THE
INDIAN LAW REPORTS
ALLAHABAD SERIES

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

2021 - VOL. IX
(SEPTEMBER)

PAGES 1 TO 1468

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

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APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.08.2021 & 08.09.2021

BEFORE

THE HON'BLE SHEKHAR KUMAR YADAV, J.

Crl. Misc. Ist Bail Application No. 18557 of 2021

Anil Bhati @ Sonu ...Applicant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Ajatshatru Pandey, Sri Navnath Pandey, Sri G.S. Chaturvedi (Senior Adv.)

Counsel for the Opposite Party:
A.G.A., Sri Harikesh Kumar Gupta, Sri Prakash Chandra Srivastava

A. Bail - The Court after considering the nature of the allegations, the impact of release of such accused, criminal history, gravity of offence and the evidence collected during investigation rejected the bail application of the applicant. (Para 17)

Bail Application Rejected. (E-10)

List of Cases cited:

1. St. of Mah. Vs Sitaram Popat Vetal (2004) 7 SCC 521

(Delivered by Hon'ble Shekhar Kumar Yadav, J.)

1. Heard Mr G. S. Chaturvedi, learned Senior counsel assisted by Mr Ajatshatru Pandey, learned counsel for the applicant, Mr Harikesh Kumar Gupta, learned counsel for the informant, learned AGA for the State and perused the record.

2. Present application under Section 439 Cr.P.C. has been filed by the applicant, namely, **Anil Bhati @ Sonu** for release on bail, who is involved in Case Crime No. 0850 of 2020, under Sections 307, 120-B IPC, P.S. Phase-3, District Gautam Buddh Nagar.

3. As per the version of the FIR, on **14.4.2019**, the informant, namely, Yogendra Yadav and his brother Shivram Yadav had gone to village Bahlolpur to attend a function in family. It is alleged that in the night at about 11.00 to 11.30 P.M. two unknown persons on a motorcycle made indiscriminate firing upon the house of the informant with an intention to kill him, and at that time only the security guard, namely, Chandra Pal was present at his house, who is said to have telephoned the informant about the alleged incident. It is further alleged that the informant, after reaching his house, is said to have informed the police by *'dialling 100'* and the police is said to have reached the place of occurrence and recovered the empty cartridges from outside the house. It is further alleged that prior to this incident, in the year 2000, the uncle of the informant, namely, Charan Singh son of Risal had been murdered by accused Santan and Mukesh along with others and the said accused persons have been convicted for life by trial Court. It is further alleged that Arun Yadav and Amit Yadav, the nephew of the same family of aforesaid accused, had also killed his cousin, namely Shiv Kumar Yadav son of Rajveer Singh on 16.11.2017 with the help of the shooters of Sunder Bhati and Anil Bhati's gang.

4. It is contended by learned counsel for the applicant that the applicant is not named in the FIR and his name came in light during investigation in the statement of co accused Aashu Jat. It is further submitted that the applicant has no concern

with the said co accused and the alleged incident.

5. It is further contended that the applicant was already in Jail in connection with Case Crime No. 751 of 2017, under Sections 147, 148, 302, 34, 149, 120-B IPC and Section 7 of Criminal Law Amendment Act, P.S. Bisrak, District Gautam Budh Nagar and in the said case, he was admitted to bail by this Court vide order dated 14.11.2018 passed in Criminal Misc bail Application No. 19942 of 2018. But he could not be released due to imposition of National Security Act, 1980, which was imposed upon him vide order dated 5.12.2018, and the said detention was later-on challenged by the applicant and after the quashing of the said detention order by this Court vide order dated 19.08.2019, the applicant was finally released from District Jail on **6.12.2019.**

6. It is further submitted that no offence under Sections 307, 120-B IPC is made out against the applicant as there is no evidence of conspiracy and the statement of co accused is not admissible to be taken into account. The applicant is in jail since 24.08.2020.

7. It is again submitted that it is not in dispute that when the incident in question took place, applicant was in jail and nothing is on record to show that applicant had participated directly in the occurrence. It is further submitted that after grant of bail the applicant herein in the present case, shall never misuse the concession of bail.

8. On the other hand, learned AGA as well as learned counsel for the informant have contended that there is high possibility of threat and danger to the life and safety of the complainant and his family members, as the applicant is having long criminal history of 15 cases against him under various heinous sections.

9. Learned counsel for the informant has also stated that from perusal of the statements of the informant and co accused Ashu Jaat @ Praveen said to have been recorded under Section 161 Cr.P.C., involvement of accused in the present case cannot be ruled out. The relevant extract of the statement of the informant said to have been recorded under Section 161 Cr.P.C. is as under:-

"बयान वादी योगेन्द्र यादव पुत्र श्री ओमवीर सिंह यादन निवासी म0न0 बी0एच0 66 सेक्टर 70 नोयडा मोबाईल .000000 ने पूछने पर बताया कि मेरे भाई शिवकुमार यादव की दिनांक 16/11/2017 को दिन मे 02:30 बजे के लगभग खजूर कट तिगडी गोल चक्कर पर गोली मारकर हत्या कर दी गयी थी। शिवकुमार के साथ ही उनके सुरक्षा गार्ड रईस पाल व ड्राईवर बलीनाथ की भी हत्या कर दी गयी थी। जिसके संबंध में मेरे चचेरे भाई योगेश यादव ने थाना बिसरख पर 1. सुन्दर यादव 2. चरण सिंह पुत्रगण जयराम 3. देवेन्द्र यादव 4. सतेन्द्र यादव पुत्रगण डालचन्द्र निवासीगण पुराना हैवतपुर थाना बिसरख गौतमबुद्ध नगर के विरूद्ध दिनांक 17/11/2017 को मु0 अप0 संख्या 751/17 धारा 147,148,149,302,34 भादवि पंजीकृत लिखवाया था। पुलिस की जांच से पता चला था कि यह हमला सुन्दर भाटी गैंग के अनिल भाटी ने अपने शूटरो से कराया था पुलिस ने तफ्तीश से अनिल भाटी, शेरू भाटी, सहदेव भाटी, सुन्दर भाटी, प्रदीप उर्फ भोला और अमर उर्फ फौजी उर्फ राजकुमार का चालान इस मुकदमें में किया था। उस मुकदमें की मै पैरवी कर रहा हूं। कई बार अनिल भाटी ने मुझे धमकी भिजवायी है कि या तो फेसला कर ले। नहीं तो तेरा भी तेरे भाई की तरह ही मर्डर करा दुंगा। मुझे जानकारी मिली की मेरे घर पर जो दिनांक 14/04/2019 को फाईरिंग करायी गयी थी वो ही अनिल भाटी ने हीं 1. आशू जाट उर्फ प्रवीन उर्फ धर्मेन्द्र पुत्र राजेन्द्र निवासी ग्राम काजीपुरा थाना मसूरी जिला गाजियाबाद, 2. उमेश उर्फ छोटे पुत्र वतन सिंह निवासी ग्राम रायपुर मौजमपुर थाना शिकारपुर जनपद बुलन्दशहर से करायी थी। आशू और उमेश ने ही हेलमेट लगाकर मो0सा0 से आकर मेरे घर पर गोलिया चलायी थी।"

10. The relevant extract of statement of co accused Aashu Jat, said to have been

recorded under section 161 Cr.P.C. is as under:-

" बयान अभियुक्त आशू जाट उर्फ प्रवीन उर्फ धर्मेन्द्र पुत्र राजेन्द्र निवासी ग्राम काजीपुरा थाना मसूरी जिला गाजियाबाद ने पूछने पर अपनी गलती की माफी मांगते हुये बताया कि मेरी अनिल भाटी पुत्र सहदेव भाटी निवासी ग्राम घंघोला ग्रेटर नोयडा गौतमवुद्ध नगर से कई साल से दोस्ती है मार्च 2019 में उससे मिला था तो उसने मुझसे अपना एक काम करने को बताया था कि उसके खिलाफ योगेन्द्र यादव निवासी सैक्टर 70 नोएडा अपने भाई की हत्या के मुकदमें में बहुत पैरवी कर रहा है और धमकी से भी नहीं मान रहा है उसके घर पर जाकर जो भी मिले उसे गोली मार देना तब देखता हूं कि वह कैसे फेसला नहीं करेगा और इस काम के लिए मुझे अनिल भाटी ने एक लाख रूपये दिये थे। तब मैने अपने साथी उमेश उर्फ छोटे पुत्र वतन सिंह निवासी ग्राम रायपुर मौजमपुर थाना शिकारपुर जिला बुलंदशहर को साथ लेकर दिनांक 14 अप्रैल 2019 को रात्रि 11 बजे के लगभग मो0सा0 पर जाकर सैक्टर 70 नोयडा में योगेन्द्र यादव के घर पर फायरिंग की थी। उस दिन उसके घ्र पर कोई नहीं था केवल गार्ड बाहर खडा था वो भी हमें देखकर अन्दर भाग गया था मैं और उमेश मो0 सा0 से दोनों हेलमेट लगाकर फायरिंग करने के लिये सैक्टर 70 में गये थे। और फायरिंग करके वापस अपने घर चले गये थे। पिस्टलों के बारे में पूछने पर बताया कि वो दोनों पिस्टल बाद में उमेश के घर रखी थी अब मुझे नहीं पता कि वह कहां पर है।"

11. It is further submitted by learned AGA and learned counsel for the informant that on perusal of the aforesaid statements it is very much clear that there is specific allegation that the applicant hatched the conspiracy. Further the antecedents of the accused; motive behind commission of the offence; threat perceptions to the complainant and his family members also cannot be brushed aside. It is submitted that there is every likelihood that the accused, if granted bail, would misuse the concession of bail. It is submitted that there is ample material collected during investigation establishing that the applicant has hatched conspiracy and the applicant is involved in various heinous offences, and, therefore, it would not be proper to release him on bail.

12. It is further contended by learned counsel for the informant that co accused, namely, Aman Yadav, Ravindra Kumar Yadav and Pravin Kumar Yadav have been granted bail in Case Crime No. 751 of 2017, by this Court vide order dated 4.12.2019, which was challenged by him before the Apex Court. Apex Court vide order dated 5.4.2019 dismissed the appeal and directed to expedite the trial and conclude the proceedings as early as possible. It was also directed that the accused must render complete co-operation on early disposal of the matter, failing which the facility of bail granted to them may stand recalled.

13. It is further submitted that in the IInd bail application of co accused Amit Kumar Yadav, being Criminal Misc IInd Bail Application 16121 of 2020 (Amit Kumar Vs State), this Court vide order dated 19.10.2020 also directed the Trial Court to secure the presence of the co accused persons, namely, Aman Yadav, Ravindra Kumar Yadav and Pravin Kumar Yadav and other co accused persons, who were on bail and frame charges against them by the next date in the matter and proceed with the trial.

14. Further submission is that the applicant has not yet surrendered before the Court below hence no charge has been framed against him in the matter and he is deliberately absconding, therefore, considering the impact of his release on witnesses and innocent members of the family of the victim, this court should not enlarge a history sheeter on bail.

15. In the case of **State of Maharashtra v. Sitaram Popat Vetal, (2004) 7 SCC 521,** it has been held by Hon'ble Supreme Court that while granting

bail, the following factors among other circumstances are required to be considered by the Court:

1. The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence;

2. Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant; and

3. Prima facie satisfaction of the court in support of the charge.

16. It is well settled that, among other circumstances, the factors to be borne in mind while considering an application for bail are:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the 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, behaviour, 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.

17. Keeping in view the law laid down in catena of decisions upon use of discretionary power of grant of bail and also considering the nature of the allegations; the impact of release of such accused, having chequered history, on witnesses and family of victim, gravity of offence, and the evidence collected during investigation, applicant's involvement that too from the jail cannot be ruled out in the present case, hence, prima facie no case for grant of any indulgence is made out.

18. Application is accordingly rejected.

(2021)09ILR A4
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.08.2021

BEFORE

THE HON'BLE SANJAY KUMAR SINGH, J.

Crl. Misc. Bail Application No. 22078 of 2021

Bhootnath ...Applicant (In Jail)
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Amit Kumar Srivastava

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

A. Criminal Law - The Protection of Children from Sexual Offences Act, 2012 - The Court has rejected the bail application on seeing the gravity of the offence, severity of the punishment and the manner in which the applicant alleged to have committed rape on the minor girl. (Para 7)

Bail Application Rejected. (E-10)

List of Cases cited:

1. Ms. Eera through Dr. Manjula Krippendorf Vs. State (Govt. of NCT of Delhi) AIR 2017 SC 3457

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

1. Heard Mr. Amit Kumar Srivastava, learned counsel for the applicant, Mr.

Rabindra Kumar Singh, learned Additional Government Advocate assisted by Mr. Rajmani Yadav, brief holder representing the State and perused the record of the case.

2. By means of this application, applicant-Bhootnath, who is involved in Case Crime No. 84 of 2019, under sections 376, 323, 363 IPC and section 3/4 of The Protection of Children from Sexual Offences Act, police station Jafarganj, district Fatehpur, seeks enlargement on bail during the pendency of trial.

3. As per prosecution case, in brief, the first information report dated 01.06.2019 has been lodged by informant-Keshanlal Sonkar under section 363 IPC against unknown person alleging inter alia that on 01.06.2019 at about 4.00 a.m. her daughter, whose date of birth is 12.10.2002 had gone to attend the call of nature, but did not return home.

4. It is submitted by learned counsel for the applicant that the applicant is absolutely innocent and has falsely been implicated in the present case with some ulterior motive. The FIR has been lodged against unknown person. It is further submitted by learned counsel for the applicant that as per medical examination report of the victim, she is about 18 years. The medical examination report does not support the prosecution story. It is next submitted by the learned counsel for the applicant that the applicant is well acquainted with the family members of the victim and he used to come to her house, therefore, the victim has developed illicit relations with the applicant and as such she was consenting party with the applicant. There are contradictions in the statements of the victim recorded under sections 161 and 164 Cr.P.C. As per medical examination report of the victim, no injury has been found on her body. It is also submitted that the applicant has no criminal antecedent to his credit and is facing detention since 05.07.2019. It is next contended that there is no chance of the applicant of fleeing away from the judicial process or tampering with the prosecution evidence. Learned counsel for the applicant lastly submitted that if the applicant is released on bail, he will not misuse the liberty of bail and will cooperate in the early disposal of the case.

5. Per contra, learned Additional Government Advocate has opposed the bail prayer of the applicant by contending that the applicant is well acquainted with the family members of the victim and had used to come to the house of the informant. The applicant is a sage and it is not expected by a sage of committing such a heinous crime with a girl, who has reverence and faith on him. The victim was recovered after one month on 02.07.2019 from the possession of the applicant (Bhootnath alias Ramdas alias Babaji) from district Jamnagar, Gujarat with the help of local police of Jamnagar. The applicant was arrested on 02.07.2019 and after obtaining transit remand order dated 02.07.2019 from the court of Chief Judicial Magistrate, Jamnagar, he was brought and produced on 05.07.2019 before the concerned court of district-Fatehpur, U.P. In her statement under sections 161 and 164 Cr.P.C. the victim has stated that she has been forcibly enticed away by the applicant and also made allegation of committing rape upon her against the applicant. She has also stated in her statement under section 161 Cr.P.C. that the applicant used to give her some medicines, due to which she fallen asleep. It is also alleged by the victim that the accused also assaulted her by danda and

chimta (tong). As per FIR and her Aadhar Card, victim is minor, as her date of birth is 12.10.2002. On 05.07.2019, sections 376, 323 IPC and 3/4 of Protection of Children from Sexual Offences Act were added by the Investigating Officer. It is next contended by the learned A.G.A. that it is a heinous crime. It is next argued that absence of injuries on private part or other part of body of victim would not rule out her being subjected to rape. Lastly, it is submitted that the innocence of the applicant cannot be adjudged at pre trial stage therefore, the applicant does not deserve any indulgence. In case, the applicant is released on bail, he will misuse the liberty of bail.

6. As per section 2(1)(d) of the Protection of Children from Sexual Offences Act 2012, "Child" means any person below the age of eighteen years. The Apex Court in the matter of ***Ms. Eera through Dr. Manjula Krippendorf vs State (Govt. of NCT of Delhi) and another,*** reported in AIR 2017 SC 3457 has held that use of word "age" in section 2(1)(d) of Protection of Children from Sexual Offences Act only includes biological/physical age and not mental age of child. The degree of understanding of child can never be put in straight jacket formula. In this case, a heinous crime of kidnapping and rape has been committed with a child/girl by the accused, who is a sage (Baba) aged about 50 years and was known to victim's father and used to visit her house, ergo he must suffer for its consequences. On account of these kind of incidents, faith and trust on the person is decreasing. A rapist not only violates the victim's personal integrity, but leaves indelible marks on the very soul of the helpless female. In this case, a hapless girl had been ravished by the accused. The act of sexual assault induces trauma and horror for any girl or regardless of her social position in the society. A child/girl, who is the victim of sexual assault, is not an accomplice to the crime, but is victim of another person's lust and therefore, her statement need not be tested at this stage with the same amount of suspicion as that of accomplice. As a matter of fact, the crime is not only against the victim, it is against the whole society as well. It demands just decision from the Court and to such demand, the Courts of law are bound to respond within the legal parameters.

7. Considering the facts and circumstances of the case, submissions advanced on behalf of parties, gravity of the offence, severity of the punishment and the manner in which the offence has been committed, I do not find any good ground to grant bail to the applicant.

8. Accordingly, the bail application is rejected.

9. However, it is clarified that the observation, if any, made herein above shall be strictly confined to the disposal of the bail application and must not be construed to have any reflection on the ultimate merits of the case.

(2021)09ILR A6
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.08.2021

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, .J.
THE HON'BLE SHAMIM AHMED, J.

Criminal Misc. Writ Petition No. 642 of 2021
and other connected cases

Arjun ...Petitioner

Versus

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

Counsel for the Petitioner:
Sri Pintu Tiwari

Counsel for the Respondents:
A.G.A.

A. Criminal Law -Constitution of India, 1950-Article 226 & U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986-Section 2/3-quashing of FIR-the scheme of the Act 1986 nowhere prohibits lodging of first information report under the Act on the basis of a single case, provided the ingredients of the definition of 'Gang' u/s 2(b) of the Act, 1986 is prima facie satisfied.(Para 1 to 23)

B. Where a group of persons act either singly or collectively by violence, or threat or show of violence, or intimidation, or coercion, or otherwise with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage of himself or any other person, indulge in anti-social activities as described in sub-clauses (i) to (xxv) of Section 2(b), they shall be a 'Gang' as defined in Section 2(b).(Para 19, 20)

The writ petition is dismissed. (E-6)

List of Cases cited:

1. Subhash & ors. Vs St. of U.P. & ors. CriMWP No. 835 of 1998

2. Ashok Kumar Dixit Vs St. of U.P. & anr.(1987) 24 ACC 164

3. Ajai Rai Vs St. of U.P. 1995 All Cri C 477

4. Kartar Singh Vs St. of Punj. (1994) 3 SCC 569

5. Dharmendra Kirthal Vs St. of U.P. & anr. (2013) 8 SCC 368

6. N. Sengodan Vs St. of T.N. (2013) 8 SCC 664

7. St. of Bih. Vs P.P. Sharma (1992) SCC (Cri) 192

8. St. of Har. & ors. Vs Bhajan Lal & ors. (1992) Supp. 1 SCC 335

9. Ashok Rai & anr. Vs St. of U.P. & ors. (1995) 25 ALR 423

10. Tej Singh & ors. Vs St. of U.P. & anr. Appl.u/s 482 No.- 3239 of 2005

11. Piyush Kanti Lal Mehta Vs Commr of Police (1989) Supp. 1 SCC 322

12. Pashkar Mukherjee & ors. Vs The St. of W,B. (1969) 1 SCC 10 (paras 14 and 15)

13. Subhash Vs St. of U.P. & anr.(1998) All. L.J. 2092

14. Ritesh Kumar @ RiKki Vs St. of U.P. & anr. CriMWP No. 3938 of 2021

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard learned counsel for the petitioners and the learned A.G.A.

2. This batch of writ petitions were finally heard at length with the consent of the learned counsels for the parties as noted in the order dated 19.02.2021.

3. Considering the facts and circumstances of the case, the provisions of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 (hereinafter referred to as "the Act, 1986') and the submissions of the learned counsels for the parties, the following questions are framed for determination:-

"(i) Whether on a solitary criminal case registered against the petitioners, a case under Section 2/3 of the U.P. Gangsters and Anti Social Activities

(Prevention) Act, 1986 (hereinafter referred to as "the Act, 1986") can be registered ?

(ii) If the answer to the question no.(i) is in affirmative, then whether the impugned First Information Report registered under Section 2/3 of the Act, 1986, deserves to be quashed ?"

Facts:-

4. The basis for registering first information reports against the petitioners are given in the impugned first information reports. Therefore, for ready reference, the first information reports under challenge in each of the present writ petitions, are reproduced below:-

" (A) CRIMINAL MISC. WRIT PETITION No. - 642 of 2021

The First Information Report No.442/2020, dated 13.12.2020 registered against the petitioner under Section 2/3 of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 at P.S. Civil Lines, District Muzaffarnagar:-

"सूचना जुबानी वादी - प्रभारी निरीक्षक श्री डी० के० त्यागी- मै प्रभारी निरीक्षक डी० के० त्यागी मय हमराह का० 316 राहुल कुमार मय 01 जरब पम्प एक्शन गन मय 10 कारतूस 12 बोर मय 01 टीयर गैस गन मय 08 सैल टीयर गैस मय सरकारी बुलेरो UP-12 AG - 0415 मय चालक का० 590 यशपाल मय एक जरब पिस्टल मय 10 कारतूस के रवाना शुदा रफ्ता रपट रो० आम तारीखी इमरोजा से वाद देखरेख शान्ति व्यवस्था गश्त, चैकिंग संदिग्ध व्यक्ति / वाहन व तालाश वांछित अभि० गण विवेचना मुकदमा मरजुआत व वाला- वाला श्रीमान जिला मजिस्ट्रेट मुजफ्फरनगर महोदय कार्यालय से अनुमोदित शुदा गैंगचार्ट गैंगलीडर जोनी उर् शुभम व अर्जुन आदि का प्राप्त कर वापस थाना आया। चार्ज थाना सुपुर्द खुद लिया कर्म०गण का हवाले शुदा अस्लाह बादस्तूर रहा। अंकित किया कि गैंग चार्ट में 1. जोनी उर् शुभम पुत्र राकेश निवासी सुनहेडी खडखडी चुडियाला कस्वा व थाना गागलहेडी जनपद सहारनपुर उम्र 25 वर्ष **आपराधिक इतिहास - मु०अ०सं० 247/2020** धारा 392,411 भादवि व चार्ज शीट नम्वर 221/2020 दिनांकित 13/9/2020 थाना सि० ला० मुजफ्फरनगर **मु०अ०सं० 249/2020 धारा 307** भादवि चार्ज सीट नम्वर 341/2020 दिनांकित 07/10/2020 थाना सि०ला० मु०नगर 2. अर्जुन पुत्र नोरतो सिंह निवासी हरिनगर थाना पुरकाजी जनपद - मु०नगर उम्र 23 वर्ष आपराधिक इतिहास - **मु०अ०सं० 247/2020** धारा 392,411 भादवि चार्ज सीट नम्वर 221/2020 दिनांकित 13/9/2020 थाना सि०ला० मुजफ्फरनगर सक्रिय सदस्य है अपने गैंग के साथ अपने **निजी आर्थिक एवं भौतिक लाभ के लिये उपरोक्त अपराध कारित करते है,** इनका यह कृत्य 2(1)3 उ०प्र० गिरोहबन्द अधि० एवं समाज विरोधी क्रियाकलाप 1986 के अंतर्गत परिभाषित है अभियुक्त गण का जनता मे इतना भय व आतंक व्याप्त है कि इनके विरूद्ध कोई भी व्यक्ति गवाही देने तथा रिपोर्ट लिखाने के लिए तैयार नही है। उपरोक्त अभि०गणों का समाज में स्वच्छन्द रहना जनहित में नहीं है अतः अभियुक्तगणों के विरूद्ध धारा 2(1)3 उ०प्र० गिरोहबन्द अधि० एवं समाज विरोधी क्रियाकलाप 1986 का अभियोग पंजीकृत कराता हूँ। नोटः बयान जुबानी जो बोला है का० 771 उमेश नायक द्वारा वही शव्द व शव्द टाईप किया गया है। हस्ताक्षर बनाता हूँ।"

(B) CRIMINAL MISC. WRIT PETITION No. - 798 of 2021

The First Information Report No.0728/2020, dated 07.11.2020 registered against the petitioner under Section 2/3 of the Uttar Pradesh Gangsters and Anti-

Social Activities (Prevention) Act, 1986 at P.S. Robertsganj, District Sonbhadra:-

"नकल तहरीर हिन्दी वादी प्रधान लेखक थाना रावर्टसगंज सोनभद्र आज दिनांक 07.11.20 को मै प्रभारी निरीक्षक मय हमराह का० रविकान्त सरोज , का० समेश यादव मय सरकारी वाहन UP64G 0389 चालक HM रविन्द्र नाथ मिश्र के रवाना शुदा देखभाल क्षेत्र शान्ति व्यवस्था डियूटी काम्बिंग थाना क्षेत्र से बाला बाला जिला मजिस्ट्रेट कार्यालय सोनभद्र से पूर्व में अनुमोदित शुदा गैंग चार्ट गैंग लीडर विरेन्द्र प्रताप सिंह उर्फ वीरू S/o सुनील सिंह निवासी नुनौटी थाना कोतवाली चुनार जनपद मिर्जापुर का प्राप्त कर बाद अवलोकन क्षेत्र में भ्रमणशील रहकर जानकारी कर तथा थाना स्थानीय के अभिलेखो के अवलोकन से ज्ञात हुआ कि गैंग लीटर विरेन्द्र प्रताप सिंह उर्फ वीरू S/o सुनील सिंह नि० नुनौटी पो० तेन्दुआ कला थाना कोतवाली चुनार मिर्जापुर का **एक संगठित गिरोह है।** इस गैंग के सदस्य प्रमोद सिंह S/o नरेन्द्र सिंह नि० पापी थाना करमा जनपद सोनभद्र ह० पता जनसोपर थाना शाहगंज जनपद सोनभद्र, धरेन्द्र प्रताप सिंह उर्फ धीरू सिंह S/o सुनील सिंह नि० नुनौटी थाना चुनार जनपद मिर्जापुर इस गैंग के सदस्यो द्वारा अपने आर्थीक एवं भौतिक लाभ हेतु भादवि के अध्याय 16 एवं 22 वर्णीत अपराधों को कारित करके समाज में भय एवं आतंक पैदा करके अपने गिरोह के सदस्यों के लिए आर्थिक एवं भौतिक लाभ हेतु धनोपार्जन करते हुए इनके गैंग के भय से जनता के लोग इनके विरूद्ध अभियोग व गवाही कराने से डरते है। जिससे जनता मे काफी भय व्याप्त है। यह गैंग काफी मनबढ़ व शातीर है। **उपरोक्त गैंग के सदस्यों के विरूद्ध कई अभियोग पंजीकृत है जिनमें आरोप पत्र मा० न्यायालय प्रेषित किये जा चुके है**। गैंग लीटर वीरेन्द्र प्रताप सिंह उर्फ वीरू व उसके गैंग के सदस्य प्रमोद सिंह, लकी सिंह उर्फ आलोक सिंह, धीरेन्द्र प्रताप सिंह उर्फ धीरू सिंह उपरोक्त का यह कार्य अन्तर्गत धारा 3(1) उ०प्र० गिरोह बन्द एवं समाज विरोधी रिया कलाप निवारण अधिनियम 1986 के तहत अभियोग पंजीकृत करें। ह० अंग्रेजी अपठनीय SHO 7.11.20 (अंजनी कुमार राय) प्रभारी निरीक्षक कोतवाली रावर्टसगंज जनपद सोनभद्र दिनांक 07.11.2020 नोटः- मै का०मु० अनुप कुमार ठाकुर प्रमाणित करता हूँ कि चिक की तहरीर को अक्षरशः बोल बोल कर क० आप० सुशील कुमार से कम्प्यूटर पर किता कराया गया। "

(C) CRIMINAL MISC. WRIT PETITION No. - 17198 of 2020

The First Information Report No.1260/2020, dated 18.08.2020 registered against the petitioner under Section 2/3 of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 at P.S. Kalyanpur, District Kanpur Nagar:-

"सूचना वादी जुबानी दिनांक 17/08/2020 को मैं प्रभारी निरीक्षक अजय सेठ मय हमराह व का० 1392 अभिषेक कुमार को व का० 2769 मनोज कुमार मय जीप सरकारी यूपी 70 एजी 3269 चालक हे० का० राजवीर के रवाना होकर चैंकिग संदिग्ध व्यक्ति /वाहन/ वस्तु तलाश वांछित अपराधी चेकिंग संदिग्ध व्यक्ति/ वाहन देखरेख क्षेत्र रोकथाम जुर्म जरायम बैंक चेकिंग, व पेण्डिंग विवेचना अहकामत व 14नाका/बैरियर को चैक किया गया। तथा जनता के व्यक्तियो को कोरोना वायरस को दृष्टिगत रखते हुए अभियुक्तो की सुरागरसी पतारसी करते हुये बाला बाला एक किता अनुमोदित शुदा खाका गैंग चार्ट जिलाधिकारी महोदय कार्यालय से प्राप्त शुदा अन्तर्गत धारा 3(1) गैंगस्टर एक्ट व दीगर प्रपत्र दाखिल किया विवरण कार्य सरकार इस प्रकार है। कि मै एसएचओ मय हमराही फोर्स के क्षेत्र मे मामूर/भ्रमण से ज्ञात हुआ कि गैंग लीडर (1) इसरत सज्जाद पुत्र स्व० सज्जाद

अहमद उम्र 51 वर्ष नि० A-604 VI प्लोर शिलालिक मित्तल अट्टालिका विल्डिंग विठूर रोड कल्यानपुर कानपुर नगर हाल पता 88/15 चमनगंज कानपुर नगर सदस्य (2) मोहम्मद इसहाक पुत्र मासूफ अली उम्र 50 वर्ष नि० 101 कर्नलगंज थाना कर्नलगंज कानपुर नगर (3) मो० जफर पुत्र स्व० अव्दुल समद उम्र 52 वर्ष नि० H-301 चन्द्र नगर थाना चकेरी कानपुर नगर 4- हसीन पुत्र अयूव खान नि० 97/311 रेडीमेन्ट मार्केट वेकनगंज थाना वेकनगंज कानपुर नगर उम्र 38 वर्ष 5- रियाजुद्दीन पुत्र नशीरूद्दीन नि० 95/26 पेच वाग कर्रासखाना लाला कम्पाउन्ड वेकनगंज कानपुर नगर उम्र 45 वर्ष 6- नशीम अख्तर पुत्र स्व० कजलू रहमान नि० 128 पोखर पुर जाजमऊ लाल वंगला थाना चकेरी कानपुर नगर उम्र 51 वर्ष 7- अकील अमहद पुत्र मुरसलीन अहमद नि० LIG 95 KDA कालोनी जाजमऊ थाना चकेरी कानपुर नगर उम्र 43 वर्ष 8- अव्दुल कादिर पुत्र अव्दुल सलाम नि० 452 मोती नगर जाजमऊ थाना चकेरी कानपुर नगर उम्र 36 वर्ष 9- निजामुल हसन पुत्र स्व० सिराजुल हसन नि० 98/176ए नाजिर वाग थाना वेकनगंज कानपुर नगर उम्र 42 वर्ष एक शातिर किस्म के अपराधी है इनका एक संगठित गिरोह है अपने व अपने गैंग के साथी के साथ आर्थिक एवं भौतिक लाभ हेतु समाज विरोधी क्रिया कलाप करके क्षेत्र में भय व आतंक फैलाये हुए है। जिनके द्वारा **नाल लेकर तास के पत्तो से रूपयों की हार जीत की वाजी लगा कर मकान के अन्दर जुआ खिलवाना** उक्त कृत्य जैसे जघन्य अपराध कारित करना इनकी आम सौहरत है एवं जिसमें क्षेत्र की जनता में असुरक्षा का माहौल है। इनके द्वारा समाज मे इतना भय व आतंक व्याप्त है कि समाज का कोई भी व्यक्ति इनके विरूद्ध अभियोग पंजीकृत कराने व न्यायालय में साक्ष्य देने का साहस नही जुटाता इनका समाज में स्वछंद विचरण करना समाज के लिए हित में नही है गैंग लीडर व उसके साथी धारा सार्वजनिक धूत अधि० 1867 में वर्णित अपराधों को करने के अभयस्त अपराधी है। जो गैंगेस्टर की धारा 2 (ख) में वर्णित अपराधो की श्रेणी में आता है इनके द्वारा (1) **मु०अ०सं० 154/2020 धारा जुंआ अधिनियम** गैंग के लीडर व सदस्य के अपराधों को दृष्टिगत रखते हुए इनके विरूद्ध उ०प्र० गिरोहबन्द एवं समाज विरोधी क्रियाकलाप निवारण अधिनियम के धारा 3(1) के अन्तर्गत कार्यवाही किया जाना नितांत आवश्यक है। इनका गैंगचार्ट तैयार कर पूर्व मे ही श्रीमान जिलाधिकारी महोदय द्वारा अनुमोदित किया जा चुका है। इनके कृत्यो पर प्रभावी नियन्त्रण हेतु इनके विरूद्ध उ०प्र० गिरोह बन्द एवं समाज विरोधी क्रिया कलाप निवारण अधिनियम 1986 की धारा 3(1) का अभियोग मुझ एसएचओं द्वारा बोल बोल कर कम्पयूटर पर म०का० 922 रंजीता यादव से पंजीकृत कराया गया पढकर देखा जो बोला वही लिखा है , नोट मै म०का० 922 रंजीता यादव प्रमाणित करती हूँ कि सूचना जुवानी मेरे द्वारा शब्द व शब्द टाइप की गयी। "

(D) CRIMINAL MISC. WRIT PETITION No. - 17194 of 2020

The First Information Report No.0293/2020, dated 25.07.2020 registered against the petitioner under Section 2/3 of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 at P.S. Civil Lines, District Etawah:-

" नकल गैंग चार्ट लीडर राहुल यादव पुत्र राधा पुत्र राधाकिशन यादव निवासी चन्देपुरा थाना सैफई जनपद इटावा क्र०सं० , नाम पता गैंग लीडर व सदस्य, मु०अ०सं० 194/2020 धारा 394/411 भादवि थाना सिविल लाइन इटावा C.S. No- 205/2020 दिनांक 26.06.2020 मु०अ०सं० 198/2020 धारा 4/25 ए एक्ट थाना सिविल लाइन इटावा C.S.No.- 147/2020 दिनांक 02.05.2020 , वर्तमान स्थिति 1. राहुल यादव पुत्र राधाकृष्ण यादव उम्र करीब 25 वर्ष

निवासी चन्देपुरा थाना सेफई, इटावा हाल पता 44 वैभव विहार कालोनी थाना फ्रैन्डस कालोनी इटावा - सही, निल, जेल 2. ज्योति यादव पत्नि अभिषेक यादव उम्र करीब 26 वर्ष निवासी बनी का नगला थाना बकेवर जिला इटावा- सही, निल, जेल 3. मुनीष कुमार यादव पुत्र विनोद कुमार उम्र करीब 22 वर्ष निवासी झिन्टुआ थाना भर्थना जिला इटावा- सही, सही, जेल, 4. पूनम पुत्री सुरेन्द्र सिंह उम्र करीब 25 वर्ष निवासी अटैया थाना कुर्रा जिला मैनपुरी हाल पता- अशोक नगर थाना फ्रैण्डस कालोनी इटावा - सही, निल, जेल। श्रीमान जी, निवेदन है कि राहुल यादव पुत्र राधाकृष्ण यादव उम्र करीब 25 वर्ष निवासी चन्देपुरा थाना सैफई इटावा हाल पता 44 वैभव विहार कालोनी थाना फ्रैण्डस कालोनी इटावा का एक गिरोह है जिसका वह स्वयं लीडर है, तथा ज्योति यादव पत्नी अभिषेक यादव उम्र करीब 26 वर्ष निवासी बनी का नगला थाना बकेवर जिला इटावा, मुनीष कुमार यादव पुत्र विनोद कुमार उम्र करीब 22 वर्ष निवासी झिन्टुआ थाना भर्थना जिला इटावा व पुनम पुत्री सुरेन्द्र सिंह उम्र करीब 25 वर्ष निवासी अटैया थाना कुर्रा जिला मैनपुरी हाल पता अशोक नगर थाना फ्रैण्डस कालोनी इटावा गिरोह के सदस्य है जिनके द्वारा मारपीट कर लूटपाट जैसे संगीन अपराध करने के अभ्यस्त अपराधी है। जिनके कब्जे से लूटी गयी सम्पत्ति क्रमशः राहुल यादव से बरामद एक लाख पचास हजार रूपये व एक अदद मोबाईल सैमसंग व ज्योति यादव से एक लाख चालीस हाजर रूपये व मुनीश कुमार से एक लाख तीस हजार रूपये व पूनम से एक लाख तीस हजार रूपये लूटी गयी सम्पत्ति दिनांक 12.04.2020 को बरामद की गयी तो अपने व अपने परिवार के आर्थिक एवं भौतिक एवं बुनियादी लाभ प्राप्त करने के उद्देश्य से धन अर्जित करते है। भादवि के अध्याय 16,17 व 22 में वर्णित अपराधो को कर समाज विरोधी क्रिया कलापो में संलिप्त है जिससे थाना क्षेत्र व समाज के व्यक्तियो में असंतोष है। गिरोह के समाज विरोधी क्रियाकलापो मे रोक जनहित में लगाया जाना आवश्यक है। अतः अनुरोध है कि गिरोह के विरूद्ध उ०प्र० गिरोह बन्द एवं समाज विरोधी क्रियाकलाप (निवारण) 1986 की धारा 3 के तहत कार्यवाही किये जाने हेतु प्रस्तुत गैंग चार्ट अनुमोदित करने की कृपा करें। SD Jitendra मय मोहर (जितेन्द्र प्रताप सिंह) थानाध्यक्ष सिविल लाइन इटावा , SD अपठनीय दिनांकित 06.07.20 मय मोहर एस०एन० वैभव पाण्डेय क्षेत्राधिकारी नगर महोदय इटावा, SD अपठनीय दिनांकित 08/07/20 मय मोहर पुलिस अधीक्षक नगर इटावा, SD अपठनीय दिनांकित 11.07.20 मय मोहर वरिष्ठ पुलिस अधीक्षक इटावा, SD अपठनीय दिनांकित 22.07.20 मय मोहर मजिस्ट्रेट इटावा। नोटः- मै का० 1286 सतेन्द्र कुमार प्रमाणित करता हूँ कि गैग चार्ट की नकल कम्प्यूटर पर शब्द व शब्द मुझ का० द्वारा अंकित की गयी। पी०एन०ओ० 152241102 "

(E) CRIMINAL MISC. WRIT PETITION No. - 1243 of 2021:-

The First Information Report No.0008/2021, dated 07.01.2021 registered against the petitioner under Section 2/3 of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 at P.S. Badalpur, District Gautam Buddh Nagar:-

"ब्यान जुबानी हिन्दी वादी.....ब्यान किया कि दिनांक 06.01.2021 को मै SO धर्मेन्द्र कुमार शर्मा मय हमराह है० का० 674 माइकल मय का० 587 बबलू सिवाच मय प्राइवेट वाहन के रवानाशुदा रपता रपट सं० 26 समय 13.08 बजे रवाना होकर बाद देखरेख क्षेत्र शान्ति व्यवस्था चैकिंग संदिग्ध व्यक्ति/ वाहन तलाश अपराधीगण आदि क्षेत्र थाना हाजा से मय अनुमोदित शुदा गैंग चार्ट श्रीमान पुलिस आयुक्त महोदय गौतमबुद्धनगर व अन्य उच्चाधिकारीगण गैंग लीडर गौरव गुप्ता

पुत्र ओमप्रकाश गुप्ता निवासी 473 कमला वाटर जीटी रोड थाना सिहानीगेट जनपद गाजियाबाद के वापस आया। जाँच से पाया कि गैंग लीडर गौरव गुप्ता पुत्र ओमप्रकाश उपरोक्त का एक संगठित गिरोह है इसके गैंग सदस्य 1. सुनील कुमार पुत्र स्व० रामेश्वर निवासी घूघनामोड सुभाषनगर निकट दीपक डाक्टर की दुकान थाना सिहानीगेट गाजियाबाद 2. विपिन कुमार उर्फ सोनू गोयल पुत्र प्रमोद कुमार गोयल निवासी म०नं० 97 चन्द्रगिरी थाना सिहानीगेट जनपद गाजियाबाद 3. देवेन्द्र यादव पुत्र भूलेराम यादव निवासी बृहस्पति बाजार के सामने बिसरख रोड छपरौला थाना बादलपुर गौतमबुद्ध नगर के साथ मिलकर थाना क्षेत्र मे हरियाणा व अरूणाचल प्रदेश से गाजियों मे भरकर **अवैध शराब लाना एवं धोखाधडी कर शराब मिश्रित कर अवैध शराब तैयार कर** आदि जैसे जघन्य घटनाए करके अवैध रूप से धन अर्जित किया जा रहा है। जनता का कोई व्यक्ति इनके विरूद्ध गवाही देने या रिपोर्ट लिखाने का साहस नही करते है। इन्नके द्वारा किये जा रहे इस कृत्य से जनता मे भय व आतंक का माहौल पैदा हो रहा है। जिससे कानून एवं लोक व्यवस्था प्रभावित हुई है ये अपराधीगण समाज विरोधी क्रियाककलाप मे निरंतर लिप्त है इन लोगो का यह कृत्य भा०द०वि० के अध्याय 16,17 एवं 22 मे वर्णित अपराध है। गैंग लीडर एवं उसके सहयोगीयो का अपराधिक इतिहास मुताबिक गैंग चार्ट इस प्रकार है। गैंग लीडर गौरव गुप्ता पुत्र ओमप्रकाश उपरोक्त 1. मु०अ०सं० 313/19 धारा 420,467,468,471,272,273 भा०द०वि० व 60/63/72 आबकारी अधिनियम थाना बादलपुर गौतमबुद्धनगर , सदस्य 1. सुनील कुमार पुत्र स्व० रामेश्वर सिंह उपरोक्त 1. **मु०अ०सं० 313/19** धारा 420,467,468,471,272,273 भादवि० व 60/63/72 आबकारी अधिनियम थाना बादलपुर गौतमबुद्ध नगर 3. **मु०अ०सं० 1368/18** धारा 60/63/72 आबकारी अधिनियम थाना सिहानी गेट जनपद गाजियाबाद व सदस्य 2. सोनू गोयल पुत्र प्रमोद गोयल उपरोक्त के विरूद्ध मु०अ०सं० 313/19 धारा 420,467,468,471,272,273 भादवि० व 60/63/72 आबकारी अधिनियम थाना बादलपुर गौतमबुद्ध नगर व सदस्य 3. देवेन्द्र यादव पुत्र रामभूल यादव उपरोक्त के विरूद्ध मु०अ०सं० 313/19 धारा 420,467,468,471,272,273 भादवि० व 60/63/72 आबकारी अधिनियम थाना बादलपुर गौतमबुद्ध नगर है , अभियुक्तगण का यह कृत्य उ०प्र० गिरोहबन्द एवम् समाज विरोधी क्रियाकलाप निवारण अधिनियम 1986 की धारा 2/3 का अपराध बनता है। अभियुक्तगण का जनता में स्वतन्त्र रहना जनहित मे ठीक नही है। अभियुक्तो के विरूद्ध अभियोग पंजीकृत कर विवेचना किया जाना आवश्यक है। अपना लिखाया गया ब्यान कम्प्यूटर पर पढकर देखा जो बोला वही टाईप किया गया। नोट- मै है० का० 976 कुशलपाल सिंह प्रमाणित करता हूँ कि ब्यान जुबानी नकल कम्प्यूटर पर मेरे द्वारा बोल बोल कर कम्प्यूटर पर का० 2684 संदीप कुमार से शब्द व शब्द टाइप कराई गई है। "

(F) CRIMINAL MISC. WRIT PETITION No. - 1403 of 2021:-

The First Information Report No.0499/2020, dated 30.09.2020 registered against the petitioner under Section 2/3 of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 at P.S. Faridpur, District Bareilly:-

"सूचना जुबानी आज दिनांक 30.09.2020 को मै SHO धनन्जय सिंह मय हमराहीयान का० 251 अनिपाल , का० 1689 मोहित कुमार , मय जीप सरकारी मय चालक का० रामकुमार के थाना हाजा से रवाना हुआ बाद देखरेख शान्ति व्यवस्था क्षेत्र व अनुमोदित गैग चार्ट मय दीगर कागजात के वापस आया, मेरे पूर्व अधिकारी द्वारा थाने पर उपलब्ध रिकार्ड के आधार पर 1. नन्हे खाँ पुत्र बुद्धा खां निवासी

ग्राम रहपुरा थाना फरीदपुर बरेली 2. ऐजूब खाँ पुत्र सल्लु खाँ निवासी ग्राम रहपुरा थाना फरीदपुर बरेली 3. इकराम पुत्र ऐजूब खाँ निवासी ग्राम रहपुरा थाना फरीदपुर बरेली 4. जाहिद पुत्र मेहदी खाँ निवासी रहपुरा थाना फरीदपुर बरेली 5. बडे उर्फ बड्डू खाँ पुत्र मस्तजाब खाँ निवासी ग्राम खिमपुरा थाना फरीदपुर बरेली 6. आलम पुत्र अख्तर निवासी मेवासर्फापुर थाना फरीदपुर बरेली 7. नवी अहमद पुत्र नवीशेर निवासी ग्राम मेवासर्फापुर थाना फरीदपुर बरेली 8. छोटे पुत्र नवीशेर निवासी ग्राम मेवासर्फापुर थाना फरीदपुर बरेली 9. जान मोहम्मद पुत्र शेर मोहम्मद निवासी ग्राम मेवासर्फापुर थाना फरीदपुर बरेली के विरूद्ध उनके कृत्यो के आधार पर एक गैग चार्ट दिनांक 28.09.2020 अनुमोदित शुदा को तैयार किया गया , जिसे उचित माध्यम से श्रीमान जिला मजिस्ट्रेट बरेली को प्रेषित किया गया था, मुझ प्रभारी निरीक्षक द्वारा थानाध्यक्ष फरीदपुर ने भी पुर्व आपराधिक रिकार्ड का अवलोकन किया तथा आसपास के लोगो से भी जानकारी एकत्रित की गयी तो गैंग लीडर नन्हे खाँ पुत्र बुद्धा खां निवासी ग्राम रहपुरा थाना फरीदपुर बरेली के **विरूद्ध मु०अ०सं० 724/19** धारा 3/5ए/8 सीएस एक्ट थाना फरीदपुर व मु०अ०सं० 187/20 धारा 3/5ए/8 c.s.act व 429 भादवि थाना फरीदपुर जनपद बरेली पंजीकृत है। अभियुक्त ऐजूब खाँ पुत्र सल्लु खाँ उपरोक्त के विरूद्ध मु०अ०सं० 724/19 धारा 3/5ए/8 सीएस एक्ट थाना फरीदपुर पंजीकृत हैं तथा अभियुक्त इकराम पुत्र ऐजूब उपरोक्त के विरूद्ध मु०अ०सं० 724/19 धारा 3/5ए/8 सीएस एक्ट थाना फरीदपुर पंजीकृत है, तथा जाहिद पुत्र मेहदी खाँ उपरोक्त के विरूद्ध मु०अ०सं० 724/19 धारा 3/5ए/8 सीएस एक्ट थाना फरीदपुर पंजीकृत हैं, तथा अभियुक्त बडे उर्फ बड्डू खाँ उपरोक्त के विरूद्ध मु०अ०सं० 724/19 धारा 3/5ए/8 सीएस एक्ट थाना फरीदपुर पंजीकृत है तथा अभियुक्त आलम पुत्र अख्तर उपरोक्त के विरूद्ध **मु०अ०सं० 187/20** धारा 3/5ए/8 cs.ct व 429 भादवि थाना फरीदपुर पंजीकृत है, तथा अभियुक्त आलम पुत्र अख्तर उपरोक्त के विरूद्ध **मु०अ०सं० 187/20** धारा 3/5ए/8 cs.ct व 429 भादवि थाना फरीदपुर तथा अभियुक्त नवी अहमद उपरोक्त के विरूद्ध मु०अ०सं० 187/20 धारा 3/5ए/8 cs.ct व 429 भादवि पंजीकृत है। , तथा अभियुक्त छोटे पुत्र नवी शेर उपरोक्त के विरूद्ध मु०अं०सं० 187/20 धारा 3/5ए/8 cs.ct व 429 भादवि पंजीकृत है। , तथा अभियुक्त जान मोहम्मद पुत्र शेर मोहम्मद उपरोक्त के विरूद्ध मु०अ०सं० 187/20 धारा 3/5ए/8 cs.ct व 429 भादवि पंजीकृत है। **उक्त आपराधीगण निहायत ही हिंसक व हेकड किस्म के अपराधी है**, इस गैंग का आम जनता में इतना भय व आतंक व्याप्त है कि इनके विरूद्ध कोई भी जनता का व्यक्ति कुछ भी कहने से डरता है, उक्त गैंग को अपराध करने से रोकने के लिए भरसक प्रयास किये गये है , लेकिन यह **गौकशी व इरादन हत्या जैसे विभत्स घटना, आदि प्रमुख अपराध किये है,** दिनांक 28.09.2020 को श्रीमान जिला मजिस्ट्रेट वरेली द्वारा अनुमोदित गैंग चार्ट मय दीगर कागजात के प्राप्त हुआ , यह अपराधीगण आर्थिक लाभ अर्जित करने के उद्देश्य से करते है अभियुक्त नन्हे खाँ गैंग लीडर है एवं ऐजूब, इकराम, जाहिद, बड़े उर्फ बड्डू खाँ, आलम , नवी अहमद, छोटे, जान मौहम्मद सक्रिय सदस्य है। यह लोग भा०द०वि० के आध्याय 16 व 17 मे वर्णित अपराध करने के अभ्यस्त अपराधी है इन का क्षेत्र में खुले रूप से रहना समाज के हित मे नही है इन लोगो का उक्त कृत्य समाज विरोधी क्रिया कलाप अधि० 1986 की धारा 2(17)/3 गैंगस्टर एक्ट के अन्तर्गत दण्डनीय अपराध है, अतः उपरोक्त अपराधियो के विरूद्ध अभियोग पंजीकृत किया जाता है। नोट मैं SHO धनन्जय सिंह प्रमाणित करता हूँ कि सूचना जुबानी मेरे द्वारा बोल बोलकर का० 2093 दानिश से करायी गयी है, तथा HC 574 यदुवीर सिंह प्रमाणित

करता हूँ मुकदमा कायमी मेरे सूचना जूबानी के आधार पर की गयी है, तथा CCTNS पर फीडिंग का० 2093 दानिश द्वारा की गयी। "

(G) CRIMINAL MISC. WRIT PETITION No. - 1306 of 2021

The First Information Report No.0201/2020, dated 22.05.2020 registered against the petitioner under Section 3(1) of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 at P.S. Saurikh, District Kannauj:-

"सूचना जुबानी वादी- मै एस०ओ० राज कुमार सिंह मय हमराह का० 496 आदित्य तिवारी का० 697 अतुल कुमार व म०का० 1143 ज्योति मय जीप सरकारी यूपी 74 जी 0181 बतौर चालक हे० का० सुरेश सिंह के रवानाशुदा रफता रपट रो० आम तारीखी इमरोजा से वाद देखरेख क्षेत्र गस्त भ्रमण चौकिंग संदिग्ध व्यक्ति/वाहन रोकथान जुर्म जरायम, तलाश वांछित अभि०गण कोरोना वायरस महामारी के दृष्टिगत लाकडाउन आगरा लखनऊ एक्सप्रेस वे पर प्रवासी श्रमिको की निगरानी व सुरक्षा व्यवस्था व विवेचना मु०अ०सं० 500/19 धारा 302/201 भा०द०वि० व मु०अ०सं० 506/19 धारा 302/201 भा०द०वि० से सम्बन्धित से विहीन शव व अज्ञात शव की पतारसी सुरागरसी एवं वाला वाला मीटिंग शिरकत श्रीमान जिलाधिकारी महोदय एवं श्रीमान पुलिस अधीक्षक महोदय जनपद कन्नौज कलेक्ट्रेट सभागार कन्नौज से एवं जॉच अनुमोदित गैंगचार्ट गैंगलीडर सुनील कुमार पुत्र कौशल किशोर उम्र 24 वर्ष नि० जरिहापुर थाना सौरिख जनपद कन्नौज आदि 4 नफर अभि०गण जिस पर पृष्ठांकित आदेश सी०ओ० छिबरामऊ महोदय व अपर पुलिस अधीक्षक व श्रीमान पुलिस अधीक्षक महोदय व श्रीमान जिलाधिकारी महोदय क्रमशः दि० 11.5.2020, 12.5.2020, 15.5.2020, 15.5.2020, 119/ जेए एवं शासनादेश संख्या 12/06 - पु०, 2003 रिट 2003 दिनांक 02.01.2004 के क्रम में अनुमोदित श्रीमान जिलाधिकरी महोदय एसडी अंग्रेजी अपठनीय दि० 15.5.2020 बाबत अभियुक्तगण 1- सुनील कुमार पुत्र कौशल किशोर नि० जरिहापुर सौरिख कन्नौज उम्र 24 वर्ष 2- शिवा दूबे पुत्र विनीत कुमार दुबे नि० जरिहापुर सौरिख कन्नौज उम्र 22 वर्ष 3- राज कुमार पुत्र मेघनाथ नि० जरिहापुर सौरिख कन्नौज उम्र 23 4- रामू शाक्य पुत्र रामजीत नि० भटौरा विधूना औरैया का एक सुगंठित गिरोह है जिसका गैग लीटर सुनील कुार उपरोक्त स्वयं है तथा जिसके सक्रिय सदस्य शिवा दूबे, राज कुमार व रामू शाक्य उपरोक्त है। यह गैंग अपने व अपने परिवार के सदस्यो को भौतिक व आर्थिक लाभ करवाने के लिए अवैध असलहो से लैश होकर चोरी जैसे जघन्य अपराध कारित करने का पेशेवर अपराधी है इनका समाज मे इतना अधिक भय व आतंक व्याप्त है कि इनके वियद्व समाज का कोई भी व्यक्ति न्यायालय मे गावाही देने अथवा रिपोर्ट लिखाने का साहस नहीं कर पाता है। यह गैंग भा० द०वि० के अध्याय 17 में वर्णित अपराधो को कारित करने का अभ्यस्त अपराधी है समाज विरोधी क्रिया कलापो मे पूरी तरह संलिप्त है इस गैंग का आम जनता के बीच स्वछन्द रहना जनहित न्यायहित में सीमकन नहीं है इनके कृत्यो पर अंकुश लगाया जाना अति आवश्यक है इस गैंग के विरूद्ध धारा 3(1) उत्तर प्रदेश गिरोह बन्द एवं समाज विरोधी क्रिया कलाप निवारण अधिनियम 1986 के अन्तर्गत कार्यवाही किये जाने का पर्याप्त आधार है। सूचना दर्ज की जावे। नोट मै का० 112 सौरभ राठौर प्रमाणित करता हूँ कि एस ओ श्री राज कुमार सिंह द्वारा सूचना जुबानी अंकित करायी हैं कम्प्यूटर पर शब्द व शब्द अंकित की गयी है व रो०आम में खुलासा हे० का० 82 राम मोहन द्वारा कराया गया है।"

(H) CRIMINAL MISC. WRIT PETITION No. - 1411 of 2021

The First Information Report No.0483/2020, dated 23.08.2020 registered against the petitioner under Section 2/3 of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 at P.S. Ghoorpur, District Prayagraj:-

"नकल तहरीर हिन्दी वादी प्रधान लेखक/सहायक लेखक थाना घूरपुर प्रयागराज। मैं थानाध्यक्ष घूरपुर भुवनेश कुमार चौबे मय हमराह का० हरिकेश चौहान मय सरकारी वाहन UP 32 BG 7510 मय चालक का० दिनेश कुमार सिंह के रवाना शुदा रो० आम तारीख द्विरोजा से बाद देखभाल क्षेत्र चेकिंग संदिग्ध व्यक्ति वाहन पेण्डिंग विवेचना व आगामी त्योहार गणेश चतुर्थी व मोहर्रम के दृष्टिगत क्षेत्र भ्रमण में मामूर था कि दौराने भ्रमण क्षेत्र के विश्वस्थ सूत्रो से ज्ञात हुआ कि 1- अभिषेक यादव पुत्र नेम कुमार यादव निवासी बसवार थाना घूरपुर जनपद प्रयागराज उम्र-29 वर्ष 2- कल्लू यादव उर्फ श्यामबाबू यादव पुत्र स्व० रामसजीवन यादव निवासी बसवार थाना घूरपुर प्रयागराज उम्र 27 वर्ष 3- गोकुल उर्फ राजकुमार निषाद पुत्र रामबाबू निषाद निवासी बसवार थाना घूरपुर प्रयागराज उम्र 24 वर्ष 4- धर्मराज यादव पुत्र स्व० रामबहादुर यादव उर्फ कडक निवासी बसवार थाना घूरपुर प्रयागराज उम्र 34 वर्ष का एक संगठित गिरोह है **इस गैंग का लीडर अभिषेक यादव उपरोक्त है इस गैंग के लीडर व सदस्यो द्वारा हत्या जैसा अपराध कारित करना पेशा है**, गैंग लीडर व इनके सदस्यो द्वारा समाज मे भय व आतंक का वातावरण उत्पन्न कर रखे है, आम जनता व क्षेत्र के आस पास इलाको मे इनका आतंक व दहशत व्याप्त है गैंग लीडर अभिषेक यादव उपरोक्त व इनके सदस्य भादवि० के अध्याय 16 व 22 मे वर्णित अपराध करने के अभ्यस्त अपराधी है शान्ति व कानून व्यवस्था के दृष्टिगत गैंग के आपराधिक कृत्यों की रोकथाम हेतु प्रभावी कार्यवाही की आवश्यक्ता है इनके विरूद्ध जनता का कोई भी व्यक्ति पुलिस मे शिकायत व अभियोग पंजीकृत कराने का साहस नही कर पाता है और न ही न्यायालय व पुलिस मे गवाही देने को तैयार होता है इस गैंग द्वारा कारित किये गये अपराधो का विवरण निम्न लिखित है -1- **मु०अ०सं० 754/2018** धारा 302,201 भादवि थाना घूरपुर प्रयागराज आरोप पत्र सं० 597/18 दिनांक 27.12.18 2- **मु०अ०सं० 379/17** धारा 323,504,506,308 भादवि थाना घूरपुर प्रयागराज आरोप पत्र सं० 189/17 दिनांक 17.09.17 देखते हुए गैंग चार्ट तैयार कराकर श्रीमान जिला मजिस्ट्रेट प्रयागराज से अनुमोदन के उपरान्त प्राप्त किया गया है , थाना क्षेत्र तथा आस पास के क्षेत्रो में शान्ति व्यवस्था स्थापित करने हेतु इन लोगो का समाज मे स्वतन्त्र रहना ठीक नही है इस गिरोह के गैंग लीडर व सदस्यगण उपरोक्त के विरूद्ध धारा 2/3 उ०प्र० गिरोह बन्द समाज विरोधी क्रिया कलाप निवारण अधिनियम 1986 के तहत अभियोग पंजीकृत करें। SD अंग्रेजी हस्ताक्षर 23/8/2020 , (भुवनेश कुमार चौबे) थानाध्यक्ष, थाना घूरपुर जनपद प्रयागराज नोटः- मै का० मु० 3110 मनोज कुमार यादव प्रमाणित करता हूँ कि तहरीर की नकल कम्प्यूटर पर बोलकर अक्षरशः अंकित कराया। "

5. The petitioners of respective writ petitions have prayed to quash the impugned first information reports registered against them under Sections 2/3 of the Act, 1986. Hence, they have filed the present writ petitions.

Submissions on behalf of the petitioners:-

6. Learned counsel for the petitioners submits that merely on the basis of solitary criminal case registered against the petitioners, a case under Section 2/3 of the Act, 1986 cannot be registered. In support of their submissions, the petitioners have

relied upon judgments of this court in **Subhash and others Vs. State of U.p. and others, (paragraphs 7, 14, 17, 47, 48), dated 24.03.1997 in Criminal Misc. Writ Petition No.835 of 1998;** Full Bench Judgment of this Court in **Ashok Kumar Dixit Vs. State of U.P. and another, 1987, (24) ACC 164 (para 22)** and another Division Bench judgment in the case of **Ajai Rai Vs. State of U.P. 1995 (32) All Cri C 477.**

Submissions on behalf of the State-Respondents:-

7. Learned A.G.A. submits that in view of the provisions of Sections 3 of the Act, 1986 even if a single criminal case is registered against the petitioners, then also the F.I.R. under Section 2/3 of the Act, 1986 can be registered provided the ingredients of Section 3 of the Act, 1986 are satisfied.

Relevant Statutory Provisions:-

8. Since controversy involved in this batch of writ petitions mainly relates to provisions of **Section 2(b), Section 2(c) and Section 3 of the Act, 1986,** therefore, these provisions are reproduced below:-

*"**Preamble:-** An Act to make special provisions for the prevention of, and for coping with, gangsters and anti-social activities and for matters connected therewith or incidental thereto.*

***Section 2(b):-** "Gang" means a group of persons, who acting either singly or collectively, by violence, or threat or show of violence, or intimidation, or coercion, or otherwise with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage of himself or any other person, indulge in anti-social activities, namely:*

(i) offences punishable under Chapter XVI, or Chapter XVII, or Chapter XXII of the Indian Penal Code (Act No. 45 of 1860), or

(ii) distilling or manufacturing or storing or transporting or importing or exporting or selling or distributing any liquor, or intoxicating or dangerous drugs, or other intoxicants or narcotics or cultivating any plant, in contravention of any of the provisions of the U.P. Excise Act, 1910 (U.P. Act No. 4 of 1910), or the Narcotic Drugs and Psychotropic Substances Act, 1985 (Act No. 61 of 1985), or any other law for the time being in force, or

(iii) occupying or taking possession of immovable property otherwise than in accordance with law, or setting-up false claims for title or possession of immovable property whether in himself or any other person, or

(iv) preventing or attempting to prevent any public servant or any witness from discharging his lawful duties, or

(v) offences punishable under the Suppression of Immoral Traffic in Women and Girls Act, 1956 (Act No. 104 of 1956), or

(vi) offences punishable under Section 3 of the Public Gambling Act, 1867 (Act No. 3 of 1867), or

(vii) preventing any person from offering bids in auction lawfully conducted, or tender, lawfully invited, by or on behalf of any Government department, local body or public or private undertaking, for any lease or rights or supply of goods or work to be done, or

(viii) preventing or disturbing the smooth running by any person of his lawful business, profession, trade or employment or any other lawful activity connected therewith, or

(ix) offences punishable under Section 171-E of the Indian Penal Code (Act No. 45 of 1860), or in preventing or

obstructing any public election being lawfully held, by physically preventing the voter from exercising his electoral rights, or

(x) inciting others to resort to violence to disturb communal harmony, or

(xi) creating panic, alarm or terror in public, or

(xii) terrorising or assaulting employees or owners or occupiers of public or private undertakings or factories and causing mischief in respect of their properties, or

(xiii) inducing or attempting to induce any person to go to foreign countries on false representation that any employment, trade or profession shall be provided to him in such foreign country, or

(xiv) kidnapping or abducting any person with intent to extort ransom, or

(xv) diverting or otherwise preventing any aircraft or public transport vehicle from following its scheduled course;

(xvi) offences punishable under the Regulation of Money Lending Act, 1976;

(xvii) illegally transporting and/or smuggling of cattle and indulging in acts in contravention of the provisions in the Prevention of Cow Slaughter Act, 1955 and the Prevention of Cruelty to Animals Act, 1960;

(xviii) human trafficking for purposes of commercial exploitation, bonded labour, child labour, sexual exploitation, organ removing and trafficking, beggary and the like activities.

(xix) offences punishable under the Unlawful Activities (Prevention) Act, 1966:

(xx) printing, transporting and circulating of fake Indian currency notes;

(xxi) involving in production, sale and distribution of spurious drugs;

(xxii) involving in manufacture, sale and transportation of arms and ammunition in contravention of Sections 5, 7 and 12 of the Arms Act, 1959;

(xxiii) felling or killing for economic gains, smuggling of products in contravention of the Indian Forest Act, 1927 and Wildlife Protection Act, 1972;

(xxiv) offences punishable under the Entertainment and Betting Tax Act, 1979;

(xxv) indulging in crimes that impact security of State, public order and even tempo of life.

Section 2(c):- *"gangster" means a member or leader or organiser of a gang and includes any person who abets or assists in the activities of a gang enumerated in clause (b), whether before or after the commission of such activities or harbours any person who has indulged in such activities;*

Section 3:- Penalty. *-(1) A gangster shall be punished with imprisonment of either description for a term which shall not be less than two years and which may extend to ten years and also with fine which shall not be less than five thousand rupees:*

Provided that a gangster who commits an offence against the person of a public servant or the person of a member of the family of a public servant shall be punished with imprisonment of either description for a term which shall not be less than three years and also with fine which shall not be less than five thousand rupees.

(2) Whoever being a public servant renders any illegal help or support in any manner to a gangster, whether before or after the commission of any offence by the gangster (whether by himself or through others) or abstains from taking lawful measures or intentionally avoids to

carry out the directions of any Court or of his superior officers, in this respect, shall be punished with imprisonment of either description for a term which may extend to ten years but shall not be less than three years and also with fine."

Discussion and Findings:-

9. In **Kartar Singh vs. State of Punjab (1994) 3 SCC 569,** Hon'ble Supreme Court as per majority view, observed that ***"the Legislation begins where Evil begins."*** The legislature being guided by its sacrosanct duty to protect individual members of the society to enjoy their rights without fear and see that some people do not become a menace to the society in singular or collective manner as indicated. The Constitutional Validity of the Act, 1986 has been upheld by Hon'ble Supreme Court in the case of **Dharmendra Kirthal vs. State of U.P. and another, (2013) 8 SCC 368.** While upholding the constitutional validity, Hon'ble Supreme Court observed in Para-45 (SCC) that *the accused is tried by the Special Court as he is "gangster' as defined under Section 2(c) of the Act, 1986 and is involved in anti-social activities with* ***the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage for himself.*** It was further observed that apart from normal criminality, the accused is also involved in an organised crime for a different purpose and motive. The intention of legislature is to curve such type of crime, which has become epidemic in the society. It was further observed in para-47 (SCC) that in the case at hand it can be stated with certitude that ***the legislature has felt that there should be curtailment of the activities of the gangsters and, accordingly, provided for stern delineation with such activities to establish stability in society where citizens can live in peace and enjoy a secured life. It has to be kept uppermost in mind that control of crime by making appropriate legislation is the most important duty of the legislature in a democratic polity, for it is necessary to scuttle serious threats to the safety of the citizens.*** *Therefore, the legislature has, in actuality, responded to the actual feelings and requirements of the collective.* It was also observed vide paras 38-39 (SCC) of the aforesaid judgment that *in essence, liberty of an individual should not be allowed to be eroded but* ***every individual has an obligation to see that he does not violate the laws of the land or affect others' lawful liberty to lose his own.*** *The cry of liberty is not to be confused with or misunderstood as unconcerned senile shout for freedom. Protection of the collective is the bone marrow and that is why liberty in a civilized society cannot be absolute. It is the duty of the courts to uphold the dignity of personal liberty. It is also the duty of the court to see whether the individual crosses the "Lakshman Rekha" that is carved out by law is dealt with appropriately. No individual has any right to hazard others' liberty. The body polity governed by Rule of law does not permit anti-social acts that lead to a disorderly society.*

10. The provisions of the Act, 1986/ other similar provisions have been interpreted by this Court and also by Hon'ble Supreme Court. Therefore, it would be appropriate to refer to the judgments so as to appropriately answer the questions framed above in this batch of writ petitions.

11. In **N. Sengodan vs. State of Teamil Nadu, (2013) 8 SCC 664 (paras-47-48),** Hon'ble Supreme Court considered

the provisions of **The Prevention of Dangerous Activities of Bootleggers, Drug-Offenders, Forest Offenders, Goondas, Immoral Traffic Offenders and Slum-grabbers Act, 1982** and held as under:

*"47. In **State of Bihar vs. P.P. Sharma, 1992 SCC (Cri) 192,** this Court defined **mala fides** and held: (SCC p.260, paras 50-51)*

*"50. Mala fides means want of good faith, personal bias, grudge, oblique or improper motive or ulterior purpose. The administrative action must be said to be done in good faith, if it is in fact done honestly, whether it is done negligently or not. An act done honestly is deemed to have been done in good faith. An administrative authority must, therefore, act in a bona fide manner and should never act for an improper motive or ulterior purposes or contrary to the requirements of the statute, or the basis of the circumstances contemplated by law, or improperly exercised discretion to achieve some ulterior purpose. **The determination of a plea of mala fide involves two questions, namely** (i) whether there is a personal bias or an oblique motive, and (ii) whether the administrative action is contrary to the objects, requirements and conditions of a valid exercise of administrative power.*

51. The action taken must, therefore, be proved to have been made mala fide for such considerations. Mere assertion or a vague or bald statement is not sufficient. It must be demonstrated either by admitted or proved facts and circumstances obtainable in a given case. If it is established that the action has been taken mala fide for any such considerations or by fraud on power or colourable exercise of power, it cannot be allowed to stand."

This Court in the same case of P.P. Sharma (supra) further held that: (SCC pp.261-62, para 55)

"55. ..... the person against whom mala fides or bias was imputed should be impleaded eo nomine as a party-respondent to the proceedings and given an opportunity to meet those allegations."

In the present case the appellant has not only made assertion but demonstrated by placing either by admitted or proved facts and circumstances obtainable that even though the case has not made out but he was harassed.

48. Personal liberty is of the widest amplitude covering variety of rights. Its deprivation shall be only as per procedure prescribed in the Code and the Evidence Act conformable to the mandate of the Supreme Law, the Constitution. The investigator must be alive to the mandate of the Constitution and is not empowered to trample upon the personal liberty of a person when he has acted by malafides, as held by this Court in P.P. Sharma."

12. In the case of **State of Haryana and others vs. Bhajan Lal and others, 1992 Supp. (1) SCC 335,** Hon'ble Supreme Court has considered the scope of interference with the FIR in writ jurisdiction and has illustrated certain circumstances, in which FIR can be interfered with in exercise of powers under Article 226 of the Constitution of India. The said illustrations crystallized by Hon'ble Supreme Court in the case of **Bhajan Lal and others** (supra), are reproduced below:

"(i) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do

not prima facie constitute any offence or make out a case against the accused.

(ii) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(iii) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(iv) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(v) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(vi) Where there is an express legal bar engrafted in any of the provisions of the Code or the Act concerned (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the Act concerned, providing efficacious redress for the grievance of the aggrieved party.

(vii) Where a criminal proceeding is manifestly attended with mala fides and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

13. In **Ashok Rai and another vs. State of U.P. and others, 1995 (25) ALR 423 (Paras 6 & 8),** a Division Bench of this court held as under:

"6. To appreciate the submission as made by Sri Chaturvedi and his learned associate advocate, we must go through the ***definition of "gang' as enunciated under Section 2(b)*** *of the Act. It states that "gang means a group of persons, who acting either singly or collectively, by violence, or threat or show of violence, or intimidation or coercion or otherwise with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage for himself or any other person indulge in anti-social activities, namely ----------".*

8. The definition itself indicates that if a group of persons acting either singly or collectively indulged in any of the activities as elaborated in the section, by means of violence etc. with the objects as indicated therein, the group is to be termed a "gang". We may not put any words within the definition with a view to infer that a gang is to be formed first and then any of the anti-social activities, as detailed in the definition, is to be committed. ***Under the definition the essentials required are (1)*** *Existence of a group of persons,* ***(2)*** *commission by them, singly or collectively, any of the anti-social activities as detailed in the definition,* ***(3)*** *such commission should be associated with Violence or threat or show of violence, or intimidation etc. and* ***(4)*** *the object of such commission should be gaining any undue temporal, pecuniary, material or other advantage for himself or any other person. We, therefore, cannot accept the contention of the learned counsel that the definition demands that the gang is first to be made and commission of the anti-social activities is to be followed."*

14. In **Application U/S 482 No. - 3239 of 2005 (Tej Singh and others vs. State of U.P. and another), decided on 20.04.2019,** a learned Single Judge of this Court held as under:

"A careful perusal of the definition of "Gangster" and "Gang" would not fail to indicate that if an offence punishable under Chapter XVI, Chapter XVII and Chapter XXII of Indian Penal Code is committed with the object of disturbing public order or with the object of gaining any undue temporal, pecuniary or material advantage, such activity on the part of accused can make him liable to face the imposition of Gangsters Act in question. He may commit such kind of act just once and may face a single F.I.R. or he may commit such kind of offences many times and may face more than one F.I.Rs. in that connection. It is not the number of F.I.Rs. which is relevant as it is significant to assess whether the crime committed by the accused was inspired and prompted with the motive of gaining any undue temporal, pecuniary or material advantage or not. It is the object of the offence or the motive behind it which is of crucial significance in order to adjudge whether the provisions of Gangsters Act in question can be brought into application in a given case or not.

After having perused the record, this Court finds itself in agreement with the submissions made by the learned counsel for the applicants that though the accused are facing the allegations of having committed murder but they cannot be said to have committed the crime because they were gangsters. There was no motive of making any wrongful economic gains. This Court also does not see any material on the basis of which it may be held that the prime object behind committing the crime in question was so as to disturb the public order. ***Whenever some grave crime is committed it always leads to a consequential result of some kind of disturbance in society. Such normal disturbance in society and disturbing the public order or creating panic or terror are different species.*** *Ordinary law and order problems can not be clubbed with phenomenon of break of public order. The crime in question does not appear to have been committed with the object of gaining any undue temporal, pecuniary, material or other similar kind of advantage for itself or for any other person indulged in anti-social activities.*

Here in this context it may also be seen that in the definition of 'gang' as provided under Section -2(b) of the U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986 (hereinafter referred to as Act) reference to the words 'gaining any undue temporal, pecuniary, material or other advantage' for himself or any other person has been given. One might argue that ***the words 'other advantage'*** *is an all inclusive term and all kinds and categories of advantages will come under its title, and therefore, there is hardly any need to see the facts of the case with a fine class in order to find whether the object of the gang is or was of gaining undue temporal, pecuniary and material advantage or not. If the violence or offence committed was inspired to get any kind of advantage for himself or for any other person, the letter of definition as provided by the Act shall stand satisfied. But in the considered opinion of this Court such kind of approach will lead to complete misinterpretation of the Statute. If the Legislature in its wisdom has used a number of qualifying words with regard to Anti Social Activity as has been referred to and contemplated in the Act, then its whole purpose shall stand defeated by providing*

such an all sweeping meaning to the words 'other advantage' as has been used in the definition. If the term 'other advantage' was meant to include all advantages or was meant to include any kind of advantage whatsoever where was the need to use different other defining words like 'temporal, pecuniary and material' which immediately precede the words 'or other advantage' ! It is self evident that the use of the preceding words have a qualifying effect and must be seen lending its complexion to the subsequently used words 'other advantage'. ***The words 'other advantage' has got to be seen in the context and perspective and with reference to the preceding aforesaid words and must be understood in the same light. Just as a man is often known by the company he keeps, the import of words in Statute also are often to be seen and understood by the company of the words in which they appear.*** In this regard this Court deems it appropriate to keep in perspective the rule of 'Ejusdem Generis' in order to correctly appreciate the scope and the actual ambit of the general words which follow the aforesaid specific words used in the Statute. ***The Court is of the view that the aforesaid preceding words 'temporal, pecuniary and material' are constituting a genus and the words 'other advantage' has to be read as an species of the same.*** Though ordinarily the general words must be provided to bear their natural and larger meaning but they have to be confined Ejusdem generis to the class of things previously enumerated by certain specific words because it is not difficult to see clearly the intention of the Statute which it spells out by using a specific class and category of qualifying words. ***This Court sees reasons and therefore feels persuaded to limit the scope of the meaning of the general words 'other advantage' because if we provide to it a larger all embracing meaning it is likely to lead to absurd and unforeseen results.*** The general expression has to be read contemplating to imply the things of the same kind which have been referred to by the preceding specific class of things constituting a genus. ***If we do not adhere to this rule and do not impute specific complexion to the general words in the light of the preceding words the blatant misuse and plain absurdity to which it shall lead is that the administrative executives and the police would feel free to impose the provisions of this Act upon anybody and everybody who is facing the charge of committing any sort of offence or any breach of law howsoever trivial it be because hardly any violence or threat or show of violence or intimidation or coercion is done without having the object of gaining some kind of advantage himself or for any other person. The word 'advantage' has an all sweeping natural meaning and may include material and psychological both kinds of advantages. In that view of the matter the use of the words 'other advantage' will bring in its mischief everything under the sun. It is therefore very expediently needed to read these words in right perspective and read them Ejusdem generis with the things or words previously enumerated by the Statute."***

(Emphasis supplied)

15. In the case of **Piyush Kanti Lal Mehta vs. Commissioner of Police, 1989 Supp.(1) SCC 322 (Paras 16 and 17),** Hon'ble Supreme court considered t**he distinction between "law and order"** and **"public order"** and after referring to the judgment in the case of **Pushkar Mukherjee & Ors vs The State Of West Bengal, (1969) 1 SCC 10 (Paras 14 and 15),** observed as under:

"16. It is submitted by Dr Chitale that the allegations which have been made by the said five witnesses against the petitioner are also very general in character and do not involve the question of public order. Counsel submits that there is a distinction between `law and order' and 'public order' . The allegations made against the petitioner may give rise to a question of law and order but, surely, they have nothing to do with the question of public order. ***A person may be very fierce by nature, but so long as the public generally are not affected by his activities or conduct, the question of maintenance of public order will not arise. In order that an activity may be said to affect adversely the maintenance of public order, there must be materials to show that there has been a feeling of insecurity among the general public. If any act of a person creates panic or fear in the minds of the members of the public upsetting the even tempo of life of the community, such act must be said to have a direct bearing on the question of maintenance of public order.*** *The commission of an offence will not necessarily come within the purview of `public order'.*

17.In this connection, we may refer to a decision of this Court in Pushkar Mukherjee vs. State of West Bengal, (1969) 1 SCC 10; where the ***distinction between `law and order'*** *and* ***`public order'*** has been clearly laid down. Ramaswami, J. speaking for the Court observed as follows: (SCC pp. 14-15)

"Does the expression `public order' take in every kind of infraction of order or only some categories thereof. It is manifest that ***every act of assault or injury to specific persons does not lead to public disorder. When two people quarrel and fight and assault each other inside a house or in a street, it may be said that there is disorder but not public disorder.*** *Such cases are dealt with under the powers vested in the executive authorities under the provisions of ordinary criminal law but the culprits cannot be detained on the ground that they were disturbing public order.* ***The contravention of any law always affects order but before it can be said to affect public order, it must affect the community or the public at large.*** *In this connection we must draw a line of demarcation between serious and aggravated forms of disorder which directly affect the community or injure the public interest and the relatively minor breaches of peace of a purely local significance which primarily injure specific individuals and only in a secondary sense public interest.* ***A mere disturbance of law and order leading to disorder is thus not necessarily sufficient for action under the Preventive Detention Act but a disturbance which will affect public order comes within the scope of the Act."***

16. A Division Bench of this Court in the case of **Subhash vs. State of U.P. and another, 1998 All.L.J. 2092** (Paras-8, 9, 11,13 and 14) answered the question as to whether an FIR can be registered under Section 2/3 of the Act, 1986 on the basis of a single case and the meaning of the word "indulge" used in Section 2(b) of the Act and held as under:

"8. In paragraph 58 of the judgment the Full Bench Bench met the argument of the counsels that there would always be an apprehension that a person, though not physically present on the scene of occurrence, could be roped in under the provisions of the Act in relation to that occurrence on the façile ground that, he was a gangster. The Court observed that

the apprehension was not very real, but it also uttered a word of caution that it could not be dismissed as altogether imaginary or absurd. The Court observed that "police is sometimes prone to be overzealous and in order to win laurels, books all and one within the range of its rod. ***Needless to say, the Act has to be enforced in a reasonable manner.*** *Care should be taken that no unnecessary inroad is made into the exercise of fundamental rights of the citizen or interference in the peaceful prosecution of their avocation." In paragraph 59 of the judgment the Court further observed,"****Thus, for booking a person under the provisions of the Act, the authorities have to be prima facie satisfied that a person has acted. The authority has to be satisfied that there is a reasonable and proximate connection between the occurrence and the activity of the person sought to be apprehended and that such activities were to achieve undue temporal, physical, economic or other advantage.*** *There need not be any overt or positive act of the person intended to be apprehended at the place. It is enough to prove active complicity which has a bearing on the crime."*

9. The Full Bench further observed in paragraph 60 of the judgment that under the ordinary criminal law, it was sometime difficult to bring to book the overlords of crime and under world because they seldom operated in person or in public case. They indulged in clandestine operations which threaten to tear apart the very fabric of the society. ***In the immediate next paragraph again a note of caution was sounded by the Full Bench observing "provisions of the Act cannot be used as a weapon to wreck vengeance or harass or intimidate innocent citizens or to settle scores on political or other fronts. The prosecution has to bear in mind that it has to bring home the guilt.***

*11. The Division Bench in the case of Ajai Rai (supra) considered the above aspect in paragraph 9 of its judgment and in the absence of any definition of the words in the Act looked for the Dictionary meaning thereof. The word "****indulges****", according to the Webster, meant "too yield to the desire of or to get pleasure in doing" etc. The word "indulge", according to Chamber, is a verb used as a transitive verb and also used as an intransitive verb. As a transitive verb, it meant "to yield to the wishes of", or "to favour or gratify", or "not to restrain". In an intransitive verb a meaning was given to the word "indulge" parallel to "permit oneself in action or expression".* ***The word used in the Act is not only "indulges" but also followed by another word "in" and the Division Bench was of the view that "indulges in", as used in the Act, meant "to permit oneself in action or expression"*** *and with this meaning it was opined that the words carried the same connotation as "does" or "commits". The Division Bench was further of the view that these two common terms have been avoided by the legislature apparently for the reason that the words "indulges in" were followed by the words "anti-social activities" and the actions detailed in the 15 sub-clauses of Section 2 might not strictly come within the term "commits."*

13. We may come to point No.3, categorised by us in the earlier pages of this judgment. We are to see, if under the concept of the offence, created by the Act, there must be some allegation of any act or omission towards commission of the offence. While taking up the question of constitutional validity of the Act in the case of Ashok Kumar Dixit (supra), the Full

Bench had made certain very important observations which are relevant for the present point. It was observed that a person was not liable to be punished under the Act merely because he happened to be a member of the group. The Court was, rather, of the view that a person could be accused of an offence only if he had chosen to join a group which indulges in anti-social activities, defined under the Act, with use of force for obtaining material or other advantages to himself or to any person. The Court was of the view "The element of actus reus is hence clearly present in the offence created under the statute." Whenever any act or omission covered by Sections 2 and 3 of the Act is reported an offence is made out and as a corollary it may be indicated without any fear of contradiction that ***unless an allegation is there concerning an act or omission on the part of an accused, covered by the definition of the term "gang" or "gangster", no F.I.R. should be maintainable.*** *Whether the allegations are true or false will be a matter for investigation, but* ***unless the allegations of an offence under the Act are indicated, as F.I.R. may not be justifiable whatever large the number of past acts be alleged against him.***

14. As a sequel to this decision when there are some allegations of any act or omission towards the commission of the offence under the Act to justify an F.I.R., ***it follows that such an FIR could lie even for a single incident as habituality of the acts is not required for making out an offence.*** *The words used in Section 2 are no doubt in plural indicating "indulge in anti-|social activities" but the sentence does not stop with the words "anti-social activities". It goes on with the word, "viz." followed by 15 clauses of anti-social activities enumerated therein. The plural in "anti-social activities" referred to the large number of activities to be brought under the umbrella of this single offence and it would never mean that there must be plurality of actions before a person could be prosecuted or convicted for an offence under the Act. When a specific offence has been created, it is open to be punished even for a single act, if it is covered by the requirements of law. We, thus, answer point No.1 framed by us."*

(Emphasis supplied by us)

17. In a recent **judgment dated 05.08.2021 in Criminal Misc. Writ Petition No.3938 of 2021 (Ritesh Kumar @ Rikki vs. State of U.P. and another and other connected writ petitions)**, a Division Bench of this Court framed the following question:

"Whether a first information report under the provisions of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 [hereinafter referred to as the ''Gangsters Act'] can be lodged and is maintainable on the basis of involvement of the petitioner(s) / accused in a single previous case."

