the correct datum figure which is required to be multiplied by appropriate multiplier. Even taking a conservative view in the matter, the deceased would be earning not less than an amount of Rs.1000/- per month and considering the prospective average income of Rs.2000/- and divided by half, would, obviously come to Rs.1500/."

7. Thus even in year of accident, the addition of future prospects was not ruled out, just because tribunals in Uttar Pradesh were not granting future loss, it cannot hold field where the decision of Apex Court is otherwise. The decision of the Apex Court in **New India Assurance Company Ltd. Vs. Urmila Shukla and others, LL 2021 SC 359** will have to be looked into. Therefore, we will have to consider the same in the light of the recent decisions as well as the decisions of the Apex Court prevailing.

8. Even in the earlier days, the factors to be considered for issuing quantum of compensation reads as follows:

i. To give present value, a reasonable deduction or reduction is required as lump sum amount is given at a stretch under the head of prospective economic loss;

ii. The tax element is also required to be considered as observed in the Gourley's case (1956 AC 185).

iii. The resultant impairment/death on the earning capacity of the claimant/claimants .

iv. That the amount of interest is awarded also on the prospective loss of income.

v. That the amount of compensation is not exemplary or punitive but is compensatory.

9. While perusing the judgement, it is very clear that the Tribunal has not considered the judgment of the Apex Court in **Sarla Verma (Supra)** nor has it considered the earlier judgments which were focusing on future loss of income to be paid. We grant 50% addition towards future loss of income as the deceased was below the age of 40 years and was in regular service. As far as multiplier is concerned, it should be considered on the basis of the age of the deceased. We are fortified in our view by the decisions of the Apex Court in **Munna Lal Jain & Anr. Vs. Vipin Kumar Sharma & Ors. 2015 (6) SCALE 552** wherein it has been held that multiplier should be on the basis of the age of the deceased and also the decision in **Sarla Verma (Supra)** and, therefore, we grant multiplier of 17 as the deceased was in the age bracket of 26-30. As far as amount under the head of non-pecuniary damages are concerned, we grant Rs.30,000/- to the mother towards filial consortium.

10. Hence, the total compensation payable to the appellant is computed herein below:

i. Income Rs.15,000/- per month

ii. Percentage towards future prospects : 50% namely Rs.7500/-

iii. Total income : Rs. 15,000 + 7500 = Rs.22,500/-

iv. Income after deduction of 1/2 : Rs.11,250/-

v. Annual income : Rs.11,250 x 12 = Rs.1,35,000/-

vi. Multiplier applicable : 17

vii. Loss of dependency: Rs.1,35,000 x 17 = Rs.22,95,000/-

viii. Amount under non pecuniary damages : Rs.30,000/-

xi. Total compensation : 23,25,000/-

11. As far as issue of rate of interest is concerned, it should be 7.5% in view of the latest decision of the Apex Court in **National**

Insurance Co. Ltd. Vs. Mannat Johal and Others, 2019 (2) T.A.C. 705 (S.C.) wherein the Apex Court has held as under :

"13. The aforesaid features equally apply to the contentions urged on behalf of the claimants as regards the rate of interest. The Tribunal had awarded interest at the rate of 12% p.a. but the same had been too high a rate in comparison to what is ordinarily envisaged in these matters. The High Court, after making a substantial enhancement in the award amount, modified the interest component at a reasonable rate of 7.5% p.a. and we find no reason to allow the interest in this matter at any rate higher than that allowed by High Court."

12. No other grounds are urged orally when the matter was heard.

13. In view of the above, the appeal is partly allowed. Judgment and decree passed by the Tribunal shall stand modified to the aforesaid extent. The respondent-Insurance Company shall deposit the amount within a period of 12 weeks from today with interest at the rate of 7.5% from the date of filing of the claim petition till the amount is deposited. The amount already deposited be deducted from the amount to be deposited.

14. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of **A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442,** the order of investment is not passed because applicants /claimants are neither illiterate or rustic villagers.

15. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansaguti P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291**, total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount without producing the certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 (Smt. Sudesna and others Vs. Hari Singh and another) while disbursing the amount.

16. Fresh Award be drawn accordingly in the above petition by the tribunal as per the modification made herein. The Tribunals in the State shall follow the direction of this Court as herein aforementioned as far as disbursement is concerned, it should look into the condition of the litigant and the pendency of the matter and apply the judgment of **A.V. Padma (supra)**. The same is to be applied looking to the facts of each case.

17. Record and proceedings be sent to the Tribunal. A copy of this order be circulated to the learned Judge, Sri Ajay Kumar Tripathi where he is serving so that he may remain more vigilant in future while considering the judgment of the Apex Court. The judgment in **Sarla Verma (supra)** also held that where a person is salaried, future loss of income should be granted. The Uttar Pradesh Motor Vehicles Rules also stipulates the same.

(2021)11ILR A859
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.09.2021 & 28.09.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE VIVEK VARMA, J.

First Appeal From Order No. 1956 of 2002
with
First Appeal From Order No. 1856 of 2002
with
First Appeal From Order No. 1854 of 2002

Smt. Nirmala Rai & Ors. ...Appellants
Versus
M/s Oswal Agro Mills Ltd., New Delhi & Ors. ...Respondents

Counsel for the Appellants:
Sri Ram Singh

Counsel for the Respondents:
C.S.C., Sri Arvind Kumar, Sri B.B. Jauhari, Sri Saurabh Srivastava

A. Civil Law - Motor Accident Death Claim - Motor Vehicles Act, 1988 – Section 166 - Compensation - Death claim - First Appeal No. 1956 of 2002 - deceased aged about 42 years, having six dependants, income assessed at Rs. 11,950/- per month - *Future prospects* : 30% of the income has to be added under the head of future prospects - *deduction towards personal expenses* of the deceased : it should be ¼ as the deceased had six persons to feed - *Multiplier applicable* : 14 (as the deceased was in the age bracket of 41-45 years) - Amount under non pecuniary heads : Rs.70,000/- + 10% rise every three years rounded as Rs. 1,00,000 - Total compensation : Rs. 20,57,368/- (Para 14)

B. Civil Law - Motor Accident Death Claim - Motor Vehicles Act,1988 - Section 166 - Compensation - Death claim - First Appeal No. 1856 of 2002 - deceased aged about 46 years, having four dependants, income assessed at Rs. 4100 - per month - Future prospects : deceased aged about 46 years, hence 30% of the income has to be added under the head of future prospects - *deduction towards personal expenses* of the deceased : it should be ¼ as the deceased had four persons to feed - *contributory negligence* - 40% of contributory negligence is to deduct from the total compensation (Para 14)

Allowed. (E-5)

Cases Relied on :

1. National Insurance Co. Ltd. Vs Pranay Sethi & ors., 2017 0 Supreme (SC) 1050

2. General Manager, Kerala S.R.T.C., Trivandrum v. Susamma Thomas & ors.,(1994) 2 SCC 176

3. U.P.S.R.T.C. & ors. Vs Trilok Chandra & ors.(1996) 4 SCC 362

4. Sarla Dixit Vs Balwant Yadav AIR 1996 SC 1274

5. Hardeo Kaur Vs Rajasthan State Transport Corporation, 1992 2 SCC 567

6. Puttamma Vs K.L.Narayana Reddy, AIR 2014 SC 706

7. Raman Vs Uttar Haryana Bijli Vitran Nigam Ltd., Bijoy Kumar Dugar Vs Bidyadhar Dutta, 2006 (3) SCC 242

8. R.K.Malik Vs Kiran Pal, AIR 2009 SC 2506

9. National Insurance Co. Ltd. Vs Pranay Sethi, AIR 2017 SC 5157

10. Raj Rani Vs Oriental Insurance Company Limited, 2009 (13) SCC 654

11. Ritaben @ Vanitaben Wd/o. Dipakbhai Hariram & anr. v/s.Ahmedabad Municipal Transport Service & anr.,
1998 (2) G.L.H. 670

12. New India Assurance Co. Ltd. Vs Urmila Shukla & ors., LL 2021 SC 359

13. Malarvizhi & ors Vs United India Insurance Co. td. & anr. 2020 (4) SCC 228

14. National Insurance Co. Ltd. Vs Mannat Johal & ors. 2019 (2) T.A.C. 705 (S.C.)

15. Smt. Hansaguti P. Ladhani Vs The Oriental Insurance Co. Ltd. 2007(2) GLH 291

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
&
Hon'ble Vivek Varma, J.)

1. Since similar questions of fact and law are involved in the present appeals, therefore, they are being heard and decided by common judgment.

2. Heard Sri Ram Singh, learned counsel for the appellants, Sri Saurabh Srivastava, learned counsel for the respondent no. 3, United India Insurance Company Limited, insurer of truck, learned Standing Counsel for the State respondent, Sri B.B. Jauhari, learned counsel for the owner of the truck, Sri Ajay Kumar, learned Standing Counsel in FAFO No. 1854 of 2002 and Sri S.K. Mehrotra, learned Standing Counsel in FAFO No. 1856 of 2002.

3. The present appeals have been filed by the claimants against judgment and award dated 28.05.2002 passed by Motor Accident Claims Tribunal/Additional District Judge, Court No.10, Allahabad, (in short " the Tribunal") in Claim Petitions No. 347 of 1997, 399 of 1997 and 346 of 1997.

4. Brief facts giving rise to the present appeals are that on 22.01.1997 at about 09.00 AM Bashistha Narain Rai, who at the relevant time was posted as Deputy Director in Agriculture Department, Lucknow, along with Imtiyaz Ali, who was posted as Accountant in Agriculture Department, Lucknow, were going to Lucknow from Allahabad by government jeep no. UP 70/B 2416 driven by Shiv Prasad driver. Said jeep head on collided with truck no. UP 27/5513, which was coming from Raibaraeli side near village Arkha, Unchahar. On account of which the driver of jeep Shiv Prasad and Imtiyaz Ali died on the spot while Bashistha Narain Rai received serious injuries. He was treated at PHC, Unchahar, thereafter, he was referred to SGPGI, Lucknow, where he died during the course of medical treatment.

5. The claim petition no. 347 of 1997 has been filed by the legal representatives/dependents of deceased Bashishtha Narain Rai, claim petition no. 399 of 1997 has been filed by the legal representatives/dependents of Shiv Prasad and claim petition no. 346 of 1997 has been filed by the legal representatives/depedents of Imtiyaz Ali.

6. At this stage it is pertinent to state here that against the award dated 28.05.2002 passed by the Tribunal in claim petition no. 346 of 1997 and 347 of 1997, the State of U.P. preferred FAFO No. 1363 of 2015 (State of U.P. through Deputy Director of Agriculture, Allahabad Vs. Shahjhan Begum and others) and FAFO No. 1360 of 2015 (State of U.P. through Deputy Director of Agriculture, Allahabad Vs. Smt. Nirmala Rai and others) before this Court and both the appeals were dismissed on 28.08.2017 by following order:

"After going through the evidence on record and the arguments of the counsel for the parties, we find that the point put forward by the learned Standing Counsel in respect of entire negligence of the truck driver is not established from the record. The evidence on record goes to indicate that there was head on collision between both the vehicles. When there was head on collision, then evidence has to be appreciated. The evidence, which was led, goes to indicate that both the drivers were negligent. The Jeep in question was a Government vehicle. The charge sheet was submitted against the truck driver. It is therefore evident from the conduct of the Investigating Officer that he tried

to give undue protection to the Government vehicle by not filing any charge sheet against the driver of the Jeep. The evidence has been led to the effect that the truck owner is responsible, but looking to the pleading of the parties and the site plan as well as the evidence on record, the Tribunal has come to the conclusion that drivers of both the vehicles were negligent and liability of 40% has been fixed upon the Government (owner of the jeep) whereas 60% liability has been fixed upon the owner of the truck. The argument of the learned Standing Counsel is that no such evidence is available on the record on the basis of which negligence of the driver of the Jeep can be fixed, but in view of the finding recorded by the Tribunal, we are not able to appreciate the aforesaid argument. The Tribunal is the first stage court which records the evidence and is also able to gather evidence from the parties; as to what evidence has been led and what decision should be taken, it is for the Tribunal to decide. The question of contributory negligence being a question of fact, we are not inclined to interfere with the aforesaid finding.

Therefore, both the appeals fail and they are accordingly dismissed."

7. Counsel for the parties submit that the order dated 28.08.2017 passed by this Court has attained finality. Thus, 40% negligence has been fastened upon Shiv Prasad, driver (deceased) of the jeep no. UP 70/B 2416.

8. Counsel for the appellants submits that the Tribunal vide separate judgment and order dated 28.05.2002 has not granted any amount to the claimants towards future loss of income of the deceased, which was required to be granted in view of the decision of the Apex Court in ***National Insurance Company Limited Vs. Pranay Sethi and Others,*** 2017 0 Supreme (SC) 1050. It is further submitted that the amount under non-pecuniary heads granted and the interest awarded by the tribunal are on lower side and requires enhancement.

9. As against this, learned counsel for the Insurance Company has submitted that the award does not require any interference. The Tribunal has not committed any error in granting the compensation as awarded.

10. The accident is not in dispute. The issue of negligence decided by the Tribunal is also not in dispute. The respondent concerned has not challenged the liability imposed on them. The only issue to be decided is, the quantum of compensation awarded.

11. The submission that the Tribunal has not granted any amount towards future loss of income. Grant of future prospects will have to be traced back and reference can be had to the decision in **General Manager, Kerala S.R.T.C., Trivandrum v. Susamma Thomas & Ors.,(1994) 2 SCC 176** wherein addition of future prospects was also calculated. The decision in **Susamma Thomas (Supra)** was referred in **U.P.S.R.T.C. & Ors. v. Trilok Chandra & Ors.(1996) 4 SCC 362** which have been considered by the Apex Court in **Sarla Dixit Versus Balwant Yadav AIR 1996 SC 1274** and the Apex Court has considered decision in **Hardeo Kaur V/s. Rajasthan State Transport Corporation, 1992 2 SCC 567**. The decision in **Sarla Dixit** has been considered to be good law in (1) **Puttamma Vs. K.L.Narayana Reddy, AIR 2014 SC 706 (2) Raman Vs. Uttar Haryana Bijli Vitran Nigam Limited, Bijoy Kumar Dugar Vs. Bidyadhar Dutta, 2006 (3) SCC 242 : (3) Sarla Verma (supra)(4)R.K.Malik Vs. Kiran Pal, AIR 2009 SC 2506 (5)National Insurance Company Limited Vs. Pranay Sethi, AIR 2017 SC 5157 Raj Rani Vs. Oriental Insurance Company Limited, 2009 (13) SCC 654.** We have gone through the decisions in those days referred to herein above and the judgment of Gujarat high court in **Ritaben alias Vanitaben Wd/o. Dipakbhai Hariram and Anr. v/s.Ahmedabad Municipal Transport Service & Anr., 1998 (2)**

G.L.H. 670, wherein, the Court has observed as under:

"para-7: It is settled proposition of that the main anxiety of the Tribunal in such case should be to see that the heirs and legal representatives of the deceased are placed, as far as possible, in the same financial position, as they would have been, had there been no accident. It is therefore, an action based on the doctrine of compensation.

para-8: It may also be mentioned that perfect determination of compensation in such tortuous liability is, hardly, obtainable. However, the Tribunal is required to take an overall view of the facts and the relevant circumstances together with the relevant proposition of law and is obliged to award an amount of compensation which is just and reasonable in the circumstances of the case.

para-10: Even in absence of any other evidence an able bodied young man of 25 years, otherwise also presumed to earn an amount of Rs.1000/- or more per month, on that basis the prospective income could be calculated by doubling the one prevalent on the date of the accident, which is required be divided by half, so as to reach the correct datum figure which is required to be multiplied by appropriate multiplier. Even taking a conservative view in the matter, the deceased would be earning not less than an amount of Rs.1000/- per month and considering the prospective average income of Rs.2000/- and divided by half, would, obviously come to Rs.1500/."