18. The afore-noted question has been answered by the Division in the aforesaid judgment in the case of **Ritesh Kumar @ Rikki (supra),** as under:

"After having heard the learned counsels for the parties and perusing the records, it is apparent that barring Criminal Misc. Writ Petition No. 4149 of 2021, all the above writ petitions were argued on the common point for which the question as framed, is answered that as per the settled principles of law, the lodging of a first information report on

the basis of a single case, is valid and permissible. In a petition under Article 226 of the Constitution of India, this Court cannot adjudicate the correctness of the allegations in the impugned first information reports or the cases on the basis of which the impugned first information reports have been lodged. The writ petitions are thus dismissed."

19. Thus, where a group of persons act either singly or collectively, **by violence, or threat or show of violence, or intimidation, or coercion, or otherwise** with the object of **disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage of himself or any other person,** indulge in anti-social activities as described in sub-clauses (i) to (xxv) of Section 2(b), they shall be a "Gang' as defined in Section 2(b) and thus, a "gangster' under Section 2 who shall be liable for punishment under Section 3 of the Act, 1986.

20. **The intention of the Act, 1986 is to curve such type of crime, which has become epidemic in the society. The legislature has felt that there should be curtailment of the activities of the gangsters and, accordingly, provided for stern delineation with such activities to establish stability in society where citizens can live in peace and enjoy a secured life. Control of crime by making appropriate legislation is the most important duty of the legislature in a democratic polity and for this reason it is necessary to scuttle serious threats to the safety of the citizens. Thus, the Act, 1986, in actuality, responded to the actual feelings and requirements of the collective. In view of the basic idea of protection of the society, liberty in a civilized society cannot be absolute. Therefore, it is the duty of the courts to uphold the dignity of personal liberty and to see if an individual crosses the limit carved out by law, he needs to be dealt with appropriately, inasmuch as no individual has any right to hazard others' liberty. Rule of law does not permit anti-social acts that lead to a disorderly society.**

21. The Scheme of the Act, 1986 nowhere prohibits lodging of first information report under the Act, 1986 on the basis of a single case. In a recent judgment in the case of **Ritesh Kumar @ Rikki (supra),** a Division Bench of this court held that lodging of a first information report on the basis of a single case is valid and permissible under the Act, 1986. Therefore, we have no difficulty to hold that a first information report may be lodged on the basis of a single case, provided the ingredients of the definition of "Gang' under Section 2(b) of the Act, 1986 is *prima facie* satisfied.

22. For all the reasons aforestated, the question No.(i) as framed in para-3 above, is answered in affirmative. Consequently the question (ii) is answered in negative, inasmuch as no other point has been argued before us except quashing of the impugned FIRs on the ground that it has been registered on the basis of a solitary case. Accordingly, we hold that a first information report under Section 2/3 of the Act, 1986, can be registered against a person even if only one criminal case is registered against him, and on the ground of registration of merely one criminal case, an FIR registered under Section 2/3 of the U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986, cannot be quashed.

23. For all the reasons afore-stated, we do not find any merit in all these writ petitions and accordingly, **all the writ petitions** being CRIMINAL MISC. WRIT PETITION No. - **642 of 2021**, CRIMINAL MISC. WRIT PETITION No. - **798 of 2021** CRIMINAL MISC. WRIT PETITION No. - 17198 of 2020, CRIMINAL MISC. WRIT PETITION No. - **17194 of 2020**, CRIMINAL MISC. WRIT PETITION No. - **1243 of 2021**, CRIMINAL MISC. WRIT PETITION No. - **1403 of 2021**, CRIMINAL MISC. WRIT PETITION No. - **1306 of 2021** and CRIMINAL MISC. WRIT PETITION No. - **1411 of 2021,** are hereby dismissed.

(2021)09ILR A27
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.08.2021

BEFORE

THE HON'BLE PRITINKER DIWAKER, .J.
THE HON'BLE SAMIT GOPAL, J.

Criminal Misc. Writ Petition No. 3938 of 2021
and other related cases

Ritesh Kumar @ Rikki ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Utsav Singh, Sri Vinay Singh

Counsel for the Respondents:
A.G.A.

A. Criminal Law -Constitution of India, 1950-Article 226 - U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986-Section 2/3-quashing of FIR-the scheme of the Act 1986 nowhere prohibits lodging of first information report under the Act on the basis of a single case, provided the ingredients of the definition of 'Gang' u/s 2(b) of the Act, 1986 is prima facie satisfied.(Para 1 to 23)

B. Where a group of persons act either singly or collectively by violence, or threat or show of violence, or intimidation, or coercion, or otherwise with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage of himself or any other person, indulge in anti-social activities as described in sub-clauses (i) to (xxv) of Section 2(b), they shall be a 'Gang' as defined in Section 2(b).(Para 19, 20)

The writ petition is dismissed. (E-6)

List of Cases cited:

1. Ajay Rai Vs St. of U.P. & ors. (1995) Cr.L.J. 2801

2. Rinku @ Hukku Vs St. of U.P. & anr. (2000) Cr.L.J. 2834 Kishan Pal @ K.P. Vs St. of U.P. & anr. (2006) 54 ACC 1015

3. Ashok Kumar Dixit Vs St. of U.P. (1987) Alld 235

4. Subhash Vs St. of U.P. & anr.(1998) SCC Online All 973

5. Shamsul Isham Vs St. of U.P. (1999) 38 ACC 315

6. Rinku@ Hukku Vs St. of U.P. & anr.(2001) Suppl ACC 641 (HC-LB)

7. Ajit Singh @ Muraha Vs St. of U.P & ors.,(2006 56 AC 433

8. Satya Pal Vs St. of U.P. & ors. (2000) Cr.L.J.569

9. St. of Har. Vs Bhajan Lal & ors. (1992) AIR SC 604

10. St. of Telangana Vs Habib Abdullah Jellani (2017) 2 SCC 779

11. M/s Neeharika Infrastracture Pvt. Ltd. Vs. St. of Mah. & ors. CRLA No. 330 of 2021

(Delivered by Hon'ble Samit Gopal, J.)

1. Matter taken up through video conferencing.

2. The above-mentioned 12 writ petitions are connected together with 11 other writ petitions and are listed today in the additional / unlisted list and as such, a total of 23 writ petitions are connected together. Out of 23 writ petitions connected together, one writ petition being Criminal Misc. Writ Petition No. 4216 of 2021 (Manish vs. State of U.P. and 03 others) has been prayed to be dismissed as infructuous by the learned counsel appearing therein on behalf of the petitioner and as such, separate order has been passed dismissing the same as being infructuous.

3. The above-mentioned 12 writ petitions have been stated to be urgent in nature by the learned counsels appearing on behalf of the petitioners and they have prayed that their cases be heard and decided inspite of non-appearance of other learned counsels appearing in the connected matters to which learned Additional Government Advocates appearing for the State of U.P. have no objection and as such, this Court proceeds to hear and decide the above-mentioned 12 writ petitions on their own merits.

4. The present bunch of writ petitions along with other writ petitions are connected together on the following question :

"Whether a first information report under the provisions of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 [hereinafter referred to as the "Gangsters Act'] can be lodged and is maintainable on the basis of involvement of the petitioner(s) / accused in a single previous case".

5. The common ground as raised in all the writ petitions is that the petitioners have been made accused in the impugned first information reports which have been lodged under the provisions of the Gangsters Act on the basis of their involvement in a solitary case and even the gang chart prepared and approved by the authority shows that there is a single case against them on the basis of which, the impugned first information report has been registered which is illegal and against the essence of the Gangsters Act. The said first information report could not have been lodged on the basis of a solitary case and as such, the said writ petitions should be allowed and the respective impugned first information reports be quashed.

6. Criminal Misc. Writ Petition No. 3938 of 2021 has been filed challenging the first information report of Case Crime No. 0069 of 2021, under Section 3(1) of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986, Police Station Kotwali, District Basti. Sri Amrendra Pratap Singh, learned counsel appearing in matter argued that:

(i) The petitioner has been falsely implicated in the present case on the basis of concocted facts and influence of illegal politics.

(ii) The impugned first information report has been lodged on the basis of a single case shown against the petitioner in which he has been granted bail vide order dated 09.02.2021 passed by the trial court.

(iii) No offence whatsoever is made out against the petitioner.

(iv) There is no independent witness of the alleged incident and the story narrated by the police is false. The petitioner is a peace loving and law abiding citizen.

(v) The lodging the impugned first information report on the basis of a solitary case is illegal. There is no evidence on record to show that the petitioner is either a gang leader or member of any gang as there is no evidence whatsoever to show that there was a meeting of mind of persons to commit the offence. There is no evidence to show that the petitioner along with co-accused collectively committed the offence. There is no material to show that the alleged gang is operating.

7. Criminal Misc. Writ Petition No. 1296 of 2021 has been filed challenging the first information report of Case Crime No. 297 of 2020, under Sections 2/3 (1) of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986, Police Station Colonelganj, District Prayagraj. Sri Aadesh Kumar Srivastava, learned counsel appearing in the matter argued that:

(i) The entire allegations levelled against the petitioner is false, frivolous, perverse and without any legs to stand and as such, the impugned first information report is liable to be quashed.

(ii) The petitioner is a respected person having good academic record and at the time of the incident, was preparing for his third year of graduation and his name has been dragged in the present case by some political persons.

(iii) The single case on the basis of which the impugned first information report has been registered is a false case in which the petitioner has been falsely implicated and he has been granted bail vide order dated 03.03.2020 by the trial court.

(iv) The petitioner is neither a gang leader nor a member of any gang and is not involved in any illegal activity.

(v) There is no direct evidence against the petitioner and the name of the petitioner has been dragged in the said matter solely on the basis of his confessional statement while he was in police custody.

(vi) As such, the impugned first information report be quashed.

8. Criminal Misc. Writ Petition No. 1871 of 2021 has been filed challenging the first information report of Case Crime No. 0028 of 2021, under Section 2/3 of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 , Police Station Dhaulana, District Hapur. Sri Shiv Vilas Mishra, learned counsel appearing in the matter has argued that :

(i) The petitioner has been falsely implicated in the present case. As per the gang chart only one case has been shown against the petitioner on the basis of which the impugned first information report has been registered and in the said case the petitioner has been granted bail vide order dated 10.04.2019 passed by this Court. The case in which the petitioner has been shown to be involved is a false case and the police after getting a tip off information, arrested the petitioner and other persons and has shown some recoveries on the basis of joint confessional statement. There is no public or independent witness of the alleged recovery. The said case is a false case and the petitioner has been falsely implicated therein.

(ii) The said case is a case of the year 2019 and is an old case. No recent case has been shown against the petitioner.

The impugned first information report has been registered on 28.01.2021. The said case on the basis of which the impugned first information report has been registered and the gang chart has been prepared is a stale case and there is no evidence against the petitioner being involved in any activity which could be said to be a recent activity against law.

(iii) Section 2 (b) of the Gangsters Act has been placed before the Court and the learned counsel has stressed upon the word "acting' and proceeded to argue that there is no evidence or allegation to show that the petitioner "continued to act' and had a "recent activity' of any indulgence in any illegal activity.

9. Criminal Misc. Writ Petition No. 1873 of 2021 has been filed challenging the first information report of Case Crime No. 61 of 2021, under Section 2/3 of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986, Police Station Civil Lines, District Aligarh. Sri Araf Khan, learned counsel appearing in the matter has argued that :

(i) The petitioner has been falsely implicated in the present case on the basis of his involvement in a single case and in the said case, the arrest of the petitioner has been stayed by a Division Bench of this Court vide order dated 30.05.2019.

(ii) The basis on which the impugned first information report has been registered is a case of civil nature. After the protective order in favour of the petitioner by this Court, charge-sheet has been submitted against him and cognizance has been taken by the concerned Magistrate which is illegal and is without any evidence. The petitioner is a law abiding and peace living citizen of the society and is innocent. He has not committed any offence and is not a member of any gang.

(iii) It is stated that he does not intend to argue that a case under the Gangsters Act cannot be lodged on the basis of involvement in one case as the same can very well be done. Even if the first information report cannot be quashed, at least the interest of the petitioner be protected by giving him a protective order.

10. Criminal Misc. Writ Petition No. 1986 of 2021 has been filed challenging the first information report of Case Crime No. 0192 of 2020, under Section 2/3 of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986, Police Station Pisava, District Aligarh. Sri Devesh Kumar Shukla, learned counsel appearing in the matter has argued that:

(i) The petitioner has been falsely implicated in the present case. The lodging of the impugned first information report is on the basis of involvement of the petitioner only in one case in which he has been granted bail vide order dated 11.11.2020 passed by this Court.

(ii) No offence is made out against the petitioner and the case has been registered because of enmity and local party bandi.

(iii) The petitioner is neither a leader nor a member of any gang.

11. Criminal Misc. Writ Petition No. 2019 of 2021 has been filed challenging the first information report of Case Crime No. 0045 of 2021, under Section 3(1) of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986, Police Station Amroha City, District Amroha. Sri Jameel Ahmad Azmi, learned counsel appearing in the matter has argued that:

(i) The impugned first information report has been registered against the petitioner showing his involvement only in one case. The petitioner has been falsely implicated in the present case.

(ii) The petitioner is a businessman and is engaged in the business of Sandal Wood by following all legal procedures and norms. The sole case shown against the petitioner in the gang chart was challenged before this Court in which vide order dated 11.11.2020, the arrest of the petitioner has been stayed by a Division Bench of this Court while disposing of the said writ petition.

(iii) The case of the petitioner does not fall under Section 2 (b) of the Gangsters Act.

12. Criminal Misc. Writ Petition No. 2291 of 2021 has been filed challenging the first information report of Case Crime No. 34 of 2021, under Section 2/3 of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986, Police Station Jasrana, District Firozabad. Sri Rajesh Yadav, learned counsel appearing in the matter has argued that :

(i) The petitioner has been falsely implicated in the present case. According to the gang chart, one case has been shown against the petitioner on the basis of which the impugned first information report has been lodged and in the said case, the petitioner has been granted bail vide order dated 20.01.2021 passed by the trial court.

(ii) The said case on the basis of which the impugned first information report has been registered was lodged against 02 unknown persons. Subsequently, the name of the petitioner surfaced during investigation which is the handy work of the police. Persons of the said case were not known to the petitioner and despite this fact, a false case has been registered against him. 04 persons were arrested in a different case who named the petitioner as a person in whose shop they had sold part of a gold chain and as such, the petitioner has been implicated in the said case.

13. Criminal Misc. Writ Petition No. 3819 of 2021 has been filed challenging the first information report of Case Crime No. 296 of 2020, under Section 2/3 of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986, Police Station Nidhauli Kalan, District Etah. Sri Narayan Singh Kushwaha, learned counsel appearing in the matter has argued that:

(i) The petitioners are peace loving and law abiding citizens and have never involved themselves in any type of criminal activity.

(ii) Although the impugned first information report has been lodged showing the involvement of the petitioners in one case but in the said case they have been granted bail vide order dated 24.09.2020 passed by the trial court. The prosecution case as narrated in the first information report is absolutely false and concocted and without any documentary proof or any support of any independent witness because the petitioners have never been arrested on the spot and the allegations are fake and fabricated. The entire prosecution case has been initiated on the basis of wrong facts and false, concocted and fabricated story in collusion with the local political persons who have a grudge against the petitioners. No prima facie case is made out against the petitioners.

(iii) The petitioners are neither members of a gang nor gang leader.

14. Criminal Misc. Writ Petition No. 3845 of 2021 has been filed challenging the

first information report of Case Crime No. 255 of 2021, under Section 3(1) of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986, Police Station Gajraula, District J.P. Nagar (Amroha). Sri Sandeep Kumar Srivastava, learned counsel appearing in the matter has argued that :

(i) The petitioners have been falsely implicated in the present case. Only one case has been shown against the petitioner nos. 1 & 2 being of the year 2020 in which they have been granted bail vide orders dated 10.09.2020 and 21.09.2020 passed by the trial court. The petitioner no. 3 is also said to be involved in one case but the said case is of the year 2019 and even in the said case, he has been granted bail vide order dated 03.07.2019 passed by the trial court. Except for the single case against the petitioners, there is no other case shown against them.

(ii) The petitioners do not run any gang and have not given threat to any public and have been falsely shown as gangsters.

(iii) In so far as the petitioner no. 3 is concerned, the impugned first information report has been registered on 17.04.2021 where as the solitary case against him is a stale case and as such, he adopts the arguments as raised by learned counsel for the petitioner in Criminal Misc. Writ Petition No. 1871 of 2021 to this extent.

15. Criminal Misc. Writ Petition No. 4149 of 2021 has been filed challenging the first information report of Case Crime No. 159 of 2021, under Section 2/3 of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986, Police Station Baberu, District Banda. Sri Pradip Kumar Rao, learned counsel appearing in the matter has argued that :

(i) The petitioner has been falsely implicated in the present case. The involvement of the petitioner has been shown in the gang chart in two cases of the year 2019 and in both the cases, the petitioner has been released on bail vide orders dated 14.11.2019 passed by this Court.

(ii) The petitioner has been falsely shown as a gang leader of the gang and the offence under the Arms Act as shown against the petitioner being two cases do not fall within the purview of Gangsters Act.

(iii) There is no ingredient of Gangsters Act in the impugned first information report and as such, the petitioner cannot be said to be indulged in any criminal activity.

(iv) The lodging of the first information report is totally false and baseless.

16. Criminal Misc. Writ Petition No. 4185 of 2021 has been filed challenging the first information report of Case Crime No. 0204 of 2021, under Section 2/3 of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986, Police Station Kharkhauda, District Meerut. Sri Jamaluddin Mohd. Nasir, learned counsel appearing in the matter has argued that :

(i) The petitioner has been falsely implicated in the present case. He is a peace loving, law abiding citizen and commands respect in the locality. The involvement of the petitioner in the present case is shown on the basis of a single case in which the petitioner was issued a notice under Section 41 (A) Cr.P.C. by the Investigating Officer in pursuance of which he appeared before him and was released by him.

(ii) The petitioner has not committed any offence, no offence is made out against him. The first information report has been lodged with malafide intentions.

17. Criminal Misc. Writ Petition No. 4280 of 2021 has been filed challenging the first information report of Case Crime No. 05 of 2021, under Section 3(1) of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986, Police Station Manchi, District Sonbhadra. Sri Anubhav Shukla, learned counsel appearing in the matter has argued that :

(i) The involvement of the petitioners in the present case is on the basis of a single case in which the petitioner no. 1 was not named in the first information report and his name came into picture after 09 months of the incident whereas the petitioner no. 2 was not arrested by the police and even then charge-sheet has been submitted against both.

(ii) Lodging of the case on the basis of which the impugned first information report has been lodged is a fake first information report and the petitioners are not members of any gang.

(iii) Lodging of the first information report is an abuse of process of court and the action of police is arbitrary, illegal, malafide and with an intention to harass the petitioners.

18. Per contra, Sri J.K. Upadhyay and Sri Amit Sinha, learned Additional Government Advocates appearing for the State of U.P. argued that :

(i) Under the Gangsters Act, lodging of the first information reports even on the basis of the involvement of an accused in a single and solitary case is not illegal. The said proposition of law has been dealt with in the judgements of this Court in the case of ***Ajay Rai vs. State of U.P. and others: 1995 Cr.L.J. 2801; Rinku @ Hukku vs. State of U.P. and another: 2000 Cr.L.J. 2834 and Kishan Pal @ K.P. vs. State of U.P. and another: (2006) 54 ACC 1015.*** The said three cases in no indifferent terms have held that lodging of a first information report on the basis of a single case is permissible.

(ii) The implication of an accused in a single case is not a bar in lodging of a first information report under the provisions of the Gangsters Act even after a considerable period of time.

(iii) Since the perusal of the first information report discloses commission of a cognizable offence, the impugned first information reports cannot be quashed.

(iv) Barring Criminal Misc. Writ Petition No. 4149 of 2021 which is though connected with this bunch but the same has the implication of the petitioner therein on the basis of two cases, the other cases being argued on the premise that lodging of the first information report under the Gangsters Act on the basis of a solitary case is not permissible, is incorrect. In the said judgements, it has been held that a first information report under the Gangsters Act can be registered on the basis of a solitary case.

(v) Since perusal of the impugned first information reports in all the cases do disclose commission of an offence, investigation is required and since investigation is required, the said first information reports cannot be quashed.

(vi) The efforts of the learned counsels for the petitioners to demonstrate that their involvement in the previous case on the basis of which the impugned first information reports have been registered

are false implications, cannot be gone into by this Court as the said cases are not the matters to be adjudicated by this Court and are separate cause of actions.

(vii) Since a cognizable offence is made out on the reading of the first information reports in all the cases, investigation is required and as such, the same cannot be quashed and so no interim order of protection can also be granted as per settled principles of law.

(viii) The present writ petitions are devoid of any merit and deserve to be dismissed.

19. Before dealing with the question in issue, it will be apt to reproduce Section 2 (b) and (c) of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 which are as follows:-

"(b) "Gang" means a group of persons, who acting either singly or collectively, by violence, or threat or show of violence, or intimidation, or coercion or otherwise with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage for himself or any other person, indulge in anti-social activities, namely-

(i) offences punishable under Chapter XVI or Chapter XVII or Chapter XXII of the Indian Penal Code (Act No. 45 of 1860), or

(ii) distilling or manufacturing or storing or transporting or importing or exporting or selling or distributing any liquor, or intoxicating or dangerous drugs, or other intoxicants or narcotics or cultivating any plant, in contravention of any of the provisions of the U.P. Excise Act, 1910 (U.P. Act No. 4 of 1910), or the Narcotic Drugs and Psychotropic Substances Act, 1985 (Act No. 61 of 1985), or any other law for the time being in force, or

(iii) occupying or taking possession of immovable property otherwise than in accordance with law, or setting-up false claims for title or possession of immovable property whether in himself or any other person, or

(iv) preventing or attempting to prevent any public servant or any witness from discharging his lawful duties, or

(v) offences punishable under the Suppression of Immoral Traffic in Women and Girls Act, 1956 (Act No. 104 of 1956), or

(vi) offences punishable under Section 3 of the Public Gambling Act, 1867 (Act No. 3 of 1867), or

(vii) preventing any person from offering bids in auction lawfully conducted, or tender, lawfully invited, by or on behalf of any Government department, local body or public or private undertaking, for any lease or rights or supply of goods or work to be done, or

(viii) preventing or disturbing the smooth running by any person of his lawful business, profession, trade or employment or any other lawful activity connected therewith, or

(ix) offences punishable under Section 171-E of the Indian Penal Code (Act No. 45 of 1860), or in preventing or obstructing any public election being lawfully held, by physically preventing the voter from exercising his electoral rights, or

(x) inciting others to resort to violence to disturb communal harmony, or

(xi) creating panic, alarm or terror in public, or

(xii) terrorising or assaulting employees or owners or occupiers of public or private undertakings or factories and

causing mischief in respect of their properties, or

(xiii) inducing or attempting to induce any person to go to foreign countries on false representation that any employment, trade or profession shall be provided to him in such foreign country, or

(xiv) kidnapping or abducting any person with intent to extort ransom, or

(xv) diverting or otherwise preventing any aircraft or public transport vehicle from following its scheduled course;

(xvi) offences punishable under the Regulation of Money Lending Act, 1976;

(xvii) illegally transporting and/or smuggling of cattle and indulging in acts in contravention of the provisions in the Prevention of Cow Slaughter Act, 1955 and the Prevention of Cruelty to Animals Act, 1960;

(xviii) human trafficking for purposes of commercial exploitation, bonded labour, child labour, sexual exploitation, organ removing and trafficking, beggary and the like activities.

(xix) offences punishable under the Unlawful Activities (Prevention) Act, 1966:

(xx) printing, transporting and circulating of fake Indian currency notes;

(xxi) involving in production, sale and distribution of spurious drugs;

(xxii) involving in manufacture, sale and transportation of arms and ammunition in contravention of Sections 5, 7 and 12 of the Arms Act, 1959;

(xxiii) felling or killing for economic gains, smuggling of products in contravention of the Indian Forest Act, 1927 and Wildlife Protection Act, 1972;

(xxiv) offences punishable under the Entertainment and Betting Tax Act, 1979;

(xxv) indulging in crimes that impact security of State, public order and even tempo of life.]

(c) "gangster" means a member or leader or organiser of a gang and includes any person who abets or assists in the activities of a gang enumerated in clause (b), whether before or after the commission of such activities or harbours any person who has indulged in such activities;"

20. The proposition as to whether a first information report under the Gangsters Act can be lodged on the basis of involvement of an accused in only once case is no more res integra.

21. In the judgement of ***Ajay Rai*** *(supra)* paragraph 6, 9 and 10 are as follows:-

"6. As a law point alone was urged concerning interpretation of the term "indulges" as aforesaid, the State counsel was heard even without a counter affidavit on facts. It was urged by him that the FIR was a competent one as the ingredients of the term "gang" and "gangster" were made out therein.

9. As to meaning of the term "indulges", the learned counsel relied on the dictionary meaning as given by the Webstar Dictionary and one of such meaning, according to the learned counsel, is to yield to the desire of or to get pleasure in doing etc. The Chamber's English Dictionary interprets the term "indulge" as a transitive verb "to yield to the wishes of", "to favour or gratify" and "not to restrain" and this term is also an intransitive verb meaning "permit oneself in action or expression. This meaning is to be given when the term is used with proposition "in". The definition, as per Section 2, not

only uses the term "indulges", the term is immediately followed by the word "in" and we may, therefore, safely take the term to mean to permit oneself in action or expression. Thus, we may say that the terms "indulge in" in the definition of "gang" would carry the same meaning as "does" or "commits". These two common terms have been avoided by the legislature apparently for the reason that the terms "indulge in" are followed by two words "anti-social activities." Moreover, there are certain actions detailed in the next 15 sub-clauses the doing of which may not strictly come within the term "commits". We may look to the paragraphs 10 to 13 and 15 of the clauses in Section 2(b) in appreciating this view.

10. If the legislature had the intention that the Act would be applicable only to past proven acts, there was no bar for the legislature to have used the word "habitually" within the definition of gang. We may look to the preamble of the Act for interpreting this definition. This Act was enacted to make special provisions for the prevention of and for coping with gangster and anti-social activities and for matters connected therewith or incidental thereto."

22. A Full Bench of this Court in the case of ***Ashok Kumar Dixit vs. State of U.P.: AIR 1987 Allahabad 235,*** has stated about the concept behind lodging of a first information report under the Gangsters Act. It has been held in paragraph 73 and 74 as follows:-

"73. In this behalf, provisions of the Act themselves provide intrinsic guidelines. If we advert to Section 2(b) of the Act. which defines the term 'gangster' we would find significant words. They are "acting", 'singly or collectively', 'violence or show of violence', 'intimidation', 'coercion', or unlawful means'. Thus, for booking a person under the provisions of the Act the authorities have to be prima facie satisfied that a person has acted. The authority has to be satisfied that there is a reasonable and proximate connection between the occurrence and the activity of the person sought to be apprehended and that such activities were to achieve undue temporal, physical, economic or other advantage. There need not be any overt or positive act of the person intended to be apprehended at the place. It is enough to prove active complicity which has a bearing on the crime.

74. While laying down so, we should not be oblivious of the avowed object of the Act. Under the ordinary criminal law, it is sometimes difficult to bring to book the overlords of crime and underworld because they seldom operate in person or in the public gaze. They indulge in clandestine operations which threaten to tear apart the very fabric of society. It is this purpose which the Act seeks to achieve."

23. In the case of ***Subhash vs. State of U.P. and another: 1998 SCC Online All 973,*** a Division Bench of this Court framed the following questions while dealing with a writ petition in which there was a challenge to the first information reports under the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986. The questions as framed are enumerated in paragraph 1 of the judgement which is as follows:-

"1. In all these matters the respective petitioners have challenged their prosecution for an offence under Sections 2 and 3 of the U.P. Gangsters and Anti-Social Activities (Prevention) Act (in short "the Act'). Prayers have been made for

quashing the respective F.I.Rs. and for interim orders protecting them from arrest. The questions, that have been raised, may be categorised as follows:

1. There could not be prosecution under the Act for a single incident as the Act spoke of "anti-social activities" (in plural).

2. Prosecution under the Act for past offences was not thought of.

3. If at all the Act created a new concept of an offence, there must be some allegation that any act or omission towards the commission of the offence was there.

4. The words "indulges in" as used in Section 2 of the Act would only mean that there should be habituality of the acts covered by Section 2."

The answer to the questions enumerated in paragraph 1 of the judgement have been given in paragraph nos. 13, 14, 15 and 16 of the said judgement which are as follows:-

"13. As a sequel to this decision when there are some allegations of any act or omission towards the commission of the offfence under the Act to justify an F.I.R., it follows that such an F.I.R. could lie even for a single incident as habituality of the acts is not required for making out an offence. The words used in Section 2 are no doubt in plural indicating "indulge in anti-social activities" but the sentence does not stop with the words "anti-social activities". It goes on with the word, "viz." followed by 15 clauses of anti-social activities enumerated therein. The plural in "anti-social activities" referred to the large number of activities to be brought under the umbrella of this single offence and it would never mean that there must be plurality of actions before a person could he prosecuted or convicted for an offence under the Act. When a specific offence has been created, it is open to be punished even for a single act, if it is covered by the requirements of law. We, thus, answer point No. 1 framed by us.

14. We are left with the question whether prosecution under the Act was thought of for past offences. We may, for a decision on this point, refer to the definition of the term "gang" as given in Section 2(b) of the Act. The requirement of this definition are that (1) "Gang" means a group of persons, (2) those persons might act either single or collectively, (3) such action is to be associated with violence or threat or show of violence or intimidation or coercion or otherwise, (4) such action must be with the object of disturbing public order or of gaining any undue advantage (temporal pecuniary, material or otherwise) for himself or for any other person. If under the condition of the above points anti-social activities, as enumerated under the definition, are indulged in then and then only the action could be designed as an action of a gang. If a person is a member or a leader or organiser of a gang, or if he abets or assists in the activities of a gang or harbours any person who has indulged in such activities, such person would be a gangster and he is to be punished with the penalty as indicated in Section 3 of the Act. All the anti-social activities enumerated under the definition of ''Gang' are not covered as offences, but were certainly unlawful activities having serious reflection on the society, though not termed as offences. The law, thus, never required that offence must have been committed in the past for a proper prosecution under this Act.

15. Section 4 of the Act speaks of special rules of evidence and States as under:

"4. Special Rules of Evidence.-- Notwithstanding anything to the contrary

contained in the Court (Code) or the Indian Evidence Act, 1872 (1 of 1872) for the purposes of trial and punishment for offences under this Act or connected offences;

(a) the Court may take into consideration the fact that the accused was--

(i) on any previous occasion bound down under Section 107 or Section 108 or Section 109 or Section 110 of the Code, or

(ii) detained under any law relating to preventive detention, or

(iii) externed under the Uttar Pradesh Control of Goondas Act, 1970 (Act No. 8 of 1971), or any other such law;

(b) where it is proved that a gangster or any person on his behalf is or has at any time been, in possession of movable or immovable property which he cannot satisfactorily account for, or where his pecuniary resources are disproportionate to his known sources of income, the Court shall, unless contrary is proved, presume that such property or pecuniary resources, have been acquired or derived by his activities as a gangster;

(c) where it is proved that the accused has kidnapped or abducted any person, the Court shall, presume that it was for ransom;

(d) where it is proved that a gangster has wrongfully concealed or confined a kidnapped or abducted person, the Court shall presume that the gangster knew that such person was kidnapped or abducted, as the case may be;

(e) the Court may, if for reasons to be × × × × × × × × × recorded it thinks fit so to do, proceed with the trial in absence of the accused and record the evidence of any witness, provided that the witness may be recalled for cross-examination if the accused so desires but recording his examination in chief afresh in presence of the accused shall not be necessary."

Under these special rules of evidence, the Court is entitled to take into consideration the previous orders binding down an accused under Sections 107, 108, 109 or 110 of the Code of Criminal Procedure, or previous orders of detention under preventive laws, or previous orders of externment under the U.P. Control of Goondas Act, but the special rules of evidence do not permit consideration of previous conviction for an offence under any other law. This also suggests that the past acts are not meant to be punished under the provisions of the present legislation.

16. In dealing with the procedures, Section 7 of the Act provides that only a special Court constituted under the Act is to take up a case under this Act, is to try an offence under this Act, and Section 10 provides that the special Court is empowered to take cognizance of any offence triable by it, without there being a regular commitment order and cognizance could be taken either on complaint or a police report. Section 8 provides that when a special Court tries any offence punishable under this Act, it can also try any other offence with which the accused may, under any other law for the time being in force, be charged at the same trial. This suggests that if by a single act of omission the offender commits an offence under the general law as also one under this Act, both the offences may be tried together before the special Court. This saves the provisions of Section 300(4), Cr. P.C., as was observed by the Division Bench in Ajai Rai's case (supra) at paragraph 13 of that judgment. We may, therefore, conclude that allegations of past acts may not be the sole criterion for institution of a case for an

offence under this Act, rather if there be old cases pending on the date of institution of the F.I.R. under any other offence and for the same set of facts a case under this Act is also instituted, then those cases should also come to the special Court to avoid double jeopardy to the accused. We may, therefore, answer point No. 2 with the observation that a prosecution under the Act for past offence was not thought of unless elements of the offence under this Act are made out."

It has been held in no uncertain terms while answering the question no. 1 that a first information report can be lodged even for a single act, if it is covered by the requirements of law.

24. In the judgement of ***Rinku @ Hukku*** *(supra)* paragraph 12 is as follows:-

"12. In view of the above, under Sec.13 of the U.P. General Clauses Act the activities denotes activity as well as the said provisions are in pari materia of Sec.13 of the General Clause Act 1897. As such a single act of anti-social activity can come within the definition of gangster."

25. In the judgement of ***Kishan Pal @ K.P.*** *(supra)* while following the judgement in the case of ***Shamsul Islam and Rinku @ Hukku*** it has been also held as follows:

"6. Therefore, the Division Bench under writ jurisdiction scrutinized the individual cases of investigation to grant relief in direct conflict with Full Bench decision. It is a departure from the ratio of the Full Bench judgment and as such has no binding effect. That apart, the aforesaid judgment was also distinguished by another Division Bench of this Court in ***Shamsul Islam v. State of U.P, 1999 (38) ACC 315*** *. There the Court held that original relief is quashing of the first information report. Additional relief is in the nature of stay of arrest. If the original relief can not be granted, the order of stay can not be granted. The Act creates a new and distinct Offence. The protection of Article 20 (2) of the Constitution of India would not be available at all at any stage and there can be no bar in arresting the person, who has committed an offence, which is punishable under the Act. Therefore, as we understood question of double jeopardy or double conviction or double protection or double arrest may not hit the cause since the source of investigation is the separate law introduced by the State. In a further judgment in* ***Rinku alias Hukku v. State of U.P. and another, 2001 (Suppl) ACC 641 (HC-LB)*** *a Division Bench of this High Court held that singular includes plural and vice versa, thereby single act of antisocial activities is sufficient to trap a person as a gangster. Hence, the basis of the judgment reported in Subhash (supra) is no more available in view of the successive judgments and these being later judgments have binding effect upon this Court. There is no occasion to forward the matter to the Larger Bench in view of the discussion made herein."*

26. The Full Bench of this Court in ***Ajit Singh @ Muraha Vs. State of U.P. and others : (2006) 56 ACC 433*** reiterated the view taken by the earlier Full Bench in ***Satya Pal Vs. State of U.P. and others : 2000 Cr.L.J. 569*** after considering the various decisions including ***State of Haryana Vs. Bhajan Lal and others : AIR 1992 SC 604*** that there can be no interference with the investigation or order staying arrest unless cognizable offence is not ex-facie discernible from the allegations contained in the F.I.R. or there is any statutory restriction operating on the power of the police to investigate a case.

27. Further the Apex Court in the case of ***State of Telangana v. Habib Abdullah Jellani : (2017) 2 SCC 779*** has disapproved an order restraining the Investigating Agencies arresting the accused where prayer of quashing the First Information Report has been refused.

28. The Apex Court in the case of ***M/s Neeharika Infrastructure Pvt. Ltd. Vs. State of Maharashtra and others: Criminal Appeal No. 330 of 2021*** in its judgment dated 13th April, 2021 has in detail held that the Courts should not thwart any investigation into the cognizable offences. It is only in cases where no cognizable offence or offence of any kind is disclosed in the First Information Report that the Court will not permit an investigation to go on. The power of quashing should be exercised sparingly with circumspection, as it has been observed, in the rarest of rare cases. While examining an FIR/complaint, quashing of which is sought, the Court cannot embark upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR/complaint. Criminal proceedings ought not to be scuttled at the initial stage. Quashing of complaint/FIR should be an exception rather than an ordinary rule. Ordinarily, the Courts are barred from usurping the jurisdiction of the police, since the two organs of the State operate in two specific spheres of activities and one ought not to tread over the other sphere. The First Information Report is not an encyclopaedia which must disclose all facts and details regarding the offence reported. Therefore, when the investigation by the police is in progress, the Court should not go into merits of the allegations made in the FIR. Police must be permitted to complete the investigation.

29. After having heard the learned counsels for the parties and perusing the records, it is apparent that barring Criminal Misc. Writ Petition No. 4149 of 2021, all the above writ petitions were argued on the common point for which the question as framed, is answered that as per the settled principles of law, the lodging of a first information report on the basis of a single case, is valid and permissible. In a petition under Article 226 of the Constitution of India, this Court cannot adjudicate the correctness of the allegations in the impugned first information reports or the cases on the basis of which the impugned first information reports have been lodged. The writ petitions are thus ***dismissed.***

30. In so far as Criminal Misc. Writ Petition No. 4149 of 2021 is concerned, the involvement of the petitioner is on the basis of two cases and even therein from perusal of the first information report, a cognizable offence is made out. The writ petition is also ***dismissed.***

31. The party shall file computer generated copy of this order downloaded from the official website of High Court Allahabad, self attested by the petitioner (s) along with a self attested identity proof of the said person (s) (preferably Aadhar Card) mentioning the mobile number (s) to which the said Aadhar Card is linked.

32. 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)09ILR A41
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.08.2021

BEFORE

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

Criminal Misc. Writ Petition No. 4898 of 2021

Hariom Sharma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Uttar Kumar Goswami

Counsel for the Respondents:
A.G.A.

A. Criminal Law - Constitution of India,1950-Article 226 & Indian Penal Code,1860-Sections 477-A, 409, 120-B & 420-quashing of FIR-On the Complaint of the informant, the impugned FIR registered against six named accused persons including the petitioner-on the advice of petitioner and co-accused who is said to be accountant, the work of purchase of wheat was being carried out from Anuj Trader-On the raid, illegal government bags of 200 quintal wheat and stencils of the three centres have been recovered from Anuj Trader-there appears to be sufficient ground for investigation of case after considering the allegations and material brought on record.(Para 1 to 23)

B. It is settled law that a criminal proceeding is not a proceeding for vindication of a private grievance but it is a proceeding initiated for the purpose of punishment to the offender in the interest of society. It is for maintaining stability and orderliness in the society that certain acts are constituted offences and the right is given to any citizen to set the machinery of the criminal law in motion for the purpose of bringing the offender to book. Punishment of the offender in the interest of society being one of the objects behind statute enacted for larger goods of society, the right to initiate proceedings cannot be whittled down, circumscribed of lettered by putting it into a strait jacket formula of locus standi.(Para 18 ,19)

The writ petition is dismissed. (E-6)

List of Cases cited:

1. St. of Telangana Vs Habib Abdullah Jeelani & ors. (2017) 2 SCC 779

2. Neeharika Infrastructure Pvt. Ltd. Vs. St. of Mah.(2021) SCC OnLine SC 315

3. Sheo Nandan Paswan Vs St. of Bih. & ors. (1987) AIR SC 877

4. Subramanian Swamy Vs Manmohan Singh & anr.(2012) 3 SCC 64

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

1. This writ petition has been filed by the petitioner seeking quashment of first information report dated 24th May, 2021 in respect of Crime No. 0036 of 2021, under Sections 185, 477-A, 409, 120-B and 420 of I.P.C. Police Station-Kakavan, District-Kanpur Nagar.

2. Heard Mr. Uttar Kumar Goswami, learned counsel for the petitioner and Mr. J.K. Upadhyay, learned A.G.A. for the State-respondents.

3. The first information report has been lodged on 24th May, 2021 at 18:03 hrs by S.N. Khare against six named accused persons, namely, Rajesh Kumar, Surendra Kumar, Sohil Kumar, Accountant Atul Sharma, Hariom Sharma (petitioner herein) and Anuj Traders

regarding financial irregularity and scam at Wheat Purchase Centre, P.C.F. Farmer Service Centres, Vishdhan, Sindhauli and Aroul. In the first information report, it has been alleged that in a surprise inspection carried out at the aforesaid farmer service centres, purchasing centre In-Charge, namely, Rajesh Kumar, Surendra Kumar and Shahil Kumar were present. It was informed by the concerned Centre In-charge that concerned records, government grants (Bardana), Stencil Machine were not available at the Centres. In their written statements, it has been stated that at the behest of Atul Sharma (Accountant), District Office, P.C.F. Kanpur Nagar and Hariom Sharma (petitioner herein), Regional Director, P.C.F., Kanpur Division, Kanpur, the work of purchasing of wheat is being carried out from Rice Mill (Anuj Traders, Vishdhan). On the basis of aforesaid statements, when the Assistant Commissioner and Assistant Registrar raided the place of Anuj Traders, Vishdhan, government bags of wheat containing 200 quintal (four gath i.e. each gath contains 50 kgs. of wheat) and stencils of aforesaid three centres were recovered and on the rice mill itself, purchase of wheat has been found to be done in the names of aforesaid three centres. On the basis of statements of concerned Centre In-charge and the raid carried out by the Assistant Commissioner and Assistant Registrar and the recovery made by them, the named accused persons, including the petitioner were found guilty of carrying out illegal government grants and purchase of wheat at the aforesaid three centres and the present first information report has been lodged.

4. In support of his case, learned counsel for the petitioner has advanced following arguments:

1. The petitioner, who is presently working as Regional Manager, P.C.F., Kanpur Division, Kanpur, is wholly innocent and has been falsely roped in the aforesaid case in collusion with some interested persons and he has no concern with the aforesaid crime.

2. The petitioner was not present at the place when the raid was carried out and the allegation levelled against the petitioner is based on false and concocted story in order to implicate him in the aforesaid case. The first information report itself discloses that till date no material evidence in respect of alleged allegation, which has been levelled against the petitioner, is available on record.

3. Prior to registering the first information report against the petitioner, respondent no.4 has not taken any approval or permission from the higher authorities qua the first information report against the government/public servant, therefore the same is per se illegal and arbitrary.

4. (I) Respondent no.4/informant, who has lodged the first information report, is much junior to the petitioner and he has no power to make the complaint against the petitioner like the present one.

(II) Only due to enmity and for harassing the petitioner, so that the image of the petitioner may be tarnished, respondent no.4 has lodged the impugned first information report falsely implicating him. As such, the impugned first information report is illegal, as the allegations levelled against the petitioner in the said report, is based on false and concocted story.

5. Perusal of the entire record indicates that the petitioner has not committed any offence under Sections 185, 477-A, 409, 120-B and 420 I.P.C., Police Station-Kakavan, District-Kanpur. Petitioner has no criminal antecedents to his credit except the present one.

On the cumulative strength of the aforesaid arguments, learned counsel for

the petitioner submits that the petitioner is innocent, the contents of the impugned F.I.R. are concocted, tutored and vague in nature and the charges as alleged in the impugned F.I.R. are vague one, hence the impugned F.I.R. is liable to be quashed.

5.(I) Learned Additional Government Advocate, on the other hand, opposed the prayer for quashing the impugned F.I.R. and has argued that on the complaint of the informant, S.N. Khare, who is said to be Additional District Cooperative Officer, Bilhore Tehsil In-charge, Bilhore, Kanpur Nagar, the impugned F.I.R. has been registered against six named accused persons including the petitioner herein, in which, there is specific allegation that on the advise of the petitioner and co-accused Atul Sharma, who is said to be the Accountant, District Office P.C.F., Kanpur Nagar, the work of purchase of wheat was being carried out from Anuj Trader, Vishdhan. On the raid, illegal government bags of 200 quintal wheat and stencils of the three centres referred to above have been recovered from Anuj Trader, Vishdhan. Therefore, when the matter is at the state of investigation, it cannot be said that the petitioner is innocent and allegations made in the impugned F.I.R. are mala fide, false, concocted or vague and the petitioner has been falsely implicated in the present case. He, therefore, submits that argument nos. 1 and 2 advanced by the learned counsel for the petitioner cannot be examined at this stage.

(II) So far as argument no.3 advanced on behalf of the petitioner is concerned, in reply, learned A.G.A. for the State submits that no prior permission or approval from the higher authorities is required before registering the first information report against a public/ government servant.

(III) Elaborating the aforesaid submission, learned A.G.A. has referred to Section 197 of Cr.P.C., wherein it has been provided that only at the stage of cognizance against a public/government servant, prior permission or approval from the higher authorities/State, as the case may, is required. Therefore, the said submission of the learned counsel for the petitioner has no legs to stand.

(IV) In regard to argument no.4 (I) advanced on behalf of the petitioner, learned A.G.A. submits that it is settled law that every person has a right to lodge a first information report against a person, who in his presence, commits a non-bailable or cognizable offence. Therefore, the argument advanced on behalf of the petitioner that since respondent no.4 is junior to the petitioner, he has no power to make any complaint against him, has no legs to stand.

(V) To the other argument made on behalf of the petitioner i.e., No. 4 (II) that due to enmity and harassing the petitioner as well as tarnishing his image, respondent no.4 has made false complaint against the petitioner, learned A.G.A. submits that the same cannot be accepted, as there is nothing on record, which establishes that there is any enmity or any rivalry between the petitioner and respondent no.4.

(VI) So far as argument no.5 advanced on behalf the petitioner is concerned, learned A.G.A. submits that at the stage of investigation, it cannot be examined as to whether the petitioner is involved in the commission of the alleged offence or not.

On the cumulative strength of the aforesaid, learned A.G.A. submits that from perusal of the impugned F.I.R. it cannot be said that no cognizable offence is made out, hence the writ petition is liable to be dismissed.

6. We have examined the submissions advanced by the learned Counsel for the

petitioner and learned AGA and also gone through the material brought on record.

7. Normally, this Court would have issued notice to respondent no.4, but no purpose would be served by keeping this petition pending, inasmuch as the learned counsel for the petitioner and the learned A.G.A. for the State agree that this petition may be disposed of at this stage, without issuing notice to respondent no.4 as well as without calling for any further affidavits.

8. Before entering into the merits of the case set up by the learned counsel for the petitioner and the learned A.G.A. for the State, it would be worthwhile to reproduce the offences, which are alleged to have been committed by the named accused persons in the first information report including the petitioner herein, which are being quoted herein below:

*"**185. Illegal purchase or bid for property offered for sale by authority of public servant.**--Whoever, at any sale of property held by the lawful authority of a public servant, as such, purchases or bids for any property on account of any person, whether himself or any other, whom he knows to be under a legal incapacity to purchase that property at that sale, or bids for such property not intending to perform the obligations under which he lays himself by such bidding, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both.*

***477A. Falsification of accounts.**--Whoever, being a clerk, officer or servant, or employed or acting in the capacity of a clerk, officer or servant, wilfully, and with intent to defraud, destroys, alters, mutilates or falsifies any 2[book, electronic record, paper, writing], valuable security or account which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or wilfully, and with intent to defraud, makes or abets the making of any false entry in, or omits or alters or abets the omission or alteration of any material particular from or in, any such 2[book, electronic record, paper, writing], valuable security or account, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both. Explanation.--It shall be sufficient in any charge under this section to allege a general intent to defraud without naming any particular person intended to be defrauded or specifying any particular sum of money intended to be the subject of the fraud, or any particular day on which the offence was committed.]*

***409. Criminal breach of trust by public servant, or by banker, merchant or agent.**--Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with 1[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.*

***120B. Punishment of criminal conspiracy.**--*

(1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, 2[imprisonment for life] or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.

(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both.

***420. Cheating and dishonestly inducing delivery of property.**--Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."*

9. The legal position on the issue of quashing of FIR or criminal proceedings is well-settled that the jurisdiction to quash a complaint, FIR or a charge-sheet should be exercised sparingly and only in exceptional cases. The Courts should not ordinarily interfere with the investigations of cognizable offences. However, where the allegations made in the FIR or the complaint, even if taken at their face value and accepted in their entirety, do not prima facie constitute any offence or make out a case against the accused, FIR or the charge-sheet may be quashed in exercise of powers under Article 226 or inherent powers under Section 482 of the Cr.P.C.

10. The Apex Court rendered in the case of **the State of Telangana v. Habib Abdullah Jeelani and Others** reported in 2017 (2) SCC 779, wherein in paragraph nos. 13 and 23, it has been observed as follows:

"13.There can be no dispute over the proposition that inherent power in a matter of quashment of FIR has to be exercised sparingly and with caution and when and only when such exercise is justified by the test specifically laid down in the provision itself. There is no denial of the fact that the power under Section 482 CrPC is very wide but it needs no special emphasis to state that conferment of wide power requires the court to be more cautious. It casts an onerous and more diligent duty on the Court.

23.....What needs to be stated here is that the States where Section 438 CrPC has not been deleted and kept on the statute book, the High Court should be well advised that while entertaining petitions under Article 226 of the Constitution or Section 482 CrPC, exercise judicial restraint. We may hasten to clarify that the Court, if it thinks fit, regard being had to the parameters of quashing and the self-restraint imposed by law, has the jurisdiction to quash the investigation and may pass appropriate interim orders as thought apposite in law, but it is absolutely inconceivable and unthinkable to pass an order of the present nature while declining to interfere or expressing opinion that it is not appropriate to stay the investigation. This kind of order is really inappropriate and unseemly. It has no sanction in law. The Courts should oust and obstruct unscrupulous litigants from invoking the inherent jurisdiction of the Court on the drop of a hat to file an application for quashing of launching an FIR or investigation and then seek relief by an interim order. It is the obligation of the court to keep such unprincipled and unethical litigants at bay. "

11. In the latest judgment, the Apex Court in the case of **Neeharika Infrastructure Private Limited vs. State of Maharashtra** reported in *2021 SCC*

OnLine SC 315, considered the powers of the High Court, while adjudicating a petition for quashing of FIR under Article 226 of the Constitution of India and under Section 482 of the Criminal Procedure Code, 1973. In **Neeharika Infrastructure Private Limited** (supra), the appellants challenged an interim order issued by the Bombay High Court, in a quashing petition filed under Section 482 Cr.P.C. and Article 226 of the Constitution. The Bombay High Court issued an interim order directing that "no coercive measures shall be adopted against the petitioners in respect of the said FIR". While examining the correctness of the said interim order, the Apex Court in para-80 has held as under :

"80. In view of the above and for the reasons stated above, our final conclusions on the principal/core issue, whether the High Court would be justified in passing an interim order of stay of investigation and/or "no coercive steps to be adopted", during the pendency of the quashing petition under Section 482 Cr.P.C and/or under Article 226 of the Constitution of India and in what circumstances and whether the High Court would be justified in passing the order of not to arrest the accused or "no coercive steps to be adopted" during the investigation or till the final report/chargesheet is filed under Section 173 Cr.P.C., while dismissing/disposing of/not entertaining/not quashing the criminal proceedings/complaint/FIR in exercise of powers under Section 482 Cr.P.C. and/or under Article 226 of the Constitution of India, our final conclusions are as under:

i) Police has the statutory right and duty under the relevant provisions of the Code of Criminal Procedure contained in Chapter XIV of the Code to investigate into a cognizable offence;

ii) Courts would not thwart any investigation into the cognizable offences;

iii) It is only in cases where no cognizable offence or offence of any kind is disclosed in the first information report that the Court will not permit an investigation to go on;

iv) The power of quashing should be exercised sparingly with circumspection, as it has been observed, in the "rarest of rare cases (not to be confused with the formation in the context of death penalty).

v) While examining an FIR/complaint, quashing of which is sought, the court cannot embark upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR/complaint;

vi) Criminal proceedings ought not to be scuttled at the initial stage;

vii) Quashing of a complaint/FIR should be an exception rather than an ordinary rule;

viii) Ordinarily, the courts are barred from usurping the jurisdiction of the police, since the two organs of the State operate in two specific spheres of activities and one ought not to tread over the other sphere;

ix) The functions of the judiciary and the police are complementary, not overlapping;

x) Save in exceptional cases where non-interference would result in miscarriage of justice, the Court and the judicial process should not interfere at the stage of investigation of offences;

xi) Extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice;

xii) The first information report is not an encyclopaedia which must disclose all facts and details relating to the offence reported. Therefore, when the investigation by the police is in progress, the court should not go into the merits of the

allegations in the FIR. Police must be permitted to complete the investigation. It would be premature to pronounce the conclusion based on hazy facts that the complaint/FIR does not deserve to be investigated or that it amounts to abuse of process of law. After investigation, if the investigating officer finds that there is no substance in the application made by the complainant, the investigating officer may file an appropriate report/summary before the learned Magistrate which may be considered by the learned Magistrate in accordance with the known procedure;

xiii) The power under Section 482 Cr.P.C. is very wide, but conferment of wide power requires the court to be more cautious. It casts an onerous and more diligent duty on the court;

xiv) However, at the same time, the court, if it thinks fit, regard being had to the parameters of quashing and the self-restraint imposed by law, more particularly the parameters laid down by this Court in the cases of R.P. Kapur (supra) and Bhajan Lal (supra), has the jurisdiction to quash the FIR/complaint;

xv) When a prayer for quashing the FIR is made by the alleged accused and the court when it exercises the power under Section 482 Cr.P.C., only has to consider whether the allegations in the FIR disclose commission of a cognizable offence or not. The court is not required to consider on merits whether or not the merits of the allegations make out a cognizable offence and the court has to permit the investigating agency/police to investigate the allegations in the FIR;

xvi) The aforesaid parameters would be applicable and/or the aforesaid aspects are required to be considered by the High Court while passing an interim order in a quashing petition in exercise of powers under Section 482 Cr.P.C. and/or under Article 226 of the Constitution of India. However, an interim order of stay of investigation during the pendency of the quashing petition can be passed with circumspection. Such an interim order should not require to be passed routinely, casually and/or mechanically. Normally, when the investigation is in progress and the facts are hazy and the entire evidence/material is not before the High Court, the High Court should restrain itself from passing the interim order of not to arrest or "no coercive steps to be adopted" and the accused should be relegated to apply for anticipatory bail under Section 438 Cr.P.C. before the competent court. The High Court shall not and as such is not justified in passing the order of not to arrest and/or "no coercive steps" either during the investigation or till the investigation is completed and/or till the final report/chargesheet is filed under Section 173 Cr.P.C., while dismissing/disposing of the quashing petition under Section 482 Cr.P.C. and/or under Article 226 of the Constitution of India.

xvii) xvii) Even in a case where the High Court is prima facie of the opinion that an exceptional case is made out for grant of interim stay of further investigation, after considering the broad parameters while exercising the powers under Section 482 Cr.P.C. and/or under Article 226 of the Constitution of India referred to hereinabove, the High Court has to give brief reasons why such an interim order is warranted and/or is required to be passed so that it can demonstrate the application of mind by the Court and the higher forum can consider what was weighed with the High Court while passing such an interim order.

xviii) Whenever an interim order is passed by the High Court of "no coercive

steps to be adopted" within the aforesaid parameters, the High Court must clarify what does it mean by "no coercive steps to be adopted" as the term "no coercive steps to be adopted" can be said to be too vague and/or broad which can be misunderstood and/or misapplied."

12. Keeping in mind the aforesaid dictum of the Apex Court, we find that in the instant case, it transpires from the impugned F.I.R. that on the complaint of the informant, S.N. Khare, who is said to be Additional District Cooperative Officer, Bilhore Tehsil In-charge, Bilhore, Kanpur Nagar, the impugned F.I.R. has been registered against six named accused persons including the petitioner herein, in which, there is specific allegation that on the advise of the petitioner and co-accused Atul Sharma, who is said to be the Accountant, District Office P.C.F., Kanpur Nagar, the work of purchase of wheat was being carried out from Anuj Trader, Vishdhan. On the raid, illegal government bags of 200 quintal wheat and stencils of the three centres referred to above have been recovered from Anuj Trader, Vishdhan. The petitioner has approached this Court by filing the instant writ petition under Article 226 of the Constitution of India. More so, from perusal of the entire pleadings of the writ petition, it transpires that there is question of facts, which cannot be examined under Article 226 of the Constitution of India in writ jurisdiction.

13. It is well settled that this Court has to eschew itself from embarking upon a roving enquiry into the last details of the case. It is also not advisable to adjudge whether the case shall ultimately end in submission of charge sheet and then eventually in conviction or not. Only a prima facie satisfaction of the court about the existence of sufficient ingredients constituting the offence is required in order to see whether the F.I.R. requires to be investigated or deserves quashing. The ambit of investigation into the alleged offence is an independent area of operation and does not call for interference in the same, except in rarest of rare cases.

14. Keeping in view the aforesaid law and considering the submissions advanced by learned counsel for the petitioner, we are of the view that the submissions made by the learned A.G.A. for the State, to the argument nos. 1,2, 4 (II) and 5, advanced on behalf of the petitioner, have substance.

15. So far as the submission made by the learned A.G.A. to the argument no.3 advanced on behalf of the petitioner is concerned, it would be relevant to reproduce Section 197 Cr.P.C., which is being quoted herein below:

"197. Prosecution of Judges and public servants.

(1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, ***no Court shall take cognizance of such offence except with the previous sanction-***

(a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government;

(b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government:

1. Provided that where the alleged offence was committed by a person referred to in clause (b) during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in a State, clause (b) will apply as if for the expression "State Government" occurring therein, the expression "Central Government" were substituted.

***(2) No Court shall take cognizance of any offence alleged** to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.*

(3) The State Government may, by notification, direct that the provisions of sub- section (2) shall apply to such class or category of the members of the Forces charged with the maintenance of public order as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub- section will apply as if for the expression "Central Government" occurring therein, the expression "State Government" were substituted.

*(3A) Notwithstanding anything contained in sub- section (3), **no court shall take cognizance of any offence, alleged to have been committed by any member of the Forces charged with the maintenance of public order in a State** while acting or purporting to act in the discharge of his official duty during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force therein, except with the previous sanction of the Central Government.*

*(3B) Notwithstanding anything to the contrary contained **in this Code or any other law, it is hereby declared that any sanction accorded by the State Government or any cognizance taken by a court upon such sanction, during the period commencing on the 20th day of August, 1991 and ending** with the date immediately preceding the date on which the Code of Criminal Procedure (Amendment) Act, 1991, receives the assent of the President, with respect to an offence alleged to have been committed during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in the State, shall be invalid and it shall be competent for the Central Government in such matter to accord sanction and for the court to take cognizance thereon.*

(4) The Central Government or the State Government, as the case may be, may determine the person by whom, the manner in which, and the offence or offences for which, the prosecution of such Judge, Magistrate or public servant is to be conducted, and may specify the Court before which the trial is to be held."

16. From a simple reading of Section 197 Cr.P.C., it is apparently clear that no court or magistrate shall take cognizance against a public servant without prior permission or sanction from his/her higher authorities or State, as the case may. Therefore, the submission made by the learned A.G.A. has also substance.

17. In respect of argument no. 4 (I) advanced on behalf of the petitioners, we have also found substance in the submission made by the learned A.G.A. for the State that every person has a right to file a complaint against a public servant.

18. The Apex Court in the case of **Sheo Nandan Paswan Vesus State of Bihar & Others reported in** *AIR 1987 SC 877,* specifically in paragraph-14, has observed as follows:

"..... It is now settled law that a criminal proceeding is not a proceeding for vindication of a private grievance but it is a proceeding initiated for the purpose of punishment to the offender in the interest of the society. ***It is for maintaining stability and orderliness in the society that certain acts are constituted offences and the right is given to any citizen to set the machinery of the criminal law in motion for the purpose of bringing the offender to book. It is for this reason that in R.S. Nayak v. A.R. Antulay, [1984] 2 SCC 500 this Court pointed out that "punishment of the offender in the interests of the society being one of the objects behind penal statute enact- ed for larger goods of society, the right to initiate proceedings cannot be whittled down, circumscribed of lettered by putting it into a strait jacket formula of locus standi".*** *This Court observed that locus standi of the complainant is a concept foreign to criminal jurisprudence.* ***Now if any citizen can lodge a first information report or file a complaint and set the machinery of the criminal law in motion and his locus standi to do so cannot be questioned, we do not see why a citizen who finds that a prosecution for an offence against the society is being wrongly withdrawn, cannot oppose such withdrawal.*** *If he can be a complainant or initiator of criminal prosecution, he should equally be entitled to oppose withdrawal of the criminal prosecution which has already been initiated at his instance. If the offence for which a prosecution is being launched is an offence against the society and not merely an individual wrong, any member of the society must have locus to initiate a prosecution as also to resist withdrawal of such prosecution, if initiated. Here in the present case, the offences charged against Dr. Jagannath Misra and others are offences of corruption, criminal breach of trust etc. and therefore any person who is interested in cleanliness of public administration and public morality would be entitled to file a complaint, as held by this Court in R.S. Nayak v.A.R. Antulay (supra) and equally he would be entitled to oppose the withdrawal of such prosecution if it is already instituted. ....."*

19. In **Subramanian Swamy Versus Manmohan Singh & Another** *reported in (2012) 3 SCC 64,* the Apex Court has held that there is no restriction on a private citizen to file complaint against a public servant. The Apex Court has also held that locus standi of a private citizen is, therefore, not excluded. In paragraph nos. 72 and 73, the Apex Court has held as follows:

"72. ***The right of private citizen to file a complaint against a corrupt public servant must be equated with his right to access the Court in order to set the criminal law in motion against a corrupt public official. This right of access, a Constitutional right should not be burdened with unreasonable fetters. When a private citizen approaches a court of law against a corrupt public servant who is highly placed, what is at stake is not only a vindication of personal grievance of that citizen but also the question of bringing orderliness in society and maintaining equal balance in the rule of law.***

73. It was pointed out by the Constitution Bench of this Court in Sheonandan Paswan vs. State of Bihar and Others, (1987) 1 SCC 288 at page 315:

".....It is now settled law that a criminal proceeding is not a proceeding for vindication of a private grievance but it is a proceeding initiated for the purpose of punishment to the offender in the interest of

the society. It is for maintaining stability and orderliness in the society that certain acts are constituted offences and the right is given to any citizen to set the machinery of the criminal law in motion for the purpose of bringing the offender to book. It is for this reason that in A.R. Antulay v. R.S. Nayak this Court pointed out that (SCC p. 509, para 6) "punishment of the offender in the interest of the society being one of the objects behind penal statutes enacted for larger good of the society, right to initiate proceedings cannot be whittled down, circumscribed or fettered by putting it into a strait jacket formula of locus standi....." (Emphasis added)

20. In view of the aforesaid, it is crystal clear that every person has a right to lodge a first information report against a person, who in his presence, commits a non-bailable or cognizable offence. Therefore, the informant of the present case, namely, S.N. Khare, who is also none other than the public servant holding the post of Additional District Cooperative Officer, Bilhore Tehsil In-charge, Bilhore, Kanpur Nagar, had every right to make a complaint for lodging of first information report against the accused persons including the petitioner.

21. We are of the considered view that the submissions advanced by the learned Counsel for the petitioner call for determination on questions of fact, which may be adequately discerned either through proper investigation or which may be adjudicated upon only by the trial court and even the submissions made on points of law can also be more appropriately gone into only by the trial Court in case a charge sheet is submitted in this case. A perusal of the record makes out a prima facie offence at this stage and there appears to be sufficient ground for investigation of the case.

22. In view of the aforesaid, considering the allegations made in the FIR and material brought on record, it cannot be said that no prima facie case is made out against the petitioner, rather there appears to be sufficient ground for investigation of the matter. More so, learned Counsel for the petitioner has failed to point out any irregularity in lodging the impugned F.I.R. and also not placed any document(s) so as to interfere in the instant case in the extra-ordinary jurisdiction under Article 226 of the Constitution of India. Accordingly, we do not find any justification to quash the impugned F.I.R.

23. The petition lacks substance and is, accordingly, dismissed.

24. It is needless to state that the petitioner is having remedy to move an appropriate application for anticipatory bail before the competent Court as provided under Section 438 of the Code of Criminal Procedure, 1973, if so desires.

25. The learned A.G.A. is obliged to produce a copy of this order before the concerned police station and also before the Senior Superintendent of Police, Kanpur Nagar.

26. It is made clear that this Court has observed nothing on the merits of the case and investigation is to be carried out strictly in accordance with law on the basis of material so collected by the investigation agency.

27. The party shall file a computer generated copy of this order downloaded

from the official website of High Court Allahabad, self attested by the petitioner alongwith a self attested identity proof of the said person (preferably Aadhar Card) mentioning the mobile number to which the said Aadhar Card is linked.

28. 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)09ILR A52
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.08.2021

BEFORE

THE HON'BLE PANKAJ NAQVI, J.
THE HON'BLE SANJAY KUMAR PACHORI, J.

Criminal Misc. Writ Petition No. 6539 of 2020

Rama Shankar Mishra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Dheeraj Kumar Dwivedi, Sri K.K. Tripathi

Counsel for the Respondents:
G.A.

A. Criminal Law - Constitution of India, 1950-Article 226 & Indian Penal Code, 1860-Section 147, 366-application-seeking direction in the nature of mandamus to transfer of the investigation to CBCID -jurisdictional magistrate taken cognizance against the accused-Learned magistrate rejected the Final reports submitted by investigating officer and issued summon against the accused persons-vehicle in question used in abduction has not been recovered by the I.O.-Magistrate has power to investigate further after the statement of victim u/s 164, final reports have been submitted and the accused persons were released-the power of Magistrate's u/s 156(3) is very wide and would continue to ensure such power at all stages of the criminal proceedings until the trial itself commences.(Para 1 to 40)

The writ petition is disposed off. (E-6)

List of Cases cited:

1. Amar Nath Chaube Vs UOI & ors. (2021) AIR SC 109

2. In Manohar Lal Sharma Vs Principal Secretary and ors. (2014) 2 SCC 532

3. Pooja Pal Vs U.O.I. (2016) 3 SCC 135

4. Vinay Tyagi Vs Ishad Ali (2013) 5 SCC 762

5. Babubhai Vs St. of Guj.(2010) 12 SCC 254

6. Bharati Tamang V. U.O.I. (2013) 15 SCC 578

7. Sakiri Basu Vs St. of U.P.(2008) 2 SCC 409

8. St. of Ker. Vs Rasheed (2019) AIR SC 721

9. St. of Guj. Vs Kishanbhal & ors.(2014) 5 SCC 108

10. Perumal Vs Janaki (2014) 5 SCC 377

11. St. of Guj. Vs Kishanbhai (2014) 5 SCC 108

12. Vinubhai Haribhai Malaviya ors. Vs The St. of Guj. & ors.(2019) 17 SCC 1

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

1. The present writ petition under Article 226 of the Constitution of India was initially preferred for seeking direction in the nature of mandamus to transfer of the investigation of Case Crime No. 3 of 2020, P.S. Meja, District Prayagraj to Crime

Branch Criminal Investigation Department (C.B.C.I.D.) or any other independent agency to ensure a fair investigation and prayed for following principal reliefs:

"(i) Issue a writ order or direction in the nature of mandamus direct the respondent no. 2 to transfer the investigation of present case, i.e. Case Crime No. 03 of 2020, under Sections 147, 366 I.P.C. Police Station Meja, District Prayagraj to C.B.C.I.D. or any other any other independent agency to ensure fair investigation.

(ii) Issue a writ order or direction in the nature of mandamus commanding the respondent no. 2 and 3 to arrest the accused persons in the present case."

2. We, after hearing the learned counsel for the parties, passed a detailed order on 1.10.2020. The operative part of the said order is quoted hereunder:-

(i) The order of cognizance dated 1.5.2020 passed by the Remand Magistrate in Case Crime No. 3/2020, under Sections 147/366 IPC, P.S. Meja, Prayagraj is quashed. The learned Jurisdictional Magistrate is directed to take fresh cognizance on available materials at the earliest.

(ii) The Competent Authority is directed to immediately place the I.O.s of Case Crime No. 3 & 264, both of 2020 and the Circle Officer concerned under suspension and institute disciplinary proceedings against them which shall be conducted by an officer not below the rank of Superintendent of Police. The disciplinary proceedings shall be completed as expeditiously as possible preferably within 2 months and the action taken be apprised to the court in a sealed cover on 18.12.2020.

(iii) The Disciplinary Authority shall not hesitate in invoking the provisions of Section 166-A IPC and other offence, if need be, against the erring police officials.

(iv) The victim shall be provided adequate security (24 X 7) at the expense of the State. She shall be escorted in a police vehicle to record her evidence in the Court and the witness protection scheme formulated by the Apex Court in Mahendra Chawla and Others vs. Union of India and others in Writ Petition (Criminal) No. 156/2016 on 5.12.2018 shall be adhered to."

3. We kept the petition pending.

4. Pursuant to our detail order dated 01.10.2020, it was reported that not only the two I.O.'s of Case Crime Nos. 3 & 264, both of 2020 but the C.O.'s concerned were suspended and disciplinary inquiries initiated in which the two I.O.'s namely Mohd. Azhar Khan and Sri Munna Lal were found guilty in discharge of their duties while Sri Navin Kumar Naik (erstwhile C.O.- Meja) was found partly guilty whereas Sri Sachidanand (erstwhile C.O- Meja) stood exonerated.

5. Sri Shiv Kumar Pal, learned Government Advocate for the State submitted that pursuant to quashing of the cognizance order by this Court on 1.10.2020, further investigation of Case Crime Nos. 3 of 2020 and 264 of 2020 was transferred to Crime Branch, both the cases were independently investigated by Inspector Vridhi Chand Gautam, Crime Branch who after completing investigation of both the cases fairly and impartially, submitted Final Reports in both the cases before the jurisdictional Magistrate. He further pointed out about materials collected during further investigation but

fairly admitted that at the time of submitting the police report, the investigation agency has no scope to discard the statements of the victim under Section 164 of the Code.

6. Learned Government Advocate further argued that the jurisdictional Magistrate issued summons after taking cognizance vide order dated 22.3.2021, on the basis of materials collected during the investigation against respondents no. 5 to 7 and Abhishek Singh @ Shani under Sections 363 and 376D of the IPC after rejecting the Final Report in Case Crime No. 3 of 2020. It is further submitted that the jurisdictional Magistrate has also issued summons against accused Arun Kumar Singh, Ashish Singh, Amrendra Pratap Singh, and Abhishek Singh in Case Crime No. 264 of 2020 under Sections 363, 366, and 376D of the IPC vide order dated 2.4.2021, after taking cognizance.

7. Learned counsel for the petitioner admitted that although the jurisdictional Magistrate took cognizance in Case Crime No. 3 of 2020 and 264 of 2020 and issued summons against the accused persons yet the local police has not served the process.

BRIEF FACTS OF THE CASE:

8. The first incident took place on 25.12.2019 when after taking objection to the conduct of the informant/cousin of the victim and his family in not letting a road to be constructed, respondents no. 5 to 7 and Shani Singh came to the house of the victim at about 6:30 AM. They hurled filthy abuses and inflicted serious injuries to the family members of the victim. First Information Report (in short "FIR") of the incident was lodged by Vinod Kumar Mishra, against the respondents no. 5 to 7 and Shani Singh on 26.12.2019 at 6:27 PM as Case Crime No. 1070 of 2019 under Sections 452, 323, 504, and 506 of the IPC at Police Station Meja, Prayagraj.

9. On 1.1.2020, the second incident took place at about 8:00 PM, when the victim had gone to ease herself on the rear side of her house, respondents no. 5 to 7, Abhishek @ Shani, and 4 other unknown persons were waiting for the arrival of the victim and when she came, 8 accused persons forcibly dragged her in an unnumbered vehicle (Red Renault Duster). On hearing her cries for help, the petitioner and other family members came out from the house, saw the armed accused persons, who threatened them with life, and the victim abducted. On 25.12.2019, respondent nos. 5 to 7 and Abhishek @ Shani had extended a threat that the family of the informant would be given a new year gift. An FIR of the above incident was lodged by the petitioner/ father of the victim against respondents no. 5 to 7, Abhishek @ Shani, and 4 other unknown persons on 2.1.2020 at 13.48 hours as Case Crime No. 3 of 2020 under Sections 147, and 366 of the IPC at P.S. Meja, Prayagraj.

10. Sub-Inspector Mohd. Azhar Khan started the investigation, recorded the statements of the petitioner Rama Shankar Mishra (informant/father of the victim), Daya Shankar Mishra (brother of the informant), Om Shankar Mishra (brother of the informant), Ruchi Mishra (sister of the victim) and Shivam Mishra (brother of the victim) as eyewitnesses of the incident, under Section 161 the Code on 7.1.2020.

11. Statement of the victim under Section 161 of the Code was recorded on 8.1.2020 by S.I. Munna Lal II I.O., wherein she stated that on 1.1.2020 at 8:30 PM that

when she had gone to ease herself on the rear side of her house, all the accused persons along with Shani @ Abhishek were standing there with firearms to commit murder of her cousin Vinod Kumar Mishra. All the accused persons caught her and closed her mouth with a handkerchief and put her in a Red Duster car. She does not remember where they took her. She stayed with the accused persons for 7 days. She stayed 2 days in a room and 5 days in the dicky of the car. They used to take her into the room and commit rape with her while keeping her unconscious. After 7 days, respondents no. 5 to 7, Abhishek @ Shani Singh, and 4 other unknown persons left her near her house.

12. The victim was medically examined on 9.1.2020 at 1:00 PM in Community Health Centre, Ram Nagar by Dr. Reeta Dwivedi, which indicated that her hymen was torn with slight redness in the region. During medical examination, hair of the scalp, nail scrapings of both hands, and vaginal smear (air-dried) for semen examination of the victim were collected.

13. On 14.1.2020, statement of the victim under Section 164 of the Code was recorded by Judicial Magistrate -II, Allahabad, which is extracted as:

"घटना 1/1/20 की हैं। मैं शाम 8.30 बजे अपने चाचा को खाना देकर घर के पीछे शौचालय जा रही थी । तब मैंने तहसीलदार सिंह, अरूण सिंह, आशीश सिंह, सन्नी सिंह को देखा । 3 - 4 और लोग थे जिन्हे मैंने नहीं पहचाना। तहसीलदार सिंह ने मेरा मुह दबा दिया जिससे मैं बोल नहीं पाई । फिर मैं बेहोश हो गई । जब होश आया तब आँखे, मुँह और हाथ बंधे थे । आँख में पट्टी होने के कारण मुझे कुछ नहीं समझ आ रहा था कि जगह क्या है । ऐसा लगता था किसी कमरे में है । 3 - 4 दिन खाने को कुछ नहीं दिया, पानी देते थे । एक दो दिन बाद किसी ने मेरी सलवार उतारी । मेरे साथ गलत काम किया (बलात्कार)/गलत काम करने के बाद सलवार पहना दी । 2 - 3 दिन बाद बेहोश करके डिक्की में रखा गाड़ी की । मुझे नहीं पता कितने समय डिक्की में थी । आँखों में पट्टी बंधी थी । मुझे नही पता गाड़ी में कितने लोग थे । मेरे साथ 3 - 4 बार गलत काम (बलात्कार) किया गया परन्तु किसने किए यह नहीं पता । 8/1/2020 को मुझे घर के पीछे गाड़ी से उतार दिया गया । जब मुझे छोड़ा तब हाथ खोल कर छोड़ा । तब मैंने आंखो की पट्टी खोली और देखा लाल रंग की गाड़ी जा रही थी । नम्बर नहीं देख पाई । तहसीलदार, अरूण सिंह और उनके बेटों से जमीन का विवाद चल रहा था हमने 25/12/19 को पुलिस बुलाई तब सन्नी सिंह ने कहा था कि बच्ची मैं तुम्हें नए साल के दिन गिफ्ट दूगाँ । जब मैं घर गई तब पुलिस थी। इसके अतिरिक्त मुझे कुछ नहीं कहना।"

14. On 22.1.2020, the petitioner approached the Assistant Director General of Police, Prayagraj Zone by way of an application to get the investigation of case Crime no. 3 of 2020 transferred to any other police station of the district. He stated that the police of Police station Meja had colluded with the accused persons and the police were not taking any concrete action against the accused persons.

15. On 28.3.2020, co-accused Abhishek @ Shani Singh was arrested and sent to judicial custody. On 29.3.2020, after completing investigation, S.I. Munna Lal submitted a charge sheet against respondents no. 5 to 7 and Abhishek @ Shani Singh under Sections 323, 504, and 506 of the IPC only, while exonerating all the accused persons under Sections 147, 366, and 376D of the IPC. The Magistrate took cognizance under Sections 323, 504,

and 506 of the IPC only. As a result, accused Abhishek @ Shani Singh after being enlarged on bail under Sections 323, 504, and 506 of the IPC started extending threat to the victim, therefore, the victim had to be shifted to the house of her maternal uncle.

16. The second incident of abduction took place on 17.5.2020 at about 7:30 PM, when the victim had gone to attend the call of nature from the house of her maternal uncle, where she was residing for 25 days prior to the incident. When she did not return after a long time then her maternal uncle and aunt searched for her and dialed 112 to inform the police about the incident. The informant came to know that a boy came on a motorcycle and abducted the victim. An FIR was lodged by her uncle namely Umakant Dubey, on 19.5.2020 at 3:27 PM against unknown persons as Case Crime No. 264 of 2020 under Sections 363 and 366 of the IPC at P.S. Meja, Prayagraj.

17. On 16.6.2020, a Division Bench of this Court directed the Senior Superintendent of Police, Prayagraj to recover and produce the victim before the Court in a Habeas Corpus Writ Petition No. 277 of 2020 which was filed by the petitioner for the recovery of the victim.

18. On 17.8.2020, subsequently in Case Crime No. 264 of 2020, the statement of the victim under Section 164 of the Code was recorded by Civil Judge (Sr.D.)/F.T.C. Prayagraj which is extracted as under:

"1/01/2020 को मेरा आपहरण अरूण सिंह, पवन सिंह उर्फ तहसीलदार, आशीश सिंह, अभिशेक सिंह उर्फ सनी ने किया था । और आठ दिन कर मुझे एक कमरे में रखा । और मेरे साथ जबरदस्ती संबंध बनाया । उस समय आशीश सिंह और अरूण सिंह ने मेरे साथ शारीरिक संबंध बनाया था । इस घटना की FIR भी हुयी थी । दूसरी बार 17/05/2020 को मेरा आपहरण अमरेन्द्र सिंह उर्फ पंकज, आशीष सिंह ने किया । मैं अपने मामा के घर गयी थी। वहाँ से मेरा अपहरण किया । एक महिना तक मुझे एक कमरे में बन्द करके रखा । वहाँ पर अरूण सिंह ने मेरे साथ जबरदस्ती शारीरिक संबंध बनाया । एक और आदमी भी आता था लेकिन वो मुंह ढक कर आता था । उसने भी मेरे साथ शारीरिक संबंध बनाया । एक दिन मौका देखकर मैं वहाँ से निकल गयी । तब रास्ते में एक आदमी मिल गया जिसका नाम नीरज सिंह उर्फ डिग्री था । उसने तीन चार लोग को बुला लिया और मुझे जबरदस्ती साड़ी पहनाकर थाने पर छोड़ दिया । थाने पर पुलिस नित्यानन्द, राकेश चौरसिया ने मुझसे जबरदस्ती कागज पर हस्ताक्षर करवाया । और जबरदस्ती लिखवाया कि मैं धर्मपाल की पत्नी हूँ । जब की धर्मपाल से मैंने शादी नहीं की, धर्मपाल 45 - 50 साल का आदमी है । और उसकी एक पत्नी भी है । जब मेरा मेडिकल हो रहा था तो महिला आरक्षी नेहा तिवारी ने डाक्टर को बोल कर अपने मन से रिपोर्ट लिखाई । और वहां पर भी जबरदस्ती नेहा तिवारी ने लिखवाया कि मैं धर्मपाल की पत्नी हूँ । धर्मपाल आज भी यहाँ कोर्ट में मेरा पीछा करते हुये आया है । और शादी का झूठा कागज बनवा कर लाया है । अरूण सिंह ने मेरी मम्मी को डण्डे से मारा था । और जान से मारने की धमकी दिया । मैंने धर्मपाल सिंह के साथ शादी नहीं की है । अरूण सिंह, आशीष सिंह, पवन सिंह और सनी ने मेरे घर आकर बन्दूक चलाये और पापा मम्मी को मारे । मैंने पुलिस को बुला दिया था । सनी सिंह ने मेरे भाई के ऊपर गोली चलाई थी । जो मेरे चाचा को छू कर निकल गयी । पुलिस वालों ने सब गलत कागज पर हस्ताक्षर करवाया अरूण सिंह के कहने पर । मैं अपनी मम्मी पापा के साथ रहना चाहती हूँ । मेरी जान को बहुत खतरा है ।"

19. The victim was medically examined again on 22.6.2020 at 1:30 PM in Community Health Centre, Ram Nagar by Dr. Reeta Dwivedi, which indicated that her hymen was old, torn and healed. During medical examination, hair of the scalp, nail scrapings of both hands and vaginal smear (air-dried) of the victim were collected for semen examination.

20. We, in view of above background were constrained to pass a detailed order on 1.10.020 and it appears that further investigation in respect of both the occurrences was conducted by the Crime Branch.

21. On 10.2.2021, accused persons of case Crime No. 264 of 2020 Amrendra Pratap Singh, Arun Kumar Singh, and Ashish Singh were also released by the jurisdictional Magistrate on the basis of the Final report, submitted by the investigating officer of Crime Branch after completing further investigation vide order dated 10.2.2021.

22. On 22.3.2021, on a protest application of the petitioner, the jurisdictional Magistrate issued summons after taking cognizance vide order dated 22.3.2021, on the basis of materials collected during investigation against respondents no. 5 to 7 and Abhishek Singh @ Shani under Sections 363 and 376D of the IPC after rejecting the Final Report in Case Crime No. 3 of 2020. The Magistrate also issued summons against accused person respondents no. 6, 7 and Amrendra Pratap Singh, and Abhishek Singh in Case Crime No. 264 of 2020 under Sections 363, 366, and 376D of the IPC vide order dated 2.4.2021 on protest application which has been filed by the petitioner, after taking cognizance, on the basis of materials collected during the investigation and rejected the Final Report.

23. In compliance of the order dated 4.8.2021, Sri Vridhhi Chand Gautam, investigating officer of Crime Branch has filed a compliance affidavit, wherein he stated that he conducted further investigation of both the cases i.e. Case Crime No. 3 of 2020 and Case Crime No. 264 of 2020, as ordered by Deputy Inspector General of Police, Prayagraj, with a team of competent police officials. He claims to have conducted the investigation fairly and impartially.

24. Another compliance affidavit has also been filed by the Superintendent of Police (Crime) on 16.8.2021, wherein he stated that he is the supervisory authority of the investigation of both the cases after perusal of the Final Reports, he found that the investigation was conducted in accordance with law.

25. Without going to the details of the evidence collected during the investigation and further investigation of both the cases, it is clear that the Final Reports were submitted after discarding the statements of the informants, the victim, and her family members which were recorded under Section 161 of the Code. The I.O. also discarded the statements of the victim, recorded under Section 164 of the Code. It is also clear that the investigating officer has not enquired about the Red Duster car by which the victim was abducted on 1.1.2020 as stated by the eye-witnesses and the victim in her statements under Sections 161 and 164 of the Code. The medical examinations of the victim have also not been considered by the investigating officer.

26. In **Amar Nath Chaubey v. Union of India (UOI) and Ors., AIR 2021 SC 109,** (3 Judge), the Supreme Court observed as follows:

"8. The police has a statutory duty to investigate into any crime in accordance with law as provided in the Code of Criminal Procedure. Investigation is the exclusive privilege and prerogative of the police which cannot be interfered with. But if the police does not perform its statutory duty in accordance with law or is remiss in the performance of its duty, the court cannot abdicate its duties on the precocious plea that investigation is the exclusive prerogative of the police. Once the conscience of the court is satisfied, from the materials on record, that the police has not 49investigated properly or apparently is remiss in the investigation, the court has a bounden constitutional obligation to ensure that the investigation is conducted in accordance with law. If the court gives any directions for that purpose within the contours of the law, it cannot amount to interference with investigation. A fair investigation is, but a necessary concomitant of Articles 14 and 21 of the Constitution of India and this Court has the bounden obligation to ensure adherence by the police.

9. In Manohar Lal Sharma v. Principal Secretary and Ors. (2014) 2 SCC 532, the Apex Court observed as follows:

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 not functioning bonafide. In very exceptional cases, however, where the courts finds that the police officer has exercised his investigatory powers in breach of the statutory provision putting the personal liberty and/or the properly 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 bonafide or the investigation is tainted with animosity, the court may intervene to protect the personal and/or property rights of the citizens.

25. Lord Denning has described the role of the police thus:

In safeguarding our freedoms, the police play a vital role. Society for its defence needs a well-led, well-trained and well-disciplined force of police whom it can trust: and enough of them to be able to prevent crime before it happens, or if it does happen, to detect it and bring the Accused to justice.

The police of course, must act properly. They must obey the Rules of right conduct. They must not extort confessions by threats or promises. They must not search a man's house without authority. They must not use more force than the occasion warrants."

26. One of the responsibility of the police is protection of life, liberty and property of citizens. The investigation of the offences is one of the important duties of the police has to perform. The aim of investigation is ultimately to search for truth and bring the offender to book.

39. ..In the rare and compelling circumstances referred to above, the superior courts may monitor an investigation to ensure that the investigating agency conducts the investigation in a free, fair and time-bound manner without any external interference."

27. In **Pooja Pal v. Union of India, (2016) 3 SCC 135,** the Supreme Court observed as under:

"87. Any criminal offence is one against the society at large casting an onerous responsibility on the State, as the

guardian and purveyor of human rights and protector of law to discharge its sacrosanct role responsibly and committedly, always accountable to the law-abiding citizenry for any lapse. The power of the constitutional courts to direct further investigation or reinvestigation is a dynamic component of its jurisdiction to exercise judicial review, a basic feature of the Constitution and though has to be exercised with due care and caution and informed with self-imposed restraint, the plenitude and content thereof can neither be enervated nor moderated by any legislation.

88. The expression "fair and proper investigation" in criminal jurisprudence was held by this Court in Vinay Tyagi v. Ishad Ali (2013) 5 SCC 762) to encompass two imperatives; firstly, the investigation must be unbiased, honest, just and in accordance with law; and secondly, the entire emphasis has to be to bring out the truth of the case before the court of competent jurisdiction.

96. The avowed purpose of a criminal investigation and its efficacious prospects with the advent of scientific and technical advancements have been candidly synopsised in the prefatory chapter dealing with the history of criminal investigation in the treatise of Criminal Investigation-Basic Perspectives by Paul B. Weston and Renneth M. Wells:

'Criminal investigation is a lawful search for people and things useful in reconstructing the circumstances of an illegal act or omission and the mental state accompanying it. It is probing from the known to the unknown, backward in time, and its goal is to determine truth as far as it can be discovered in any post-factum inquiry.

Successful investigations are based on fidelity, accuracy and sincerity in lawfully searching for the true facts of an event under investigation and on an equal faithfulness, exactness, and probity in reporting the results of an investigation. Modern investigators are persons who stick to the truth and are absolutely clear about the time and place of an event and the measurable aspects of evidence. They work throughout their investigation fully recognising that even a minor contradiction or error may destroy confidence in their investigation.

The joining of science with traditional criminal investigation techniques offers new horizons of efficiency in criminal investigation. New perspectives in investigation bypass reliance upon informers and custodial interrogation and concentrate upon a skilled scanning of the crime scene for physical evidence and a search for as many witnesses as possible. Mute evidence tells its own story in court, either by its own demonstrativeness or through the testimony of an expert witness involved in its scientific testing. Such evidence may serve in lieu of, or as corroboration of, testimonial evidence of witnesses found and interviewed by police in an extension of their responsibility to seek out the truth of all the circumstances of crime happening. An increasing certainty in solving crimes is possible and will contribute to the major deterrent of crime the certainty that a criminal will be discovered, arrested and convicted."

28. After submitting police report under Section 173(2) of the Code, it is only further investigation that can be ordered under Section 173(8) of the Code. The power may be exercised if the court comes to the conclusion that the investigation has been done in a manner to help someone to escape from the clutches of law. In such exceptional circumstances the court may, in

order to prevent miscarriage of criminal justice direct de novo investigation. [Vide: Babubhai v State of Gujarat, (2010) 12 SCC 254]. Fair investigation is a part of a constitutional right guaranteed under Article 21 of the Constitution of India. In **Babubhai v State of Gujarat, (2010) 12 SCC 254** the Apex Court observed as:

"45. Not only fair trial but fair investigation is also part of constitutional rights guaranteed Under Articles 20 and 21 of the Constitution of India. Therefore, investigation must be fair, transparent and judicious as it is the minimum requirement of Rule of law. The investigating agency cannot be permitted to conduct an investigation in a tainted and biased manner. Where non-interference of the court would ultimately result in failure of justice, the court must interfere. In such a situation, it may be in the interest of justice that independent agency chosen by the High Court makes a fresh investigation."

29. In ***Bharati Tamang v. Union of India, (2013) 15 SCC 578,*** the Apex Court relied on the following extract from Zahira Habibulla H. Sheikh v. State of Gujarat, (2004) 4 SCC 158, as follows:

"33...Courts have to ensure that Accused persons are punished and that the might or authority of the State are not used to shield themselves or their men. It should be ensured that they do not wield such powers which under the Constitution has to be held only in trust for the public and society at large. In deficiency in investigation or prosecution is visible or can be perceived by lifting the veil trying to hide the realities or covering the obvious deficiencies, courts have to deal with the same with an iron hand appropriately within the framework of law. It is as much the duty of the prosecutor as of the court to ensure that full and material facts are brought on record so that there might not be miscarriage of justice."

30. In ***Sakiri Basu v. State of Uttar Pradesh, (2008) 2 SCC 409,*** the Supreme Court observed in paragraph 10 and 11 as under:

"10. It has been held by this Court in CBI v. Rajesh Gandhi, 1997 Cri LJ 63 that no one can insist that an offence be investigated by a particular agency. We fully agree with the view in the aforesaid decision. An aggrieved person can only claim that the offence he alleges be investigated properly, but he has no right to claim that it be investigated by any particular agency of his choice.

11. In this connection we would like to state that if a person has a grievance that the police station is not registering his FIR under Section 154 Cr.P.C., then he can approach the Superintendent of Police under Section 154(3) Cr.P.C. by an application in writing. Even if that does not yield any satisfactory result in the sense that either the FIR is still not registered, or that even after registering it no proper investigation is held, it is open to the aggrieved person to file an application under Section 156(3) Cr.P.C. before the learned Magistrate concerned. If such an application under Section 156(3) Cr.P.C. is filed before the Magistrate, the Magistrate can direct the FIR to be registered and also can direct a proper investigation to be made, in a case where, according to the aggrieved person, no proper investigation was made. The Magistrate can also under the same provision monitor the investigation to ensure a proper investigation."

Directions issued by the Apex Court:

31. For the time bound conclusion of the criminal trial the Apex Court in **State of Kerala v. Rasheed, AIR 2019 SC 721**, held as under:

"The following practice guidelines should be followed by trial courts in the conduct of a criminal trial, as far as possible:

(i) a detailed case-calendar must be prepared at the commencement of the trial after framing of charges;

(ii) the case-calendar must specify the dates on which the examination-in-chief and cross-examination (if required) of witnesses is to be conducted;

(iii) the case-calendar must keep in view the proposed order of production of witnesses by parties, expected time required for examination of witnesses, availability of witnesses at the relevant time, and convenience of both the prosecution as well as the defence, as far as possible;

(iv) testimony of witnesses deposing on the same subject matter must be proximately scheduled;

(v) the request for deferral under Section 231(2) of the Cr.P.C. must be preferably made before the preparation of the case-calendar;

(vi) the grant for request of deferral must be premised on sufficient reasons justifying the deferral of cross-examination of each witness, or set of witnesses;

(vii) while granting a request for deferral of cross-examination of any witness, the trial courts must specify a proximate date for the cross-examination of that witness, after the examination-in-chief of such witness (es) as has been prayed for;

(viii) the case-calendar, prepared in accordance with the above guidelines, must be followed strictly, unless departure from the same becomes absolutely necessary;

(ix) in cases where trial courts have granted a request of deferral, necessary steps must be taken to safeguard witnesses from being subjected to undue influence, harassment or intimidation."

32. In **State of Gujarat v. Kishanbhai and Ors., (2014) 5 SCC 108,** the Supreme Court has observed with regard to the glaring lapses in the investigation by the investigating agency, in para 20 reads as under:

"20. Every acquittal should be understood as a failure of the justice delivery system, in serving the cause of justice. Likewise, every acquittal should ordinarily lead to the inference, that an innocent person was wrongfully prosecuted. It is therefore, essential that every State should put in place a procedural mechanism, which would ensure that the cause of justice is served, which would simultaneously ensure the safeguard of interest of those who are innocent. In furtherance of the above purpose, it is considered essential to direct the Home Department of every State, to examine all orders of acquittal and to record reasons for the failure of each prosecution case. A standing committee of senior officers of the police and prosecution departments, should be vested with aforesaid responsibility. The consideration at the hands of the above committee, should be utilized for crystallizing mistakes committed during investigation, and/ or prosecution, or both. The Home Department of every State Government will incorporate in its existing training programmes for junior investigation/prosecution officials course content drawn from the above

consideration. The same should also constitute course-content of refresher training programmes, for senior investigating/ prosecuting officials. The above responsibility for preparing training programmes for officials, should be vested in the same committee of senior officers referred to above. Judgments like the one in hand (depicting more than 10 glaring lapses in the investigation/prosecution of the case), and similar other judgments, may also be added to the training programmes. The course content will be reviewed by the above committee annually, on the basis of fresh inputs, including emerging scientific tools of investigation, judgments of Courts, and on the basis of experiences gained by the standing committee while examining failures, in unsuccessful prosecution of cases. We further direct, that the above training programme be put in place within 6 months. This would ensure that those persons who handle sensitive matters concerning investigation/ prosecution are fully trained to handle the same. Thereupon, if any lapses are committed by them, the would not be able to feign innocence, when they are made liable to suffer departmental action, for their lapses.

21. On the culmination of a criminal case in acquittal, the concerned investigating /prosecuting official (s) responsible for such acquittal must necessarily be identified. A finding needs to be recorded in each case, whether the lapse was innocent or blameworthy. Each erring officer must suffer the consequences of his lapse, by appropriate departmental action, whenever called for. Taking into consideration the seriousness of the matter, the concerned official may be withdrawn from investigative responsibilities, permanently or temporarily, depending purely on his culpability. We also feel compelled to require the adoption of some indispensable measures, which may reduce the malady suffered by parties on both sides of criminal litigation. Accordingly, we direct, the Home Department of every State Government, to formulate a procedure for taking action against all erring investigating/ prosecuting officials/ officers. All such erring official / officers identified, as responsible for failure of a prosecution case, on account of sheer negligence or because of culpable lapses, must suffer departmental action. The above mechanism formulated would infuse seriousness in the performance of investigating and prosecuting duties, and would ensure that investigation and prosecution are purposeful and decisive. The instant directions shall also be given effect to within 6 months.

23. A copy of the instant judgment shall be transmitted by the Registry of this Court, to the Home Secretaries of all State Governments and Union Territories, within one week. All the concerned Home Secretaries, shall ensure compliance of the directions recorded above. The record of consideration, in compliance with the above direction, shall be maintained."

Duties of Superior Police Officer:

33. Sub-rule (iii) of Rule 122 of Police Regulations provides that the final report must in all cases be submitted through the Superintendent of Police.

34. The Chief Secretary of Government of Uttar Pradesh has issued a direction to the Director General of Police and Director General (Prosecution) on 5.8.219 in compliance of several directions issued by the Supreme Court in **Perumal v. Janaki, (2014) 5 SCC 377 and State of Gujarat v. Kishanbhai, (2014) 5 SCC 108**

for submitting charge-sheets/final report in the competent court, relevant part of aforesaid direction reads as under:

"(1) प्रत्येक विवेचना पूर्ण होने के उपरान्त आरोप पत्र/अन्तिम रिपोर्ट प्रेषित करने से पूर्व विवेचक द्वारा क्षेत्राधिकारी के माध्यम से केस डायरी जनपदीय अभियोजन कार्यालय में प्रेषित की जायेगी । जहां पर अभियोजन अधिकारी द्वारा केस डायरी के अवलोकनोपरान्त/परीक्षणोपरान्त विवेचक के मध्य संकलित साक्ष्य आदि की समीक्षा की जायेगी और यदि उसमे कोई कमी या विसंगति पायी जाती है तो स्वतंत्र मस्तिष्क से उसको इंगित करते हुए उसकी पूर्ति हेतु अग्रेतर विवेचना हेतु प्रेषित की जायेगी । इस कार्यवाही में केस डायरी जिस माध्यम से अभियोजक के पास परीक्षण हेतु प्रेषित की जाय उसी माध्यम से अभियोजक द्वारा पुनः परीक्षणोपरान्त ही यथा स्थिति आरोप पत्र अथवा अंतिम रिपोर्ट न्यायालय प्रेषित किया जायेगी । इस कार्य की सुचारू रूप से सम्पादित करने हेतु जनपदीय अभियोजन कार्यालय में एक केस डायरी प्राप्त करने का पटल स्थापित होगा, जहां पर आवश्यकतानुसार कान्सटेबिल मोहर्रिर लगाये जायेगे । उक्त समस्त कार्यवाही बिलम्बतम 07 दिन में पूर्ण करनी होगी। यदि अपरिहार्यतावश 07 दिन से अधिक के समय लग रहा हो तो इस स्थिति में वस्तुस्थिति का उल्लेख करते हुये अनिवार्यतः 15 दिन में कार्यवाही पूर्ण करनी होगी ।"

35. The object behind recording of the statement of witness under Section 164 of the Code is to ensure that the investigation is in the right direction, against the right person which will instil a sense of feeling in the mind of the witness that he/she should not retract later. The statement of witness has to be recorded like a statement recorded from a witness in the court. Before recording the statement, oath has to be administered to the witness. Although the statement of a witness recorded under Section 164 of the Code is also a previous statement like recorded under Section 161, it has some higher value as it is recorded by a Magistrate.

36. We now revert to submission of the learned counsels for the parties. It is an admitted fact that the jurisdictional Magistrate has taken cognizance in Case Crime No. 3 of 2020 under Sections 363, 376D of the IPC against respondents no. 5 to 7 and Abhishek Singh @ Shani and in Case Crime No. 264 of 2020 under Sections 363, 366, 376D of IPC against respondents no. 6, 7, Amrendra Pratap Singh and Abhishek Singh. Learned Magistrate rejected the Final Reports submitted by the investigating officer of Crime Branch vide order dated 22.3.2021, 2.4.2021 respectively and has issued the summon against the accused persons. It is also admitted fact that all the accused person were in judicial custody during further investigation but were released after submitting of the Final Reports.

37. At this juncture, one question remains unanswered, why the vehicle in question used in abduction of the victim has not been recovered or what attempts/ efforts were made by the I.O. to recover the same?

38. A question of law, after filing of charge-sheet, whether Magistrate has power to order for further investigation has been considered by a three Judge Bench of the Apex Court in **Vinubhai Haribhai Malaviya and Ors. vs. The State of Gujarat and Ors., (2019) 17 SCC 1**, wherein it observed as under:

"17. It is clear that a fair trial must kick off only after an investigation is itself fair and just. The ultimate aim of all investigation and inquiry, whether by the

police or by the Magistrate, is to ensure that those who have actually committed a crime are correctly booked, and those who have not are not arraigned to stand trial. That this is the minimal procedural requirement that is the fundamental requirement of Article 21 of the Constitution of India cannot be doubted. It is the hovering omnipresence of Article 21 over the Code of Criminal Procedure that must needs inform the interpretation of all the provisions of the Code of Criminal Procedure, so as to ensure that Article 21 is followed both in letter and in spirit.

23. It is thus clear that the Magistrate's power Under Section 156(3) of the Code of Criminal Procedure is very wide, for it is this judicial authority that must be satisfied that a proper investigation by the police takes place. To ensure that a "proper investigation" takes place in the sense of a fair and just investigation by the police-which such Magistrate is to supervise-Article 21 of the Constitution of India mandates that all powers necessary, which may also be incidental or implied, are available to the Magistrate to ensure a proper investigation which, without doubt, would include the ordering of further investigation after a report is received by him Under Section 173(2); and which power would continue to enure in such Magistrate at all stages of the criminal proceedings until the trial itself commences. Indeed, even textually, the "investigation" referred to in Section 156(1) of the Code of Criminal Procedure would, as per the definition of "investigation" Under Section 2(h), include all proceedings for collection of evidence conducted by a police officer; which would undoubtedly include proceedings by way of further investigation Under Section 173(8) of the Code of Criminal Procedure."

39. In view of above, we leave the matter of the involvement of the vehicle in question to the jurisdictional Magistrate for consideration.

40. After considering the facts and circumstances of the present case as noted above and after keeping in mind the settled position of law in respect of fair and proper investigation relating to sexual offences, we direct that the jurisdictional Magistrate, District Prayagraj shall commit both the cases (Case Crime Nos. 3 and 264 of 2020 both P.S. Meja, Prayagraj) within a month from the date of receipt of this order, to the Court of Sessions and also direct that the security of the victim (24 X 7) shall continue till the conclusion of the trial of both the cases, as per our order dated 1.10.2020.

41. We, before parting, are of the view that considering the issues involved, it would be just and appropriate to issue following directives:

(i) The 'Monitoring Cell' of all the districts of the State shall collect monthly data of the number of cases in which after recording the statement of victim of sexual offences under Section 164 of the Code in support of prosecution, Final Report(s) has/have been submitted.

(ii) In the Monitoring Cell meetings, all the district judges of the State shall ensure that all Police Report(s) are submitted in accordance with the directions issued by the Apex Court in **State of Gujarat v. Kishanbhai and Ors. (2014) 5 SCC 108.**

42. A copy of this order shall be transmitted by the Registry of this Court to all the Judgeships for information and compliance.

43. All pending applications are disposed off. Matter consigned.

(2021)09ILR A65
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.08.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE SUBHASH CHAND, J.

First Appeal From Order No. 3066 of 2019
with
First Appeal From Order No. 224 of 2020

Shriram General Insurance Company Ltd., Jaipur Rajasthan ...Appellant
Versus
Smt. Ranjana Kushwaha & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vijay Prakash Mishra

Counsel for the Respondents:
Sri Ram Singh, Sri Amit Kumar Singh

Motor accident claim-amount of compensation challenged-widow granted compansionate appointment-amount under head of future loss of income was deducted on the ground of her employment-such deduction is bad.

Appeals partly allowed. (E-9)

List of Cases cited:

1. Smt. Sumitra Kaur & ors. Vs New India Insurance Co. Ltd. by Regional Manager & ors. 2013 (1) AICC 244,

2.Dhruvnath Tiwari & ors. Vs Guldesh Kumar & ors. 2012 (1) AICC 366

3. N.K.Vs Brothers Pvt. Ltd. Vs M. Karumai Ammal & ors. 1980 ACJ 435

4.Ravi Vs Badri Narayan & ors. 1 (2011) ACC 704 AC

5. Oriental Insurance Co. Ltd.Vs Kheeramani & ors. 2012 (2) TAC 598

6. U.P.S.R.T.C. Tedi Koti Lucknow Vs Smt. Shanti Devi & ors. 2003 (3) TAC 61 (Allahabad)

7.U.P.S.R.T.C. Vs Rabiya Begam & anr., 2016 (1) AICC 188

8. Manasvi Jain Vs Delhi Transport Corp. & ors. 2014 ACJ 1416

9. Meena Devi & ors. Vs Sikandar Singh & ors. 2006 ACJ 2140 h

10. Sunita & anr. Vs Rajasthan State Road Transport Corp. & anr. AIR 2019 SC 994

11. Vimla Devi & ors. Vs National Insurance Co. Ltd. & anr. (2019) 2 SCC 186

12.Vimal Kanwar & ors. Vs Kishore Dan & ors. AIR 2013 SC 3830

13.National Insurance Co. Ltd. Vs Smt. Urmila Devi & anr. decided on 02.06.2020 in F.A.F.O. No. 1022 of 1999

14. Smt. Sarla Verma & ors. Vs Delhi Transport Corp. & ors. 2009 ACJ 1298

15. National Insurance Co. Ltd. Vs Pranay Sethi & ors., 2017 0 Supreme (SC) 1050

16. Sunita & ors. Vs Rajasthan State Road Transport Corp. & anr., 2019 LawSuit (SC)190,

17. Mangla Ram Vs Oriental Insurance Co. Ltd. & ors., 2018 (5) SCC 656

18. Vimla Devi & ors. Vs National Insurance Co. Ltd. & anr., (2019) 2 SCC 186

19.F.A.F.O. No.2389 of 2016 (National Insurance Co. Ltd. Vs Smt. Vidyawati Devi & 2 ors.) decided on 27.7.2016.

20. Kirti vs Oriental Insurance Company: 2021 (1) TAC 1

21. National Insurance Co. Ltd. Vs Mannat Johal & ors., 2019 (2) T.A.C. 705 (S.C.)

22. Smt. Hansagori P. Ladhani Vs The Oriental Insurance Co. Ltd., reported in 2007 (2) GLH 291

23. A.Vs Padma Vs Venugopal 2012 (1) GLH (SC) 442

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

1. Heard learned counsel for the parties and perused the judgment and order impugned.

2. Both these appeals arise out of common judgment and order dated 30.05.2019, they have been heard together and are being decided by a common judgment.

3. First Appeal From Order No. 3066 of 2019, has been filed by the Shriram General Insurance Company with whom vehicle No. U.P. 79 T 3872 was insured, and, the First Appeal From Order No. 224 of 2020 has been filed by claimant-appellants and in these appeals judgment and award dated 30.05.2019 passed by Motor Accident Claims Tribunal/Additional District Judge, Court No.1, Bareilly (hereinafter referred to as 'Tribunal') in M.A.C.P. Case No. 653 of 2017 awarding a sum of Rs. 51,15,760/- as compensation are under challenge.

4. As culled out from the record that on 29.07.2017 when deceased Vijay Kumar was returning to go to his home through highway and was arrived near Apollo Tyre Agency situated on G.T. Road, a Canter No. UP 79 T 3872 being driven rash and negligent manner, Vijay Kumar was dashed by which he received injuries and during the treatment at Siddh Vinayak Hospital, he was declared died, his age was 39 years and he was a Teacher and his salary was Rs. 40,000/- per month. The FIR was lodged by brother of deceased on 31.07.2017 and thereafter charge-sheet was submitted. The owner filed his reply and has only accepted the averments of paragraph nos. 15 and 16 of the claim petition. He has denied that no accident took place by the involvement of his vehicle. His driver, namely Naushad had proper driving license and his vehicle was ensured with Sriram Insurance Company and, therefore, they were liable to pay the amount.

5. The Insurance Company filed its reply of denial. The driver did not accept the involvement of his vehicle nor he accepted that he was driving the vehicle in rash and negligent manner.

6. The submissions of learned counsel for the Insurance Company that the vehicle was not involved and its driver was not negligent also is negative.

7. Parties are referred as claimants and Insurance Company for convenience.

8. It is submitted by learned counsel for the claimants that deceased Vijay Kumar Kushwaha was an Assistant Teacher in government school and his salary was Rs. 40,000/- per month. At the time of accident the age of the deceased was 39 years. The deceased has left behind him his widow, parents and daughter.

9. Sri Vijay Prakash Mishra, learned counsel for the Insurance Company has raised the following grounds:-

(i) The vehicle cannot be said to be involved in the accident as the oral testimony of the investigator of the Insurance Company is to the effect that one of the injured has conveyed to him that the accident took place with Bus whereas, two days belated FIR mentions that the truck, which was a goods container vehicle was involved in the accident and, therefore, it can be said that the vehicle insured by the appellant was a planted vehicle.

(ii) As far as the deceased is concerned, it is submitted that father is not dependent on the deceased, who was aged about 39 years and, therefore, deduction should be 1/3 towards personal expenses and not 1/4 as done by the tribunal.

(iii) As far as income of the deceased is concerned, it is stated that deceased was Assistant Teacher and his income as assessed per month is just and proper.

10. The main grievance of the Company is that as far as the quantum is concerned as the widow has been given a job and the amount which is being paid to her be deducted and in alternative it is stated that non grant of future loss is just and proper as widow is granted job.

11. Taking the issue, namely issue of negligence, the driver of the truck has not stepped into the witness box. The PW-2 and PW-3 are eye witnesses as they were going on morning walk then they saw the accident happening. Nothing has been elucidated by the Insurance Company so that the fact that there is no negligence by the driver of the truck and that the vehicle was not involved in the accident. The reliance placed on the judgments of **Smt. Sumitra Kaur and others Vs. New India Insurance Company Limited by Regional Manage and others 2013 (1) AICC 244, Dhruvnath Tiwari and others Vs. Guldesh Kumar and others 2012 (1) AICC 366, N.K.V. Brothers Private Limited Vs. M. Karumai Ammal and others 1980 ACJ 435, Ravi Vs. Badri Narayan and others 1 (2011) ACC 704 AC and Oriental Insurance Company Limited Vs. Kheeramani and others 2012 (2) TAC 598.** All these decisions cited and evaluated by learned Tribunal will not permit us to concur with the submissions of learned counsel for the Insurance Company that the vehicle was not involved and that there was no negligent of the driver of the vehicle. Though, the FIR was against the unknown vehicle, but in the charge-sheet, the Tanker was mentioned along with its number. Charges have been levelled against the driver and he has accepted before the criminal court that his vehicle was involved in the accident and accepted his guilt and, therefore, the Tribunal has relied on decision of this High Court in case of **U.P.S.R.T.C. Tedi Koti Lucknow Vs. Smt. Shanti Devi and others 2003 (3) TAC 61 (Allahabad),** therefore, finding on issue no.1 cannot be found fault with. Hence, we hold that the driver of the vehicle, which was involved in the accident, was negligent. This takes us to the compensation awarded by the Tribunal. The Tribunal has relied on the judgment in case of **2016 (1) AICC 188 U.P.S.R.T.C. Vs. Rabiya Begam and another** and held that as the widow has been granted what is known as compassionate appointment, they would not be entitled for any amount under the head of future loss of income. This is nothing but as misreading of judgment of **Manasvi Jain Vs. Delhi Transport Corporation and others 2014 ACJ 1416** on which the learned judge has placed reliance. He has not deducted the said amount from the income of the deceased,

but has felt that no future loss of income can be granted, as the widow has got appointment. This aspect has been challenged by the Insurance Company as well as the claimants.

12. The Tribunal held that "it is thus submitted that principle of balancing of loss and gains so as to arrive at a just and fair amount of compensation has been accepted by this Court as well. On behalf of the Insurance Companyu Hodgson Vs. Trapp (1983) 3 All ER 870 has been relied on in which our attention has particularly been drawn to the following observation made at All Erp.873j-874b." and granted multiplier of 15, which is maintained as the deceased was in the age bracket of 36-40 years. He had wife, daughter and mother, therefore, the deductions for personal expenses would be 1/3 and not ¼ and we are in agreement with the submissions of learned counsel for the appellants that the father cannot be said to be dependent and as far as deductions is concerned for personal expenses, it is different then computing the compensation. The judgment in Pranay Sethi (supra) has been wrongly interpreted by the learned judge. The Tribunal has considered the income to be Rs. 38040/- per month and minus the Rs. 667/-, which was monthly tax and considered the income of the deceased to be Rs. 37,376/- per month with which, we concur that out of which 1/3 is deducted. The learned judge has misread the judgments on future loss of income just because the widow has been granted compassionate appointment, that amount cannot be deducted nor can he refused what is known as future loss of income. The reliance on several judgments have been misread by the learned Tribunal. The judgement of Pranay Sethi (supra) has been misread as the future loss income is the income which the deceased would have earned and not that the other are given what is known as compassionate appointment. Judgment in case of **Meena Devi and others Vs. Sikandar Singh and others 2006 ACJ 2140** has been wrongly interpreted. The future loss of income has to be granted and hence we recalculate the amount. In totality of the facts and circumstances, in view of the decision of Apex Court in case of **Sunita and another Vs. Rajasthan State Road Transport Corporation and another AIR 2019 SC 994 as well as Vimla Devi and others Vs. National Insurance Company Ltd. and another (2019) 2 SCC 186,** it cannot be held that the vehicle was not involved in the accident just because at the time when officer of the Insurance Company went to the hospital, one of the injured had conveyed that the accident had occurred with a Bus. This has to be proved to the guilt by the Insurance Company, which has not been done and, therefore, the said submission of Insurance Company is false. The submission of Insurance Company as far as deduction is concerned, is accepted and we deduct 1/3 towards personal expenses. As far as the submission of claimants is concerned, the amount, which is being paid her by the job, the same cannot be denied. The judgment in case of **Vimal Kanwar and others Vs. Kishore Dan and others AIR 2013 SC 3830** will not have to be applied in full cost as the principle of future loss of income cannot be co-related with the income, which the widow receives by doing work. It is her personal income post job, the Tribunal should not deduct any amount if spouse was a earning spouse and therefore, the findings that as the widow had been given job, no future loss of income should be granted, is fallacious finding, which requires to be upturned. We have also

fortified our view in case of **National Insurance Company Ltd. Vs. Smt. Urmila Devi and another** decided on 02.06.2020 in F.A.F.O. No. 1022 of 1999 that strict proof of law of evidence cannot be applied to Motor Vehicle Act as it would frustrate the purpose of beneficial legislation. Insurance Company to prove breach of policy, which was not done, hence liable to pay the amount. Future loss of income can be considered in a different manner for people with job.

13. The appeal of the Insurance Company requires to be decided on the grounds raised by it. The first ground raised is that the oral testimony of PW-2 should not have been relied by the Tribunal, as he was not an eye witness. He was not even named in the charge-sheet. He can be said to be a got up witness. It is further submitted that the Tribunal failed to consider the evidence gathered by life line station to Police Station Baradari that injured was admitted in the hospital and the evidence of one other person named as Ritu Puri, who had conveyed orally that accident occurred with Bus and FIR being belated was lodged against driver of the Canter, which was involved in the accident. It is next submitted that the claimants failed to prove that the vehicle insured by the Insurance Company-appellant herein was involved in the accident and that the accident had taken place with the Bus and not with the Canter. As far as the compensation is concerned, it is submitted that father of the deceased was dependent on him, though he was receiving government pension. It is also submitted that the Tribunal did not follow the decision of the Apex Court in celebrated judgment of **Smt. Sarla Verma and others Vs. Delhi Transport Corporation and others 2009 ACJ 1298** and deducted what is known as ¼ for personal expenses of the deceased. The dependency unit if the father is not held to be dependent, then 1/3 should have been deducted. It is next submitted that the salary certificate should not have been accepted in evidence, as it was not a proved document. As far as the issue of negligence is concerned, it is submitted that the driver of the Canter was not negligent and that the award is arbitrary, illegal and based on conjecture and surmises. It is further submitted that the duty of the owner to give intimation as per the provisions of Section 104 will absolved them from their liability. We would decide all the issues raised by the Insurance Company. First issue as far as the appeal by the claimants is concerned, they have felt aggrieved as the Tribunal has not considered grant of future loss of income to the appellants even though the matter was decided after the judgement in case of **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050.**

14. The issue of involvement of the vehicle as well as negligence will have to be decided. The vehicle is contended not to be involved. The reason being, it is submitted that one of the witnesses had opined that accident occurred with a Bus. The judgment of Apex Court in case of Vimla Devi and Sunita Devi (supra) will not permit us to up turn the findings of the Tribunal that the vehicle was involved. The driver of the truck should have taken proper care and caution and has not entered into the witness box.

15. This takes this Court to the issue of compensation. The income of the deceased in the year of accident and looking to his profession namely that deceased was an Assistant Teacher, to which as he was below 40 years, 40% as

future loss of income requires to be added in view of the decision of the Apex Court in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050.**

16. It has been time and again held that trappings of civil and criminal proceedings cannot be applied in a very strict manner. We have also fortified our view by the decisions in **Sunita and others Vs. Rajasthan State Road Transport Corporation and Another, 2019 LawSuit (SC)190, Mangla Ram Vs. Oriental Insurance Company Limited and Others, 2018 (5) SCC 656 and Vimla Devi and others Vs. National Insurance Company Limited and another, (2019) 2 SCC 186.** The compensation is ordered to be reassessed in view of the submission made by learned counsel for the appellant and in view of the decision in F.A.F.O. No.2389 of 2016 **(National Insurance Co. Ltd. Vs. Smt. Vidyawati Devi And 2 Others)** decided on 27.7.2016. On the basis of the recent judgments laying principles for ascertaining compensation. The right to compensation would accrue on the date the accident took place. The law enunciated in **Kirti vs Oriental Insurance Company: 2021 (1) TAC 1** that the compensation awarded by a court ought to be just, reasonable and must undoubtedly guided by principles of fairness, equity and good conscious. In our case the Tribunals had not granted what can be said to be just compensation.

17. 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.37,376/-

ii. Percentage towards future prospects : 50% namely Rs.18688/-

iii. Total income : Rs. 37,376 + 18688 = Rs. 56,064/-

iv. Income after deduction of 1/3rd : Rs. 37376/- (rounded up)

v. Annual income : Rs.37376 x 12 = Rs. 4,48,512/-

vi. Multiplier applicable : 15

vii. Loss of dependency: Rs.4,48,512 x 15 = Rs.67,27,680/-

viii. Amount under filial consortium and other non pecuniary heads : Rs.70,000/-

x. Total compensation : 67,97,680/-

18. 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."

19. In view of the above, both the appeals are 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.

20. 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.

21. Fresh award be drawn accordingly in the above petition by the tribunal as per the modification made herein. The Tribunal 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 . The same is to be applied looking to the facts of each fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in case of **A.V. Padma Vs. Venugopal 2012 (1) GLH (SC) 442,** the order of investment is not passed because applicants/claimants are neither illiterate of rustic villagers.

22. We are thankful to Sri Ram Singh,Amit Kumar Singh and Vijay Prakash Mishra, Advocates for getting the matter decided promptly.

23. Record and proceedings be sent back to the Tribunal.

(2021)09ILR A71
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.08.2021

BEFORE

THE HON'BLE YASHWANT VARMA, .J.

Writ A No. 4845 of 2021
AND
Writ A No. 4571 of 2021
AND
Writ A No. 4882 of 2021
AND
Writ A No. 5728 of 2021
AND
Writ A No. 5914 of 2021
AND
Writ A No. 6966 of 2021
AND
Writ A No. 8595of 2021
AND
Writ A No. 6716 of 2021
AND
Writ A No. 8587 of 2021

Suneeta Singh ...Petitioner
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Petitioner:
Sri J.P. Singh, Sri Yadvendra Pratap Singh

Counsel for the Respondents:
C.S.C., Sri Durga Singh, Sri Syed Nadeem Ahmad

A. Constitution of India – Article 226 – Writ – Maintainability – Contractual appointment – Termination – Impugned order passed by the State – Interference with by the Court, when called for – Principle laid down – Held, all the writ petitioners assail actions of respondents who are undisputedly State. The impugned actions have been taken in the course of implementation of a scheme which seeks to extend and implement the constitutional promise of providing elementary education. It would be too late in the day for the Court to shut its eyes to the well-established principle that all actions of the State are liable to be tested on the constitutional principle of fairness. Consequently, the Court finds itself unable to countenance the broadly stated proposition that the writ petitions would not be maintainable *per se*. (Para 48)

B. Service Law – Sarva Shiksha Abhiyan – Contract of service – Universal principle of its being not enforceable – Court laid down three exceptions, when contract of service can be enforceable – These exceptions are (a) where a civil servant is removed from service in violation of Article 311 or a law made under Article 309 of the Constitution (b) where a workman is removed in violation of protections accorded by industrial legislation and (c) where an employee of a body is dismissed in breach of a statute or a statutory rule. It is only in these three exceptional circumstances that Courts can enter declarations of the termination being void or invalid and direct reinstatement – Held, the Court fails to recognise an inherent right in the petitioners to be continued as full time teachers even though their initial engagement was on the basis of their educational qualifications to teach a subject which is no longer earmarked or treated as a compulsory or primary topic. (Para 50 and 60)

Eight Writ Petitions dismissed; Counter affidavit called in Writ A No. 4882 of 2021. (E-1)

Cases relied on :-

1. Roychan Abraham Vs St. of U.P. & ors. 2019 (3) ADJ 391 (FB)

2. Rajesh Bhardwaj Vs U.O.I. 2019(2) ADJ 830

3. Smt. Sheela Devi & anr. Vs St. of U.P. & ors. 2010 (5) ADJ 86 (FB)

4. Ram Prasad Vs St. of U.P. & ors. 2018 SCC OnLine All 5886

5. Sonu Kumar Vs St. of U.P. & ors. 2019 SCC OnLine 4740

6. M.K. Gandhi & ors.Vs Director of Education; 2005 (4) ESC 2265

7. Ramakrishna Mission & anr. Vs Kago Kunya & ors. (2019) 16 SCC 303

8. Ram Niwas Sharma Vs U.O.I. & ors. (2020) 4 ADJ 166

9. Writ A No. 4789 of 2020; Bruce Henderson Vs St. of U.P. & 9 ors. decided on 10 September 2020

10. Special Appeal Defective No. 1033 of 2020; Henderson Vs St. of U.P. & 9 ors. decided on 13 April 2021

11. K.Krishnamacharyulu & ors. Vs Sri Venkateswara Hindu College of Engineering & anr.; [(1997) 3 SCC 571

12. Civil Appeal No. 11303 of 2011; Gridco Limited & anr. Vs Sri Sadananda Doloi & ors.

13. Bharati Reddy Vs St. of Karn. & ors. [(2018) 12 SCC 61

14. Civil Appeal No. 5654 of 2019; Maharashtra Chess Association Vs U.O.I. & ors.

15. Dr. Vandana Vahistha Vs St. of U.P. & ors. 2018(4) ADJ 819 (FB)

16. Kailash Singh Vs Mayo College; (2018) 18 SCC 216

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

1. Heard learned counsels for the petitioners, Sri Yatindra, Sri Pankaj Kumar

Tyagi, Sri Sanjay Kumar Singh, Sri Harshvardhan Gupta, Sri Ram Vilas Yadav, Sri Amit Shukla, Sri Santosh Kumar, Sri Ashok Kumar, Sri Syed Nadeem Ahmad learned counsels for the Basic Education Officers, Sri Durga Singh who appears for the State Project Director, Samagra Shiksha Abhiyan and Sri Bipin Bihari Pandey learned Chief Standing Counsel alongwith Sri Sanjay Chaturvedi for the State respondents.

2. This batch of writ petitions have been clubbed and heard for final disposal collectively with the consent of parties.

A. KASTURBA GANDHI BALIKA VIDYALAYA

3. All the petitioners were engaged by the respondents in residential schools established under the **Kasturba Gandhi Balika Vidyalaya Scheme1** launched by the Union Government. In August 2004, the Union Government launched a scheme for setting up of residential schools upto the upper primary level for girls belonging predominantly to the SC, ST, OBC and minorities in difficult areas. The scheme provided for the establishment of schools in educationally backward blocks. Priority was to be accorded to the establishment of these schools in areas having a concentration of SC, ST, OBC, minorities, tribal population and where enrollment of girls was found to be lagging. Areas with low female literacy and areas with a large number of small and scattered habitations in which educational facilities were nonexistent were also to be identified for the purposes of establishment of schools under the aforesaid scheme. With effect from 01 April 2008, the criteria for educationally backward block was revised to include those blocks where rural female literacy was below 30% and town/cities having minority concentration. Initially the scheme was run as a separate initiative of the Union Government till it came to be merged with the **Sarva Shiksha Abhiyan2** with effect from 01 April 2007. With the promulgation of the **Right to Education Act, 20093** and the adoption of the framework for implementation of SSA being revised, the scheme and its objectives were revised to bring it in tune and harmony with the right and entitlement of children as envisaged under the RTE. In the State of U.P., the U.P. Education For All4 society came to be formed in 1993 to oversee the field of Basic Education. The KGBV scheme is presently being administered by this entity.

B. THE SCHEME AND POLICY DIRECTIVES

4. The Scheme is based on two basic models (i) schools with a hostel for 100 girls and (ii) schools with hostel for 50 girls. Various Government Orders and directives of the Union Government have come to be issued from time to time in order to ensure a uniform implementation of the scheme throughout the country. The aforesaid Government Orders and directives apart from laying down norms for infrastructure and facilities in those residential schools also lay in place various stipulations relating to issues such as curriculum and the appointment of teachers and other staff. In terms of the policy directives the schools are to be managed by a Warden along with a complement of support staff and instructions are to be imparted by full time and part time teachers. For the purposes of the present batch of writ petitions, the directives and orders issued from time to time may be viewed commencing from the Government

Order dated 29 July 2013. For the purposes of selection of teaching and non-teaching staff, the aforesaid Government Order provided for the constitution of a District Selection Committee. The Government Order while prescribing the nature of staff and the subjects to be taught provided thus: -

"2. पदों का विवरणः

कस्तूरबा गांधी बालिका विद्यालय के शैक्षणिक व शिक्षणोत्तर कर्मियों के चयन में पदों का निर्धारण निम्नानुसार प्रस्तावित हैः-

क्र० सं०	पद का नाम	पदों की संख्या	
		मॉडल-I (100 बालिकाओं हेतु)	मॉडल-II (50 बालिकाओं हेतु)
1.	वार्डन	1	1
2.	फुल टाइम टीचर	4	3
3.	पार्टटाइम टीचर	4	3
4.	एकाउंटेन्ट	1	1
5.	रसोइया	1	1
6.	सहायक रसोइया	2	1
7.	चौकीदार	1	1
8.	चपरासी	1	1
कुल योग		15	12

इन पदों के सापेक्ष Warden-cum- teacher को सम्मिलित करते हुये मॉडल-I कस्तूरबा गाँधी बालिका विद्यालयों में विषयवार शिक्षकों की व्यवस्था निम्नवत की जायेगीः-

गणित(पी०सी०एम०) 01
विज्ञान (पी०सी०बी०) 01
समाजिक विषय
(भूगोल, इतिहास एवं नागरिक शास्त्र) 01
हिन्दी, संस्कृत 01
अंग्रेजी 01
उर्दू 01
कम्प्यूटर 01
स्काउट गाइड एवं शारिरिक शिक्षा, कला क्राफ्ट एवं संगीत 02

इसी प्रकार मॉडल -II के कस्तूरबा गाँधी बालिका विद्यालयों में विषयवार शिक्षकों की व्यवस्था निम्नवत की जायेगीः-

गणित(पी०सी०एम०) 01
विज्ञान (पी०सी०बी०) 01
समाजिक विषय
(भूगोल, इतिहास एवं नागरिक शास्त्र) 01
भाषा 02
कम्प्यूटर 01
स्काउट गाइड एवं शारिरिक शिक्षा, कला क्राफ्ट एवं संगीत 01

5. Setting forth the details with respect to the curriculum and the qualification of staff, the Government Order provided as follows: -

"बेसिक शिक्षा परिषद द्वारा उच्च प्राथमिक स्तर पर निर्धारित पाठ्यक्रम के सभी विषय यथा हिन्दी, अंगेजी, संस्कृत/उर्दू, गणित (अंकगणित, बीजगणित, ज्यामिति) सामाजिक विषय(इतिहास, भूगोल तथा नागरिक शास्त्र), कला/संगीत/वाणिज्य, गृह शिल्प, शारीरिक शिक्षा, खेल तथा योगासन, स्काउटिंग एण्ड गाइडिंग, नैतिक शिक्षा, पर्यावरणीय शिक्षा तथा कम्प्यूटर शिक्षा आदि के लिए विषयवार शिक्षकों का चयन इस प्रकार किया जायेगा कि सभी विषयों का अध्यापन गुणवत्तपरक हो तथा पाठ्य सहगामी क्रियाओं का संचालन भी प्रभावी ढंग से हो।

वार्डन जिस विषय की होगी उस विषय हेतु अलग से शिक्षका का चयन नहीं किया जायेगा। चयन समिति अनुमन्य पदों पर चयन के समय विषयों का ध्यान रखेगी। मॉडल- I के विद्यालय में गणित एवं विज्ञान हेतु प्रस्तावित 02 शिक्षकों में से यथा संभव 01 पूर्णकालिक शिक्षक तथा 01 अंशकालिक शिक्षक होगा। यदि मॉडल-

I का विद्यालय अल्पसंख्यक बाहुल्य विकासखण्ड/ शहरी क्षेत्र में स्थित न हो तो स्काउट- गाइड एवं शारीरिक शिक्षा कला काफ्ट एवं संगीत के लिए प्रस्तावित 02 शिक्षकों में से यथा संभव (1 पूर्णकालिक शिक्षक तथा 01 अंशकालिक शिक्षक होगा।)

3. अर्हताः

वार्डेन एवं शिक्षक के पदों के लिये निर्धारित योग्यता उच्च प्राथमिक स्तर की टी०ई०टी० एवं प्रशिक्षित स्नातक होगी। प्रशिक्षण उपाधि के अन्तर्गत एन०सी०टी०ई० से मान्य बी०एड तथा उसके समकक्ष एल०टी० इत्यादि प्रशिक्षण को सम्मिलित किया जायेगा।

कम्प्यूटर शिक्षक के लिए प्राशिक्षित स्नातक होना अनिवार्य है। प्रशिक्षण उपाधि के अन्तर्गत एन०सी०टी०ई० से मान्य बी०एड तथा उसके समकक्ष एल०टी० इत्यादि प्रशिक्षण सम्मिलित है। इसके अतिरिक्त कम्प्यूटर शिक्षण हेतु पी०जी०डी०सी०ए०/बी०सी०ए०/बी०एस०सी० कम्प्यूटर साइंस अथवा स्नातक सहित डी०ओ०ई०ए०सी०सी० या समक्ष संस्था से 'ओ लेवल'/ए लेवल डिप्लोमा आदि शैक्षिक योग्यता भी वांछित होगी। कम्प्यूटर शिक्षक जिस विषय से स्नातक होगा। उस विषय हेतु अलग से शिक्षक चयनित नहीं किया जायेगा।

कला, काफ्ट एवं संगीत आदि विषयों के लिए शैक्षिक योग्यता स्नातक उपाधि सहित प्रशिक्षण उपाधि होगी तथा गृह विज्ञान के शिक्षक का पद कला, काफ्ट एवं संगीत के पद के अन्तर्गत ही माना जायेगा।

बी०पी०एड०, सी०पी०एड०, डी०पी०एड० तथा व्यायाम रत्न आदि उपाधियाँ केवल शारीरिक शिक्षा के अध्यापन हेतु मान्य होगी किन्तु शारीरिक शिक्षा पद पर चयन हेतु बी०पी०एड० सी०पी०एड० तथा डी०पी०एड० अभ्यार्थियों हेतु टी०ई०टी० अनिवार्य नहीं होगी।"

6. In terms of the scheme, all appointments of teachers, be it full time or part time, was to be on contractual basis for a period of 11 months and 29 days. Those contracts were renewable subject to the authorities being satisfied with the work and conduct of teachers. Dealing with the issues of renewal and termination of contract, the Government Order made the following provisions: -

"8. नवीनीकरणः

शैक्षिक सत्र में कस्तूरबा गांधी बालिका विद्यालय में कार्यरत शैक्षणिक एवं शिक्षणेत्तर कर्मियों का सेवा अनुबन्ध 11 माह 29 दिन के लिए किया जायेगा। तात्पर्य यह है कि अगले वर्ष संविदा नवीनीकरण में एक दिन का अन्तराल रखा जायेगा।

कार्यरत शिक्षकों/शिक्षणेत्तर कर्मचारियों के कार्य एवं व्यवहार का वार्षिक मूल्यांकन वार्डेन द्वारा किया जयेगा तथा वार्डेन के कार्य एवं आचरण का वार्षिक मूल्यांकन जनपदीय संचालन समिति के सदस्य सचिव द्वारा किया जायेगा। स्वयंसेवी संस्था/महिला समाख्या द्वारा संचालित विद्यालयों में कार्यरत वार्डेन के कार्य एवं आचरण का वार्षिक मूल्यांकन संस्था के अधिकृत पदाधिकारी द्वारा किया जायेगा एवं आख्या सदस्य सचिव, जनपदीय चयन समिति के माध्यम से जिलाधिकारी के अनुमोदनार्थ प्रस्तुत की जायेगी।

यदि कार्यरत वार्डेन/शिक्षकों/शिक्षणेत्तर कर्मचारियों का कार्य एवं व्यवहार सन्तोषजनक पाया जाता है, तो अगले सत्र के लिए उनकी संविदा का जिलाधिकारी के अनुमोदनोपरान्त नवीनीकरण किया जायेगा।

सी कर्मी की सेवाएं सन्तोषजनक नहीं पाये जाने की दशा में मुल्यांकनकर्ता अधिकारी द्वारा संबंधित कर्मी को अपना पक्ष प्रस्तुत करने का पर्याप्त अवसर उपलब्ध कराने के उपरान्त प्राप्त उत्तर के आधार पर पत्रावली में उन परिस्थियों का साक्ष्य सहित स्पष्ट आकलन किया

जायेगा। तथा यदि संविदा का नवीनीकरण नहीं किया जाना है तो युक्तियुक्त प्रस्ताव जिलाधिकारी के समक्ष प्रस्तुत किया जायेगा।

सेवा अनुबन्ध में यह प्राविधान भी किया जाये कि यदि उसकी सेवाएं अनुपयुक्त पायी जाती है तो उन्हें एक माह का नोटिस दकर सेवाओं को समाप्त कर दिया जायेगा। गम्भीर परिस्थितियों/वित्तीय अनियमितता/गंभीर अनुशासनहीनता की स्थिति में बिना कोई नोटिस के यदि सेवा समाप्त करने की आवश्यकता प्रतीत होती है तो जिला बेसिक शिक्षा अधिकारी द्वारा पुष्ट प्रमाणों सहित कार्यवाही हेतु प्रस्ताव जिलाधिकारी के अनुमोदनार्थ प्रस्तुत किया जायेगा। उक्त समस्त कार्यवाही जिलाधिकारी की अनुमति से की जायेगी।

कस्तूरबा गांधी बालिका विद्यालय में चयनित शैक्षणिक एवं शिक्षणोत्तर कर्मियों से प्रति वर्ष संविदा नवीनीकरण हेतु अनुबन्ध पत्र भराया जायेगा। सेवा अनुबन्ध के नवीनीकरण की कार्यवाही प्रति वर्ष 30 अप्रैल से प्रारम्भ करते हुए 30 मई तक पूर्ण की जायेगी। कार्य मूल्यांकन के आधार पर अनुबन्ध समाप्त होने की दशा में रिक्त पद पर चयन की कार्यवाही नवीन सत्र आरंभ होने के पूर्व की जायेगी।"

7. The aforesaid basic pattern was reiterated in the Government Order of 30 June 2015. More recently on 14 July 2020, a fresh Government Order came to be issued. Based on various inputs which were received by the State Government, it was noted that various irregularities appeared to have been committed in the selection and appointment of teachers. For instance, it was noted that in many instances more than one teacher had come to be engaged for the same subject. It was further found that appointments had come to be made without adhering to the requirements of curriculum as prescribed by the Basic Education Board for upper primary institutions. It was also noted that in various institutions appointment had been made without bearing in mind the clarifications issued by the Ministry of Human Rights Development in the Union Government on 24 March 2014 with reference to Sections 19 and 25 of the RTE Act 2009. Upon noticing the aforesaid, that Government Order while dealing with the issue of more than one teacher having been engaged to impart instructions in one subject, made the following provisions: -

"(i) के०जी०बी०वी० में एक विषय के एक से अधिक शिक्षक/शिक्षिका का चयन/संविदा की गयी है।

वार्डेन/पूर्णकालिक शिक्षिका- कस्तूरबा गॉधी आवसीय बालिका विद्यालयों मे वार्डेन एवं पूर्ण कालिक शिक्षिका का पद महिला अभ्यर्थी हेतु नियत है। इनकी शैक्षिक योग्यता प्रशिक्षित स्नातक थी। उ०प्र० शासन के पत्रांक के०जी०बी०वी०/3-2/1916/2013-14 दिनांक 29-07-2013 द्वारा शैक्षिक योग्यता उच्च प्राथमिक स्तर की टी०ई०टी० एवं प्रशिक्षित स्नातक निर्धारित की गयी है। कस्तूरबा गॉधी आवसीय बालिका विद्यालय बेसिक शिक्षा परिषद द्वारा संचालित उच्च प्राथमिक विद्यालयों में निर्धारित पाठ्यक्रम के समरूप है। अतः निःशुल्क और अनिवार्य बाल शिक्षा का अधिकार अधिनियम, 2009 की धारा 19 एवं 25 में वर्णित मान एवं मानको की अनुसूची के आलोक में वर्णित विषयों में वार्डेन कम शिक्षिका एवं पूर्णकालिक शिक्षिका की नवीन संविदा की जाये। यदि किसी कस्तूरबा गाँधी आवासीय बालिका विद्यालय में एक विषय के एक से अधिक पूर्ण कालिक शिक्षिका या वार्डन कार्यरत हैं तो शासन के पत्र दिनॉक 29-07-2013 द्वारा निर्धारित अर्हता धारित करने वाली शिक्षिकाओं की के०जी०बी०वी० में सेवा, अवधि/अनुभव के आधार पर संकलित सूची तैयार की जाये। उक्त सूची में उच्च अनुभव धारित करने वाली अभ्यार्थी

की सम्बन्धित के०जी०बी०वी० में पदस्थापन/नवीन संविदा की जाय, यदि सम्बन्धित विषय का जनपद में संचालित अन्य किसी के०जी०बी०वी० में पद रिक्त हो तो अवरोही क्रम में संकलित सूची के अनुसार सम्बन्धित वार्डेन/शिक्षिका को समायोजित किया जाये। उक्त जनपदीय समिति के प्रस्ताव के क्रम में जिलाधिकारी के अनुमोदनोपरान्त नवीन सविदा/पदस्थापन किया जयेगा।"

8. Dealing with the issue of curriculum, the Government Order noted:-

"(iii) के०जी०बी०वी० में शिक्षक/शिक्षिका को मुख्य विषयों यथा गणित, विज्ञान, सामाजिक विषय, भाषा (हिन्दी एवं संस्कृत) एवं अंग्रेजी का पदस्थापन/नवीन संविदा वार्डेन/फुल टाईम शिक्षिका में न करके अंशकालिक के पद पर तथा वार्डेन/पूर्ण कालिक शिक्षिका को पाठ्य सहगामी विषयों यथा कम्प्यूटर स्काउट गाइड एवं शारीरिक शिक्षा कला क्राफ्ट एवं संगीत विषयों पदस्थापन/नवीन संविदा के पद पर किया गया है।

उल्लेखनीय है कि निःशुल्क और अनिवार्य बाल शिक्षा का अधिकार अधिनियम, 2009 की धारा 19 एवं 25 में वर्णित मान एवं मानको की अनुसूची में निम्नवत् व्यावस्था उल्लिखित हैः-

छठी से आठवी कक्षा के लिए 1. कम से कम प्रति कक्षा एक शिक्षक, इस प्रकार का होगा कि निम्नलिखित प्रत्येक के लिए कम से कम शिक्षक हो-

(i) विज्ञान एवं गणित।

(ii) सामाजिक अध्ययन।

(i) भाषा।

2. प्रत्येक पैंतीस बालकों के लिए कम से कम एक शिक्षक।

3. जहाँ एक सौ से अधिक बालकों को प्रवेश दिया गया है वहां-

(i) एक पूर्णकालिक प्रधान अध्यापक

(ii) निम्नलिखित के लिए अंशकालिक शिक्षक-

(अ) कला शिक्षा।

(आ) स्वास्थ और शारिरिक शिक्षा।

(इ) कार्य शिक्षा।"

9. By a Government Order of 11 December 2020, the bifurcation of part time and full time teachers across subjects was provided for in the following terms:-

"उपरोक्त पदों के सापेक्ष नवीन चयन मॉडल-I के कस्तूरबा गांधी बालिका विद्यालयों में विषयवार व्यवस्था निम्नवत् की जायेगीः-

विषय	पद	मॉडल- I हेतु पदों की संख्या		
		पूर्णकालिक	उर्दू	अंशकालिक
गणित (पी०सी०एम० वर्ग से प्रशिक्षित स्नातक एवं उच्च प्राथमिक स्तर की टी०ई०टी०)	पूर्णकालिक	01	-	-
विज्ञान (जेड०बी०सी० वर्ग से प्रशिक्षित स्नातक एवं उच्च प्राथमिक स्तर की टी०ई०टी०)	पूर्णकालिक	01	-	-
भाषा (हिन्दी एवं संस्कृत से स्नातक एवं उच्च प्राथमिक स्तर की टी०ई०टी०)	पूर्णकालिक	01	-	-
समाजिक विषय (भूगोल, इतिहास एवं नागरिक शास्त्र	पूर्णकालिक	01	-	-

में से किसी एक विषय से)				
प्रशिक्षित स्नातक एवं उच्च प्राथमिक स्तर की टी०ई०टी०				
अंग्रेजी (अंग्रेजी से स्नातक एवं उच्च प्राथमिक स्तर की टी०ई०टी०)	पूर्णकालिक	01	-	-
उर्दू - बी०ए० उर्दू विषय से तथा एल०टी० या बी०टी० या बी०एड० या अन्य समकक्ष शिक्षा अथवा शिक्षण में डिग्री या डिप्लोमा	उर्दू	-	01	-
कम्प्यूटर प्रशिक्षित स्नातक	अंशकालिक	-	-	01
स्काउट गाइड एवं शारीरिक शिक्षा- बी०पी०एड० सी०पी०एड एवं डी०पी० एड० आदि उपाधि	अंशकालिक	-	-	01
कला, क्राफ्ट एवं संगीत/गृह शिल्प	अंशकालिक	-	-	01
कुल पद		**05**	**01**	**03**

उपरोक्त पदों के सापेक्ष नवीन चयन मॉडल- II के कस्तूरबा गांधी बालिका विद्यालयों में विषयवार व्यवस्था निम्नवत् की जायेगीः-

विषय	**पद**	**मॉडल- I हेतु पदों की संख्या**		
		पूर्णकालिक	उर्दू	अंशकालिक
गणित (पी०सी०एम० वर्ग से प्रशिक्षित स्नातक एवं उच्च प्राथमिक स्तर की टी०ई०टी०)	पूर्णकालिक	01	-	-
विज्ञान (जेड०बी०सी० वर्ग से प्रशिक्षित स्नातक एवं उच्च प्राथमिक स्तर की टी०ई०टी०)	पूर्णकालिक	01	-	-
भाषा (हिन्दी- संस्कृत एवं अंग्रेजी में से न्यूनतम एक वर्ग में प्रशिक्षित स्नातक एवं उच्च प्राथमिक स्तर की टी०ई०टी०)	पूर्णकालिक	01	-	-
समाजिक विषय (भूगोल, इतिहास एवं नागरिक शास्त्र में से किसी एक विषय से प्रशिक्षित स्नातक एवं उच्च प्राथमिक स्तर की टी०ई०टी०)	पूर्णकालिक	01	-	-
उर्दू - बी०ए० उर्दू विषय से तथा एल०टी० या बी०टी० या बी०एड० या अन्य समकक्ष शिक्षा अथवा शिक्षण में डिग्री या डिप्लोमा	उर्दू	-	01	-
कम्प्यूटर प्रशिक्षित स्नातक	अंशकालिक	-	-	01
स्काउट गाइड एवं शारीरिक शिक्षा- बी०पी०एड० सी०पी०एड एवं डी०पी० एड० आदि उपाधि	अंशकालिक	-	-	01
कला, क्राफ्ट एवं संगीत/गृह शिल्प	अंशकालिक	-	-	01
कुल पद		**04**	**01**	**03**

10. The directions as contained in the aforesaid Government Order presently hold the field and have also been circulated by the State Director constituted by the

UPEFA society under cover of its letter of 04 January 2021. The Government Orders noted above while dealing with the issue of qualification provided that for the post of Warden-cum-Full Time Teacher a candidate must hold a TET certificate for the upper primary level as well as a graduation degree such as B.Ed. or other qualification recognised as equivalent thereto by the NCTE. Those Government Orders further prescribed separate qualifications for a teacher who may be selected and appointed for teaching the subjects of Computer, Art, Craft and Music. For the aforesaid category of teachers, it was clearly provided that they must hold a graduation degree as well as a training qualification duly recognised. The Government Order of 29 July 2013 additionally specified that the subject of Home Science would be treated as being part of Art, Craft and Music. The aforesaid Government Order also envisaged the establishment of KGBVs where instructions in Urdu language may also be imparted. Urdu as a subject was to be taught in KGBVs which were situate in a location which had a minority population of 20% or more. The Government Order of 17 August 2013 prescribing the qualifications for an Urdu teacher made the following provisions: -

"(क) भारत में विधि द्वारा स्थापित किसी विश्वविद्यालय से स्नातक की उपाधि या सरकार द्वारा उसके समकक्ष मान्यता प्राप्त कोई उपाधि, जिसमें एक विषय के रूप में उर्दू रही हो। परन्तु कोई अभ्यर्थी जो उर्दू में उपर्युक्त अर्हता नहीं रखता है, नियुक्ति के लिये पात्र होगा, यदि अभ्यर्थी उर्दू विषय में स्नातकोत्तर उपाधि रखता हो।

(ख) सरकार द्वारा उर्दू अध्यापन के लिये प्रशिक्षण देने हेतु लखनऊ, आगरा मवाना जिला मेरठ और सकलडीहा जिला चन्दौली में स्थापित किसी प्रशिक्षण केन्द्रों में से किसी एक केन्द्र से बेसिक अध्यापक प्रमाण पत्र या सरकार द्वारा उसके समक्ष मान्यता प्राप्त कोई अन्य प्रशिक्षण अर्हता या बेसिक अध्यापक प्रमाण पत्र (बी०टी०सी०), द्विवर्षीय बी०टी०सी०(उर्दू) और उ०प्र० सरकार या भारत सरकार द्वारा संचालित अध्यापक पात्रता परीक्षा उत्तीर्ण किया हो।"

11. When these writ petitions came to be preferred before the Court, one of the contentions, which was raised by the respondents, was with respect to their maintainability. It was principally contended that since the appointment of the petitioners was purely contractual, a writ petition challenging either an order of termination or variation in the terms of appointment would not lie. Those submissions were voiced based on the decision rendered by the Full Bench of the Court in **Roychan Abraham v. State of U.P. and Others5** and of the Division Bench in **Rajesh Bhardwaj V. Union of India6.**

12. Before, however, proceeding to deal with the aforesaid objections, it would be apposite to briefly notice the facts of each case.

Writ-A No.4845 of 2021.

13. The petitioner challenges an order of 13 November 2020 pursuant to which she has been asked to exercise an option whether she would be willing for the renewal of her contract as a part time teacher in the subject of Art, Craft and Music. The petitioner was initially appointed as a Warden-cum-Full Time Teacher based on a graduation degree in which her major was Home Science. The

writ petition also refers to the order of 14 July 2020 which while delineating compulsory subjects provided:-

"(II) बेसिक शिक्षा परिषद द्वारा संचालित उच्च प्राथमिक विद्यालयों में निर्धारित पाठयक्रम से इतर विषय धारित करने वाले शिक्षक/शिक्षिका का पदस्थापन/नवीन संविदा की गयी है, का सघन परीक्षण कर लिया जाये एवं निःशुल्क और अनिवार्य बाल शिक्षा का अधिकार अधिनियम, 2009 की धारा 19 एवं 25 में वर्णित मान एवं मानकों को अनूसूची एवं राज्य परियोजना कार्यालय के पत्र दिनांक 13.08.2018 एवं 06.08.2019 के आलोक मे बेसिक शिक्षा परिषद द्वारा संचालित उच्च प्राथमिक विद्यालयों मे निर्धारित पाठयक्रम के अनुसार ही कस्तूरबा गांधी बालिका विद्यालयों हेतु पाठयक्रम/विषय के शिक्षक उपरोक्त मानकानुसार उक्त जनपदीय समिति के प्रस्ताव के क्रम मे जिलाधिकारी के अनुमोदनोपरान्त नवीन संविदा/पदस्थापन किया जायेगा।

(III) के०जी०बी०वी मे शिक्षक/ शिक्षिका को मुख्य विषयों यथा गणित, विज्ञान, सामाजिक विषय, भाषा (हिन्दी एवं संस्कृत) एवं अंग्रेजी का पदस्थापन/नवीन संविदा वार्डेन/फुल टाईम शिक्षिका में न करके अंशकालिक के पद पर तथा वार्डेन/पूर्ण कालिक शिक्षिका को पाठय सहगामी विषयों तथा कम्प्यूटर स्काउट गाइड एवं शारीरिक शिक्षा कला क्राफ्ट एवं संगीत विषयों पदस्थापन/नवीन संविदा के पद पर किया गया है।

उल्लेखनीय है कि निःशुल्क और अनिवार्य बाल शिक्षा का अधिकार अधिनियम 2009 की धारा 19 एवं 25 मे वर्णित मान एवं मानको की अनुसूची मे निम्नवत् व्यवस्था उल्लिखित हैः-

छठी से आठवी कक्षा के लिए 1. कम से कम प्रति कक्षा एक शिक्षक, इस प्रकार का होगा कि निम्नलिखित प्रत्येक के लिए कम से कम एक शिक्षक हो-

(I) विज्ञान एवं गणित।

(II) सामाजिक अध्ययन।

(III) भाषा।

2. प्रत्येक पैंतीस बालकों के लिए कम से कम एक शिक्षक।

3.जहाँ एक सौ से अधिक बालकों को प्रवेश दिया गया है वहाँ

(I) एक पूर्णकालिक प्रधान अध्यापक,

(II) निम्नलिखित के लिए अंशकालिक शिक्षक (अ) कला शिक्षा।

(आ) स्वास्थ्य और शारीरिक शिक्षा।

(इ) कार्य शिक्षा। "

14. By the aforesaid Government Order, Home Science as has been noted above, came to be discontinued as a primary subject and became part of Art, Craft and Music. Although the contract of the petitioner was renewed permitting her to teach Hindi, the respondents upon noticing the provisions made in the directive of the State Director of 26 August 2020 restraining continuance of teachers by permitting change in subjects terminated her contract. By way of the impugned directive she has now been asked to exercise a choice of whether she would be willing to continue as a part time teacher in the subject Art, Music and Craft.

Writ-A No.4571 of 2021.

15. In this petition also, the petitioner assails an order of 19 November 2020 whereby the petitioner, who was initially selected and appointed as a Warden, has been downgraded to a part time teacher in the subject of Art, Craft and Music. Initially she was selected and appointed to teach the subject Home Science.

Writ-A No.4882 of 2021.

16. The petitioner challenges the order of the respondents refusing to renew her contract of engagement. The petitioner had initially been engaged as a part time teacher in the subject of Music. Insofar as her training qualifications were concerned, she had relied upon a certificate of Sangeet Prabhakar issued by the Prayag Sangeet Samiti, Allahabad. The respondents have taken the position that the aforesaid training qualification is not recognised. Consequently the impugned decision has come to be made for the contract of the petitioner not being renewed.

Writ-A No.5728 of 2021.

17. The petitioner, who holds the degrees of B.Com, M.Com and B.Ed., was engaged to teach the subject of Computer. By a communication of 22 February 2021 the respondents have held that her contract is not liable to be renewed since she does not possess the qualifications prescribed for teaching the aforesaid subject. It becomes relevant to note that the petitioner was appointed as a full-time teacher in Computers based on a Diploma in Computer Applications appearing at Page-53 of the paperbook. However she did not possess the O level certificate as required and prescribed to be an essential qualification.

Writ-A No.5914 of 2021.

18. The petitioner who was engaged as an Urdu teacher, challenges the order of 13 January 2021 by which her engagement has come to be discontinued upon the respondents finding that in the concerned block the population of minorities was less than 20%. Although learned counsel has relief upon an extract from an unspecified webpage to challenge the aforesaid conclusion, the respondents have proceeded on the basis of the certification apprising them of the minorities there being below 20% in the concerned location.

Writ-A No.6966 of 2021.

19. The petitioner here was appointed as a Computer Operator. He was engaged through a service provider and placed to discharge duties in connection with the KGBV scheme under the respondents. His engagement admittedly was through an outsourcing agency. It was in the aforesaid background that the respondents contend that apart from the engagement being contractual, there was no privity of contract between the petitioner and the State so as to warrant this Court entertaining the writ petition.

Writ-A No.8595 of 2021.

20. The petitioner challenges the order of 02 February 2021 passed by the District Basic Education Officer rejecting her objections to the engagement of the fifth respondent. The respondents have rejected that objection holding that although both the fifth respondent and the petitioner hold the requisite qualifications, since the fifth respondent had been engaged for a longer length in time, her absorption is liable to be upheld in terms of the provisions made under the Government Order of 29 July 2013. The provisions of the aforesaid government order were neither questioned nor assailed.

Writ-A No.6716 of 2021.

21. The petitioner who was engaged as an Urdu Teacher challenges the

validity of the decision of the Basic Education Officer discontinuing her engagement on the ground that she did not have Urdu as one of the subjects at the Graduation level. The aforesaid reasoning was assailed on the ground of the same being in violation of a Government Order of 05 September 2006 which had provided that for engagement as an Urdu teacher it would be essential for the candidate to have studied that language in two out of the three examinations of High School, Intermediate and Graduation. The respondents on the other hand rest their case on the government order of 17 August 2013 the relevant part whereof has been extracted hereinabove and which had amended the government order of 05 September 2006.

Writ-A No.8587 of 2021.

22. The petitioner who was engaged as a Full Time Teacher-cum-Warden challenges the order of 19 October 2020 by which the respondents have held that renewal cannot be granted since she did not have Science as a subject at the graduation level.

23. The facts of individual petition noticed above evidence that the jurisdiction of the Court under Article 226 of the Constitution is sought to be invoked in principally the following three situations.

A- Termination of contract.

B- Downgradation from a full time to a part time teacher.

C- Variation of the terms of the contract.

C. THE MAINTAINABILITY OF THE WRIT PETITIONS

24. The principal objection which is taken by the State respondents is that since the terms and conditions of service of the petitioners are governed purely by contract, no writ petition would lie in light of the decisions rendered in **Rajesh Bhardwaj** and of the Full Bench in **Roychan Abraham**. The submission essentially was that a contract for personal service cannot be enforced. It was submitted that if it be the contention that the termination has been affected in violation of the provisions made in the contract, the only remedy available to the petitioners would be to bring an action for damages for wrongful termination. It was contended that the engagement of the petitioners was under a scheme formulated by the Union Government and governed solely by the provisions made in various Government Orders and directives referred to above. It was in the aforesaid backdrop that it was argued that the writ petitions would not be maintainable and that in any case it was liable to be dismissed with the reliefs as prayed for being refused.

25. Before proceeding to deal with the ratio of **Roychan Abraham** and **Rajesh Bhardwaj**, it would be apposite for the Court to note the judgment of the Full Bench rendered in **Smt. Sheela Devi and another vs. State of U.P. and others7**. The Full Bench was constituted to consider whether a writ petition under Article 226 of the Constitution would be maintainable at the behest of an Angadwadi worker appointed on a temporary basis by the State upon payment of honorarium. The Full Bench took note of the Integrated Child Development Service Program run under the auspices of the Union Government. It found that the engagement of Angadwadi workers was under the provisions of the aforesaid scheme with those workers being

deployed at various Angadwadi centers established throughout the country. After noticing various decisions of the Supreme Court dealing with the maintainability of a writ petition directed against an action of the Government or a body discharging a public function, the Full Bench held thus:-

"26. The above decisions of the Supreme Court clearly demonstrates that the ambit and scope of Article 226 has been liberalised, widened and expanded by the Courts. A petition is maintainable if the petitioner seeks relief in accordance with law and his real grievance is against the action or an order passed by a statutory authority or an authority vested with performance of public functions. In short a writ petition would always be maintainable under Article 226 of the Constitution against an order passed by any person in discharge of public duty or by public authority i.e., an officer of the Government."

26. It then proceeded to observe in paragraph 44 as follows: -

"44. The issue is not as to whether the appellants/petitioners would succeed in the writ petitions and get the desired relief but is altogether different as to whether the petition is maintainable or the appellants/petitioners are entitle to invoke the writ jurisdiction. In our opinion in view of the above discussion such a writ petition is maintainable and the appellants/petitioners are justified in invoking the extraordinary remedy on the grounds permissible for judicial review, though it may ultimately result in dismissal on merits."

27. The Full Bench ultimately recorded the following conclusions: -

"54. In view of the aforesaid facts and circumstances, we answer the question referred to us in favour of the appellants/petitioners and hold that the Anganwadi workers though appointed under a scheme of the Government notwithstanding that they are not holders of civil posts are entitle to invoke the writ jurisdiction under Article 226 of the Constitution against the order terminating their services passed by the CDPO, a Government functionary on grounds permissible for judicial review."

28. It becomes pertinent to note that in **Smt. Sheela Devi** while noticing the terms of the appointment of Angadwadi workers, the Full Bench noted that although their appointment was temporary and based on the payment of an honorarium, those workers were entitled to continue till the age of 60 years subject to being found fit. The engagement of these workers was thus not based purely on a contract of service which provided that the engagement was terminable with notice. As was noted by the Full Bench, these workers were entitled to continue till they attained the age of 60 years unless the project itself came to be abandoned.

29. Even before **Rajesh Bhardwaj** came to be decided, a Division Bench in **Ram Prasad Vs. State of U.P. and others8** came to consider an issue whether a contractual employee of UPSRTC could claim regularization. Noticing that the aforesaid contractual engagement was not governed by any statutory regulations framed by the Corporation, the Division Bench held as follows:-

"12. **Even otherwise, appellant's appointment was contractual hence it could not be enforced in a Court of law**

and that too in a writ petition. In other words, when right to continue is not based either on the statute or the Constitution or otherwise in law, then a writ of mandamus compelling the authorities to continue appellant in employment cannot be issued since for issuance of writ of mandamus, condition precedent is the existence of a legal right upon the aggrieved person and a legal obligation corresponding upon the authorities concerned. In Uma Devi (Supra), Apex Court, considering the question as to when a writ of mandamus can be issued by the Court directing employer either to absorb the employee in permanent service or to allow him to continue, has held:

"In order to that a mandamus may issue to compel the authorities to do something, it must be shown that the statute imposes a legal duty on the authority and the aggrieved party had a legal right under the statute or rule to enforce it." (emphasis added)

13. Even otherwise, enforcement of contract of personal service in a writ jurisdiction is not permissible except of certain limited circumstances. In Roshan Lal Tandon v. Union of India, AIR 1967 SC 1889, drawing distinction between employment under a contract and status, it was held that there is no vested contractual right in regard to terms of service where employment is one of the status. The origin of Government service is contractual. There is an offer and acceptance in every case. But once appointed to the post or office, the Government servant acquires a status and his rights and obligations are no longer determined by consent of both parties, but by statute or statutory rules which may be framed and altered unilaterally by Government. In other words, legal position of a Government servant is more one of status than of contract. The hall-mark of status is the attachment to a legal relationship of rights and duties imposed by public law and not by mere agreement of the parties. The relationship between the Government and the Servant is not like an ordinary contract of service between a master and servant. The legal relationship is something entirely different, something in the nature of status. In the language of jurisprudence, status is a condition of membership of a group of which powers and duties are exclusively determined by law and not by agreement between the parties concerned.

14. Thus, in the cases where appointment and conditions of service are governed by statute, the relationship is that of status and not mere a contract. However, in other cases, it is purely a contract of service resulting in a relationship of ordinary master and servant. In the present case, it cannot be said that the appellant's employment is that of a status since it is not governed by statutory provisions in any manner. It is purely and simply an ordinary contract of service between master and servant. In such cases, where the contract of service is not governed by statutory provisions, it is well-settled that contract of service cannot be sought to be enforced by seeking reinstatement or continuance in employment since such a relief is barred under the Specific Relief Act. In Executive Committee of U.P. State Warehousing Corporation, Lucknow v. C.K. Tyagi, (1969) 2 SCC 838 : AIR 1970 SC 1244, considering question as to when such a relief is granted, Court observed:

"Under the common law the Court will not ordinarily force an employer to retain the services of an employee whom he no longer wishes to employ. But this rule is subject to certain well-recognised exceptions. It is open to the Courts in an

appropriate case to declare that a public servant who is dismissed from service in contravention of Article 311 continues to remain in service, even though by doing so the State is in effect forced to continue to employ the servant whom it does not desire to employ. Similarly under the Industrial Law, jurisdiction of the Labour and Industrial Tribunals to compel the employer to employ a worker whom he does not desire to employ, is recognised. The Courts are also investigated with the power to declare invalid the act of a statutory body, if by doing the a act the body has acted in breach of a mandatory obligation imposed by statute..."