12. Thus even in year 1990 to 2000, the addition of future prospects was not ruled out. Just because tribunals in Uttar Pradesh were not granting future loss, it cannot hold field where the decision of Apex Court is otherwise as demonstrated with decision though of persuasive value of Gujarat High Court referred herein above, therefore, the submission of learned counsel for the respondent that no amount under the head of future loss of income was admissible in those days, will have to be considered. The decision of the Apex Court in **New India Assurance Company Ltd. Vs. Urmila Shukla and others, LL 2021 SC 359** will have to be looked into. Therefore, we will have to consider the same in the light of the recent decisions as well as the decisions of the Apex Court prevailing.

13. In **Malarvizhi & Ors Vs. United India Insurance Company Limited and Another, 2020 (4) SCC 228,** it has been held that Income Tax is the mirror of one's income unless proved otherwise, Even in the earlier days, the factors to be considered for issuing quantum of compensation reads as follows:

i. To give present value, a reasonable deduction or reduction is required as lump sum amount is given at a stretch under the head of prospective economic loss;

ii. The tax element is also required to be considered as observed in the Gourley's case (1956 AC 185).

iii. The resultant impairment/death on the earning capcity of the claimant/claimants .

iv. That the amount of interest is awarded also on the prospective loss of income.

v. That the amount of compensation is not exemplary or punitive but is compensatory.

14. Heard learned counsels for the parties and considered the factual data and following the decision of Apex Court in Pranay Sethi (Supra) and the latest judgment of Apex Court in the matter of Urmila Shukla (Supra), the total compensation payable to the appellants in each of the appeals are computed herein below:

First Appeal No. 1956 of 2002

This Court found that the Tribunal has assessed the income of the deceased to be Rs. 11,950/- per month. To which as the deceased was aged about 42 years, hence 30% of the income has to be added under the head of future

prospects. As far as deduction towards personal expenses of the deceased is concerned, it should be ¼ as the deceased had six persons to feed. Hence total compensation payable to the appellant is computed herein below:

i. Income Rs. 11,950/-

ii. Percentage towards future prospects : 30% namely Rs. 3585/-

iii. Total income : Rs. 11,950 + 3585 = Rs. 15,535/-

iv. Income after deduction of 1/4th : Rs. 11,651/-

v. Annual income : Rs. 11,651 x 12 = Rs. 1,39,812/-

vi. Multiplier applicable : 14 (as the deceased was in the age bracket of 41-45 years)

vii. Loss of dependency: Rs. 1,39,812 x 14 = Rs. 19,57,368/-

viii. Amount under non pecuniary heads : Rs.70,000/- + 10% rise every three years rounded as Rs. 1,00,000/-

ix. Total compensation : Rs. 20,57,368/-

First Appeal No. 1856 of 2002

This Court found that the Tribunal has assessed the income of the deceased to be Rs. 4100/- per month. To which as the deceased was aged about 46 years, hence 30% of the income has to be added under the head of future prospects. As far as deduction towards personal expenses of the deceased is concerned, it should be ¼ as the deceased had four persons to feed. Further 40% of contributory negligence is to deduct from the total compensation. Hence total compensation payable to the appellant is computed herein below:

i. Income Rs. 4100/-

ii. Percentage towards future prospects : 30% namely Rs. 1230/-

iii. Total income : Rs. 4100 + 1230 = Rs. 5330/-

iv. Income after deduction of 1/4th : Rs. 3998/-

v. Annual income : Rs. 3998 x 12 = Rs. 47,976/-

vi. Multiplier applicable : 13 (as the deceased was in the age bracket of 46-50 years)

vii. Loss of dependency: Rs. 47976 x 13 = Rs. 6,23,688/-

viii. Amount under non pecuniary heads : Rs.70,000/- + 10% rise every three years rounded as Rs. 1,00,000/-

ix. Total compensation : Rs. 6,23,688/- + 1,00,000/- = Rs. 7,23,688/-

x. Deduction of amount of contributory negligence: 40% = Rs. 2,89,475/-

xi. Amount payable to the claimants: Rs. 7,23,688/- - Rs. 2,89,475/- = Rs. 4,34,213/-

First Appeal No. 1854 of 2002

This Court found that the Tribunal has assessed the income of the deceased to be Rs. 6700/- per month. To which as the deceased was aged about 53 years, hence 20% of the income has to be added under the head of future prospects. As far as deduction towards personal expenses of the deceased is concerned, it should be ¼ as the deceased had five persons to feed. Hence total compensation payable to the appellant is computed herein below:

i. Income Rs. 6700/-

ii. Percentage towards future prospects : 15% namely Rs. 1005/-

iii. Total income : Rs. 6700 + 1005 = Rs. 7705/-

iv. Income after deduction of 1/4th : Rs. 5778/-

v. Annual income : Rs. 5778 x 12 = Rs. 69,336/-

vi. Multiplier applicable : 11 (as the deceased was in the age bracket of 51-55 years)

vii. Loss of dependency: Rs. 69,336 x 11 = Rs. 7,62,696/-

viii. Amount under non pecuniary heads : Rs.70,000/- + 10% rise every three years rounded as Rs. 1,00,000/-

ix. Total compensation : Rs. 7,62,696/- + 1,00,000/- = Rs. 8,62,696/-

12. As far as issue of rate of interest is concerned, it should be 7.5% in view of the latest decision of the Apex Court in ***National***

Insurance Co. Ltd. Vs. Mannat Johal and Others, 2019 (2) T.A.C. 705 (S.C.) wherein the Apex Court has held as under :

"13. The aforesaid features equally apply to the contentions urged on behalf of the claimants as regards the rate of interest. The Tribunal had awarded interest at the rate of 12% p.a. but the same had been too high a rate in comparison to what is ordinarily envisaged in these matters. The High Court, after making a substantial enhancement in the award amount, modified the interest component at a reasonable rate of 7.5% p.a. and we find no reason to allow the interest in this matter at any rate higher than that allowed by High Court."

15. No other grounds are urged orally when the matter was heard finally.

16. In view of the above, the appeal is partly allowed. Judgment and decree passed by the Tribunal shall stand modified to the aforesaid extent. The respondent-Insurance Company shall deposit the amount of compensation as per the ratio fixed by the tribunal along with additional amount within a period of 12 weeks from today with interest at the rate of 7.5% from the date of filing of the claim petition till the amount is deposited. The amount already deposited be deducted from the amount to be deposited. The state shall also deposit their share as per award of tribunal.

17. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of ***A.V. Padma V/s. Venugopal,*** Reported in 2012 (1) GLH (SC), 442, the order of investment is not passed because applicants /claimants are neither illiterate or restic villagers.

18. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of ***Smt. Hansaguti P. Ladhani v/s The Oriental Insurance Company Ltd.***, reported in 2007(2) GLH 291, total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount without producing the certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 (Smt. Sudesna and others Vs. Hari Singh and another) while disbursing the amount.

19. Fresh Award be drawn accordingly as per modification made herein.

In re: Civil Misc. Correction Application No. 4 of 2021

Heard learned counsel for the parties.

In the sixteenth paragraph of the judgment dated 06.09.2021, in the third line after the word 'amount' the words *"of compensation as per the ratio fixed by the tribunal."*, and in the seventh line after the 'full stop' the sentence "*The State shall also deposit their share as per award of tribunal.*" shall be read.

The correction application is accordingly allowed.

(2021)11ILR A865
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.09.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE SUBHASH CHAND, J.

First Appeal From Order No. 3018 of 2014

Rajesh Singh & Anr. ...Appellants
Versus
Margub Ali & Ors. ...Respondents

Counsel for the Appellants:
Sri V.S. Rajpoot, Sri H.M. Srivastava, Sri Ram Shiromani Yadav, Sri S.D. Ojha

Counsel for the Respondents:
Sri Nagendra Kr. Srivastava, Sri Sanjay Singh

Civil Law – Motor Accident Death Claim – Motor Vehicles Act,1988 – Section 166 - Enhancement of Compensation - Wife of claimant, Smt. Rita Singh posted as Assistant Teacher - On 19.2.2013, she was travelling as a pillion rider on motor cycle, when a truck being driven rashly and negligently dashed the motorcycle as a result of which Smt. Rita Singh died on the spot itself - Claimant sought enhancement of compensation on ground that as the deceased was below 40 years and salaried person, 50 per cent should have been added to her income under the head of future prospect, amount under the head of pecuniary loss ought to have been awarded & Interest is to be enhanced - Insurance company resisted claim on ground that husband cannot be considered to be dependent on his wife, he would have his own earnings - *Held* - Court fixed income of the deceased at Rs.25,000 - Added 50% under the head of Future Prospect - Deduction of ½ towards personal expenses as there was only one dependent, i.e., minor son - As the deceased was 36 years of age, multiplier of 16 and not 17 applied - Husband and son lost their wife and mother, hence, Rs.70,000/- awarded towards non pecuniary damages - Court found Chandra Bhan, driver of the motorcycle to be 25% negligent therefore deducted 25% from the amount payable by the Insurance Company - Compensation payable to the claimants after deduction of 25% of amount would be Rs.27,52,500 - rate of interest should be 7.5% from the date of filing of the claim petition till the amount is deposited (Para 13, 14)

Allowed. (E-5)

Cases Relied on :

1. Vimal Kanwar & ors. Vs Kishore Dan & ors., AIR 2013 SC 3830

2. Sunil Sharma Vs Bachitar Singh, Laws (SC)-2011-2-73

3. National Insurance Co. Ltd. Vs Pranay Sethi & ors., 2017 0 Supreme (SC) 1050

4. Khenyei Vs New India Assurance Co. Ltd. & ors., 2015 LawSuit (SC) 469

5. Pramodkumar Rasikbhai Jhaveri Vs Karmasey Kunvargi Tak dt 05.08.2002 Appeal (Civil) No. 5436 of 1994

6. Raj Rani & ors. Vs Oriental Insurance Company Limited & ors. dt 06.05.2009 in Civil Appeal No. 33-3318 of 2009 (Arising out of SLP (C) Nos. 2792-27793 of 2008)

7. Archit Saini Vs Oriental Insurance Company Ltd.& ors., 2018) AIR (SC) 1143

8. National Insurance Co. Ltd. Vs Mannat Johal & ors., 2019 (2) T.A.C. 705 (S.C.)

9. A.Vs Padma Vs Venugopal 2012 (1) GLH (SC), 442

10. Smt. Hansaguti P. Ladhani Vs The Oriental Insurance Company Ltd., 2007(2) GLH 291

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
&
Hon'ble Subhash Chand, J.)

1. Heard Sri S.D. Ojha, Advocte, holding brief of Sri Ram Shiromani Yadav, learned

counsel for the appellants, Sri N.K. Srivastava, learned counsel for the respondent and perused the judgment and order impugned.

2. This appeal, at the behest of the claimants, challenges the judgment and award dated 7.8.2014 passed by Motor Accident Claims Tribunal/Special Judge (E.C. Act), Rampur (hereinafter referred to as 'Tribunal') in M.A.C.No.50 of 2013 awarding a sum of Rs.1,43,616/- with interest at the rate of 6% as compensation.

3. Facts in brief as per claim petition are that Smt. Rita Singh wife of claimant, namely, Rajesh Singh was posted as Assistant Teacher in Primary School, Mohanpura, Police Station Tanda, District Rampur. On 19.2.2013, she was travelling as a pillion rider on motor cycle bearing Registration No. UP 22 L 7256, which was being driven by Sri Chandrabhan Singh. When they reached Kharij brick-kiln, driver of a truck bearing Registration No. U.P. 21 N. 1312 driving rashly and negligently dashed said motorcycle as a result of which Smt. Rita Singh sustained grievous injury and later on she died on the spot itself. Chandrabhan Singh also sustained injuries and motorcyle also got damaged. Report of the accident was registered as Crime No. 112 of 2013 at Police Station Chowki Saidnagar under Sections 279, 304 A I.P.C.

4. The Tribunal seems to have deducted dearness allowance and has considered the income to be Rs.10,560/- which, according to Sri Ojha should not have been done in view of the Judgment in **Vimal Kanwar and others v. Kishore Dan and others, AIR 2013 SC 3830 and Sunil Sharma Vs. Bachitar Singh, Laws (SC)-2011-2-73.** According to him, as the deceased was below the 40 years and salaried person, 50 per cent should have been added to her income under the head of future prospect in view of the decision in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050.** It is submitted by counsel for the appellants that no amount under the head of pecuniary loss has been awarded by the Tribunal. Interest is also required to be enhanced.

5. It is submitted by the learned counsel, Sri N.K. Srivastava ably assisted by Anubha Gupta that husband cannot be considered to be dependent on his wife. He would have his own earnings. In the pleadings also it is not shown that he was not having his own income. This submission is made, we think, for deduction of personal expenses of the deceased. Learned counsel for the respondent contends that the driver of the motorcycle, namely, Chandra Ban is third party. The motorcycle belonged to appellant no.1, namely, Rajesh Singh. It is further submitted that finding of fact of the Tribunal cannot be found fault with as the motor cyle was going ahead of the truck.

6. Sri Ojha submitted that the finding of fact recorded by the Tribunal that motorcyclist was 90% negligent cannot be accepted. He further submitted that even if it is assumed that the driver Chandra Bhan Singh was negligent qua the appellants it would be a case of composite negligence. In support of his submissions, he relied upon the decision of the Apex Court in the case of T.O. Anthony Vs. Karvarnan and others, 2008 (3) TAC 193 (SC) and **Khenyei Vs. New India Assurance Company Limited & Others, 2015 LawSuit (SC) 469** to contend that no amount can be deducted from the compensation awarded from the legal heirs of the deceased, who was not co-author of the accident.

7. The term negligence means failure to exercise care towards others which a reasonable and prudent person would in a circumstance or taking action which such a reasonable person would not. Negligence can be both intentional or

accidental which is normally accidental. More particularly, it connotes reckless driving and the injured must always prove that the either side is negligent. If the injury rather death is caused by something owned or controlled by the negligent party then he is directly liable otherwise the principle of "res ipsa loquitur" meaning thereby "the things speak for itself" would apply.

8. The principle of contributory negligence has been discussed time and again. A person who either contributes or is author of the accident would be liable for his contribution to the accident having taken place.

9. The Division Bench of this Court in First Appeal From Order No. 1818 of 2012 (Bajaj Allianz General Insurance Co.Ltd. Vs. Smt. Renu Singh And Others) decided on 19.7.2016 has held as under :

"16. Negligence means failure to exercise required degree of care and caution expected of a prudent driver. Negligence is the omission to do something which a reasonable man, guided upon the considerations, which ordinarily regulate conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Negligence is not always a question of direct evidence. It is an inference to be drawn from proved facts. Negligence is not an absolute term, but is a relative one. It is rather a comparative term. What may be negligence in one case may not be so in another. Where there is no duty to exercise care, negligence in the popular sense has no legal consequence. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which would be reasonably foreseen likely to caused physical injury to person. The degree of care required, of course, depends upon facts in each case. On these broad principles, the negligence of drivers is required to be assessed.

17. It would be seen that burden of proof for contributory negligence on the part of deceased has to be discharged by the opponents. It is the duty of driver of the offending vehicle to explain the accident. It is well settled law that at intersection where two roads cross each other, it is the duty of a fast moving vehicle to slow down and if driver did not slow down at intersection, but continued to proceed at a high speed without caring to notice that another vehicle was crossing, then the conduct of driver necessarily leads to conclusion that vehicle was being driven by him rashly as well as negligently.

18. 10th Schedule appended to Motor Vehicle Act contain statutory regulations for driving of motor vehicles which also form part of every Driving License. Clause-6 of such Regulation clearly directs that the driver of every motor vehicle to slow down vehicle at every intersection or junction of roads or at a turning of the road. It is also provided that driver of the vehicle should not enter intersection or junction of roads unless he makes sure that he would not thereby endanger any other person. Merely, because driver of the Truck was driving vehicle on the left side of road would not absolve him from his responsibility to slow down vehicle as he approaches intersection of roads, particularly when he could have easily seen, that the car over which deceased was riding, was approaching intersection.

19. In view of the fast and constantly increasing volume of traffic, motor vehicles upon roads may be regarded to some extent as coming within the principle of liability defined in ***Rylands V/s. Fletcher, (1868) 3 HL (LR) 330.*** *From the point of view of pedestrian, the roads of this country have been rendered by the use of motor vehicles, highly dangerous. 'Hit and run' cases where drivers of motor vehicles who have caused accidents, are unknown. In fact such cases are increasing in number. Where a pedestrian without negligence on his part is injured or killed by a motorist, whether negligently or not, he or his legal*

representatives, as the case may be, should be entitled to recover damages if principle of social justice should have any meaning at all.

20. These provisions (sec.110A and sec.110B of Motor Act, 1988) are not merely procedural provisions. They substantively affect the rights of the parties. The right of action created by Fatal Accidents Act, 1855 was 'new in its species, new in its quality, new in its principles. In every way it was new. The right given to legal representatives under Act, 1988 to file an application for compensation for death due to a motor vehicle accident is an enlarged one. This right cannot be hedged in by limitations of an action under Fatal Accidents Act, 1855. New situations and new dangers require new strategies and new remedies.

21. In the light of the above discussion, we are of the view that even if courts may not by interpretation displace the principles of law which are considered to be well settled and, therefore, court cannot dispense with proof of negligence altogether in all cases of motor vehicle accidents, it is possible to develop the law further on the following lines; when a motor vehicle is being driven with reasonable care, it would ordinarily not meet with an accident and, therefore, rule of res-ipsa loquitor as a rule of evidence may be invoked in motor accident cases with greater frequency than in ordinary civil suits ***(per three-Judge Bench in Jacob Mathew V/s. State of Punjab, 2005 0 ACJ(SC) 1840).***

22. By the above process, the burden of proof may ordinarily be cast on the defendants in a motor accident claim petition to prove that motor vehicle was being driven with reasonable care or that there is equal negligence on the part the other side."

emphasis added

10. The Apex Court in **Khenyei Vs. New India Assurance Company Limited & Others, 2015 LawSuit (SC) 469** has held as under:

"4. It is a case of composite negligence where injuries have been caused to the claimants by combined wrongful act of joint tort feasors. In a case of accident caused by negligence of joint tort feasors, all the persons who aid or counsel or direct or join in committal of a wrongful act, are liable. In such case, the liability is always joint and several. The extent of negligence of joint tort feasors in such a case is immaterial for satisfaction of the claim of the plaintiff/claimant and need not be determined by the by the court. However, in case all the joint tort feasors are before the court, it may determine the extent of their liability for the purpose of adjusting inter-se equities between them at appropriate stage. The liability of each and every joint tort feasor vis a vis to plaintiff/claimant cannot be bifurcated as it is joint and several liability. In the case of composite negligence, apportionment of compensation between tort feasors for making payment to the plaintiff is not permissible as the plaintiff/claimant has the right to recover the entire amount from the easiest targets/solvent defendant.

14. There is a difference between contributory and composite negligence. In the case of contributory negligence, a person who has himself contributed to the extent cannot claim compensation for the injuries sustained by him in the accident to the extent of his own negligence;whereas in the case of composite negligence, a person who has suffered has not contributed to the accident but the outcome of combination of negligence of two or more other persons. This Court in ***T.O. Anthony v. Karvarnan & Ors. [2008 (3) SCC 748]*** *has held that in case of contributory negligence, injured need not establish the extent of responsibility of each wrong doer separately, nor is it necessary for the court to determine the extent of liability of each wrong doer separately. It is only in the case of contributory negligence that the injured himself has contributed by his negligence in the accident. Extent of his negligence is required to be determined as damages recoverable by him in respect of the injuries have to be reduced in*

proportion to his contributory negligence. The relevant portion is extracted hereunder :

"6. 'Composite negligence' refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrong doers, it is said that the person was injured on account of the composite negligence of those wrong-doers. In such a case, each wrong doer, is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrong-doer separately, nor is it necessary for the court to determine the extent of liability of each wrong-doer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence of the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stands reduced in proportion to his contributory negligence.

7. Therefore, when two vehicles are involved in an accident, and one of the drivers claims compensation from the other driver alleging negligence, and the other driver denies negligence or claims that the injured claimant himself was negligent, then it becomes necessary to consider whether the injured claimant was negligent and if so, whether he was solely or partly responsible for the accident and the extent of his responsibility, that is his contributory negligence. Therefore where the injured is himself partly liable, the principle of 'composite negligence' will not apply nor can there be an automatic inference that the negligence was 50:50 as has been assumed in this case. The Tribunal ought to have examined the extent of contributory negligence of the appellant and thereby avoided confusion between composite negligence and contributory negligence. The High Court has failed to correct the said error."

This Court in ***Challa Bharathamma &Nanjappan (supra)*** *has dealt with the breach of policy conditions by the owner when the insurer was asked to pay the compensation fixed by the tribunal and the right to recover the same was given to the insurer in the executing court concerned if the dispute between the insurer and the owner was the subject-matter of determination for the tribunal and the issue has been decided in favour of the insured. The same analogy can be applied to the instant cases as the liability of the joint tort feasor is joint and several. In the instant case, there is determination of inter se liability of composite negligence to the extent of negligence of 2/3rd and 1/3rd of respective drivers. Thus, the vehicle ? trailor-truck which was not insured with the insurer, was negligent to the extent of 2/3rd. It would be open to the insurer being insurer of the bus after making payment to claimant to recover from the owner of the trailor-truck the amount to the aforesaid extent in the execution proceedings. Had there been no determination of the inter se liability for want of evidence or other joint tort feasor had not been impleaded, it was not open to settle such a dispute and to recover the amount in execution proceedings but the remedy would be to file another suit or appropriate proceedings in accordance with law.*

What emerges from the aforesaid discussion is as follows :

7. (i) In the case of composite negligence, plaintiff/claimant is entitled to sue both or any one of the joint tort feasors and to recover the entire compensation as liability of joint tort feasors is joint and several.

8. (ii) In the case of composite negligence, apportionment of compensation between two tort feasors vis a vis the plaintiff/claimant is not permissible. He can

recover at his option whole damages from any of them.

9. (iii) In case all the joint tort feasors have been impleaded and evidence is sufficient, it is open to the court/tribunal to determine inter se extent of composite negligence of the drivers. However, determination of the extent of negligence between the joint tort feasors is only for the purpose of their inter se liability so that one may recover the sum from the other after making whole of payment to the plaintiff/claimant to the extent it has satisfied the liability of the other. In case both of them have been impleaded and the apportionment/ extent of their negligence has been determined by the court/tribunal, in main case one joint tort feasor can recover the amount from the other in the execution proceedings.

10. (iv) It would not be appropriate for the court/tribunal to determine the extent of composite negligence of the drivers of two vehicles in the absence of impleadment of other joint tort feasors. In such a case, impleaded joint tort feasor should be left, in case he so desires, to sue the other joint tort feasor in independent proceedings after passing of the decree or award."

emphasis added

11. The decision of the Apex Court in **Khenyei (Supra)** has laid down one further aspect about considering the negligence more particularly composite and contributory negligence.

12. The judgments of **Pramodkumar Rasikbhai Jhaveri Vs. Karmasey Kunvargi Tak and others decided on 05.08.2002 in Appeal (Civil) No. 5436 of 1994, (2) Raj Rani and others Vs. Oriental Insurance Company Limited and others decided on 06.05.2009** in Civil Appeal No. 33-3318 of 2009 (Arising out of SLP (C) Nos. 2792-27793 of 2008) and **(3) Archit Saini Vs. Oriental Insurance Company Ltd. And others, 2018) AIR (SC) 1143,** will also permit us to revaluate the percentage of the negligence of the deceased. The Tribunal has held that the deceased too was negligent in driving the vehicle.

13. Having heard both the counsel while going through the site plan, the magnitude of the accident and the principle, which is enunciated time and again, we are of the view that the driver of motor vehicle has to be more cautious on the Highway. The driver of the truck has not stepped into the witness box. Charge sheet was laid down against him. There was instantaneous death of the deceased on the spot which shows he tried to overtake a motor cycle. Looking to the totality of facts and circumstances, we hold Chandra Bhan, driver of the motorcycle to be 25% negligent. Judgment of Khenyei **(supra)** would give recovery right of 25% from the driver or owner. In our case, owner is appellant no.1 himself, hence, instead of going into the fresh cases of recovery, it would be better for us to deduct of 25% from the amount payable by the Insurance Company.

14. This takes us towards consideration of compensation amount to be awarded in the facts of the present case. We may fix income of the deceased as Rs.25,000/- as out of Rs.26468 certain amount has to be deducted to which 50% requires to be added under the head of Future Prospect. Deduction of is required towards personal expenses as there was only one dependent, ie., minor son. As the deceased was 36 years of age, multiplier of 16 and not 17 would apply . Husband and son have lost their wife and mother, hence, Rs.70,000/- is awarded towards non pecuniary damages.

15. Hence, the total compensation payable to the appellants in view of the decision of the Apex Court in Pranay Sethi **(Supra)** is computed herein below:

i. Income Rs.25,000 p.m.

ii. Percentage towards future prospects : Rs.12,500/-

iii. Total income : Rs.25,000/- +Rs.12,500/- = Rs.37,500/-

iv. Income after deduction of towards personal expenses : Rs.18,750/-

v. Annual income : Rs.18,750/- x 12 = Rs.2,25,000/-

vi. Multiplier applicable : 16

vii. Loss of dependency: Rs.2,25,000/- x 16 = Rs.36,00,000/-

viii. Amount under non pecuniary heads : Rs.70,000/-

ix. Total compensation : Rs.36,70,000/-

16. Compensation payable to the claimants after deduction of 25% of amount would be Rs.27,52,500/-.

17. As far as issue of rate of interest is concerned, it should be 7.5% in view of the latest decision of the Apex Court in **National Insurance Co. Ltd. Vs. Mannat Johal and Others, 2019 (2) T.A.C. 705 (S.C.)** wherein the Apex Court has held as under :

"13. The aforesaid features equally apply to the contentions urged on behalf of the claimants as regards the rate of interest. The Tribunal had awarded interest at the rate of 12% p.a. but the same had been too high a rate in comparison to what is ordinarily envisaged in these matters. The High Court, after making a substantial enhancement in the award amount, modified the interest component at a reasonable rate of 7.5% p.a. and we find no reason to allow the interest in this matter at any rate higher than that allowed by High Court."

18. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of **A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442,** the order of investment is not passed because applicants /claimants are neither illiterate or rustic villagers.

19. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansaguti P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291,** total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount without producing the certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 (Smt. Sudesna and others Vs. Hari Singh and another) while disbursing the amount.

20. In view of the above, the appeal is **partly allowed.** Judgment and decree passed by the Tribunal shall stand modified to the aforesaid extent. The respondent-Insurance Company shall deposit the amount within a period of 12 weeks from today with interest at the rate of 7.5% from the date of filing of the claim petition till the amount is deposited. The amount already deposited be deducted from the amount to be deposited. Amount for the minor child be kept in fixed deposit till he attains majority.

21. Fresh Award be drawn accordingly in the above petition by the tribunal as per the modification made herein. The Tribunals in the

State shall follow the direction of this Court as herein aforementioned as far as disbursement is concerned, it should look into the condition of the litigant and the pendency of the matter and not blindly apply the judgment of **A.V. Padma (supra).** The same is to be applied looking to the facts of each case.

22. Record be sent back to the Tribunal.

(2021)11ILR A872
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.10.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE SUBHASH CHAND, J.