30. **In Sonu Kumar Vs. State of U.P. and others9** , the Division Bench considered the issue of whether a contractual employee could invoke the jurisdiction of the Court under Article 226 of the Constitution for the issuance of a prerogative writ for being continued in service. Rejecting the aforesaid prayer as made, the Division Bench held thus: -

"24. Even otherwise, enforcement of contract of personal service in a writ jurisdiction is not permissible except of certain limited circumstances. The appellant's appointment was not in a Department of Government. Instead he was engaged by a private agency constituted for the purposes of implementation of a scheme launched for a fixed period. The scheme launched by Government is under an executive order. It does not have status of a statute or statutory order. The nature of engagement of appellant, therefore, is not to be governed by status but is like an ordinary contract of service between a master and servant.

25. In Roshan Lal Tandon v. Union of India, AIR 1967 SC 1889, drawing distinction between employment under a contract and status, it was held that there is no vested contractual right in regard to terms of service where employment is one of the status. The origin of Government service is contractual. There is an offer and acceptance in every case. But once appointed to the post or office, the Government servant acquires a status and his rights and obligations are no longer determined by consent of both parties, but by statute or statutory rules which may be framed and altered unilaterally by Government. In other words, legal position of a Government servant is more one of status than of contract. The hall-mark of status is the attachment to a legal relationship of rights and duties imposed by public law and not by mere agreement of the parties. The relationship between the Government and the Servant is not like an ordinary contract of service between a master and servant. The legal relationship is something entirely different, something in the nature of status. In the language of jurisprudence, status is a condition of membership of a group of which powers and duties are exclusively determined by law and not by agreement between the parties concerned.

26. Thus, in the cases where appointment and conditions of service are governed by statute, the relationship is that of status and not mere a contract. However, in other cases, it is purely a contract of service resulting in a relationship of ordinary master and servant. In the present case, it cannot be said that the appellant's employment is that of a status since it is not governed by statutory provisions in any manner. It is purely and simply an ordinary contract of service between master and servant. In such cases, where the contract of service is not governed by statutory provisions, it is well-settled that contract of

service cannot be sought to be enforced by seeking reinstatement or continuance in employment since such a relief is barred under the Specific Relief Act."

31. The aforesaid view of the Court that a contract of a personal service which is not imbued with any statutory flavour cannot be enforced and that the writs as prayed for in cases of termination cannot be granted has consistently held the field. The view as expressed in the aforesaid decisions was reemphasized by the Division Bench in **Rajesh Bhardwaj** in the following terms:-

"30. Now we come to Questions-(2), (3) and (4), which, in our view, can be dealt with together. In the present case, terms and conditions of employment, applicable to petitioner are not challenged that such terms and conditions are arbitrary and violative of Article 14 of Constitution read with Section 23 of Indian Contract Act, 1872 (hereinafter referred to as "Act, 1872") being unfair, unreasonable or unconscionable, and against public policy. The order of termination is challenged on the ground that petitioner has not been given adequate opportunity of defence and termination is in violation of principles of natural justice. It is not in dispute that terms and conditions are not governed by any Statute or statutory provision or by any provision made under any authority of Statute. Petitioner being in the Cadre of Manager, his terms and conditions are also not governed by Standing Orders made by Employer with respect to employees governed by provisions of Industrial Employment (Standing Orders) Act, 1946 (hereinafter referred to as "Act, 1946"). In these circumstances, in the cases like petitioner, consistently it has been laid down that employment is simply a part of contract. If employment is terminated or contract of service is terminated, Court shall not grant relief of reinstatement, i.e. specific performance of contract of personal service, as it is barred by the provisions of Specific Relief Act, 1963 (hereinafter referred to as "Act, 1963") and, therefore, no remedy under Article 226 shall be available since employee, if complains about wrongful termination of service, then must avail remedy in common law by claiming damages.

31. As we have already said that CUPGL even if taken to be a 'State' within the meaning of Article 12 of Constitution, this by itself would not mean that petitioner can claim status of a Government Servant or holding a post governed by 'status'. Nature of engagement/ appointment of petitioner is not to be governed by 'status' but by a 'contract of service' entered into between master and servant. A distinction between an appointment under a contract and status was noticed and explained by Supreme Court in Roshan Lal Tandon Vs. Union of India AIR 1967 SC 1889. Court held that when a matter is governed by status, the employee has no vested contractual rights in regard to the terms of service but where employment is purely in the realm of a simple contract of employment, it is strictly governed by terms and conditions of employment settled between the parties. To remind the difference between 'status' and 'contractual appointment', we may take up case of a Government Servant. Origin of employment in a Government department is contractual. There is an offer and acceptance in every case but once appointed to the post or office, the person appointed, i.e., Government Servant, acquires a status and his rights and obligations are no longer determined by consent of both the parties but same are

governed by Statute or statutory rules which may be framed and altered unilaterally by employer, i.e., the Government. Legal position of a Government Servant, thus, is more one of 'status' than of a 'contract'. The hallmark of 'status' is that attachment to a legal relationship of rights and duties must be by public law and not by mere agreement of parties. Relationship between Government (employer) and Government Servant (employee) is not like an ordinary contract of service between a master and servant. The legal relationship is something entirely different, something in the nature of status. In the language of jurisprudence, 'status' is a condition of membership of a group, whereof powers and duties are exclusively determined by law and not by agreement between the parties concerned. Thus, where appointment and conditions of service are governed by Statute, relationship of 'employer' and 'employee' is that of 'status' and not a mere contract. However, in other cases, it is purely a contract of service resulting in a relationship of ordinary master and servant.

32. In the present case also, relationship of employment between petitioner and CUPGL is purely and simply an ordinary contract of service which is not governed by any statute or statutory provision. In such cases, a contract of service cannot be sought to be enforced by Court of law by giving relief of reinstatement or continuance in employment as this relief is barred under Act, 1963. "

32. The Full Bench of the Court in **Roychan Abraham** was called upon to consider the correctness of another decision of three learned Judges of the Court rendered in **M.K. Gandhi and others Vs. Director of Education10**. In **M.K. Gandhi**, the Full Bench had held that the employees of an educational institution whose services were governed solely by non-statutory byelaws could not maintain a writ petition. The Full Bench in **M.K. Gandhi** held that a private educational institution was not State. The decision in **M.K. Gandhi**, when taken in appeal to the Supreme Court, was upheld to the aforesaid extent. A further direction which had come to be issued therein namely for the CBSE taking further steps against the concerned institution was set aside. In **Roychan Abraham**, the Full Bench elaborately noticed the various decisions rendered by the Supreme Court as well as this Court with respect to bodies which discharge a public function or perform a public duty. Upon noticing the body of precedent which had grown on the subject, the Full Bench observed as follows: -

"37. In State of U.P. and another vs. Johri Mal, 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. However, it may not be possible to generalize the nature of the action which would come either under public law

remedy or private law field nor is it desirable to give exhaustive list of such actions."

38. Even if it be assumed that an educational institution is imparting public duty, the act complained of must have direct nexus with the discharge of public duly. 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. "

33. As is evident from the aforesaid extract, the Court in **Roychan Abraham** also reiterated the settled position that breach of contracts without having any public element as an integral part thereof cannot be questioned in a writ petition under Article 226 of the Constitution. The Court further noticed that wherever Courts had intervened they had done so upon finding that either the service conditions were regulated by statutory provisions or where the employer had the status of State and where it was found that the action as complained of had a public law element. The Full Bench then went on to observe that while it was true that even a private institution imparting education is amenable to judicial review under Article 226 of the Constitution by virtue of the fact that it discharges a public function, that the decision in **M.K. Gandhi** must be understood as confined to the facts of the case. It was noted that **M.K. Gandhi** essentially answered the question whether a writ petition would be maintainable for violation of non-statutory byelaws and for enforcement of a private contract. The Court went on to observe that **M.K. Gandhi** cannot be understood as having propounded the principle that private educational institutions do not render a public function. Ultimately it was held that the decision in **M.K. Gandhi** did not merit being reviewed.

34. More significant for our purposes is the decision of the Supreme Court in **Ramakrishna Mission and another Vs. Kago Kunya and others11.** In the aforesaid decision, the Supreme Court held: -

"29. More recently in K K Saksena v International Commission on Irrigation and Drainage, another two judge Bench of this Court held that a writ would not lie to enforce purely private law rights. Consequently, even if a body is performing a public duty and is amenable to the exercise of writ jurisdiction, all its decisions would not be subject to judicial review. The Court held thus:

"43. What follows from a minute and careful reading of the aforesaid judgments of this Court is that if a person or authority is "State" within the meaning of Article 12 of the Constitution, admittedly a writ petition under Article 226 would lie against such a person or body. However, we may add that even in such cases writ would not lie to enforce private law rights. There are a catena of judgments on this aspect and it is not necessary to refer to those judgments as that is the basic principle of judicial review of an action under the administrative law. The reason is

obvious. A private law is that part of a legal system which is a part of common law that involves relationships between individuals, such as law of contract or torts. Therefore, even if writ petition would be maintainable against an authority, which is "State" under Article 12 of the Constitution, before issuing any writ, particularly writ of mandamus, the Court has to satisfy that action of such an authority, which is challenged, is in the domain of public law as distinguished from private law."

30. **Thus, even if the body discharges a public function in a wider sense, there is no public law element involved in the enforcement of a private contract of service.**

"34. Thus, contracts of a purely private nature would not be subject to writ jurisdiction merely by reason of the fact that they are structured by statutory provisions. The only exception to this principle arises in a situation where the contract of service is governed or regulated by a statutory provision. Hence, for instance, in K K Saksena (supra) this Court held that when an employee is a workman governed by the Industrial Disputes Act, 1947, it constitutes an exception to the general principle that a contract of personal service is not capable of being specifically enforced or performed."

35. The aforesaid decisions were noticed by this Court in **Ram Niwas Sharma Vs. Union of India and others12** and the legal position summarized as follows:-

"15. It must be consequently held that while a body may be discharging a public function or performing a public duty and thus its actions becoming amenable to judicial review by a Constitutional Court, its employees would not have the right to invoke this Courts powers conferred by Article 226 in respect of matter relating to service where they are not governed or controlled by statutory provisions. An educational institution may perform myriad functions touching various facets of public life and in the societal sphere. While such of those functions as would fall within the domain of a "public function" or "public duty" be undisputedly open to challenge and scrutiny under Article 226 of the Constitution, actions or decisions taken solely within the confines of an ordinary contract of service, having no statutory force or backing, cannot be recognised as being amenable to challenge under Article 226 of the Constitution. In the absence of the service conditions being controlled or governed by statutory provisions the matter would remain in the realm of an ordinary contract of service.

17. As has been lucidly explained, contracts of a purely private nature even though entered by bodies w **Ram Niwas Sharma Vs. Union of India and others12**hich may perform a public function would not be subject to judicial review. The only exception would be where such contracts are governed or regulated by statute. In the present case it is the undisputed position that the byelaws and the service conditions which apply are non statutory. They are deprived of any statutory ordainment. Such a contract, as noted above, would remain a pure private contract of service. In that view of the matter the writ petition challenging the termination of such a contract would not be maintainable."

36. A learned Judge of the Court in **Bruce Henderson Vs. State of U.P. and 9 others13** dealt with the question of whether a writ petition would lie against an order of termination passed by a private educational

institution. After noticing the various decisions rendered by the Court including the ones noted hereinabove, the learned Judge insofar as the question of maintainability is concerned, held thus:-

"The Full Bench has taken into consideration the judgments relied upon by the parties before me and being bound by the Full Bench, I hold that the writ petition would lie against the institution being St. Marks School and College, Jhansi. Thus, the preliminary objection raised by the respondent is rejected and following the Full Bench judgment I hold that the writ petition is maintainable.

Now, the matter shall be heard with regard to the merits of the averments that may be raised by the petitioner.

The preliminary issue is decided accordingly."

37. However dealing with whether the Court could interfere with the order of termination on merits, the learned Judge held as follows:-

"The counsel for the respondents have placed before this Court a judgment by this Court dated 28.1.2020 passed in Writ-A No. 29911 of 2012 (Rajesh Kumar Srivastava and Others Vs. State of U.P. and Others), wherein a similar challenge was made to the contract of personal service by a privately managed unaided educational institutions. This Court after considering the entire gamut of cases held that challenge to a contract of personal service breached by a privately managed unaided educational institutions can be agitated in remedies available under common law rights as none of the exceptions noticed by the Apex Court in Executive Committee of Vaish Degree College Vs. Lakshmi Narain and Others; (1976) 2 SCC 58 are made out. Thus, no writ can be issued by this Court to allow the petitioner to continue in employment in exercise of its writ jurisdiction.

The facts of the present case are also similar to those in Writ-A No. 29911 of 2012. There is no issue that the Institution in question is not a privately managed unaided educational institutional institutions, that being the case, respectfully following the judgment dated 28.1.2020 of this court in Writ-A No. 29911 of 2012, Rajesh Kumr Srivastava (Supra), the petitioner is not entitled for issuance of a writ, as prayed for."

38. The aforesaid decision was upheld by the Division Bench of the Court in Bruce **Henderson Vs. State of U.P. and 9 others14** with the following observations.

"Hon'ble Supreme Court in Executive Committee of Vaish Degree College, Shamli and others Vs. Lakshmi Narain and others reported in AIR 1976 SC 888 in quite unambiguous terms held that no declaration to enforce a contract of personal service will be granted. The only exceptions are the employees having status of civil servant, workman under Industrial Disputes Act or not any other labour legislation or where violation is in mandatory obligation under a statute. No such eventuality exists in the case in hand."

D. THE PETITIONERS STAND

39. For the petitioners, submissions were ably advanced by Sri J.P. Singh and other learned counsels who principally submitted that since the issue was one of employment under the State, the preliminary objection was liable to be rejected. The Court before proceeding further may briefly notice the following

decisions on which reliance was placed by Sri J.P. Singh in support of his submission that the writ petition would be maintainable. Learned counsel firstly pressed in aid the decision of the Supreme Court in **K.Krishnamacharyulu And Others v. Sri Venkateswara Hindu College of Engineering And Another15**. In paragraph-4 of the report the Supreme Court in the aforesaid decision held thus: -

"4. It is not in dispute that executive instructions issued by the Government have given them the right to claim the pay scales so as to be on a par with the government employees. The question is when there is no statutory values issued in that behalf, and the institution, at the relevant time, being not in receipt of any grant-in-aid; Whether the writ petition under Article 226 of the Constitution is not maintainable? In view of the long line of decisions of this Court holding that when there is a interest created by the Government in a institution to impart education, which is a fundamental right of the citizens, the teachers who impart the education get an element of public interest in the performance of their duties. As a consequence, the element of public interest requires regulation of the conditions of service of those employees on a par with government employees. In consequence, are they also not entitled to the parity of the pay scales as per the executive instructions of the Government? It is not also in dispute that all the persons who filed the writ petition along with the appellant had later withdrawn from the writ petition and thereafter the respondent-Management paid the salaries on a par with the government employees. Since the appellants are insisting upon enforcement of their right through the judicial pressure, they need and seek the protection of law. We are of the view that the State has obligation to provide facilities and opportunities to the people to avail of the right to education. The private institutions cater to the need of the educational opportunities. The teacher duly appointed to a post in the private institution also is entitled to seek enforcement of the orders issued by the Government. The question is as to which forum one should approach. The High Court has held that the remedy is available under the Industrial Disputes Act. When an element of public interest is created and the institution is catering to that element, the teacher, being the arm of the institution, is also entitled to avail of the remedy provided under Article 226; the jurisdiction part is very wide. It would be a different position, if the remedy is a private law remedy. So, they cannot be denied the same benefit which is available to others. Accordingly, we hold that the writ petition is maintainable. They are entitled to equal pay so as to be on a par with government employees under Article 39(d) of the Constitution."

40. As would be evident from a reading of the aforesaid decision and the paragraphs extracted above, the principal question there was whether the petitioners were entitled to claim pay scales equivalent to and at par with government employees. Their claim before the High Court was rejected with the observation that it would be open to those teachers to institute proceedings under the Industrial Disputes Act. The view so taken was faulted by the Supreme Court upon noticing that the executive instructions which had been issued by the government did give those petitioners the right to claim pay scales at par with other government employees. Additionally, the Court noted the rights conferred on the petitioners to claim equal

pay on the basis of Article 39(d) of the Constitution. The aforesaid decision answered the issue in favour of the petitioners principally based on the fact that executive instructions did confer on them the right to claim parity in pay. Additionally the Supreme Court recognised the constitutional right inhering in the petitioners to claim equal pay.

41. Sri Singh then drew the attention of the Court to the judgment in **Gridco Limited And Another v. Sri Sadananda Doloi & Others16.** Gridco again was a matter which dealt with the contractual engagement of employees whose appointments were admittedly governed by the Gridco Officers Service Regulations 1996. This is evident from the following extract of that decision:-

"14. There is one other aspect to which we must advert before we part with the question of nature of appointment offered to the respondent. The appointment order issued in favour of the respondent specifically stated that the respondent will be governed by the GRIDCO Officers Service Regulations, 1996. With the coming into force of the said Regulations, the respondent was re-designated as Chief General Manager, HR which was in terms of the Regulations, a post in the Executive Grade of E-10. This re- designation was not at any stage questioned by the respondent. On the contrary it was he who had prayed for amendment of clause (2) of the appointment letter to bring the same in tune with para 13(3) of the GRIDCO Officers Service Regulation. Para 13(3) of the Regulations reads as:

"13(3): The appointment to grades above E-9 shall be on a contract basis initially for a period of 3 years and renewable thereafter for such period(s) as the Board or the Committee of the Board may prescribe until the Officer attains the age of superannuation as provided in these Regulations."

15. The above makes it manifest that an appointment to the post in category E-10 could be made only on a contractual basis. The Regulations do not envisage a regular appointment at E-10 level to which the respondent stands appointed on the terms of the contract of employment. That being the case it is difficult to see how the said appointment could be treated to be a regular appointment when the Rules did not permit any such appointment. We may mention to the credit of learned senior counsel who appeared for the respondent that although at one stage an attempt was made to argue that the appointment of the respondent was regular in nature, that line of argument was not pursued further and in our opinion, rightly so having regard to what we have said above. Such being the case the question of the so called unequal bargaining power of the parties did not have any relevance or role to play in the facts and circumstances of the case. Question No.1 is answered accordingly. Re: Question No.2 ."

42. It was in the aforesaid backdrop and noticing that the contractual engagement was in fact traceable to statutory regulations that the Supreme Court observed :-

"26. A conspectus of the pronouncements of this court and the development of law over the past few decades thus show that there has been a notable shift from the stated legal position settled in earlier decisions, that termination of a contractual employment in accordance with the terms of the contract was permissible and the employee could claim

no protection against such termination even when one of the contracting parties happened to be the State. Remedy for a breach of a contractual condition was also by way of civil action for damages/compensation. With the development of law relating to judicial review of administrative actions, a writ Court can now examine the validity of a termination order passed by public authority. It is no longer open to the authority passing the order to argue that its action being in the realm of contract is not open to judicial review. A writ Court is entitled to judicially review the action and determine whether there was any illegality, perversity, unreasonableness, unfairness or irrationality that would vitiate the action, no matter the action is in the realm of contract. Having said that we must add that judicial review cannot extend to the Court acting as an appellate authority sitting in judgment over the decision. The Court cannot sit in the arm chair of the Administrator to decide whether a more reasonable decision or course of action could have been taken in the circumstances. So long as the action taken by the authority is not shown to be vitiated by the infirmities referred to above and so long as the action is not demonstrably in outrageous defiance of logic, the writ Court would do well to respect the decision under challenge."

43. Sri Singh then placed reliance upon the decisions of the Supreme Court in **Bharati Reddy v. State of Karnataka And Others17 and Maharashtra Chess Association v. Union of India & Others18. Bharati Reddy** dealt with a question of whether a writ petition challenging the election of an Adhyaksha could be maintained having regard to the bar placed by Article 243-O of the Constitution. Dealing with the aforesaid issue the Supreme Court observed as follows:-

"11. We do not find any merit in this contention. We are of the view that a voter in a particular panchayat cannot be rendered remediless if he is aggrieved by the election of the Adhyaksha of the Panchayat. In Kesavananda Bharati Sripadagalvaru v. State of Kerala and Anr. (1973) 4 SCC 225, a thirteen Judge Bench of this Court held that Article 368 of the Constitution does not enable the Parliament to alter the basic structure or framework of the Constitution. The basic structure of the Constitution could not be altered by any constitutional amendment and it was held in unambiguous terms that one of the basic features is the existence of constitutional system in judicial review. This view was followed by a Constitution Bench in Minerva Mills Ltd. v. Union of India and Ors. (1980) 3 SCC 625. In L. Chandra Kumar v. Union of India (1997) 3 SCC 261, a seven Judge Bench of this Court has held that jurisdiction conferred upon the High Courts under Articles 226/227 of the Constitution and upon the Supreme Court under Article 32 of the Constitution is a part of the inviolable basic structure of our Constitution. While this jurisdiction cannot be ousted, other courts and tribunals may perform a supplementary role in discharging the powers conferred by Articles 226/227 and Article 32 of the Constitution of India. It has been held as under:

"78. ... We, therefore, hold that the power of judicial review over legislative action vested in the High Courts under Article 226 and in the Supreme Court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic

structure. Ordinarily, therefore, the power of High Courts and the Supreme Court to test the constitutional validity of legislations can never be ousted or excluded."

12. In I.R. Coelho v. State of Tamil Nadu (2007) 2 SCC 1, a Bench of nine Judges has again held that power of judicial review is the part of the basic structure of the Constitution. The power to amend cannot be equated with the power to frame the Constitution.

It is thus clear that power of judicial review under Articles 226/227 of the Constitution is an essential feature of the Constitution which can neither be tinkered with nor eroded. Even the Constitution cannot be amended to erode the basic structure of the Constitution. Therefore, it cannot be said that the writ petition filed by Respondents 6 to 9 under Article 226 of the Constitution is not maintainable. However, it is left to the discretion of the court exercising the power under Articles 226/227 to entertain the writ petition."

44. As is evident from the aforesaid extracts, **Bharati Reddy** is essentially an authority for the proposition that the power of judicial review is an essential feature of the Constitution and that the mere existence of an alternative forum cannot be solely determinative of whether the High Court should entertain a writ petition. **Maharashtra Chess Association** again deals with the question of whether the High Courts must necessarily desist from invoking its constitutional powers merely because an alternative forum for adjudication exists. Dealing with the aforesaid issue the Supreme Court held: -

"13. While the powers the High Court may exercise under its writ jurisdiction are not subject to strict legal principles, two clear principles emerge with respect to when a High Court's writ jurisdiction may be engaged. First, the decision of the High Court to entertain or not entertain a particular action under its writ jurisdiction is fundamentally discretionary. Secondly, limitations placed on the court's decision to exercise or refuse to exercise its writ jurisdiction are self-imposed. It is a well settled principle that the writ jurisdiction of a High Court cannot be completely excluded by statute. If a High Court is tasked with being the final recourse to upholding the rule of law within its territorial jurisdiction, it must necessarily have the power to examine any case before it and make a determination of whether or not its writ jurisdiction is engaged. Judicial review under Article 226 is an intrinsic feature of the basic structure of the Constitution.

....

21. The mere existence of alternate forums where the aggrieved party may secure relief does not create a legal bar on a High Court to exercise its writ jurisdiction. It is a factor to be taken into consideration by the High Court amongst several factors. Thus, the mere fact that the High Court at Madras is capable of granting adequate relief to the Appellant does not create a legal bar on the Bombay High Court exercising its writ jurisdiction in the present matter."

45. As is manifest from the above, both **Bharati Reddy** and **Maharashtra Chess Association,** strictly speaking, do not deal with the question which confronts this Court at all.

46. Sri Singh lastly placed reliance on the decision of a Division Bench of the Court rendered in the matter of **Dr. Vandana**

Vahistha v. State of U.P. And Others19. Vandana Vahistha was a matter where the service of a Lecturer appointed in a B.Ed. College was terminated by an order of the Committee of Management. However, it becomes pertinent to note that the Court found that the appointment of the appellant there was governed by the provisions of the U.P. State Universities Act 1973 in the same fashion and to the same extent as any other teacher appointed in an affiliated college. The Court noted that the 1973 Act made no distinction between a teacher of an affiliated college whether in a department receiving grant-in-aid or one constituted under a self-financing scheme. It also noted that the appointment of the appellant there had been duly approved by the Vice Chancellor in accordance with the provisions made in the Act. The order of termination was set aside upon the Division Bench finding that it had come to be made in violation of Section 35(2) of the Act. The Court struck down the impugned action upon it finding that termination had come to be affected in violation of the provisions of statute.

E. CONCLUSIONS ON MAINTAINABILITY

47. At the outset and before the Court proceeds to deal with the legal question which is raised, it becomes necessary to note that the petitioners here do not assail their contracts as being unconscionable or opposed to public policy. They also do not assail the validity of the government orders or circulars which circumscribe these contracts. This aspect assumes significance since the challenge to the impugned orders would have to be evaluated bearing the aforesaid in mind.

48. The Court firstly notes that the contention of the respondents that the writ petitions would not be maintainable, is perhaps misdirected and in any case too broadly stated. In the considered view of the Court what essentially falls for consideration is not an issue of maintainability but whether a prerogative writ would issue in light of the nature of the challenge that is raised. All the writ petitioners assail actions of respondents who are undisputedly State. The impugned actions have been taken in the course of implementation of a scheme which seeks to extend and implement the constitutional promise of providing elementary education. It would be too late in the day for the Court to shut its eyes to the well-established principle that all actions of the State are liable to be tested on the constitutional principle of fairness. Consequently, the Court finds itself unable to countenance the broadly stated proposition that the writ petitions would not be maintainable per se.

49. The issue which principally falls for consideration is whether the termination of these contracts or the variation of the terms of engagement would warrant a writ being issued to either grant reinstatement or other appropriate relief and if so in which exceptional situations. As was aptly stated by the Supreme Court in **Ramkrishna Mission,** the question of whether the termination of an appointment not governed by statute could form the subject matter of a writ petition would arise notwithstanding the decision having been taken by a state functionary or a body which even though not answering the description of State, performs a public function or discharges a public duty.

50. In the considered view of the Court, the key to understanding the legal principles propounded in **Rajesh Bharadwaj, Roychan Abraham or**

Ramkrishna Mission is to foremost bear in mind that those decisions dealt with the question of a termination simpliciter of contractual appointments which were not governed by any statutory rule or regulation. The only known and established exceptions to the universal principle of a contract of personal service not being enforceable is where such a contract is regulated and controlled by statute or law. The three well known and repeatedly articulated exceptions to a contract of service not being specifically enforceable are (a) where a civil servant is removed from service in violation of Article 311 or a law made under Article 309 of the Constitution (b) where a workman is removed in violation of protections accorded by industrial legislation and (c) where an employee of a body is dismissed in breach of a statute or a statutory rule. It is only in the aforementioned three exceptional circumstances that Courts can enter declarations of the termination being void or invalid and direct reinstatement. Even as the functions of the State became more varied and pervasive and it went forth discharging those functions through various forms of entities, the jurisprudence that developed on this question remained consistent and unwavering. The precedents following an undeviating thread have stuck to the three exceptions noticed above. Consequently it must be held that the contractual engagement of the petitioners when viewed exclusively from the standpoint of the terms laid down in the individual agreements would bind parties and judicial review of action taken pursuant thereto would have to be tested on the cornerstone of the *"trinity exceptions"* noted above.

51. However, there is one seminal distinguishing feature which imbues these engagements compelling the Court to enter the following caveat. The contractual engagement of the petitioners would have been liable to be tested solely on the aforesaid principles but for the fact that their engagement is also controlled and governed by executive orders, circulars and policy statements issued by the respondents from time to time. These orders whether made in the exercise of executive power of the State or the mere expression of policy by an authority which is State, an adjunct thereof or a body which discharges a public function or performs a public duty would bind those authorities to the same extent as any statutory rule, regulation or a code of conduct enforceable in law. A public authority must be held bound to act in accordance with the rules of conduct adopted by it when it interacts with citizens of the State. It is this distinguishing feature that would confer a right on the petitioners here to assail and question the actions of the respondents notwithstanding the fact that their engagement is contractual. The executive orders and circulars issued by the respondents govern and control a whole gamut of activities relating to KGBV including the selection and appointment of teachers and staff, their terms of engagement, curriculum and pattern of instructions. The Court in **Roychan Abraham** aptly noted the following principles enunciated by the Supreme Court in Johri Mal:-

"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 of** the State, an executive act of the State or an instrumentality or a person or authority imbued with public law element."

52. The Court thus comes to the definitive conclusion that the limited ground on which the action instituted by

the petitioner and the challenge to the impugned orders is liable to be tested is whether the same falls foul of the provisions of the various executive orders and directives issued from time to time. The Court holds that it is within this narrow confine alone that the impugned actions are liable to be tested. To put it in other words, the challenge to orders of termination or variation in the terms of engagement would have to be established and found to be in violation of a provision or stipulation contained in those executive orders or circulars issued by the respondents so as to warrant a writ being issued notwithstanding their employment being otherwise and principally governed by the terms of the individual contracts.

F. THE CHALLENGE ON MERITS

53. While the various orders issued from time to time by the respondents in connection with KGBV have been noticed in some detail in the preceding parts of this decision, it would be appropriate to briefly deal with the provisions made in those orders insofar as the issues of termination, non-renewal and variation of terms of engagement are concerned.

54. These orders issued either by the State or UPEFA deal with various facets of the engagement and appointment of teachers and staff in KGBV. These include subjects such as: -

(a) Staff Structure
(b) Scale of honorarium payable
(c) Curriculum
(d) Selection process of Wardens, Teachers and other staff members
(e) Essential Qualifications for appointment in KGBV
(f) Renewal of existing contracts
(g) Assessment of the quality of work discharged by existing staff
(h) Disengagement of existing staff based on performance appraisal

55. It would be apposite to firstly deal with the issue of disengagement of existing staff and termination of contracts. The Government Orders and the Circulars issued by UPEFA have consistently followed a process of performance appraisal from the inception of the scheme. That process which has essentially remained unchanged over the years is reiterated in the latest Circular of the State Project Director dated 4 January 2021. The Court consequently proposes to deal with the relevant clause as contained in the aforementioned Circular. Clause 8 of that Circular firstly notes that all contractual engagements are to be for a period of 11 months and 29 days. It then stipulates that the contracts of existing Wardens, teachers and other staff may be renewed provided their work and conduct is found to be satisfactory. The work of annually appraising the performance of existing staff is entrusted to the Block Development Officer. If the conduct of the teacher alongwith the educational progress of pupils be found satisfactory, the contract may be renewed subject to the approval of the District Magistrate.

56. Clause 8 then provides that if the services rendered by a teacher be found to be unsatisfactory, the assessing authority would provide adequate opportunity to that person to submit an explanation and upon consideration of the justification proffered frame a recommendation for the consideration of the District Magistrate. That leaves the District Magistrate to take further action on the question of renewal. Clause 8 then prescribes that each contract

will incorporate a clause to the effect that in case the services of any teacher or staff be found to be unsatisfactory, the contract would be terminable upon a notice of 1 month. It further provides that in cases where serious infractions or acts of misconduct or financial irregularities are noticed or found, it would be open to the competent authority to draw up a detailed recommendation for the consideration of the District Magistrate for termination of the contract. In addition, Clause 8 leaves it open to the authority to initiate criminal prosecution in that regard.

57. Having noticed the scheme of Clause 8 it becomes pertinent to note that significantly it neither contemplates nor puts in place an adjudicatory mechanism enabling teachers or staff members to assail or question a performance appraisal or a recommendation for non-renewal of a contract. It also does not oblige the District Magistrate to conduct proceedings in which a staff member may have an opportunity to question or assail a recommendation for disengagement or represent against the proposed consequential action that the District Magistrate may take. In the considered opinion of this Court the provisions made in Clause 8 requiring the assessing authorities to frame detailed proposals and recommendations in respect of disengagement and non-renewal only subserves the objective of eschewing arbitrariness and infusing the process with a degree of probity. Those provisions simply put in place a salutary check on the exercise of power by the respondents and ensuring that a degree of objectivity infuses the aforesaid process. However, the Court fails to discern any intent in Clause 8 of conferring a right on a staff member to question a decision to not renew a contract of employment during the decision making process except to the extent provided in that clause itself. If Clause 8 were to be read contrary to the above, it would amount to recognizing a right inhering in a contractual employee to compel an employer to renew and perpetuate a contract of personal service. Such a right has never been recognised under our jurisprudence relating to contractual engagement. It would additionally introduce the principle of enforcement of personal contracts of service which is otherwise impermissible in law. Ultimately Clause 8 proceeds essentially on the employer being satisfied that the work and conduct of the employee does not warrant a renewal of the contract. Such an interpretation would also be in line with the principles of loss of confidence as enunciated by the Supreme Court in **Kailash Singh Vs. Mayo College20.**

58. It also becomes relevant to note that the executive orders and circulars which came to be issued from inception provided for the appointment of full time and part time teachers for individual subjects. The subjects which are considered to be primary and compulsory were to be taught by full time teachers while secondary subjects were to be taught by part time teachers. In order to ensure that instructions in compulsory subjects were imparted by trained and qualified teachers, essential qualifications were prescribed accordingly. These qualifications have been duly spelt out in the Government Orders of 14 July 2020 and 11 December 2020. As these two orders would establish, full time teachers were to be engaged to teach the subjects of Maths, Science, Language (Hindi and Sanskrit), Social Studies and English. The subjects of Physical Education, Computers and Art/Craft/Music and Woodcraft (a consolidated subject)

were to be taught by part time teachers. The essential qualifications for teachers to be engaged to teach compulsory subjects required them to possess a Graduate Training qualification in the concerned stream together with a TET certificate recognised for upper primary classes. These orders further ordained that no separate teacher for a compulsory subject may be hired where the selection of a Warden had come to be made based on her credentials establishing her to be competent to impart instructions in that field. The subject of Home Science came to be merged in "Art/Craft/Music and Woodcraft" and persons who had been initially engaged as full-time teachers based on a qualification held in the subject of Home Science were to be adjusted accordingly.

59. A major review of the selections and appointments made in KGBV came to be undertaken pursuant to the issuance of the Government Order of 14 July 2020. Upon noticing the various irregularities which had sullied the selection and appointment process, the respondents initiated an in depth review and for placement of existing teachers based on the qualifications held by them. The Court fails to find that action to be tainted either by arbitrariness or any illegality. A teacher who otherwise does not possess the qualification prescribed for a full-time teacher and is ineligible to teach a compulsory subject cannot possibly assert a right to be retained full time. If the Court were to uphold such a claim or recognise such a right it would have a debilitating impact on the economics and effectiveness of a significant scheme formulated by the respondents aimed at providing educational opportunities of an appropriate standard and quality to the girl child. Additionally, the Court holds that assertion of claims like the present must be balanced against the paramount objective of providing qualitative education to girls. The right of employment as asserted by the petitioners if not subordinate must at least give way to the right of education conferred on the child under our Constitution.

60. In any case, the Court fails to recognise an inherent right in the petitioners to be continued as full time teachers even though their initial engagement was on the basis of their educational qualifications to teach a subject which is no longer earmarked or treated as a compulsory or primary topic. At the cost of repetition, it may be stated that the provisions made in the various Government Orders were never assailed or questioned before the Court as being constitutionally invalid. It is in light of the aforesaid conclusions that the individual writ petitions are taken up for consideration.

G. DECISION ON THE WRIT PETITIONS

61. The Court in light of the aforesaid conclusions thus proceeds to deal with the individual writ petitions.

(I) Writ A. No. 4845 of 2021

Undisputedly the petitioner was selected and appointed based on her being qualified to teach the subject of Home Science. That subject as noted above is no longer in the list of compulsory subjects and has been merged with Art, Music and Craft. In terms of the provisions made in the various executive orders and directives issued from time to time, the aforementioned subject is to be taught by a part time teacher. Although the contract of

the petitioner was initially renewed permitting her to teach Hindi, the same came to be terminated in light of the directive of the State Director dated 26 August 2020 restraining the continuance of teachers by permitting change in subject. Neither the aforesaid directive nor the primary policy documents of 14 July 2020 and 11 December 2020 are assailed by the petitioner. The Court does not find a semblance of a legal right inhering in the petitioner to compel the respondents to continue her as a Warden or full-time teacher. The action of the respondents is not shown to be in contravention of any provision made in the government orders and executive instructions issued from time to time. Acceptance of the submission as addressed on behalf of the petitioner would amount to the Court by way of a prerogative writ commanding the respondents to modify the terms of the contract and rewrite the policy decisions taken by them and that too at the behest of a petitioner whose engagement from its inception rested on a contract. The writ petition would thus **merit dismissal. Ordered accordingly.**

(II) Writ A No. 4882 of 2021

The respondents orally contended that the training qualification held by the petitioner is unrecognized. The petitioner has however placed on the record a document issued by the U.P. Secondary Education Services Selection Board which evidences that the aforesaid certificate is duly regonized. Additionally the Court notes that the petitioner had music as a subject at the graduation level. However the order impugned spells out no reason why the training qualifications held by the petitioner are not liable to be recognized.

In view of the aforesaid, this writ petition would have to be heard separately with the respondents explaining the reasons for non renewal of the contract of the petitioner. Consequently, let a counter affidavit be filed by the respondents within three weeks. List thereafter.

(III) Writ A. No. 4571 of 2021

This writ petition which again has been preferred by a teacher who was initially engaged by virtue of her qualification to teach Home Science, assails the action of the respondents downgrading her to the status of a part time teacher to impart instructions in the subject of Art, Music and Craft. For reasons aforenoted, this writ petition too stands dismissed.

(IV) Writ A No. 5728 of 2021

Admittedly the petitioner does not possess the O level certificate so as to be recognised as being qualified to teach the subject of Computers. Under the relevant orders, the subject of Computers was to be taught by a part time teacher. However and for reasons unknown, the petitioner was engaged and her contract renewed periodically as a full time teacher. For the aforesaid reasons, the writ petition must fail. It shall stand dismissed.

(V) Writ A. 5914 of 2021

The engagement of the petitioner as an Urdu teacher has been discontinued upon it being found that the population of minorities in the location is less than 20%. Although the petitioner relies upon a website extract appearing at page 25 of the paperbook to challenge the aforesaid, the

Court notes that no material or evidence in support of the authenticity of the data appearing therein has been placed on the record. Even the origins and the address of the web portal are not disclosed. The petitioner has also not challenge the prescription of Urdu teachers being engaged only in those areas where the population of minorities is at least 20%. In view of the above, the writ petition shall stand dismissed.

(VI) Writ A No. 6966 of 2021

Quite apart from the fact that the petitioner was engaged by an outsourcing agency and private entity, Sanjari Corporate Services, the Court finds no right inhering in the petitioner to command the respondents to renew his contractual engagement. The writ petition shall stand dismissed.

(VII) Writ A No. 8595 of 2021

The challenge to the appointment of the private respondent by the petitioner has been rejected by the respondents on the ground that the said respondent had a longer length of service rendered in the KGBV than the petitioner. For resolution of such competing claims the respondents have placed reliance on the provisions made in the executive orders and directions issued from time to time. The petitioner has not challenged the criteria as evolved and adopted by the respondents in this regard. Although it was contended that the fifth respondent was not qualified for the post, her Bachelor's Degree which stands appended at page 33 of the paperbook establishes that she obtained a B.A. degree with Hindi, Sanskrit, Sociology and Hindi Language as her subjects. The challenge on this score also consequently fails. The writ petition is dismissed.

(VIII) Writ A No. 6716 of 2021

The petitioner is aggrieved by the decision of the respondents to discontinue her engagement upon it being found that she did not have Urdu as a subject at the Graduation level. While the petitioner relies upon a government order of 5 September 2006, to contend that as long as she had Urdu as a subject in two out of the three examinations of High School, Intermediate and Graduation, the Court finds itself unable to accept that contention for the following reasons. Firstly that government order related to the appointment of teachers in primary schools established by the Basic Education Board and does not pertain to KGBV. Secondly the respondents have placed for the consideration of the Court the government order of 17 August 2013 which clearly stipulates that a candidate would be entitled to be appointed as an Urdu teacher provided she can establish that she had studied that subject at the graduation level. In view of the aforesaid, the Court finds no merit in the writ petition which shall stand dismissed.

(IX) Writ A No. 8587 of 2021

According to the respondents the petitioner was engaged to impart instructions in the subject Science. However, as her testimonials would establish, she was not qualified to either teach that subject or be engaged for the aforesaid purpose. The Court consequently finds no merit in the writ petition which shall stand **dismissed.**

62. The batch of writ petitions shall stand **disposed of** in the above terms except Writ-A No. 4882 of 2021.

(2021)09ILR A102
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.08.2021

BEFORE

THE HON'BLE YASHWANT VARMA, .J.

Writ A No. 5498 of 2021

Geetika Katiyar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Seemant Singh

Counsel for the Respondents:
C.S.C., Sri Ram Prakash Shukla, Sri Sanjay Kumar Singh

A. Service Law – GO dated 02.12.2019 – Transfer – Nature – Transfer cannot be claimed as a matter of right. (Para 5)

B. Service Law – Transfer – GO dated 02.12.2019 – Clause 15 – Facility of transfer is provided to the Assistant Teacher, whose spouse were 'currently serving' in the forces; facility is not provided to the employee not in service – Validity challenged – Held, members of the Forces are often called upon to discharge their duties in tense and stressful environments. Their families continue to go about their daily lives living in a state of constant uncertainty. Those families, thus, stand on a completely distinct footing from others – In any case, the aim of the policy as noted above clearly appears to be to provide some relief and comfort to the families of those who serve in the Forces – High Court did not found the restriction of that clause to those whose spouses are 'currently serving' either irrational or arbitrary. (Para 9)

C. Service Law – Estoppels –Binding effect – Validity of Clause 2(13) of GO dated 02.12.2019 could not be challenged when application of transfer was made, it could be challenged at later stage – Permissibility – Held, if the petitioner was of the view that Clause 2 (13) was invalid, she should have raised a challenge in that respect at the very outset and when the process was initiated – Held further, the petitioner cannot now turn around and assail those very conditions and restrictions subject to which she had applied for transfer in the first place. (Para 4)

Writ petition dismissed. (E-1)

Cases relied on :-

1. Smt Ruchi Vs St. of U.P.; 2018 (10) ADJ 161

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

1. Heard Sri Seemant Singh, learned counsel for the petitioner, Sri Birendra Pratap Singh, learned Standing Counsel for the State respondents and Ms. Archana Singh, who appeared for the contesting respondents.

2. This petition has been preferred seeking the following reliefs:

"**(a)** Issue a writ, order or direction in the nature of Certiorari calling for the records of the case and quashing the impugned Clause 2(13) of the Government Order dated 02.12.2019 issued by the Additional Chief Secretary, Government of U.P., Lucknow only to an extent that it only refers to exemption for getting transferred from the aspirational districts like Bahraich to District Kannauj insofar as it relates to the petitioner, whose spouse is serving in the Indian Army/ Air Force/ Navy/ Paramilitary Forces (CRPF/ CISF/ SSB/ Assam Riffles/ ITBP/ NSG/ BSF) and not to the petitioner whose husband has served in the Indian Army and died while being in

service of the Indian Army and the result of online inter-district transfer dated 01.01.2021 where the result is shown as not transferred due to aspirational district restriction as per Government Order dated 02.12.2019.

(b) Issue a writ, order or direction in the nature of Mandamus directing the respondents to consider the inter-district transfer relating to the petitioner on the post of Assistant Teacher in a primary school, from the district Baharaich to her desired district Kannauj by extending benefit of Clause 2(13) of the Government Order dated 02.12.2019 issued by the Additional Chief Secretary, Government of U.P., Lucknow which provides exemption to the Assistant Teachers whose spouse are working in the Indian Army/ Air Force/ Navy/ Paramilitary Forces (CRPF/ CISF/ SSB/ Assam Riffles/ ITBP/ NSG/ BSF)."

3. The petitioner is a widow whose husband served in the Armed Forces. He unfortunately died while serving in the Forces. The submission of Sri Singh was that Clause 2(13) insofar as it restricts consideration of requests for transfer to those whose spouses are serving members of the Armed Forces is arbitrary. As would be manifest from a reading of reliefs as framed, the petitioner essentially seeks the extension of Clause 2 (13) to even those cases where the spouse of the Assistant Teacher may have previously been in the Armed Forces.

4. It becomes pertinent to note that the petitioner admittedly applied for transfer in terms of the policy as framed by the respondents. She raised no challenge to the clause on grounds aforenoted prior to filing her application for transfer. If the petitioner was of the view that Clause 2 (13) was invalid, she should have raised a challenge in that respect at the very outset and when the process was initiated. In the considered view of the Court the petitioner cannot now turn around and assail those very conditions and restrictions subject to which she had applied for transfer in the first place.

5. As is manifest from a reading of the Government Order of 2 December 2019, transfer could not be claimed as a matter of right. The respondents formulated a policy in terms of which requests for transfer was to be considered based on points which were earmarked to cover varied eventualities. One of those clauses related to those Assistant Teachers whose spouse may be currently serving in the Forces. The petitioner was fully aware of the extent of the application of Clause 15 of the Government Order and was placed on notice that she would not be eligible to be assigned marks merely because her husband had prior to his demise been a member of the Forces. Yet she chose not to assail that stipulation at the first available opportunity. This circumstance weighs heavily against the petitioner.

6. Turning then to the legal challenge which is raised, it would be apposite to notice the legal position as it obtains under the 1981 Rules and the U.P. Teachers Posting Rules 2008. **In Smt Ruchi Vs. State of U.P.1** a learned Judge of the Court enunciated the position as under: -

19. It is settled law that transfer is not a right. As per Rule 4 of the Rules 1981, the service cadre of the petitioners is the local area of the respective district. Their appointing authority is the concerned District Basic Education Officer. In view of Rule 21 of the Rules 1981, the Assistant Teachers of basic schools run by the Board

cannot be transferred from rural local area to an urban local area or vice versa or from one urban local area to another of the same district or from local area of one district to that of another district except on the request of or with the consent of the teacher himself and in either case, approval of the Board shall be necessary. Rule 8(2)(d) of the Rules 2008 also does not confer any right for inter-district transfer. On the contrary it provides that in normal circumstances, the applications of inter-district transfers in respect of male and female teachers will not be entertained within five years of their posting. However, an exception has been provided in respect of female teachers that in special circumstances their applications for inter-district transfer would be entertained to the place of residence of their husband or in-laws' district. Rule 21 read with Rule 8(2)(d) of the Rules 1981 clearly indicates that teachers have no right for inter-district transfer.

28. In view of the above discussion, the question No. (b) is answered as under:

Petitioners do not have any right for transfer or a right for consideration of their application for transfer. Applications for inter-district transfer may be entertained by the competent authority only if such applications for inter-district transfer are within the four corners of the provisions of the Rule 21 of the Rules, 1981 read with Rule 8(2)(d) of the Rules, 2008 and the guidelines framed by the Board for transfer."

7. The aforesaid position stands reiterated in Clauses 9, 10 and 11 of the Government Order of 2 December 2019. The Court then proceeds to consider whether the challenge to Clause 2(13) is legally sustainable.

8. As is manifest from a reading of Clause 15 of the Government Order, the facility of transfer was provided to those Assistant Teachers whose spouses were *"currently serving"* in the Forces. Clause 15 reads thus:-

"(15) ऐसे अध्यापिकाएं/अध्यापक जिनके पति/पत्नी (spouse) भारतीय सेना/वायु सेना/नौ सेना अथवा अर्ध सैनिक बलों यथा, CRPF/CISF/SSB/ASSAM RIFLES/ITBP/NSG/BSF, में कार्यरत हैं और इस सम्बन्ध में सक्षम प्राधिकारी द्वारा प्रमाण पत्र निर्गत किया गया है, उन्हें उनके इच्छित जनपद/इच्छित ग्राम पंचायत में स्थानान्तरित किया जायेगा। प्रतिबन्ध यह है कि इस प्रावधान का लाभ मात्रा एक बार ही अनुमन्य होगा."

9. The reason and the underlying logic for restricting the application of Clause 15 to those whose spouses were "currently serving" is clearly obvious and discernible. The respondents essentially wanted to provide a ground for Assistant Teachers whose spouses were serving in the Forces to seek transfer on a preferential basis in order to consider their posting closer to their spouses or the family of their spouses. The provision so made clearly appeals to logic and good sense bearing in mind the unique situation in which such families are placed. The Court cannot possibly shut its eyes to the anxious and trying conditions in which such families carry on with their lives separated for long periods with the spouse on many occasions posted in remote, harsh and unfriendly locations. Regard must also be had to the fact that the members of the Forces are often called upon to discharge their duties in tense and stressful environments. Their families continue to go about their daily lives living in a state of constant

uncertainty. Those families, thus, stand on a completely distinct footing from others. In any case, the aim of the policy as noted above clearly appears to be to provide some relief and comfort to the families of those who serve in the Forces. The restriction of that clause to those whose spouses are "currently serving" thus cannot be said to be either irrational or arbitrary.

10. The Court also bears in mind that the policy makes adequate provision for a situation where one of the parent is physically challenged as well as in respect of families which are headed by a single parent thus clearly providing adequate avenues for the petitioner and other similarly situate teachers to have asserted their right to seek consideration. What the Court seeks to underline is that the policy as promulgated does provide for situations where teachers are single parents irrespective of whether their spouses are serving, retired or erstwhile members of the Forces. The policy similarly introduces sufficient provisions for situations where both parents are serving under the State. It is thus manifest that the policy does not operate arbitrarily or irrationally.

11. A challenge to a policy measure, it becomes relevant to note, must be evaluated bearing in mind the need for a certain degree of discretion and leeway being recognised to vest in the executive. A stipulation made therein would not merit interference unless it appears to be manifestly unjust or patently arbitrary. Courts while exercising their power of judicial review cannot take over the mantle of framing policy. That must necessarily be left to the executive. Courts are obliged to step in where there is either a failure on the part of the executive to discharge their constitutional functions and obligations or where it is found that a measure adopted by the State causes grave injustice or operates harshly from a constitutional standpoint. The challenge in the instant case fails to meet that well recognised threshold.

12. The writ petition consequently fails and shall stand dismissed.

(2021)09ILR A105
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.08.2021

BEFORE

THE HON'BLE YASHWANT VARMA, J.

Writ A No. 8312 of 2021

Suman ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vishal Shukla, Sri R.P. Mishra, Sri Arvind Kumar Tripathi

Counsel for the Respondents:
C.S.C., Sri Akhilesh Chandra Srivastava

A. Constitution of India – Article 341 and 342 – OBC List and Scheduled Caste list – Nature and its extent – List of backward classes is maintained by States of the Union individually. It is not akin to lists of Scheduled Castes or Tribes which are notified by a Presidential Order promulgated in terms of the provisions made in Articles 341 and 342 of the Constitution. (Para 8)

B. Service law – Constitution of India – Article 16 – Reservation – Marriage in another State – OBC certificate issued by the State, where birth took place – It's non-acceptance by the State, where the woman married – Validity – Held, benefits of reservation cannot be obtained by virtue of marriage – Caste as is well

settled is determined by birth. The identification of a person as belonging to a particular caste or social class has an unbroken and undeviating connect with the family of the individual – A certificate issued by an authority in Rajasthan was rightly not accepted by the respondents as certifying the petitioner as belonging to a backward class recognised by the State of U.P. (Para 9, 10 and 11)

Writ petition dismissed. (E-1)

Cases relied on :-

1. Vipin Kumar Maurya & 4 ors. Vs St.of U.P. & 3 ors. 2019 (2) ADJ 133

2. Gaurav Sharma Vs St. of U.P.; 2017 (5) ADJ 494 (FB)

3. Sobha Hymavathi Devi Vs Setti Gangadhara Swamy (2005) 2 SCC 244

4. Sunita Singh Vs St.of U.P; (2018) 2 SCC 493

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

1. Heard learned counsel for the petitioner, Sri Birendra Pratap Singh, learned Standing Counsel and Ms. Archana Singh, learned Additional Chief Standing Counsel appearing for the Basic Education Officer.

2. This petition has been preferred seeking the following relief:-

"i) Issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 09.012021 passed by respondent no.4 (Basic Education Officer, Hathras) as contained in Annexure no.1 to this writ petition.

ii) Issue a writ, order or direction in the nature of certiorari quashing the Govt. Order No.1656/68-5-2020 Basic Shiksha Anubhag-5, Lucknow dated 04.12.2020 (Copy of which is not available to the petitioner)

iii) Issue a writ order or direction in the nature of mandamus directing commanding the respondents to appoint the petitioner on the post of Assistant Teacher in pursuance of advertisement dated 05.12.2018 being "Sahayak Adhyapak Bharti Pariksha-2019"."

3. The petitioner had appeared in a recruitment exercise initiated by the respondents for appointment of Assistant Teachers. She claimed the benefits of reservation by virtue of belonging to the OBC category. By the impugned order however her candidature has been rejected with the respondent noting that the petitioner had furnished an OBC certificate which bore the name of her husband and not the father. Additionally, it was noted that the OBC certificate which carried the name of her father had been issued by an authority in the State of Rajasthan and thus was not liable to be accepted. The respondents ultimately referring to the provisions made in a Government Order of 04 December 2020, have consequently held that the petitioner cannot be offered appointment.

4. Learned counsel for the petitioner assailing the aforesaid decision places reliance upon a judgment rendered by a learned Judge in **Vipin Kumar Maurya and 4 others Vs. State of U.P. and 3 others1** to submit that merely because the petitioner originally hailed from Rajasthan and subsequently married in Uttar Pradesh, she could not be denied benefits of reservation as otherwise provided to OBC candidates. It was then contended that the Government Order of 04 December 2020 cannot be said to apply since it admittedly came to be issued not just after the initiation of the recruitment process but after the counseling process had come to an

end. Learned counsel then placed reliance upon the certificate dated 15 March 2004 issued by the Tehsildar, Bharatpur, Rajasthan to contend that the aforesaid certificate which bore the name of her father clearly qualified as being in sufficient compliance with the conditions which were imposed under the recruitment notification. It was lastly contended by learned counsel that even if her candidature under the OBC category came to be denied on grounds noted above, it was incumbent upon the respondents to consider her candidature in the General category.

5. The Court finds itself unable to sustain the aforenoted submissions for the following reasons.

6. Firstly, **Vipin Kumar Maurya** was a decision which dealt with the issue of whether a woman from outside the State of U.P. could be excluded from a recruitment exercise initiated by the State. The learned Judge on the basis of the submissions which were addressed, proceeded to record his conclusions in paragraph 58 in the following terms: -

" 58. In our constitutional scheme women of this country are otherwise a homogeneous lot and they cannot be differentiated unless reasons and materials exists for their further classification. Classification based only on residence would otherwise be permitted only by law made by the Parliament, which is not the case here. In such circumstances and for the reasons disclosed, it is held that Clause (4) of the Government Order dated 9.1.2007 restricting grant of horizontal reservation only to the women who are original residents of Uttar Pradesh as also specific stipulations in that regard, contained in Advertisement No. 14 of 2015 would be contrary to Articles 16(2) and 16(3) of the Constitution of India."

7. It is thus manifest that **Vipin Kumar Maurya** strictly speaking was not dealing with the question which arises in the instant petition namely of whether a caste certificate bearing the name of the husband of a candidate can be considered as valid for the purposes of certifying the holder thereof as belonging to the OBC category. The aforesaid decision principally dealt with the constitutional validity of the restriction imposed by the respondents excluding women from outside the State of U.P. from participating in the recruitment exercise. As noted hereinabove, the candidature of the petitioner here has not been rejected on the ground that she originally hailed from Rajasthan. The application has been refused solely on the basis of her failure to furnish a caste certificate compliant with the requirements placed under the advertisement.

8. That then takes the Court to evaluate the claim of the petitioner based on the certificate issued by the revenue authority in the State of Rajasthan. It is by now well settled, that the list of backward classes is maintained by States of our Union individually. It is not akin to lists of Scheduled Castes or Tribes which are notified by a Presidential Order promulgated in terms of the provisions made in Articles 341 and 342 of the Constitution. It is also not the case of parties that Article 342 A of the Constitution applied to the recruitment in question. Dealing with the requirement of members of the OBC being obliged to produce a certificate issued by the appropriate State governments in matters of recruitment, the Full Bench of the Court in Gaurav Sharma Vs. State of U.P.2 held: -

13. Before we proceed to rule upon the questions framed for our consideration, it would be apposite to bear in mind certain basic precepts. While a Scheduled Caste or a Scheduled Tribe comes to be identified and declared as such by virtue of the constitutional orders promulgated by Parliament in terms of Articles 341 and 342 of the Constitution, the classification of OBC's is a subject which is left in the province of individual State Governments. While a Scheduled Caste or a Scheduled Tribe may also be mentioned and identified under the constitutional orders with reference to a particular State, it is settled law that the States can neither expand nor modify any entry appearing in the two constitutional orders nor can they by an executive or administrative order expand upon or read something into an entry which appears in the orders promulgated under Articles 341 and 342. OBC's however are identified and recognized by individual States with reference to the backwardness of a particular caste, class or group in that particular State. Therefore, it logically follows that a list of OBC's which is prepared by a particular State cannot have an over arching or pan-India operation or effect. Castes which come to be included in a list of OBC's prepared by a State have to be necessarily read to mean OBC's in that particular State alone. The OBC's specified in Schedule-I to the 1994 Act is, therefore, a list of castes/communities which are conferred the status of an OBC in the State of U.P. alone. This issue does not brook any debate. However, it is useful to refer to the following observations which appear in the judgment of the Supreme Court in M.C.D. v. Veena6:

"Castes or groups are specified in relation to a given State or Union Territory, which zobviously means that such caste would include caste belonging to an OBC group in relation to that State or Union Territory for which it is specified. The matters that are to be taken into consideration for specifying a particular caste in a particular group belonging to OBCs would depend on the nature and extent of disadvantages and social hardships suffered by that caste or group in that State.

However, it may not be so in another State to which a person belongs thereto goes by migration. It may also be that a caste belonging to the same nomenclature is specified in two States but the considerations on the basis of which they been specified may be totally different. So the degree of disadvantages of various elements which constitute the data for specification may also be entirely different. Thus, merely because a given caste is specified in one State as belonging to OBCs does not necessarily mean that if there be another group belonging to the same nomenclature in other State and a person belonging to that group is entitled to the rights, privileges and benefits admissible to the members of that caste. These aspects have to be borne in mind in interpreting the provisions of the Constitution with reference to application of reservation to OBCs.

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A careful reading of this notification would indicate that the OBCs would be recognised as such in the Government of National Capital Territory of Delhi as notified in the Notification dated 20.01.1995 and further for the purpose of verification of claims for belonging to castes/communities in Delhi as per the list notified by the National Capital Territory of Delhi the certificates will have to be issued only by the specified

authorities and certificates issues by any other authority could not be accepted. The Government of India has also issued instructions from time to time in this regard which indicated that a person belonging to OBC on migration from the State of his origin in another State where his caste was not in the OBC list was entitled to the benefits or concessions admissible to the OBCs in his State of origin and Union Government, but not in the Sate to which he has migrated. Thus the High Court lost sight of these aspects of the matter in making the impugned order in either ignoring the necessary notifications issued in regard to classification of OBC categories or in the matter of verification thereof. Thus the order made by the High Court in this regard deserves to be reversed."

9. In view of the aforesaid, this Court is of the opinion that a certificate issued by an authority in Rajasthan was rightly not accepted by the respondents as certifying the petitioner as belonging to a backward class recognised by the State of U.P.

10. Insofar as the OBC certificate bearing the name of the husband of the petitioner is concerned, the Court finds that the stipulation of the caste certificate bearing the name of a parent serves a salutary and significant purpose. Caste as is well settled is determined by birth. The identification of a person as belonging to a particular caste or social class has an unbroken and undeviating connect with the family of the individual. The candidate must therefore necessarily establish that he or she was born into a family which belongs to a backward class duly recognised as such by the appropriate government. A certificate bearing the name of the parent thus serves the purposes of enabling the respondents to ascertain and verify the actual caste of the holder thereof as existing at the time of birth.

11. While it is well settled that benefits of reservation cannot be obtained by virtue of marriage, the Court may only extract the following passage from the decision of the Supreme Court in **Sobha Hymavathi Devi v. Setti Gangadhara Swamy3:-**

"10. What then remains is the fact that the appellant though assigned the caste of her father Murahari Rao, namely, the Sistu Karnam community, had married a tribal belonging to the Bhagatha community. On the basis of this marriage, it is argued that she must be taken to have acquired membership in the community of her husband and consequently treated as a member of that community. It is in that context that the decision in Horo [(1972) 1 SCC 771 : AIR 1972 SC 1840] was relied on. It is also contended that the decision in *Horo* [(1972) 1 SCC 771 : AIR 1972 SC 1840] related to an election dispute and consequently, the ratio of that decision should govern the present case. We have already indicated that there is nothing to show that the marriage of the appellant with Appala Raju was sanctioned or approved by the elders of the Bhagatha community or the Panchayat concerned or was in tribal form or that the formalities attending such a tribal marriage were observed and the marriage was performed after obtaining the approval of the elders of the tribe. Even otherwise, we have difficulty in accepting the position that a non-tribal who marries a tribal could claim to contest a seat reserved for tribals. Article 332 of the Constitution speaks of reservation of seats for Scheduled Tribes in Legislative Assemblies. The object is clearly to give representation in the legislature to Scheduled Tribe candidates,

considered to be deserving of such special protection. To permit a non-tribal under cover of a marriage to contest such a seat would tend to defeat the very object of such a reservation. The decision of this Court in Valsamma Paul v. Cochin University [(1996) 3 SCC 545 : 1996 SCC (L&S) 772 : (1996) 33 ATC 713] supports this view. Neither the fact that a non-backward female married a backward male nor the fact that she was recognised by the community thereafter as a member of the backward community, was held to enable a non-backward to claim reservation in terms of Article 15(4) or 16(4) of the Constitution. Their Lordships after noticing *Bhoobum Moyee Debia v. Ram Kishore Acharj Chowdhry* [(1865) 10 MIA 279] and *Lulloobhoy Bappoobhoy Cassidass Moolchund v. Cassibai* [(1879-80) 7 IA 212 : ILR 5 Bom 110] held that a woman on marriage becomes a member of the family of her husband and thereby she becomes a member of the caste to which she has moved. The caste rigidity breaks down and would stand as no impediment to her becoming a member of the family to which the husband belongs and to which she gets herself transplanted. Thereafter, this Court noticed that recognition by the community was also important. Even then, this Court categorically laid down that the recognition of a lady as a member of a backward community in view of her marriage would not be relevant for the purpose of entitlement to reservation under Article 16(4) of the Constitution for the reason that she as a member of the forward caste, had an advantageous start in life and a marriage with a male belonging to a backward class would not entitle her to the facility of reservation given to a backward community. The High Court has applied this decision to a seat reserved in an election in terms of Article 332 of the Constitution. We see no reason why the principle relating to reservation under Articles 15(4) and 16(4) laid down by this Court should not be extended to the constitutional reservation of a seat for a Scheduled Tribe in the House of the People or under Article 332 in the Legislative Assembly....."

12. Reiterating the aforesaid position in law in **Sunita Singh v. State of U.P4.**, the Supreme Court succinctly observed: -

5. There cannot be any dispute that the caste is determined by birth and the caste cannot be changed by marriage with a person of Scheduled Caste. Undoubtedly, the appellant was born in "Agarwal" family, which falls in general category and not in Scheduled Caste. Merely because her husband is belonging to a Scheduled Caste category, the appellant should not have been issued with a caste certificate showing her caste as Scheduled Caste. In that regard, the orders of the authorities as well as the judgment of the High Court cannot be faulted.

13. Regard must be had to the fact that in **Sunita Singh**, the Supreme Court was dealing with a caste certificate which came to be issued based on the caste of the husband. It was in the aforesaid backdrop that it held that the caste certificate was invalid. It is thus evident that it was to avoid such situations and claims that the respondents insisted upon the caste certificate bearing the name of the parent of the candidate. The aforesaid stipulation has neither been challenged by the petitioner nor can it be described as being arbitrary or superfluous.

14. The Court additionally shudders to imagine the enormous burden that would stand placed upon a recruiting body before whom caste certificates such as the one produced by the petitioner here were placed in support of claims for extension of

reservation benefits. In all such cases, the recruiting agency would then have to independently verify the family origins of each such candidate in order to ascertain whether the individual was born in a social class to which benefits under Article 16 of the Constitution stand conferred. Ms. Archana Singh, learned counsel, apprises the Court that the present recruitment was undertaken to fill up 69,000 posts of Assistant Teachers. Learned counsel informs the Court that 146060 candidates participated in the selection process. The facts as noticed above underscore the enormity of the avoidable and unnecessary obligation which would stand placed on the recruitment agency. In fact, placing such an onus on the recruiting body may also have a deleterious effect on the paramount requirement of completing a selection process connected with appointment to public posts within a defined timeline. The Court in view of the aforesaid facts is of the considered view that there is no justification for such an additional responsibility being legally foisted upon the respondents.

15. The challenge to the Government Order of 4 December 2020 on grounds as urged by learned counsel, pales into insignificance in light of what has been held and in any case cannot be viewed as imposing a burden or otherwise ushering in a position which would be either legally unsustainable or one which could not have been recognised to exist irrespective of its promulgation.

16. Insofar as the submission of learned counsel with respect to the candidature of the petitioner being considered under the General category is concerned, the Court notes that no foundation in support of the aforesaid submission stands laid in the writ petition. The petitioner has not disclosed the qualifying marks which were obtained by the last admitted candidate under the General category to enable the Court to ascertain whether she could have claimed an appointment without the benefits of reservation being extended to her.

17. The writ petition consequently fails and shall stand **dismissed.**

(2021)09ILR A111
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.09.2021

BEFORE

THE HON'BLE SALIL KUMAR RAI, J.

Writ A No. 12623 of 2020

Pragati Dwivedi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rakesh Pandey

Counsel for the Respondents:
C.S.C., Sri Bajrang Bahadur Singh, Sri Krishna Kumar Chand, Sri Satya Prakash Singh

A. Service Law – UP Intermediate Education Act, 1921 – Ch. II Reg. 1 – Appointment – Post of Lecturer in Music (Instrument) – Selection held by the Board, however, the Management contended that the said post is for Music (Instrument-Tabla) – Under the statute, an institution would be recognized by the Education Board for teaching in Music (Vocal) and Music (Instrument) and not for teaching a particular musical instrument or a particular branch of vocal or instrumental music – The institution was granted recognition by the Education

Board for teaching in Music (Instrument) and was not recognized for teaching a particular musical instrument – Held, the petitioner being a post-graduate in Music (Instrument) was eligible for being considered for appointment as teacher in Music (Instrument) in the Institution and after being so selected is entitled to be issued an appointment letter by the Management of the Institution on the post vacant in the Institution. (Para 17, 18 and 22)

B. Interpretation of statute – Duty of court – Sanctity of legislation – The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the Courts. The Court cannot add words to a statute or read words into it which are not there – Assuming there is a defect or an omission in the words used by the legislature the Court could not go to its aid to correct or make up the deficiency. (Para 17)

Writ petition allowed. (E-1)

Cases relied on :-

1. U.O.I. & anr. Vs Deoki Nandan Aggarwal, A.I.R.; 1992 Supreme Court 96

2. Sangeeta Singh Vs U.O.I. & ors. (2005) 7 SCC 484

3. Dr. Chetkar Jha Vs Dr. Vishwanath Prasad Verma & anr.1970 (2) SCC 217

(Delivered by Hon'ble Salil Kumar Rai, J.)

1. The facts of the case are that Shanta Smarak Kanya Inter College, Meerut (hereinafter referred to as, 'Institution') is an 'institution' as defined in Section 2(b) of the Uttar Pradesh Intermediate Education Act, 1921 (hereinafter referred to as, 'Act, 1921') and receives maintenance grant from the State Government. The Institution is governed by the Act, 1921 and the Regulations framed thereunder. Selections to the post of Lecturers in recognized and aided institutions are held by the Uttar Pradesh Education Services Selection Board, Prayagraj (hereinafter referred to as, 'Board'). The procedure for selection of Lecturers is prescribed in Uttar Pradesh Secondary Education Services Selection Board Rules, 1998 (hereinafter referred to as, 'Rules, 1998'). Under Section 16(E) of the Act, 1921 the Committee of Management of a recognized institution is the appointing authority of the Teachers of the institution but under the Rules 1998, the Committee of Management of the institution is liable to issue an appointment letter to any candidate selected for appointment and allocated the institution by the Board.

2. Smt. Krishna Sharma and Smt. Shashi Maratha, Lecturers in the institution retired on 30.6.2012. It has been stated in the counter affidavit filed by the Manager of the Committee of Management of the institution, i.e., the respondent No. 5, that the post held by Smt. Krishna Sharma was of Lecturer in Music (Instrument-Tabla) while the post held by Smt. Shashi Maratha was of Lecturer in Music (Instrument-Sitar) and they were teaching the said subjects. After the retirement of the aforesaid teachers, the Committee of Management of the institution sent a requisition to the Board notifying the vacancies and the requisition form specified that of the two posts of Lecturer which were vacant in the institution, one post was of Lecturer in Music (Instrument-Tabla) and the other post was of Lecturer in Music (Instrument-Sitar).

3. In 2016, the Board issued Advertisement No.2/2016 inviting

applications for appointment on vacant posts of Lecturers which included the abovementioned two posts of Lecturers in the Institution. It is admitted by the parties that the aforesaid posts were reserved for women and the vacancies in the institution were advertised as Lecturer in Music (Instrument) (Female Category) and the advertisement did not specify any sub-category in the aforesaid subject. In other words, the advertisement did not indicate that of the two posts advertised one was of Lecturer in Music (Instrument-Sitar) and the other was of Lecturer in Music (Instrument-Tabla).

4. It has been stated in the writ petition that the petitioner is a Post Graduate (M.A.) in Music (Instrument-Sitar). In response to the Advertisement No. 2/2016, the petitioner also filed her application to be considered for appointment as Lecturer (Female Category) in the subject Music (Instrument) and was selected by the Board for appointment as Lecturer in Music-Instrument. In the panel of selected candidates prepared by the Board under Rule 12(8) of the Rules, 1998 for appointment as Lecturers in Music (Instrument), one Smt. Rinki Singh was placed at Serial No.1 while the petitioner was placed at Serial No. 3, in order of merit. Both, the petitioner and Smt. Rinki Singh, were allocated the Institution for appointment as Lecturers in Music (Instrument) and an intimation for the said purpose was sent to the Institution by the District Inspector of Schools-II, Meerut (hereinafter referred to as, 'D.I.O.S'). The intimation regarding the petitioner was sent through letter dated 31.7.2020 of the D.I.O.S. On 18.8.2020, the management of the institution issued an appointment letter to Smt. Rinki Singh appointing her as Lecturer in Music (Instrument-Sitar) in the Institution. However, the Committee of Management of the Institution refused to issue an appointment letter to the petitioner on the ground that after Smt. Rinki Singh joined as Lecturer in Music (Instrument-Sitar) no post of Lecturer in Music (Instrument-Sitar) was vacant in the Institution and the other vacant post was of Lecturer in Music (Instrument-Tabla) and because the petitioner was not a post graduate in Music (Instrument-Tabla) but a post graduate in Music (Instrument-Sitar), she was not qualified for appointment on the other vacant post of Lecturer in the Institution. When the petitioner came to know about the aforesaid developments, she submitted a representation to the Chairman of the Board requesting that, in light of Rule 13(5) of the Rules, 1998, she be allocated any other Institution. The Board has not yet taken any action on the aforesaid representation of the petitioner and therefore the present writ petition has been filed by the petitioner praying for a writ of mandamus commanding the Manager of the Institution to issue an appointment letter in favour of the petitioner for the post of Lecturer (Female Category) in Music (Instrument) and, in the alternative, a writ in the nature of mandamus commanding the Board and the Chairman of the Board to allocate any other Institution to the petitioner pursuant to her selection for the post of Post Graduate Teacher - Lecturer (Female Category) in Music (Instrument) against Advertisement No. 2/2016.

5. The Institution has filed a counter affidavit opposing the prayer of the petitioner. In paragraph No. 4 of its counter affidavit, the Manager of the Committee of Management of the Institution (respondent No. 5) has stated that by letter dated 13.8.1969 two posts of teachers in Music

were sanctioned in the Institution. The letter dated 13.8.1969 has not been annexed with the counter affidavit. From the tenor of the averments made in paragraph No. 4 of the counter affidavit, it appears that of the two posts sanctioned through letter dated 13.8.1969 one post was for Music (Vocal) and the other post was for Music (Instrumental). Through its counter affidavit the respondent No. 5 has brought on record the letter dated 24.2.1987 issued by the Regional Secretary of the Board of High School and Intermediate Examinations (hereinafter referred to as, 'Education Board'), Regional Office, Meerut which shows that the Institution was recognized by the Board for imparting education at High School and Intermediate level. At the High School level, it was recognized, amongst other, for teaching in Music while at the Intermediate level, it was recognized for teaching in, amongst other subjects, in Music (Vocal) and Music (Instrumental). It has been further stated in paragraph No. 4 of the counter affidavit that vide letter dated 20.6.2005 one post of Music (Instrument-Sitar) in L.T. Grade was upgraded to Lecturer Grade. The letter dated 20.6.2005 has been annexed as Annexure No. 5 to the counter affidavit. It has been further stated in the counter affidavit that Smt. Krishna Sharma who was working on the post of Lecturer in Music (Instrument-Sitar) and Smt. Shashi Maratha, who was working as Lecturer in Music (Instrument-Tabla) in the Institution retired on 30.6.2012 and consequently a requisition, as noted earlier, was sent to the Board. In its counter affidavit, the respondent No. 5 has also brought on record the number of students, who had opted for Music (Instrument) in the Institution indicating that more students had opted for Music (Instrument-Tabla) than Music (Instrument-Sitar) as their optional subject. It has been averred by the Institution in paragraph No. 4 of the counter affidavit that three posts of Lecturer in Music were sanctioned in the Institution out of which one post was for Music (Vocal), one post was of Lecturer in Music (Instrument-Sitar) and one post was of Lecturer in Music (Instrument-Tabla). On the aforesaid facts, the respondent No. 5 pleads that because Smt. Rinki Singh, who was at serial no. 1 in the panel of selected candidates, had already joined as Lecturer in Music (Instrument-Sitar) therefore no vacant post of Lecturer in Music (Instrument-Sitar) was available in the Institution and the other vacant post in the Institution was of Lecturer in Music (Instrument-Tabla) but because the petitioner was not a post-graduate in Music (Instrument-Tabla) but a post-graduate in Music (Instrument-Sitar) she was not qualified to be appointed as Lecturer on the other vacant post and no appointment letter can be issued to her for appointment as Lecturer in the Institution. On the aforesaid ground, the respondent No. 5 has prayed that the writ petition be dismissed.

6. The Board, the Chairman of the Board and the D.I.O.S., arrayed as respondent Nos. 2, 3, and 4 respectively in the writ petition, have also filed their counter affidavits in which they have admitted that the vacancies in the Institution were advertised for appointment as Lecturer in Music (Instrument) and the advertisement did not specify that of the two vacancies advertised, one was of Lecturer in Music (Instrument-Sitar)and the other was of Lecturer in Music (Instrument-Tabla). In their counter affidavits, the respondent Nos. 2, 3 and 4 have not denied the qualification of the petitioner as stated by her in the petition. However, the counter affidavits of

respondent nos. 2, 3 and 4 are silent on the nature of the two posts in the Institution which were advertised through Advertisement No. 2 of 2016.

7. The counsel for the petitioner has argued that the Regulations framed under the Act, 1921 prescribe only Music (Vocal) and Music (Instrument) as optional subjects to be taught in any recognized institution and no sub-category of the said subjects have been prescribed as separate optional subjects to be taught in any recognized institution. It was argued that the stand of the management of the Institution that, of the two posts of Lecturer in Music Instrument in the Institution, one post was of Lecturer in Music (Instrument-Tabla) and the other was of Lecturer in Music (Instrument-Sitar) is an artificial sub-division of the prescribed subjects and the said sub-division is not supported by the Act, 1921 or the Regulations framed thereunder. It was further argued that Appendix 'A' to the Regulations prescribes only post-graduation in Music as the minimum qualification for appointment as lecturer in Music and does not prescribe a degree in a specific branch of Music as a requisite qualification for appointment as a Lecturer in Music. It has been further argued that the vacancies notified by the Board through Advertisement No. 2/2016 were for appointment as Lecturer in Music (Instrument) and not as Lecturer in either Music (Instrument-Sitar) or in Music (Instrument-Tabla) and the petitioner being a post-graduate in Music (Instrument) was therefore qualified to be appointed as Lecturer in Music (Instrument) and because she has been selected by the Board for such appointment and allocated the Institution, therefore, the Committee of management of the Institution is liable to issue an appointment letter to the petitioner and a mandamus for the said purpose is to be issued to the respondents. It was further pleaded by the counsel for the petitioner that, in any case, as the petitioner has been selected by the Board for appointment as Lecturer in Music (Instrument) and, if in the facts of the case the Court holds that the petitioner is not entitled to be appointed on the other vacant post in the Institution, the respondent Nos. 2 and 3 are liable to allocate any other Institution to the petitioner under Rule 13(5) of the Rules, 1998 and therefore a mandamus for the said purpose may be issued to respondent Nos. 2 and 3, i.e., Board and its Chairman.

8. Rebutting the argument of the counsel for the petitioner, the counsel for respondent No. 5 has repeated the stand taken by the Committee of Management in its counter affidavit and has argued that the Board has wrongly allocated two candidates having the same qualifications, i.e., post graduation in Music (Instrument-Sitar) for appointment against one post of Lecturer in Music (Instrument-Sitar) in the institution and, in the facts of the case, the institution is not liable to issue an appointment letter to the petitioner for appointment as Lecturer in Music (Instrument-Sitar). It was argued that in view of the aforesaid, the writ petition so far as it prays for a mandamus to the Institution and for a mandamus to the respondent Nos. 2 to 4 to ensure that the petitioner be allowed to join as Lecturer in Music (Instrument-Sitar) in the Institution, is liable to be dismissed.

9. I have considered the submissions of the counsel for the parties.

10. It is the admitted case of the parties that the Institution is a recognized institution as defined in Section 2(d) of the

Act, 1921 and is governed by the Act and the Regulations made thereunder. The qualification of the petitioner as M.A. in Music (Instrument-Sitar) is also not denied by the respondents. It is also admitted by the Board that Advertisement No. 2/2016 was issued notifying two vacancies of Lecturer in Music (Instrument) (Female Category) in the Institution and the advertisement did not specify that the posts notified were for teaching any particular musical instrument. The panel of the selected candidates prepared by the Board under Rule 12(8) of the Rules, 1998 which has been annexed as Annexure No. 3 to the writ petition and has not been denied by the respondents also shows that the selections were made by the Board for appointment as Lecturer in Music (Instrument) in different recognized institutions.

11. The records annexed with the counter affidavit filed by the management of the Institution do not show that of the two posts of Lecturer vacant in the Institution and advertised by the Board, one post was of Lecturer in Music (Instrument-Sitar) and the other post was of Lecturer in Music (Instrument-Tabla). There is nothing on record to show that the post of Teacher in L.T. Grade in Music (Instrument) in the Institution, which was ultimately upgraded by order dated 20.6.2005 to Lecturer Grade, was for teaching in Music (Instrument-Sitar). The letter/order dated 20.6.2005 of the D.I.O.S. only indicates that the post held by Smt. Shashi Maratha had been upgraded to the Lecturer Grade. Further, the documents annexed with the counter affidavit of the management of the Institution also do not show that Smt. Krishna Sharma was working on a post of Lecturer of Music (Instrument-Tabla). The letter dated 24.2.1987 issued by the Regional Secretary of the Education Board only indicates that the Institution was recognized for teaching in Music (Vocal and Instrument) and it does not indicate that the posts sanctioned in the Institution to teach Music (Instrument) or Music (Vocal) were sub-divided either into different branches of vocal and instrumental music or were for teaching specific musical instrument.

12. The issue before this Court is as to whether the fact that Smt. Krishna Sharma and Smt. Shashi Maratha were, in actuality, teaching two different musical instruments in the Institution and the requisition sent by the Institution to the Board specified that of the two vacant posts of Lecturer in the Institution, one post was of Lecturer in Music (Instrument-Sitar) and the other post was of Lecturer in Music (Instrument-Tabla) are relevant to decide the nature of posts sanctioned in the Institution and the nature of vacancies advertised by the Board through its Advertisement No. 2/2016 and consequently the right of the petitioner to be issued an appointment letter for appointment as Lecturer on the other post-vacant in the Institution.

13. Under Section 2(d) of the Act, 1921 a recognized Institution means an institution recognized for the purpose of preparing the candidates for admission to the examinations conducted by the Education Board. Under Sections 7(3) to 7(5) of the Act, 1921 the Education Board has the power to conduct examinations at the end of High School and Intermediate Courses, to recognize institutions for the purposes of its examinations and to admit candidates to its examinations. Under Section 7(1) of the Act, 1921 the Education Board has the power to prescribe courses of instructions for High School and Intermediate classes in such branches of

education as it thinks fit. Section 15(1) of the Act, 1921 authorizes the Education Board to frame Regulations for the purposes of carrying into effect the purpose of Act, 1921. Section 15(2) of the Act, 1921 empowers the Education Board to make Regulations providing for the courses of study to be laid down for all certificates and diplomas, the conferment of diplomas and certificates, the conditions of recognition of institutions for the purpose of its examinations and all matters which by the Act, 1921 are to be or may be provided for by the Regulations.

14. Chapter XI of the Regulations framed under the Act, 1921 provides that the Education Board shall conduct High School Examination, Intermediate Examination and Intermediate Vocational Educational Examination. Regulation 15 of Chapter VII of the Regulations prescribes that an institution shall hold classes and admit students only in subjects for which the institution has been given recognition by the Education Board. Regulation 16 of Chapter VII of the Regulations further provides that if students are admitted in any institution for a course not recognized by the Board the concerned institution may be subjected to penal action.