First Appeal From Order No. 3065 of 2013

Smt. Sita Rai & Ors. ...Appellants
Versus
The NIACL, Ghazipur & Ors. ...Respondents

Counsel for the Appellants:
Sri Satya Prakash Pandey, Sri Shashi Kant Shukla

Counsel for the Respondents:
Sri Nishant Mehrotra

Civil Law - Accidental Death - Motor Accident Claim - Motor Vehicles Act ,1988 - Section 168 - Uttar Pradesh Motor Vehicles Rules, 1988 - Enhancement of Compensation - deceased below the age of 60 years & was in permanent job, survived by two major sons & father - net income of the deceased, after the deduction of income tax, was Rs.7,49,562/- per annum, as per ITR for the year in which accident took place - Tribunal illegally held that since deceased was to retire in near future so his income should be considered at Rs.3,000 per month - *future loss of income* - in view of 1988 Rules court granted 15% addition towards future loss of income as the deceased was below the age of 60 years and was in permanent job - *deductions towards personal expenses* - deductions towards personal expenses would be 1/2 as the deceased was survived by two major sons & father who cannot be considered to be dependent upon the deceased - *Pension* - pension cannot be deducted from the amount admissible to the legal heirs - *Multiplier* - multiplier would be 9 as the deceased was in the age bracket of 56-60 on the date of accident - *non-pecuniary damages* - amount under the head of non-pecuniary damages Rs. 70,000/- + 10% increase in every three years - Court granted grant Rs. 80,000/- under the head of non pecuniary damages - Total compensation of Rs.39,59,000/- awarded with - Insurance Company directed to deposit the amount within a period of 12 weeks with interest at the rate of 7.5% from the date of filing of the claim petition till the amount is deposited - order of investment was not passed because applicants /claimants are neither illiterate or rustic villagers - total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis - if interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source (Para 10, 11, 13, 14, 19)

Allowed. (E-5)

List of Cases cited :

1. Vimal Kanwar & ors. Vs. Kishore Dan & ors., (2013) 7 SCC 476

2. Rajesh Singh & anr. Vs. Margub Ali & ors. First Appeal From Order No.3010 of 2014 decided on 27.9.2021

3. Sarla Verma & ors. Vs. Delhi Transport Corporation & anr., 2009 LawSuit (SC) 613

4. National Insurance Company Limited Vs. Pranay Sethi & ors., 2017 0 Supreme (SC) 1050

5. Smt. Parvati @ Baby & ors. Vs. Hollu Hallappa, 1999 ACJ 344

6. Subhadra Pandey Vs. Siddarth Agrawal First Appeal From Order No.1237 of 2018 decided on 7.12.2020

7. National Insurance Co. Ltd. Vs. Mannat Johal & ors., 2019 (2) T.A.C. 705 (S.C.)

8. A.V. Padma Vs Venugopal, 2012 (1) GLH (SC), 442,

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
&
Hon'ble Subhash Chand, J.)

1. Heard Sri Shashi Kant Shukla, learned Advocate assisted by Sri Satya Prakash Pandey, learned counsel for the appellant and Sri Nishant Mehrotra, learned counsel for respondent-Insurance Company.

2. By way of this appeal, the claimants have challenged the judgment and award dated 29.7.2013 passed by Motor Accident Claims Tribunal/Special Judge (SC/ST Act) Ghazipur (hereinafter referred to as 'Tribunal') in M.A.C.P. No.26 of 2011 awarding sum of Rs.3,26,440/- as compensation to the claimants with interest at the rate of 6%.

3. We have not gone into the factual data except as important for our purpose namely compensation awarded. The accident is not in dispute. The deceased died out of accidental injuries is not in dispute. The Insurance Company has not challenged the liability imposed on them. Hence, the dispute involved in this appeal relates to the correctness in the calculation of compensation payable to the claimants. The details of facts except for deciding compensation are not narrated.

4. It is submitted by learned counsel for the appellants that the Tribunal has committed grave error in considering the income of the deceased who was a salaried person aged 59 years which is evident from the record. Learned counsel for the appellant has submitted that the net income of the deceased was Rs.7,49,562/- per annum which was after the deduction of income tax.

5. Learned counsel for the appellants has submitted that pension should not have been deducted from the compensation to be paid to the legal heirs of the deceased and has relied on the decisions in **Vimal Kanwar and Others Vs. Kishore Dan and others, (2013) 7 SCC 476** and decision of this Court in First Appeal From Order No.3010 of 2014 **(Rajesh Singh and Another Vs. Margub Ali and Others)**, decided on 27.9.2021.

6. It is further submitted that the Tribunal has not granted any amount under the head of future loss of income which should be granted in view of the decisions of the Apex Court in **Sarla Verma and others Vs. Delhi Transport Corporation and Another, 2009 LawSuit (SC) 613 and National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050.**

7. The next contention is that the multiplier of 5 granted by the Tribunal is bad and it should be 9 in view of the decision of the Apex Court in **Sarla Verma (Supra)** as the deceased was in the age bracket of 56-60 years. It is submitted by learned counsel for the appellants that the tribunal has granted only 10,000/- under the head of non-pecuniary damages which requires enhancement in view of the decision of the Apex Court in **Pranay Sethi (Supra)**. It is also submitted by learned counsel for the appellants that the interest awarded by the Tribunal is on the lower side and requires to be enhanced. Learned counsel for the appellant has submitted that deduction towards personal expenses of the deceased should be 1/4th.

8. Sri Nishant Mehrotra, learned counsel for the respondent-Insurance Company has submitted that Tribunal has not committed any error and that pension is paid to the widow who has also now passed away cannot be considered to be loss to the estate. It is further submitted by learned counsel for the respondent that the

multiplier granted by the Tribunal and the compensation awarded by the Tribunal does not warrant any change.

9. It is also submitted by learned counsel for the respondent that the deductions towards personal expenses of the deceased would be 1/2 as the deceased was survived by two major sons and father who are not the dependent on the deceased. The widow also passed away during the pendency of the appeal.

10. Having heard the arguments advanced by learned counsel for the parties, we accepts the submission of learned counsel for the appellant as far as income of the deceased is concerned. The income of the deceased was Rs. 7,49,562/- after the deduction of income tax as the per the Income Tax Return for the year in which the accident took place. The decision in **Vimal Kanwar (Supra)** does not permit us to accept the finding of the Tribunal as far as income is concerned as the Tribunal held that the deceased was to retire in near future so his income should be considered at Rs.3,000/- per month. Therefore, we consider the income of the deceased to be Rs.7,49.562/- which we round up to Rs.7,50,000/- per annum.

11. As far as future loss of income is concerned, in view of Uttar Pradesh Motor Vehicles Rules, 1988, we grant 15% addition towards future loss of income as the deceased was below the age of 60 years and was in permanent job.

12. We would hasten to fall back on the decision in **Smt. Parvati @ Baby and Others Vs. Hollu Hallappa, 1999 ACJ 344 &** decision of this Court in First Appeal From Order No.1237 of 2018 **(Subhadra Pandey Vs. Siddarth Agrawal)** decided on 7.12.2020 wherein it has been categorically held that pension cannot be deducted from the amount admissible to the legal heirs.

13. We are unable to accept the submission of learned counsel for the respondent that the multiplier is just and proper. It would be 9 in view of decision in **Sarla Verma (Supra)** as the deceased was in the age bracket of 56-60, even if we take the age of the deceased on the date of accident. As far as amount under the head of non-pecuniary damages are concerned, it should be Rs.70,000/- + 10% increase in every three years in view of the decision of the Apex Court in **Pranay Sethi (Supra)**. Therefore, we would grant Rs.80,000/- under the head of non pecuniary damages.

14. After correcting the manuscripts, we find that sons of the deceased were major even at the time of accident and they cannot be considered dependent upon the deceased. We are in agreement with learned counsel for the respondent. The widow of the deceased has passed away. Both the sons of the deceased was major at the time of accident. The father cannot be said to be dependent as per Motor Vehicles Act, hence, 1/2 has to be deducted as personal expences of the deceased.

15. Hence, the total compensation payable to the appellant is computed herein below:

i. Annual Income : Rs.7,50,000/-

ii. Percentage towards future prospects : 15% namely Rs.1,12,500/-

iii. Total income : Rs. 7,50,000 + 1,12,500 = Rs.8,62,500/-

iv. Income after deduction of 1/2 towards personal expenses of the deceased : Rs.4,31,000/- (round figure)

v. Multiplier applicable : 9

vi. Loss of dependency: Rs.4,31,000 x 9 = Rs.38,79,000/-

vii. Amount under non pecuniary damages : Rs.80,000/-

viii. Total compensation : 39,59,000/-

16. As far as issue of rate of interest is concerned, it should be 7.5% in view of the latest decision of the Apex Court in **National Insurance Co. Ltd. Vs. Mannat Johal and Others, 2019 (2) T.A.C. 705 (S.C.)** wherein the Apex Court has held as under :

"13. The aforesaid features equally apply to the contentions urged on behalf of the claimants as regards the rate of interest. The Tribunal had awarded interest at the rate of 12% p.a. but the same had been too high a rate in comparison to what is ordinarily envisaged in these matters. The High Court, after making a substantial enhancement in the award amount, modified the interest component at a reasonable rate of 7.5% p.a. and we find no reason to allow the interest in this matter at any rate higher than that allowed by High Court."

17. No other grounds are urged orally when the matter was heard.

18. In view of the above, the appeal is partly allowed. Judgment and decree passed by the Tribunal shall stand modified to the aforesaid extent. The respondent-Insurance Company shall deposit the amount within a period of 12 weeks from today with interest at the rate of 7.5% from the date of filing of the claim petition till the amount is deposited. The amount already deposited be deducted from the amount to be deposited. The Insurance Company has been given recovery right by the Tribunal. We do not disturb the same as the owner of truck is not before us.

19. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of **A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442**, the order of investment is not passed because applicants /claimants are neither illiterate or rustic villagers.

20. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansaguti P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291,** total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount without producing the certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 (Smt. Sudesna and others Vs. Hari Singh and another) while disbursing the amount.

21. Fresh Award be drawn accordingly in the above petition by the tribunal as per the modification made herein. The Tribunals in the State shall follow the direction of this Court as herein aforementioned as far as disbursement is concerned, it should look into the condition of the litigant and the pendency of the matter and judgment of **A.V. Padma (supra)**. The same is to be applied looking to the facts of each case.

22. Record and proceedings be sent to the Tribunal.

(2021)11ILR A876
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.09.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE SUBHASH CHAND, J.

First Appeal From Order No. 3264 of 2014

Girish Kumar Gupta ...Appellant
Versus
Brijesh Tyagi & Ors. ...Respondents

Counsel for the Appellant:
Sri K.P. Pandey, Sri K.C. Pandey

Counsel for the Respondents:
Sri Nagendra Kr. Srivastava, Sri Saral Srivastava, Sri V.K. Maurya, Sri V.K. Maurya

Civil Law - Accidental Injury - Motor Accident Claim - Motor Vehicles Act ,1988 - Section 166 - appellant a policeman sustained grievous head injury, when a motorcycle dashed him from behind, accident occurred near police station – Claim petition dismissed as F.I.R. was lodged on next day - Held - claim petition cannot be dismissed just because there is delay in lodgment of the F.I.R. by one day - involvement of vehicle proved as charge sheet laid - Tribunal committed an error in not considering the fact that the doctor opined that the injured was under his treatment since the date which was mentioned in the F.I.R. and the claim petition - Driver of vehicle present at place of accident and he himself accepted that he had gone to bus stand to drop somebody - Matter remitted to Tribunal to decide quantum.

Allowed. (E-5)

List of Cases cited:

1. Anita Sharma & ors. Vs The New India Assurance Company Ltd. & anr. 2020 0 Supreme (SC) 704

2. Mangla Ram Vs Oriental Insurance Co. Ltd. & ors., 2018 5 SCC 656

3. Jai Prakash Vs National Insurance Com. Ltd. 2010 (2) GLR 1787

4. Anil Vs National Insurance Company reported in 2018 ACJ 729

5. Parmeshwari Vs Amir Chand, (2011) 11 SCC 635

6. Sunita & ors. Vs Rajasthan State Road Transport Corporation, AIR 2019 SC 994

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
&
Hon'ble Subhash Chand, J.)

1. Heard learned counsel for the parties.

2. This appeal challenges the Judgment and order dated 31.3.2014 passed by Motor Accident Claim Tribunal/Additional District Judge, Room No.6, Ghaziabad (hereinafter referred to as the Tribunal) in Motor Accident Claim Petition No. 570 of 2011, Girish Kumar Gupta Vs. Brijesh Tyagi and others.

3. The Tribunal has dismissed the claim petition filed by the appellant herein, who had sustained grievous head injury. The claimant filed the claim petition alleging that on 9.6.2011 when he along with his wife Prabha Gupta were moving on their feet on their correct side and when they reached in front of old bus-stand Ghaziabad near over bridge at about 9.30 am, a young boy driving a Pulsar motorcycle bearing Registration No. UP 14 AE 3202 rashly and negligently came and dashed the claimant from behind.

4. At the time of accident, the claimant aged about 55 years was an ASI posted at Police Department whose monthly income was Rs.34,850/-. The F.I.R. was lodged as Crime No. 752 of 2011. The claimant, when filed the petition, was in coma. Dr. Atul Gupta, who was attached with Yashoda Hospital, Ghaziabad

treated him. The respondent no. 1 and 2 filed their reply of denial but averments made in paras 14 to 17 were accepted. The respondents contended in the written statement that no such accident had taken place. Para 23 of the written statement is quoted as under:-

"यह कि याचिका की धारा 23 की उपधाराओं के कथन अस्वीकार है। याचिका की मोटर साइकिल से कोई दुर्घटना नही हुई है प्रतिवादी संख्या 2 प्रतिवादी संख्या एक की रिश्तेदार को बस अड़डा पर वापिस प्रतिवादी सं0 1 के घर जा रहा था तभी किसी अज्ञात वाहन द्वारा जिसे अन्य वाहनो की भीड़ के कारण प्रतिवादी संख्या 2 नही देख सका याची जो बीच सड़क पर चल रहे थे को टककर मार दी प्रतिवादी सं0 2 उसी वक्त वहा से गुजरा था सम्भवतः किसी ने भूलवश याची की मोटर साइकिल को दुर्घटना कारित करने वाला वाहन समझ कर उसकी मोटर साइकिल को नम्बर नोट कर लिया याचीगण को मोटर साइकिल से कोई दुर्घटना नही हुई। दुर्धटना याची के अत्याधिक वाहन संचालित होने वाली सड़क के मध्य लापरवाही से चलने के कारण दुर्घटना हुयी।''

5. The Insurance Company also filed its reply of denial and contended that the vehicle was not involved and accepted that vehicle was insured with it from 20th October 2010 to 19th October 2011.

6. The appellant herein examined P.W. 1 Prabha Gupta, wife of the injured. P.W. 2 Balveer Singh stated that he looks after the injured and he has suffered parlytic stroke because of this accident and, for two years, he has been under treatment. In his cross-examination, he was asked as to who stays with him and whether the witness has passed any nursing course or not. Dr. Atul Gupta has been examined as P.W. 3 under whom the treatment of the injured was going on. In his testimony, it is mentioned that even in the case paper he has mentioned that the injured was injured due to accidental injuries and had produced all the documents. P.W. 4 Mangal Sain has been examined so as to depose about the income and fact that from 9.6.2011, he is on leave.