15. Apparently, the Education Board shall conduct examinations only in courses of study prescribed by it and the subjects specified in the Regulations. Further, under Sections 2(d) and 7(4) of the Act, 1921 an institution is granted recognition by the Education Board for purposes of its examinations and to prepare candidates for admission to the Board's examinations. Evidently, the recognition given by the Education Board to the institutions is only regarding the subjects specified in the Regulations.

16. Chapters XIII, XIV and XIV(A) of the Regulations specify the different subjects/courses for instructions. The Regulations mention only Music (Vocal) and Music (Instrument) as optional subjects for High School, Intermediate and Intermediate Vocational Education examinations and do not sub-divide the two subjects on the basis of genre or different musical instruments. In other words, the Regulations do not prescribe as separate subjects, courses in different genres of music or in different musical instruments. Any reading of the Regulations by specifying the genres of music or musical instrument would amount to adding words in the particular entry in the Regulations. Any such reading of the entries would result in changing the nature of entry and prescribing a different subject of study, a subject not prescribed by the Education Board and the Regulations. There is nothing in the Act, 1921 or the Regulations which could lead to an inference that the Education Board had intended to prescribe teaching of different musical instruments or of different branches of Music as different subjects. The certificate or degree conferred by the Board would also indicate that the candidate was admitted by the Education Board and passed its examinations in Music (Vocal) or Music (Instrument) and would not reflect that the candidate had studied any specific branch of Music or gained proficiency in any particular musical instrument. The Regulations framed by the Education Board are delegated legislations and, therefore, the omission in Chapters XIII, XIV and XIV-A of the Regulations in not indicating the different branches or genres of music or differqent musical instruments in the relevant entries can be, at the most, a **casus-omissus** which can not be supplied either by this Court through interpretation

or by the Education Board through executive order or by any recognized institution.

17. In ***Union of India & Another Vs. Deoki Nandan Aggarwal, A.I.R. 1992 Supreme Court 96,*** the Supreme Court observed, "that ***it is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous.*** *The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the Courts.* ***The Court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature the Court could not go to its aid to correct or make up the deficiency."*** Similarly in ***Sangeeta Singh Vs. union of India & Others, (2005) 7 SCC 484,*** the Supreme Court held that the Courts, cannot aid the Legislatures' defective phrasing of an Act, and cannot add or mend, and by construction make up deficiencies which are left there and it would be contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so. The observation of the Supreme Court in paragraph Nos. 5, 6 and 9 of the reports which are relevant are reproduced below :-

"5. It is well settled principle in law that the Court cannot read anything into a statutory provision or a stipulated condition which is plain and unambiguous. **A statute is an edict of the Legislature. The language employed in a statute is the determinative factor of legislative intent.** Similar is the position for conditions stipulated in advertisements.

6. Words and phrases are symbols that stimulate mental references to referents. The object of interpreting a statute is to ascertain the intention of the Legislature enacting it. (See *Institute of Chartered Accountants of India v. M/s Price Waterhouse*). The intention of the legislature is primarily to be gathered from the language used, which means that **attention should be paid to what has been said as also to what has not been said. As a consequence, a construction which requires for its support, addition or substitution of words or which results in rejection of words as meaningless has to be avoided.** As observed in *Crawford Vs. Spooner* the courts cannot aid the legislature's defective phrasing of an Act, they cannot add or mend, and by construction make up deficiencies which are left there. (See *State of Gujarat Vs. Dilipbhai Nathjibhai Patel*). **It is contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so.** (*See Stock Vs. Frank Jones (Tipton) Ltd.)* Rules of interpretation do not permit the courts to do so, unless the provision as it stands is meaningless or of doubtful meaning. **The courts are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself.** *(Per Lord Loreburn, L.C. in Vickers Sons and Maxim Ltd. Vs. Evans, quoted in Jumma Masjid, Mercara Vs. Kodimaniandra Deviah).*

9. While interpreting a provision the Court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary. (See C.S.T. Vs. Popular Trading Company). ***The legislative casus omissus***

cannot be supplied by judicial interpretative process."

(Emphasis added)

Thus, the entries Music (Vocal) and Music (Instrument) in Chapters XIII, XIV and XIV-A of the Regulations are to be read as they are and without sub-dividing them either on the basis of different genres of music or on the basis of different musical instruments. An institution would be recognized by the Education Board for teaching in Music (Vocal) and Music (Instrument) and not for teaching a particular musical instrument or a particular branch of vocal or instrumental music. The posts sanctioned by the State Government in any aided institution would also be for teaching Music (Vocal) or Music (Instrument) and not for teaching a particular branch of vocal music or a particular musical instrument and in light of Regulation 15 of Chapter VII of the Regulations, the institutions do not have the liberty to treat the posts as posts sanctioned to teach a particular musical instrument.

18. In the present case, the Institution was granted recognition by the Education Board for teaching in Music (Instrument) and was not recognized for teaching a particular musical instrument. In fact, in light of the reasons given, the institution could not have been granted recognition for teaching only a particular musical instrument. For the said reasons, the two posts vacant in the Institution and advertised by the Board were of Lecturer in Music (Instrument) and not of Lecturer in particular musical instrument and the one post still vacant is not of Lecturer in Music (Instrument-Tabla). The fact that the teachers previously working in the Institution were teaching two different musical instruments and the Management had sent the requisition specifying that the posts were for teaching two different musical instruments is not relevant to decide the nature of vacancies advertised by the Board through Advertisement No. 2 of 2016. In the circumstances, the information sent by the Committee of the Management to the Board through its requisition that, of the two posts of Lecturers in Music (Instrument) sanctioned and vacant in the Institution, one was of Music (Instrument-Tabla) and the other was of Music (Instrument-Sitar), was not relevant and the Board rightly ignored it and notified the vacancies for appointment as Lecturer in Music (Instrument).

19. The right of the petitioner to be issued an appointment letter also depends on whether the petitioner possessed the minimum qualifications for appointment as Lecturer in Music (Instrument). Section 16-E(3) of the Act, 1921 provides that only a person who possesses the minimum qualifications prescribed by the Regulations shall be appointed as a teacher in a recognized institution. Rule 5 of Rules, 1998 provides that a candidate for appointment to a post of teacher must possess the qualifications specified in Regulation 1 of Chapter II of the Regulations made under the Act, 1921.

20. Regulation 1 of Chapter II of the Regulations is part of Appendix 'A' appended to the Regulations framed by the Education Board and prescribes the minimum qualifications required for appointment as teacher in a recognized institution. Entry 25 of Regulation 1 prescribes M.A. in Music (amongst other alternative qualifications) as minimum qualification required for a music teacher to teach intermediate students, i.e., class 11 and 12 students. The Regulations do not prescribe a degree in any particular musical

instrument or in any particular genre of music as minimum qualification for appointment as Teacher in Music. Chapters XIII, XIV and XIV-A of the Regulations mention Music (Vocal) and Music (Instrument) as optional subjects to be chosen by any candidate admitted for appearing in the High School, Intermediate or Intermediate Vocational Education examinations conducted by the Education Board. However, the candidates can chose only one of them as their optional subject and not both of them as their optional subjects. In other words, a candidate can opt either for Music (Vocal) or Music (Instrument) but cannot opt for both of them. It is pertinent to note that the Regulations do not mention 'Music' as a course of study but specify Music (Vocal) and Music (Instrument) as courses of study. Evidently, Music (Vocal) and Music (Instrument) are two different subjects and courses of study. However, Entry 25 in Regulation 1 of Chapter II prescribes post-graduation in Music as the minimum qualification required for appointment as Teacher / Lecturer in Music to teach in Class XI and XII. The Regulations do not prescribe different qualifications for appointment as Teacher in Music (Instrument) and Music (Vocal). A plain reading of the qualifications prescribed in Entry 25 of Regulation 1 of Chapter II for appointment as Teacher in Music (Vocal) and Music (Instrument) would lead to an absurdity as a Post-graduate in Music (Vocal) would also be eligible for appointment as Teacher of Music (Instrument) and a Post-graduate in Music (Instrument) would also be eligible for appointment as Teacher of Music (Vocal) even though Music (Vocal) and Music (Instrument) are two different subjects prescribed by the Education Board. While interpreting legislative provisions, absurdity is to be avoided. Regulation 1 of Chapter II which prescribes minimum qualifications for appointment as Teacher in recognized institutions and the relevant items in Chapters XIII, XIV and XIV-A specifying the courses of study are part of the same legislative enactment. In order to avoid the absurdity referred earlier, the qualifications prescribed in Entry 25 have to be interpreted and read as 'Post-graduate in Music (Vocal) or in Music (Instrument) depending on the post for which appointments are to be made.' In other words, only a candidate, who is a post-graduate in Music (Vocal) would be eligible for appointment as Lecturer in Music (Vocal) and a candidate who is a post-graduate in Music (Instrument) would be eligible for appointment as Lecturer in Music (Instrument) in any recognized institution. But the same can not be read to mean as requiring a post-graduate in a specific genre of music or a post-graduate in a particular musical instrument, because the Regulations do not prescribe, as courses of study, a particular genre of music or teaching of a particular musical instrument. Thus, if the selecting body or the appointing authority demands from an applicant a post-graduation in a specific branch of vocal music or a post-graduation in a particular musical instrument, such a demand would be inconsistent with the Regulations. For the aforesaid reasons, the refusal of the Management of the Institution to issue an appointment letter to the petitioner on the ground that she is a post-graduate in Music (Instrument-Sitar) and not a post-graduate in Music (Instrument-Tabla) is inconsistent with the Regulations.

21. An issue similar to the issue in the present case arose before the Supreme Court in ***Dr. Chetkar Jha Vs. Dr.***

Vishwanath Prasad Verma & Another, 1970 (2) SCC 217. In the aforesaid case, the controversy related to the minimum qualifications required for appointment as Professor in Department of Political Science in Patna University. The relevant Statutes of the University, at the time of advertisement, prescribed the minimum qualifications for appointment as Professor in the University as, *"first or second class Master's degree of an Indian University or an equivalent qualification of a foreign university."* The Bihar Public Service Commission, which at that time had the power to recommend names for appointments to the University, advertised the said post and the minimum qualifications required for appointment to the post were published as *"first or second class Master's degree in the subject of an Indian University or an equivalent qualification of a foreign university."* The Vice-Chancellor of the University got published, through the Commission, another advertisement amending the earlier advertisement and the revised advertisement stated the required qualifications as *"first or second class Master's degree in Political Science or in an allied subject like History or Economics of an Indian University or an equivalent qualification of a foreign university."* The appointment of the selected candidate was under challenge before the Supreme Court wherein it was argued that the words in the University Statute, namely, that the University Professor "shall possess a first or second class Master's degree" meant a Master's degree "in the subject" and therefore the original advertisement was in conformity with the University Statute relating to the qualifications and the revised advertisement had the effect of amending the Statute and was therefore unauthorized and the appointment of the selected candidate was contrary to the Statute. The Supreme Court rejected the aforesaid contention and held that the words "in the subject" in the advertisement initially issued by the Commission debarred the candidates with first and second class Master's degree in subjects other than Political Science and was therefore not in conformity with and not consistent with the relevant University Statute laying down the qualifications. In this context the observations of the Supreme Court in paragraph Nos. 10, 11 and 12 of the reports are reproduced below :-

"10. Under Section 58 of the Act, until Statutes, Ordinances, Regulations and Rules were made under the Act, Regulations made under the Bihar State Universities Act, XIV of 1960, which were in force immediately before the commencement of the present Act, were to continue to be in force and were to be deemed to be Statutes, Ordinances, Regulations and Rules made under the corresponding provisions of this Act. Chapter XII of the Statutes made under the earlier Act and which was in force immediately before the commencement of the Act, was, therefore, to continue in force and was deemed to have been made under the present Act. Under that Statutes, the qualifications for the post of a University Professor were inter alia "a first or a second class Master's degree of an Indian University or an equivalent qualification of a foreign University". **The Statute, it will be noticed, did not lay down that the Master's degree had to be "in the subject" for which the candidate would be appointed. Apparently, the question whether the concerned candidate was proficient in the subject for which he had applied for appointment was left for decision by the appointing authority**.

Under Chapter XIV of the Statute, whenever an appointment had to be made the Vice-Chancellor had the power with the approval of the Chancellor to decide whether the post should be filled up by promotion or by direct recruitment.

11. There is no dispute that the Vice-Chancellor had obtained such approval and the post was to be filled up by direct recruitment. As required by Section 26(1) of the Act, appointments of teachers and professors of the University could only be made on the recommendations made by the State Public Service Commission. Accordingly, the Vice-Chancellor sent to the Commission a requisition for advertisement for the post. In that requisition he set out, without any words of, limitation or additional qualifications, Chapter XII of the Statutes which laid down the qualifications. **In the advertisement issued by the Commission, however, that body introduced the words "in the subject" announcing thereby that the candidate must possess a first or second class Master's degree in Political Science. The insertion of those words of limitation clearly was not in conformity either with the requisition sent by the Vice-Chancellor or with Chapter XII of the Statutes and actually debarred candidates with first or second class Master's degrees in subjects other than Political Science. Such a restriction was not consistent with the Statute in Chapter XII laying down the qualifications.**

12. It was obviously to correct this error on the part of the Commission that the Vice-Chancellor caused the revised advertisement to be issued by the Commission in which it was clarified that candidates not only with first or second class M.A. degrees in Political Science but those with such degrees in allied subjects such as History and Economics could also apply. The record shows that this fact was explained to the Chancellor by the Vice Chancellor and the then Chancellor had at that time raised no objection. As appears from the Vice-Chancellor's reply to the show cause notice issued by the Chancellor, this very interpretation of the Statute had been given in the past on a number of occasions and several appointments had been made without any objection from anybody. The revised advertisement was thus made to clarify the position that under the Statute laying down the qualifications for the post it was not as if an eligible candidate could be the one who held the M.A. degree in Political Science only. **Since the post was for a professorship in Political Science, the revised advertisement stated that candidates with first or second class M.A. degree in Political Science as also in an allied subject could apply. In doing so the Vice-Chancellor did not purport to modify or alter the Statute relating to qualifications as was the view of the Chancellor, but on the contrary, clarified the correct position and gave a correct interpretation to the Statute in question.** The Chancellor, therefore, could not, on a wrong interpretation of the Statute, hold that the revised advertisement was a modification of that Statute, that it was, therefore, invalid, and that, therefore, he had the jurisdiction to nullify the Syndicate's resolution of July 3, 1963, under Section 9(4) of the Act. Section 9(4) authorises the Chancellor to nullify the Syndicate's resolution provided only if the Syndicate's proceedings were not in conformity with the Act or the Statute."

(Emphasis added)

22. It is admitted that one post of Lecturer in Music (Instrument) in the

institution is still vacant and the contention of the Management that the said post is for Music (Instrument-Tabla) stands rejected. The petitioner being a post-graduate in Music (Instrument) (though in a particular musical instrument) was eligible for being considered for appointment as teacher in Music (Instrument) in the Institution on the posts advertised through Advertisement No. 2 of 2016 and after being so selected is entitled to be issued an appointment letter by the Management of the Institution on the post vacant in the Institution.

23. Under Rule 12(8) of the Rules, 1998 the Board prepares a panel, for each category of advertised post, of those candidates found most suitable for appointment in order of merit and institutions are allocated to the candidate under Rule 12(10) on the basis of his place in the order of merit. The panel is to be forwarded by the Board under Rule 12(11) of the Rules, 1998 along with the name of the institution allocated to the selected candidates to the Inspector, i.e., all the District Inspector of Schools, with a copy thereof to the Joint Director of Education, Incharge of the Region. Under Rule 13 of the Rules, 1998, the Inspector is required to intimate the name of the candidate to the management of the institution which had notified the vacancy, with the direction that, under resolution of the management, an order of appointment be issued to the candidate by registered post. Under Rule 13(2) of the Rules, 1998 the management is liable to comply with the direction given under sub-rule (1) and report compliance thereof to the Board through the Inspector. Under Rule 13(4) of the Rules, 1998 the Joint Director of Education Incharge of Region shall monitor and ensure that the candidates selected by the Board joins the institution in the specified time and for this purpose, he may issue such direction to the Inspector as he thinks proper.

24. The D.I.O.S. vide his letter dated 31.7.2020 addressed to the Manager of the Committee of the Management and the Principal of the Institution has already directed them to ensure that the Committee of Management passes an appropriate resolution authorizing the Manager to issue an appointment letter to the petitioner enabling her to join as teacher in Lecturer Grade in the subject Music (Instrument) in the Institution. The Committee of Management of the Institution and the Manager and the Principal of the Institution are liable to comply with the directions given by the D.I.O.S vide letter dated 31.7.2020 and issue an appointment letter to the petitioner to enable her to join as teacher in Lecturer Grade in the subject Music (Instrument) in the Institution.

25. In view of the aforesaid, the D.I.O.S. is directed to ensure compliance of his order dated 31.7.2020 and ensure that an appointment letter is issued to the petitioner by the Manager of the Committee of Management of Shanta Smarak Kanya Inter College, Meerut appointing her as Lecturer in Music (Instrument) in the Institution. The D.I.O.S. shall ensure that the appointment letter is issued to the petitioner within 15 days from the date a copy of this order, downloaded from the website of the Allahabad High Court, is served by the petitioner to the D.I.O.S. and the Principal or the Manager of the Committee of the Management of the Institution. The appointment letter shall be served on the petitioner personally as well as by registered post and the petitioner shall be permitted to join the Institution in pursuance to the aforesaid appointment letter. The Joint Director of Education,

Meerut Region, Meerut is also directed to ensure that the petitioner is allowed to join in the Institution as Teacher in Lecturer Grade in Music (Instrument) and be given all consequential benefits. The Joint Director of Education, Meerut Region, Meerut shall also ensure that the aforesaid exercise is completed within two months from today.

26. With the aforesaid directions, the writ petition is ***allowed.***

27. The Joint Registrar (Compliance) shall send a copy of this order to the Joint Director of Education, Meerut Region, Meerut within 24 hours.

(2021)09ILR A124
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.08.2021

BEFORE

THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Criminal Appeal No. 157 of 1992

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

Counsel for the Appellant:
Sri Vivek Shandilya, Sri Raj Bahadur, Sri Sudama Ji Shandilya

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

A. Criminal Law – Indian Penal Code, 1860 – Section 387 – Extortion – Firing shot from country made pistol in air with a view to threaten the complainant – Victim/informant corroborated averment of FIR by his examination-in-chief – One another eye witnesses also corroborated complainant – Trustworthiness of the witnesses discussed – Witnesses were found independent – Sentence of three years rigorous imprisonment ordered – Validity challenged – Held, there is no material on record which establish any enmity or ill will of these witnesses with the accused-appellant and there is no reason to disbelieve these witnesses. They are trustworthy and reliable – Findings recorded by the learned trial Court is well reasoned – There is no infirmity or perversity in the findings recorded by the learned trial Court in holding the accused guilty under Section 387 I.P.C. – However, High Court modified the sentence of three years R.I. and converted it into two years. (Para 6, 9 and 10)

Criminal Appeal partly allowed. (E-1)

(Delivered by Hon'ble Syed Aftab Husain Rizvi, J.)

1. Heard Sri Raj Bahadur, Amicus Curie, for the appellant and learned A.G.A. for the State.

2. This criminal appeal arises out of judgment and order dated 13.01.1992 passed by the learned Special Judge (D.A.A. Act), Jhansi in Special Case No.11 of 1991, Case Crime No.16 of 1991, under Sections 387, 504, 506, 427 I.P.C., Police Station- Moth, District- Jhansi, convicting the appellant (accused) under Section 387 I.P.C. and sentencing him to undergo rigorous imprisonment for 03 years.

3. The prosecution story in brief is that on 29.01.1991 at about 10:30 P.M., accused Girish Kumar Tiwari along with one unknown person came at the house of the complainant Ramesh Chandra, situated in Mohalla Katra Bazar, Town and P.S. Moth and called the complainant. As soon as the complainant reached, then accused started to abuse him asked to pay

Rs.5,000/-. The complainant showed his inability to pay such huge amount, then accused fired shot from country made pistol in air with a view to threaten the complainant. Hearing the noise the neighours came out of their houses but they again went inside their houses hearing the sound of firing made by country made pistol. At that time witnesses Awadha Bihari, Munna Khan and Babloo who were passing through from there tried to impress the accused. Accused and his associate threatened them. Accused threatened the complainant to pay the said amount by 4 P.M. tomorrow else he will be shot and any member of his family will be kidnapped. The witness Babloo again intervened, then accused went to Motor stand, Moth and threw the betel shop of Babloo on the ground causing damages to Babloo.

A written report to this affect scribed by the complainant himself submitted at Police Station Moth same day at 11:45 P.M., on the basis of which case got registered under Sections 387, 427, 504 and 506 I.P.C. The Investigating Officer recorded the statements of the witnesses inspected the site and prepared the site plan and after completing the investigation submitted the charge sheet against accused Girish.

The learned trial court framed charges against the accused Girish under Sections 387 and 427 I.P.C.. The accused denied the charges and claimed for trial. The prosecution produced four witnesses. In his statement under Section 313 Cr.P.C. the accused denied the prosecution allegations and claimed to have been falsely implicated due to enmity. He has further stated that he had a dispute with Iddu and Kailash the owners of the hotel. Ramesh is friend of Iddu and Kailash and all of them have falsely got implicated him in collusion with the police. No evidence in defence has been produced by the accused. The learned trial court after hearing the arguments by the impugned judgment held the accused guilty of charge under Section 387 I.P.C., while acquitted him from charge under Section 427 I.P.C.

4. Learned counsel for the appellant contended that in order to constitute an offence under Section 387 I.P.C. there are to be some visible over act. It is alleged that appellant firstly demanded Rs.5,000/- from the complainant and thereafter fired a shot in the air from country made pistol, hence, the case is not covered by Section 387 I.P.C.. It is further contended that all the witnesses named in the F.I.R. are chance witnesses and there is no witness of vicinity, hence the oral testimony of PW-2 Awadh Bihari is not reliable. It is further contended that Babloo was an important witness but he has not been examined by the prosecution and accused has been acquitted of the charge under Section 427 I.P.C.. The place of occurrence is a residential area but no person of the vicinity has been named as a witness nor examined. Accused has been falsely implicated at the instance of hotel owners Iddu and Kailash who are inimical to the accused and complainant being friend of Kailash and Iddu in collusion with the police has falsely implicated the accused. Lastly, it is contended that the trial Court has failed to appreciate the evidence on record and finding of conviction is perverse.

5. Learned A.G.A. submitted that informant/victim has fully corroborated the prosecution case and an independent witness, Awadh Bihari has also supported the informant. The accused has made a demand of Rs.5,000/- and fired a shot in

the air and also threatened the informant with death, so offence under Section 387 I.P.C. is made out. The judgment and finding recorded by the trial Court is just and proper and there is no illegality in the impugned order.

6. To substantiate the charges, prosecution has produced 03 witnesses. PW-1 Ramesh Chandra is the victim/informant and he has corroborated averments made in the First Information Report by his examination-in-chief. He has also proved the written information (Tehrir) Ex-Ka-1. From his testimony, it is proved that on 29.01.1991 at about 10:30 p.m. the accused (appellant) came at the house of informant and called him outside and started abusing the informant and demanded Rs.5,000/-, he also fired shot in the air from a country made pistol and threatened the informant to give Rs.5,000/- by the next day failing with he will be killed or any other member of his family will be kidnapped. Accused has failed to establish any enmity with complainant or motive for false implication. Witness has been cross examined at length by the defence but there is no major discrepancy or contradiction in his cross examination which makes his testimony unreliable. PW-2 Awadh Bihari is the eye witness and he has also corroborated the complainant Ramesh Chandra. This witness has also been cross examined by the defence and there is nothing in his cross examination which makes his oral statement unreliable. Although, he is not neighbour but he is resident of same locality where the occurrence has took place and it has come in his cross examination that he lives 3 to 4 furlong away from the house of Ramesh Chandra, so his presence on the spot cannot be said to be unnatural or improbable. His testimony cannot be discarded on the ground that in his cross examination he has said that some time he do the labour work at complainant's Jaggery business. There may be some minor discrepancy or omission in the oral statement of the witnesses but that is natural. There is no material, discrepancy or contradiction which shake trustworthiness of the witnesses.

The remaining witness S.I. Surendra Singh PW-3 is the Investigating Officer who has proved the steps taken during the investigation and the papers prepared i.e. site plan and charge sheet. He has also proved the Chik report and copy of G.D.

Both the witnesses PW-1 Ramesh Chandra and PW-2 Awadh Bihari are independent witnesses. There is no material on record which establish any enmity or ill will of these witnesses with the accused-appellant and there is no reason to disbelieve these witnesses. They are trustworthy and reliable.

The effect of non production of witness Babloo has already been considered by the trial Court and accused has been acquitted from charges under Section 427 I.P.C. due to this.

7. Contention of learned counsel for the appellant that the case is not covered by Section 387 I.P.C. has no force. In order to constitute an offence as laid down Under Section 387 I.P.C., there ought to be some visible overt act which may reflect the natural and normal inference that the wrong doer had, in fact, put a person or had made an attempt to put any person in fear of death or of grievous hurt. From the evidence on record, it is established that accused-appellant armed came at the house of the complainant called him outside and started abusing him and demanded

Rs.5,000/- and also fired a shot in the air, he further threatened the complainant to pay Rs.5,000/- by the next day otherwise he will be shot or any member of his family will be killed. So, it cannot be said that there was no overact during the act of extortion.

8. The defence taken by the accused in his statement under Section 313 Cr.P.C. that he has been falsely implicated at the instance of hotel owners Iddu and Kailash who are inimical to the accused does not get any support from material on record. The charge under Section 387 I.P.C. stand proved against the accused.

9. The learned trial Court has fully discussed and appreciated the entire evidence. The findings recorded by the learned trial Court is well reasoned. There is no infirmity or perversity in the findings recorded by the learned trial Court in holding the accused guilty under Section 387 I.P.C. and there is no reason to disagree with the aforesaid findings. So, the judgment and order of conviction is just and proper.

10. The learned trial Court has sentenced the accused for 03 years rigorous imprisonment only while punishment prescribed for offence under Section 387 I.P.C. is imprisonment and fine. Considering the nature of the offence and attending facts and circumstances, imposition of 02 years rigorous imprisonment and fine of Rs.10,000/- will be just. In default of payment of fine accused will serve six month simple imprisonment. Sentence is modified accordingly.

11. The appeal is partly **allowed** in the aforesaid terms.

12. Lower court record along with copy of the judgment be transmitted immediately to the trial Court.

(2021)09ILR A127
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.09.2021

BEFORE

THE HON'BLE AJAI TYAGI, J.

Criminal Appeal No. 183 of 1986

Kailashi & Anr. ...Appellants (In Jail)
Versus
The State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Pt. Mohan Chand, Sri Satya Prakash Tiwari

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

A. Criminal Law – Indian Penal Code, 1860 – Sections 304(2) & 34 – Culpable Homicide – Prompt FIR – Presence of eye-witnesses was found natural – Evidence of witnesses of fact was fully corroborated by medical evidence – As per prosecution evidence, appellants gave blow to the deceased in his chest, stomach and pelvis (pedu) and if injuries are inflicted to any person at chest, stomach and pelvis, it is very much possible that liver and spleen will sustain injuries – Sentence of three years rigorous imprisonment ordered – Validity challenged – Held, the injuries sustained by deceased were sufficient to cause his death – Learned trial court appreciated the evidence on record in right perspective and rightly convicted the appellants. (Para 12, 13, 14 and 16)

B. Criminal Law – Offence under Sections 304 (2) & 34 – Partisan witness – Reliability – Admittedly witnesses are niece, wife and son of deceased – Held,

testimony of partisan witnesses cannot be discarded on this count alone – There is no hard and fast rule that the evidence of a partisan witness cannot be acted upon without corroboration, if his presence at the scene of the occurrence cannot be doubted and his evidence is consistent with the surrounding circumstances and the probability of the case striking the court as true, it can be good foundation for conviction. (Para 11)

C. Criminal Law – Indian Penal Code,1860 – Section 34 – Common intention – Scope – It is not necessary that common intention should always be premeditated. It can take place on the spot also. (Para 14)

Appeal dismissed. (E-1)

Cases relied on :-

1. Prithi Vs St. of Har., 1994 Supp. (1) SCC 498

2. Dayaneshwar Dagdoba Hivrekar Vs St. of Mah.; 1982 (0) CrLJ 1870

3. Tameshwar Sahi & ors. Vs St. of UP; 1976 ACC 36 SC,

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

1. This appeal has been preferred against the judgment and order dated 6.1.1986, passed by 3rd Additional Sessions Judge, Agra, in Sessions Trial No.53 of 1985 arising out of Case Crime No.66 of 1984 under Section 304 IPC, Police Station Etmad-ud-daula, District-Agra, whereby the appellants, namely, Kailashi and Ramesh were convicted and sentenced under Section 304 (2) IPC read with Section 34 IPC for three years rigorous imprisonment.

2. The brief facts for disposal of this appeal are that informant-Radhey Shyam lodged a report at Police Station Etmad-ul-daula, Agra on 22.2.1984 stating that at about 4:00 p.m., he was going from his house to his field at Ram Nagar, when he was passing through the street near his house, one Kailashi and Ramesh R/o Ram Nagar were coming from the side of their shop. When they reached near the informant, Kailashi struck his shoulder to him. At this, the informant said that they should walk carefully and Kailashi and Ramesh started abusing and beating the informant. On hearing the noise and shouting of the informant, his father Ram Dayal reached the spot and tried to intervene. At this, Kailashi and Ramesh left the informant and dashed Ram Dayal-father of informant to the ground and started beating him with fists, kicks and bricks. Kailashi told Ramesh that today they will settle the score with him. Informant's mother-Smt.Premwati, grand mother-Smt.Govindi, sisters-Usha and Mithalesh and the neighbours-Soonsa Ram and Rajendra arrived at the place of occurrence. They saw the occurrence and saved Ram Dayal from Kailashi and Ramesh. When they were going to the doctor, Radhey Shyam succumbed to the injuries, which he had sustained in his abdomen and chest. While keeping the dead-body at house, the informant reached the police station and lodged the report. On the basis of written-report, Case Crime No.66 of 1984 under Section 304 IPC was registered. After investigation, Investigating Officer submitted charge-sheet against the appellants under Section 304 IPC. Learned trial court framed charge against both the appellants under Section 304 IPC read with Section 34 IPC and after trial, convicted and sentenced both the appellants for the charges levelled against them for three years rigorous imprisonment. Aggrieved with the judgment and order, this appeal has been preferred by the appellants.

3. Heard Shri Satya Prakash Tiwari, learned counsel for the appellants, Shri S.S. Sachan, learned AGA appearing on behalf of State and perused the record.

4. Learned counsel for the appellants has submitted that prosecution case is that on the day of occurrence, appellants started beating informant-Radhey Shyam on very little cause, i.e., striking the shoulder with the informant. When informant's father Ram Dayal came to his rescue, appellants started beating Ram Dayal with fists, kicks and bricks. Ram Dayal sustained injuries in his abdomen and chest due to which he died.

5. Shri Tiwari, learned counsel for the appellants argued that postmortem report of deceased-Ram Dayal shows that there was no external injuries on the body of Ram Dayal. In postmortem report, there was no ante-mortem external injury. If, there was use of bricks, external injury was must. There was no external injury on the body of Ram Dayal, hence prosecution story falsifies the incident that brick was used in beating Ram Dayal. It creates heavy doubt on the prosecution story.

6. Learned counsel for the appellants argued that three so called eye-witness were produced to prove this case. Mithalesh (PW3) is the niece of deceased, Premwati (PW4) is wife of the deceased and Radhey Shyam-informant (PW5) is the son of the deceased. Hence, all the three witnesses are related to the deceased and they are partisan witnesses. Learned counsel submitted that as per prosecution story, Soonsa Ram and Rajendra, who were neighbor, also came at the place of occurrence, but they were not produced by prosecution in evidence, who were independent witnesses. Hence, no reliance could be placed on the testimony of related and interested witnesses. Moreover, there was no injury, even a scratch, to the informant-Radhey Shyam and to any other family member of the deceased, who gathered at the place of occurrence. It also shows that witnesses and other family members of the deceased were not present on the spot. They are eye-witnesses and reached the spot afterwards. It is stated by all prosecution witnesses that appellants started beating Radhey Shyam first and when deceased came to intervene, appellants started beating his father. If it was so, there should have been some injuries to informant Radhey Shyam also, but there is no medical evidence on record to show that Radhey Shyam sustained any injury. Hence, nobody saw the occurrence and appellants were falsely implicated in the present case.

7. Learned counsel for the appellants also argued that appellants had no motive to beat either Radhey Shyam or his father; there was no previous enmity between the parties. He submits that learned trial court has believed that appellants gave beating to Ram Dayal in such a manner that he died by sustaining fatal injuries, but from entire prosecution case, it is well established that appellant had no intention and they had no knowledge that deceased could die. Even, appellants were not having any sort of weapon with them nor any weapon was used by them. Manner of assault also does not indicate that they had any intention to kill the deceased-Ram Dayal.

8. Submission of counsel for the appellants is that if Court reaches on conclusion that appellants are guilty then their offence reaches maximum to Section 323 IPC. In support of this argument, he has placed reliance on the judgment in the case of ***Prithi vs. State of Haryana*** [1994 Supp. (1) SCC 498] and ***Dayaneshwar Dagdoba Hivrekar vs. State of Maharashtra*** [1982 (0) CrLJ 1870] and argued that charge under Section 304 (2)

could not be framed along with Section 34 IPC as there was no common intention of appellants to commit the alleged offence. As per prosecution story, they were coming from their shop and there was scuffle between them and informant on striking the shoulder of each other. So, there was no prior meeting of minds of appellants, therefore, common intention could not be gathered. Learned trial court adopted wrong approach for taking the recourse of Section 34 IPC by convicting the appellants otherwise there was no such evidence on record as to who caused fatal injury to the deceased.

9. Lastly, it was submitted by counsel for the appellants that it is a case of 1984, when appellants were at the age of about 23-25 years and now they are about 60-65 years old. If Court reaches the conclusion of their guilt, their sentence may be modified as undergone.

10. Learned AGA appearing on behalf of State opposed the arguments advanced by counsel for the appellants and submitted that there are three eye-witnesses in this case, who saw the occurrence. He argued that although PWs.3, 4 & 5 are related to the deceased, but their presence at the place of occurrence was very much natural because the occurrence took place very near to the informant's house. Hence, family members immediately reached the spot after hearing hue and cry of informant and his father. He next argued that evidence of eye-witnesses is fully corroborated by medical evidence also. Dr.U.C.Vaishya (PW1), who conducted postmortem on the body of deceased-Ram Dayal, he has stated in his evidence that lever and spleen of the deceased were found ruptured and deceased died due to the injuries sustained by him, which were sufficient to cause death. Lastly, it is argued that both the appellants attacked at the time of occurrence to settle the score with the deceased, therefore, they had common intention to beat the deceased and due to which, the deceased sustained fatal injuries. Hence, prosecution case is fully proved and learned trial court rightly convicted the appellants.

11. Learned counsel for the appellants firstly assailed the conviction of appellants on the basis of eye-witnesses (PW3, PW4 and PW5) being related to the deceased, therefore, they are partisan witnesses. It is admitted fact that Mithalesh (PW3) is the niece of the deceased and Premwati (PW4) is the wife of the deceased and PW5 is the son of the deceased, but the settled law is that testimony of partisan witnesses cannot be discarded on this count alone. In ***Tameshwar Sahi and others vs. State of UP*** [1976 ACC 36 (SC)], it is held by Hon'ble Apex Court that there is no hard and fast rule that the evidence of a partisan witness cannot be acted upon without corroboration, if his presence at the scene of the occurrence cannot be doubted and his evidence is consistent with the surrounding circumstances and the probability of the case striking the court as true, it can be good foundation for conviction. More so, if some assurance is available from the medical evidence.

12. If the evidence of PWs.3, 4 & 5 is examined in the light of above observations of Hon'ble Apex Court, it can be undoubtedly believed that the presence of above eye-witnesses is natural at the place of occurrence as Mithalesh (PW3) was the child of just 11 years old at the time of deposing before the learned trial court. She has categorically stated in her statement that at the time of occurrence, she was

playing near the place of occurrence. Radhey Shyam (PW5) is the son of the deceased. It is the prosecution version that appellants started quarreling and beating Radhey Shyam first and they started beating deceased-Ram Dayal when he came to the spot to intervene and save his son Radhey Shyam. So the presence of Radhey Shyam at the place of occurrence cannot be doubted. Premwati (PW4) wife of the deceased could also be present on the spot because occurrence was in the street near the house of the deceased. So the presence of PWs.3, 4 & 5 was natural on the spot and it cannot be doubted. Hence, their evidence cannot be discarded on this count alone that they are partisan witnesses rather it is important for the Court to scrutinize their evidence very carefully. Perusal of the impugned judgment shows that the learned trial court has very carefully and meticulously scrutinized the testimony of PWs.3, 4 and 5 on every count. There was no material contradiction in their statements. Trial court appreciated their evidence in right perspective.

13. It is very important to note that in this case, first information report was very prompt. Occurrence took place at 4:00 p.m. on 22.2.1984 and on the same day, FIR was lodged at 5:30 p.m., i.e., just after one and half hour of the occurrence. So, in such a short time, there was no occasion for any false implication of the appellants. It is also not the case that appellants and deceased were having previous enmity.

14. The evidence of witnesses of fact was fully corroborated by medical evidence. Dr.U.C.Vaishya (PW1), who conducted the postmortem, has deposed that lever and spleen of the deceased were ruptured and it is said by him that the internal injuries sustained by deceased could be the result of beating as stated by prosecution and it was not necessary that external injuries should have been there. The doctor has given opinion that injuries sustained by the deceased were sufficient to cause his death. He has specifically denied the suggestions put before him by the defence that above injuries could be result of falling of the deceased or striking with any object. It is also stated by the doctor in his statement that spleen cannot be ruptured due to disease and if spleen is enlarged, it can rupture by inflicting simple injury. Hence, as per medical evidence, the injuries sustained by deceased were sufficient to cause his death. It is also important to note that as per prosecution evidence, appellants gave blow to the deceased in his chest, stomach and pelvis *(pedu)* and if injuries are inflicted to any person at chest, stomach and pelvis, it is very much possible that lever and spleen will sustain injuries. So, the manner of assault by the appellants matches with the injuries sustained by the deceased. Since the testimony of PWs.3, 4 & 5 is corroborated by medical evidence, therefore, their testimonies carried more weight and learned trial court has rightly believed their testimonies. It is submitted by counsel for the appellants that the offence of appellants does not travel beyond the offence under Section 323 IPC for which he has placed reliance on *Pirthi (supra)* and *Dayaneshwar Dagdoba Hiverkar (supra)*. In the case of Pirthi (supra), the deceased died after two days of incident and cause of death was Toxaemia due to Gangrene, which developed because of lack of immediate medical help, but this was not the case here. In this case, deceased Ram Dayal succumbed to the injuries while taking to the hospital. The facts of *Dayaneshwar Dagdoba Hiverkar (supra)* were also differ from this case

because in that case deceased was beaten by using the stick. It was held that stick could not be held the weapon from which knowledge can be attributed that the blow by such stick could cause death. In this case, there were repeated blows by the appellants on chest, stomach and *pedu* of the deceased for which deceased had knowledge that such type of blows could cause fatal injury in the internal organs of the deceased. Therefore, both the above cases did not apply in this case due to different set of facts. As far as common intention is concerned, it is not necessary that it should always be premeditated. It can take place on the spot also. It is very much on record that when the quarrel started by striking the shoulders of appellants and informant-Radhey Shyam and on protest by informant, appellants started slapping him and after that when deceased reached the spot, appellants left informant and started beating deceased-Ram Dayal. Hence, it cannot be believed that quarrel took place all of sudden. Appellants intentionally started beating the deceased, therefore, it is very much clear that they were having common intention to beat the deceased and they repeatedly gave blows to him. Hence, learned trial court has rightly convicted the appellants with the aid of Section 34 IPC.

15. Learned counsel for the appellants has also submitted that in case Court comes to the conclusion that appellants are guilty then keeping in view their age to be nearly 60-62 years, their sentence can be modified as undergone. But, in my opinion, this case is not a case where appellants can be set free as undergone. Learned trial court has sentenced the appellants only for three years under Section 304(2) read with Section 34 IPC. The sentence awarded by the learned trial court, in my considered opinion, is not very harsh keeping in view the offence of the appellants.

16. In view of the discussion as above, this Court is of definite view that learned trial court appreciated the evidence on record in right perspective and rightly convicted the appellants under Section 304 (2) read with Section 34 IPC. The appeal has no force and is liable to be dismissed.

17. The appeal is, accordingly, **dismissed**. Appellants are reported to be on bail, their bail bonds stand cancelled and sureties are discharged. Appellants are directed to surrender before the court-below forthwith to serve the remaining sentence.

18. Let a copy of this judgment be sent to concerned court for ensuring compliance.

(2021)09ILR A132
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 17.09.2021

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Criminal Appeal No. 254 of 1999

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

Counsel for the Appellant:
V.N. Shukla, Abhishek Misra, Shishir Pradhan

Counsel for the Respondent:

A. Criminal law – Indian Penal Code,1860 – Section 364 – Kidnapping in order to

commit murder – Not named in FIR – Sentence of six years rigorous imprisonment ordered – Declared guilt on the ground that the appellant had taken the victim from the latter's home on motorcycle – Other accused acquitted – Ingredient of offence u/s 364 IPC, discussed – Relevancy of intention, explained – Held, to establish an offence punishable under Section 364 I.P.C., it must be proved that the person charged with the offence had the intention at the time of the abduction that the person abducted would be murdered or would be so disposed of as to be put to danger of being murdered – Prosecution had to prove that the appellant accused at the time when he took away the victim, had this particular intention – However, no finding has been recorded by the trial Court on this element of the offence – High Court found the conviction order suffers from serious infirmity. (Para 20, 21 and 28)

B. Criminal Law – Criminal Procedure Code,1860 – Section 313 – Defence case – Duty of trial court – Judgment neither disclosed the case of the accused, nor there is any whisper as regards the defence of the accused appellant – No specific question was asked from the accused under Section 313 CrPC as to what he did after taking the deceased from his house – Held, the defence of the appellant has not been dealt with. Further the statement too has been recorded in a very casual and cursory manner, without asking the accused relevant and direct question – Not only the judgment of the trial Court but also the statement under Section 313 CrPC is flawed. (Para 25 and 27)

C. Evidence Law - Evidence Act, 1872 – Section 106 – Burden of proving the fact especially within knowledge – Scope and applicability – S. 106 of the Evidence Act may not be intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt – It would only be applicable where the prosecution had succeeded in proving facts – Since the prosecution failed to establish the facts, it cannot be said that the accused failed to offer sufficient explanation to attract Section 106 Evidence Act. (Para 27)

Appeal allowed (E-1)

Cases relied on :-

1. Chunda Murmu Vs St. of W.B., (2012)5 SCC 753

2. Satbir Singh & anr. Vs St. of Har. 2021 SCC Online SC 404

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

1. Present criminal appeal under Section 374 CrPC has been filed against the judgment of conviction and sentence dated 18.3.1999, passed by Additional District & Sessions Judge, Barabanki in Sessions Trial No.448 of 192, Case Crime No.138 of 1991 under sections 364, 302, 379 I.P.C., P.S. Kursi, district Barabanki whereby and whereunder the appellant accused Subrati has been convicted and sentenced to undergo six years R.I. and to pay a fine of Rs.2000/-, with default stipulation, under Section 364 I.P.C. Other accused persons Subrati, Taukeer and Abul Hassan have been acquitted of the charges framed against them.

2. Heard learned counsel for the appellant Mr. Abhishek Mishra, learned Additional Government Advocate for the State Mr. Ashok Kumar and perused the record.

3. Prosecution case as per the first information report is that the informant Shashibhal Tripathi son of Brijbhushan is a resident of village Khanwaha, P.S. Deva, district Barabanki. Around three years ago,

one Malik of Gausar was killed in village Kutlupur, P.S. Fatehpur, in which, son of the complainant was made accused. Since then, the entire family of Malik was inimical towards the family of the informant. It is for this reason that the son of the informant used to live in Lucknow and come home frequently. Today, at about 8.00a.m., he came home from Hero Honda. Subrati came to his house and asked him to accompany him to go to Gramsevak for urgent work. His son went with Subrati on Hero Honda. Then he received information that his son has been killed at 11.00a.m. in village Garhi, Mauja Kursi. Thus, the informant has suspicion that his son has been killed by Tauqeer, his father Abdul Hassan, resident of police station Kursi.

The first information report was registered on 2.12.1991 at 12.10p.m. and Case Crime No.138 of 1991 under sections 364, 302 I.P.C. has been registered.

4. The investigating officer inspected the place of occurrence, took the statement of prosecution witnesses, prepared site plan and after completing the formalities filed charge-sheet in the court of competent jurisdiction. After committal of the case to the Court of Sessions, charges were framed.

5. The prosecution to prove its case has produced as many as seven witnesses, viz. P.W.1 Shashibhushan Tripathi, P.W.2 Smt. Malti Tripathi, mother of the deceased, P.W.3 Smt. Rajkumari, wife of deceased, P.W.4 Dr. B.K. Verma who conducted the post mortem of the deceased, P.W.5 S.I. Shivdatt Singh, P.W.6 Azam Ali Khan who prepared the panchayatnama, Ext. Ka-7 and P.W.7 S.I. Rama Shankar Yadav who had investigated the case and filed charge-sheet.

6. P.W.1 in his examination-in-chief stated that around six years ago, one Malik, A.D.O.M.I. was killed in which his son Satish (deceased) was made accused and for this reason, the family of Malik was inimical to them. His son used to live in Lucknow because of fear. At the time of death, he was having a job of cycle in Mall kasba. He was having friendship with accused Subrati. Abul Hassan is the father of deceased Malik. Subrati was in collusion with Abul Hassan. His wife asked the deceased Satish not to have friendship with Subrati as he is in tie with Abul Hasan and others. The day deceased was killed, he came to him at about 8.00a.m. from Lucknow. Subrati came to call his son and said that they have to go to Block Deva. Both of them went on Hero Honda motorcycle to meet Gram Sevak. Thereafter, the complainant came to know that his son has been killed at around 11.00a.m. It is stated by the witness that his son has been killed by Subrati in collusion with Abul Hassan and Tauqeer. He has proved the written report, Ext. Ka-1.

In the cross-examination, witness has stated that Subrati used to often come to his residence when Satish was at home. His son was in the business of engine and cycle. On the date of incident he was at home and he(P.W.1) was also present. After 10-15 minutes of arrival of his son at home, Subrati came and on the pretext of meeting with Gram Sevak took him. Both of them often used to come and go together. Subrati used to get the loan sanctioned to the farmers and provide engines (pumping sets). It is further stated by the witness that his son had gone with Subrati at about 8.30a.m..Information regarding murder of his son was given by Rahmati, brother of Subrati at Deva. Then he says that he named the accused persons

on the basis of suspicion. It is further said that he does not know whether ADOMI was having friendship with his son or was inimical with him. He then said that there has never been any enmity between his son and Subrati, nor it is today. He is also not aware whether Abul Hasan and Taqeer were inimical to his son or not. There has been no enmity between Abul Hasan and others with him or his son. Motorcycle has not been recovered from the spot/place of occurrence and till date, it has not yet been recovered.

7. P.W. 2 Smt. Malti Tripathi is the mother of deceased Satish. This witness being the wife of the complainant Shashibhan Tripathi also deposed in tune with that of the complainant. She deposed that the incident of murder of Malik, in which her son was made an accused. Subrati was in friendship with Abul Hasan and Tauqeer. The accused and her son were friends. She had also warned her son not to be in the company of Subrati as the latter had good terms with Abul Hasan and others. The witness has further stated that her son would live in Lucknow due to his being an accused in the murder of Malik. On the day of murder, her son came home at 8.00a.m. It was Subrati who called her son who was having tea. The moment he came, Subrati said that hurry up, they have to meet Gram Sevak. The deceased went with Subrati on Hero Honda motorcycle. Due to murder of ADOMI, in which her son was accused, Tauqeer and Abul Hassan were inimical to her son.

In cross-examination, the witness has stated that Subrati often used to come to her house 3-4 times a day as he was having friendship with her son since childhood. She also stated that in the murder of her son, according to the villagers, Tauqeer and Abul Hassan are involved. That is why, the witness had also suspected. Her son often used to go with Subrati on motorcycle. It is true that on the basis of suspicion and on saying of some persons, the names of Tauqeer, Abul Hassan have been told to investigating officer. The killers had taken the motorcycle of her son/deceased. It is also true that the rings, money, watch etc the deceased had at the time of incident were looted.

8. Another fact witness P.W.3 Smt. Rajkumari who is the wife of the deceased Satish Chandra Tripathi has stated on oath that three years before, Malik was murdered and it was suspected that her son was involved in the said murder and thereby, the brother of Malik, Tauqeer had inimical terms with her son. The witness stated that Tauqeer and Subrati are friends. On the day of the incident, Subrati had come to her house and called her husband. At that time, she was not at home.

In her cross-examination the witness has stated that Subrati would come to her home very frequently. Subrati used to get engines financed. The motorcycle has also been looted on the date of murder, which has not been recovered till date. Her mother-in-law told that in the murder of her husband, Subrati, Tauqeer and Abul Hassan are involved. This has been told by her mother-in-law on the basis of suspicion.

9. P.W.4, P.W.5, P.W.6 and P.W.7 are the formal witnesses.

P.W.4 Dr. B.K. Verma who conducted the post mortem of the deceased Satish proved the Ext.Ka-2, i.e. the post

mortem report. In his cross-examination, Dr. Verma has sated that the shot of fire was made from the distance of 5-6'

10. P.W.5 S.I. Shiv Datt Singh proved Ext. Ka.3.

11. P.W.6 Azam Ali Khan who prepared panchayatnama proved it as Ext.ka-7. In his cross-examination, the witness stated that the statement of the informant and Vimlesh Kumar was recorded after preparation of panchayatnama. Vimlesh Kumar is an eye-witness. Vimlesh Kumar has stated before him that he recognises the culprits and he can identify them, on seeing.

12. P.W.7 is S.I. Rama Shankar Yadav who investigated the case and filed charge-sheet, Ext. Ka-7.

13. Statement of the accused has been recorded under Section 313 CrPC, in which his case is of denial.

14. Trial Court after hearing the parties and perusal of the record as well as appreciation of evidence(s) has convicted the accused appellant and sentenced him under Section 364 I.P.C.

15. While assailing the judgment of conviction, appellant's counsel has submitted that there is no direct or circumstantial evidence against the accused appellant in this case. The appellant has been falsely implicated. No motive has been attributed by the prosecution to the appellant. While putting question No.6 from the accused in his statement under Section 313 CrPC the specific question that on 2.12.1991 when the deceased Satish came from Lucknow to his home, then accused Subrati under the pretext of meeting with Gram Sevak has taken the deceased from his house with an intention to kill or commit his murder has not been put; rather it has been pointed out that it has revealed in the statement of the prosecution witnesses that on 2.12.1991 in the morning when Satish has come to his home village Sanwaha from Lucknow, Subrati under the pretext to meet Gram Sevak took Satish with him. On this, the accused Subrati replied, "galat", i.e. wrong. which is a serious infirmity in the judgment.

Again, while putting question No.12, the specific evidence of particular witnesses has not been put to him; rather collectively in one line, the entire evidence of prosecution has been vaguely put to him which is not proper. It is contended that the appellant has been implicated due to enmity. It is lastly contended that the deceased has been murdered by unknown assailants and his motorcycle, money as well as watch etc have been looted out and thus, it is a case of loot, might have been committed by some strangers.

16. Learned Addl. Government Advocate has supported the judgment and submitted that the prosecution has been successful in proving the case against the accused appellant.

17. I have considered the submission advanced by appellant's counsel, learned Addl. Government Advocate and gone through the judgment rendered by the trial Court as also perused the lower court's records.

18. A perusal of the judgment and order under appeal reveals that the trial Court while acquitting the accused persons, namely Subrati, present appellant, Tauqeer and Abul Hassan for the offence under

Section 302, read with Section 34 and Section 379/34, has held the appellant Subrati guilty of offence under Section 364 I.P.C. on the only ground that he had taken the victim Satish from the latter's home on motorcycle at about 8.00 in the morning. In the first information report, the appellant has not been named, nor any suspicion has been raised as against him.

19. Before proceeding further, it would be appropriate to go through the ingredients of Section 364 I.P.C. to prove the offence. To quote Section 364 I.P.C. :

"364. Kidnapping or abducting in order to murder.-Whoever kidnaps or abducts any person in order that such person may be murdered or may be so disposed of as to be put in danger of being murdered, shall be punished with imprisonment for life or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine."

20. A bare reading of the definition of Section 364 I.P.C. depicts that the ingredients of the said offence are (1) abduction/kidnapping by the accused must be proved; (2) it must also be proved that he was kidnapped in order to ; (a) that such person may be murdered; or (b) that such person might be disposed of as to be put in danger of being murdered. The intention for which a person is kidnapped must be gathered from the circumstances attending prior to, at the time of and subsequent to the commission of the offence.

21. In the case in hand, the deceased Satish being friend of the appellant had gone with the appellant on his motorcycle, as usual, on being called by the latter in the morning. Except being called by the appellant, there is nothing on record to show that the appellant is in any way involved in the commission of alleged offence. The action of the accused appellant in taking the victim on the motorcycle with a view to meet Gram Sevak cannot attract the necessary ingredients of either the offence of kidnapping or abduction so as to attract Section 364 I.P.C. as held by Hon'ble Supreme Court in **Chunda Murmu** versus **State of West Bengal** (2012)5 SCC 753. In this context, it is relevant to quote para 18 as under :

"18. Insofar as the offence under Section 364 IPC is concerned, we have considered the materials on record on the basis of which the aforesaid offence has been held to be proved. According to us, the action of the accused in bringing back his wife to the matrimonial home from the house of PW 6 Bishu Murmu cannot attract the necessary ingredients of either the offence of kidnapping or abduction so as to attract Section 364 IPC.

From the above case law as well as the ingredients of Section 364 I.P.C., it is evident that to establish an offence punishable under Section 364 I.P.C., it must be proved that the person charged with the offence had the intention at the time of the abduction that the person abducted would be murdered or would be so disposed of as to be put to danger of being murdered. In this case, the prosecution had to prove that the appellant accused at the time when he took away the victim Satish had this particular intention. On this element of the offence, no finding has been recorded by the trial Court.

22. It is further significant to note that Malik who was the son of Abul Hassan and

brother of Tauqeer was killed three years back, in which the present appellant was made an accused. In case it is taken to be true, for argument's sake, that due to alleged involvement of the victim, the relations between family members of deceased Malik and the victim were not good, but it cannot reasonably be inferred that after three years of the incident of murder of Malik, the incident of murder of Satish can be committed with a view to wreak vengeance, at the instance of the appellant who was in friendship with the victim since childhood.

23. P.W.1 Shashi Bhan Tripathi in his statement has deposed that there has never been any enmity between his son and the appellant Subrati, nor it is today. The mother of the deceased whose statement has been recorded as P.W.2 too has stated that Subrati used to come her home 3-4 times a day, since childhood. Thus, it is proved beyond doubt that Subrati and the victim were the real friends.

P.W.3 who is the wife of the deceased has stated that she was not at home at the time her husband went with Subrati. She received the information of murder of her husband in the evening at about 4.00p.m. Although she deposed that in the murder of her husband, Subrati, present appellant, Tauqeer and Abul Hassan are involved, but she has also stated that she is telling the names of the accused on the basis of suspicion as told by her mother-in-law.

24. It is further important to note that though P.W. 6 Azam Ali Khan who prepared panchayatnama stated that Vimlesh Kumar is an eye-witness and he(Vimlesh Kumar) can recognise the culprits, on seeing but there is no whisper in the judgment passed by the trial Court, in this context. From the perusal of the record, it does not appear that this important witness has been examined.

25. It is further worthy to note that the learned trial court, although recorded the statement of the accused appellant under Section 313 CrPC, but a perusal of the judgment does not disclose the case of the accused, nor there is any whisper as regards the defence of the accused appellant. It is only after holding the accused appellant guilty of offence under Section 364 I.P.C. that the trial court has mentioned in a casual manner that "heard learned counsel for the accused Subrati and **Subrati**", on the point of sentence. The defence of the appellant has not been dealt with. Further the statement too has been recorded in a very casual and cursory manner, without asking the accused relevant and direct question, as referred to above. Thus, not only the judgment of the trial Court but also the statement under Section 313 CrPC is flawed.

26. In **Satbir Singh and another** versus **State of Haryana** 2021 SCC Online SC 404, Hon'ble Supreme Court has observed that that the trial court should not record statement of the accused in a very casual and cursory manner, without specifically questioning the accused as to his defence. To quote para 22 :

"It is a matter of grave concern that, often, Trial Courts record the statement of an accused under Section 313 CrPC in a very casual and cursory manner, without specifically questioning the accused as to his defense. It ought to be noted that the examination of an accused under Section 313 CrPC cannot be treated as a mere procedural formality, as it is

based on the fundamental principle of fairness. This provision incorporates the valuable principle of natural justice "audi alteram partem", as it enables the accused to offer an explanation for the incriminatory material appearing against him. Therefore, it imposes an obligation on the part of the Court to question the accused fairly, with care and caution. The Court must put incriminating circumstances before the accused and seek his response. A duty is also cast on the counsel of the accused to prepare his defense, since the inception of the trial, with due caution, keeping in consideration the peculiarities of Section 304-B, IPC read with Section 113-B, Evidence Act. "(Emphasised by me)

27. No specific question was asked from the accused under Section 313 CrPC as to what he did after taking the deceased from his house. Section 106 of the Evidence Act may not be intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. Section 106 of the Evidence Act would only be applicable where the prosecution had succeeded in proving facts. Since the prosecution failed to establish the facts, it cannot be said that the accused failed to offer sufficient explanation to attract Section 106 Evidence Act.

Further it appears from the perusal of the statement of the accused under Section 313 as also the judgment on the point that the appellant was not afforded opportunity to put his defence. Learned trial court also did not examine the defence of the accused. The court must put incriminating circumstances before the accused and seek his response. Section 232 CrPC provides, "If, after taking the evidence for the prosecution, **examining the accused** and hearing the prosecution and the defence on the point, the Judge considers that there is no evidence that the accused committed the offence, the Judge shall record an order of acquittal. Such discretion must be utilised by the trial Courts as an obligation of best efforts.

28. It also appears that there is no evidence on the record nor discussed in the judgment of the trial Court to show that the deceased Satish had been abducted for causing his murder or with a view to see that he was murdered, as envisaged under Section 364 I.P.C. Learned trial Judge nowhere in the judgment gave his satisfaction as regards the state of mind of the appellant accused at the time of the alleged abduction and thus, the judgment of conviction suffers from serious infirmity and warrants interference by this Court in its appellate jurisdiction.

29. In view of what has been discussed hereinabove, the appeal is allowed and the judgment and order dated 18.3.1999 (supra) is set aside. The bail bonds are discharged.

Pending application, if any stands disposed of.

30. Let a copy of the order be sent to the trial Court as also the lower court records.

(2021)09ILR A139
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.08.2021

BEFORE

THE HON'BLE AJAI TYAGI, J.

Criminal Appeal No. 414 of 2017

Neeraj @ Kalua ...Appellant (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Apul Mishra, Sri Shailendra Singh Rathore, Sri V.P. Singh Kashyap, Sri Vinod Singh

Counsel for the Respondent:
A.G.A.

A. Criminal Law – Indian Penal Code, 1860 – Sections 304B & 498-A – Dowry Prohibition Act, 1961 – Sections 3 & 4 – Dowry Death – Death due to burning – Unnatural circumstances – Held, if a married woman dies in unnatural circumstances in her matrimonial home within seven years of her marriage and there are allegations of cruelty or harassment upon such married woman in connection with demand of dowry by her husband or relatives of the husband, the case would squarely come under dowry death. (Para 10)

B. Criminal Law – Indian Penal Code, 1860 – Section 201 – Causing disappearance of evidence – No post-mortem report conducted – Body of deceased cremated without informing the parent – Father of the deceased said that when he came to the house of her daughter, he did not find the body of his daughter and she had already been cremated – Held, it is established by the prosecution that after the death of deceased, her body was cremated without getting the postmortem done to destroy the evidence which is an offence under Section 201 I.P.C. (Para 19 and 21)

C. Criminal Law – Dowry Prohibition Act, 1961 – Section 2 – Dowry – Meaning and definition – Dowry means any property or valuable security given or agreed to be given either directly or indirectly by one party to the other party at or before or any time after the marriage in connection with the marriage of said parties – Emphasis on property or valuable security given 'at or before' or 'any time after the marriage in connection with the marriage of said parties'. (Para 12)

D. Evidence Act, 1872 – Section 113-B – Presumption of dowry death – Applicability – Held, if it is shown that soon before her death such woman has been subjected to cruelty or harassment by the accused for, or in connection with any demand of dowry, the Court shall presume that such person has caused the dowry death – Any demand of money or anything else must relate with the marriage – Admittedly deceased died after one and half years of her marriage i.e. within seven years of her marriage and she died in her matrimonial home and her death was due to burning and it was an unnatural death otherwise in normal circumstances – Presumption of causing dowry death arisen. (Para 10 and 13)

E. Evidence Act, 1872 –Section 113-B – Presumption – Nature – Onus to proof, when it shift on the accused – Held, presumption under Section 113-B of Indian Evidence Act is rebuttable, hence now onus shifts on the accused to prove as to how the deceased died – It is for the accused to show that the death of the deceased did not result from any cruelty or demand of dowry by the accused persons/appellant. (Para 15)

F. Criminal trial – Criminal Procedure Code, 1973 – Section 313 – Defence – Burden of proof – Burden is on the shoulder of appellant to prove the defence under Section 313 Cr.P.C. – Defence witness stated in his cross-examination that he does not know as to how deceased died. At the time of occurrence, he was not there – Held, there is no evidence on behalf of appellant on record, hence appellant miserably failed to prove the reason of committing suicide by the deceased – Conviction held justified. (Para 17 and 23)

Appeal dismissed (E-1)

Cases relied on :-

1. Vipin Jaiswal Vs St. of A.P. (2013) 3 SCC 684

2. Surinder Singh & anr. Vs St. of Pun.; 1999 (1) Crimes 429

3. Maya Devi & anr. Vs St.of Har. AIR (2016) Supreme Court 125

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

1. Heard the arguments of learned counsel for the appellant and learned A.G.A. for the State and perused the record.

2. This Appeal has been preferred against the order and judgement dated 23.12.2016 passed by Additional Sessions Judge (F.T.C.), Court No.03, Bulandshahr in S.T. No. 403 of 2015, Neeraj alias Kalua Vs. State of U.P. arising out of Case Crime No. 186 of 2015 convicting and sentencing the appellant under Section 498-A I.P.C. for two years' imprisonment with fine of Rs. 5,000/-, in case of default, four months' additional imprisonment; under Section 304B I.P.C. for 10 years' imprisonment; under Section 201 I.P.C. for two years' imprisonment with fine of Rs. 5,000/-, in case of default, four months additional imprisonment; under Section 3 of Dowry Prohibition Act for five years' imprisonment with fine of Rs.15,000/-, in case of default, one year additional imprisonment; under Section 4 of Dowry Prohibition Act for one year imprisonment with fine of Rs. 3,000/-, in case of default, two months' additional imprisonment. All the punishments were directed to run simultaneously.

3. Brief facts of the case are that complainant, Mahesh has lodged First Information Report in Police Station, Kotwali Dehat, District Bulandshahr stating therein that her daughter Shikha, aged about 22 years, got married on 13-11-2013, with Neeraj S/o Murari, Village Akhtiyarpur, District Bulandshahr with Hindu rituals in which he gave articles, jewellery, clothes, motorcycle, etc. in dowry as per his capacity. In all, complainant spent Rs. 7,00,000/- to Rs. 8,00,000/- in her marriage. Even then, in-laws of her daughter were not happy with the dowry given and after some days of marriage, they started beating his daughter. After six months of marriage, Neeraj demanded Rs. 2,00,000/- for purchasing a car which was paid to him by the complainant, after that also, his daughter was continuously beaten, thereafter Rs. 1,00,000/- lakh were given to Neeraj but even after that, he continued beating his daughter. On 14-03-2015, his daughter has been murdered by his son-in-law, Neeraj, his father, Murari, mother, Sheela Devi and brothers, Vishnu and Kuldeep and for hiding his daughter's body, they cremated her without giving any information to him. It is also stated that complainant sister's son, Dhara Singh, who resides in the same village, informed complainant regarding the killing and cremation of his daughter. After getting this information, complainant came to the Police Station from Delhi. On this first information, Case No. 186 of 2015 under Sections 498A, 304 B, 201 IPC and Sections 3 and 4 of Dowry Prohibition Act was registered against above-mentioned accused persons.

4. After investigation, Investigating Officer submitted charge-sheet against accused Neeraj alias Kalua, Vishnu and Smt. Sheela Devi. Murari and Kuldeep were summoned by the learned trial court for trial under Section 319 Cr.P.C. Learned trial court framed charges under Section 498A, 304 B, 201 IPC and Section 3 and 4 of Dowry Prohibition Act against the accused persons and after considering the evidence on record, learned trial court

convicted and sentenced only accused Neeraj alias Kalua under Section 498-A I.P.C. for two years' imprisonment with fine of Rs. 5,000/-, in case of default, four months' additional imprisonment; under Section 304B I.P.C. for 10 years' imprisonment; under Section 201 I.P.C. for two years' imprisonment with fine of Rs. 5,000/-, in case of default, four months additional imprisonment; under Section 3 of Dowry Prohibition Act for five years' imprisonment with fine of Rs.15,000/-, in case of default, one year additional imprisonment; under Section 4 of Dowry Prohibition Act for one year imprisonment with fine of Rs. 3,000/-, in case of default, two months' additional imprisonment. Rest of the accused persons were acquitted by learned trial court, hence his appeal has been filed by appellant, Neeraj alias Kalua.

5. First of all, learned counsel for appellant has argued that in this case prosecution has miserably failed to prove the demand of dowry made by the appellant. Appellant never demanded anything from the deceased-wife or her parents which could be considered as dowry demand. Learned counsel has argued that prosecution has produced two witnesses of facts i.e. P.W. 2, Mohini Devi, who is mother of the deceased and P.W. 3, Mahesh Chand who is father of the deceased. Both the witnesses have stated in their statements that they paid Rs.2,00,000/- to the appellant for starting a dairy. If this statement is assumed to be true, even then, it does not relate to demand in connection of marriage.

6. Learned counsel for the appellant has referred the judgement of ***Vipin Jaiswal Vs. State of Andhra Pradesh (2013) 3 SCC 684*** and submitted that if any demand is made for investing money in business then it cannot be said as a dowry demand. Learned counsel further argued that P.W. 3, Mahesh Chand, father of the deceased has said in his statement that only Neeraj used to demand the money for starting milk dairy which he got started, hence, it is admission of father of the deceased that he paid money only for starting a milk diary which had no connection with the marriage at all.

7. Per contra, learned A.G.A. submitted that apart from the payment of Rs. 2,00,000/-, appellant was paid additional Rs. 1,00,000/- also and even after that, appellant continued with maltreatment to the deceased and after that, he pressurized the deceased and her parents to transfer their land in his name which had no connection with any business and for not getting the demand fulfilled, he killed his wife and if it is assumed that deceased committed suicide by setting herself ablazed, even then, suicide was the result of pressure of demand of dowry made by accused and due to beating her regularly. Learned A.G.A. also next argued that deceased died just after one and half years of her marriage and her death was otherwise than in normal circumstances. It was unnatural death occurred within seven years of her marriage and it is proved by prosecution witnesses that before the occurrence, she was subjected to cruelty by appellant in connection with demand of additional dowry, hence in such circumstances as per Section 113B of Indian Evidence Act, a presumption of dowry death will be drawn and the death of deceased, whether it is homicide, suicide or accidental, will be covered under dowry death as envisaged under Section 304 B I.P.C.

8. For ready reference, it is relevant to reproduce Section 304B IPC which reads as under:

*"**304B. Dowry death.**-- (1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.*

***Explanation.**-- For the purposes of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).*

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life."

9. For ready reference, Section 113-B of Indian Evidence Act is also reproduced which reads as under:

*"**113B. Presumption as to dowry death.**--When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death.*

***Explanation.**--For the purposes of this section, "dowry death" shall have the same meaning as in section 304B of the Indian Penal Code, (45 of 1860)."*

10. If a married woman dies in unnatural circumstances in her matrimonial home within seven years of her marriage and there are allegations of cruelty or harassment upon such married woman in connection with demand of dowry by her husband or relatives of the husband, the case would squarely come under dowry death. And for that, presumption of dowry death will arise under Section 113B of Indian Evidence Act which says that if it is shown that soon before her death such woman has been subjected to cruelty or harassment by the accused for, or in connection with any demand of dowry, the Court shall presume that such person has caused the dowry death. Now here comes the question of dowry first. It is obvious that any demand of money or anything else must relate with the marriage.

11. Learned counsel for appellant has argued that demanding or paying Rs. 2,00,000/- for starting milk diary cannot be said to be demanded in connection with marriage and it will not come under the definition of dowry.

12. PW 2, Mohini Devi, mother of deceased has said in her statement that appellant was not happy with the dowry given in marriage of her daughter and he started demanding additional dowry. P.W. 3, Mahesh Chand, father of deceased also said in his statement that appellant used to beat his daughter for not meeting out the demand of additional dowry. Further, both the witnesses have also said that appellant also put demand before them to transfer their land in his name, hence, it cannot be said that the demand by appellant was confined only to the extent of starting milk dairy but demand of additional dowry in the name of cash and land was connected with marriage also. Section 2 of Dowry Prohibition Act 1961 states that the dowry means any property or valuable security given or agreed to be given either directly or indirectly by one party to the other party at or before or any time after the marriage

in connection with the marriage of said parties. Thus, the emphasis on property or valuable security given "at or before" or "any time after the marriage in connection with the marriage of said parties". In this case both the witnesses, P.W. 2 and P.W. 3 have clearly stated that the accused was unhappy with the quantity of dowry given at the time of marriage and demand of additional dowry was being made by appellant and for that reason there was continuous beating of deceased by the appellant, hence, on the basis of facts and evidence of this case, it cannot be said that appellant demanded money only and only to start the milk-dairy, hence, the case laws submitted by learned counsel for the appellant i.e. ***Vipin Jaiswal Vs. State of Andhra Pradesh (2013) 3 SCC 684*** does not apply in this case.

13. It is an admitted fact that deceased died after one and half years of her marriage i.e. within seven years of her marriage and she died in her matrimonial home and her death was due to burning and it was an unnatural death otherwise in normal circumstances, hence, the presumption under Section 113B of the Indian Evidence Act, 1872 arises and it shall be presumed that it was a dowry death. It is also a burden of prosecution to prove that the deceased was subjected to cruelty soon before her death. In this regard, P.W. 3, Mahesh Chand, father of deceased has said in his cross-examination that before 4-5 days of her death, Shikha (his deceased-daughter) came to his house and told that her in-laws harassed her to the great extent and they were demanding land in additional dowry and if he doesn't transfer the land in favour of accused, they would kill her. It was the statement of deceased made before 4-5 days of her death.

14. Though the language used is "soon before her death", but no definite period has been indicated in this regard and the expression "soon before her death" has not been defined in Section 113B of Indian Evidence Act or in Section 304B IPC. Accordingly, the period which can come within the term "soon before her death" is to be determined by the Court depending upon the facts and circumstances of each case because it may vary from case to case but it is necessary that interval between the cruelty or harassment and the death in question should not be very wide. In other word, there must be existence of her proximate and live link between the effect of cruelty based on dowry demand and the death concerned. In the present case, P.W. 3 has stated in his statement that just before four to five days of her death, her daughter came to his house and complained about the harassment and demand of additional dowry. So it can very well come in the ambit of phrase "soon before her death".

15. In the light of discussion made above, prosecution has established that the death of the deceased was dowry death. The presumption under Section 113B of Indian Evidence Act is rebuttable, hence now onus shifts on the accused to prove as to how the deceased died. It is for the accused to show that the death of the deceased did not result from any cruelty or demand of dowry by the accused persons/appellant.

16. Appellant has taken up case that the deceased has herself committed suicide but Hon'ble Apex Court in ***Surinder Singh & Anr. Vs. State of Punjab 1999 (1) Crimes 429*** and ***Maya Devi and Another Vs. State of Haryana AIR (2016) Supreme Court 125*** has held that a homicidal or suicidal or accidental, all three types of

deaths come under the purview of dowry death. In his statement under Section 313 Cr.P.C., the accused appellant has set up the case and stated that the deceased was of irritating nature and she committed suicide by locking the door of the room from inside and he took her out after breaking the door with the help of villagers. It is also stated in his statement that cremation of deceased was made in the presence of her father and after that, on instigation of his wife, father of the deceased made illegal demand of money from appellant and due to not meeting out that demand, he was falsely implicated in this case.

17. Now, it is the burden on the shoulder of appellant to prove the defence under Section 313 Cr.P.C. for which the defence witness, Dalchand was produced as D.W. 1 but this witness has stated in his cross-examination that he does not know as to how Shikha died. At the time of occurrence, he was not there. He has also stated in cross-examination that deceased Shikha was of feeble minded and irritating in nature. She got treatment also for that but he failed to disclose as to which doctor had treated her. Besides this, there is no evidence on behalf of appellant on record, hence appellant miserably failed to prove the reason of committing suicide by the deceased. Moreover, it is not worth-believing that if a person is of irritating nature, he or she will commit suicide only due to that reason. In ***Surinder Singh & Anr. Vs. State of Punjab (Supra)***, it is also held by Hon'ble Apex Court that husband being the direct beneficiary can be inferred to have caused life of his wife so miserable that she was compelled to commit suicide.

18. Appellant is not able to rebut the presumption of dowry death in this case.

19. Now, here comes the conduct of accused appellant after death of his wife. In this regard, learned counsel for appellant argued that after the death of deceased, her father was duly informed, after that, he came from Delhi and cremation took place with his consent in his presence but I do not agree with this argument from the side of appellant because it is against the evidence on record. P.W. 3, father of the deceased has said in his statement that when he came to the house of her daughter, he did not find the body of his daughter and she had already been cremated while destroying the evidence. He has also stated in his cross-examination that police personnel had already gone after taking the ashes of fire of his daughter even before his reaching there. P.W. 2 and P.W. 3, both the witnesses have stated in their statements that when they reached the house of their daughter, she had already been cremated and appellant and his family members have already fled from there.

20. Perusal of record also shows that police went to the house of deceased and collected wooden pieces of door of the room which was half burnt and police also collected some hair, pieces of bangle, burnt pieces of saree etc. from inside the room and police sealed above articles on the spot. This recovery-memo is proved by P.W. 6 as Exhibit-Ka 8 and in this recovery-memo, it is written that when the police physically inspected the place of offence, there was nobody present in the house and all were found absconded. These collected articles from the spot were sent to Forensic Science Laboratory, Agra for chemical examination. That report dated 22, July 2016 is on record and in this report, it is opined that in pieces of burnt cloth, it could not be opined that there was human skin present in these clothes and whether burnt

bones and ashes were of human bones or not but it was opined in this report that the hair was found to be human hair.

21. Investigating Officer also prepared one site plan, Exhibit-Ka 4 which relates to the place of occurrence and in addition to that Investigating Officer also prepared site-plan, Exhibit-Ka 5 which shows place where the dead body of deceased was cremated behind a school, hence it is established and proved by the prosecution that after the death of deceased, her body was cremated without getting the postmortem done to destroy the evidence which is an offence under Section 201 I.P.C. The conduct of accused appellant after the death of his wife also establishes that he had tried to destroy the evidence because if the deceased had committed suicide and appellant was not responsible for that then he would have informed the police but the accused neither informed the police nor informed the parents of deceased and even before arrival of parents of deceased, dead body of the deceased was cremated and accused fled away from his residence. So his conduct is also contrary to the defence taken by him under Section 313 Cr.P.C.

22. No other argument has been placed by learned counsel for the appellant before this Court.

23. Hence, keeping in view the above discussion, this Court is of the opinion that learned trial court has rightly appreciated the evidence on record and rightly convicted and sentenced the accused Neeraj alias Kalua.

24. The appeal lacks merit and is liable to be dismissed, and is accordingly dismissed.

(2021)09ILR A146
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.09.2021

BEFORE

THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Jail Appeal No. 507 of 2018

Govind Kumar Kureel ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Dheeraj Kumar Dwivedi, Sri Swetashwa Agarwal (A.C.)

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

A. Criminal Law – Indian Penal Code,1860 – Section 308 – Attempt to commit culpable homicide – Wife's FIR that she was assaulted by her husband with lathi-danda, bricks and kick and punches, due to which she suffered grievous injuries – Her face and nose were disfigured – Injured-victim was admitted to Hospital and remained in Hospital for 17-18 days – Sentence of four years rigorous imprisonment ordered – Validity challenged – Held, the learned trial court has fully discussed the entire evidence and has properly appreciated it and has rightly held the accused guilty for offence under Section 308 IPC – There is no illegality or perversity in the findings recorded by the trial court – However, High Court converted sentence of four years RI to three and half years RI and fine of Rs. 20,000 to Rs. 10,000. (Para 15, 16 and 19)

B. Criminal Law – Trustworthiness of injured witness – Corroboration by medical evidence – Held, the statement of the victim is reliable and trustworthy and there is no major discrepancy or

contradiction in her statement, which makes it unreliable – There is no reason to disbelieve victim's testimony, which is also corroborated by the medical evidence and there is no reason for false implication. (Para 14)

Appeal partly allowed. (E-1)

(Delivered by Hon'ble Syed Aftab Husain Rizvi, J.)

1. Heard Sri Swetashwa Agarwal, learned counsel appearing for the appellant as *Amicus Curiae* and learned A.G.A.

2. This jail appeal has been filed against the judgment and order dated 19.07.2018 passed by the Additional Sessions Judge, court no.17, Kanpur Nagar arising out of case crime no.97 of 2011 for offence under Sections 308, 323, 504, 506 IPC Police Station Bidhnu, District Kanpur Nagar convicting the appellant (accused) under Section 308 IPC and sentencing him to undergo rigorous imprisonment for four years and imposing a fine of Rs. 20,000/- and in default of payment of fine, three months simple imprisonment.

3. In brief the prosecution case is that an application written by Raj Karan under the thumb impression of victim/informant Sarita dated 05.03.2011 was given at Police Station- Bidhnu alleging therein that " applicant- Smt. Sarita is the wife of Govind Kureel resident of Pahadpur- Tulsinagar. In the night of 04.03.2011 in between 11:00 to 12:00 O'clock my husband suddenly attacked me while I was sleeping and assaulted me with *lathi-danda*, bricks and kick and punches, due to which I suffered grievous injuries and thereafter he went away threating me and locking my room from outside. On the aforesaid, application case crime no.97 of 2011 under Sections 323, 504, 506, 308 IPC was registered and the investigation commenced. The Investigating Officer, visited the place of occurrence from where he took one blood stained piece of brick and sealed it, he also collected blood stained and unstained soil from the place of occurrence and sealed it and prepared the memo and site plan, recorded the statements of scribe victim/ complainant and other witnesses and after completion of the investigation, submitted the charge-sheet under Section 308, 323, 504, 506 IPC.

4. The learned trial court framed the charges against the accused-appellant Govind Kureel under Sections 308, 323, 504 and 506 I.P.C. The accused denied the charges and claimed for trial, the prosecution lead its evidence and examined eight witnesses. Statement of accused recorded under Section 313 Cr.P.C. in which he denied all the allegations and stated that he has been falsely implicated. No evidence in defence has been produced. The learned trial court after hearing the arguments by the impugned judgment has held the accused-Govind Kureel guilty for charge under Sections 308 and 323 IPC but acquitted him from the charges under Sections 504 and 506 IPC. The learned trial court has imposed sentence of four years rigorous imprisonment with fine of Rs.20,000/- for offence under Section 308 IPC only.

5. The medical examination of complainant/ victim namely- Smt. Sarita was conducted on 05.03.2011 at about 11:05 a.m. by Dr. Y.K. Nigam in Hallett Hospital, Kanpur Nagar and according to medical report Ex. Ka-6, the condition of patient was kept under observation:

Pulse rate - 78 per minute

B.P. - 126/70 mmHg
Respiratory Rate - 18 per minute
Temperature – normal
Hydration – Indefinite
Chest – clear
Abdomen – Soft
Patient was conscious but drowsing
Pupils – normal

Injuries:

Lacerated wound on the face extending from forehead to right side nose to right side of upper lip measuring 22 cm X 10 cm X bonedeep. X-Ray Advised.

Dr. has opined that the injury is kept under observation, fresh, due to blunt and hard object, X-Ray advised, police informed, patient admitted under care of doctor Harendra Gautam vide BHT No.5035 of 2011 department of E.N.T. for expert treatment and management.

6. The Complainant Smt. Sarita P.W.-1 is the injured and main witness. In her examination in chief, she has said that the accused- Govind Kureel is her husband. The incident is of 04.03.2011 in between 11:00 to 12:00 p.m., she and her husband Govind Kureel were present in the house. She ought to prevent her husband from wrong doing and due to this her husband Govind Kureel attacked her with a brick and assaulted many times on her face and on her noise, Govind Kureel ran away locking the door from outside. In the morning, the uncle of her husband *(Chachiya Sasur)*, came to know about her condition which was serious and he took her to the police station where he wrote an application on her dictation on which she put her thumb impression. Thereafter she was taken to the Hallett Hospital where she was medically examined and got treatment and admitted in the said hospital for 17 to 18 days. Her face and nose is permanently disfigured in this incident.

7. Razol Saini (P.W.-2) is the formal witness who has proved the memo of taking into possession of blood stained brick and blood stained and unstained soil from the place of occurrence by the Investigating Officer.

8. Chandra Pal (P.W.-3) is the father of the accused. From his testimony, it appears that he is not an eye-witness and at the time of incident he was at his native village while complainant and accused were at Pahadpur Tulsinagar and he has also stated that on information he reached Hallett Hospital where her daughter in law Sarita was admitted in injured condition but he does not know who has committed the alleged incident.

9. Raj Karan (P.W.-4) is the scribe of the FIR. In his examination in chief he has said that Govind Kureel is his real nephew and he lives with his wife Smt. Sarita in his neighbourhood. In the morning when he came from his duty, he saw that his elder brother Chote Lal, wife Ram Wati were carrying Smt. Sarita in a tempo to hospital, he also accompanied them to the hospital, there were serious injuries on the face of Smt. Sarita and she was under treatment for several days in the Hallett Hospital. The witness further stated that Sub-Inspector got his signatures on a plain paper and he has not written anything on it. He has not written any application and also not written any report on behalf of Sarita. This witness is close relation of accused and it appears that due to this he has disowned his writing the application on which the FIR has been lodged. In his cross-examination he has

admitted this fact that Ex.Ka-1 is in his hand writing and earlier he has giving false statement that the application is not in his hand writing. He has also admitted this fact that Smt. Sarita have a good character.

10. Learned counsel for the appellant further contended that the incident is of midnight and it was darkness. The witness herself has admitted that she has not seen who assaulted her, so there is no evidence against the accused and his identification is also doubtful. This argument has no substance. Although the incident occurred in the midnight and darkness and P.W.-1 Smt. Sarita in her cross-examination has admitted that at the time of occurrence, it was dark and she was sleeping, she has also said that she has not seen who assaulted her but she has further stated that when the accused pressed her neck then she recognized him from his voice. The victim is the wife of the accused and from the record it is also clear that only victim and the accused were present in the house at the time of occurrence and after assaulting the victim, the accused went away from the place of occurrence locking the door from outside. In these circumstances, there is no ground for making suspicion about the identity of the accused. The accused has also not put up any case in defence and there is no suggestion that any outsider has entered and committed the incident.

11. Learned counsel for the appellant further contended that the FIR has been lodged on the next day after 12 hrs of the incident and there is considerable delay in lodging the FIR, casting doubt on the prosecution story. The learned AGA submitted that the delay has been reasonably explained as the accused has locked the injured in the room and she was detected in the morning by the family members of her husband then she was taken to the police station and hospital. The incident occurred in the mid-night and the FIR has been lodged on the next day i.e. 05.03.2011 at about 12:45 p.m. The reasons for delay is fully explained, the victim was alone in her house and after committing the crime the accused locked her from outside and she was in badly injured condition and when the matter was detected by her *Chachiya Sasur* then the FIR was lodged.

12. The remaining witnesses S.I.- Mohan Lal Dixit (P.W.-5) and S.I.- Yadu Nath Singh (P.W.-6) and head constable Manoj Kumar (P.W.-8) are formal, the Investigating Officer and chick/ G.D. writer.

13. The only eye witness account is that of Smt. Sarita (P.W.-1) the injured. The incident has occurred inside the house of complainant/ injured and she has implicated her husband. The victim/ complainant Smt. Sarita has supported the prosecution case from her oral testimony. The medical evidence on record also corroborates the ocular version of the complainant/ victim P.W.-1. Dr. Y.K. Nigam (P.W.-7) in his examination in chief has said that the injury was fresh and was caused by hard and blunt object, so the medical evidence fully corroborates the ocular version and there is no contradiction between the two.

14. The statement of the victim- Smt. Sarita is reliable and trustworthy and there is no major discrepancy or contradiction in her statement, which makes it unreliable and there is no reason to disbelieve her testimony which is also corroborated by the medical evidence and there is no reason for false implication.

15. From the evidence on record, it is also established that injury has been caused

on the face and due to which her face and nose were disfigured, injured was admitted to the hospital and she remained in hospital for 17-18 days. The discharge slip of Medical College, Kanpur Nagar is also on record, according to which injured Smt. Sarita was admitted in the hospital on 05.03.2011 and was discharged on 22.03.2011.The injury report also shows that injury was extended from forehead of right side of nose to right side of upper lip, her entire face was damaged.

16. The learned trial court has fully discussed the entire evidence and has properly appreciated it and has rightly held the accused guilty for offence under Section 308 IPC. There is no illegality or perversity in the findings recorded by the learned trial court and the finding of conviction is upheld.

17. The learned Amicus Curaie Mr. Shwetashwa Agarwal submitted that it is a matter of quarrel between husband and wife and the incident is 10 years old, appellant-accused is in jail since 19.07.2018 he also remained in jail at the time of his arrest for more than two months and has completed more than three years and three months imprisonment. Learned counsel prayed that the sentence of undergone may be imposed.

18. The learned trial court has sentenced the accused for four years rigorous imprisonment and a fine of Rs.20,000/- and in default of payment of fine three months simple imprisonment.

19. Considering the nature of the offence, nature of the injuries and all other attending facts and circumstances of the case, it appears to be just to sentence the accused with three years and six months rigorous imprisonment and a fine of Rs.10,000/- and in default of payment of fine three months simple imprisonment. If the fine is deposited the victim- Smt. Sarita will get half of the fine amount.

18. The appeal is ***partly allowed*** in the aforesaid terms.

19. Copy of this judgment along with lower court record be transmitted to the learned trial court immediately. The copy of the judgment be also served on accused through Superintendent of Jail, concerned so that he may be able to deposit the fine, if he so desires.

(2021)09ILR A150
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.08.2021

BEFORE

THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Criminal Appeal No. 508 of 1988

Mainpal ...Appellant (In Jail)
Versus
State ...Respondent

Counsel for the Appellant:
Sri Anil Malik, Sri Kulveer Singh, Sri Deepesh Kumar Ojha

Counsel for the Respondent:
A.G.A.

(A) Criminal Law - appeal against conviction - Indian Penal Code, 1860 - Section 376 - rape - The Code of criminal procedure, 1973 - Section 313 - absence of injury on the prosecutrix may not be a factor that leads the court to absolve the accused - mere delay in lodging the FIR does not adversely affect the prosecution case unless it is proved that delay in

lodging FIR was due to deliberation and consultation making it possible to frame innocent persons - Minor contradictions or insignificant discrepancies in the statement of a prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case - Evidence of the victim of sexual assault is enough for conviction and it does not require any corroboration unless there are compelling reasons for seeking corroboration.(Para - 8,10,12)

At the time of incident - Victim (PW-1) was cutting grass in the field - about 2:00 - 2:30 pm - accused /appellant came from inside sugar-cane field - forcefully dragged victim against her will into the sugar-cane field - committed rape with her - On her noise, her Jethani (PW-2) came there at that time accused was committing rape - appellant ran away - other co - villager also saw him running away - complaint filed by husband of victim - trial court held victim guilty for offence under Section 376 IPC - hence appeal.

HELD:-Victim has fully corroborated the allegations made in the FIR and another eye witness, P.W.-2 has also supported her. Oral statement of the two witnesses are consistent and there is no discrepancy or contradiction, and hence, no reason to disbelieve them. No perversity or illegality in the findings of the trial court. Prosecution case stands proved and finding of conviction recorded by the trial court is just and proper.(Para -13, 14)

Criminal Appeal dismissed. (E-7)

List of Cases cited:-

1. St. of U.P. Vs Pappu, (2005) 3 SCC 594

2. St. of Pun. Vs Gurmit Singh, (1996) 2 SCC 384

3. St. of Pun. Vs Gurmit Singh, (1996) 2 SCC 384

(Delivered by Hon'ble Syed Aftab Husain Rizvi, J.)

1. Heard Sri Kulveer singh, learned counsel for the appellant, learned AGA for the state and perused the material on record.

2. This Criminal Appeal has been filed against the judgment and order dated 29.2.1988 passed by Vth Additional Session Judge, Saharanpur in Sessions Trial No. 167 of 1987 arising out of Case Crime No. 13 of 1986, Police Station - Manglore, District - Saharanpur convicting the appellant under section 376 IPC for five years rigorous imprisonment and to pay a fine of Rs. 1,000/- and in default of fine three months Simple imprisonment.

3. In brief, the prosecution case is that complainant - Chandu gave a written information at Police Station - Mangalore that on 14.1.1986 his wife was cutting grass in field of Satyawan. His Bhabhi was also cutting grass at some distance. At about 2:30 p.m. his co-villager Mainpal came from inside the sugar-cane field and forcefully dragged his wife into the sugar-cane field intimidating her and pressing her mouth and committed rape with her. On getting opportunity, his wife make a noise, then his sister-in-law (Bhabhi) - Rajo went inside the sugar-cane field and saw Mainpal committing rape with the wife of the complainant. Seeing this incident, Rajo made a noise and on her noise, other co-villager- Rajpal came there, then Mainpal holding his trouser in his hand ran away from there, intimidating and saying that if any action is taken, he will kill all of them. When complainant came to the house, his wife told the whole incident but due to fear, he could not go to the Police Station. On getting opportunity, he went to the Police Station for lodging the FIR. On the aforesaid information, Case Crime No. 13 of 1986 under Section 376 IPC was registered against accused - Mainpal on 15.1.1986. Investigating officer recorded

the statement of complainant, victim and other witnesses. Victim was also medically examined. Investigating officer also took in possession one piece of Salwar which the victim was wearing at the time of occurrence and prepared its memo. After completion of the investigation, charge sheet was submitted.

4. Learned trial court framed charge against the accused - Mainpal under Section 376 IPC, accused denied it and claimed for trial. Prosecution produced four witnesses. Statement of accused was recorded under Section 313 Cr.P.C. Accused denied the prosecution version and has further stated that he has been falsely implicated due to enmity. Learned trial court after hearing the arguments by the impugned judgement has held him guilty for offence under Section 376 IPC and sentenced him to five year rigorous imprisonment and fine of rupees 1000/-.

5. Victim was medically examined and his medico legal report and supplementary report are on record but the same have not been got proved by the prosecution. According to the medico legal report, height of the victim was 150 cm, weight 100 pounds. In External examination, breasts were well developed, axillary hair present. In internal examination, vagina admits two fingers easily, hymen torn, old & healed, uterus normal size. Victim was referred for X-ray to assess her age and vaginal smear examination for the presence of spermatozoa.

6. According to the supplementary report on basis of radiologist report her age was above 18 years. No opinion about rape was possible as she was used to sexual intercourse.

7. In all four witnesses have been examined by the prosecution out of which PW-1 is victim herself. She has fully corroborated the FIR allegations and has stated that at the time of occurrence she was cutting grass in the field. At about 2:00 - 2:30 pm, accused - Mainpal came from inside the sugar-cane field and forcefully dragged her against her will into the sugar-cane field and committed rape with her. On her noise, her Jethani - Rajo came there at that time accused was committing rape and thereafter he ran away holding his trouser in his hand, Rajpal also saw him running away. Rajo the eyewitness has also been examined as PW-2 and she has also corroborated the statement of PW-1 - the victim. Both these witnesses have been cross examined at length by the defence but there is no major discrepancy or contradiction in their statements which makes their statements unreliable or untrustworthy.

8. Learned counsel for the appellant contended that according to the prosecution case, accused forcefully dragged the victim into the sugar-cane field and put her down on the ground and committed rape in the field itself. Victim in her statement has also admitted that when she was forcefully dragged into the sugar-cane field then sugar-cane leaves rubbed against her body but no visible mark of injury has been found on the body of the victim in medical examination which is improbable. In the circumstances of the case the marks of abrasion / contusion should have been found on the body of the victim and the medical report does not support the ocular version and the testimony of the witness is not trustworthy.

This point was raised before the trial court and the trial court in paragraph 2

of page 10 has dealt with it and has observed that victim was medically examined after two days of the incident. At paragraph 6 of page 4, she has stated that when the accused caught her then she put some resistance and also requested the accused not to commit such act with her. In these circumstances, there was little possibility of injuries on the body of the victim. The aforesaid observation of learned trial court appears to be reasonable and proper. The absence of visible injuries, in the circumstances of the case does not make the prosecution version doubtful or unreliable.

In ***State of U.P. Vs. Pappu, (2005) 3 SCC 594***, it has been held that absence of injury on the prosecutrix may not be a factor that leads the court to absolve the accused.

9. Learned counsel further contended that the alleged incident is of 14.1.1986 at 2:30 p.m. but first information report has been lodged on 15.1.1986 at 7:35 p.m. after more than 29 hours, so there is considerable delay in lodging the FIR. The explanation of delay as given in the FIR is not sufficient. In the oral testimony, it is that when complainant came in the evening the whole incident was narrated by the victim to him but no FIR was lodged on that day. On the next day, complainant went to his duty and thereafter FIR has been lodged in the evening so there is no sufficient explanation of the delay. This argument has also got no force. In the FIR itself, it is mentioned that complainant could not come to the police station due to fear and on getting opportunity he has come to lodge the FIR. It has also come in the evidence that complainant and victim belong to Schedule Caste while accused is Gurjar. He has threatened the complainant and victim of evil consequences if they lodge any report or take any action. Apart from this in case of such a nature, due to fear of social stigma, the people avoid to take any action promptly.

In the case of ***State of Punjab Vs. Gurmit Singh, 1996 (2) SCC 384***, the Hon'ble Supreme Court has held as under:-

"The Courts cannot overlook the fact that in sexual offences and, in particular, the offence of rape and that too on a young illiterate girl, the delay in lodging the FIR can occur due to various reasons. One of the reasons is the reluctance of the prosecutrix or her family members to go to the police station and to make a complaint about the incident, which concerns the reputation of the prosecutrix and the honour of the entire family. In such cases, after giving very cool thought and considering all pros and cons arising out of an unfortunate incident, a complaint of sexual offence is generally lodged either by victim or by any member of her family. Indeed, this has been the consistent view of this Court as has been held in."

10. It is also well settled law that mere delay in lodging the FIR does not adversely affect the prosecution case unless it is proved that delay in lodging FIR was due to deliberation and consultation making it possible to frame innocent persons. In this case, there is no evidence on record to show that there was any deliberation or consultation and there is no reason for false implication.

11. Lastly, learned counsel for the appellant contended that the prosecution story is highly improbable because in the FIR it has been alleged that at the time of incident the victim along with her sister-in-law (Jethani) was cutting grass in the field of Satyawan when the accused

forcefully dragged her into the sugar-cane field. In this circumstance, it was natural and probable that sister-in-law - Rajo should have noticed it at the very moment and should have made a hue and cry but nothing like this sort has happened and accused was successful in dragging the victim into sugar-cane field and committing rape with her. It appears from the circumstances that victim was a consenting party but when the incident was noticed by her sister-in-law (Jethani), the story as alleged in the FIR was cooked up. This argument has also no force because it has come in the evidence that sister-in-law of the victim was cutting grass 50 to 60 paces away from the victim. The victim - P.W.-1 in her examination-in-chief has stated that her Jethani was cutting grass in Arhar field 50 to 60 paces away from her while she was cutting grass in the sugar-cane field. In site plan, Exhibit (Ka-2) also the place where victim was cutting grass has been shown with letter (A) while the place where sister-in-law of the victim was cutting grass has been shown with letter (B) and the distance between the two is 64 paces. So it is clear from the evidence on record that at the time of incident two ladies were cutting grass at some distance, so there is nothing improbable in the prosecution story. Victim - P.W.-1 in her statement has also stated that she put some resistance and also requested to the accused for not committing such act with her so it cannot be said that she was a consenting party.

12. In ***State of Punjab Vs. Gurmit Singh, (1996) 2 SCC 384***, it has been held by the Apex Court that *"in cases involving sexual harassment, molestation, etc. the court is duty bound to deal with such cases with utmost sensitivity. Minor contradictions or insignificant discrepancies in the statement of a prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case. Evidence of the victim of sexual assault is enough for conviction and it does not require any corroboration unless there are compelling reasons for seeking corroboration. The court may look for some assurances of her statement to satisfy judicial conscience. The statement of the prosecutrix is more reliable than that of an injured witness as she is not an accomplice."*

13. In this case the victim has fully corroborated the allegations made in the FIR and another eye witness, P.W.-2 has also supported her. The oral statement of the two witnesses are consistent and there is no discrepancy or contradiction, and hence, no reason to disbelieve them.

14. Learned trial court has fully discussed and properly appreciated the entire evidence. There is no perversity or illegality in the findings of the learned trial court. From the evidence on record, the prosecution case stands proved and finding of conviction recorded by the trial court is just and proper. The sentence awarded by the trial court also need no interference.

15. The criminal appeal has no force and liable to be dismissed.

16. The criminal appeal is hereby **dismissed.**

17. Lower court record along with copy of the judgment be transmitted to the trial court immediately.

(2021)09ILR A155
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 27.09.2021

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE RAJEEV SINGH, J.

Criminal Appeal No. 546 of 1982
connected with
Criminal Appeal No. 547 of 1982
with
Criminal Appeal No. 548 of 1982

Shiv Baran Singh & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Kr. M. Rakesh, Arun Sinha, Jyotiendra Misra, K.S. Prakash, Kapil Misra, O.P. Srivastava, R N S Chauhan, Ram Naresh Singh Chauhan, U.P. Singh

Counsel for the Respondent:
Govt. Advocate, Amarjeet Singh Rakhra, Anil Kumar Tripathi, Manish Bajpai, N. Mohan, Nagendra Mohan, Rajit Krishan, Sharad Dixit, Shishir Pradhan

A. Criminal Law - Code of Criminal Procedure, 1973-Section 374(2)-challenge to-conviction-PW-1 and PW-2 supported the prosecution case as they are the eyewitnesses to the incident-when accused fired, the deceased fell down on the earth, thereafter, other accused assaulted the deceased with Kanta, ballam and lathis-deceased received 26 ante-mortem injuries-testimony of injured witness PW-3 is supported from medical evidence as well as statement of Investigating Officer-While injuries of the accused are superficial one as per statement of DW-1 and DW-2-the injuries are self suffered or self-manufactured-their injuries report is suspected-if plea of defense that accused/appellants have been attacked by the miscreants or by the complainant's party, is taken to be true, then, certainly some of the accused would have received grievous injuries but DW-1 and DW-2 who examined the accused have not found any grievous injuries-trial court rightly observed that defence version is only an afterthought and rightly convicted the accused/appellants-bail are cancelled directed to surrender and serve out remaining period of sentence. (Para 1 to 117)

The appeals are dismissed. (E-6)

List of Cases cited:

1. Arjun Pradhan & anr. Vs St. of Orissa (1979) AIR SC 1259

2. Gotti Pulla Venkete Siva Vs St. of A.P. & anr. (1970) AIR 1079

3. Munshi Ram & ors. Vs Delhi Administration (1968) AIR 702

4. James Martin Vs St. of Ker.(2004) 2 SCC 203

5. Lakshmi Singh & ors. Vs St. of Bih.(1976) AIR SC 2263

6. Jagdish Vs St. of Raj.(1979) AIR 1010

7. Onkarnath Singh & ors. Vs St. of U.P. (1975) 3 SCC 276

8. Lalji & ors. Vs St. of U.P. (1989) JIC 172 SC

9. Kattukulangara Madhvan Vs Majeed & ors. (2017) 2 SCC (Cri.) 611

10. Supdt. of Police,C.B.I. Vs Tapan Kumar Singh (2003) 6 SCC 175

11. St. of U.P. Vs Naresh (2011) 4 SCC 324

12. Dalip Singh & ors. Vs St. of Punj.(1954) 1 SCR 145

13. Kartik Malhar Vs St. of Bih.(1996) 1 SCC 614

14. St. of U.P. Vs Krishna Master (2010) 12 SCC 324

15. Shamim Vs State (GNCT of Delhi) (2018) AIR SC 4529

16. Mano Dutt & anr. Vs St. of U.P. (2012) 4 SCC 79

17. Nathuni Yadav Vs St. of Bih.(1998) 9SCC 238

18. Pruthviraj Jayantibhai Vanol Vs Dinesh Dayabhai Vala & ors.CRLA No. 177 of 2014

(Delivered by Hon'ble Ramesh Sinha, J.)

1. The above-captioned appeals along with Criminal Appeal No. 589 of 1982 were allowed and all the appellants were acquitted by a Co-ordinate Bench of this Court vide judgment and order dated 17.09.1998 *inter alia* on the grounds that all the records including those which were called for from the trial Court, were found missing in the High Court and it would not be appropriate to proceed on the basis of carbon copies supplied by the complainant.

2. Against the aforesaid judgment and order dated 17.09.1998, the *de facto* complainant, namely, Kunwar Bahadur Singh had approached the Hon'ble Supreme Court by filing Criminal Appeal No. 1078-1083 of 2000 arising out of SLP (Crl.) Nos. 1459-1463/99, whereas State of U.P. had also approached the Hon'ble Supreme Court by filing Criminal Appeal Nos. 1083-1086 of 2000 arising out of SLP (Crl.) Nos. 1928-31/99. The Hon'ble Supreme Court had heard the aforesaid criminal appeals together with as the common question as to whether the High Court erred in law in not disposing of the said appeals filed by the respondents on merits on the basis of the re-constructed records, was raised. After considering the submissions advanced by the learned Counsel for the parties and gone through the record, the Hon'ble Supreme Court opined that the reason given by the High Court for doubting the authenticity of the reconstructed records, is untenable as in the instant cases, reconstructed file was proper, therefore, the Hon'ble Supreme Court, vide judgment and order dated 29.11.2000, has passed the following order :-

"From the above discussion, it follows that in the instant cases, there is properly reconstructed file, therefore, the High Court erred in not going into the merits of the case and acquitting the convict appellants before it by allowing the appeals. Ergo we set aside the impugned order and restore the aforementioned criminal appeals to the file of the High Court to be heard and disposed of on merits. The High Court shall now consider and decide the appeals on merits on the basis of the reconstructed records.

It is needless to mention that while examining the merits of the case, it would be open to the High Court to examine the copies of statements in the reconstructed record on the basis of intrinsic inconsistency between the reconstructed records as the contents of the judgment of the learned Sessions Judge or with reference to any irrefragible evidence placed before it by the appellants therein.

The appeals are accordingly allowed."

3. It appears that after remand from the Hon'ble Supreme Court by the aforesaid judgment and order dated 29.11.2000, the above-captioned appeals have been listed before different Benches of this Court. Vide order dated 04.03.2021, Hon'ble the Chief Justice has nominated this Bench and directed to place all the connected matters before this Bench. In these circumstances,

the above-captioned criminal appeals have been listed before this Bench.

4. Before proceeding further, it would be relevant to mention here that during the course of arguments, none of the parties have raised any objection with regard to the authenticity of the paper book of the instant case, which has been supplied to them or any document relating to this case and, therefore, with the consent of the learned Counsel for the parties, we proceed to hear the above-captioned criminal appeals finally.

5. The twelve accused persons, namely, Hari Shanker Singh, Bhagwat Singh, Shiv Baran Singh, Badri Singh, Amar Bahadur Singh, Shiv Prasad Singh, Sardar Bahadur Singh, Sharda Bux Singh, Jitendra Bahadur Singh, Indra Bahadur alias Dhunni Singh, Shiv Narayan Yadav and Indra Bahadur Singh, were tried by the II Additional Sessions Judge, Raebareli in Sessions Trial No. 43 of 1982 : *State Vs. Hari Shankar and 11 others*. In addition, accused Bhagwat Singh was also tried by the II Additional Sessions Judge, Raebareli in Sessions Trial No. 44 of 1982 : *State Vs. Bhagwat Singh*, for the offence punishable under Section 25 of the Arms Act.

6. Vide common judgment and order dated 15.07.1982/ 16.07.1982, the learned II Additional Sessions Judge, Raebareli has convicted and sentenced the accused persons in the aforesaid Sessions Trial Nos. 43 of 1982 and 42 of 1982 in the manner as indicated hereinbelow :-

"Accused Hari Shanker Singh, Bhagwat Singh, Shiv Baran Singh and Shiv Prasad Singh

"(i) Under section 148 of the Indian Penal Code to undergo imprisonment for one year's R.I.;

(ii) Under Section 302 read with Section 149 of the Indian Penal Code to undergo imprisonment for life;

(iii) Under Section 323 read with Section 149 of the Indian Penal Code to undergo six months' R.I.; and

(iv) Under Section 395 of the Indian Penal Code to undergo five years' R.I."

Accused Badri Singh, Amar Bahadur Singh, Sardar Bahadur Singh, Sharda Bux Singh, Jitendra Bahadur Singh, Indra Bahadur Singh alias Dhunni Singh, Shiv Narain Yadav and Indra Bahadur Singh son of Shitla Bux Singh

(i) Under section 147 of the Indian Penal Code to undergo imprisonment for nine months' R.I.;

(ii) Under section 302 read with Section 149 of the Indian Penal Code to undergo imprisonment for life;

(iii) Under section 323 read with Section 149 of the Indian Penal Code to undergo imprisonment for six months' R.I.; and

(iv) Under section 396 of the Indian Penal Code to undergo imprisonment for five years' R.I."

The trial Court directed the sentences of all accused persons on all the counts to run concurrently.

7. However, II Additional Sessions' Judge, Raebareli had acquitted the accused Bhagwat Singh in Sessions Trial No. 44 of 1982 for the offences punishable under Section 25 of the Arms Act vide aforesaid judgment and order dated 15.07.1982/16.07.1982.

8. Aggrieved by the aforesaid conviction and sentences, accused Shiv Baran Singh, Badri Singh, Amar Bahadur Singh, Shiv Prasad Singh, Jitendra Bahadur Singh, Indra Bahadur Singh, Shiv Narain Yadav and Indra Bahadur Singh have preferred Criminal Appeal No. 546 of 1982, whereas accused Sardar Bahadur Singh and Sharda Bux Singh have preferred Criminal Appeal No. 547 of 1982 and accused Hari Shanker Singh preferred Criminal Appeal No. 548 of 1982 and accused Bhagwat Singh preferred Criminal Appeal No. 589 of 1982.

9. As per office report dated 04.09.2019 appended in Criminal Appeal No. 547 of 1982 : *Sardar Bahadur Singh Vs. State of U.P.*, accused/appellant of Criminal Appeal No. 589 of 1982, namely, Bhagwat Singh, died during pendency of the said appeal, hence his appeal has already been abated vide order dated 08.09.2015 and, therefore, his appeal has not been listed in the today's cause list along with the above-captioned appeals.

10. It transpires from the record that accused/appellant no.1-Shiv Baran Singh, accused/appellant no.6-Indra Bahadur Singh alias Dhunni Singh and accused/appellant no.8-Indra Bahadur Singh of Criminal Appeal No. 546 of 1982 and accused/appellant no.1-Sardar Bahadur Singh of Criminal Appeal No. 547 of 1982 died, during pendency of the above-captioned appeals, hence their appeals have already been abated vide order dated 06.02.2020.

11. Now, we proceed to examine the correctness of the conviction and sentences as awarded vide impugned order passed by the trial Court to the surviving accused/appellant no.2-Badri Singh, accused/ appellant no.3-Amar Bahadur Singh, accused/appellant no.4-Shiv Prasad Singh, accused/appellant no.5-Jitendra Bahadur Singh, accused/appellant no.7-Shiv Narain Yadav in Criminal Appeal No. 546 of 1982, accused/appellant no.2-Sharda Bux Singh in Criminal Appeal No. 547 of 1982 and accused/sole appellant-Hari Shanker Singh in Criminal Appeal No. 548 of 1982.

12. Since the above-captioned appeals arise out of a common factual matrix and impugned judgment, we are disposing them of by a common judgment.

13. Shorn off unnecessary details, the case of the informant P.W.1-Kunvar Bahadur Singh, as narrated in the written report (Ext. Ka.1), is as under :-

In the evening of 01.09.1981, at the village of informant- Kunvar Bahadur Singh (P.W.1), namely, Parmanpur, *Aalha* (madrigals) was going on at the door of Bhagwati Gadariya. The informant-Kunvar Bahadur Singh (P.W.1), his brother Avadhesh Bahadur Singh (deceased) and his father Chandra Bhushan Singh had gone to listen *Aalha* (madrigals). At the time of listening *Aalha* (madrigals), altercation took place between the father of the informant (Chandra Bhushan Singh), his brother (Avadhesh Bahadur Singh) and some villagers with accused Shiv Baran Singh (appellant no.1 in Criminal Appeal No. 546 of 1982), upon which accused Shiv Baran Singh, after using abusive language and threatening them, went away from there.

At about 09.30 p.m., the brother of the informant (Avadhesh Bahadur Singh) went to his home and also after listening *Aalha* (madrigals), the informant-Kunwar Bahadur Singh (P.W.1), Jai Singh,

son of Ram Bahadur Singh, Tej Bahadur Singh (P.W.2) son of Ramdas Singh, Balwant Singh, son of Bhagwati Deen Singh and Peshkar Singh, son of Sunder Singh also went behind the brother of the informant (Avadhesh Bahadur Singh). As soon as the brother of the informant (Avadhesh Bahadur Singh) came out from the street situated near the house of Chhatarpal Singh, accused persons Hari Shankar Singh (appellant in Criminal Appeal No. 548 of 1982) son of Fateh Bahadur Singh, Badri Singh (appellant no.2 in Criminal Appeal No. 546 of 1982), Amar Bahadur Singh (appellant no.3 in Criminal Appeal No. 546 of 1982), Shiv Prasad Singh (appellant no.4 in Criminal Appeal No. 546 of 1982), son of Kalika Bux Singh, Sardar Bahadur Singh (appellant no.1 in Criminal Appeal No. 547 of 1982), son of Vijay Bahadur Singh, Indra Bahadur Singh (appellant no.6 in Criminal Appeal No. 546 of 1982) son of Shitla Bux Singh, Sharda Bux Singh (appellant no.2 in Criminal Appeal No. 547 of 1982), son of Shitla Bux Singh, Jitendra Bahadur Singh (appellant no.5 in Criminal Appeal No. 546 of 1982) son of Balikaran Singh, resident of Village Parmanpur and Shiv Narayan Yadav (appellant no.7 in Criminal Appeal No. 546 of 1982), resident of village Pure Gosai, Majare Basar, surrounded the brother of the informant (Awadhesh Bahadur Singh) at once. Hari Shankar Singh (appellant of Criminal Appeal No. 548 of 1982) was armed with country made pistol and other persons were armed with Kanta, ballam and lathis. Accused Bhagwat Singh instigated to kill him, to which Hari Shanker Singh (appellant of Criminal Appeal No. 548 of 1982) fired with country made pistol, as a consequence of which, informant's brother (Awadhesh Bahadur Singh) fell down in the street near nabadan (cesspool) and thereupon, all the accused persons started beating him with lathis, kanta and ballam. Thereafter, informant Kunvar Bahadur Singh (P.W.1), his friends and his brother raised alarm, upon which his grand-father Dan Bahadur Singh (P.W.3) and his aunt Ramraj Kumari, widow of Chandra Bhan Singh ran to save the informant's brother (Awadhesh Bahadur Singh), then, accused persons had also beaten them. Thereafter, when informant's brother (Awadhesh Bahadur Singh) ran in an injured condition, then, accused persons surrounded him near the house of Chattrapal Singh and killed him. In the meantime, his father Chandra Bhushan Singh came with licensee gun single barrel twelve bore no. 197167 and challenged the accused persons, then, accused Bhagwat Singh and three-four persons snatched the gun from his father. The incident was seen by all the aforesaid persons in the light of their torches and in the light of the torches of the accused/appellants. Prior to 12-13 years, accused Sardar Bahdur Singh (appellant no.1 in Criminal Appeal No. 547 of 1982) had falsely implicated the informant's father and his grand father and since then, accused persons had ill-will against the family members of the informant and because of which, on seeing the chances, accused persons killed the informant's brother (Awadhesh Bahadur Singh) and the dead body of his brother was lying there.

14. The informant P.W.1-Kunwar Bahadur Singh himself wrote down the F.I.R. (Ext. Ka.1), put his signature thereron and along with it reached to the Police Station Bhadokhar, District Raebareli at a distance of 7 ½ Kms. and at about 11:00 p.m., he handed over the handwritten report to P.W.7-H.C. Ram Jas Yadav. On the basis of the said report, P.W.7-H.C. Ram Jas Yadav prepared a

chik F.I.R. (Ext. Ka.7) and made its entry in the general diary and registered a case (Ext. Ka.8).

15. The evidence of P.W.7-H.C. Ram Jas Yadav shows that on 01.09.1981, he was posted as Head Moharrir at police station Bhadokhar and on the said date, Kunvar Bahadur Singh (P.W.1) came along with the written report (Ext. Ka.1), on the basis of which, chik F.I.R. (Ext. Ka.7) was prepared by him, for which entry was made by him in report no. 39 in G.D. and also lodged a case. A copy of the chik F.I.R. (Ext. Ka. 8) has been filed. He further deposed that on 02.09.1981, at about 5:45 p.m., S.O. Sri Shyampal Singh Rana (P.W.11) came along with eight sealed bundle items and one S.B.B.L Gun No. 197167 at police station and admitted therein, for which entry was made by him in report no. 24 in G.D.. The Sub-Inspector had also taken four accused persons and also detained them in jail, for which entry was made by him in report no. 24.

In the cross-examination, P.W.7-H.C. Ram Jas Yadav has deposed that Kunvar Bahadur Singh (P.W.1) was accompanied by Chowkidar for filing report and at that time, Sub-Inspector was present at police station. At about 11:30 P.M., the Sub-Inspector went to the place of occurrence by Jeep. At the time of lodging the accused in jail, accused Bhagwat Singh, Hari Shanker (appellant in Criminal Appeal No. 548 of 1982), Sharda Bux Singh (appellant no.2 in Criminal Appeal No. 547 of 1982), Sardar Bahadur Singh (appellant no.1 in Criminal Appeal No. 547 of 1982) had injuries, entry of which was also made by him in G.D, however, he had not made their medical examination, for which no reason was given. This witness has denied the suggestion that the report was ante time and the report was lodged after returning of the Sub-Inspector from the place of occurrence. The special report of the incident was sent by Constable Kalluram on 02.09.1981 at 4:30 a.m., which was entered in report no.4 in G.D. Till 02.12.1981, he was posted at Police Station Bhadokhar, by which time the items of the case were at police station.

16. A perusal of the chik FIR shows that the distance between the place of incident and Police Station Bhadokhar was seven and a half kilometers. It is significant to mention that a perusal of the chik FIR also shows that on the basis of written report (Ext. Ka.1), a case crime no. 207 of 1981, under Sections 147, 148, 149, 302, 395 I.P.C. was registered against appellants at police station Bhadokhar, District Raebareli.

17. The investigation of the case was conducted by SI Shyampal Singh Rana (P.W. 11). His evidence shows that on 01.09.1981, he was posted as Station Officer at Police Station Bhadokhar. On the said date, informant Kunvar Bahadur Singh (P.W.1) has lodged the written report in his presence. The investigation of the case was conducted by him. He made entry of the relevant papers in the case diary and also recorded the statement of informant Kunvar Bahadur Singh (P.W.1) at police station. Thereafter, at about 11:30 p.m., he along with the police personnel went to the place of incident at village Parmanpur by Jeep. At the place of incident, the deadbody of deceased Avadhesh was lying near the door of Chattrapal Singh. He left Constable Brahma Deen and Constable Uma Dutt near the deadbody of the deceased for protection and himself went in search of the accused persons in the night but he could

not find them. However, at about 5:00 a.m., he recorded the statement of witnesses Jai Singh and Tej Bahadur Singh (P.W.2) and thereafter he came back to the door of Chattrapal Singh, wherein identification of the deceased was done and at about 06:30 a.m., panchayatnama along with photo laash, challan laash and letter for post-mortem were prepared. He also deposed that the documents were prepared on his dictation by S.I. Babu Singh, who was an under trainee, which was marked as Ext. ka-14 to Ext. Ka. 17. Thereafter, the sealed dead body with cloth was sent for post-mortem along with Constable Ramadhar (P.W.8) and Chowkidar Harcharan Lal. Thereafter, he inspected the place of occurrence and prepared the site plan (Ext. Ka. 18). He had also collected the plain earth and blood stained earth in a sealed container from the place of occurrence as well as from the place where the corpse was lying and also prepared two recovery memos duly signed by him (Ext. Ka 19 and Ext.20).

18. P.W.11-Shyampal Singh has further deposed that at the place of occurrence, a used cartridge was recovered, which was sealed under the recovery memo (Ext. Ka.21). Thereafter, he inspected the torches of witnesses Tej Bahadur (P.W.2), Jai Singh and Kunvar Bahadur (informant-P.W.1), which were found in a running condition and after inspection, the same were handed over to them but their memos were not prepared, however, there is an endorsement in the case diary with respect to the inspection of their torches. Thereafter, statements of the witnesses, Balwant Singh, Peshakar Singh, Das Bahadur Singh, Ramraj Kumari, Chandra Bhushan Singh and others were recorded. In the meanwhile, SI Raghuraj Singh, who was on patrol duty and later on came at the place of occurrence, was deputed for searching the accused. Thereafter, accused Sharda Bux Singh (appellant no.2 in Criminal Appeal No. 547 of 1982) and Sardar Bahadur Singh (appellant no.1 in Criminal Appeal No. 547 of 1982) were arrested. Thereafter, accused Sardar Bahadur Singh was interrogated and on his pointing out, lathi, which was used at the time of the incident by him, was recovered from the chappar of his house in the presence of witnesses Dal Bahadur Singh (P.W.5) and Ayodhya Singh, in which blood stains were present. The lathi was taken in the custody and prepared recovery memo (Ext. Ka.22). Thereafter, he inspected the place of recovery of lathi and also prepared the site plan (Ext. Ka.23). Thereafter, he interrogated accused Sharda Bux Singh (appellant no.2 in Criminal Appeal No. 547 of 1982) and on his pointing out, lathi was recovered from his house, wherein blood stain was present. He, thereafter, took the lathi in his custody, sealed it and prepared recovery memo for the same (Ext. Ka. 24). Thereafter, he inspected the place of occurrence of recovery of lathi and prepared the site plan (Ext. Ka. 25). Thereafter, Constable Guruprasad and Uma Datt had arrested accused persons Bhagwat Singh and Hari Shanker Singh (appellant in Criminal Appeal No. 548 of 1982). Thereafter, he interrogated accused Bhagwat Singh and on his pointing out, the licensee gun, which was snatched at the place of incident, was recovered from his house and, thereafter, he took the said licensee gun in custody, sealed it and a recovery memo for the same was prepared as Ext. Ka. 2. Thereafter, he inspected the place of recovery of licensee gun and prepared site plan (Ext. Ka. 26). Thereafter, accused Hari Shanker (appellant in Criminal Appeal No. 548 of 1982) was interrogated and on his

interrogation, accused Harishanker told him that Kanta of accused Bhagwat Singh, which he used at the time of incident, was hidden at the house of Chetrapal Singh, wherein he resided. Thereafter, on the pointing out of accused Hari Shanker, one Kanta was recovered, which was sealed and recovery memo (Ext. Ka. 3) was prepared. He also inspected the place of occurrence and prepared the site plan (Ext. Ka. 27). Thereafter, he recorded the statements of witnesses of recovery, namely, Baijnath Singh (P.W.4) and Ayodhya Singh, however, rest of the accused persons could not be traced out. Thereafter, he came back with the recovered items and accused persons at police station and thereafter, he lodged the recovered items and the accused persons at police station vide report no. 24 at 05.45 p.m.

19. P.W.11 S.I. Shyam Pal Singh Rana, in his examination-in-chief, has further deposed that after recording the statements of Ramraj Kumari, Ram Bahadur Singh at the place of the incident, they were sent for medical examination from the place of incident to Sadar Hospital Raibareli and when he reached back to the police station, he received medical examination report as well as post-mortem report at 06.20 p.m., for which entry was made in the case diary. On 03.09.1981, he searched for the rest of the accused persons. However, on 04.09.1981, when he came to Sadar to search the accused person, he came to know in the Court that accused Indra Bahadur Singh alias Dhunni Singh (appellant no.6 in Criminal Appeal No. 546 of 1982) had surrendered in the Court. On the same day, when he was on the way to Parmanpur via Sadar police station, he came to know about the presence of accused Shiv Narain (appellant no.7 in Criminal Appeal No. 546 of 1986) at the tea shop of Kallu situated in Mullahganj, whereby he went there and arrested him and also interrogated him on the way to Parmanpur. On 05.09.1981, informant's father Chandra Bhushan Singh was called at the police station and saw his licensee gun. On the same day, when he reached Sadar, he came to know that accused Badri Singh (appellant no.2 in Criminal Appeal No. 546 of 1982), Amar Bahadur Singh (appellant no.3 in Criminal Appeal No. 546 of 1982), Shiv Narayan Singh (appellant no.7 in Criminal Appeal No. 546 of 1982) and Jitendra Singh (appellant no.5 in Criminal Appeal No. 546 of 1982) had surrendered in the Court and thereafter, he interrogated them. On 08.09.1981, on being called by C.O., he reached there, from where the pairokar told him that accused Shiv Prasad Singh (appellant no.4 in Criminal Appeal No. 546 of 1982) had surrendered before the Court and thereafter, he interrogated him. Thereafter, on 09.09.1981, he filed charge-sheet (Ext. Ka. 28) against the accused persons, namely, Hari Shanker Singh, Bhagwat Singh, Shiv Narayan Singh, Badri Singh, Amar Bahadur Singh, Shiv Pratap Singh, Sardar Bahadur Singh, Sharda Bux Singh, Jitendra Bux Singh, Indra Bahadur Singh alias Dhunni Singh and Shiv Narain. As the accused Indra Kumar Singh (appellant no.6 in Criminal Appeal No. 546 of 1982) could not be arrested, therefore, his name in the charge-sheet has been mentioned as absconder. He also stated that recovered items were to be sent for the chemical examiner but he was transferred, hence further action could not be made.

20. In his cross-examination, P.W.11-S.I. Shyampal Singh Rana has deposed that on 28.09.1981, he left the charge of police station Bhadokhar. Till that time, recovered items were still in the police station and he

did not get an opportunity to send the items to the malkhana (warehouse). The items were not with him and he did not remember that seal was his or other S.I. He further stated that it is not possible that he had given the seal to any innocent person of public. The seal is being used frequently and it is being kept in custody and used it and do not keep it in secure place.

21. It has further been stated by P.W.11-S.I. Shyampal Singh Rana, in his cross-examination, that he started to search the accused persons in the night at around 1:00 a.m. and also raided their houses in the night. He did not enter their houses and on enquiry their around, it was confirmed that the accused were not at home. The names of the people who were questioned in this regard are not known. He didn't think it was right to search the houses at night and in the morning, he was busy in investigation and informer was put to give clues of the accused, on account of which, he did not searched their houses. He further submitted that when he reached at the place of incident, he did not find Kunvar Bahadur Singh (P.W.1) and on the next day, Kunvar Bahadur Singh (P.W.1) met him but by what time he met, he do not remember. He also stated that he also went to the house of Chandra Bhushan Singh in the night but he did not know about his whereabout. He also stated that the time at which the statement of Chandra Bhushan Singh was taken is not mentioned in the case diary. He stated that most probably it would be around 12-1 p.m. and prior to his statement, statement of Dan Bahadur Singh (P.W.3) was recorded. When he recorded the statement of Chandra Bhushan, he did not remember it. He did not see the license of Chandra Bhushan's gun at the time of recording his staement nor did he see how many cartridges were with Chandra Bhushan. He submitted that empty catridge, which was found at the place of occurrence, was not sent by him to the ballistic expert in order to verify as to whether it was fired with the gun of Chandra Bhuhan or not. He did not get the gun inquired as to whether it was used or not as during the investigation, firing from it was not told. He also stated that house of Kunvar Bahadur Singh (P.W.1) and Dan Bahadur Singh (P.W.3) was 127 steps away from the place of incident. He did not record the statement of all the persons of the houses situated within the radius of 127 steps, but he recorded some of them. He recorded the statement of Shambhu and Pancham and may be others fled at that place on account of the terror that they too would be made accused. He further stated that he did not tell as to whether Kunvar Bahadur (P.W.1) came at Sadar with the corpse or not.

22. P.W.11-S.I. Shyampal Singh Rana, in his cross-examination, has denied the suggestion that report was lodged after he reached the place of incident. He did not record the statement of S.I. Raghuraj Singh during the investigation. He did not record the statement of the persons in whose presence he saw the torches. The torches were in running condition as it was seen in a day time, therefore, he could not assess the range of the light of the torches in night. He did not record the difference of two places from whom he collected the blood in the site plan and he did not record the difference during the investigation nor he is able to recall the same. However, it could be assumed to be 14-20 feet. He did not prepare any memo prior to recovery. He further stated that in the houses of the accused persons from where recovery was said to be made by him on their pointing out, he did not know who lived therein but

their family members were living there. He further stated that lathi was recovered from the open shed (chappar) outside the house of accused Sardar Bahadur Singh, which is the first room while entering his house and the said lathi was recovered on the pointing out of accused Sarda Bux Singh. The two doors of the said room was opened inward and one door of the said room was opened outward. He enquired both the accused persons beneath the trees, situated in front of the house of Shambhoo Chamar. He denied that he did not explain as to how many persons gathered there. He, however, stated that it must have taken 10-15 minutes to inquire. First of all, he enquired from accused Sardar Bahadur Singh, recovered the lathi, prepared the site plan and thereafter he enquired from accused Sarda Bux Singh and during this period, Sarda Bux Singh was with him and was in custody of the Constables. Thereafter, Constables and accused Sarda Bux Singh did not go to the house of Sardar Bahadur Singh after the recovery being made. He further stated that he did not know that if the Constables kept talking with accused Sarda Bux Singh, then what they talked to him about. At that relevant time, several small children were there but he could not give numbers of that. The older person probably were not in that crowd. After sometime from the recovery of two persons, the Constables took by arresting accused Bhagwat Singh and accused Hari Shanker Singh. He did not remember the place from where they were arrested and also did not remember the place from where they were enquired. He, however, first of all, recorded the statement of accused Bhagwat Singh and also completed the recovery process and then he enquired from accused Bhagwat Singh. He further stated that he did not remember whether he enquired from accused Bhagwat Singh about Kanta or not and also he did not remember the place where he enquired from accused Hari Shanker. He further stated that he did not search the accused person because he was brought there by other personnel. He did not record the statement of said personnel. He further stated that the gun from where it was recovered, was the outer room of the house, which was also known as *Takotha*. He did not mention the doors of the room from the place where the recovery was made. No recovery memo was prepared by him prior to arrest of accused Bhagwat Singh and accused Hari Shanker Singh. He further stated that he did not know whether Chatrapal and accused Hari Shanker Singh were having relation or not. He did not see the family register nor see ration card for ascertaining the fact as to who lives to whom house. He further stated that the sand that came out from the canal in the construction of the house was piled up but he did not remember that which part of the house was to be constructed.

23. P.W.11-S.I. Shyampal Singh Rana, in his cross-examination, has further stated that he did not beat up or harshly treated the accused. He did not remember that when accused Hari Shanker was brought before him after arresting, did he get any injury or not. He also stated that he knows Sri Jagannath Singh. After the incident, Sri Jagannath Singh made an application against the conduct of the police. He stated that in relation to the investigation, he lastly visited the village, where the incident occurred, on 04.09.1981 and on 04.09.1981, he did not search the house of any accused person. He denied the suggestion that the mark of blood on the recovered items were not present. He did not send it to Chemical Examiner. He further stated that he could not trace

Bhagawati Gaderiya nor did he recorded his statement. He stated that he did not try to find out the cause of heated verbal exchange in the madrigals but on seeing the Case Diary, he stated that he got to know that Chandra Bhushan Singh had stated the reason for the dispute in madrigals. He stated that he did not search accused persons for the torches. P.W.2-Tej Bahadur Singh has made statement that entire incident was seen by every person from their own torches as well as from the light of the torches of the killer. P.W.3 Dan Bahadur Singh has made statement that he listened the alarm that Awadhesh Bahadur Singh was being beaten and this witness did not tell him about listening of any blast and also did not tell him about seeing the incident in the torchlight. He also stated that it is not written in the statement made by P.W.3-Dan Bahadur Singh that accused Bhagwat told the Sub-Inspector in front of him about the gun which he was carrying would be made recovered by him. He did not record any statement of the brother of the complainant Faujdar Singh. He did not make any identification of the recovered Katta. He denied the suggestion that accused, who were said to be arrested during the daytime, were actually arrested at night and also no recovery was either made at the pointing out of accused or from their house. He further stated that in the recovery memo, it has not been noted as to whether the copy of it has been given to the accused or not. He also stated that when he reached the police station along with the accused persons, copy of the recovery memo was not along with them. He also stated that it would be wrong to say that Jagannath Singh identified against him and according to him, accused were the men of Jagannath Singh and because of that he was falsely implicated. Jagannath Singh made applications for identification against the higher officials only after the incident and not prior to it. The complainant belongs to a family of simple living. He further stated that during his posting, the complainant did not visit the police station. It would be wrong to say that due to influence of complainant or pressure of higher officials, unfair investigation was conducted and also no recovery memo was prepared at police station. He did not record the statement of Chaukidar.

24. The evidence of P.W.9-S.I. Hanoman Singh shows that in September, 1981, he was posted at Police Station Bhadokhar, Raebareli. The investigation of the case under Section 25 of the Arms Act against accused Bhagwati was conducted by him. From 03.09.1981, he started the investigation of the case and on the said date, he made entries the copy of the documents in the case diary and recorded the statement of S.I. Sri Shyam Pal Singh (P.W.11) and H.C. Ramjas Yadav (P.W.7) at the police station. On 24.09.1981, he recorded the statement of witnesses Jawahar Lal, Baijnath Singh. He inspected the place of occurrence on the pointing out of witness Jawahar Lal and prepared the site plan (Ext. Ka. 10). Thereafter, he made enquiry from Ved Prakash and Sahab Datt. On 30.09.1981, after completion of investigation, he submitted charge-sheet (Ext. Ka.11) against the accused. He proved the chick report (Ext. Ka.12) which was written and signed by H.C. Ramjas Yadav.

In his cross-examination, P.W.9 S.I. Hanoman Singh has deposed that he did not produce the gun before the District Magistrate, Raibareli nor taken permission for initiation of case under Section 25 of the Arms Act.

25. The evidence of P.W.8-Ram Adhar Rawat shows that on 02.09.1981, he was posted as Constable at Police Station

Bhadokhar. On the said date, he went along with the Inspector at Village Parmanpur. At about 08:30 a.m., he was handed over the sealed deadbody, which was taken by him for post-mortem to hospital. He identified the deadbody before the doctor. He also handed over the requisite documents in relation to deadbody to the doctor. When the deadbody was in his custody, it was being kept in a sealed condition and no one was permitted to look or touch it.

In the cross-examination, P.W.8-Ram Adhar Rawat has stated that he brought the deadbody on a cart. He brought the cart from Majorganj. He reached hospital at 04:00 p.m.. He handed over the documents to the doctor at 04:00 p.m. Chaukidar was also with him and none else.

26. The post-mortem on the dead body of Awadhesh Bahadur Singh was conducted on 02.09.1981, at 4.00 p.m., by Dr. D.S. Shukla (P.W.10), who, found, on his person, ante-mortem injuries, enumerated hereinafter :--

"Ante-mortem injuries of deceased Awadhesh Bahadur Singh

(1) Incised wound with contused margins at 4 cm x 2.5 cm x bone deep medial part right eye nosal bone cut eye ball cut and wound cut.

(2) Incised wound with contused margins 10 cm x 2 cm x bone deem right zygomatic part zygomatic process cut (outer lable).

(3) Two overlapping incised wound with contused margins 10 cm x 4 cm bone deep 2 cm above no.2.

(4) Lacerated wound 7 cm x 1.5 cm x bone deep right parietal region 11 cm from right ear.

(5) Incised wound with contused margins. over pinne of right ear 4 cm x 3 cm x through and through.

(6) Lacerated wound 2 cm x 0.5 cm x muscle deep 2 cm below right eye.

(7) Lacerated wound 2 cm x ½ cm x bone deep on right moral region.

(8) Lacerated wound 9 cm x 1 cm x bone deep left parietal region 7 cm above left ear.

(9) Abrasion 4 cm x 1 cm below right clavicle.

(10) Lacerated wound 3 cm x 0.5 cm x bone deep back of right elbow joint.

(11) Lacerated wound 2 cm x 0.5 cm x bone deep inner side right lower 3rd fore arm.

(12) Lacerated wound 5 cm x 1 cm x muscle deep on middle of right index and middle finger.

(13) Lacerated wound 5 cm x 2 cm x bone deep 11 cm below right knee.

(14) Two contusion right chest. 20 cm x 3 cm, 12 cm below right asula.

(15) Lacerated wound 2 cm x 1 cm x bone deep outerside left elbow.

(16) Traumatic swelling 10 cm x 5 cm x lower part left forearm both bones fractured.

(17) Lacerated wound 3 cm x 2 cm x muscle deep on middle of left index and middle fingers.

(18) Incised wound with contused margins 5 cm x 3 cm x muscle deep on right scapular region.

(19) Contusion 10 cm x 4 cm x 6 cm above injury no. (18).

(20) Two contusion 15 cm x 4 cm on right scapular region.

(21) Two contusion 10 cm x 3 cm back of lower chest.

(22) Incised wound with contused margins left feet below little to a 4 cm x 1 cm x muscle deep.

(23) Lacerated wound 3 cm x 1 cm bone deep middle left leg front.

(24) Incised wound with contused margins 2 cm x 1 cm x muscle deep 4 cm below injury no.23.

(25) Lacerated wound 1 cm x 1 cm x muscle deep 10 cm above left ankle.

(26) Contusion 2 cm x 2 cm x 2 cm above injury no. 23."

The cause of death spelt out in the autopsy reports of the deceased person was shock and haemorrhage as a result of ante-mortem injuries, which he had suffered.

27. It is significant to mention that in his deposition in the trial Court, Dr. D.S. Shukla (P.W.10) has reiterated the said cause of death and also stated therein that on internal examination, he found on the corpse of the deceased that the frontal bone of the head was fractured; membrane of the brain was congested; ribs 3 to 6 on the right side were fractured; clotted blood was on outer side cereburm. He further stated that these injuries were sufficient in the ordinary course to cause death. He also stated that the death could have been caused on 01.09.1981 at about 9:30 p.m.. He further stated that incised wounds with contused margins could have been caused by Kanta (Ext.2) and the remaining injuries were caused by some blunt objects like Lathi. He also proved the post-mortem examination report was (Ext. Ka.13) prepared by him.

In his cross-examination, P.W.10 Dr. D.S. Shukla has admitted the fact that he received the related documents on 02.09.1981 at 3 :00 P.M. and the sealed deadbody was made available to him in post-mortem house at 4:00 p.m. when he reached to conduct post-mortem of the deceased there. He further stated that he has no record which shows the time when the deadbody reached to the mortuary. He stated that margins of the incised wounds were clear cut and the clear cut margin was not irregular and if it would be caused by a heavy cutting weapon, then, margin would be clear cut but it would be contused on account of pressure. The contusion could be caused by blunt object or pressure. The contusion could not be caused by pressure of sharp edge. The contusion could also be caused on burst of capillaries below the skin and if the blood would ooze out, then, it could not be contusion.

28. On being asked if any blunt object like lathi having less depth and sharp edged and when hit from it touches the bones, then, what will be nature of injuries caused, P.W.10-Dr. D.S. Shukla has deposed that if a blade of sharp edged object or a sharp edged knife is attached in the lathi or danda, then, incised wound could be caused by sharp edged object and the portion on which the impact of the blunt object caused, contusion could be occurred. The incised wound, which was found in the deadbody of the decased, had contusion in the margin. He denied the suggestion that incised wound with contused margin could not be caused by Kanta (Ext-2).

29. The evidence of P.W.11 S.I. Shyampal Singh Rana shows that Smt. Ramraj Kumari and P.W.3-Dan Bahadur Singh were sent for medical examination to District Hospital, Raebareli after their statement was recorded by him. The injuries of Smt. Ramraj Kumari and P.W.3-Dan Bahadur Singh were examined on 02.09.1981, at 02:00 p.m. and 2:10 P.M., respectively, by P.W.6-Dr. Surendra Singh, Incharge Medical Officer, District Hospital, Raebareli, who, found on their persons, following injuries :-

"Injuries of Smt. Ramraj Kumari wife of Late Chandra Bhan Singh:-

1. Contusion 3 cm x 2 cm over back at left forearm 6 cm above the wrist.

2. C/o pain of over back at lower part and no external mark of injury over Rt. Part.

In the opinion of P.W.6 Dr. Surendra Singh, the injury no. 1 is simple in nature and caused by blunt object and the duration of the injury was one day old.

Injuries of P.W.3-Dan Bahadur Singh, son of Sher Bahadur Singh :-

1. Lacerated wound 6 cm x ½ cm x ¼ cm over back of right external ear.

2. Lacerated wound 2 cm x ½ cm x 1/10 cm over palm (left hand) 3½ cm over the base of thumb.

3. Contusion 3 cm x 2 cm over back of left hand with suspected fracture of bone underneath with traumatic swelling around the contusion 8 cm x 6 cm.

4. Contusion 2½ cm x 2 cm over back of right hand 3 cm below the wrist with traumatic swelling around the contusion 5 cm x 3½ cm with suspected fracture of bone underneath.

5. Contusion 6 cm x 3 cm over back right scapular area, upper part.

In the opinion of P.W.6 Dr. Surendra Singh, injuries no. 3 and 4 were kept under observation; x-ray of right hand was advised; the remaining injuries were simple; all the injuries were caused by blunt object; and the duration of the injuries was about one day old.

30. It is significant to mention that in his deposition in the trial Court, P.W.6 Dr. Surendra Singh has reiterated the said cause of injuries and also stated therein that on 02.09.1981, he was posted as Incharge Medical Officer, District Hospital, Raibareli. He examined the injuries of Smt. Ramraj Kumari on the said date at 10:00 a.m. The injury no.1 sustained by Smt. Ramraj Kumari, w/o Chandra Bhan Singh, was simple in nature and could be caused by lathi and danda and the injuries were one day old. He further stated that he also examined the injuries of P.W.3-Dan Bahadur Singh at 2:10 p.m and after examination, he opined that injuries no. 3 and 4 were kept in observation and advised him for X-ray. He also stated that remaining injuries were simple in nature and all the injuries were caused by blunt objects like lathi and danda and injuries were about one day old. He further stated that injuries of both the injured could have caused on 1.09.1981 at 09:30 p.m. At the time of examination of the injured, he prepared the injury reports Ext. Ka.5 and Ext. Ka. 6.

In his cross examination, P.W.6 Dr. Surendra Singh has deposed that injury no. 1 sustained by Ramraj Kumari can come by falling on the ground. He further deposed that he cannot tell as to whether X-Ray of injuries of Dan Bahadur was done or not. The injuries sustained by Dan Bahadur Singh (P.W.3) is superficial. He also deposed that injured were brought by Constable Jagatram Mishra.

31. Accused Bhagwat Singh, accused/appellant Hari Shankar Singh, accused/appellant Sharda Bux Singh and accused /appellant Sardar Bahadur Singh, were examined on 04.09.1981, at 09:30 a.m., 09:40 a.m., 09:50 a.m. and 10:10 a.m., respectively, by D.W.1 Dr. R.N. Sharma, Medical Officer, District Jail, Raebareli, who, found, on their persons, following inujuries :-

"Injuries of accused Bhagwat Singh :-

"1. Lacerated wound 2 cm x 1 cm skin deep on lateral side of left elbow joint.

2. Contusion 5 cm x 2 cm on lateral side of upper part of right upper arm.

3. Abrasion 3 cm x 1 cm on front of left knee joint.

4. Abrasion1 cm x ½ cm on middle of back of right foot.'

In the opinion of D.W.1 Dr. R.N. Sharma, all the injuries are simple in nature and caused by blunt object. The duration of injuries were four days old.

Injuries of accused/appellant Hari Shankar Singh:-

"1. Lacerated wound 1 cm x 1 cm x skin deep (round) on front of head 3 cm above the right eye brow (suspected gun shot injury).

2. Contusion 3 cm x 2 cm on lateral side of right elbow joint.

3. Contusion 3 cm x 2 cm on front of right knee joint.

4. Abrasion 2 cm x 1 cm on distal part of right foot at back towards lateral side.'

In the opinion of D.W.1 Dr. R.N. Sharma, in respect of injury no.1, accused/appellant Hari Shanker Singh was referred to District Hospital, Raebareli; except injury no.1, all the injuries are simple in nature and caused by blunt object. The duration of injuries were four days old.

Injuries of accused/appellant Sharda Bux Singh :-

`1. Contusion 5 cm x 2 cm on medial aspect of right lower part of forearm.

2. Contusion 4 cm x 2 cm on lateral side of left ankle joint.

3. Contusion 3 cm x 2 cm on lateral side of right ankle joint.'

In the opinion of D.W.1 Dr. R.N. Sharma, all the injuries are simple in nature and caused by blunt object. The duration of injuries were four days old.

Injuries of accused/appellant Sardar Bahadur Singh :-

"1. Contusion 3 cm x 2 cm on back of right foot. Close to ankle joint.

2. Abrasion 1 cm x 1 cm on base of left big toe."

In the opinion of D.W.1 Dr. R.N. Sharma, all the injuries are simple in nature and caused by blunt object. The duration of injuries were four days old.

32. It is significant to mention that in his deposition, in the trial Court, D.W.1 Dr. R.N. Sharma has reiterated the said cause of injuries and also stated therein that on 04.09.1981, he was posted as Medical Officer, District Jail, Raebareli. Except the injury no.1 sustained by the accused/appellant Hari Shankar Singh, all the injuries sustained by the accused/appellants could have been caused by blunt object like lathi and danda. At the time of examination, the injuries were four days old. The injuries could have been caused on 01.09.1981 at about 10:00 p.m. In respect of injury no.1 sustained by accused/appellant Hari Shanker Singh, he was referred for x-ray, a report of which has been enclosed with the injury report. He has prepared the injury report and also proved it Exts. Kha-1 to Kha.4.

In his cross-examination, D.W.1 Dr. R.N. Sharma has deposed that except injury no. 1 sustained by accused/ appellant and accused Bhagwat, all the injuries sustained by the accused/injured are superficial. He could not tell as to whether injuries no. 1 to 3 sustained by accused Bhagwat Singh could have been caused by falling or not. Injury no.4 sustained by

accused Bhagwat Singh could not have been caused by falling because it was on middle of upper portion of foot.

He further stated that injuries no. 2 and 3 sustained by accused/appellant Hari Shanker Singh could have been caused either way by falling or by not falling. However, injury no.4 could not have caused by falling. Injury no.1 sustained by Hari Shanker is a lacerated wound. The lacerated wound could be caused by blunt weapon. He further stated that as Radiologist found radio opaque in the injury, therefore, he could not tell as to whether it could be caused by blunt object or not and this would be asked from the Radiologist. He did not find burn in the injury, which was round opening and, therefore, he suspected that it could be gunshot injury. Since the injury was opening round, therefore, he opined that it could not be caused by falling, however, it could be caused by falling on *keel* (thin piece of metal with one pointed end and one flat end).

In the cross examination, he also stated that injuries sustained by accused/appellant Bhagwati Singh, accused/ appellant Sharda Bux Singh and Sardar Bahadur Singh were on accessible parts, whrereas injuries sustained by accused/ appellant Hari Shankar Singh was on hand approachable parts. He denied the suggestions that he wrote the existing injury in the injury register and also wrote gun shot injury under the influence of the accused.

33. D.W.2-Dr. M.M. Pratap, in his examination-in-chief, has stated that on 08.09.1981, he was the Radiologist in District Hospital, Raibareli. He did x-ray of the head of accused/appellant Hari Shankar under his supervision by the x-ray technician. He proved the x-ray examination plates Exts. 9 and 10 being taken of skull of accused Hari Shanker Singh and opined that one radio opaque shadow was found present in the skull. He proved the x-ray examination report (Ext. Kha.7) and opined that this radio opaque shadow can be of a pellet. However, he qualified this statement by saying that it confirmation could only be made by a ballistic expert.

34. The case was committed to the Court of Session by the Chief Judicial Magistrate and the trial Court framed charge against accused/appellants Hari Shankar Singh, Bhagwat Singh, Shiv Baran Singh, Shiv Prasad Singh under Sections 148, 302/149, 323/149 and 395 of the Indian Penal Code, whereas accused/appellants Badri Singh, Amar Bahadur Singh, Sardar Bahadur Singh, Sharda Bux Singh, Jitendra Bahadur Singh, Indra Bahadur Singh alias Dhunni Singh, Shiv Narain Yadav and Indra Bahadur Singh son of Shitla Bux Singh under Sections 147, 302/149, 323/149 and 395 I.P.C.. They pleaded not guilty to the charges and claimed to be tried. Their defence was of denial.

35. The accused/appellants, in their statements under Section 313 of the Code of Criminal Procedure, have denied the prosecution evidence. Accused/appellant Hari Shanker, in his statement under Section 313 Cr.P.C., took the plea that on 01.09.1981, at about 10:00 p.m., the deceased Avadhesh Bahadur Singh and his party men attacked them. The villagers thought that miscreants have raided the village. He came out of his house. He was shot as a result of which he fell down. Even thereafter, the attackers continued beating him. He raised a hue and cry, upon which a number of villagers thinking that

miscreants have attacked him challenged them. It was pitch dark. The neighbors inflicted injuries upon the attackers in order to save themselves. Injuries upon Avadhesh Bahadur Singh and others were inflicted in self defence. The persons who had participated in this brawl (Marpeet) were not seen by him from several days in the village. Injuries upon Avadhesh Bahadur Singh and others were inflicted by the villagers in self defence thinking them to be miscreants. Accused/appellant Bhagwat Singh took the plea that he was lying in front of the door of the house of Chattrapal Singh when 7-8 or 9 other persons came there. They inflicted injuries upon his hands and feet. Hari Shankar Singh came out of the house. He was shot. They raised an alarm shouting that miscreants have attacked them. The miscreants even then continued to inflict injuries upon them. The villagers in order to save their lives inflicted injuries upon these attackers.

36. Accused/appellants Shiv Baran Singh, Shiv Prasad Singh and Badri Singh took the pleas under Section 313 Cr.P.C. that nothing took place in their presence. Accused/appellant Amar Bahadur Singh took plea that at the time of occurrence, he was at his house. He came to know that some miscreants have come at the house of Hari Shanker Singh. It was about 10 p.m. He reached there. It was pitch dark. Avadhesh Bahadur Singh was lying dead there. The miscreants had fled away. Accused/appellant Sardar Bahadur Singh, in his statement under Section 313 Cr.P.C., has stated that Avadhesh Bahadur Singh and others attacked them. The villagers though that miscreants had come. The villagers and neighbors rushed. There was brawl (Marpeet) between the villagers and these persons. Some of the miscreants fled away. Avadhesh Bahadur Singh could not run away. It was pitch dark. Persons who actually participated in this brawl (Marpeet) fled away from the village. Accused/appellant Sardar Bux Singh, in his statement under Section 313 Cr.P.C., has stated that he was sleeping at his house. In the night there was an uproar. The women of the house told him that dacoity is being committed. He also ran but could not recognize as to who were committing dacoity. Accused/appellant Jitendra Bahadur Singh, in his statement under Section 313 Cr.P.C., stated that he did not know anything about the occurrence and took a plea that he lives in another village. Accused/appellant Indra Bahadur Singh alias Dhunni Singh took a plea in a statement under Section 313 Cr.P.C. that at the alleged time of occurrence, he was not living in village Parmanpur. Accused/appellant Shiv Narain and Indra Bahadur Singh son of Shitla Bux Singh also stated that they live in another village and that they have been falsely implicated in this case.

37. During trial, in all, the prosecution examined 11 witnesses in support of its case, whereas from the side of the defense, in all, two witnesses i.e. D.W.1- Dr. R.N. Sharma and D.W.2-Dr. M.M. Pratap, were examined. The evidences of P.W.6-Dr. Surendra Singh, who examined injured Smt. Ramraj Kumari and Dan Bahadur Singh (P.W.3), P.W.7-H.C. Raj Jas Yadav, who has proved the chik F.I.R. (Ext. Ka.7) and registered a case (Ext. Ka. 8), P.W.8-Ram Adhar Rawat, who has taken away the sealed corpse of the deceased for post-mortem, P.W.9-S.I. Hanoman Singh, who has investigated the case under Section 25 of the Arms Act against accused Bhagwat Singh, P.W.10-Dr. D.S. Shukla, who conducted the post-mortem of the deceased Awadhesh Bahadur Singh and P.W.11-S.I.

Shyapal Singh Rana, who was the Investigating Officer of the case, and D.W.1- Dr. R.N. Sharma, who examined the accused/appellant/ injured Bhagwat Singh, Hari Shanker Singh, Sharda Bux Singh and Sardar Bahadur Singh and D.W.2-Dr. M.M. Pratap, who was the Radiologist and under his supervision, x-ray of skull of accused/appellant Hari Shankar Singh was made, have already been stated hereinabove.

38. Now, we would like to deal with the evidence of informant P.W.1-Kunwar Bahadur Singh. Since in paragraph 13, 14, 15 and 16, we have set out the prosecution story primarily on the basis of the recitals contained in his examination-in-chief, for the sake of brevity, the same is not reiterated. P.W.1-Kunwar Bahadur Singh has deposed on oath that the house of Chattrapal in village Parmanpur is East faced. The main door of his house is towards East and another door of his house is towards Northern side. In front of this door, a passage running East-West direction is there. The Nabdan of Chattrapal is towards the Western side of the Northern door of his house. The said Nabdan is going towards Northern side of the house of Vilash Gaderiya. A Neem tree is there towards the Western side of Nabdan. A platform (chabutra) is in front of the western door of the house of Chattrapal Singh. The distance between the house of Chattrapal Singh and Bhagwat Gadariya is 200 paces towards east. The house of the P.W.1-Kunwar Bahadur Singh is at distance of about 127 paces towards the western side of the house of Chattrapal. The house of P.W.3-Dan Bahadur Singh is at a distance of 127 paces towards the western side. He also stated that P.W.3-Dan Bahadhur Singh is his grand father and elder brother of his father and Injured Ramraj Kumari is his aunt and is living East-North side at a distance of 40 paces from his house. The deceased Awadhesh Bahadur Singh is his real brother. Accused/appellants Bhagwat and Harishankar are the father and son, respectively. Accused/appellants Shiv Prasad Singh, Badri Singh and Amar Bahadur Singh are real brothers. Accused/appellants Indra Bahadur and Sharda Bux Singh are the real brothers. Accused/appellant Sharda Bux Singh is the cousin of accused/appellant Sardar Bahadur Singh. Accused appellants Jitendra Bahadur and Indra Bahadur Singh alias Dhunni are the real brother. Accused/appellant Vijay Bahadur Singh is the father of accused/appellant Sardar Bahadur Singh. Accused/appellant Shiv Baran Singh is the nephew of accused/appellant Bhagwat Singh.

39. P.W.1-Kunwar Bahadur Singh has further deposed that Chattrapal Singh died after the incident and at that time, he was aged about 80 years. Accused/appellant Hari Shankar Singh is residing at the house of Chattrapal Singh. The relation between the accused/appellants and him (P.W.1) is not cordial and there is enmity between them. He stated that prior to 10-12 years ago, accused/appellant Sardar Bahadur Singh had implicated his father (Chandra Bhushan Singh) and his grand father (P.W.3. Dan Bahadur Singh) in a false case of highway robbery, in which they were acquitted. He also stated that accused/appellant Sardar Bahadur Singh had contested the election of Gram Pradhan against his grand-father (P.W.3-Dan Bahadur Singh), in which he was defeated. On account of this, the relations between the accused/appellants and his father (Chandra Bhushan Singh) and his family members were strained. It has also been

stated that on the date of occurrence, *Aalha* was going on at about 06:00-06:30 P.M. in front of the house of Bhagwati Gadariya, in which besides other villagers, he (P.W.1 Kunwar Bahadur Singh), his brother (deceased Avadhesh Bahadur Singh), their father (Chandra Bhushan Singh) and accused/appellant Shiv Baran Singh were present. During the *Aalha*, his father (Chandra Bhushan Singh) asked accused/appellant Shiv Baran Singh to give him a bidi, to which accused/appellant Shiv Baran Singh told his father (Chandra Bhushan Singh) that if he was fond of taking bidi, he should purchase it, upon which his father (Chandra Bhushan Singh) retorted that you must not misbehave, to which accused /appellant Shiv Baran Singh abused his father (Chandra Bhushan Singh) and, thereafter, his brother Avadhesh Bahadur Singh (deceased) told accused/appellant Shiv Baran Singh as to why he abused his father (Chandra Bhusan Singh), upon which accused/appellant Shiv Baran Singh left from there by abusing him. Thereafter, his father (Chandra Bhushan Singh went to his house and thereafter, deceased Avadhesh Babadur Singh also started for his house. He (P.W.1), P.W.2-Tej Bahadur Singh, Peshkar Singh, Balwant Singh and Jai Singh also started for their respective houses behind deceased Avadhesh Babadur Singh at a distance of about 10-15 paces. At that relevant time, he (P.W.1), Jai Singh and P.W.2-Tej Bahadur Singh were carrying torches. It was about 08:30 p.m.

40. P.W.1-Kunvar Bahadur Singh has further stated that when the deceased-Avadhesh Bahadur Singh reached near the Nabdan of the house of Chhatrapal, all the accused/appellants surrounded him. Accused/appellant Hari Shanker was armed with pistol; accused/appellant Bhagwat Singh and Shiv Baran Singh was armed with Kanta; accused/appellant Shiv Prasad Singh was armed with Ballam; and other accused/appellants were armed with lathis. Accused/appellant Hari Shanker Singh fired upon his brother Avadhesh Singh (deceased), upon which his brother Avadhesh Singh (deceased) fell down near the Nabdan. He did not know as to whether fire hit his brother or not, however, all the other accused/appellants started beating his brother with lathis, kanta and ballam. Thereafter, in the light of torches which he (P.W.1-Kunwar Bahadur Singh), P.W.2-Tej Bahadur Singh and Jai Singh were carrying, recognized the accused/appellants and they raised an alarm upon which his grand father P.W.3- Dan Bahadur Singh and his aunt Ramraj Kumari came to rescue his brother (deceased Awadhesh Bahadur Singh), upon which they had also assaulted them, as a consequence thereof, his grand father P.W.3- Dan Bahadur Singh and his aunt Ramraj Kumari had also sustained injuries. Thereafter, when his grand father P.W.-3 Dan Bahadur Singh and his aunt Ramraj Kumari were inflicting injuries by the accused/appellants, his brother Avadhesh Bahadur Singh (deceased) ran towards the eastern side of the house of Chhatrapal Singh and reached the passage near the Chabutra of Chatrapal Singh, then, accused/appellants had inflicted injuries upon his brother, as a result thereof, his brother succumbed to injuries on the spot. In the meantime, his father Chandra Bhushan Singh came with his licensee gun, upon which accused/appellants Bhagwat Singh, Shiv Baran Singh, Indra Bahadur Singh alias Dhunni Singh, Amar Bahadur Singh and others had snatched the licensee gun of his father near the house of Pancham Kumhar. He recognized the licensee gun (Ext. Ka.1) in the trial Court and on seeing the licensee gun, he has also

stated that the Court Moharrir told him that the bundle in which this licensee gun was kept, was not sealed. He further stated that at about 09:30 p.m., his brother was murdered and licensee gun was snatched. He saw the whole incident in the light of torch. Accused/appellants are in his village and he knows all of them prior to it. He lodged the report (Ext.Ka. 1) by himself on 01.09.1981 at police station Bhadokhar. When the Inspector came on the spot, he shown his torch to him and after seeing it, Inspector returned it to him. The torch was in running condition.

41. P.W.1-Kunvar Bahadur Singh, in his cross-examination, has deposed that he was studying in Sarvodaya Inter College. At that relevant time, he had given Intermediate examination and his result was withheld but in the month of December, 1981, his result was declared, in which he was passed. He had enmity with accused / appellant Sardar Bahadur Singh and other accused /appellants. The enmity was continuing since 10-12 years. He also had enmity with the family members of the accused/appellants and even he did not sit or eat with accused/appellants. *Aalha* was frequently organized in his village. He, his brother and his father have gone to listen Aalha when they were in village. The *Aalha* was started in front of the house of Bhagwati Gadariya on the date of the incident only and not prior to it. His father, grand-father and his brother Avadhesh were residing in one house. He further stated that in his house, lunch was taken between 11-12 in the afternoon and on the date of the incident, he took lunch at about 11:30 a.m. He also stated that he did not know as to which time Avadhesh Bahadur Singh (deceased) took lunch on the date of the incident. He was in the house after taking lunch and before going to listen *Aalha*. He and his brother Avadhesh Bahadur Singh had gone to listen *Aalha* after taking evening snack at about 06:00-06:30 p.m. and his father was gone to listen *Aalha* after about half an hour. He and his brother had listened Aalha at about 09:30 p.m. and by that time, *Aalha* had not ended. 50-60 persons including women and children were in the crowd, out of which 40-45 persons were male members. Bhagwati Gadariya was also present there. In his village, number of castes are living. When altercation took place during *Aalha*, the distance between him and his father was at about 5-6 paces. The person, who recited *Aalha*, came from Pratapgarh but he did not know his name. The persons, who were present at the time of *Aalha*, stopped accused/appellant Shiv Baran Singh to quarrel with his father. They had also stopped his father. When altercation took place, *Aalha* was stopped. The altercation was going on for atleast 2-3 minutes. Accused/appellant went from there by using abusive language and thereafter, all the persons sat there and *Aalha* was again started. He further stated that at the time of writing down the report and also at the time of recording his statement by the Investigating Officer, he had remembered that altercation took place on account of Bidi but the Investigating Officer did not ask him about the reason for altercation as he was satisfied. He further stated that in the statement recorded by the Investigating Officer and in the report, he did not tell and write about dispute over bidi because at the time of lodging report, he was quite nervous and the Investigating Officer did not ask him about the dispute, therefore, he did not tell the same to him. He further stated that there are two ways i.e. one road and one passage, between the house of Bhagwati Gadariya and his house. The passage went towards northern side of the

house of Chattrapal Singh. There is a small pool next to the passage but there is no pond or any forest, however, there is one-two kothiya (cells) of bamboo. The second road went towards his house. In the house of Chattrapal, his daughter, his wife and one boy, namely, Hari Shanker (accused/appellant), were living. The house of accused/ appellant was 100 paces of northern side of the house of Chattrapal.

42. P.W.1-Kunwar Bahadur Singh, in his cross-examination, has further deposed that the persons, who are residing near the house of Chattarapal, are in the party of the accused/appellants, therefore, he is jealous against them. He further stated that there is 100-125 houses in his village. 10-15 houses are of the party of the accused/appellants and most of the villagers do not care about anyone. Witnesses Jai Singh and Jawahar Singh are real brothers and Peshkar Singh was the son of his cousin. Ramesh is the real brother of Peshkar Singh. The husband of Ramraj Kumari was Chandra Bhan Singh. He further stated that as he listened Aalha for about 2-2:30 hours and then thought to eat food at home and, therefore, he got up from the Alaha and when Awadhesh (deceased) got up and started walking, he also joined him. The persons, who were sitting along with him, also stated to leave from there as their houses were also on the way from which he was going. They went in the light of the torch. He further stated that it was the month of Bhado and it was very dark. His brother (Awadhesh Bahadur Singh deceased) was 10-15 steps ahead of him, who was going in the dark and they were lighting the torch from behind him, some light of which was also going there. Neither he nor his companion tried to save his brother because they were unarmed and firing was going on.

43. P.W.2-Tej Bahadur Singh, who is the witness of fact, in his examination-in-chief, has reiterated the happening of Aalha in front of the house of Bhagwati Gadariya and stated that he was going to the house of Bhagwati Gadariya for listening Alaha at about 07:00 p.m. and at that time, Alaha was going on. In the Alaha, number of persons of his village were present. P.W.1-Kunwar Bahadur Singh, his father Chandra Bhushan Singh, deceased Awadhesh Bahadur Singh and accused/appellant Shiv Baran Singh were also present there. At about 08:30 p.m., altercation took place between the deceased Avadhesh Bahadur Singh and his father Chandra Bhushan Singh with accused/appellant Shiv Baran Singh. Accused/appellant Shiv Baran Singh used abusive language for Avadhesh Bahadur Singh (deceased) and his father Chandra Bhushan Singh and after using abusive language, accused/appellant Shiv Baran Singh went from there. At about 09:30 p.m., Chandra Bhushan Singh got up and went from there. Thereafter, at about 09:30 p.m., Awadhesh Bahadur Singh (deceased) and behind him he, Kunwar Bahadur Singh (P.W.1), Balwant Singh, Peshkar Singh, Jai Singh, started to go towards their house. At that time, he, Kunwar Bahadur Singh (P.W.1) and Jai Singh were having torch in their hands and all of them were lighting torches. Avadhesh Bahadur Singh (deceased) was 10-15 paces ahead from them and when Avadhesh Bahadur Singh (deceased) reached near the napdan situated in the northern side of the house of Chattarpal Singh, then, accused/appellants Hari Shanker Singh, Shiv Baran Singh, Bhagwat Singh, Badri Singh, Shiv Prasad Singh, Amar Bahadur Singh, Sardar Bahadur Singh, Sarda Bux Singh, Indra Bahadur Singh, Jitendra Bahadur Singh, Indra Bahadur Singh alias Dhunni Singh and Shiv Narayan Yadav

came there. Accused/appellant Hari Shanker was armed with pistol, accused/appellants Bhagwat Singh and Shiv Baran Singh were armed with Kanta and accused/appellant Shiv Prasad was armed with Ballam and other accused/appellants were armed with lathis. Accused/appellant Hari Shanker fired, as a consequence of which, deceased Avadhesh Bahadur Singh fell down near the Napdan and other accused/appellants inflicted blow upon him with lathi, Kanta and ballam. Thereafter, they and deceased Avadhesh Bahadur Singh raised alarm, upon which P.W.3-Dan Bahadur Singh and Ramraj Kumari (injured) reached there and tried to escape deceased Avadhesh Bahadur Singh. Thereafter, accused/appellants had assaulted P.W.3-Dan Bahadur Singh and Ramraj Kumari. Thereafter, on seeing the opportunity, Avadhesh Bahadur Singh (deceased) ran towards them in the eastern side of the house of Chattapal Singh. Thereafter, accused/appellants left Ramraj Kumari and P.W.3-Dan Bahadur Singh and came near Avadhesh Bahadur Singh (deceased). Thereafter, accused/appellants killed Avadhesh Bahadur Singh near the Chabutra of Chattrapal. In the meantime, Chandra Bhushan Singh (father of deceased and P.W.1) came from his house with his gun. Thereafter, four accused/appellants, namely, Bhagwat Singh, Shiv Baran Singh, Amar Bahadur Singh, Indra Bahadur Singh alias Dhunni, snatched the gun of Chandra Bhushan Singh. In the meantime, some of the villagers also came there. He saw the incident in the light of his torch and of Kunwar Bahadur Singh (P.W.1) and Jai Singh.