7. As far as the respondents are concerned, DW 2 who is one Pratap son of Hari Kishan, has mentioned that respondent no. 2 had gone to the bus station to drop the relative of respondent no.1 and when he was returning therefrom to the house of respondent no.1, one unknown vehicle which he could not see due to crowd, dashed with the claimant in front of bus stand when he passed through at the very moment. Someone taking it the motorcycle of respondent no.2 which caused the accident, noted number of his motorcycle. Later on, he deposed that no accident occurred due to the said vehicle. He had not withstood the cross-examination despite his evidence has been believed by the Tribunal. He accepts that he did not see the claimant on the road. Pratap, in the cross-examination, accepted that he came out of the bus station but he disputes the timing. He has accepted that the charge-sheet is laid against him and the criminal trial is going on. He has accepted that the learned Advocate had prepared his affidavit and written statement. He had only singed on the same.

8. Learned counsel for the appellant has heavily relied on the decisions of Apex Court in **Anita Sharma and others Vs. The New India Assurance Company Ltd. and another, 2020 0 Supreme (SC) 704 and Mangla Ram Vs. Oriental Insurance Co. Ltd.** and **others, 2018 5 SCC 656.** According to him, both these Judgments are in favour of the appellant.

9. The submission of Sri N.K. Srivastava is that as the petition has rightly been dismissed as though the injured is a policeman and the accident occurred near the police station, the F.I.R. was lodged on the next day. Thus, the Tribunal has rightly, according to Sri Srivastava, rejected the claim petition.

10. We are concerned mainly with issue no.1 which has been answered in the negative on the basis of fact that she did not register the F.I.R. immediately despite the fact that her husband is a police officer. The F.I.R. was lodged on the next date. The claim petition was dismissed because there are some discrepancies in the timings. The Tribunal decided all the other issues also and dismissed the claim petition.

11. We have perused the evidence. Though the F.I.R. was lodged on the next day, the Judgment of the Apex Court **Jai Prakash Vs. National Insurance Company Ltd. 2010 (2) GLR 1787** wherein the Apex Court has held that the police authorities are under a duty to intimate the Court regarding the accident having taken place and, therefore, dismissing the claim petition on this ground is bad and is against the mandate of the Supreme Court. In **Anita Sharma & others Vs. The New India Assurance Co. Ltd & another, 2020 0 Supreme 52,** it was held by the Supreme Court that strict principles of evidence and standards of proof like in a criminal trial are inapplicable in MACT claim cases and it is commonplace for most people to be hesitant about being involved in legal proceedings and they do not volunteer to become witnesses. In **Mangla Ram Vs. Oriental Insurance Co. Ltd & others, 2018 4 Supreme 525,** it was held by the Supreme Court that Tribunal stricto sensu not bound by pleadings of parties. Its function is to determine amount of fair compensation and even if Insurance Company is not held liable, principle of "pay and recover' can be invoked. Based on the same, the learned counsel has contended that the findings of the Tribunal are based on misreading of the evidence on record. The Tribunal has committed an error in not considering the fact that the doctor opined that the injured was under his treatment. The evidence clinches that the injured has been in hospital since the date which he has mentioned in the F.I.R. and the claim petition.

12. The Judgment of the Apex Court in the case of **Anil Vs. National Insurance Company reported in 2018 ACJ 729** will also come to the aid of the claimant. The claim petition cannot be dismissed just because there is delay in lodgment of the F.I.R. by one day. The involvement of the vehicle is proved. The reason being charge sheet is laid. It is not proved by the respondent that on the said date, he was not on that road rather he accepts the fact that he was on the said road. He had gone to drop somebody at the bus stand and in the absence of evidence to the contrary that the evidence have been planted, the Tribunal could not have dismissed the claim petition. The F.I.R. was registered. The deposition of the eye witness could not have been discarded in the manner in which the Tribunal has done. It was the solemn duty of the Tribunal to take a holistic view of the matter as held by the Apex Court in Jai Prakash **(supra)** and several precautions are given to the police authorities so as to comply with Section 166 (4) of the Motor Vehicle Act 1988. The decision in the case of Mangla Ram **(supra)** and the recent Judgment in Anita Sharma **(supra)** would apply to the facts of the case. The Judgment in **Parmeshwari Vs. Amir Chand, (2011) 11 SCC 635,** relied in the case of Anita Sharma **(supra)** would also come to the aid of the appellant. The Judgment of the Apex Court in **Sunita and others Vs. Rajasthan State Road Transport Corporation, AIR 2019 SC 994** will also come to the aid of the appellant herein where the wife was examined but just because there is difference in the timing which she has narrated in oral testimony and the timing given to the respondent are different, the claim petition has been dismissed.

13. We have perused the paper book also which shows that the accident had occurred but same has been disbelieved by the Tribunal only on the ground that she did not go to lodge F.I.R. immediately. The Tribunal held that the accident occurred but it occurred with this vehicle could

not be proved. This finding is perverse. The driver of the vehicle was present at the place of accident. He himself accepted that he had gone to the bus stand to drop somebody and takes a stand that his vehicle was not involved despite the fact that the charge-sheet was already laid against him.

14. Having perused the record, we are convinced that the Tribunal has decided the claim petition on surmises and conjectures and had not taken a holistic view of the matter, which was required to be taken. The charge-sheet is laid against the driver and his presence is accepted on timing but as the F.I.R. was delayed by one day, the claim petition was dismissed. We cannot concur with the Tribunal rather for the reasons we have mentioned hereinabove. The claim petition could not have been dismissed when the aforesaid facts were proved.

15. We would have decided the quantum here but remit the matter to the Tribunal to decide the quantum as all other issues have been decided. It shall hear the parties for compensation only. No further evidence be led as the evidence is already led. The matter be decided on or before 31st of December 2021 as the accident is of the year 2011 and the appellant is paralytic as mentioned by his counsel while making his oral submissions.

16. Appeal is partly allowed with the aforesaid observations.

17. Record be sent back to the Tribunal.

18. We are thankful to the counsel for both the parties for ably assisting the Court in deciding the appeal.

(2021)11ILR A879
APPELLATE JURISDICTION
CIVIL SIDE

DATED: ALLAHABAD 24.09.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE SUBHASH CHAND, J.

First Appeal From Order No. 3602 of 2018
with
First Appeal From Order No. 3994 of 2018

Smt. Prabha Sharma & Anr. ...Appellants
Versus
The NIACL & Ors. ...Respondents

Counsel for the Appellants:
Sri Amit Kumar Sinha, Deepali Srivastava Sinha

Counsel for the Respondents:
Sri Brijesh Chandra Naik, Archana Singh, Sri Ajay Singh

Civil Law - Motor Accident Claim - Motor Vehicles Act, 1988 - Section 166 - Insurance Company contend that alleged accident did not take place, vehicle insured was not involved and was planted - Held - documentary evidence such as certified copy FIR, certified copy of site plan, charge-sheet and death certificate of deceased was filed which prima facie prove involvement of the vehicle in accident - accident proved by eye witnesses - Doctor proved that deceased was admitted in hospital in injured condition & was given treatment - FIR though was lodged belatedly but explanation was given - chargesheet was filed - non conducting the post mortem cannot be fatal to the case of claimants - Held involvement of the offending vehicle cannot be accepted to be planted (Para 12)

Allowed. (E-5)

List of Cases cited:

1. Ravi Vs. Badrinarayan & ors. 2011 (1) T.A.C. 867 (S.C.)

2. Sumitra Kaur & anr. Vs. New India Assurance Company Limited through Divisional Manager 2012 (4) T.A.C. 799 (All.)

3. Sunita & ors. Vs. Rajasthan State Road Transport Corporation & anr. 2019 (1) T.A.C. 710 (S.C.)

4. Jai Prakash Vs. National Insurance Company Ltd. (2010) 2 SCC 607

5. Smt. Hansagori P. Ladhani Vs. The Oriental Insurance Company Ltd., 2007 (2) GLH 291

6. A.V. Padma Vs. Venugopal reported in 2012 (1) GLH (SC) 442

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
&
Hon'ble Subhash Chand, J.)

1. Heard Sri Amit Kumar Sinha, learned counsel for the appellant and Sri B.C. Naik, Advocate and Sri Ajay Singh, learned counsel for the Insurance Company and perused the judgment and order impugned.

2. First Appeal From Order No. 3602 of 2018 (Smt. Prabha Sharma and another Vs. The New India Assurance Company Limited) is at the behest of appellants-claimants against the judgment and award dated 11.07.2018 passed by Motor Accident Claims Tribunal/Additional District Judge, Room No.8, Aligarh (hereinafter referred to as 'Tribunal') in M.A.C.P. No. 77 of 2016 the same is for enhancement of compensation awarded by the Tribunal.

3. First Appeal From Order No. 3994 of 2018 (The New India Assurance Company Limited Vs. Smt. Prabha Sharma and others) against the judgment and award dated 11.07.2018 passed by Motor Accident Claims Tribunal/Additional District Judge, Court No.8, Aligarh (hereinafter referred to as 'Tribunal') in M.A.C.P. No. 77 of 2016 on the ground of non involvement of vehicle in the impugned accident and for exonerating the Insurance Company from the liability to pay compensation to third party.

4. The brief facts culled out from the materials on record are that on 25.11.2015 Rajendra Prasad Sharma (deceased) and appellant no.1 had gone to Village Mukundpur for some personal work and while coming back at 9 O' clock they were standing on the road side to board a Bus at that time, a car bearing registration No. UP 81 AU 2270 driven by its driver rashly and negligently came at high speed and dashed with both of them namely deceased and his wife PW-1, as a result of which both sustained injuries. Rajendra Prasad Sharma was admitted in Russa Hospital thereafter shifted to Central Hospital situated at Masoodabad and during treatment on 29.11.2015 Rajendra Prasad Sharma died. The deceased was 55 years old on the date of accident and after his death he was survived by his widow and son Bharat Sharma. The deceased was practising Advocate at District Court, Aligarh. The FIR of the accident was registered as case crime no. 234 of 2018 under Sections 279, 338, 304A IPC at Police Station Madrak, District Aligarh. The offending vehicle was insured by New India Insurance Company Limited, therefore, compensation of Rs. 79,25,000/- is claimed along with interest thereon.

5. On behalf of New India Insurance Company-opposite party no.3 filed written statement contending that alleged accident did not take place and the vehicle insured was not involved and was planted. The claim petition had been filed in collusion with owner and the Insurance Company had right to contest the claim petition on all the grounds, available to the Insurance Company in view of Section 170 of Motor Vehicle Act, 1988. It was contended that the Insurance Company cannot be fastened with any liability to pay compensation because the owner has committed breach of terms and conditions of the insurance policy. On behalf of opposite party nos. 1 and 2 owner and driver of the offending vehicle who filed written statement and stated that on the date of accident,

the driver of the offending vehicle was having a valid and effective driving license. The offending vehicle was insured with New India Insurance Company Limited. No terms and conditions of the insurance policy was breached on behalf of the respondents responding opposite parties and if any liability to pay the compensation is arise for the same, the Insurance Company is liable to pay. The learned Tribunal after taking evidence on record and herein the passed the award vide judgment and order dated 11.07.2018 awarding compensation of Rs. 16,91,400/- along with 7% interest thereupon and opposite party New India Insurance Company was directed to pay the compensation.

6. First Appeal From Order No. 3994 of 2018 is at the behest of New India Insurance Company, in which the Insurance Company has challenged the impugned award on the ground that the offending vehicle has been falsely implicated in the said accident. It is contended that the vehicle was planted. The accident did not occur because of involvement of the said vehicle. It is further submitted that the evidence on record also does not inspire truth. PW-1 and PW-2 were giving the two different versions. The presence of PW-2 on the spot is very doubtful, in the G.D. entry, neither his name nor his statement was recorded during the investigation. It is submitted that it is admitted position of fact that the death being because of this accident could not be ascertained as no post mortem report was produced on the record. No alleged accident took place by the offending vehicle. The owner of the vehicle and claimants are in collusion. It is submitted that the FIR of accident was lodged belated by 21 days as the accident took place on 25.11.2015 and the FIR of the same was lodged on 16.12.2015. No post mortem of deceased was conducted so as to ascertain the cause of death on account of accident.

7. Per contra, learned counsel for the respondent-claimants contended that the alleged accident is admitted by the opposite party nos. 1 and 2 of the claim petition, who are the owner of the vehicle and driver of the offending vehicle. They have filed written statement but none of them stepped into the witness box for oral examination before the Tribunal. Even on behalf of Insurance Company no witness was examined to rebut the evidence adduced on behalf of the petitioner. On behalf of claimants, certified copy of the FIR, charge-sheet, site plan have been filed on record. Oral testimony of the two eye witnesses of the accident were adduced. The doctor was also examined, who gave treatment to the deceased prior to his death as he was admitted in injured condition. On the oral and documentary evidence, the involvement of the offending vehicle and also the negligence of the driver of the offending vehicle is very well proved. The post mortem was not conducted is a fact, and the FIR was lodged belated because of this it cannot be accepted that the vehicle was falsely involved. In support of his contention learned counsel for the claimants relied on following authoritative pronouncements:-

Ravi Vs. Badrinarayan and others 2011 (1) T.A.C. 867 (S.C.), Sumitra Kaur and another Vs. New India Assurance Company Limited through Divisional Manager 2012 (4) T.A.C. 799 (All.) and Sunita and others Vs. Rajasthan State Road Transport Corporation and another 2019 (1) T.A.C. 710 (S.C.)

8. To prove the involvement of the offending vehicle and negligence of the driver of the vehicle on behalf of claimants documentary evidence have been filed. The certified copy of FIR, certified copy of site plan and charge-sheet and death certificate of deceased Rajendra Prasad Sharma was filed which prima facie prove involvement of the vehicle in accident.

9. PW-1 namely Prabha Sharma has examined herself on oath she was the eye witness at the time of occurrence as she had accompanied the deceased who was her husband. PW-2 Parag Gupta is also portrayed as eye witness of the accident. These witnesses have stated that the offending car came at high speed driven by its driver rashly and negligently and dashed Rajendra Prasad Sharma and his wife, who were waiting on the road side to board a Bus. The respondent has not led any evidence in rebuttal and no contrary conclusion could be drawn from the cross examination of these witnesses on behalf of Insurance Company or the owner. Moreover, PW-3 Dr. Gyanendra Prasad was also examined, who has stated that he had treated Rajendra Prashad Sharma, who was admitted in his hospital being injured and died in the hospital during treatment. He had informed the police for post mortem of deceased, but police refused to conduct the post mortem. This witness has also proved by cogent evidence the documents produced about the admission of deceased and treatment papers of deceased and death certificate.