44. In his cross-examination, P.W.2-Tej Bahadur Singh has deposed that during the incident, accused/appellant Hari Shanker was also lighting the torch towards Avadhesh Bahadur Singh (deceased) and also all around. He did not see the torch of any other of the accused/appellants. He denied the suggestion that he told the Investigating Officer that he recognized the accused/appellants in the lights of the torches. He further stated that at the time of firing, Avadhesh Bahadur Singh (deceased) was in eastern side of accused/appellant Hari Shanker Singh. Accused/appellant Hari Shanker Singh fired towards Avadhesh Bahadur Singh (deceased) from the distance of 5-6 paces. After firing, Avadhesh Bahadur Singh (deceased) fell down on that place. He further stated that he did not see as to whether blood was oozing out from Avadhesh Bhadur Singh immediately after firing or not. Accused/appellant Hari Shanker Singh did not receive any injury. They were 10-15 paces away from the place of incident, from where they raised alarm. He further stated that P.W.3-Dan Bahadur Singh and Ram Raj Kumari were assaulted while surrounding them by the accused/appellants, who were armed with lathis only. Before inflicting blow upon P.W.3-Dan Bahadur Singh and Ram Raj Kumari, accused/appellants had assaulted the deceased for 2-4 minutes. He denied the suggestion that he told the names of the accused/appellants due to enmity and he was not present on the place of incident.

45. P.W.3-Dan Bahadur Singh, who is the injured witness and uncle of deceased and the complainant P.W.1-Kunwar Bahadur Singh, in his cross-examination, has deposed that on the date of incident, at about 09:30 p.m., he was sleeping at his door. On listening the fire of pistol as well as alarm of Avadhesh Bahadur Singh (deceased) and Kunwar Bahadur Singh (P.W.1), which coming out from eastern side of his house and napdan situated in the

northern side of the house of Chatrapal Singh, he and Ramraj Kumari ran and when they reached near the Napdan situated in the northern side of the house of Chatrapal, then, they saw accused/appellant Hari Shanker was standing with pistol and accused/appellants Bhagwat Singh and Shiv Baran Singh with pharsa (spear), accused/appellants Shiv Prasad, Badri and Amar Bahadur with ballam and accused/appellants Indra Bahadur, Sharda Bux, Indra Bahadur, Indra Bahadur alias Dhunni Singh, Shiv Baran Singh Yadav and Jitendra Bahadur with lathis, were assaulted Avadhesh Bahadur Singh (deceased). When he and Ramraj Kumari asked them that what are you doing and why they beating up, then, they assaulted 5-6 lathis blow upon him and Ramraj Kumari, as a consequence of which, he and Ramraj Kumari sustained injuries. In the meantime, on seeing the opportunity, his nephew Avadhesh Bahadur Singh (deceased) ran towards the door of Chattrapal. Thereafter, accused/appellants left them and after surrounding Avadhesh Bahadur Singh (deceased) beaten him, as a consequence thereof, Avadhesh Bahadur Singh died on the spot. Thereafter, his younger brother Chandra Bhusan came with gun in the southern side of the house of Pancham and told the accused/appellants that they should not beat his son, otherwise, he would kill them with gun. Thereafter, he told his brother Chandra Bhushan not to fire, upon which accused/appellants Bhagwat Singh, Shiv Baran Singh, Amar Bahadur Singh, Indra Bahadur Singh alias Dhunni Singh, were snatching the gun from Chandra Bhushan Singh and after tussle, they snatched the gun from Chandra Bhushan Singh. In the meantime, about 15-20 persons came there and raised alarm in the southern side of the house of Prabhu Kumhar not to assault and they are coming. There were light of torches. P.W.2-Tej Bahadur Singh, P.W.1-Kunwar Bahadur Singh and Jai Singh were carrying torches and they were using lighting the torches in the eastern side and in the light of the torches, they saw the accused/appellants. The injuries sustained by him and Ramraj Kumari were medically examined at Sadar Hospital, Raibareli.

46. P.W.3-Dan Bahadur Singh, in his cross-examination, has deposed that he and Chandra Bhushan Singh were residing in different houses and their food were made separately but no articles/items were partitioned between them. Prior to firing, Chandra Bhushan Singh came home at about 9:00 p.m. and was sleeping at 15-20 paces away from him. After listening fire, he did not say anything to Chandra Bhushan Singh and ran towards the house of Chatrapal Singh. His niece Avadhesh Bahadur Singh (deceased) and Kunwar Bahadur Singh (P.W.1) were shouting that they were being beaten. He listened the alarm when he went 3-4 paces. He further stated that when he got up from *Khat* and walked a little further, then, he listened the noise of Avadhesh Bahadur Singh (deceased) and Kunwar Bahadur Singh (P.W.1) that to run, they are being beaten, upon which they understood that they have been beaten. He did not call any person to help nor took any weapon because he has no weapon. He further stated that he did not listen the alarm that deceased Avadhesh Singh was being beaten. He further stated that at the time of incident, Chandra Bhushan Singh was sleeping and he got flustered and in the concern that there should be no quarrel, he came outside and he did not not call Chandra Bhushan. When he reached near the place of incident, then, he saw the scuffle. At that time, villagers were not coming and Kunwar Bahadur Singh (P.W.1) and Jai Singh and others had raised alarm and when

firing was made, then, villagers, who wanted to help, did not come. Prior to assault, he was shouting but when he was beaten, then, he tried to escape himself by using hishand and at that time, he did not raise any shout for help. He further stated that 10-12 persons were beating in front of him. He and Ramraj Kumari were beaten for about one, two or half a minute. When accused/appellants were assaulting him, then, he saw Chandra Bhushan Singh, who was 25-30 paces from him. He further stated that Chandra Bhushan at a distance of 15-20 paces told the accused/appellants that he would fire and warned them not to beat Avadhesh Bahadur. At that time, the accused/appellants was eastern door of the Chattrapal Singh. At the time when accused/appellant Bhagwat Singh were snatching the gun, then, other accused/appellant inflicted blow upon Avadhesh and thereafter gathered beneath the tree of neem. He also stated that he did not see the torch with Kunwar Bahadur (P.W.1) when he wrote down the report. The report was written by Kunvar Bahadur (P.W.1) in the light of the lantern. He did not see the injuries on corpse but he saw the accused/appellants assaulting the deceased. He told the Investigating Officer that he saw the incident in the light of the torch but if he did not write about it, then, he did not tell anything. He denied the suggestion that there was no torch nor Jai Singh and Kunwar Bahadur Singh were present. On the date of incident, there was no cloud but the night was dark. He also denied the suggestion that accused/appellants had sustained injuries. He also denied the suggestion that he had falsely implicated the accused/appellants by telling false story.

47. P.W.4-Baijnath Singh, who is the witness of recovery of gun of Chandra Bhushan Singh from accused/appellant Bhagwat Singh, in his examination-in-chief, has deposed that on 02.09.1981, the Investigating Officer recovered the gun from the house of accused/appellant Bhagwat Singh in his presence and one Jawahar Lal on pointing out of accused/appellant Bhagwat Singh.

48. In his cross-examination, P.W.4-Baijnath has stated that on the report of accused/appellant Sardar Bahadur Singh, a case under Section 394 I.P.C. was lodged against his father Jeet Bahadur Singh. He further stated that in the said case, his father was acquitted. He also stated that at the time of recovery, he was standing at a distance of 15-20 paces from the Investigating Officer and the Investigating Officer had called him and Jawahar Singh by insinuate. He denied the suggestion that recovery of gun was not made in his presence and accused/appellant has been falsely implicated due to enmity.

49. P.W.5-Dal Bahadur Singh, who is the witness of search of the house of Chattrapal Singh and accused/appellant Sharda Bux Singh, deposed that the Investigating Officer had searched the house of Chattrapal Singh, accused/appellants Sarda Bux Singh, Sardar Bahadur Singh and Hari Bux Singh in his presence at about 2:30 p.m. On the said date, the Investigating Officer has arrested the accused/appellant Sarda Bux Singh and after arrest, accused/appellant had handed over a lathi to the Investigating Officer, wherein blood was present.

50. The learned trial Court, after hearing learned Counsel for the parties and gone through evidence on record, convicted and sentenced the accused/appellants in the manner as stated in paragraphs 6 and 7 hereinabove by the impugned judgment and order dated 15.07.1982/16.07.1982.

51. Aggrieved by the aforesaid impugned judgment and order dated 15.07.1982/16.07.1982, the accused/appellants have preferred the above-captioned criminal appeals.

52. We have heard Shri Jyotinjay Mishra, learned Senior Advocate, assisted by Sri Kapil Mishra, learned Counsel for the appellants no. 5 and 7 and Sri R.N. S. Chauhan, learned Counsel for the appellants no. 2, 3 and 4 in Criminal Appeal No. 546 of 1982, Sri R.C. Singh, holding brief of Sri Arun Sinha, learned Counsel for the appellant no.2 in Criminal Appeal No. 547 of 1982, Sri Kunwar Mridul Rakesh, learned Senior Advocate, assisted by Sri Santosh Srivastava, learned Counsel for the appellant in Criminal Appeal No. 548 of 1982, Sri Nagendra Mohan assisted by Sri Anil Kumar Tripathi, learned Counsel for the complainant and Ms. Nand Prabha Shukla, learned Additional Government Advocate for the State/respondents in all the above captioned appeals and have also perused, the depositions of the prosecution witnesses and defense witnesses; the material exhibits tendered and proved by the prosecutions, the statement of the appellants recorded under Section 313, Cr.P.C.; and the impugned judgment of the trial Court.

53. Challenging the impugned judgment and order passed by the trial Court, Sri Jyotinjay Mishra, learned Senior Advocate appearing on behalf of the accused/appellants no.5 and 7 in Criminal Appeal No. 546 of 1982 has argued that the prosecution has suppressed the origin of the incident and the incident has not taken place in the manner as has been stated by the prosecution. He argued that in the F.I.R., it has been stated that complainant's brother, Avadhesh Bahadur Singh (deceased), went to his house at 09:30 p.m., whereas in his examination-in-chief, P.W.1-Kunwar Bahadur Singh, who is the complainant in the instant case and brother of the deceased, at one place has stated that when accused/appellant Shiv Baran went to his house while abusing his father, thereafter, his father (Chandra Bhushan Singh) and his brother (deceased Avadhesh Bahadur Singh) also went to their home and on other place, P.W.1-Kunwar Bahadur Singh has stated that his father (Chandra Bhushan Singh) went to home half an hour ahead of the deceased Avadhesh Singh and him. This shows the contradiction in the statement of P.W.1-Kunwar Bahadur Singh and also doubts his presence at the place of occurrence. He further argued that when the presence of the complainant P.W.1-Kunwar Bahadur Singh is itself a contradictory one and doubtful, hence his testimony cannot be considered as trustworthy. He also argued that P.W.1-Kunvar Bahadur Singh and P.W.2-Tej Bahadur Singh are not the injured witnesses and also did not try to save his brother Avadhesh Bahadur Singh (deceased) and P.W.3-Dan Bahadur Singh (injured) and Ramraj Kumari (injured), hence the testimony of P.W.1-Kunvar Bahadur Singh and P.W.2-Tej Bahadur Singh cannot be believed. Thus, the trial Court has committed a grave error in convicting the accused/appellants, relying upon the depositions of PW1-Kunwar Bahadur Singh and PW2-Tej Bahadur Singh.

54. Shri Mishra has further argued that according to the prosecution, earlier accused/appellant Sardar Bahadur Singh had implicated Chandra Bhushan Singh (father of the deceased Awadhesh Bahadur Singh) and his elder brother P.W.3-Daan Bahadur Singh (injured witness) in a case

of Highway Robbery about 10-12 years back in which they were acquitted. He further argued that accused/appellant Sardar Bahadur Singh had fought election against P.W.3-Daan Bahadur Singh (uncle of the deceased Avadhesh Bahadur Singh) for the post of Pradhan of village in which accused/appellant Sardar Bahadur Singh was defeated and for these reasons, the relations between the accused/appellant on one hand and Chandra Bhushan Singh (father of the deceased) and his family members on the other hand, were strained. He further stated that as per prosecution, on the alleged date of occurrence i.e. on 01.09.1981, Aalha was going on at the house of one Bhagwati Gadariya in the village Parmanpur, District Raebareli. Accused/appellant Shiv Baran Singh and other other persons of the village were present in the Aalha. The complainant Kunwar Bahadur Singh (P.W.1), his brother Avadhesh Bahadur Singh (deceased) and his father Chandra Bhushan Singh had gone to the house of Bhagwati Gadariya to hear *Aalha*. During the course of hearing Aalha, Chandra Bhushan Singh (father of the deceased) asked Biri from the accused/appellant Shiv Baran Singh, upon which some heated arguments took place between accused/appellant Shiv Baran Singh and Chandra Bhushan Singh (father of the deceased). It is alleged that after heated arguments, accused/appellant Shiv Baran Singh left the place and went towards his house. The complainant and his family members also left the place and after sometime, the instant alleged incident took place. His submission is that as per the prosecution case itself, there were enmity between the complainant's side and appellant's side, therefore, it is highly improbable that complainant's father, Chandra Bhushan Singh, would ask for Biri from the accused/appellant Shiv Baran Singh, hence the prosecution case is fabricated one.

55. Elaborating his submission, Mr. Mishra has argued that it is an admitted position that there was an enmity prior to the disputes between the accused/appellants and the family of the deceased. Thus, there are all possibility of falsely implicating the accused/appellants.

56. Sri Mishra has stated that Chandra Bhushan Singh (father of the deceased) with whom the alleged altercation between the accused/appellant Shiv Baran Singh took place on account of Biri issue, has not been produced by the prosecution in support of its case. Furthermore, Bhagwati Gadariya at whose house Aalha was going on, has also not been produced by the prosecution in support of its case to prove the genesis of the incident.

57. Mr. Mishra has also argued that P.W.1-Kunwar Bahadur Singh has stated in his statement that accused/appellant Hari Shanker Singh fired single shot upon the deceased Avadhesh Bahadur Singh as a result of which the deceased Avadhesh Bahadur Singh had fallen down near "Napdaan' of Chattrapal's house but on perusal of the post-mortem report of the deceased Avadhesh Bahadur Singh would show that no fire arm injury was found by P.W.10-Dr. D.S, Shukla, who conducted the post-mortem of the deceased Avadhesh Bahadur Singh. Moreso, pistol, which has been recovered, has not been sent for examination from the Ballistic Expert.

58. Sri Mishra has further stated that P.W.1-Kunwar Bahadur Singh has stated that at the time of the incident, it was the month of Bhado and the night was very dark, therefore, it is highly improbable to

identify the person who has allegedly fired a single shot, in the light of the torch. He also argued that P.W.1-Kunwar Bahadur Singh has stated that gun of his father (Chandra Bhushan Singh) was snatched by the accused/ appellants but the name(s) of the accused/ appellants, who snatched the gun, has not been disclosed in the report as well as number of persons involved in snatching the gun.

59. Shri Mishra has next submitted that as per the prosecution, some of the witnesses including P.W.1-Kunwar Bahadur Singh were having torches in their hands and in the light of torches, he and other witnesses saw the whole incident but surprisingly, the Investigating Officer P.W.11 Shyampal Singh Rana has not prepared any memo for torches of the prosecution witnesses. He argued that it is alleged that the prosecution witnesses have seen the whole incident in the light of torches and if that is so, it is quite impossible to see the incident and recognized the persons who assaulted the deceased and also specify the specific role of each of the accused/appellants. He also argued that as per the site plan, distance between the house of the complainant and place of incident is about 127 paces and P.W.1-Kunwar Bahadur Singh and P.W.2-Tej Bahadur Singh, in their statement, has deposed that at the time of the incident, Awadhesh Bahadur Singh (deceased) was 10-15 paces ahead and in the dark night of Bhado month, from a distance of 10-15 paces, it is unlikely to witness the entire incident and also identity the accused/ appellants in the light of the torch. Thus, version of the P.W.1-Kunwar Bahadur Singh and P.W.2-Tej Bahadur Singh cannot be relied.

60. Sri Mishra has further stated that the prosecution has failed to explain the injuries upon the persons of the accused/appellants. He argued that P.W.7 Head Moharrir Ramjas Yadav, who has written chik F.I.R. of the case (Ext. Ka.7) and also prepared G.D. entry of the F.I.R. (Ext. Ka.8), has stated that four accused/appellants, namely, Bhagwat Singh, Hari Shanker Singh, Sharda Bux Singh and Sardar Bahadur Singh, were brought to the police station Bhadokhar, Raibareli in injured conditions on 01.09.1981, though their injuries were noted in the G.D. of the Police Station but they were not sent for medical examination by the police. This shows the bias attitude of the police personnel against the accused personnel. He further submits that D.W.1-Dr. R.N. Sharma had medically examined four injured accused/appellants, namely, Bhagwat Singh, Hari Shanker Singh, Sharda Bux Singh and Sardar Bahadur Singh and after examination, D.W.1-Dr. R.N. Sharma opined that accused/appellant Hari Shanker Singh had received one gunshot injury on his forehead above right eyebrow and as per the statement of D.W.2-Dr. M.M. Pratap, the X-ray of accused/appellant Hari Shanker Singh shows that there was a radio-opaque shadow, found on the right of accused/appellant Hari Shanker Singh. Thus, in view of the statements of D.W.1-Dr. R.N. Sharma and D.W.2-Dr. M.M. Pratap, it is apparent that the fire arm injury received by the accused/appellant Hari Shanker Singh could not be self-inflicted. Therefore, the entire prosecution story cannot be believed and the same is liable to be brushed aside.

61. Mr. Mishra has next argued that as a matter of fact, an incident took place in village Parmanpur, District Raebareli on 01.09.1981 at night in which a free fight ensued between two groups, in which both sides received injuries. Avadhesh Bahadur

Singh died on account of the injuries received by him and according to the prosecution, two persons, namely, Dan Bahadur Singh (P.W.3) and Ram Raj Kumari had allegedly received some injuries on one hand and four accused/appellants had received injuries on the other side. He argued that the prosecution had denied having seen the injuries of the accused/appellants and pleaded ignorance. He further argued that with regard to the injuries of four accused/appellants, whose injuries have been duly proved by D.W.1-Dr. R.N.Sharma and D.W.2-Dr. M.M. Pratap, the police after the arrest did not sent the injured accused/appellants for their medical examination, which shows the ulterior motive in order to conceal the true facts of the case. He argued that the villagers of Village Parmanpur where the incident took place came to the rescue of the accused/appellants and exercised the right of the private defence in order to save the accused/appellants as a result of which some persons on the side of the prosecution had received injuries. He further argued the prosecution has not produced the alleged injured Smt. Ram Raj Kumari in support of the prosecution case.

62. Sri R.N. S. Chauhan, learned Counsel for the appellants no. 2, 3 and 4 in Criminal Appeal No. 546 of 1982 and Sri Kunvar Mridul Rakesh, learned Senior Advocate, assisted by Sri Santosh Srivastava, learned Counsel for the appellant in Criminal Appeal No. 548 of 1982 have stated that they have adopted the arguments advanced by Sri Jyotinjay Mishra and they have nothing to say in addition in the matter.

63. Sri R.C. Singh, holding brief of Sri Arun Sinha, learned Counsel for the appellant no.2 in Criminal Appeal No. 547 of 1982 has also reiterated the submissions advanced by Sri Jyotinjay Mishra and has argued that statements of the accused/appellants recorded by the trial Court under Section 313 Cr.P.C. are missing from the record of the case, however, in paragraph-14 of the impugned judgment, the defense version taken by the different accused/appellants has been mentioned. Accused/ appellant Sharda Bux singh (of Criminal Appeal No. 547 of 1982) was said to be armed with a lathi at the time of the alleged incident. He argued that the conviction of the accused/appellants with the help of Section 149 I.P.C. is not sustainable inasmuch as it is well settled law that Section 149 I.P.C. cannot be invoked when it is a case of self defense. He also argued that it is also well settled law that more injuries on the side of the prosecution is not a proof of aggression by defence, the prosecution may have bargained for the injuries. To strengthen his submission, he has placed reliance upon the judgment of the Apex Court in **Arjun Pradhan and another Vs. State of Orissa** : AIR 1979 (SC) 1259, **Gotti Pulla Venkete Siva Vs. State of Andhra Pradesh and another** : 1970 AIR 1079, **Munshi Ram and others Vs. Delhi Administration** : 1968 AIR 702, **James Martin Vs. State of Kerala** : 2004 (2) SCC 203 and **Lakshmi Singh and others Vs. State of Bihar** : AIR 1976 (SC) 2263.

64. *Per contra*, Ms. Nand Prabha Shukla, learned Additional Government Advocate, has supported the impugned judgment and while controverting the arguments advanced by the learned Counsel for the appellants has vehemently submitted that in the facts and circumstances of the case, there is no error in the impugned judgment and order dated

15.07.1982/16.07.1982 passed by the trial Court convicting the accused/appellants, relying upon the depositions of PW1-Kunwar Bahadur Singh, PW2-Tej Bahadur Singh and P.W.3-Dan Bahadur Singh (injured). It is submitted that PW1-Kunwar Bahadur Singh, P.W.2-Tej Bahadur Singh and P.W.3-Dan Bahadur Singh are trustworthy and reliable witnesses. It is submitted that their presence at the time of incident has been established and proved by the prosecution by examining PW1-Awadhesh Bahadur Singh, P.W.2-Tej Bahadur Singh and P.W.3-Dan Bahadur Singh. It is submitted that PW1-Awadhesh Bahadur Singh, P.W.2-Tej Bahadur Singh and P.W.3-Dan Bahadur Singh have been fully and thoroughly cross-examined and considering the entire evidence/deposition of PW1-Awadhesh Bahadur Singh, P.W.2-Tej Bahadur Singh and P.W.3-Dan Bahadur Singh, their presence at the time of incident has been established and proved. It is submitted that on appreciation of entire evidence on record, the trial Court has rightly convicted and sentenced the accused/appellants.

65. Elaborating her submissions, Ms. Shukla has submitted that in the instant case, the motive has also been established and proved. It is submitted that the defence has failed to establish and prove that they were falsely implicated in the case. She argued that nothing is on record and there is no evidence on record to even suggest that accused/appellants did not cause injuries on the deceased by the time he died. She argued that the defence is not borne out at all either from the deposition of PW1-Awadhesh Bahadur Singh, P.W.2-Tej Bahadur Singh and P.W.3-Dan Bahadur Singh. Therefore, the prosecution has fully established and proved that on 01.09.1981, the deceased, PW1-Awadhesh Bahadur Singh and P.W.2-Tej Bahadur Singh were present at the place of occurrence and P.W.3-Dan Bahadur Singh, on hearing the alarm, also reached the place of occurrence and he and Ramraj Kumari were also beaten by the accused/appellants and the incident of assault to P.W.3-Dan Bahadur Singh and Ramraj Kumari were also seen by P.W.1-Avadhesh Bahadur Singh and P.W.2-Tej Bahadur Singh. She has further submitted that recovery of weapon/weapons used by the accused/appellants have been established and proved. Even the accused/appellants did not lead any evidence to prove that they were not present on the spot at the time of incident and that they were present elsewhere. Hence, there is no illegality or infirmity in the impugned judgment of the trial Court.

66. To strengthen her submissions, Ms. Shukla, learned Additional Government Advocate has placed reliance upon **Jagdish Vs. State of Rajasthan** : 1979 AIR 1010, **Onkarnath Singh and others Vs. The State of U.P.** : 1975 (3) SCC 276, **Lalji and others Vs. State of U.P.** : 1989 JIC 172 (SC) and **Kattukulangara Madhavan Vs. Majeed and others** : (2017) 2 SCC (Cri) 611.

67. Sri Nagendra Mohan assisted by Sri Anil Kumar Tripathi, learned Counsel for the informant has reiterated the submission of the learned Additional Government Advocate and has vehemently argued that the evidences of PW1-Kunvar Bahadur Singh, P.W.2-Tej Bahadur Singh and P.W.3-Dan Bahadur Singh are credible. He argued that their presence at the time of incident has been established and proved. He further argued that PW2-Tej Bahadur Singh has consistently stated that at the time of the incident, he and

PW1-Kunvar Bahadur Singh were behind 10-15 paces from the deceased Avadhesh Bahadur Singh and saw that when deceased Avadhesh Bahadur Singh reached near the Napdan of Chattrapal Singh, accused/appellants armed with pistol, kanta, ballam and lathis surrounded the deceased-Avadhesh Bahadur Singh and he witnessed the accused/appellant Hari Shanker Singh shooting the deceased, on which deceased fell down near Napdan of Chattrapal Singh and, thereafter, other accused/persons assaulted the deceased with Kanta, ballam and lathis. He has argued that there might be some minor contradictions but it is settled law that minor discrepancies should not be given undue importance that don't go to the root of the matter.

68. So far as the submission on behalf of the accused/appellants that gun was examined by the ballistic expert, it is argued by the learned Counsel for the informant that even if the gun was not sent to ballistic expert and if the statements of the witnesses have inspired the confidence of the Court and have been held to be credible and reliable, then, not sending the gun to ballistic expert cannot be the basis of rejecting the evidence of a eye-witnesses P.W.1-Avadhesh Bahadur Singh and P.W.2-Tej Bahadur Singh and injured witness P.W.3-Dan Bahadur Singh.

69. So far as the submissions of the accused/appellants that it has been alleged that accused/appellant Hari Shanker Singh fired with gun but there is no injury of gun shot in the post-mortem report of the deceased, Sri Mohan has vehemently argued that when PW1-Kunvar Bahadur Singh and P.W.2-Tej Bahadur Singh have specifically stated that it was the accused/appellant Hari Shanker Singh, who fired, as a result, deceased fell down immediately and it might be that the gun shot went missing but the fact that both P.W.1-Avadhesh Bahadur Singh and P.W.2-Tej Bahadur Singh have categorically stated that when accused/appellant Hari Shanker Singh fired, deceased immediately fell down and other accused/appellants assaulted him with kanta, ballam and lathis and this has also been supported by the injured witness i.e. PW3 Dan Bahadur Singh. Thus, the evidences of PW1, PW2 and PW3 are fully supported by the medical evidence.

70. Sri Mohan has further argued that there is a recovery of weapons (gun, kanta, ballam and lathis) on the pointing out of the accused/appellants, which were used by accused/appellants for commission of the offence. Therefore, there is no perversity or infirmity in the impugned judgment and order of conviction and sentence imposed by the trial Court against the accused/appellants.

71. Sri Mohan has also contended that the fact that Alaha was going on in front of the house of Bhagawati Gadariya, is not in dispute. P.W.1-Kunwar Bahadur Singh and P.W.2-Tej Bahadur Singh are the eye-witnesses, whereas P.W.3-Dan Bahadur Singh and Ramraj Kumari are the injured. He argued that the defense case is that on one hand, accused/appellants were assaulted by the complainant's party and in defense, the villagers caused injuries to the deceased, on account of which, the deceased died and on the other hand, the case of the defense is that on the date of incident, night was very dark but even then, they recognized the complainant's party, which is unnatural conduct. He further argued that one of the accused has taken plea that his wife and ladies told him that

dacoity is being committed at the house of Chhatrapal and immediately thereafter, he rushed to the place of occurrence. He argued that the alleged injuries sustained by the accused/appellants are absolutely false and cannot be reliable as all the injuries appears to be manufactured. He argued that the aforesaid plea has rightly been dealt with by the trial Court in paragraphs 34, 35 and 36 of the impugned judgment.

72. Sri Mohan has further argued that the prosecution witnesses have asserted that they saw the entire incident in the light of the torches carrying at the time of incident by the accused/appellant and the prosecution witnesses. He argued that even if it is presumed that in the light of the torch, prosecution witnesses cannot be recognize the accused/ appellants as there was dark night, then, it is also highly improbable that the accused/appellant can also not seen the prosecution witnesses at the time of incident. He argued that all the accused/appellants and prosecution witnesses are in same village and known to each other. Thus, the contention of the appellants that in the light of torches, it is improbable to identify the accused/ appellants in the dark night of bhado month, cannot be believed, hence the defense taken by the appellants in this regard is liable to be rejected.

73. We have heard the learned counsel for the respective parties and have carefully gone through the impugned judgment and order of conviction and sentenced passed by the learned trial Court and have also re-appreciated the entire evidence on record, more particularly the depositions of PW1, PW2 and PW3 and also considered the injuries found on the dead body of the deceased Avadhesh Bahadur Singh, injured persons (P.W.3-Dan Bahadur Singh and Ramraj Kumari) as well as accused/ appellants Sardar Bahadur Singh, Sharda Bux Singh, Hari Shanker Singh and Bhagwat Singh.

74. From the judgment and order passed by the learned trial Court, it appears that while convicting the accused/appellants, the trial Court has heavily relied upon the depositions of PW1-Kunwar Bahadur Singh, PW2-Tej Bahadur Singh and PW3-Dan Bahadur Singh. PW1-Kunvar Bahadur Singh and PW2-Tej Bahadur Singh are stated to be the eye-witnesses of the incident. P.W.3-Dan Bahadur Singh, who is real uncle of the deceased and Ramraj Kumari, who is aunt of the deceased, are injured witnesses, however, injured Ramraj Kumari was not examined. P.W.4-Baij Nath Singh and P.W.5-Dal Bahadur Singh are the witnesses of recovery. P.W.6-Dr. Surendra Singh has medically examined injured P.W.3-Dan Bahadur Singh and Ramraj Kumari. P.W.7-H.C. Ramjas Yadav has written chik F.I.R. of the case (Ext. Ka.7) and also prepared G.D. entry of the F.I.R. P.W.8-Constable Ram Adhar Rawat has taken sealed dead body of the deceased Avadhesh Bahadur Singh for post-mortem from the place of the incident. P.W.9-S.I. Hanuman Singh was the Investigating Officer to investigate the case under Section 3/25 of the Arms Act against accused/appellant Bhagwat Singh. P.W.10-Dr. D.S. Shukla has conducted post-mortem of the deceased Avadhesh Bahadur Singh and P.W.11-S.I. Shyam Pal Singh Rana was the Investigating Officer of the case. D.W.1-Dr. R.N. Sharma has medically examined accused/appellants Bhagwat Singh, Hari Shankar Singh, Sharda Bux Singh, Sardar Bahadur Singh. D.W.2-Dr. M.M. Pratap was the radiologist, who has prepared X-ray plate/X-ray report of the injured accused/appellant Hari Shanker Singh.

75. There is no denial to the fact that accused/appellant Bhagwat Singh is the son of the accused/appellant Hari Shanker Singh; accused/appellants Shiv Prasad Singh, Badri Singh and Amar Bahadur Singh are the brothers; accused/appellants Indra Bahadur and Sharda Bux Singh are the real brothers; accused/appellant Sardar Bahadur Singh is the cousin brother of the accused/appellant Sharda Bux Singh; accused/appellant Jitendra Bahadur and Indra Bahadur Singh alias Dhunni are the real brothers; accused/appellant Vijay Bahadur Singh is the father of accused/appellant Sardar Bahadur; accused/appellant Shiv Baran Singh is the nephew of accused/appellant Bhagwat Singh; and accused/appellant Shiv Narayan is the friends of other accused/appellants.

76. So far as the date, time and place of the incident, the trial Court has found that the witnesses of fact i.e. P.W.1-Kunvar Bahadur Singh and P.W.2-Tej Bahadur Singh have not been cross-examined in their statement relating to date, time and place of the incident. Further, the Investigating Officer P.W.11-S.I. Shyam Pal Singh Rana has deposed in his examination-in-chief that when he reached at the place of the incident, he saw that the deadbody of the deceased Avadhesh Bahadur Singh was lying near the house of Chattrapal Singh. The defence was not suggested in the cross-examination from P.W.11-S.I. Shyam Pal Singh Rana that Avadhesh Bahadur Singh (deceased) was done to death at some other place and his dead body was dragged and placed near the house of Chattrapal Singh. However, some of the accused/appellants, in their statement under Section 313 of the Code of Criminal Procedure, has categorically stated that they were attacked by the miscreants at the place of occurrence, upon which villagers on thinking that a dacoity is being committed, inflicted injuries upon the attackers, as a consequence of which Avadhesh Bahadur Singh died. In these backgrounds, the trial Court, while appreciating the evidence on record, that the occurrence took place upon the date, time and place as alleged by the prosecution has been established.

77. So far as motive of the accused/appellants to commit the crime is concerned, P.W.1-Kunwar Bahadur Singh and P.W.2-Tej Bahadur Singh have deposed in their deposition that before about 10 to 12 year, accused/appellant Sardar Bahadur Singh had implicated Chandra Bhushan Singh (father of the deceased) and P.W.3-Dan Bahadur Singh in a false case of highway robbery, in which they were acquitted and further accused/appellant Sharda Bux Singh also contested election for the Pradhan of Gaon Sabha, in which he was defeated. The trial Court, on appreciating the aforesaid two incidents, has rightly came to the conclusion that relations between the side of the complainant and the side of the accused/appellants were not cordial.

78. In respect of immediate motive for the accused/appellants to commit the crime, it transpires from the record that during the course of Aalha, which was going on in front of the house of Bhagwati Gadariya on the date of the incident, the father of the deceased, Chandra Bhushan Singh, asked biri from accused/ appellant Shiv Baran Singh, upon which some altercation took place between them and, thereafter, after abusing Chandra Bhushan Singh (father of the deceased) left away from the place of Aalha. The accused/appellants, in their statement under Section 313 Cr.P.C., did not deny the

holding of Aalha in front of the house of the Bhagwati Gadariya. P.W.1-Kunwar Bahadur Singh and P.W.2-Tej Bahadur Singh, in their examination-in-chief, have categorically deposed that Aalha was held in front of the house of the Bhagwati Gadariya and even P.W.3-Dan Bahadur Singh, who is the injured witness, in his cross-examination, has deposed that though an invitation for Aalha was given to him but he did not go to listen Aalha. The defence has not suggested in their cross-examination that no Aalha was held at the house of Bhagwati Gadariya. The testimonies of P.W.1, P.W.2 and P.W.3 have clearly established that Aalha was held in front of the house of Bhagwati Gadariya, hence, the contention of the applicants/appellants that examination of the Bhagwati Gadariya is necessary to prove the fact that Aalha was held in front of his house, is not sustainable, therefore, it cannot be said that merely not examining Bhagwati Gadariya, any adverse inference can be drawn against the prosecution.

79. So far as the contention of the learned Counsel for the applicants/appellants that since the relations between the side the accused/appellants and the said of complainant were not cordial rather strained, hence in such a situation, father of the deceased, Chandra Bhushan Singh, would not have demanded a biri from the accused/appellant Shiv Baran Singh, the Trial Court has found from perusal of the evidence on record that it does not appear that two parties were not even on speaking term, therefore, it is not improbable that Chandra Bhushan Singh demanded Biri from accused/appellant Shiv Baran Singh, who was sitting nearby. This finding of the trial Court has substance as P.W.1-Kunwar Bahadur Singh and P.W.2-Tej Bahadur Singh have clearly stated that biri was asked by Chandra Bhushan Singh during the course of Aalha. The defense has not suggested in cross-examination to P.W.1 and P.W.2 that no biri was asked by Chandra Bhushan Singh from accused/appellant Shiv Baran Singh at the time of Aalha, which shows the admission on the part of the accused/appellants that biri was asked by Chandra Bhushan Singh from the accused/appellant Shiv Baran Singh at the time of Aalha.

80. The other contention of the learned Counsel for the applicants/appellants is that Chandra Bhushan Singh, father of the deceased, was not examined. From perusal of the evidence on record, it transpires that P.W.1-Kunwar Bahadur Singh, in his cross-examination, has deposed that accused/appellant Shiv Baran Singh was so annoyed and left the place of Aalha by abusing them and their father and further he and his brother Avadhesh Bahadur Singh rebuked Shiv Baran Singh for his behavior towards their father Chandra Bhushan Singh and also accused/appellant Shiv Baran Singh used harsh words against them. At that relevant time of altercation, apart from other villagers, P.W.1-Kunwar Bahadur Singh and P.W.2-Tej Bahadur Singh were present, hence the Trial Court has rightly came to the conclusion that it was not necessary for the prosecution to examine Chandra Bhushan Singh in order to corroborate the prosecution case about the motive for the accused/appellant to commit the crime.

81. The next contention of the learned Counsel for the applicant/ appellants is that the reason for altercation has not been disclosed in the F.I.R. by the complainant/P.W.1-Kunwar Bahadur Singh

and further in the F.I.R., it has not been mentioned as to which time Chandra Bhushan Singh has left the place of Aalha. This Court is of the view that this contention of the learned Counsel for the accused/appellants has no force. In the case of Supdt. of Police, **CBI v. Tapan Kumar Singh** :(2003) 6 SCC 175 and in the case of **State of U.P. v. Naresh** : (2011) 4 SCC 324, the Apex Court has held that FIR is not an encyclopaedia, which must disclose all facts and details relating to the offence reported. In paragraph 20 in the case of **Supdt. of Police, CBI v. Tapan Kumar Singh (supra)**, the Apex Court has held as under :-

20. It is well settled that a first information report is not an encyclopaedia, which must disclose all facts and details relating to the offence reported. An informant may lodge a report about the commission of an offence though he may not know the name of the victim or his assailant. He may not even know how the occurrence took place. A first informant need not necessarily be an eyewitness so as to be able to disclose in great detail all aspects of the offence committed. What is of significance is that the information given must disclose the commission of a cognizable offence and the information so lodged must provide a basis for the police officer to suspect the commission of a cognizable offence.

At this stage it is enough if the police officer on the basis of the information given suspects the commission of a cognizable offence, and not that he must be convinced or satisfied that a cognizable offence has been committed. If he has reasons to suspect, on the basis of information received, that a cognizable offence may have been committed, he is bound to record the information and conduct an investigation. At this stage it is also not necessary for him to satisfy himself about the truthfulness of the information. It is only after a complete investigation that he may be able to report on the truthfulness or otherwise of the information. Similarly, even if the information does not furnish all the details he must find out those details in the course of investigation and collect all the necessary evidence.

The information given disclosing the commission of a cognizable offence only sets in motion the investigative machinery, with a view to collect all necessary evidence, and thereafter to take action in accordance with law. The true test is whether the information furnished provides a reason to suspect the commission of an offence, which the police officer concerned is empowered under Section 156 of the Code to investigate. If it does, he has no option but to record the information and proceed to investigate the case either himself or depute any other competent officer to conduct the investigation.

The question as to whether the report is true, whether it discloses full details regarding the manner of occurrence, whether the accused is named, and whether there is sufficient evidence to support the allegations are all matters which are alien to the consideration of the question whether the report discloses the commission of a cognizable offence. Even if the information does not give full details regarding these matters, the investigating officer is not absolved of his duty to investigate the case and discover the true facts, if he can."

82. So far as the submission of the learned Counsel for the accused/appellants that P.W.1-Kunwar Bahadur Singh was a got up witness as he was not present at the time of

place of occurrence and he had no injury on his person and if he was present at the place of incident, he would have definitely tried to save his brother Avadhesh Bahadur Singh (deceased), his grand-father P.W.3-Dan Bahadur Singh and his aunt Ramraj Kumari from the assault of the accused/appellants. This argument of the learned Counsel for the applicants/appellants have also no force for the reason that twelve persons/accused/appellants were armed with pistol, kanta, ballam and lathis and at that relevant time, P.W.1-Kunwar Bahadur Singh was unarmed, therefore, in these circumstances, if he would have gone to save his brother Avadhesh Bahadur Singh (deceased), his grand-father P.W.3 Dan Bahadur Singh and his aunt Ramraj Kumari, then, he would have also been inflicted injuries and probably gotten killed and if his instinct of self preservation prevented him from going to save his brother, his grand-father and his aunt, his presence cannot be doubted. P.W.1-Kunwar Bahadur Singh, in his statement, has deposed that on seeing that accused/appellants have started to assault with their respective weapons to his brother Avadhesh Bahadur Singh, he raised alarm and on hearing his alarm, his grand-father P.W.3-Dan Bahadur Singh and his aunt Ramraj Kumari ran towards the place of occurrence and tried to save his brother Avadhesh Bahadur Singh but they were also beaten by the accused/appellants. P.W.3-Dan Bahadur Singh has also supported the aforesaid version of P.W.1-Kunwar Bahadur Singh that he and Ramraj Kumari, on listening the noise of fire and alarm of P.W.1-Kunwar Bahadur Singh, ran towards the place of occurrence in order to save Avadhesh Bahadur Singh. Thus, the presence of P.W.1-Kunwar Bahadur Singh at the place of occurrence cannot be doubted.

83. Another submission of the learned Senior Counsel for the accused/appellants is that P.W.1-Kunwar Bahadur Singh did not disclose the names of the accused/appellants, who was alleged to have snatched the gun of Chandra Bhushan Singh nor he disclosed the weapon held by the individual accused/appellants nor he knows about the presence of the cartridge of his father nor he disclosed the name the assailants of his brother (deceased), his grand-father (P.W.3) and his aunt injured Ramraj Kumari not tell the names of the person gathered at the time of occurrence, hence the presence of P.W.1 is doubtful and moreso it is quite improbable to identify the persons in a dark night from the distance of 10-15 paces. This contention of the learned Counsel for the applicants/appellants has also no force. It is a specific case of the prosecution that there was no source of light except the torches that have been carried out by P.W.1-Kunwar Bahadur Singh, P.W.2-Tej Bahadur Singh, Jai Singh and one of the accused and all these persons including other accused/appellants were at same village and they knows each other very well even their body language were known to each other. In the situation of dark night, if P.W.1-Kunwar Bahadur Singh did not identify as to who amongst the accused/appellants were actually inflicting his brother Avadhesh Bahadur Singh, his grand father P.W.3-Dan Bahadur Singh and his aunt Ramraj Kumari, this cannot make any difference as in the cross-examination, P.W.1-Kunwar Bahadur Singh have specifically deposed that after the occurrence, he saw his brother Avadhesh Bahadur Singh dead and then he neither touch him nor did he move him from that place. If P.W.1-Kunvar Bahadur Singh was not touching or moving his brother Avadhesh Bahadur Singh till the police arrived at the place of occurrence, it cannot be presumed that his conduct was improbable. Moreso, when P.W.3-Dan

Bahadur Singh and aunt Ramraj Kumari were coming to save Avadhesh Bahadur Singh, then, they were also inflicting by lathis by the accused/ appellants, which are corroborated with their injury report.

84. So far as the submissions of the learned Counsel for the accused/appellants that all three witnesses i.e. P.W.1, P.W.2 and P.W.3 are having relations and no independent witness has been examined, therefore, the adverse inference can be drawn against the prosecution, it is relevant to mention here that it is a well-established principle of law that testimony of a witness otherwise inspiring confidence cannot be discarded on the ground that he being a relation of the deceased is an interested witness. A close relative who is a very natural witness cannot be termed as an interested witness. The term interested postulates that the person concerned must have some direct interest in seeing the accused person being convicted somehow or the other either because of animosity or some other reasons.

85. In **Dalip Singh and Ors. Vs. The State of Punjab** : [1954] 1 SCR 145, the Apex Court has laid down as under:

"27. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

86. The Apex Court in **Kartik Malhar v. State of Bihar** : (1996) 1 SCC 614 has opined that a close relative who is a natural witness cannot be regarded as an interested witness, for the term "interested" postulates that the witness must have some interest in having the accused, somehow or the other, convicted for some animus or for some other reason.

87. In the instant case, the FIR was lodged in the police station and while lodging it, there is no consultation with any other person in lodging the FIR. The accused/appellants were named in the FIR. The evidence of the complainant Kunvwar Bahadur Singh PW-1 has been fully supported by Tej Bahadur Singh PW-2 and injured Dan Bahadur Singh PW-3. This clearly shows the presence of P.W.1-Kunwar Bahadur Singh on the spot.

88. Having gone through the entire depositions of PW1-Kunvar Bahadur Singh and P.W.2-Tej Bahadur Singh and even the cross- examination of the aforesaid two witnesses, this Court is of the opinion that both, PW1-Kunvar Bahadur Singh & PW2-Tej Bahadur Singh are trustworthy and reliable witnesses. Their presence at the time of incident when the deceased-Avadhesh Bahadur Singh was murdered, has been established and proved by the

prosecution. The presence of PW1-Kunvar Bahadur Singh, P.W.2-Tej Bahadur Singh and even PW3-Dan Bahadur Singh, at the time of incident, is natural. PW1-Kunvar Bahadur Singh is the brother of the deceased, whereas P.W.2-Tej Bahadur Singh was accompanied with the P.W.1-Kunvar Bahadur Singh while returning home after listening Alaha which was going on in front of the house of Bhagwati Gadariya. Both these witnesses have categorically stated in their deposition that at the time of incident, they were 10-15 paces behind the deceased-Avadhesh Bahadur Singh while returning from listening Aalha, which was going on in front of the house of Bhagwati Gadariya. Similarly, PW3-Dan Bahadur Singh is the grand-father of the deceased and P.W.1-Kunvar Bahadur Singh. P.W.3-Dan Bahadur Singh, who is the injured witness, has specifically stated in his deposition that at about 09:30 p.m., he was sleeping at his door and on listening the noise of fire as well as alarm raised by Avadhesh Bahdur Singh (deceased) and Kunvar Bahadur Singh (P.W.1) coming out from western side of his house and northern side of the house of Chattrapal Singh near Napdan, he and Ramraj Kumari ran towards the house of Chattrapal and reached near the Napdan of Chattrpal, then, they saw that accused/appellant Hari Shanker armed with pistol, accused/appellant Bhagwat Singh and Shiv Baran armed with farsa, accused/appellant Shiv Prasad, Badri and Amar Bahadur armed with Ballam, accused/appellants Sardar Bahadur, Sharda Bux and Indra Bahadur, Indra Bahadur alias Dhunni Singh and Jitendra Bahadur, were inflicting the deceased Avadhesh Bahadur Singh and on seeing this, they tried to save deceased Avadhesh Bahadur Singh and thereafter, accused/appellants had also inflicted 5-6 lathis upon them. Both the witnesses P.W-3-Dan Bahadur Singh and P.W.1-Kunwar Bahadur Singh even P.W.2-Tej Bahadur Singh have fully and thoroughly cross-examined.

89. It has been contended by the accused/appellants that there is the failure of the trial Court in not taking into consideration the major contradictions in the version of the F.I.R. and the statement of P.W.1-Kunvar Bahadur Singh with regard to presence of his father Chandra Bhushan Singh. According to him, in the F.I.R., there is no whisper of word as to when Chandra Bhushan Singh went to home from the place of Aalha, however, it has been stated that his brother Avadhesh Bahadur Singh (deceased) left the place of Aalha for home at 09:30 p.m. and he reached near the passage of the house of Chattrapal at about 09:30 p.m. His submission is that the distance between the place of Aalha i.e. the house of Bhagwati Gadariya and the house of Chattrapal is 200 steps, therefore, the presence of Avadhesh Bahadur Singh (deceased) at the place of Aalha and near the passage of the house of Chattapal Singh at the same time i.e. at 09:30 p.m. mentioned in the F.I.R. is quite impossible. According to him, P.W.1-Kunwar Bahadur Singh, in his deposition, has deposed at one place that his father (Chandra Bhushan Singh) and his brother (deceased Avadhesh Bahadur Singh) went to home together and on other place, he has stated that his father (Chandra Bhushan Singh) went to home half an hour ahead of the deceased Avadhesh Singh and him, which shows that there are major contradictions in statement of the P.W.1-Kunvar Bahadur Singh.

90. So far as non-mentioning the time of leaving the place of Aalha by the informant/P.W.1 in the F.I.R. with regard

to his father Chandra Bhushan Singh, it is a settled legal proposition that an FIR is not an encyclopaedia of the entire case. It may not and need not contain all the details. The informant fully acquainted with the facts may lack necessary skill or ability to reproduce details of the entire incident without anything missing from this. Some people may miss even the most important details in narration. Therefore, in case the informant fails to name a particular person in the FIR, this ground alone cannot tilt the balance of the case in favour of the accused/appellants. Hence, this contention of the learned Senior Counsel appearing on behalf of the appellants has no force.

91. So far as the contention of the learned Senior Counsel for the accused/appellants with regards to contradictions in the statement of the P.W.1-Kunvar Bahadur Singh that he deposed at one place that his father (Chandra Bhushan Singh) and his brother (deceased Avadhesh Bahadur Singh) went to home togetherwith and on other place, he has stated that his father (Chandra Bhushan Singh) went to home half an hour ahead of the deceased Avadhesh Singh and him, it is pertinent to mention that there may be some minor contradictions, however, as held by Apex Court in catena of decisions, minor contradictions which do not go to the root of the matter and/or such contradictions are not material contradictions, the evidence of such witnesses cannot be brushed aside and/or disbelieved.

92. In the case of **State of U.P Vs. Krishna Master** : (2010) 12 SCC 324, it was observed by the Apex Court that in appreciating the evidence of a witness, Court should read the evidence as a whole. In the event, it appears to have a ring of truth, the discrepancy and the inconsistency of minor nature not touching core of the case would not ordinarily permit rejection of the evidence as a whole. Further, the cardinal rule of analysing the evidence of the witnesses in the light of the aforesaid principles is this the Court will have to determine first whether the evidence of eyewitnesses proves the prosecution case. The relevant portions of the above decision are quoted below:-

"15. Before appreciating evidence of the witnesses examined in the case, it would be instructive to refer to the criteria for appreciation of oral evidence. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is found, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hypertechnical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.

16. . . . .

17. In the deposition of witnesses, there are always normal discrepancies, howsoever honest and truthful they may be. These discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental

disposition, shock and horror at the time of *occurrence* and threat to the life. It is not unoften that improvements in earlier version are made at the trial in order to give a boost to the prosecution case, albeit foolishly. Therefore, it is the duty of the court to separate falsehood from the truth. In sifting the evidence, the court has to attempt to separate the chaff from the grains in every case and this attempt cannot be abandoned on the ground that the case is baffling unless the evidence is really so confusing or conflicting that the process cannot reasonably be carried out. In the light of these principles, this Court will have to determine whether the evidence of eyewitnesses examined in this case proves the prosecution case."(Emphasis supplied)

93. While taking note of the aforesaid case i.e. **State of U.P. vs. Krishna Master and others** (Supra), the Apex Court the case of **Shamim Vs. State (GNCT of Delhi)** : AIR 2018 SC 4529 has observed as under :-

"12. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole inspires confidence. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hypertechnical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error without going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. Minor omissions in the police statements are never considered to be fatal. The statements given by the witnesses before the police are meant to be brief statements and could not take place of evidence in the court. Small/Trivial omissions would not justify a finding by court that the witnesses concerned are liars. The prosecution evidence may suffer from inconsistencies here and discrepancies there, but that is a shortcoming from which no criminal case is free. The main thing to be seen is whether those inconsistencies go to the root of the matter or pertain to insignificant aspects thereof. In the former case, the defence may be justified in seeking advantage of incongruities obtaining in the evidence. In the latter, however, no such benefit may be available to it."

94. In the instant case, the FIR was registered on the basis of a report submitted PW 1-Kunvar Bahadur Singh, who and P.W.2-Tej Bahadur Singh are the eye-witnesses. According to the prosecution case, as appears from the depositions of PW-1-Kunwar Bahadur Singh and P.W.2-Tej Bahadur Singh, on the date of the incident, they went to listen Aalha, which was going on in front of the house of Bhagwati Gadariya. Chandra Bhushan Singh, Avadhesh Bahadur Singh (deceased), accused/appellant Shiv Baran Singh and other villagers were also present there to listen Aalha. As per the deposition of P.W.1-Kunwar Bahadur Singh, he was 5-6 paces away from his father Chandra Bhushan Singh in the place of Aalha and during the course of Aalha, his father Chandra Bhushan Singh asked Biri from accused/ appellant Shiv Baran Singh, upon which accused/appellant Shiv Baran Singh told Chandra Bhushan Singh if you are fancier of biri, then, buy a

biri and smoke it, to which his father Chandra Bhushan Singh told accused/ appellant Shiv Baran Singh that you are misbehaving, upon which accused/appellant abused his father Chandra Bhushan Singh and, then, his brother Avadhesh Bahadur Singh (deceased) asked accused/appellant Shiv Baran Singh as to why you have abused his father. Thereafter, accused/appellant Shiv Baran Singh left the place of Aalha while using filthy language and subsequent thereto, his father Chandra Bhushan Singh and his brother Avadhesh Bahadur Singh (deceased) went to home. After the aforesaid deposition, P.W.1-Kunwar Bahadur Singh has subsequently deposed that his father Chandra Bhushan Singh had gone home half an hour before them (P.W.1-Kunwar Bahadur Singh, Avadhesh Bahadur Singh (deceased), Jai Singh, Tej Bahadur Singh (P.W.2), Balwant Singh, Peshkar Singh). P.W.2-Tej Bahadur Singh, in his examination-in-chief, has categorically deposed that Aalha took place in front of the house of Bhagwati Gadriya and at that time, he, Kunwar Bahadur Singh (P.W.1), Avadhesh Bahadur Singh (deceased), Chandra Bhushan Singh (father of the deceased and P.W.1), accused/appellant Shiv Baran Singh and other villagers were present. In the night about 08:30 p.m., altercation took place between Avadhesh Bahadur Singh (deceased), his father Chandra Bhusan Singh and accused/appellant Shiv Baran Singh and accused/appellant Shiv Baran Singh has said some abusive language and after using abusive language, accused/appellant left from there. P.W.2-Tej Bahadur Singh has further deposed that at about 09:00 p.m., Chandra Bhushan Singh got up and left from there.

95. From perusal of the depositions of P.W.1-Kunwar Bahadur Singh and P.W.2-Tej Bahadur Singh, one thing is clear that Chandra Bhushan Singh, who is the father of the deceased and P.W.1-Kunwar Bahadur Singh, has left from the place of Aalha prior to P.W.1-Kunwar Bahadur Singh and Avadhesh Bahadur Singh (deceased) as P.W.1-Kunwar Bahadur Singh has deposed at one place in his deposition that his father Chandra Bhushan Singh has left the place, where Aalha was going on, half an hour before them, whereas P.W.2-Tej Bahadur Singh has deposed in his deposition that altercation took place between Avadhesh Bahadur Singh (deceased), Chandra Bhushan Singh and accused/appellant Shiv Baran Singh at about 08:30 p.m. and Chandra Bhushan Singh left the place, where Aalha was going on, at about 09:00 p.m. Moreso, both P.W.1-Kunwar Bahadur Singh and P.W.2-Tej Bahadur Singh have deposed in their deposition that immediately after Chandra Bhushan Singh, Avadhesh Bahadur Singh (deceased) also went from the place, where Aalha was going on, towards home and when Avadhesh Bahadur Singh (deceased) reached near the Napdan of Chattrapal Singh, they as well as Balwant Singh, Peshkar Singh were 10-15 paces behind from Avadhesh Bahadur Singh (deceased) and also at that time, they and Jai Singh were having torches in their hand.

96. In their deposition, both P.W.1-Avadhesh Bahadur Singh and P.W.2-Tej Bahadur Singh have further deposed that when Avadhesh Bahadur Singh (deceased) reached near Napdaan, they saw that accused/appellant Hari Shanker Singh armed with pistol, accused/appellants Bhagwat Singh, Shiv Baran Singh armed with Kanta and accused/appellant Shiv Prasad armed with Ballam and other accused/appellants armed with lathis surrounded Avadhesh Bahadur Singh (deceased) and, thereafter, accused/appellant Hari Shanker Singh fired

upon Avadhesh Bahadur Singh, upon which Avadhesh Bahadur Singh fell down near Napdan and other accused/appellants, thereafter, assaulting Avadhesh Bahadur Singh with Kanta, Ballam and lathis.

97. The report of Post-Mortem of the deceased Avadhesh Bahadur Singh shows that P.W.10-Dr. D.S. Shukla, who conducted the post-mortem of deceased Avadhesh Bahadur Singh, has found 26 ante-mortem injuries on his person and opined that deceased-Avadhesh Bahadur Singh died on account of shock and haemorrhage as a result of ante-mortem injuries. In his deposition, P.W.10 Dr. D.S. Shukla has stated that frontal bone of the head was fractured; Membrane of the brain was congested; ribs 3 to 6 on the right side were found fractured; and clotted blood was found on outerside of cerburm; these injuries were sufficient in the ordinary course to cause death. P.W.10 Dr. D.S. Shukla has also deposed that death could have been caused on 01.09.1981 at about 09:30 p.m.; incised wounds with contused injuries were caused by Kanta; and remaining injuries were caused by some blunt weapon like Lathi. This witness has also proved the post-mortem examination.

98. The injured P.W.3-Dan Bahadur Singh and Ramraj Kumari were examined by P.W.6-Dr. Surendra Singh, who, on examination, found one injury of contusion upon injured Ramraj Kumari and five injuries upon P.W.3-Dan Bahadur Singh. In his deposition, P.W.6 has stated that all the injuries were caused by blunt weapon and these injuries could have been caused on 01.09.1981 at about 09:30 p.m.

99. Here, it is to be kept in mind that the evidentiary value of an injured witness carries great weight. In **Mano Dutt and another v. State of Uttar Pradesh** : (2012) 4 SCC 79, it was held as under:

31. We may merely refer to Abdul Sayeed v. State of M.P. : (2010) 10 SCC 259 where this Court held as under:

28. The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. 'Convincing evidence is required to discredit an injured witness.' [Vide Ramlagan Singh v. State of Bihar : (1973) 3 SCC 881, Malkhan Singh v. State of U.P. : (1975) 3 SCC 311, Machhi Singh v. State of Punjab : (1983) 3 SCC 470, Appabhai v. State of Gujarat , Bonkya v. State of Maharashtra : (1995) 6 SCC 447, Bhag Singh v. State of Punjab : (1997) 7 SCC 712, Mohar v. State of U.P. : (2002) 7 SCC 606, Dinesh Kumar v. State of Rajasthan : (2008) 8 SCC 270, Vishnu v. State of Rajasthan , Annareddy Sambasiva Reddy v. State of A.P. : (2009) 12 SCC 546 and Balraje v. State of Maharashtra : (2010) 6 SCC 673.]

29. While deciding this issue, a similar view was taken in Jarnail Singh v. State of Punjab : (2009) 9 SCC 719 where this Court reiterated the special evidentiary status accorded to the testimony of an injured accused and relying on its earlier judgments held as under:

'28. Darshan Singh (PW 4) was an injured witness. He had been examined by the doctor. His testimony could not be brushed aside lightly. He had given full

details of the incident as he was present at the time when the assailants reached the tubewell. In Shivalingappa Kallayanappa v. State of Karnataka : 1994 Supp (3) SCC 235 this Court has held that the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies, for the reason that his presence on the scene stands established in case it is proved that he suffered the injury during the said incident.

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

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

To the similar effect is the judgment of this Court in *Balraje* (supra)"

100. From the aforesaid dictum of the Apex Court as well as on perusal of injuries sustained by the injured P.W.3-Dan Bahadur Singh and Ramraj Kumari, it transpires that injuries sustained by the injured Ramraj Kumari and P.W.3-Dan Bahadur Singh and also the ante-mortem injuries sustained by deceased Avadhesh Bahadur Singh have been supported by the depositions adduced by the PW.1-Kunvar Bahadur Singh, P.W.2-Tej Bahadur Singh and P.W.3-Dan Bahadur Singh before the trial Court. These witnesses P.W.1, P.W.2 and P.W.3 are thoroughly cross-examined on each and every aspect pointed out by the defence. However, they have fully supported the case of the prosecution From the entire evidence on record, it is established and proved that the deceased Avadesh Bahadur Singh, PW1-Kunvar Bahadur Singh, PW2-Tej Bahadur Singh, Chandra Bhushan Singh and accused/appellant Shiv Baran Singh went to listen Aalha in front of the house of Bhagwati Gadariya on the date of the incident, wherein some altercation between Chandra Bhushan Singh and accused/appellant Shiv Baran Singh occurred on the asking of biri by Chandra Bhushan Singh from accused/appellant Shiv Baran Singh, thereafter, the incident had taken place, as narrated hereinabove. The place of incident has been established and proved by the prosecution.

101. So far as the submission of the learned Counsel for the accused/appellants that there is no gun shot injury on the person of deceased Avadhesh Bahadur Singh though as per prosecution, accused/appellant Hari Shanker Singh has alleged to be fired with his pistol, it is required to be noted that it was never the case of the prosecution that there was a firearm injury on the person of the

deceased. Even as per the evidence of the witnesses, when accused/appellant Hari Shanker Singh fired, the deceased fell down on the earth and thereafter, other accused/appellants have assaulted the deceased with Kanta, ballam and lathis. It was never the case of the witnesses that bullet hit the deceased.

102. We have carefully gone through the depositions of PW1 and PW2, who can be said to be the star witnesses and they are the eyewitnesses to the incident. Their presence at the place of the incident are not doubted and they are found to be trustworthy and reliable. Their deposition is consistent with the allegations in the FIR. There is no reason to doubt his trustworthiness. Therefore, even the appellants can be and is rightly convicted relying upon the depositions of PW1 and PW2, who are eyewitnesses to the incident.

103. In the instant case, it is apparent that testimony of injured witness P.W.3-Dan Bahadur Singh is clear and cogent and it finds ample support from medical evidence as well as statement of Investigating Officer. After considering entire evidence on record, it is apparent that conviction of accused-appellants are based on evidence.

104. So far as the contention of the learned Counsel for the appellants that the alleged occurrence is stated to have taken place in the month of *bhado* and it was a dark night with no moonlight even and the entire incident are said to have seen by the eye-witnesses in the light of torch, which is improbable and on this count, the story of the prosecution cannot be believed also, it is relevant to mention here that from the perusal of the evidence on record, it is established that the occurrence took place at about 09:30 p.m. On the date of the incident, P.W.1-Kunwar Bahadur Singh and P.W.2-Tej Bahadur Singh were coming together after listening *Aalha* and the deceased was 10-15 paces ahead from them. Both the witnesses P.W.1-Kunwar Bahadur Singh and P.W.2-Tej Bahadur Singh have specifically stated in their depositions that they had seen the entire incident in the light of torches which were carried by them at the time of the incident as well as in the light of the torches of the accused/appellant.

105. At this juncture, it would be apt to mention that in **Nathuni Yadav Vs. State of Bihar** : 1998 (9) SCC 238, the Apex Court has dealt with the issue of identification in the dark and observed as under :-

"Ever assuming that there was no moonlight then, we have to gauge the situation carefully. The proximity at which the assailants would have confronted with the injured, the possibility of some light reaching there from the glove of stars, and the fact that the murder was committed on a roofless terrace are germane factors to be born in mind while judging whether the victims could have had enough visibility to correctly identify the assailants. Over and above those factors, we must bear in mind the further fact that assailants were no strangers to the inmates of the tragedy bound house, the eye witnesses being well acquainted with the physiognomy of each one of the killers. We are, therefore, not persuaded to assume that it would not have been possible for the victims to see the assailants or that there was possibility for making a wrong identification of them. We are keeping in mind the fact that even the assailants had enough light to identity the victims whom they targeted without any

mistake from among those who were sleeping on the terrace. If the light then available, though meagre, was enough for the assailants why should we think that same light was not enough for the injured who would certainly have pointedly focussed their eyes on the faces of the intruders standing in front of them. What is sauce for the goose is sauce for the gander."

106. Recently, in the case of **Pruthiviraj Jayantibhai Vanol Vs. Dinesh Dayabhai Vala and others** (Criminal Appeal No. 177 of 2014), decided on 26.07.2021, the Apex Court has also relied upon **Nathuni Yadav Vs. State of Bihar (supra)** and has observed as under :-

"There is evidence about the availability of light near the place of occurrence. Even otherwise, that there may not have been any source of light is hardly considered relevant in view of the fact that the parties were known to each other from earlier. The criminal jurisprudence developed in this country recognizes that the eye sight capacity of those who live in rural areas is far better than compared to the town folks. Identification at night between known persons is acknowledged to be possible by voice, silhouette, shadow, and gait also. Therefore, we do not find much substance in the submission of the respondents that identification was not possible in the night to give them the benefit of doubt."

107. P.W.1-Kunvar Bahadur Singh and P.W.2-Tej Bahadur Singh have consistently deposed in their statement that in addition to them, accused /appellant Hari Shanker Singh was also carrying a torch. In the F.I.R., it has been stated that the occurrence was seen by all of them with their respective torches and also in the light of the torches of the accused. In these circumstances, it cannot be said that there was no source of light at the place of occurrence. It is not in dispute that all the accused/appellants except accused/appellant Shiv Narain Yadav and eye-witnesses were living at very same village and in that situation, it is a common thing that a little light would have been sufficient to recognize the faces of known persons as the parties were known to each other from earlier and the eye-sight capacity of those who live in rural areas is far better than compared to the town folks. Moreso, the Investigating Officer has also inspected the torch and found it in a running condition and a entry of the same has also been recorded in the case diary. Therefore, the plea of the accused/appellants that there was no source of light, is not sustainable and the trial Court has rightly observed that from the evidence of record, the existence of light has clearly been established and would have been sufficient to identify the faces of the accused/appellants.

108. At this juncture, it would also be borne in mind that the deceased Avadhesh Bahadur Singh has received as many as 26 ante-mortem injuries. This shows that he was inflicted injuries by a large number of persons and a smaller number of persons would not have been able to inflict so many injuries. Moreso, from the evidence on record, it transpires that at the time of death, deceased was aged about 35 years. That being so, he would have certainly been able to run away after receiving some injuries. These circumstances also corroborates the prosecution story.

109. Now let us consider the case and/or defence on behalf of the

accused/appellants. It was the case on behalf of the accused/appellants that the prosecution has failed to explain the injuries upon the persons of the accused/appellants, therefore, this ought to be taken as a circumstance to indicate the falsity of the prosecution case. It has been contended by the learned Counsel for the accused/appellant that injury no.1 caused by the accused/appellant Hari Shanker Singh by a fire arm.

110. As per the statement of D.W.1-Dr. R.N.Sharma, he was not sure whether injury no.1 was caused by fire arm or not and, therefore, he recommended for radiological examination and further no pellet or foreign substance was palpable to him. He also stated that injury no.1 was skin deep. If for the sake of argument, it can be presumed that injury no.1 has been caused by a fire arm, then, definitely some foreign substance should have been palpable but D.W.1-Dr. R.N. Sharma has admitted in his statement that injury no.1, which is a lacerated wound, is caused by a blunt object. He further deposed that as Radiologist D.W.2-Dr. M.M. Pratap found a radio opaque shadow, therefore, he could not say as to whether this was caused by a blunt weapon or by a fire-arm. The cross-examination of this witness shows that he was not in a position to say as to whether this injury was in fact caused by a fire-arm, however, he admitted that injury no.1 could have been caused by a nail. D.W.2-Dr. M.M. Pratap, in his examination-in-chief, deposed that the radio opaque shadow could be of a pellet and that its confirmation could be made only by a ballistic expert. He admitted the fact that injury no.1 could be made by inserting a nail and then putting some foreign body in it. He, in his cross-examination, deposed that this radio opaque shadow had crossed the inner table of skull. The Trial Court, after considering the aforesaid, came to the conclusion that injury no.1 caused by accused/appellant Hari Shanker Singh was aggravated after medical examination and before the radiological examination in order to give it colour that it was caused by a fire-arm and more so from the evidence on record, it cannot be established that the said injury was caused at the time of occurrence.

111. It transpires from the evidence on record that a suggestion was put to P.W.1-Kunwar Bahadur Singh in his cross-examination that fire arm was used from his side. This suggestion was denied by P.W.1. The name of the person who may have fired the gun was not suggested to any of the witnesses nor it was suggested that the fire hit accused/appellant Hari Shanker Singh. If any shot has been fired at the time of occurrence, then, a number of persons would have also been injured. In any case, accused/appellant Hari Shanker Singh would have receive more than one injury. In his statement, accused/appellant Hari Shanker Singh has stated that as soon as he came out of the house, he was shot. No blackening or carrying was found around this injury. In these backgrounds, the trial Court has rightly came to the conclusion that no such injury was received by accused/appellant Hari Shanker Singh at the time of occurrence and the trial Court has rightly observed that it is not improbable that in order to create a defense, this injury was manufactured and after aggregated in order to create a defence.

112. It transpires from the injuries of the accused/appellants that injury no.1 of accused/appellant Bhagwat Singh is a lacerated wound 2 cm x 1 cm skin deep,

which is a superficial one. D.W.1-Dr. R.N. Sharma has deposed in his statement that these injuries were about four days old. It appears that apprasions of the dimension of 1 cm x ½ cm would have been present even after the lapse of four days. Moreso, most of the injuries were on non-vital parts of the body as the injuries were on overhand and feet. The Trial Court has rightly observed that the injuries could have been very well self-suffered and self-manufactured or caused at the time of their arrest.

113. So far as the defense taken by the accused/appellants that miscreants have attacked the villagers and the villagers, on thinking that deceased Avadhesh Bahadur Singh and others to be miscreants, were inflicted them in self defense and, on account of which, Avadhesh Bahadur Singh sustained injuries and died and also P.W.3-Dan Bahadur Singh sustained injuries, it is relevant to mention that the trial Court has recorded specific finding that accused/appellants had refused to give statement under Section 313 Cr.P.C. unless their counsel had come. It transpires from perusal of the evidence on record that it was not suggested to any of the witnesses or to the Investigating Officer in their cross-examination that miscreants had attacked the villagers and the villagers thought Avadhesh Bahadur Singh and Dan Bahadur Singh being the miscreants assaulted them in self defense and on account of which both of them sustained injuries. The injuries report of the accused/ appellants shows that except injury no.1 of the accused/appellant Hari Shanker Singh, which too was suspected, all the injuries are simple in nature and non-vital part of the body. If plea of defense that accused/appellants have been attacked by the miscreants or by the complainants' party, is taken to be true, then, certainly some of the accused/ appellants would have received grievous injuries but D.W.1 and D.W.2, who examined the accused/appellants, have not found any grievous injuries on the persons of accused/appellants. In these backgrounds, the trial Court has rightly observed that accused/appellants were grouping in the dark as they had no defence and only as an afterthought, they took the plea of the attack by the miscreants including the complainant's party for the first time in their statement under Section 313 Cr.P.C. and as such, defence version is only an afterthought and has no legs to stand.

114. The judgments, which have been relied by the learned Counsel for the accused/appellants are not applicable in the facts and circumstances of the case.

115. For the reasons stated hereinabove, this Court see no reason to interfere with the impugned judgment and order dated 15.07.1982/16.07.1982 passed by the trial Court convicting and sentencing the accused/appellants for the offences as mentioned in paragraph Nos. 6 and 7 hereinabove. This Court are in complete agreement with the view taken by the trial Court.

116. The above-captioned appeals are, accordingly, **dismissed.**

117. Accused/appellant no.2-Badri Singh, accused/appellant no.3-Amar Bahadur Singh, accused/appellant no.4-Shiv Prasad Singh, accused appellant no.5-Jitendra Bahadur Singh, accused/appellant no.7-Shiv Narain Yadav in Criminal Appeal No. 546 of 1982, accused/appellant no.2-Sharda Bux Singh in Criminal Appeal No. 547 of 1982 and accused/appellant-

Hari Shanker Singh in Criminal Appeal No. 548 of 1982 are on bail. Their bail bonds are cancelled and sureties discharged. They are directed to surrender forthwith, failing which they shall be taken into custody to serve out remaining period of sentence in terms of the impugned judgment and order dated 15.7.1982/16.07.1982 passed by the trial Court.

118. The Senior Registrar of this Court is directed to transmit the certified copy of this judgment and order of this Court along with the record to the Sessions Judge, Raebareli for necessary information and compliance. It is further directed that the record of the case transmitted by this Court shall be kept in safe custody by the trial Court.

(2021)09ILR A201
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.08.2021

BEFORE

THE HON'BLE AJAI TYAGI, J.

Criminal Appeal No. 757 of 2018

Jose Luis Quintanilla Sacristan
...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Manu Sharma, Sri Dinesh Kumar Pandey, Sri Mohd. Kalim, Sri Rajeev Kumar, Ms. Mary Punch

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

A. Criminal Law – Narcotic Drugs and Psychotropic Substances Act, 1985 – Section 50 – Applicability – Provision of Section 50 of the Act stands attracted in case of personal search and not in the case where the search was given effect otherwise than from the personal search of the accused – It applies only in case of personal search of a person. It does not extend to search of a vehicle or container or a bag or premises. (Para 11 and 12)

B. Criminal Law – N.D.P.S. Act, 1985 – Sections 8, 20(b)(ii)(C) & 23(C) – Ten Kg. Charas recovered at Indo-Nepal Border from a foreigner – No public witness – Only police personnel appeared as a witness – Effect – Held, it can be safely assumed that it is very hard to procure public-witness because nobody wants to become witness in such type of cases, easily. Witnesses, examined in this case, are no doubt police-personnel, but they are relevant witnesses and their statements are consistent and corroborated each other – High Court further observed that it cannot be said that police/prosecution withheld or suppressed public-witnesses with an ulterior motive. (Para 14)

C. Criminal Law – Criminal Procedure Code,1973 – Section 293 – Public Document – Report of Forensic Science Laboratory – Admissibility as an evidence – Exemption from being proved – Held, Report of Forensic Science Laboratory is a public document – Report of State Forensic Science Laboratory is admissible in evidence and there is no requirement to call the Director of that laboratory to get the report proved. (Para 16 and 17)

Appeal dismissed. (E-1)

Cases relied on :-

1. St. of Punj. Vs Baldev Singh; (1999) 6 SCC 172

2. Madan Lal & anr. Vs St. of H.P. 2003 (47) ACC 763

3. Megh Singh Vs St.of Pun.; 2003 Cr.LJ 4329

4. St. of H.P. Vs Pawan Kumar; 2005 (52) ACC 710.

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

1. This appeal has been preferred by the appellant-Jose Luis Quintanilla Sacristan against the judgment and order dated 30.10.2017, passed by learned Additional Sessions Judge, Fast Track Court-I, Maharajganj, in Special Case No.16 of 2015, arising out of Case Crime No.86 of 2015, Police Station-*Sonauli*, District-*Maharajganj* convicting and sentencing the appellant for ten years R.I. and Rs.1,00,000/- fine (in default, imprisonment for six months) under Section 8 read with section 20 (b) (ii) (C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (herein after referred to as 'NDPS Act, 1985'), and for ten years R.I. and fine of Rs.1,00,000/- (in default, imprisonment of six months) under Section 8 read with Section 23 (C) of NDPS Act, 1985.

2. The relevant facts for disposal of this appeal are that on 15.2.2015, Sub Inspector-Ram Saran Yadav with Police Personnel of Police Station-Sonauli, Maharajganj and Sub Inspector-Raja Murad Ali of Seema Suraksha Bal (SSB) were on checking at India Gate situates at Indo-Nepal Border. They were jointly checking the people and vehicles. At about 14:10, a foreigner was seen by them taking a trolley-bag with him coming from the 'No Man's Land' after crossing the Nepal border. Police Personnel stopped him and started checking his bag, which the foreigner tried to avoid, but when his trolley-bag was opened and checked, 10 kg. of *charas* was recovered from the bag in a plastic packet. On asking the foreigner, he told that he is Spanish and his name is Jose Luis Quintanilla Sacristan (the appellant) R/o Village-Street Dolores Lbarrliri No.5 ZA 33401 Aviles Astlirias Spain. The S.I. of S.S.B. Raja Murad Ali gave option to the accused-appellant speaking in English that if he desires so his search can be taken before any Gazetted Officer. On this option, he refused to opt and said that police personnel may take his personal search for which he gave his consent also in writing. First of all, police personnel took personal search of each other and after that accused was searched. Recovered *charas* was weighed by electrical weighing machine and weight of recovered *charas* was found to be 10 kg. out of which 100 gm. of *charas* was separated as sample and after sealing it properly, it was sent to Forensic Science Laboratory, Varanasi, for chemical examination and rest of the substance was sealed separately. At the time of arrest of the accused and recovery of *charas*, public was there, but nobody was ready to become public witness. Information of arrest of the accused-appellant was given to her sister-Lushia Cutena in Spain on her Mobile No.0034985565980 and recovery-memo was prepared on the spot and the case under Section 8/20/23 NDPS Act, 1985, was registered against the accused-appellant at P.S.-Sonauli, District-Maharajganj.

3. Heard Ms.Mary Punch, learned Advocate, assisted by Mr.Mohd. Kalim, Shri Rajeev Kumar, learned Amicus Curie, Mr.B.A. Khan, learned AGA appearing on behalf of the State and perused the record.

4. Learned counsel for the appellant, first of all, argued that in this case first information report is delayed, but it is not explained that how it was delayed. On perusal of chick-FIR, it is clear that accused was arrested on 15.2.2015 at 14:10 and on the same day, FIR was lodged at 16:45, i.e., after two and a half hour of the orrurrence. After arresting the accused, recovery-memo was prepared on the spot

and accused was brought to the police station, which was three km. north from the place of occurrence. Hence, there is no delay in lodging the first information report against the appellant.

5. Learned counsel for the appellant further submits that accused is a spanish-national, he does not know Hindi while consent letter is written in Hindi and it is clear that accused was unable to understand the language and the matter of consent letter. In fact, police had taken the signature of the accused on blank-paper and after that matter was written on that showing the consent of the accused. It has also been submitted that no member of the police-party knew the Spanish-language, therefore, it was impossible for them to explain anything to the accused regarding his search, arrest etc. It is also not in the prosecution case that police-party was having a translator with them, who could translate the language to the accused-appellant.

6. *Per contra*, learned AGA submitted that prosecution witnesses have clearly stated in their statement that they explained entire proceedings to the accused in English-language, which was being very-well understood by the appellant. Hence, there was no language barrier.

7. In this regard, perusal of recovery-memo (Ex.ka3) shows that the matter of arrest and recovery was explained to accused-appellant in English-language. S.I.-Ram Saran Yadav (PW2) has said in his statement that when the police-party came to know about *charas*, S.I.-Raja Murad Ali from S.S.B. (PW3) talked with the accused in English-language and also said in his statement that he made the accused understood all the things in English-language. It is not denied by the defence that accused did not understand the English-language. Hence, this Court is of the considered view that there was no language barrier between the police-party and the accused-appellant and it cannot be believed that accused did not understand what proceedings were going on against him and what was recovered from his possession. Therefore, the argument of learned counsel for the appellant regarding language-barrier is not sustainable.

8. Learned counsel for the appellant also argued that in this case, there was no compliance of Section 50 of NDPS Act, 1985, inasmuch as the offer given to the accused-appellant for searching in presence of a gazetted officer and he declined the offer and the same was not corroborated by any independent witness. Learned counsel submitted that before searching the belongings of the accused, he was not given option to be searched before a Gazetted Officer or a Magistrate.

9. As far as the compliance of Section 50 of the Act, 1985, is concerned, it would be relevant to quote Section 50 of the Act for ready reference:

50. Conditions under which search of persons shall be conducted.--

(1) When any officer duly authorized under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer

or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female. 1[(5) When an officer duly authorized under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.]

10. The Hon'ble Apex Court in ***State of Punjab vs. Baldev Singh*** (1999) 6 SCC 172, held as under:

"12. On its plain reading, Section 50 of the Act, would come into play only in the case of a search of a person as distinguished from search of any premises etc. However, if the empowered officer without any prior information as contemplated by Section 42 of the Act makes a search or causes arrest of a person during the normal course of investigation into an offence or suspected offence and on completion of that search contraband under the NDPS Act, is also recovered, the requirements of Section 50 of the Act are not attracted."

11. Apart from this, it has also been held by Hon'ble Apex Court that the provision of Section 50 of the Act stands attracted in case of personal search and not in the case where the search was given effect otherwise than from the personal search of the accused. Following cases were relied:

1. ***Madan Lal and another vs. State of Himachal Pradesh***, 2003 (47) ACC 763;

2. ***Megh Singh vs. State of Punjab***, 2003 Cr.LJ 4329; and

3. ***State of Himachal Pradesh vs. Pawan Kumar***, 2005 (52) ACC 710.

12. In the aforesaid judgments, it has been held by the Hon'ble Apex Court that Section 50 of the Act, 1985, applies only in case of personal search of a person. It does not extend to search of a vehicle or container or a bag or premises.

13. In this case, recovery-memo shows that 10 kg. *charas* was recovered from the trolley-bag of the accused-appellant and it was not recovered from the person of the accused. Hence, recovery of the trolley-bag does not attract of provisions of Section 50 of NDPS Act, 1985, but it is clear that after recovery, the *charas* from trolley-bag, police-personnel took the personal search of accused also, but for that recovery-memo shows that he was given an option to be searched before Gazetted Officer and that he denied. Accused-appellant signed consent letter also, which is Ex.ka2 on record. For this consent letter, learned counsel for the appellant has argued that it is written in

Hindi-language while the accused-appellant does not know Hindi. It is also submitted that signature of accused was taken on blank-paper, but appellant could not prove that his signature was taken on a blank-paper. So far as language in Hindi is concerned, the arresting witnesses PW2 & PW3 have categorically stated in statements that they explained the matter to the accused in English-language. S.I.-Raja Murad Ali (PW3) from S.S.B. specifically said in his cross-examination that consent letter was prepared by S.I.-Ram Saran Yadav (PW2), which was translated and read over to the accused in English-language. PW2 also stated in his cross-examination that regarding consent letter, accused-appellant was told in English-language. In *State of Punjab vs. Baldev Singh (supra)*, it is held by Hon'ble Supreme Court that when an empowered officer or a duly authorized officer while acting on a prior information about to search a person, it is imperative for him to inform the person concerned of his right under sub-section 1 of Section 50 of the Act, 1985, of being taken to the nearest Gazetted Officer or nearest Magistrate for making the search. However, such information may not necessarily be in writing. Hence, in this case also, the accused-appellant was orally given option regarding search before a Gazetted Officer. Although, neither the police was acting on prior information nor *charas* was recovered from his person, it was recovered from his trolley-bag, therefore, it cannot be said that there was contravention and non-compliance of Section 50 of the Act, 1985.