10. On behalf of Insurance Company or the owner no evidence oral or either documentary was produced on this issue. The Apex Court in case of Sunita and others Vs. Rajasthan State Road Transport Corporation and another (supra) has held in para 25 "The Tribunal's reliance upon FIR 247/2011 (Exh.1) and charge-sheet (Exh.2) also cannot be faulted as these documents indicate the complicity of respondent No.2. The FIR and charge-sheet, coupled with the other evidence on record, inarguably establishes the occurrence of the fatal accident and also point towards the negligence of the respondent No.2 in causing the said accident. Even if the final outcome of the criminal proceedings against respondent No.2 is unknown, the same would make no difference at least for the purposes of deciding the claim petition under the Act. This Court in Mangla Ram Vs. Oriental Insurance Company Limited (2018) 5 SCC 656: 2018 (2) T.A.C. 337, noted that the nature of proof required to establish culpability under criminal law is far higher than the standard required under the law of torts to create liability." The FIR and the charge-sheet coupled with the other evidence on record establishes the occurrence of fatal accident, caused by the negligence of respondent no.2 in causing the said accident. The Apex Court in Mangla Ram (supra) noted that another proof required to establish the culpability under criminal law is higher than the standard required under law of breach of liability.

11. The Apex Court in Ravi Vs. Badri (supra) held where the owner of the vehicle categorically admitted that the vehicle was involved and that the accident occurred which is clear admission of involvement of offending vehicle in a road accident. The delay in lodging the FIR is explained and hence same is not fatal to the claim petition filed on behalf of claimants.

12. In case on hand the accident has been proved by eye witnesses PW-1 Prabha Sharma and PW-2 Parag Sharma. PW-3 Dr. Gyanendra proves that deceased was admitted in his hospital in injured condition and was given treatment by him. He has proved from the documentary evidence that the deceased has sustained injuries in motor accident. Moreover, the FIR though was lodged belatedly explanation of the same is given on behalf of PW-1 Prabha Sharma that the injured was admitted to the hospital and she remained busy in treatment and after that she lodged the FIR. The charge-sheet has also been filed and as such non conducting the post mortem cannot be fatal to the case of claimants. More so, the accident which was proved by oral and documentary evidence as such the claimants are entitled to the benefit of aforesaid case law cited in support of contentions and involvement of the offending vehicle cannot be accepted to be planted. The

Tribunal has not misdirected itself in accepting the factual data in favour of claimants. The judgment of **Jai Prakash Vs. National Insurance Company Ltd., (2010) 2 SCC 607** where the detail guidelines are given to the Tribunal. The police was under obligation to report and note down in the diary and therefore, we conclude that the offending vehicle was involved in the accident. The charge-sheet was laid against the driver of the said vehicle. The owner received the vehicle from the court, which also proves its involvement. The death certificate shows that the injuries were because of accident.

13. In view of the above analysis of evidence on record, First Appeal From Order 3994 of 2018 preferred by the Insurance Company deserves to be dismissed and is dismissed.

14. So far as First Appeal From Order No. 3602 of 2018 on behalf of the claimants for enhancement of compensation is concerned the claimants has challenged the impugned award on the ground that income of the deceased was not assessed as per income tax return. On behalf of the claimants the income tax returns of the deceased were filed by the claimants for the assessment year 2012-13, 2013-14, 2014-15 and in the year 2014-15 annual income of deceased is Rs. 2,24,568/- and the net tax payable to be Rs. 468 but the Tribunal had assessed the annual income of deceased to be Rs. 2,00,000/- while it should have been assessed as Rs. 2,24,100/- (round figure) after deduction of income tax. As far as the future prospects is concerned, which was awarded at 10% of the income is not in dispute. The deductions for personal expenses of 1/3 of income is not disputed, multiplier of 11 granted is not disputed. The amount under non pecuniary damages awarded being Rs. 70,000/- is not disputed.

15. The Insurance Company vehemently opposed the contention of learned counsel for the appellant and contended that Tribunal has rightly assessed the income of deceased at Rs. 2,00,000/- per annum in view of previous assessment year 2012-13, 2013-14, 2014-15. From the income tax return of the assessment year 2014-15 it transpires that gross income of deceased of Rs. 2,24,568/- and income tax net tax payable income is shown Rs. 468/- The total tax and interest shown is Rs. 5000/- as such the income of deceased of the year 2014-15 in which the alleged accident took place should have been assessed by the Tribunal Rs. 2,24,000/- in view of ITR of the assessment year 2014-15.

16. So far as the medical expenses is concerned since deceased was admitted to the hospital in injured condition and he underwent treatment for some days therefore, on this head lump sum expenses of Rs. 50,000/- is deemed just and proper to be awarded though there are no receipts/bills of the medicine yet the prescription discharge slip admission card etc. when the deceased was underwent to the treatment.

17. The award passed by the Tribunal would stand modified and the total compensation payable to the appellants would be:-

i. Annual Income :- 2,24,000/-

ii. Percentage towards future prospects : 10% (Rs. 22,456/-) =(Rs. 2,47,024/-)

iii. Income after deduction of 1/3rd towards personal expenses : Rs. 1,64,683/-

iv. Multiplier applicable : 11

v. Loss of dependency: Rs.1,64,683 x 11 = Rs. 18,11,513/-

vii. Amount under non pecuniary heads : Rs. 70,000 + Rs. 30,000 (10% per year due to pendency of appeal)

vii. Total compensation : Rs. 19,11,513/- + Rs. 50,000/- = Rs. 19,61,513/-

18. In view of the above, the appeal preferred by the claimants is partly allowed. Award and decree passed by the Tribunal shall stand modified to the aforesaid extent. The amount be deposited by the respondent-Insurance Company within a period of 12 weeks from today with interest at 7.5%. The amount already deposited be deducted from the amount to be deposited.

19. In view of the ratio laid down by Hon'ble Gujarat High Court in case of **Smt. Hansagori P. Ladhani Vs. The Oriental Insurance Company Ltd., reported in 2007 (2) GLH 291,** the total amount of interest, accrued on the principle amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs. 50,000/-, Insurance Company/owner is/are entitled to deduct appropriate amount under the head of "Tax Deducted at Source' as provided u/s 194A(3)(ix) of the Income Tax At, 1961 and if the amount of interest does not exceeds Rs. 50,000/- in any financial year, registry of the Tribunal is directed to allow the claimant to withdraw the amount without producing the certificate from the concerned Income-Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No. 23 of 2001 (Smt. Sudesna and others Vs. Hari Singh and another) and in First Appeal From Order No. 2871 of 2016 (Tej Kumari Sharma Vs. Chola Mandlam M.S. General Insurance Co. Ltd.) decided on 19.03.2021 while disbursing the amount.

20. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of **A.V. Padma Vs. Venugopal reported in 2012 (1) GLH (SC) 442,** the order of investment is not passed because respondents are neither illiterate nor rustic villagers.

21. We are thankful for both the counsels for getting the appeal decided without record and ably assisting the Court.

(2021)11ILR A884
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 18.11.2021

BEFORE

THE HON'BLE RAMESH SINHA, J.
HON'BLE VIVEK VARMA, J.

Criminal Appeal No. 875 of 1981

Ram Kumar & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
S.H. Ibrahim, Dharmenra Kumar Tiwari, Ravindra Kumar Dwivedi

Counsel for the Respondent:
Govt. Advocate

Criminal Law - Juvenile Justice (Care and Protection of Children) Amendment Act, 2021 - Sections 18 & 21 - Indian Penal Code, 1860 - Section 302 - Murder - juvenile in conflict with law cannot be sentenced to death or to undergo life imprisonment – further maximum period of which a juvenile may be sent to a Special Home is only three years (Para 15)

Sessions Judge convicted appellant Sangram, under Section 302 & sentenced him to undergo imprisonment for life - plea of juvenility was raised before High Court during pendency of Criminal Appeal - Juvenile Justice Board declared appellant Sangram as juvenile on the date of the incident i.e. on 08.01.1981 - accused-appellant was aged about 15 years 05 months and 22 days on the date of incident

i.e. on 08.01.981 – In year 2021 accused aged about 56 years – Held accused could not be kept along with other Juveniles in Juvenile Special Home in this age group – High Court confirmed conviction of the accused/appellant – However sentence modified to the period already undergone by appellant as appellant already undergone about more than three years imprisonment (Para 31, 32)

Allowed. (E-5)

Cases Relied on :

1. Pradeep Kumar Vs St. of U.P. 1995 SCC (Cri) 395

2. Upendra Kumar Vs St. of Bihar : 2005 (3) SCC 592

3. Vaneet Kumar Gupta @ Dharminder Vs St.of Pun. 2009 (17) SCC 587

4. Satish @ Dhanna Vs St. of M.P. & ors. 2009 (14) SCC 187

5. Vikram Singh Vs St. of Har. 2009 (13) SCC 645

6. Dharambir Vs State : 2010 (2) SCC 344

7. Bhim @ Uttam Ghosh Vs St. of W.B. 2010 (14) SCC 571

8. Lakhan Lal Vs St. of Bihar : 2011 (2) SCC 251

9. Amit Singh Vs St. of Mah. and another : 2011 (13) SCC 744

10. Kalu @ Amit Vs St. of Har. : 2012 (3) SCC (Cri) 761

11. Vijay Singh Vs St. of Delhi : 2012(3) SCC (Cri) 1044

12. Babla @ Dinesh Vs St.of Uttarakhand : 2012 (3) SCC (Cri) 1067

13. Mahesh & ors. Vs St. of Raj. & ors. 2019 (3) Crimes 60 (SC)

(Delivered by Hon'ble Ramesh Sinha, J.)

(1) The instant criminal appeal under Section 374 (2) Cr.P.C. has been filed by appellants, **Ram Kumar** and **Sangram**, against the judgment and order dated 25.11.1981 passed by the III Additional Sessions Judge, Faizabad in Sessions Trial No. 195 of 1981 : *State Vs. Ram Kumar and others* relating to Case Crime No. NIL of 1981, under Sections 307 and 323 I.P.C., which was later on converted under Section 302 I.P.C., Police Station Ibrahimpur, District Faizabad, whereby the III Additional Sessions Judge, Faizabad, convicted the appellants, Ram Kumar and Sangram, under Section 302 read with Section 34 Indian Penal Code, 1860 and sentenced them to undergo imprisonment for life, however, accused Ram Sundar has been acquitted of the charges.

(2) It transpires from the record that a Co-ordinate Bench of this Court, vide order dated 11.10.2018, partly allowed the instant appeal. The operative portion of the order dated 11.10.2018 is reproduced as under :-

"28. In view of the aforesaid discussion, the present appeal is partly allowed and the accused-appellants are convicted under Section 304 Part I IPC instead of Section 302 IPC and their sentence is modified for life to 10 years rigorous imprisonment.

29. The accused-appellants are on bail. Their bail bonds are cancelled and sureties are discharged. After they complete their sentence they would be free forthwith."

(3) Subsequently, appellant no.2-Sangram has filed application for condonation of delay in filing the modification application (C.M. Application No. 115040 of 2019) and the application for modification of the judgment and order dated 11.10.2018 (C.M. Application No.115042 of 2019). A Co-ordinate Bench of this Court, vide order dated 18.11.2019, condoned the delay in filing the modification application and rejected the application for modification. The order dated 18.11.2019 is reproduced as under :-

"(C.M.A. No. 115040 of 2019- Delay & C.M.A. No. 115042 of 2019 - Modification Application)

Heard learned counsel for the applicant and perused the record.

In view of the facts stated in the accompanying affidavit filed in support of application for condonation of delay in filling the application for modification of order dated 11.10.2018, delay is condoned.

Further, by means of application for modification, the appellant has sought modification of judgment/order dated 11.10.2018 passed in Criminal Appeal No. 875 of 1981 by a Division Bench of this Court (Hon'ble prashant Kumar, J. and Ho'nble Dinesh Kumar Singh, J.).

After hearing learned counsel for appellant and going through the record, we are of the considered opinion that the application moved by the appellant for modification of judgment/order dated 11.10.2018 passed in Criminal Appeal No. 875 of 1981 by a Division Bench of this Court (Hon'ble prashant Kumar, J. and Ho'nble Dinesh Kumar Singh, J.) is not maintainable under the law as there is no provision for modification/ review of the final judgment/order under Code of Criminal Procedure.

Accordingly, the application for modification is rejected."

(4) Feeling aggrieved by the aforesaid judgment and order dated 11.10.2018, appellant no.2-Sangram has approached the Hon'ble Supreme Court by filing Criminal Appeal No. 907 of 2021 (arising out of SLP (Crl.) No. 6432 of 2021) : *Sangram Vs. The State of Uttar Pradesh & Anr*. The Hon'ble Supreme Court, vide judgment and order dated 27.08.2021, condoned the delay in filing the appeal and disposed of the appeal. The order dated 27.08.2021 is reproduced as under :-

"1 Delay condoned.

2 Leave granted.

3 The appeal arises out of a judgment of a Division Bench of the High Court of Judicature at Allahabad dated 11 October 2018 in Criminal Appeal No 875 of 1981.

4. By a judgment dated 25 November 1981, the appellant was convicted by the IIIrd Additional Sessions Judge, Faizabad in Sessions Trial No 195 of 1981 for an offence punishable under Section 302 of the Indian Penal Code 1860.

5. During the pendency of the appeal before the High Court, a plea of juvenility was raised on behalf of the appellant on the ground that on 8 January 1981, when the incident took place, the appellant was about fifteen years of age. The order of the High Court dated 22 November 2017 (Annexure P-3) records, thus:

"Principal Magistrate, Juvenile Justice Board, Ambedkar Nagar vide his letter dated 13.10.2017 has sent the enquiry report regarding the declaration of juvenility of appellant No. 2(Sangram).

According to the said report, appellant No. 2(Sangram) juvenile on the date of occurrence i.e. 08.01.1981. Let this report be kept on the record.

As prayed, list this appeal on 08.12.2017."

6. The appeal was disposed of by the High Court on 11 November 2018, without considering the issue as to whether the appellant was a juvenile on the date on which the alleged offence is stated to have been committed.

7. Subsequently, the appellant moved CM Application No 115042 of 2019. By an order dated 27 September 2019, the application was directed to be listed before the Division Bench which had disposed of the appeal. However, the application was dismissed by an order dated 18 November 2019 on the ground that there is no provision for modification/review of the final judgment and order under the Code of Criminal Procedure 1973. The appeal has accordingly travelled to this Court.

8. The plea of juvenility was raised before the High Court during the pendency of

the appeal. The order of the High Court dated 22 November 2017 indicates that the Principal Magistrate of the Juvenile Justice Board, Ambedkar Nagar has submitted his report with a letter dated 13 October 2017. The plea of juvenility has not been decided by the High Court. In this view of the matter, it would be necessary to remit the proceedings back to the High Court to consider the issue of juvenility. It is a settled principle of law that the plea of juvenility can be raised at any stage of the proceedings.

9. The High Court shall consider the plea of juvenility which has been raised by the appellant with reference to which a report dated 13 October 2017 of the Principal Magistrate, Juvenile Justice Board, Ambedkar Nagar has been submitted. We clarify that we have not expressed any view on the merits of the plea of juvenility which shall be decided by the High Court in accordance with law. If the plea of juvenility succeeds before the High Court, necessary consequences under the law shall then follow.

10. For the aforesaid purpose, we remit the proceedings back to the High Court which shall be dealt with on the file of Criminal Appeal No 875 of 1981 before the appropriate Division Bench according to the roster of work assigned by the Chief Justice. The High Court is requested to take up the matter and dispose it of in terms of the aforesaid directions within a period of three months from the date of receipt of a certified copy of this order.

11. An application for bail, being IA No 90943 of 2021, has been moved in these proceedings on behalf of the appellant. We grant liberty to the appellant to move the High Court of Judicature at Allahabad for the grant of bail which may be considered expeditiously by the High Court.

12. In the event that the appellant requires the benefit of legal aid, a legal aid counsel shall be made available by the High Court.

13. The appeal is accordingly disposed of.

14. Pending application, if any, stands disposed of."

(5) In these backgrounds, the instant criminal appeal has come up before this Court.

(6) At the outset, Sri Ravindra Kumar Dwivedi, learned Counsel appearing on behalf of the appellant no.2-Sangram, has pointed out that though appellant no.2-Sangram has sent a letter from the Jail for providing him the services of *amicus curiae* as he is unable to engage the Counsel of his choice, but subsequently, son of the appellant no.2-Sangram has engaged him to argue the present appeal.

(7) Heard Shri Ravindra Kumar Dwivedi, learned Counsel appearing on behalf of the appellant no.2-Sangram and Ms. Smiti Sahay, learned Additional Government Advocate appearing on behalf of the State.

(8) It has been pointed out by the learned Counsel for the parties that no appeal against the judgment and order dated 11.10.2018 passed by the Co-ordinate Bench of this Court has been preferred by the appellant no.1-Ram Kumar. However, the judgment and order dated 11.10.2018 passed by the Co-ordinate Bench of this Court has been challenged by the appellant no.2-Sangram before Apex Court and the Apex Court, vide order dated 27.08.2021, disposed of the criminal appeal preferred by the appellant no.2 and remitted the matter to this Court for deciding the plea of juvenility which has been raised by the appellant no.2-Sangram with reference to which a report dated 13 October 2017 of the Principal Magistrate, Juvenile Justice Board, Ambedkar Nagar has been submitted. Hence, the instant criminal appeal has been listed before this Court only with respect to test the plea of juvenility which has been raised by the appellant no.2-Sangram only

with reference to which a report dated 13 October 2017 of the Principal Magistrate, Juvenile Justice Board, Ambedkar Nagar has been submitted.

(9) Learned counsel for appellant no.2-Sangram did not raise any argument about finding returned by a Co-ordinate Bench of this Court vide judgment and order dated 11.10.2018 on the point of conviction of accused-appellant no.2 in the aforesaid offences but before this Court, only submission of the learned Counsel for the appellant no.2-Sangram is that the plea of juvenility was raised before this Court during pendency of the instant appeal by filing an application in this regard (C.M. Application No. 23429 of 2017) and a Co-ordinate Bench of this Court, vide order dated 31.08.2017, disposed of the aforesaid application with a direction to the Juvenile Justice Board, Faizabad (now Ambedkar Nagar) to inquire into the matter and report to this Court and the appellant no.2 was also directed to appear before the Juvenile Justice Board, Ambedkar Nagar.

(10) It has been argued by the learned Counsel for the appellant no.2-Sangram that pursuant to the order dated 31.08.2017, the appellant no.2-Sangram had appeared before the Juvenile Justice Board, Ambedkar Nagar and filed Transfer Certificate of Class-5, wherein the date of the appellant no.2-Sangram has been mentioned as 16.07.1965. Thereafter, the Juvenile Justice Board, Ambedkar Nagar, vide order dated 11.10.2017, after hearing the parties and going through the record, declared the appellant no.2-Sangram as juvenile on the date of the incident i.e. on 08.01.1981. He argued that no appeal/revision has been filed against the order dated 11.10.2017 passed by the Juvenile Justice Board and also no objection on behalf of the State or the complainant had also been filed challenging the report dated 11.10.2017 passed by the Juvenile Justice Board. He further argued that as the accused-appellant no.2 (Sangram) is languishing in jail since 07.05.2018 and has been declared Juvenile on 11.10.2017 in conflict with law by the Juvenile Justice Board, Ambedkar Nagar, therefore, he confined his submission to the extent of imposition of sentence/treatment only.

(11) The learned AGA has admitted the fact that no appeal/revision has been filed against the order dated 11.10.2017 passed by the Juvenile Justice Board and also no objection on behalf of the State or on behalf of the complainant had also been filed challenging the report dated 11.10.2017 passed by the Juvenile Justice Board.

(12) The report of Juvenile Justice Board, Ambedkar Nagar dated 11.10.2017 reveals that accused-appellant no.2-Sangram was aged about 15 years 05 months and 22 days on the date of incident i.e. on 08.01.981. It transpires from the report of the Juvenile Justice Board, Ambedkar Nagar dated 11.10.2017 that inquiry was conducted as per Rules and opportunity was given to the complainant as well as accused-appellant no.2-Sangram to lead evidence. Opinion formed by the Juvenile Justice Board, Ambedkar Nagar is based on the Transfer Certificate of Class-5 of appellant no.2-Sangram, which was proved by the Headmaster of the concerned school by placing relevant document of the said school. No appeal has been filed against the order dated 11.10.2017 passed by Juvenile Justice Board, Ambedkar Nagar declaring accused-appellant no.2 (Sangram) Juvenile in conflict with law as would be clear from the admission made by the learned AGA in this regard before this Court. It also appears that no objection on behalf of State is raised challenging the report dated 11.10.2017 passed by Juvenile Justice Board, Ambekdar Nagar. Thus, we are of the view that report dated 11.10.2017 passed by Juvenile Justice Board, after making thorough inquiry, is liable to be accepted and we, accordingly, accept the same.

(13) Now, since the appellant no.2-Sangram was Juvenile on the date of incident i.e. on 08.01.1981 and no argument has been advanced about conviction of accused-appellant no.2 for the aforesaid offences, therefore, this Court has to take into consideration provisions of Sections 18 and 21 of the Juvenile Justice (Care and Protection of Children) Amendment Act, 2021 (hereinafter referred to as "***JJ Act, 2021***") to pass order in respect of accused/appellant no.2-Sangram (Juvenile in conflict with law).

(14) At this juncture, it would be apt to reproduce Sections 18 and 21 of the JJ Act, 2021, which are as under :-

"Section 18 : Orders regarding child found to be in conflict with law.-

(1) Where a Board is satisfied on inquiry that a child irrespective of age has committed a petty offence, or a serious offence, or a child below the age of sixteen years has committed a heinous offence 1[or a child above the age of sixteen years has committed a heinous offence and the Board has, after preliminary assessment under section 15, disposed of the matter], then, notwithstanding anything contrary contained in any other law for the time being in force, and based on the nature of offence, specific need for supervision or intervention, circumstances as brought out in the social investigation report and past conduct of the child, the Board may, if it so thinks fit,--

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

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

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

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

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

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

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

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

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

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

(i) attend school; or

(ii) attend a vocational training centre; or

(iii) attend a therapeutic centre; or

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

(v) undergo a de-addiction programme.

(3) Where the Board after preliminary assessment under section 15 pass an order that there is a need for trial of the said child as an

adult, then the Board may order transfer of the trial of the case to the Children's Court having jurisdiction to try such offences."

"Section 21 : Order that may not be passed against a child in conflict with law

No child in conflict with law shall be sentenced to death or for life imprisonment without the possibility of release, for any such offence, either under the provisions of this Act or under the provisions of the Indian Penal Code (45 of 1860) or any other law for the time being in force."

(15) From perusal of the aforesaid provisions, it is noticed that a juvenile in conflict with law cannot be sentenced to undergo life imprisonment, and further the maximum period of which a juvenile may be sent to a Special Home is only three years.

(16) It is pertinent to mention here that if the submission raised by learned counsel for appellant no.2-Sangram as well as learned A.G.A. are taken into consideration, the accused/appellant no.2-Sangram declared Juvenile in conflict with law under JJ Act, 2021 can be sent to Special Home for a maximum period of three years or other treatments to deal with juvenile in conflict with law have also been given under Section 15 of JJ Act, 2021.

(17) In the present case, as is evident from record and submission raised by learned counsel appearing for appellant no.2-Sangram, appellant no.2-Sangram is languishing in jail since 07.05.2018 and has undergone about more than three years imprisonment.

(18) At this juncture, it would be appropriate to look into the ratio laid down by Apex Court while dealing with the similar situation like in the case in hand.

(19) In **Pradeep Kumar Vs. State of U.P.** : 1995 SCC (Cri) 395, the Apex Court, on finding that accused was below 16 years on the date of commission of offence, held that as per the then provisions of Uttar Pradesh Children Act, he cannot be sentenced to life and as the accused had crossed 30 years, directed his release from Jail.

(20) In **Upendra Kumar Vs. State of Bihar** : 2005 (3) SCC 592, under similar circumstances, the Apex Court sustained the conviction under Section 302 IPC, however, quashed the life sentence and ordered release of juvenile from jail.

(21) In **Vaneet Kumar Gupta @ Dharminder Vs. State of Punjab** : 2009 (17) SCC 587, accused, who was sentenced to life under Section 302 read with 149 I.P.C., was found to be a Juvenile at the time of commission of the offence. The Apex Court noticing the fact that he is in jail for several years, directed his release from jail.

(22) Similar view has also been taken in **Satish @ Dhanna Vs. State of M.P. and others** : 2009 (14) SCC 187 and in **Vikram Singh Vs. State of Haryana** : 2009 (13) SCC 645.

(23) In **Dharambir Vs. State** : 2010 (2) SCC 344, appellant was sentenced to life. In the course of his Criminal Appeal before Apex Court, in the enquiry conducted, it was found that at the time of commission of offence, he was below 18 years of age and was a juvenile in conflict with law and by the time his appeal reached the Supreme Court, he had reached 35 years of his age and had spent 2 years, 4 months and 4 days in jail. So, even as per Section 15 of the JJ Act, 2000 he has to be sent to the Special Home for the balance 8 months. The Apex Court noticing that sending him to Special Home will not be in the interest of other juveniles in the Home, directed his release from jail.

(24) In **Bhim @ Uttam Ghosh Vs. State of West Bengal** 2010 (14) SCC 571, appellant was sentenced to 5 years rigorous imprisonment. It was established before the Apex Court that on

the date of offence, he was a juvenile in conflict with law and he is entitled to the benefit of JJ Act, 2000 and by that time, he has become 42 years old. But, he was in jail for less than 3 years. In the circumstances, the Apex Court did not detain him in jail for the remaining period but directed his release from jail.

(25) In **Lakhan Lal Vs. State of Bihar** : 2011 (2) SCC 251, accused who was sentenced to life under Section 302 read with 34 I.P.C. was found to be a Juvenile in conflict with law at the time of commission of the offence. By the time his appeal reached to Supreme Court, he had crossed 40 years age. He was in jail for more than 7 years. Under these circumstances, referring to Dharambir Vs. State (supra), the Apex Court set aside his life sentence and directed his release.

(26) In **Amit Singh Vs. State of Maharashtra and another :** 2011 (13) SCC 744, accused was found guilty under Section 396, 506, 341, 379 read with 120-B I.P.C. and Section 25 (1-B), 5 read with 27 of Arms Act. Apart from the other sentence of imprisonment, he was also sentenced to life and his sentences were confirmed by Bombay High Court. The Apex Court also dismissed his Special Leave Petition. Subsequently, he filed a Writ Petition before Supreme Court under Article 32 of Constitution claiming juvenility which was considered and he was found to be eligible for benefit under JJ Act, 2000 and considering the fact that by that time he had been in jail for 12 years, Court held that he was in jail for more than the maximum period for which a juvenile may be confined in a Special Home and directed his release from jail.

(27) In **Kalu @ Amit Vs. State of Haryana** : 2012 (3) SCC (Cri) 761, the Apex Court, while confirming conviction of the appellant under Section 302 read with Section 34 I.P.C., since the appellant was a Juvenile in conflict with law within the meaning of JJ Act, 2000 on the date when the offence was committed, he was already in Jail for 9 years and attained majority long back, directed his release from jail and also noticing Section 19 of JJ Act, 2000 held that he shall not incur any disqualification because of his conviction.

(28) In **Vijay Singh Vs. State of Delhi** : 2012(3) SCC (Cri) 1044, appellant who was convicted and sentenced to undergo 5 years rigorous imprisonment under Section 307 IPC, claimed that he was a Juvenile in conflict with law on the date of commission of offence and Court on the basis of the date of birth mentioned in his School Leaving Register and his Original Admission Register accepted his plea of juvenility and noticing that the appellant is in jail for more than 3 years directed his release from jail.

(29) In **Babla @ Dinesh Vs. State of Uttarakhand** : 2012 (3) SCC (Cri) 1067, appellant was sentenced to life under Section 302 read with 149 I.P.C. and on the basis of the report of the Sessions Judge, Court accepted that the appellant was Juvenile in conflict with law on the date of commission of offence and since he was in jail for more than 3 years out of the maximum period prescribed under Section 15 of JJ Act, 2000, set aside his life sentence and directed his immediate release from jail.

(30) In **Mahesh and others Vs. State of Rajasthan and others** : 2019 (3) Crimes 60 (SC), the Apex Court has held as under :-

"10. On the contrary, having regard to the period of custody suffered; the age of the accused Appellants as on date; the efflux of time since the date of occurrence and all other relevant facts and circumstances, we are of the view that while maintaining the conviction of the accused appellants the sentence imposed should be modified to one of the period undergone. We order accordingly."

(31) Keeping in mind the aforesaid legal propositions of law and also considering the facts and circumstances of the case, period of imprisonment, the age of the accused/appellant no.2-Sangram as on date, the efflux of time since the date of occurrence, we are of the considered view that no fruitful purpose would be served by remanding the matter to Juvenile Justice Board as accused-appellant no.2 (Sangram) has already served out more than three years sentence. Moreover, he was aged about 15 years 05 months and 22 days on the day of incident and by now must have crossed the age of 56 years. Therefore, he could not be kept along with other Juveniles in Juvenile Special Home in this age group.

(32) In view of the aforesaid, we confirm the judgment and order dated 11.10.2018 passed by the Co-ordinate Bench of this Court so far as the conviction of the accused/appellant no.2-Sangram. However, so far as sentence imposed vide judgment and order dated 11.10.2018 to appellant no.2-Sangram is concerned, the same is modified to the period already undergone by appellant no.2-Sangram. Appellant no.2-Sangram shall be set at liberty if not wanted in any other case.

(33) The appeal is, accordingly, **partly allowed.**

(34) Let a copy of this judgment be sent to the trial court concerned forthwith for compliance and further necessary action.

(2021)11ILR A892
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.10.2021

BEFORE

THE HON'BLE AJIT SINGH, J.

Criminal Appeal No. 981 of 1983

Faqirey & Ors. ...Appellants

Versus

State of U.P. ...Respondent

Counsel for the Appellant:
Sri P.N. Lal, Sri P.K. Srivastava, Sri Javed Habib

Counsel for the Respondent:
A.G.A.

Criminal Law - Indian Penal Code, 1860 - Sections 324 & 307 - Quantum of sentence - "Proper Sentence" - principle of proportionality - Sentence should not be either excessively harsh or ridiculously low - While determining the quantum of sentence, the court should bear in mind the principle of proportionately - Sentence should be based on facts of a given case - Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account - principle of proportionality between the crime committed and the penalty imposed are to be kept in mind - Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically (Para 16)

Incident took place in year 1981, appellant were convicted in the year 1983 - at present appellant no. 1 aged about 62 years & appellant no. 3 more than 75 years - appellant never intended to assault but it happened at the spur of moment without any premeditation due to an altercation that took place between the injured and the accused-appellants - doctors, who were examined in the trial court, have not stated anywhere in their statements that the injuries sustained by the injured were fatal to life and they were likely to cause death - two months' imprisonment has already been undergone by them during trial and after conviction - it was the first offence of the accused and after conviction the accused had not indulged in any other criminal activity - Appellant pressed appeal on quantum of sentence - *Held* - Court altered the conviction from section 307/34 I.P.C. to section 324 I.P.C. - accused-appellants are convicted with the period already undergone by them in prison during trial and after conviction - Accused-appellants directed to deposit fine of Rs. 10,000/- to be paid to the injured (Para 20, 21, 22)

Allowed.(E-5)

Cases Relied on :

1. Mohd. Giasuddin Vs. St. of AP, AIR 1977 SC 1926

2. Sham Sunder Vs Puran, (1990) 4 SCC 731

3. St. of M.P. Vs Najab Khan, (2013) 9 SCC 509

4. Jameel Vs St. of U.P. (2010) 12 SCC 532

5. Guru Basavraj Vs St. of Karn., (2012) 8 SCC 734

6. Deo Narain Mandal Vs. St. of UP (2004) 7 SCC 257

7. Shyam Narain Vs State (NCT of delhi), (2013) 7 SCC 77

8. Sumer Singh Vs Surajbhan Singh, (2014) 7 SCC 323

9. St. of Pun. Vs Bawa Singh, (2015) 3 SCC 441

10. Raj Bala Vs St. of Har. (2016) 1 SCC 463

11. Kokaiyabai Yadav Vs St. of Chhattisgarh(2017) 13 SCC 449

12. Ravada Sasikala Vs. St.of A.P. AIR 2017 SC 1166

13. Jameel Vs St. of U.P. (2010) 12 SCC 532

14.Guru Basavraj Vs St. of Karn., (2012) 8 SCC 734

15. Sumer Singh Vs Surajbhan Singh, (2014) 7 SCC 323

16. St. of Pun. Vs Bawa Singh, (2015) 3 SCC 441

17. Raj Bala Vs St. of Har., (2016) 1 SCC 463

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

1. As per order of this Court dated 1.11.2018, the appeal in respect of appellant no. 4 Bhoop Ram son Ganga Ram is abated.

2. Sri Javed Habib, learned Advocate is pressing this appeal on behalf of surviving appellant no. 1 Faqirey, appellant no. 2 Hori and appellant no. 3 Makhan.

3. This criminal appeal has been filed against the judgement and order dated 22.4.1983 passed by Addl. Sessions Judge, Pilibhit in S.T. No. 19 of 1983 (State vs. Faqirey and others), under Section 307 I.P.C., P.S. Sarkhera, district-Pilibhit, whereby learned Judge convicted and sentenced the appellants to 4 years rigorous imprisonment under Section 307 read with 34 I.P.C.

4. The prosecution story in brief is that there was dispute between the accused-appellants Bhoop Singh, Fakrey, Hori and Ram Gulam, cousin brother of complainant Parmeshwari Dayal regarding 'Mendh'. About 20 to 25 days before the incident dated 11.1.1981 Parmeshwar Dayal had slapped accused Faqirey, following which the accused Faqirey and his other family members become enmical with the complainant. On 11.1.1981 at about 1:00 O'clock in the noon when the complainant was taking bath near the well of his house, the accused Faqirey, Hori, Bhoop Ram and Makhan reached there. Accused Makhan was armed with S.B.B.L. Gun, accused Faqirey and Hori armed with country made pistol and accused Bhoop Singh armed with lathi surrounded him. Accused Faqirey exhorted other accused persons to kill Parmeshwari Dayal as a revenge of his having slapped him. On his exhortation accused Makhan, Hori Lal and Faqirey himself fired with intention to kill, fired upon him with their respective firearms, as a result of which the complainant sustained firearm injuries on his back and buttocks. The incident was witnessed by Fatehy Chand (PW-2) and Gokul Prasad.

5. As the case was exclusively triable by the Court of Sessions, learned Magistrate committed the case to the Court of Sessions and learned Additional Sessions Judge, Pilibhit framed the charge against the appellants under Sections 307/34 to which the appellants pleaded not guilty and claimed to be tried.

6. To bring home guilt of the appellants, the prosecution examined four witnesses. PW1

Parmeshwar Dayal (injured), PW2 Gokul Prasad, PW3 Constable Ram Kirpal, who prepared the chik FIR, PW4 S.H.O., Ram Niwas Sharma, PW5 Dr. K.P. Dubey, PW6 Dr. A.K. Srivastava.

7. PW5 Dr. K.P. Dubey has examined the injured/complainant (PW1) and found following injuries on the person of the injured ;

"1. Multiple gun-shot injureis in an area of 25cm x 24cm each of the size of 0.2cm x 0.2cm x depth kept under observation over both the buttocks extending upto the level of 4th lumber vertibrae back side. No blackening or tattooing was present around the wound.

2. Abrasion 2cm x 1cm over the left side leg in anterior aspect middle 1/3rd."

8. The doctor in his opinion has stated that injury no. 1 was caused by firearm and injury no. 2 by friction of some hard object. Injury no. 2 was simple in nature, while injury no. 1 was kept in observation.

9. At the very outset, learned counsel for the appellants, on instructions, stated that he does not propose to challenge the impugned judgement and order on its merits. He, however, prayed for modification of the order of the sentence for the period already undergone by the appellant.

10. In furtherance to his submission, the learned counsel for the accused-appellants submits that the incident had taken place in the year 1981 and the accused-appellants were convicted in the year 1983. Accused-appellant no. 1 Faqirey was 21 years of age, accused-appellant no. 2 Hori was 28 years of age and accused-appellant no. 3 Makhan was aged about 34 years respectively at the time of incident and at present the appellant no. 1 Faqirey is more than 62 years of age, appellant no. 2 Hori is around 20 years of age and accused Makhan is more than 75 years of age at present. He also submits that all the accused-appellants are absolutely innocent and they had not intended to assault but it happened at the spur of moment without any premeditation due to an altercation that took place between the injured and the accused-appellants. It is also argued that although the doctor had opined that multiple radio opaque foreign body shadows seen on both the buttocks and lumber region, yet before Court in his statement he did not depose that the injury sustained by the injured was fatal to life. No blackening or tattooing was present around the wound. He also submits that the medical evidence was not such which could make it out an offence against the accused appellants to be punishable under Section 307 I.P.C., still the accused appellants were convicted under Section 307/34 and they were subjected to serve out the sentence so awarded by the impugned judgment. It is also relevant to bring on record that about two months' imprisonment has already been undergone by them during trial and after conviction. No case was to be made out under Section 307/34 IPC, but at the most it was squarely covered under Section 324 I.P.C. as the ingredients of an offence punishable under Sections 307/34 IPC were not present in this matter nor it was proved by the prosection to be a case made out under Section 307/34 IPC beyond reasonable doubt and the offence under Section 307 or 307/34 IPC is made out only if the injuries sustained by the injured were likely to cause death. Since this was not the case made out here from the medical evidence, therefore, the offence, if any, will be covered under Section 324 I.P.C. Further submission is that it was the first offence of the accused and after conviction the accused had not indulged in any other criminal activity. He next submits that although the trial court has convicted the present accused on the basis of mere conjunctures while the appellants are absolutely innocent and has been falsely implicated in this case with the ulterior intention of harassing him. He also

submits that on the question of legality of sentence he is not pressing this appeal and only pressing on the quantum of sentence and he has prayed for taking a lenient view considering the age of the accused and their age related ailments.

11. Learned A.G.A. has vehemently opposed the submission made by learned counsel for the appellant. He has however, submits that if slight reduction in sentence is made, he has no objection.

12. I have perused the entire material available on record and the evidence as well as judgment of the trial court. The learned counsel for the accused-appellants does not want to press the appeal on its merit and requests to take a lenient view of the matter.

13. In ***Mohd. Giasuddin Vs. State of AP, AIR 1977 SC 1926,*** explaining rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court:

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by reculturization.Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

14. In ***Sham Sunder vs Puran, (1990) 4 SCC 731***, where the high court reduced the sentence for the offence under section 304 part I into undergone, the supreme court opined that the sentence needs to be enhanced being inadequate. It was held:

"The court in fixing the punishment for any particular crime should take into consideration the nature of offence, the circumstances in which it was committed, the degree of deliberation shown by the offender. The measure of punishment should be proportionate to the gravity of offence."

15. In ***State of MP vs Najab Khan, (2013) 9 SCC 509,*** the high court, while upholding conviction, reduced the sentence of 3 years by already undergone which was only 15 days. The supreme court restored the sentence awarded by the trial court. Referring the judgments in ***Jameel vs State of UP (2010) 12 SCC 532, Guru Basavraj vs State of Karnatak, (2012) 8 SCC 734,*** the court observed as follows:-

"In operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. We also reiterate that undue sympathy to impose inadequate sentence would do more harm to the justice dispensation system to undermine the public confidence in the efficacy of law. It is the duty of court to award proper sentence having regard to the nature of offence and the manner in which it was executed or committed. The courts must not only keep in view the rights of victim of the crime but also the society at large while

considering the imposition of appropriate punishment."

16. Earlier, "Proper Sentence" was explained in ***Deo Narain Mandal Vs. State of UP (2004) 7 SCC 257*** by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the principle of proportionately. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

17. In subsequent decisions, the supreme court has laid emphasis on proportional sentencing by affirming the doctrine of proportionality. In ***Shyam Narain vs State (NCT of delhi), (2013) 7 SCC 77,*** it was pointed out that sentencing for any offence has a social goal. Sentence is to be imposed with regard being had to the nature of the offence and the manner in which the offence has been committed. The fundamental purpose of imposition of sentence is based on the principle that the accused must realize that the crime committed by him has not only created a dent in the life of the victim but also a concavity in the social fabric. The purpose of just punishment is that the society may not suffer again by such crime. The principle of proportionality between the crime committed and the penalty imposed are to be kept in mind. The impact on the society as a whole has to be seen. Similar view has been expressed in ***Sumer Singh vs Surajbhan Singh, (2014) 7 SCC 323 , State of Punjab vs Bawa Singh, (2015) 3 SCC 441, and Raj Bala vs State of Haryana, (2016) 1 SCC 463.***

18. In ***Kokaiyabai Yadav vs State of Chhattisgarh(2017) 13 SCC 449,*** it has been observed that reforming criminals who understand their wrongdoing, are able to comprehend their acts,have grown and nartured into citizens with a desire to live a fruitful life in the outside world, have the capacity of humanising the world.

19. In ***Ravada Sasikala vs. State of A.P. AIR 2017 SC 1166,*** the Supreme Court referred the judgments in ***Jameel vs State of UP (2010) 12 SCC 532, Guru Basavraj vs State of Karnatak, (2012) 8 SCC 734, Sumer Singh vs Surajbhan Singh, (2014) 7 SCC 323 , State of Punjab vs Bawa Singh, (2015) 3 SCC 441, and Raj Bala vs State of Haryana, (2016) 1 SCC 463*** and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary

to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system."

20. Considering the facts and circumstances of the case and the substantive period of about two months already undergone by the appellants in this case in prison and the fact that the appellants are old and aged persons; so far they have realized the mistake committed by them and are remorseful to their conduct and feel it necessary to serve with their polite and cooperative behavior to the society which they belong to and now they want to transform themselves into a law abiding citizen, I am of the considered opinion that they should be given a chance to reform themselves and extend their better contribution to the society to which they belong to.

21. Considering the facts and circumstances of the case, considering the evidence available on record and considering the nature of injuries and statement of the doctors, who were examined in the trial court, have not stated anywhere in their statements that the injuries sustained by the injured were fatal to life and they were likely to cause death, this Court deems it fit to alter the conviction from section 307/34 I.P.C. to section 324 I.P.C.

22. Consequently, taking into consideration the period already undergone in prison by the appellants in this case as well as considering that they have suffered physical and mental agony of trial and after conviction for a long period of about 40 years, the sentence awarded to them under Section 307/34 is converted under Section 324/34 I.P.C. The accused-appellants are convicted with the period already undergone by them in prison during trial and after conviction and with a fine of Rs. 10,000/-.

23. Accused-appellants are directed to deposit the fine of Rs. 10,000/-each before learned lower court within four months from the date of passing of the judgement, the entire amount deposited by the appellants shall be paid to the injured, if he is alive and in case he is dead then it would be paid to his legal heirs and in default of payment of fine as directed above, they shall further undergo 30 days rigorous imprisonment.

24. Appeal is partly allowed in the above terms and surety bonds of the sureties are discharged.

25. Office is directed to transmit a copy of this order to the learned Sessions Judge, Allahabad for compliance and compliance report be submitted to this Court also.

26. Office is also directed to send back the record of the trial court immediately.

27. Office is directed to transmit the lower court record along with a copy of this judgment to the learned court below for information and necessary compliance as warranted.

28. The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad, self attested by the learned counsel for the applicant alongwith a self attested identity proof of the said persons (preferably Aadhar Card) mentioning the mobile number (s) to which the said Aadhar Card is linked before the concerned Court/Authority/Official.

29. The concerned Court/ Authority/ Official shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.