14. Learned counsel for the appellant also argued that S.I.-Ram Saran Yadav (PW2) stated in his statement that at the time of occurrence, accused-appellant did not come to the spot in white-car while S.I.-Raja Murad Ali (PW3) clearly said that accused-appellant came at the place of occurrence in white-car, he has mentioned his car number also. Hence, this contradictory statement of PW2 and PW3 indicates that there was no recovery from the accused as there was no such occurrence took place and false recovery was planted from accused-appellant because being the foreign-national, police demanded illegal money from accused and when he refused to do so, he was falsely implicated in this case and for that reason, police did not make any public witness of this alleged occurrence. In my opinion, 10 kg. *charas* is recovered from the possession of the accused-appellant and learned AGA also submitted that the market-value of 10 kg. *charas* is of Rs.1 crore. Hence, it cannot be presumed that police planted the *charas* worth Rs.1 crore, falsely. So far as public-witnesses are concerned, it can be safely assumed that it is very hard to procure public-witness because nobody wants to become witness in such type of cases, easily. Witnesses, examined in this case, are no doubt police-personnel, but they are relevant witnesses and their statements are consistent and corroborated each other. Therefore, keeping in view the above position and also keeping in view the fact that accused-appellant was caught by the combined team of Police and SSB, it can be safely assumed that prosecution did not withhold the public witnesses deliberately. In the statement under Section 313 Cr.P.C. before the trial court, the accused-appellant has stated that members of police-party demanded illegal money from him and due to not giving the money, they have falsely implicated. It is burden on accused-appellant to prove the said statement, but there is not even an iota of evidence in this regard. Appellant has also not shown any evidence, which could show

that police-party or members of S.S.B. were having any enmity with the accused-appellant as the appellant is a foreign-national and there is no reason and occasion to have any enmity between the police and the accused-appellant. Hence, it cannot be said that police/prosecution withheld or suppressed public-witnesses with an ulterior motive and it could not extend any benefit in favour of the appellant.

15. Learned counsel for the appellant also submitted that report from Forensic Science Laboratory is not on record, therefore, it was not proved by the prosecution that the sample sent to the laboratory was found to be *charas*. In this regard, I do not agree with the submission aforesaid made by counsel for the appellant. Perusal of record shows that chemical examination report of Forensic Science Laboratory, Varanasi, is very much on record. Learned counsel for the appellant objected that if there is such report, it is not exhibited and, hence, it cannot be read in evidence.

16. Report of Forensic Science Laboratory is a public document. It would be relevant to quote Section 293 Cr.P.C. for ready reference:

Section 293 in the Code Of Criminal Procedure, 1973

293. *Reports of certain Government scientific experts.*

(1) Any document purporting to be a report under the hand of a Government scientific expert to whom this section applies, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this Code.

(2) The Court may, if it thinks fit, summon and examine any such expert as to the subject- matter of his report.

(3) Where any such expert is summoned by a Court and he is unable to attend personally, he may, unless the Court has expressly directed him to appear personally, depute any responsible officer working with him to attend the Court, if such officer is conversant with the facts of the case and can satisfactorily depose in Court on his behalf.

(4) This section applies to the following Government scientific experts, namely:-

(a) any Chemical Examiner or Assistant Chemical Examiner to Government;

(b) the chief Inspector of-Explosives;

(c) the Director of the Finger Print Bureau;

(d) the Director, Haffkeine Institute, Bombay;

(e) the Director, Deputy Director or Assistant Director of a Central Forensic Science Laboratory or a State Forensic Science Laboratory;

(f) the Serologist to the Government.

17. Hence, as per the provision of Section 293 Cr.P.C., the report of State Forensic Science Laboratory is admissible in evidence and there is no requirement to call the Director of that laboratory to get the report proved. The report on record shows that the sample sent to it was found to be *charas*. The remaining recovered *charas* was produced before learned trial court during trial and it was proved by S.I.-Ram Saran Yadav (PW2) as material

Exhibits 1, 2, 3 & 4 before learned trial court.

18. No other point or argument was raised by learned counsel for the appellant before this Court.

19. In view of above, I reach on definite conclusion that prosecution proved its case beyond any reasonable doubt and the appellant has been rightly convicted and sentenced by learned trial court.

20. Accordingly, the appeal lacks merit and is **dismissed.**

(2021)09ILR A207
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.08.2021

BEFORE

THE HON'BLE AJAI TYAGI, J.

Criminal Appeal No. 831 of 2020

Upendra Kumar Tripathi @ Neeraj
...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri P.K. Singh

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

Proper Sentence/ Quantum of Sentence- It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission - The judicial trend in the country has been towards striking a balance between reform and punishment - The criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective- 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.

Settled law that the court has to award adequate sentence which is proportional to the facts, nature and manner of commission of the offence and should neither be unduly harsh nor excessively lenient. Effort has however to be made to reform the accused so that he is integrated in the society.

Criminal Law - Indian Penal Code, 1860- Section 304B, Section 498A , Dowry Prohibition Act- Section ¾- Quantum of sentence- Maximum awarded sentence to the appellant is ten years- already undergone eight years and five months of the awarded sentence-appellant is sufficient to meet the ends of justice.

In view of the reformative theory of punishment and considering the facrt that the accused has already undergone almost the entire sentence awarded to him, including remission, the conviction of the appellant upheld and sentence modified to the period undergone. (Para 12, 13, 15, 16, 17, 18, 19)

Criminal Appeal partly allowed. (E-3)

Judgements/ Case law relied upon:-

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

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

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

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

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

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

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

8. Kokaiyabai Yadav Vs St. of Chhattis. (2017) 13 SCC 449

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

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

1. This appeal has been preferred by the appellant against the judgment and order dated 23.12.2019, passed by learned Additional Sessions Judge, Court No.19, Kanpur Nagar, in S.T. No.722 of 2013 *(State of UP vs. Upendra Kumar Tripathi)* arose out of Case Crime No.102 of 2013, under Sections 498A, 304B IPC & Section 4 of Dowry Prohibition Act, 1961, Police Station-*Panki*, District-*Kanpur Nagar*.

2. The relevant facts for disposal of this appeal are that complainant-Santosh Kumar Dixit (father of the deceased) lodged FIR at Police Station-Panki, Kanpur Nagar, stating that the marriage of his daughter Ruchi @ Aradhna (deceased) with Upendra Kumar @ Neeraj (appellant) s/o late Rampal Tripathi was solemnized on 24.2.2012. He gave dowry in the marriage as decided, but Neeraj and his family members were not satisfied with the dowry so they started torturing his daughter and demanded four-wheeler and Rs.one lakh as additional dowry for which they used to give mental and physical torture to his daughter. They also stopped her daughter to contact with her father and mother. Upendra, her sister Poonam and Poonam's husband used to beat her. In December, 2012, Ruchi gave birth to a daughter and after that cruelty increased. Before 10 days of the occurrence, Ruchi's maternal uncle and complainant's sons went to the house of Ruchi at Panki, Kanpur Nagar and requested her husband (appellant) and his family members not to torture Ruchi, but they abused and beaten Ruchi before them also. On 8.3.2013 at about 9:00 a.m., somebody informed on telephone that his daughter Ruchi had died. Her daughter has been killed by her-in-laws, therefore, strict legal proceedings be initiated against them.

3. Heard Shri P.K. Singh, learned counsel for appellant, learned AGA for the State and perused the record.

4. Learned counsel for appellant argued that in this case after investigation, charge-sheet was filed against the appellant, while the complainant tried to implicate other family members of appellant also. Named Poonam and her husband were not charge-sheeted by Investigating Officer. On this score alone, the prosecution story seems to be false; it was a suicidal case; the death of the deceased is by hanging herself. Prosecution produced four witnesses of facts. PW1 is informant, PW2-Vineet Kumar is brother of the deceased, PW3-Durgesh Tiwari is cousin of the deceased and PW7-Shakti Saran is maternal uncle of the deceased. Their statements are contradictory to each other. As per prosecution evidence, there is no abatement on the part of the accused-appellant for commitment of suicide by the deceased.

5. Learned counsel for the appellant submitted that accused is in jail since 13.3.2013. He has been awarded maximum sentence of ten years under Section 304B IPC while he has already served more than eight years and four months of sentence. It is established by prosecution evidence itself that it is a case of suicide. He also submitted that prosecution brought forward a suicide note after 15 days of the occurrence and it is said that the suicide note was found in her maternal uncle's *(mausa)* house at the time of cleaning the

house. Appellant got the hand-writing of the suicide note compared with the hand-writing of the deceased and the hand-writing expert gave the conclusion that both the hand-writings are not of the same person. Hence, prosecution has failed to prove the suicide note and it is clear that it was written by somebody else to falsely implicate the appellant.

6. He submits that since appellant has already served near about eight and a half years of sentence out of ten years awarded to him, he should be freed now with undergone imprisonment as the appellant has one daughter aged about nine years only and earlier his daughter was residing with her grand-mother and now her grand-mother has died. Therefore, the daughter is residing now with her aunt *(bua)*. It is obvious that a female-child of nine years needs parental care and she needs the support of her father in her life.

7. Learned counsel for the appellant further argued that in defence, PW1 was produced, who is neighbor of the appellant and resides in the same building. He has categorically stated that there was no quarrel or differences between appellant and deceased. Appellant also produced as PW6 before learned trial court. Keeping in view the circumstances of appellant's daughter and the period of sentence already undergone, it is prayed that accused-appellant be released finally.

8. *Per contra*, learned AGA opposed the prayer of counsel for the appellant and submitted that learned trial court has considered all the pleas taken by the appellant. All the ingredients of offence under Section 304B IPC are there in this case and the learned trial court has rightly convicted and sentenced the accused-appellant.

9. Learned counsel for the appellant argued that maximum awarded sentence to the accused is of ten years and he has already undergone eight and a half years and as per jail manual, remission be also there. If remission as per jail manual is taken into account, only a little time of his sentence is left now.

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 ***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."

12. 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.

13. 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 ***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 appellant has not pressed the appeal on merits, however, this Court after perusal of the entire evidence on record and judgment of the learned Trial Court considers that the appeal is devoid of merit and is liable to be dismissed. Hence, the conviction of the appellant is upheld.

18. So far as the quantum of sentence is concerned, in this case, accused-appellant was awarded two years R.I. under Section 498A IPC with fine and imprisonment in default, six months R.I. under Section 4 D.P. Act, 1961 with fine and imprisonment in default and ten years R.I. under Section 304 B IPC. It was also directed by learned trial court that all the sentences will run concurrently. Hence, in this case, maximum awarded sentence to the appellant is ten years. He is in jail since 13.3.2013. Hence, he has already undergone eight years and five months of the awarded sentence. In my considered opinion, keeping in view the facts and circumstances of the case, sentence already

undergone by accused-appellant is sufficient to meet the ends of justice. In regard to the fine imposed upon the appellant by learned trial court, this Court finds that the same is adequate and it is not required to be disturbed and the appellant is directed to deposit the same.

19. Accordingly, the conviction is upheld. The appeal is **partly allowed** with the modification of the sentence by the period already undergone and served out by the appellant. The appellant be released from the jail on depositing the fine imposed by the trial court, if he is not wanted in any other case.

20. 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.

21. 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.

22. 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)09ILR A212

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 12.08.2021

BEFORE

THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Criminal Appeal No. 1110 of 2016

Kautik Mahaley ...Appellant (In Jail)

Versus

State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Noor Muhammad, Sri Yogesh Kumar Srivastava

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

Evidence Law - Indian Evidence Act 1872- Section 154- Hostile Witness- The complainant herself and three other witnesses have not supported the prosecution case. It is natural on part of the complainant being wife of the accused not to support the allegations made in the F.I.R. just to save her husband, but from the statements of the aforesaid witnesses, date, time and place of the incident is proved and there is no confusion or discrepancy regarding this.

It is settled law that relevant parts of the testimony of hostile witnesses, which are admissible in law, can be used by the prosecution to prove its case.

Evidence Law - Indian Evidence Act 1872- Illustration (a) of Section 6 -The trial court has rightly relied on the evidence of PW-4 who is an independent witness and not related to either the deceased or the accused-appellant. As per the testimony, complainant soon after the incident has made a statement that her husband has killed her mother, a statement which can be relied in terms of Section 6 of the Evidence Act, since, the statement being *res-gestae* which is exception to the rule of *heresay* evidence.

The statement of a witness made soon after the commission of the offence would be

relevant and will be considered to be a part of the same transaction and the testimony of the person to whom the said statement was made, would be an exception to the rule of hearsay evidence. (Para 10, 11)

Criminal Appeal Rejected. (E-3)

Judgements/ Case law relied upon:-

1. Gentela Vijayauardhan Rao Vs. St. of A.P. 1996 (6) SCC 241

2. Parsadi Ram Vs. St. of M.P. (Chhattisgarh) (1) F.J.C.C. 145

(Delivered by Hon'ble Syed Aftab Husain Rizvi, J.)

1. Heard learned counsel for the appellant and learned A.G.A.

2. This criminal appeal arises out of judgment and order dated 05.01.2016 passed by the Additional Session Judge/Special Judge (D.A.A. Act), Jhansi in S.T. No.84 of 2014 arising out of Case Crime No. 123 of 2013, Police Station- Sadar Bazar, District- Jhansi, convicting the appellant (accused) under Section 304 (1) IPC and sentencing him to undergo rigorous imprisonment for 10 years and a fine of Rs. 15,000/- and in default of payment of fine, six months rigorous imprisonment.

3. In brief the prosecution case is that complainant Smt. Deepika presented an application dated 13.12.2013 at Police Station- Sadar Bazar, Jhansi alleging therein that her husband is Sepoy in the Army and posted at Jhansi. In the evening of 7/8-12-2013 at 7 p.m. her husband in drunken condition came to the house. After taking dinner complainant with her three children, mother-in-law Narmada Bai and mother Lalita went to sleep at 10 p.m.. At about 3 a.m. she woke up on hearing some shrieks then she saw her husband standing beside the cot of her mother holding a *Gaiti* in his hand. Her mother was lying on the cot bleeding from her head. She came outside and told her neighbour Abhijeet Pal about the incident. Thereafter, other military personnel came there and took her mother to medical college, Jhansi where she died. Post-mortem was conducted on 08-12-2013. Her mother had come to Jhansi on 26-11-2013 on the occasion of birthday of her son Soham and after 4-5 days her husband in drunken condition quarreled with her mother. On 27th May 2013 her husband Kautik Mahaley has badly beaten her and she was admitted in military hospital for 8 days. On her complaint of this assault he was punished by the Army for one month of quarterguard. Due to above reasons her husband in a drunken condition assaulted her mother Smt. Lalita and injured her causing her death. On receiving information, her maternal uncle Rajesh Aabhad came to Jhansi in the night of 08-12-2013 and on 09-12-2013 she went to Nasik with the dead body of her mother for performing her last rites. On returning from Nasik, now she is giving information. On the aforesaid application Case Crime No.123 of 2013, under Section 304 I.P.C. was registered at Police Station- Sadar Bazar. Inspector Baljeet Singh started the investigation. He visited the place of occurrence and at the instance of complainant recovered blood stained *Gaiti* the weapon used in the offence from the inner courtyard of her house, sealed it and prepared the memo. He also took the blood stains "Nivad" of the cot and prepared a memo, prepared the site plan, recorded the statement of the complainant and other witnesses. Case was further investigated by Inspector Mahendra Pratap Singh who

completed the investigation and submitted charge sheet against the accused Kautik Mahaley under Section 304 I.P.C.

4. The trial court framed charge against accused under Section 304 I.P.C. who denied it and claimed for trial. The prosecution examined nine witnesses. The statement of accused under Section 313 Cr.P.C. was recorded in which the accused denied the prosecution case and said that he has been falsely implicated and he has not killed Smt. Lalita. No evidence in defence produced by the accused. The trial court after hearing the arguments of the parties by the impugned judgment has convicted the accused-appellant.

5. Learned counsel for the appellant submitted that the F.I.R. has been lodged after five days of the incident so there is much delay and prosecution has failed to give any explanation of the delay. Four witnesses of fact PW-1 Smt. Deepika, PW-2 Rajesh Aabhad, PW-3 Abhijeet Pal and PW-9 Preetam Singh have not supported the prosecution version and have become hostile. Learned trial court only on the basis of statement of PW-4 Major Abhay Juyal has held the appellant guilty. The aforesaid witness has only stated that when on the information he reached on the spot, the wife of the accused Smt. Deepika said to him that his husband Kautik Mahaley has killed her mother, don't spare him. Learned counsel for the appellant submitted that this witness is not an eye witness and he has not seen the incident. His evidence is based on the statement of complainant PW-1 Smt. Deepika who herself has not supported the prosecution version and has become hostile. So the statement of PW-4 Major Abhay Juyal has no value and cannot be relied. There is no other evidence on the record against the accused. It is further submitted that the learned trial court has also invoked Section 106 of the Evidence Act observing that the offence has been committed inside the house and it is on part of the accused to explain the circumstances under which the deceased has suffered injuries. The learned trial court has failed to appreciate that the accused was not alone and other persons were also present at the time of incident. Section 106 of the Evidence Act cannot be applied in the present case and learned trial court has erred in doing so. The findings recorded by the learned trial court is *per se* illegal and perverse. The prosecution has completely failed to establish its case against the appellant and the findings arrived by the learned trial court is based on surmises and conjectures and such the impugned judgment and order of conviction is not sustainable.

6. Learned A.G.A. submitted that although complainant and three other witnesses namely, PW-2 Rajesh Aabhad, PW-3 Abhijeet Pal and PW-9 Preetam Singh have not supported the prosecution version, PW-4 Major Abhay Juyal has fully supported the prosecution case. His oral statement that when he reached on the spot, complainant said to him that her husband Kautik Mahaley has killed her mother, don't spare him, is admissible in evidence. The incident is of inside the house and F.I.R. has been lodged by the wife of the accused implicating the accused-appellant in clear terms but later on just to save her husband she has retracted from her earlier statement. But from the evidence on record it is proved beyond reasonable doubt that accused is the author of the crime. Learned trial court has fully discussed the entire evidence and after appreciation of evidence has rightly held the accused guilty. The findings recorded by the trial court does not

suffer from any infirmity and appeal has no force.

7. Post-mortem of the deceased has been conducted on 08.12.2013 at 03:30 p.m. by Dr. Rajeev Singh Bhadauriya who has been examined as PW-5 and has proved the post-mortem report Ex-Ka.3. According to which the height of the deceased was 151 cm. Rigor mortis was present all over the body. Following Anti-mortem injuries were found on the body:

(1) Lacerated wound, 3 cm. x 2 cm. bone deep was present on the left side of the head. 10 cm. above the left ear.

(2) Lacerated wound, 7 cm. x 2 cm. bone deep on the left side of head, 5 cm. above the left ear.

In internal examination, parietal bone was fractured. Brain and its membrane were lacerated. Clotted blood was present. Near about 100 gm. pasty food was present in the stomach. Faceal matters and gases were present in the intestine.

In the opinion of the doctor, the cause of death was anti-mortem head injuries and duration of death was about half day.

From the medical evidence on record it is clear that deceased has suffered lacerated wounds on her head which caused her death and her death is homicidal. Learned counsel for the appellant contented that prosecution case is that injuries have been inflicted by a *Gaiti* while the deceased has lacerated wounds on her body which is not possible from *Gaiti* which is pointed weapon and will cause stab/penetrated wounds. So there is contradiction between the medical and oral evidence. This argument has no force as the nature of the injuries depends upon the manner in which weapon has been used. If it is used from blunt side it may cause lacerated wounds. So there is no contradiction or discrepancy.

8. As per version of the F.I.R., the incident has occurred in the intervening night of 7/8-12-2013 at about 03 a.m. inside the house of the complainant. To prove its case, prosecution has examined nine witnesses. PW-1 Smt. Deepika, PW-2 Rajesh Aabhad, PW-3 Abhijeet Pal and PW-9 Preetam Singh are public witnesses of fact. PW-1 Smt. Deepika in her examination-in-chief has stated that the incident is of night of 7/8-12-2013. She along with her three children, mother-in-law Narmada Bai and Mother Smt. Lalita was sleeping in her house. In the night of 7/8-12-2013 at about 03 a.m. she woke up on shrieks and reached near here mother's cot. She saw that her mother was bleeding. At the same time, a person holding a *Gaiti* ran away from there. Due to darkness she could not identify the person. Her husband came on the spot. She and Army personnel took her mother to medical college where she died. She has further stated that she has not seen her husband holding *Gaiti* near her mother. Regarding the F.I.R., the witness has stated that some army personnel got her signature on typed paper which was not read over to her. She has not told anyone that her husband has killed her mother. The witness has identified her signature on the Teharir (Ex.Ka-1). So, this witness has not supported the prosecution case and has become hostile. She has also disowned the contents of the F.I.R. but has admitted her signature on it.

PW-2 Rajesh Aabhad the brother of the deceased, in his examination-in-chief has stated that on receiving information from Smt. Deepika that someone has killed her mother in the night, he reached Jhansi in the morning of 08.12.2013. He has

further stated that after performing last rites of her sister at Nasik, he returned back Jhansi on 13.08.2013. Some army personnel got the signature of Smt. Deepika on an application and took Deepika and the witness to the police station where application was submitted. He has not read the application. He has admitted his signature on the memo of taking blood stains, Nivad by the Investigating Officer. The witness has been declared hostile on prayer of prosecution.

PW-3 Abhijeet Pal in his examination-in-chief has stated that he was posted as Lance Naik and in the night of 7/8-12-2013 at about 03 a.m. on hearing noise from his neighbour Kautik Mahaley's house, he went there. Kautik Mahaley and his wife were standing outside the house. Smt. Deepika told her that someone has injured her mother. She was lying on a cot. He informed the higher authorities and after arranging vehicle she was taken to hospital where doctor declared her dead. This witness has also been declared hostile on prayer of prosecution.

PW-4 Major Abhay Juyal in his examination-in-chief has stated that on 7/8-12-2013, he was posted as major in Army at Jhansi and in the night at about 03:30 a.m. he got information from Amit Pal that some incident has occurred at the house of Sepoy Kautik Mahaley and his wife is crying outside the house. When he reached at the Government residence of Kautik Mahaley and went inside, he saw that the mother-in-law of Kautik Mahaley was lying injured on cot and she was bleeding from head and mouth. He took her to medical college Jhansi on his Gypsy where doctor declared her dead. The witness has further stated that when he reached at the place of occurrence, wife of Kautik Mahaley Smt. Deepika who was not in her senses met and said to him that, "her husband Kuatik Mahaley has killed her mother, don't spare him." The witness has further proved his signature on the *Panchayatnama* Ex.Ka-2.

PW-9 Hawaldar Preetam Singh in his examination-in-chief has said that on 7/8-12-2013 he was posed as Platoon Hawaldar at Jhansi and in the night between 03-03:45 a.m. Sepoy Kautik Mahaley of the unit has not came there and he has not admitted Kautik Mahaley in the hospital. So this witness has also been not supported the prosecution.

9. Another peace of evidence which has been produced by the prosecution is the recovery of *Gaiti* used in the crime. PW-6 Sub-Inspector Baljeet Singh who is the Investigating Officer has said in his statement that at the instance of complainant the weapon (*Gaiti*) used in the offence was recovered from the place of occurrence and the recovery memo was prepared at the spot. The witness has proved it as Ex. Ka5. The weapon recovered has been sent to the Forensic Lab along with other articles for examination and according to the Forensic Lab report the blood stains on it were found disintegrated. So it is not established that the recovered *Gaiti* has been used in the offence. The remaining statement of PW-6 Sub-Inspector Baljeet Singh is of formal in nature being Investigating Officer he has stated the steps taken during investigation and has proved the papers prepared by him. PW-8 Sub-Inspector Mahendra Pratap Singh is also the Investigating Officer who has submitted the charge sheet and has proved it while PW-7 Shiv Narain is Chik and G.D. writer who has registered the case on the basis of application of the complainant and entered its proscription in the G.D. and has proved the papers.

10. Out of 5 public witness of facts produced by the prosecution, four witnesses,

PW-1 Smt. Deepika, PW-2 Rajesh Aabhad, PW-3 Abhijeet Pal and PW-9 Preetam Singh have not supported the prosecution case. It is worth of mentioning that complainant is the wife of the accused and the incident is of inside her house. The witnesses have reached on the spot on her hue and cry but under the influence of the accused, the complainant herself and three other witnesses namely PW-2 Rajesh Aabhad, PW-3 Abhijeet Pal and PW-9 Hawaldar Preetam Singh have not supported the prosecution case. It is natural on part of the complainant being wife of the accused not to support the allegations made in the F.I.R. just to save her husband, but from the statements of the aforesaid witnesses, date, time and place of the incident is proved and there is no confusion or discrepancy regarding this. So it is proved from the oral testimony of aforesaid witnesses that in the intervening night of 7/8-12-2013 at about 03 a.m. inside the house of the complainant her mother Smt. Lalita suffered injuries while lying on the cot and she succumbed to the injuries. At that time, the complainant, her three children, mother and mother-in-law were inside the house and accused was also present there. From the statement of PW-4 Major Abhay Juyal, it is also proved that on receiving information, when he reached on the spot just after the occurrence, complainant Smt. Deepika and her husband accused Kautik Mahaley were standing there and the complainant Deepika said to him that "her husband Kautik Mahaley (accused) has killed her mother, don't spare him."

11. The aforesaid statement of PW-4 Major Abhay Juyal clearly comes in the preview of the illustrations (a) of Section 6 of the Evidence Act, which is as fallows:-

"6. Relevancy of facts forming part of same transaction.--*Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.*

Illustrations

(a) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact."

The trial court has rightly relied on the evidence of PW-4 Major Abhay Juyal who is an independent witness and not related to either the deceased or the accused-appellant. As per the testimony, complainant Smt. Deepika soon after the incident has made a statement that her husband has killed her mother, a statement which can be relied in terms of Section 6 of the Evidence Act, since, the statement being *res-gestae* which is exception to the rule of *heresay* evidence.

12. The Apex Court in the case of **Gentela Vijayauardhan Rao Vs. State of A.P.** reported in **1996 (6) SCC 241**, has held as under:

"The principle of law embodied in section 6 of the Evidence Act is usually known as the rule of res gestae recognized in English law. The essence of the doctrine is that a fact which, though not in issue, is so connected with the fact in issue as to form part of the same transaction that it becomes relevant by itself. This rule is roughly speaking, an exception to the general rule that hearsay evidence is not admissible. The rationale in making certain statement or fact admissible under section 6 of the Evidence Act is on account of the spontaneity and immediacy of such

statement or fact in relation to the fact in issue. But it is necessary that such fact or statement must be a part of the same transaction. In other words, such statement must have been made contemporaneous with the acts which constitute the offence or at least immediately thereafter. But if there was an interval, however, slight it may be, which was sufficient enough for fabrication then the statement is not part of res gestae."

13. Similar view was taken in the case of **Parsadi Ram Vs. State of M.P. (Chhattisgarh)** reported in **2007 (1) F.J.C.C. 145**, further adding that in order to hold the statement *res-gestae*, it has to be remembered that the statement should be reasonable, contemporaneous and also spontaneous.

14. On examination of the evidence of PW-4 and applying the law laid down, the Court finds PW-4, is an independent witness, whose evidence is reliable; moreso, there has been no motive which has been attributed to him nor there is any suggestion that there was any enmity between this witness and the appellant, to falsely implicate the appellant. The arguments advanced by the learned counsel for the appellant is this regard have no force.

15. The delay in lodging F.I.R. has been explained in the F.I.R. itself and the explanation is satisfactory. Complainant being resident of Maharastra after death of her mother took her body to her native place for performing last rites and when she returned from there she has lodged the F.I.R. So, the delay in lodging the F.I.R. does not adversely affect the prosecution.

16. The learned trial court has observed that incident is inside the house of accused, so Section 106 of the Evidence Act, the accused has to explain the circumstances under which Smt. Lalita suffered injuries but the accused has failed to explain the circumstances and so adverse inference under Section 106 of Evidence Act can be drawn against him. Even if these observations of the learned trial court is not taken into consideration, even then from the oral testimony of PW-4 Major Abhay Juyal and other evidence on record, the case of the prosecution stands proved and it can safely be inferred that it is accused and only accused who is the author of the crime.

17. The learned trial court has properly appreciated the entire evidence and there is no perversity or infirmity in the finding recorded by the learned trial court. The learned trial court has rightly held the accused guilty and convicted him. The sentence passed by the trial court is also appropriate. There is no force in this appeal which is liable to be dismissed.

18. The criminal appeal is hereby **dismissed.**

19. Lower court record along with copy of the judgment be transmitted immediately to the trial Court.

(2021)09ILR A218
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.09.2021

BEFORE

THE HON'BLE AJAI TYAGI, J.

Criminal Appeal No. 1351 of 2018

Kalyan @ Kallu ...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Veerendra Kumar Shukla, Sri Ramendra Pal Singh, Sri Pratap Pandey

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

Criminal Law - Code of Criminal Procedure, 1973- Section 215 Cr.P.C. provides that if there is any error in stating the charge or particulars required and also provides if there is omission to state the offence or those particulars, then it would not be deemed material unless the accused was mislead by such omission or error or there was failure of justice due to that reason. But, in the case in hand, there is absolute absence of charge under Section 27 Arms Act, 1959, and total absence of charge is not omission. When there is complete absence of charge, question does not arise of any error or omission in charge. Furthermore, it is very pertinent to note that in this case, even the case under Arms Act, 1959, was not committed to the court of sessions, therefore, there was no committal and no charge was framed under Section 27 of the Act, 1959, yet the trial court convicted and sentenced the appellant for the offence, the accused was not charged with.

Where no case u/s 27 of the Arms Act was committed and no charged was framed then the same cannot be held to be an omission within the meaning of Section 215 of the CrPc.

Criminal Law -Code of Criminal Procedure, 1973- Section 221 (2) - Sub-clause 2 of Section 221 Cr.P.C. provides for a different offence emerged from the evidence other than the offence for which charge is framed. Accused may be convicted of the offence, which he is proved to have committed, although he was not charged with it. This provision does not apply in this case as it is not the case in which after evidence any other offence is emerged apart from the offence for which charge was framed against the appellant. Hence, Section 221 (2) Cr.P.C. does not cover the opinion of trial court. Trial court has made wrong interpretation of Section 215 Cr.P.C. and Section 221 (2) Cr.P.C. in this regard. Conviction of appellant in total absence of charge under Section 27 of the Act, 1959, cannot sustain.

An accused cannot be convicted of an offence, taking recourse to Section 221(2) of the Code, when no separate offence emerges after evidence of the prosecution.

Evidence Law - Indian Evidence Act, 1872- Section 134- Section 145- Section 155- Sole testimony- Should be reliable- (PW5) produced as eye-witness- Perusal of record shows that his name is not mentioned in the first information report as eye-witness while FIR was lodged by his elder brother. Investigating Officer did not record his statement under Section 161 Cr.P.C. nor he was made witness in charge-sheet. Legal position is that if Investigating Officer has not recorded any statement under Section 161 Cr.P.C., it means his first version comes before the trial court only and there is no previous statement of the occurrence to contradict or corroborate, therefore, there is no occasion to believe the testimony of such witness. It is not denied that conviction cannot be based on sole testimony, but if conviction is made on the sole testimony of the witness then his testimony should be wholly reliable. There should not be any scope of suspicion in his testimony.

Although conviction can be secured on the basis of the testimony of a solitary witness , but the same should be reliable and truthful. Where the witness appears for the first time in the trial, then neither can he be contradicted with his previous statement and nor his credibility can be impeached by the defence, hence such witness cannot be relied upon.

Evidence Law - Indian Evidence Act, 1872- Section 101, Section 103- Burden of Proof- On whom lies- Trial court has

stated that PW5 has proved his presence on the spot and accused has not produced any evidence in rebuttal. In my opinion, this was the burden on prosecution to prove the presence of PW5 at the place of occurrence and it was not the burden on accused to make its rebuttal.

It is settled law that the burden of proving a particular fact lies on the witness/ person who asserts such fact and the said burden cannot be shifted on the accused for rebutting the said fact. (Para 11, 12, 14, 15, 16, 17)

Criminal Appeal Allowed. (E-3)

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

1. This appeal has been preferred by the appellant-Kalyan @ Kallu @ Netrapal Singh against the judgment and order dated 22.11.2017, passed by learned Additional Sessions Judge, Court No.3, Shahjahanpur, in Session Trial No.1087 of 2003 (State vs. Kalyan @ Kallu @ Netrapal Singh) in Case Crime No.91 of 2003 under Section 304 IPC, Police Station-Katra, District-Shahjahanpur, whereby the appellant was convicted under Section 304 (2) and sentenced for 10 years' R.I. and also Rs.10,000/- fine and in default of fine two years simple imprisonment. The appellant has also been convicted under Section 27 Arms Act, 1959, and sentenced for three years imprisonment and Rs.2,000/- fine and in default of fine, six months simple imprisonment. All sentences were directed to run concurrently.

2. The brief facts of the case are that a written-report (Ex.ka1) was submitted in the police station by the informant Ramvir Sharma. It was stated in written-report that on 27.4.2003, there was marriage of a girl in the family of Rajendra Singh in Village-Chavarkhas, P.S.-Katra, where his father went for Erudition *(Panditai)*. Accused-appellant Kalyan was also there from the side of bride. At the time of *dwarchar*, appellant was making fires from his licencee-gun, out of which one fire hit the shoulder of his father and he died on the spot. The occurrence took place at about 9:00 p.m. It is also stated that informant was on duty as Home-Guard in Bareilly and on getting the information of his father's death, he went to the police station on the next day and submitted the written-report. It is also stated that the occurrence was seen by many people of village, who were present in marriage.

3. On the basis of above written-report, Case Crime No.91 of 2003 was registered under Section 308 IPC against appellant-Kalyan s/o Gajraj Singh. The inquest report of deceased (Ex.ka3) was prepared on 28.4.2003 and injury on his right shoulder was found. Subsequently, dead-body was sent for postmortem, which was conducted in District Hospital Shahjahanpur on 29.4.2003 and antemortem injury of entry wound of fire-arm measuring 8cm x 7cm on the right side of chest below the shoulder was found. Antemortem injury was said to be the cause of death of the deceased-Rati Ram.

4. After completion of investigation, Investigating Officer submitted charge-sheet against appellant under Section 304 IPC and under Section 27 Arms Act, 1959. Learned Chief Judicial Magistrate, Shahjahanpur, committed the case to the court of session under Section 304 IPC and charge was also framed under Section 304 IPC by trial court. After completion of trial, the trial court convicted and sentenced the appellant under Section 304 (2) IPC and Section 27 Arms Act, 1959. Hence, this appeal.

5. Heard Shri Veerendra Kumar Shukla, learned counsel for the appellant,

Shri B.A.Khan, learned AGA for the State and perused the record.

6. Learned counsel for the appellant argued that appellant has been falsely implicated in this case; there was no motive for the appellant to commit the crime as alleged by prosecution. He submits that appellant had no enmity with the deceased, therefore, there was no reason with him to commit such crime. Submission of counsel for the appellant is that three witnesses of fact are produced by prosecution. Ramvir Sharma (PW1) is the son of the deceased, but he was only informant and it was admitted case of prosecution that PW1 was not present on the spot at the time of occurrence. He was doing his duty as Home-Guard at Bareilly and on getting information of death of his father, he came from Bareilly on the next day and lodged the first information report. Therefore, PW1 has not seen any occurrence. Hence, his testimony cannot be believed on the point that appellant killed his father. It is next submitted that Smt.Neelu Singh (PW3) is another witness of fact, who has been produced by prosecution as eye-witness, but she has not supported the prosecution version in her statement and said that there was so many people, who were making '*Hersh*-firing' and there were 40-50 fires in all. She does not know whose fire hit the deceased. Learned counsel submitted that PW3 was declared hostile by prosecution and in her cross-examination, she denied her statement under Section 161 Cr.P.C. also. Hence, prosecution does not get any support from the statement of PW3 also.

7. Learned counsel for the appellant also submitted that next witness of fact is Sanjeev Kumar (PW5), who is son of the deceased. He was not present at the place of occurrence. If he would have been present there and would have seen the occurrence, he must have been made witness in first information report because it was lodged by the elder brother, namely, Sanjeev Kumar (PW5). It was very natural to mention his name in the FIR, but it was not there in the FIR. Moreover, Investigating Officer did not record his statement under Section 161 Cr.P.C. and he was not made witness in charge-sheet also. Learned counsel for the appellant further submits that even if PW5 was produced as eye-witness, but he is not at all supported the prosecution case because his statement is contradictory. In examination-in-chief, PW5 has stated the case of 'Hersh-Firing' at about 9:00 pm at the time of *Dwarpooja*, but in his cross-examination, he has stated that at the time of occurrence *Pooja* was complete. Bride-side guests have gone from there. His father was sitting on *chabootra*. At that time, appellant came there and exhorted the deceased and pointing out the barrel of gun towards the chest of his father, he shoot him. Hence, he altogether changed the colour of prosecution case in his cross-examination, but trial court believed his testimony and on his sole testimony, convicted the appellant. It was grave error on the part of the trial court. Learned trial court failed to appreciate the evidence correctly and legally and unlawfully convicted the accused-appellant.

8. Learned counsel for the appellant emphasized that during trial, no charge under Section 27 Arms Act, 1959, was farmed, but trial court also convicted the appellant under Section 27 of Act, 1959, and sentenced for three years. He argued that if no charge is framed for any offence then conviction cannot be made for that offence. Lastly, it was contended by

counsel for the appellant that maximum it can be the case of negligence under Section 304-A IPC, if court comes to the conclusion it to be an accidental firing.

9. No other argument was placed from the side of appellant and it was prayed to allow the appeal and quashing the conviction of sentence.

10. Learned AGA opposed the submissions made by learned counsel for the appellant and argued that appellant was named in first information report. Admittedly, firing was made at the time of occurrence by the appellant. Appellant had knowledge of the fact that by making such type of firing, somebody may get injured and injury could be proved fatal. There was injury to the deceased on his vital part. Learned AGA also submitted that although PW1-informant was not eye-witness and PW3 turned hostile, but PW5-Sanjeev Kumar has supported the prosecution case. He is eye-witness and present at the place of occurrence with his father-deceased. He has fully supported the prosecution version and named only appellant in his statement. Learned AGA said that appellant is the sole accused in this case, hence, there was no false implication and moreover, there was no reason for his false implication. It is also submitted by learned AGA that after the arrest of the appellant by the Investigating Officer, the gun used in commission of the crime was recovered from the appellant, which was his licencee-gun. The case is fully proved against the appellant and trial court rightly convicted him. Hence, appeal is liable to be dismissed.

11. First of all, this Court would like to consider the legal issue of conviction under Section 27 Arms Act, 1959. Perusal of record shows that factual position is that the case under Section 27 Arms Act was never committed to the court of sessions and no charge for that offence was framed by trial court. When there was no charge under Section 27 of the Act, 1959, it means that there was no trial of accused for the aforesaid offence. Even then trial court held the appellant guilty and convicted him under Section 27 of the Act, 1959. In this regard, trial court has stated in judgment that in charge-sheet, Investigating Officer has mentioned that offence under Section 304 IPC and Section 27 Arms Act, 1959, are fully proved against the accused-Kalyan. Hence, charge-sheet is being submitted against him. Trial Court has also stated that in spite of charge-sheet submitted against the appellant under Section 27 Arms Act along with Section 304 IPC, Chief Judicial Magistrate, Shahjahanpur, did not mention the offence under Section 27 Arms Act, 1959 in committal order dated 4.8.2003, which seems clerical error. It has further stated that trial court framed charge under Section 304 IPC only and not under Section 27 of Arms Act, 1959. It is also a clerical error. Trial court further mentioned in the judgment that accused was well aware of the fact that he was facing trial for killing the deceased by making fire with his licencee-gun, therefore, he was not prejudiced for not framing charge under the Act, 1959. Further, trial court took the recourse of Section 215 of Cr.P.C. and held that if there is error in charge or omission, it will not be material unless it has mislead the accused and consequently failure of justice is there. In this case, accused knew that it was a case for making fire by his licencee-gun, therefore, he was not mislead by omission as provided under Section 215 Cr.P.C. Trial court also took the recourse of sub section 2 of Section 221 Cr.P.C., which says that if it is proved that accused has

committed other offence different from the charge framed against him, accused can be held guilty for that offence, athough the charge was not framed for that offence. For ready reference, Section 215 Cr.P.C. is quoted herein as under:

"Section 215 in the Code of Criminal Procedure, 1973

215. Effect of errors. *No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice."*

12. The above provision states regarding error or omission in charge. Section 215 Cr.P.C. provides that if there is any error in stating the charge or particulars required and also provides if there is omission to state the offence or those particulars, then it would not be deemed material unless the accused was mislead by such omission or error or there was failure of justice due to that reason. But, in the case in hand, there is absolute absence of charge under Section 27 Arms Act, 1959, and total absence of charge is not omission. When there is complete absence of charge, question does not arise of any error or omission in charge. Furthermore, it is very pertinent to note that in this case, even the case under Arms Act, 1959, was not committed to the court of sessions, therefore, there was no committal and no charge was framed under Section 27 of the Act, 1959, yet the trial court convicted and sentenced the appellant for the offence, the accused was not charged with. It is very strange that trial court opined that total absence of charge is clerical error. Hence, this situation of total absence of charge cannot be said to be the omission in framing of charge.

13. Further, trial court has taken the recourse of Section 221 (2) Cr.P.C., which reads as under:

"Section 221 (1)….

(2) in the Code Of Criminal Procedure, 1973

(2) If in such a case the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of sub-section (1), he may be convicted of the offence which he is shown to have committed, although he was not charged with it.

14. Sub-clause 2 of Section 221 Cr.P.C. provides for a different offence emerged from the evidence other than the offence for which charge is framed. Accused may be convicted of the offence, which he is proved to have committed, although he was not charged with it. This provision does not apply in this case as it is not the case in which after evidence any other offence is emerged apart from the offence for which charge was framed against the appellant. Hence, Section 221 (2) Cr.P.C. does not cover the opinion of trial court. Trial court has made wrong interpretation of Section 215 Cr.P.C. and Section 221 (2) Cr.P.C. in this regard.

15. Hence, conviction of appellant in total absence of charge under Section 27 of the Act, 1959, cannot sustain.

16. Now it comes the offence under Section 304 (2) IPC. Prosecution story is that on 27.4.2003, there was marriage of a girl in

the family of Rajendra Singh in Village-Chavarkhas, P.S.-Katra, where his father went for Erudition *(Panditai)*. 'Harsh-firings' were made there and out of which one fire by appellant hit the shoulder of informants' father-Ratiram, due to which he died. It is admitted case of prosecution that informant-Ramvir Sharma (PW1) was not there at the place of occurrence. He was on his duty as Home-Guard at Bareilly. On getting the information of death of his father, he came to the police station and lodged the FIR. So, PW1 is not the eye-witness of the occurrence. Prosecution has produced Neelu Singh (PW3) as eye-witness where she said in her statement that Ratiram Pandit came in the marriage. There was crowd of 400-500 people. In *harsh*-firing, somebody's fire hit the deceased and whose fire hit the deceased, she does not know because at that time, she was inside the house and there was 40-50 fires in all. This witness was declared hostile and nothing was extracted from her cross-examination by prosecution even she denied her statement under Section 161 Cr.P.C. So, this witness did not support the prosecution case. Sanjeev Kumar (PW5), who is son of the deceased has also produced as eye-witness. Perusal of record shows that his name is not mentioned in the first information report as eye-witness while FIR was lodged by his elder brother. Investigating Officer did not record his statement under Section 161 Cr.P.C. nor he was made witness in charge-sheet. Legal position is that if Investigating Officer has not recorded any statement under Section 161 Cr.P.C., it means his first version comes before the trial court only and there is no previous statement of the occurrence to contradict or corroborate, therefore, there is no occasion to believe the testimony of such witness. Moreover, in this case, the testimony of Sanjeev Kumar (PW5) is not at all reliable. Trial court based its finding of conviction only on the basis of testimony of PW5. It is not denied that conviction cannot be based on sole testimony, but if conviction is made on the sole testimony of the witness then his testimony should be wholly reliable. There should not be any scope of suspicion in his testimony. This is not the position in the present case. PW5 has stated in his examination-in-chief that he had gone in the marriage with his father and at 9:00 p.m. at the time of '*dwarchar*', accused started *harsh*-firing and out of which, one fire hit his father, who died on the spot. But, in his cross-examination, PW5 changed the entire prosecution story and stated that at the time of occurrence, *pooja* was over, the bride-side guests had gone from there, his father was sitting on *chabootra* of Rajendra Singh, accused came there and said *"pandit hosh mein aao, tumko goli maar denge"*. Subsequently, the accused turned the barrel of gun towards the chest of his father and shoot him. This was not at all the case of prosecution. Trial court committed gross-error in holding that it was only exaggeration. It is very important to note that further in his cross-examination, PW5 specifically denied the case of '*harsh*-firing. He has stated, *"mukhya pariksha mein harsh-firing ki baat galat hai. Kallu ne seedhe goli mari thi"*. In this way, PW5 absolutely resiles from the prosecution case and make contradictory statement in his examination-in-chief and in cross-examination. Such type of sole testimony of any witness cannot be relied at all. It is very strange that trial court has opined regarding the statement of PW5 that there was no material contradiction in his statement and his presence at the place of occurrence is not doubtful. It is very perverse appreciation on evidence of PW5. Trial court has miserably failed to appreciate the evidence of PW5 in right persepective.

17. Moreover, trial court has stated that PW5 has proved his presence on the spot and accused has not produced any evidence in rebuttal. In my opinion, this was the burden on prosecution to prove the presence of PW5 at the place of occurrence and it was not the burden on accused to make its rebuttal. There must be close scrutiny of the sole testimony of a witness if court is going to believe his testimony and holding the accused guilty on the basis of sole testimony, but trial court has not scrutinized the testimony of PW5 meticulously. The contradiction of statement of PW5 in his examination-in-chief and cross-examination is so grave and material that it goes to the route of the case and shatters the prosecution case. It is in the opinion of trial court that Ramvir Sharma (PW1) has told in his examination-in-chief that accused was making fire and his fire hit his father. Trial court has believed this statement of PW1. It is very shocking because it is admitted case of prosecution that PW1 was not present at the place of occurrence.

18. Hence, PW1-informant is not eye-witness, PW3 alleged eye-witness has turned hostile and has not supported the prosecution case and testimony of PW5 does not inspire the confidence at all. Therefore, trial court has erred in placing reliance on the testimony of PW5. Moreover, prosecution has failed to prove that the fire of appellant hit the deceased because it is the statement of Investigating Officer-Krishna Pal Mishra (PW4) that there were many people in the marriage and several persons were making fire there. Many empty cartridges were lying on the ground. Hence, as per the statement of Investigating Officer there were many empty cartridges at the place of occurrence, but only a single empty cartridge was picked up by the I.O. because the recovery memo of empty cartridges (Ex.ka7) shows that from the place of occurrence, one empty cartridges of .12 bore was recovered. This cartridge was fired from the licencee-gun of the accused. Prosecution has failed to establish how the above opinion was given by Sub-Inspector while preparing the recovery memo. I.O. (PW4) recovered the licencee-gun of the appellant at the time of his arrest. It proves that I.O. had recovered the gun, alleged to be used in the crime and empty cartridge from the place of occurrence, yet these were not sent to Forensic Science Laboratory for seeking ballistic report as there is no ballistic report on the record nor there is any document on record to show that gun and empty cartridge were sent for ballistic examination. Hence, prosecution has failed to establish that the recovered empty cartridge from the place of occurrence was fired from the gun, recovered from the appellant. In this way also, prosecution has failed to establish that the fire of appellant hit the deceased and caused his death.

19. Keeping in view the above discussion, this Court finds that the finding recorded by trial court on the basis of sole testimony of PW5 is erroneous and perverse. Trial court has committed gross-error in believing the sole testimony of PW5 and conviction should not have been based on such type of testimony, which could not support the prosecution case at all. Hence, the conviction and sentence of appellant cannot be sustained and the appeal is liable to be allowed.

20. Accordingly, the appeal is **allowed.**

20. Conviction and sentence of appellant under Section 304 (Part-II) of

IPC and under Section 27 of Arms Act, 1959, is hereby set aside. He is acquitted of charges framed against him. Appellant's personal bond is cancelled and sureties stand discharged.

(2021)09ILR A226
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.09.2021

BEFORE

THE HON'BLE AJAI TYAGI, J.

Criminal Appeal No. 1407 of 2011

Jagveer Singh @ Bantu
...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Awadhesh Kumar Srivastav, Sri R.P. Srivastava

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

Criminal Law - Indian Penal Code, 1860- Sections 498A & 306- Conviction under- Prosecution witness PW1- and PW2- have failed to prove the version of FIR regarding the demand of additional dowry, torture and killing the deceased by administering the poison to her. The version of the First Information Report is the genesis of this case, but during the course of investigation the suicide-note of deceased was found and it changed the entire story of the prosecution.

Where the prosecution changes the entire story subsequently and fails to prove the initial version alleged in the FI.R, which is the genesis of the case of the prosecution, then the same renders the story of the prosecution doubtful.

Criminal Law - Indian Penal Code, 1860- Sections 107 & 306- Abetment of Suicide- Before a person may be said to have abetted the commission of suicide, he must have played an active role by an act of instigation or by doing certain act to facilitate the commission of suicide. As per provision of Section 107 IPC, it is very much clear that for abetment a person should do something to instigate any person to do something or engages with one or more persons in any conspiracy to do that thing or intentionally aids, by any act or illegal omissions, to do that particular thing.

Settled law that to make an offence of suicide, it is essential to prove that the accused had intentionally instigated the deceased to commit suicide.

Criminal Law - Indian Penal Code, 1860- Sections 107 & 306- There is absolutely nothing in the suicide-note suggesting abetment to commit suicide. There is nothing in the suicide note which can be said to be proximate reason to commit suicide by the deceased. The aforesaid suicide note does not show any *mens rea* on the part of the appellant. No guilty mind of appellant is shown by any statement in suicide note as referred by the trial court. Further, suicide note does not show the fact that there was any instigation or even cruelty on the part of appellant due to which the deceased was left with no option but to commit suicide because if the appellant had separated the deceased from his life, it was not compelling reason which put the deceased in a situation where she had no option but to commit suicide.

Where the suicide note fails to show that there was any proximate reason to commit suicide or there was any criminal intent, instigation or even cruelty of the accused compelling the deceased to commit suicide, then conviction of the accused on basis of such suicide note cannot be upheld. (Para 12, 16, 20)

Criminal appeal allowed. (E-3)

Judgements/ Case law relied upon:-

1. Amalendu Pal Vs. St. of W.B. (2010) 1 SCC 707

2. Chheena Vs. Vijay Kumar Mahajan (2010) 12 SCC 190

3. Rajesh Vs. St. of Har. 2019 (1) JIC 791 (SC)

4. Gurcharan Singh Vs. St. of Punj. 2020 (4) JIC 336 (SC)

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

1. This appeal has been preferred by the appellant-Jagveer Singh @ Bantu against the judgement and order dated 28.02.2011 passed by Additional Sessions Judge, Court No.02, Pilibhit, in Session Trial No.179 of 2009 (*State Vs. Jagveer Singh @ Bantu*) arising out of Case Crime No.1657 of 2008, under Sections 498-A & 306 IPC and Section ¾ Dowry Prohibition Act, 1961, Police Station-Jahanabad, District- Pilibhit, by which the learned trial court convicted and sentenced the appellant- Jagveer Singh @ Bantu for five years rigorous imprisonment and Rs.10,000/- fine (three months imprisonment for default of fine) under Section 306 IPC and two years rigorous imprisonment and Rs.3,000/- fine (one month imprisonment in default of fine) for the offence under Section 498A IPC. All sentences are directed to run concurrently.

2. The brief relevant facts of this case are that on 14.12.2008, informant Madan Lal submitted a written report in P.S.- Jahanabad, District- Pilibhit, with the averments that his grand-daughter (daughter of his daughter) Laxmi Devi was married to Jagveer Singh @ Bantu s/o Khoob Chandra resident of Village-Jalipura in April, 2008. They have given sufficient dowry according to their financial capacity but Jagveer Singh and his parents were not satisfied with the dowry. So, they used to torture Laxmi Devi. Laxmi Devi on several occasions made complaints regarding the demand of additional dowry and torture due to non-fulfillment of the demand. Several times they tried to convince Jagveer Singh, but Jagveer Singh used to quarrel with them also. Villagers of Jagveer Singh's village informed us in the morning at 10 O'clock through telephone that Laxmi Devi has been killed. It was evident that she was given poison.

3. On the above written report, the Case Crime No.1657 of 2008, under Section 498A, 304B IPC and Section ¾ Dowry Prohibition Act, 1961, was registered at P.S.- Jahanabad, District- Pilibhit on the same day against the appellant- Jagveer Singh and his parents. Postmortem of Laxmi Devi was conducted and cause of death could not be ascertained, therefore, viscera was preserved. After inquest of the dead-body of the deceased, report from Forensic Science Laboratory, Lucknow (Ex.ka7) was received. In the report, *aluminum phosphide* poison was found in viscera of the deceased, therefore, charge sheet was submitted against Jagveer and his father Khoob Chandra under the above mentioned offences.

4. Learned trial court framed charges under Section 498A, 304B IPC and ¾ Dowry Prohibition Act, 1961, against both the accused persons. Learned trial court, after conducting full trial, acquitted Khoob Chandra for all charges framed against him, but convicted Jagveer Singh @ Bantu under Section 306 IPC for five years rigorous imprisonment and Rs.10,000/- fine and under Section 498A IPC for two years rigorous imprisonment and Rs.3,000/- fine. Hence, this appeal.

5. Heard Shri Awadhesh Kumar Srivastav, learned counsel for the appellant and Shri S.S. Sachan, learned AGA, appearing for the State.

6. Learned counsel for the appellant argued that the appellant has been falsely implicated in this case by the informant and wrongly convicted by the trial court. No offence is made out against the appellant. Learned counsel for the appellant further submitted that initially a case was registered against the appellant under Section 304B, 498A IPC and ¾ Dowry Prohibition Act, 1961, and it was alleged in the First Information Report that appellant and his parents were not happy and satisfied with the dowry given in the marriage of the deceased and they used to demand additional dowry and also used to torture for non-fulfillment of the dowry, but no such evidence has come out on the record and learned trial court acquitted the accused- Khoob Chandra for all the charges and convicted the appellant- Jagveer Singh under Section 306 IPC only, therefore, it is clear from the judgement of the learned lower court that prosecution story was not believed to be true by the trial court and allegations of demand and torture were found false. Learned counsel for the appellant argued that when prosecution story was not found true then trial court should have acquitted the appellant also.

7. Learned counsel for the appellant next submitted that in this case a suicide-note had come into the picture. Suicide-note was found from the room of the deceased by the Investigating Officer. Entire case is based on it and in the entire suicide-note there is no allegation of demand of dowry or torture and moreover there is no allegation against the appellant for instigating the deceased to commit suicide, but learned trial court did not consider the suicide-note in right perspective. Learned counsel for the appellant further submitted that the informant, who is *Nana* of the deceased and real brother of the deceased Rakesh @ Satish Kumar admitted in their statements that suicide-note was written in the hand-writing of the deceased, therefore, there was no dispute regarding the suicide-note and prosecution witnesses admitted it to be in the hand-writing of deceased-Laxmi Devi. There is no averment in the suicide-note regarding abetment on the part of appellant to commit suicide. Appellant and deceased had cordial relations. Learned trial court has quoted the suicide-note in the judgement, which does not disclose any abetment even then trial court convicted the appellant and sentenced him under Section 306 IPC. Learned counsel for the appellant argued that for abetment, there should be immediate instigation, but it is not so in suicide-note. In this way, appellant is wrongly convicted by the trial court, therefore, the instant appeal may be allowed.

8. Learned AGA submitted that there was cruelty against the deceased by appellant and due to this cruelty trial court convicted the appellant for the offence under Section 498-A IPC. Learned AGA next submitted that suicide-note shows that appellant had driven out the deceased from his life due to which the deceased was mentally disturbed and could not tolerate keeping herself out of life of the appellant.

9. Learned AGA also submitted that although in suicide-note, deceased has written to his brother that her husband and her-in-laws should not be harassed and no case should be registered against them after her death, but law will take its own course.

Learned trial court, after believing the averments of the suicide-note, came to the conclusion that deceased was very uncomfortable and under mental disturbance when the appellant drove out her from his life, although, they were residing together. Due to this mental agony and disturbances, she committed suicide for which appellant was responsible and, therefore, learned trial court rightly convicted the appellant under Section 306 IPC.

10. Prosecution case is that appellant and his parents were not satisfied with the dowry given in marriage of deceased and they used to demand additional dowry and torturing the deceased for not meeting out the same. Prosecution has also brought this case before the court that due to non-fulfillment of demand of additional dowry, Laxmi Devi was killed by poison. To prove its case, prosecution produced two witnesses of fact, PW1- Madan Lal and PW2- Rakesh Kumar @ Satish Kumar. PW-1 is the informant and *Nana* of deceased and PW-2 is the real brother of the deceased. In their respective statements, both the witnesses have reiterated the demand of Rs.50,000/- and a four wheeler as additional dowry from the family of the deceased. Both the above witnesses have stated in their examination-in-chief that due to non-fulfillment of demand of additional dowry, deceased was killed by poison. Both the witnesses supported the version of first information report in their examination-in-chief, but a suicide note, written by the deceased, is the main basis of this case, which was found by Investigating Officer from the room of the deceased. On believing the averments of suicide-note, trial court acquitted Khoob Chandra, father of the appellant and convicted the appellant, not for offence of dowry death but for the offence of abetment to suicide under Section 306 IPC. The learned trial court has opined in the judgement that this fact is not proved on the basis of evidence available on record that husband or father-in-law of deceased have ever tortured her in connection with demand of dowry and trial court gave finding that appellant has separated the deceased from his life which comes in the category of mental cruelty which is clear from the suicide-note, therefore, in this way, the appellant had created such a circumstance and situation before the deceased, which inspired the deceased to commit suicide by consuming the poison and, therefore, the appellant was solely responsible for abetting the deceased to commit suicide.

11. This Court is not at all convinced with the above findings of the trial court regarding mental cruelty and abetment to commit suicide by the appellant.

12. Prosecution witness PW1- Madan Lal and PW2- Rakesh Kumar have failed to prove the version of FIR regarding the demand of additional dowry, torture and killing the deceased by administering the poison to her. The version of the First Information Report is the genesis of this case, but during the course of investigation the suicide-note of deceased was found and it changed the entire story of the prosecution.

13. Learned trial court found that appellant tortured the deceased mentally and he had created such a situation before the deceased by separating her from his life that she was not left with any other option but to commit suicide. This finding of trial court is not in-consonance with the settled position of law regarding abetment.

Abetment to suicide is provided under Section 306 IPC as under:-

"Section 306 in The Indian Penal Code

306. Abetment of suicide.--If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

14. Before discussing the law of abetment it is relevant to quote the provision of Section 107 IPC which is as under:-

"Section 107 in The Indian Penal Code

107. Abetment of a thing.--A person abets the doing of a thing, who--

(Firstly) -- Instigates any person to do that thing; or

(Secondly) --Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

(Thirdly) -- Intentionally aids, by any act or illegal omission, the doing of that thing. Explanation 1.--A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing. Illustration A, a public officer, is authorized by a warrant from a Court of Justice to apprehend Z. B, knowing that fact and also that C is not Z, wilfully represents to A that C is Z, and thereby intentionally causes A to apprehend C. Here B abets by instigation the apprehension of C. Explanation 2.--Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitate the commission thereof, is said to aid the doing of that act."

15. Hon'ble Supreme Court has held in **Amalendu Pal Vs. State of West Bengal (2010) 1 SCC 707** that "it is also to be borne in mind that in cases of alleged abetment of suicide there must be proof of direct or indirect acts of incitement to the commission of the suicide. Merely on the allegation of harassment without there being any positive action proximate to the time of the occurrence on the part of the accused which led or compelled the person to commit suicide, conviction in terms of Section 306 IPC is not sustainable."

16. Before a person may be said to have abetted the commission of suicide, he must have played an active role by an act of instigation or by doing certain act to facilitate the commission of suicide. As per provision of Section 107 IPC, it is very much clear that for abetment a person should do something to instigate any person to do something or engages with one or more persons in any conspiracy to do that thing or intentionally aids, by any act or illegal omissions, to do that particular thing. In this case, it was necessary for appellant to be convicted him for the offence under Section 306 IPC that he should have instigated the deceased to commit suicide or he should have engaged with one or more persons in any conspiracy to abet the deceased to commit suicide or he should have intentionally aided by any act for abetting her to commit suicide.

17. Hon'ble Apex Court in **Chheena Vs. Vijay Kumar Mahajan (2010) 12 SCC 190** held that abetment involves a

mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained. It is also held by the Hon'ble Apex Court in that judgement that in order to convict a person under Section 306 IPC there has to be a clear *mens rea* to commit the offence. It also requires an active act or direct act which led the deceased to commit suicide seeing no option and that act must have been intended to push the deceased into such a position that he committed suicide.

18. In **Rajesh Vs. State of Haryana 2019 (1) JIC 791 (SC)**, Hon'ble Apex Court held that conviction under Section 306 IPC is not sustainable on the allegation of harassment without there being any positive action proximate to the time of the occurrence on the part of the accused, which led or compelled the person to commit suicide. In order to bring a case within the purview of Section 306 IPC, there must be a case of suicide and in the commission of the said offence, the person who is said to have abetted the commission of the suicide must have played an active role by an act of instigation or by doing certain act to facilitate the commission of the suicide. Therefore, the act of abetment by the person charged with the said office must be proved and established by the prosecution before he could be convicted under Section 306 IPC.

19. The Full Bench of Hon'ble Apex Court in ***Gurcharan Singh Vs. State of Punjab*** 2020 (4) JIC 336 (SC) held that "as in all crimes, *mens rea* has to be established. To prove the offence of abetment, as specified under Section 107 IPC, the state of mind to commit a particular crime must be visible, to determine the culpability in order to prove *mens rea*, there has to be something on record to establish or show that the appellant herein had a guilty mind and in furtherance of that state of mind, abetted the suicide of the deceased.

20. In the case in hand, the trial court has referred the suicide-note left by the deceased which shows the sole reason of committing the suicide by the deceased was that she was separated by the appellant from his life. In the opinion of this Court, the aforesaid reason could not be the reason which could come under the category of the abetment. There is absolutely nothing in the suicide-note, which would make him responsible for an offence under Section 306 IPC. This Court finds nothing in the suicide-note suggesting abetment to commit suicide. There is nothing in the suicide note which can be said to be proximate reason to commit suicide by the deceased. The aforesaid suicide note does not show any *mens rea* on the part of the appellant. No guilty mind of appellant is shown by any statement in suicide note as referred by the trial court. Further, suicide note does not show the fact that there was any instigation or even cruelty on the part of appellant due to which the deceased was left with no option but to commit suicide because if the appellant had separated the deceased from his life, it was not compelling reason which put the deceased in a situation where she had no option but to commit suicide. Learned trial court has given finding that there was mental cruelty on the part of appellant towards the deceased and on the basis of this finding, appellant was convicted under Section 498A IPC, but this Court is not convinced with this finding also because firstly there was no averment of demand of additional

dowry of Rs.50,000/- and a four wheeler in the FIR. The statements of PW-1 and PW-2 show that they did not state this fact before the Investigating Officer also, both the above witnesses have stated the fact of demanding Rs.50,000/- and a four wheeler for the first time before the trial court, therefore, these averments will come under the category of improvement. Moreover, entire suicide-note does not contain any such demand of dowry or torturing the deceased. Learned trial court has wrongly given the finding of mental cruelty on the basis that appellant drove out the deceased from his life. In the absence of *mens rea* and proximate cause for abetting the suicide, learned trial court has wrongly appreciated the law regarding the abetment.

21. On the basis of above discussion, this Court is of the definite opinion that learned trial court did not appreciate the evidence on record in right perspective and wrongly convicted the appellant for the offence under Sections 306 IPC and 498A IPC.

22. Hence, the appeal is liable to be **allowed.**

23. Accordingly, the appeal is allowed. Conviction and sentence of appellant as awarded is hereby set aside. Appellant is on bail, his bail bond is cancelled and sureties are discharged.

(2021)09ILR A232
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.08.2021

BEFORE
THE HON'BLE AJAI TYAGI, J.

Criminal Appeal No. 1534 of 2020

Vinod Mali ...Appellant (In Jail)

Versus

State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Shiv Vilas Mishra, Sri Vinod Kumar Sharma

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

Criminal Law - Indian Penal Code 1860- Section 413- Code of Criminal Procedure 1973- Section 313- Confession under- Appellant-accused was held guilty and sentenced by the trial court on the basis of his confessional statement made before the learned trial court. Confession made by the accused, shall be taken as a whole. It cannot be in parts because it was made regarding same occurrence and he made confession with his own freewill - Offences committed by the appellant which he confessed include offence under Section 413 I.P.C. also. After confession made by the appellant, no other evidence was required to convict him. When conviction is made as a whole regarding any occurrence or set of occurrences, it shall be taken as a whole. It cannot be fragmented into pieces and accused cannot at later stage claim that confessional statement made by him, should be considered regarding some of the offences only.

Where the accused makes a confession voluntarily then the same will be taken as a whole and would apply to other offences also with which he is charged and conviction on the basis of such confession shall also be taken as a whole and for all the offences - No further evidence is required to be adduced by the prosecution after confession by the accused.

Criminal Law - Indian Penal Code 1860- Section 413- For convicting the accused under Section 413 I.P.C. it is not mandatory particularly after confession, that accused should have already been convicted under Section 411 I.P.C. twice or more than twice because accused appellant has himself made confession

before the learned trial court that he was habitual in dealing with the stolen properties. It is not the case of the appellant nor he argued that accused did not make confession with freewill.

When the accused voluntarily confesses that he was habitual in dealing with stolen properties then it is not mandatory for the prosecution to establish that he was previously convicted u/s 411 IPC twice or more than twice. (Para 18, 19, 21)

Criminal appeal rejected. (E-3)

Judgements/ Case law cited:-

1. Ajay Sethi Vs State 2017 (4) JCC 2495 (Distinguished on facts)

2. Banne Singh @ Pahalwan Vs St. of Raj., 2014 SCC Online Raj 169 (Distinguished on facts)

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

1. Heard learned counsel for the appellant and learned A.G.A. for the respondent.

2. This criminal appeal has been preferred by the appellant-Vinod Mali, who was convicted and sentenced in S.T. No.503 of 2019 (State Vs. Vinod Mali), arising out of Case Crime No.137 of 2016, registered under Sections 177, 171, 419, 417, 411 and 413 I.P.C. at Police Station G.R.P., District Gorakhpur, in which the accused-appellant was convicted for six months under Section 177 I.P.C., for three months under Section 171 I.P.C., for two years under Section 419 I.P.C., for one year under Section 417 I.P.C., for two years under Section 411 I.P.C. and for six years under Section 413 I.P.C. alongwith fine in all above offences and imprisonment for default of fine.

3. The relevant facts of the case are that on 12.03.2016 police party of Police Station G.R.P., District Gorakhpur was checking at the railway station and platform, when they were present at platform no.2, the informer informed the police party that some persons were standing near the gate no.1; they were suspected and were talking about theft and robbery. Police party went to that place and found that two persons were sitting on different motorcycles and others were standing there; one person was sitting on motorcycle no. U.P. 53 AS 7764 in police uniform; when he was inquired he told his name as Vinod Mali S/o Late Phooldev Mali, R/o Loharpurwa, P.S. Kaimpiarganj, permanent resident of village Pandit Purwa, P.S. Dohari Ghat, District Mau and he told that he was a constable and posted in Kotwali Maharajganj. He was asked to produce identity card, which was produced by him; prima facie identity card was looking suspicious, hence, accused Vinod Mali was asked to tell the name of S.P., Maharajganj but he could not tell name of S.P., Maharajganj and after that he was asked to tell the name of Inspector Kotwali, Maharajganj but he also could not tell the name of Inspector, Kotwali Maharajganj; when he was strictly inquired, he told that he was not a constable but rather he has running a gang of which he was a leader and other persons are his gang members. They used to make theft or robbery of passengers travelling in train and by that, they earn the bread and butter of their family. Vinod Mali also told the police that if some member of his gang is caught by the people, he helps them in the name of being in the police department. All the persons standing there, were arrested by the police and they confessed that they were having Alprazolam powder, stolen motorcycles and stolen mobile phones etc.

4. From the possession of accused-appellant 120 grams of Alprazolam

powder, two stolen mobile phones, one stolen motorcycle were recovered and a fake identity card of U.P. Police was also recovered at the time of arrest. The police uniform of appellant-Vinod Mali was also found fake.

5. Alongwith appellant-accused, other co-accused persons Santosh, Chauhan, Nand Lal @ Nandu Chauhan, Ram Darash Nishad and Ram Kishore @ Raj Kishore were also arrested and from their possession also Alprazolam powder, stolen mobile phones, stolen tablets and stolen motorcycle were recovered. As per the recovery memo, all the above persons were booked under Section 8/21/22 of Narcotic Drugs and Psychotropic Substance Act, 1985 and also under Sections 411, 413, 414, 417, 419 and 171 I.P.C. All the recovered articles were sealed on the spot and sample seal was prepared. Recovery memo was also prepared on the spot and the cases were registered against above accused persons.

6. The learned trial court has commenced the trial of above accused persons after framing different charges against them and after examination of P.W.-1 and P.W.-2, the case file of appellant-Vinod Mali was separated from other co-accused persons.

7. The learned trial court framed charges under Sections 177, 171, 419, 417, 411 and 413 I.P.C. against the accused-appellant and he was convicted for all the above offences. Aggrieved by the impugned judgment and order of learned trial court, the appellant preferred this appeal.

8. Learned counsel for the accused-appellant said that as per the prosecution case, 120 grams of Alprazolam powder was said to be recovered from the possession of the applicant for which separate case under relevant Sections of N.D.P.S. Act was registered and in this present case, two stolen mobile phones and one stolen motorcycle were said to be recovered from the possession of accused-appellant. Apart from that it is said that he was having fake identity card of U.P. Police and wearing fake uniform of U.P. Police; posing himself as police constable and on making inquiry by the police of G.R.P., Gorakhpur, he falsely told them that he was a police constable and posted in Kotwali, District Maharajganj.

9. Learned counsel for the appellant submitted that P.W.-1, constable Ram Pravesh Bharti and P.W.-2 Head Constable Abhay Pandey were examined before the learned trial court and at that time accused-appellant moved a confession application before the learned trial court and his file was separated. In his statement under Section 313 Cr.P.C. accused-appellant confessed his guilt and on the basis of that confession, learned trial court held him guilty for all the charges framed against him and convicted.

10. Learned counsel for the appellant also submitted that apart from the conviction of offences under Sections 177, 171, 419, 417 and 411 I.P.C., the accused-appellant was also convicted and sentenced under Section 413 I.P.C. It is next submitted that he had nothing to say regarding the conviction and sentence of all the other offences except offence under Section 413 I.P.C. because Section 413 I.P.C. relates to the habitual offender.

11. Learned counsel for the appellant argued that in its impugned judgment,

learned trial court has given finding regarding the appellant being habitual offender only in one line by saying that accused was habitual offender used to deal in stolen property while for being habitual, the accused should have been convicted twice or more than twice under Section 411 I.P.C. No person can become habitual by a single act. Learned counsel for the appellant in this regard relied upon the case law of Delhi High Court ***Ajay Sethi Vs. State 2017 (4) JCC 2495*** by saying that in this case Delhi High Court has held that for being habitual, the accused should have been convicted twice or more than twice under Section 411 I.P.C. Learned counsel also submitted that in above said judgment, Delhi High Court has followed the case of ***Banne Singh @ Pahalwan Vs. State of Rajasthan, 2014 SCC Online Raj 169***. In this case Rajasthan High Court has also held that for being habitual, a person should have been convicted twice or more than twice under Section 411 I.P.C.

12. Learned counsel for the appellant has submitted that if the appellant had made confession before the learned trial court under Section 413 I.P.C., even then he could not have been held guilty for that offence rather at that time learned lower court should have asked for at least two judgments of conviction of accused-appellant under Section 411 I.P.C. There is no evidence on record that accused was ever convicted for the offence under Sections 411 I.P.C.

13. Per contra, learned A.G.A. has submitted that accused himself made confession of his offences with freewill before learned trial court and there is nothing under Section 413 I.P.C. that accused should have been convicted more than once for offence under Section 411 I.P.C. There is no such requirement in the Section 413 I.P.C. Learned counsel for the appellant made rival submission in this regard that judicial interpretation of Section 413 I.P.C. is there through the judgment of ***Ajay Sethi Vs. State (Supra).***

14. I have perused the judgment of ***Ajay Sethi Vs. State (Supra)***, which was referred by learned counsel for the appellant. In this case, it is held by Delhi High Court as under:-

"49. Something more is required to establish that the offender is in the habit of dealing with or receiving stolen property. Since the offence under Section 413 I.P.C. is inter-related with and is an aggravated form of Section 411 I.P.C., the State would have to prove and establish that the offender was convicted repeatedly, twice or more than twice, for offence under Section 411 I.P.C. so as to establish beyond a reasonable doubt that he is in the habit of dealing with or receiving stolen property. Therefore, the conviction under Section 413 I.P.C. is based on repeated convictions for offence under Section 411 I.P.C. Due to previous conviction, a punishment of different kind is prescribed in Section 413 I.P.C. which the accused is required to undergo.

50. Hence, while prosecuting a person for offence under Section 413 I.P.C., the prosecution has to prove the following factors: firstly, the property in question has been stolen from a place. Thus, the prosecution must bring the property within the ambit of Section 410 I.P.C. within the definition of stolen property. Secondly, the offender has been dealing with or receiving stolen property. Thirdly, the offender knew or had a reason to believe the property to be stolen. Fourthly, he has been repeatedly convicted,

i.e. twice or more than twice, of offence under Section 411 I.P.C. It is only after the prosecution establishes these factors that the court would be legally justified in concluding that the offender is habitually dealing with or receiving stolen property and in imposing the punishment as prescribed by Section 413 I.P.C."

15. These are the above observations made by the Rajasthan High Court, which were followed by Delhi High Court in above said judgment but the facts of above cases decided by Delhi High Court and Rajasthan High Court do not apply to this case because in the cases of Delhi High Court and Rajasthan High Court, several FIRs/Charge Sheets were pending against the concerned accused persons and Delhi and Rajasthan High Court held that concerned accused has not been yet convicted under Section 411 I.P.C. In the concerned case of ***Banne Singh @ Pahalwan Vs. State of Rajasthan High Court (Supra)***, Rajasthan High Court said that appellant was involved in six different FIRs *"undoubtedly so far the appellant has been convicted only by the learned trial court at Jaipur. He continues to face trials and other FIRs mentioned above, hence prior to his conviction by the learned Judge, the appellant was never convicted for offence under Section 411 I.P.C."* In the case before Delhi High Court in **Ajai Sethi Vs. State (Supra)**, there were also several FIRs pending against the accused-appellant and Delhi High Court held that in order to convict a person under Section 413 I.P.C., the most important ingredient is that a person must be a habitual offender or receiver of stolen goods. He must be a person who is in the habit of receiving stolen properties and this Section cannot be applied in case of a single offence. The element of repetition is mandatory. Merely on the basis of pendency of FIRs or a person facing trial, a conviction under Section 413 I.P.C. would be unjustifiable in absence of accused previous conviction(s).

16. In this present case, facts are entirely different from the facts which were before the Delhi High Court and Rajasthan High Court because in this case appellant-accused was held guilty and sentenced by the trial court on the basis of his confessional statement made before the learned trial court. Although, the learned counsel for the appellant has argued that learned trial court could not hold him guilty on the basis of confession of appellant. Perusal of record shows that accused-appellant was arrested on 12.03.2016 along with other accused persons at railway station Gorakhpur and during trial, prosecution examined two witnesses as P.W.-1 and P.W.-2.

17. P.W.-1 is formal witness. Accused did not make any cross-examination of P.W.-2 and confessed his guilt in his statement under Section 313 Cr.P.C.

18. I do not agree with the submission made by the learned counsel for the appellant that despite the confession of appellant, learned trial court should have asked for two judgments in which appellant would have been convicted under Section 411 I.P.C. because confession made by the accused, shall be taken as a whole. It cannot be in parts because it was made regarding same occurrence and he made confession with his own freewill and in his statement under Section 313 Cr.P.C., in question no.6 it was specifically put before the appellant as to whether he habitually used to deal in stolen goods. Appellant did not deny this question and in question no. 11, he also said that trial was held against

him on account of commission of offences by him. It is important to mention that offences committed by the appellant which he confessed include offence under Section 413 I.P.C. also.

19. After confession made by the appellant, no other evidence was required to convict him. The confession regarding other offences under Sections 177, 171, 419, 417 and 411 I.P.C. is not challenged by appellant. Hence, when conviction is made as a whole regarding any occurrence or set of occurrences, it shall be taken as a whole. It cannot be fragmented into pieces and accused cannot at later stage claim that confessional statement made by him, should be considered regarding some of the offences only.

20. P.W.-2, Abhay Pandey, Head Constable was produced by the prosecution before the learned trial court as arresting witness, who said in his statement that on 12.03.2016 he along with other members of police party of P.S. G.R.P. Gorakhpur was present at platform no.2A. At the time of checking, accused-appellant was arrested by the police along with other co-accused persons and two stolen mobile phones, one stolen motorcycle were recovered from his possession apart from Alprazolam powder. It was also stated by this witness that at the time of arrest, appellant was having a fake identity card of U.P. Police and was wearing fake uniform of U.P. Police. Above statement was made by P.W.-2 in his examination-in-chief and it is very pertinent to note that P.W.-2 was not cross-examined by the accused-appellant, rather he made the confession of his guilt under Section 313 Cr.P.C. Hence, in my opinion, confessional statement of accused-appellant cannot be treated as partial and applicable to some of the offences only.

21. In view of the above, I am unable to agree with the argument of learned counsel for the appellant that for convicting the accused under Section 413 I.P.C. it is mandatory particularly after confession, that accused should have already been convicted under Section 411 I.P.C. twice or more than twice because accused appellant has himself made confession before the learned trial court that he was habitual in dealing with the stolen properties. It is not the case of the appellant nor he argued that accused did not make confession with freewill.

22. No other argument raised by the appellant.

23. I find no merit in this appeal and the same is liable to be dismissed.

24. The appeal is accordingly, **dismissed.**

(2021)09ILR A237
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.08.2021

BEFORE

THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Criminal Appeal No. 2051 of 1993

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

Counsel for the Appellant:
Sri V. Singh

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

Essential Commodities Act- Section 3/7- Modification of Sentence- Two hundred

litres of kerosene oil kept in a drum has been recovered from the outer portion of the house inside an open room of the accused and he was in possession of it, so the findings of conviction recorded by the learned trial court is just and proper. Learned trial court has sentenced the accused for two years rigorous imprisonment and fine of Rs. 2,000 and in default of payment of fine further six months rigorous imprisonment. The incident is of the year 1982 near about 39 years have passed since. The age of the accused according to the statement recorded under Section 313 Cr.P.C. was 40 years in October, 1993, so at present his age is about 68 years. Considering the aforesaid facts and the quantity and nature of Essential Commodity i.e. kerosene oil, it will be too harsh to send him to prison and in the opinion of this Court imposition of fine will serve the purpose of justice. So sentence is liable to be modified accordingly. Conviction of the accused under Section 3/7 Essential Commodities Act is upheld but sentence is modified and accused is punished with a fine of Rs. 10,000/-

Although the conviction of the accused is held to be just and proper but considering his present age and nature of the offence, which is not heinous, while maintaining the conviction the sentence accordingly modified to enhancement of fine. (Para 10, 11)

Criminal Appeal partly allowed. (E-3)

(Delivered by Hon'ble Syed Aftab Husain Rizvi, J.)

1. Heard learned counsel for the appellant and learned AGA for the State.

2. This criminal appeal has been filed against the judgment and order dated 10.11.1993 passed by Special Judge, Varanasi in Criminal Case No. 52 of 1986 (State Vs. Jagarnath), Crime No. 356 / 1982, Police Station - Sigra, Varanasi convicting the appellant under Section 3/7 of Essential Commodities Act and sentencing him to undergo two years rigorous imprisonment and a fine of Rs. 2000/- and in default of payment of fine, further six months rigorous imprisonment.

3. In brief, the prosecution case is that on 17.10.1982 at about 9:15 p.m., Station House Officer, Sigra received an information that one Jagarnath has stored kerosene oil in his house in illegal manner, in order to sell it, in black market. The SHO, Sigra along with other police officials and public witnesses - Sahablal and Paras reached at the house of Jagarnath and on search found 200 litres of kerosene oil kept in a drum in the corner of the outer room of the house. The accused could not show any licence. The Raiding Party took the drum of kerosene oil in its possession, prepared the recovery memo at the spot and lodged a First Information Report at police station - Sigra on the same day at about 10:30 p.m. Investigation commenced and after completion of investigation, charge sheet was submitted. Statement of the accused was recorded and particulars of the offence stated to him. The accused pleaded not guilty and claimed for trial. The prosecution produced four witnesses. Statement of accused under Section 313 Cr.P.C. was recorded in which accused denied the prosecution case and further stated that his brother - Sita Ram is inimical to him, who falsely got him implicated in this case in connivance with the local police. Learned trial court after hearing the arguments by the impugned judgment held accused guilty and sentenced him.

4. Learned counsel for the appellant contended that the place of recovery of kerosene oil is an open place outside the

house and in the premises where other families also reside. The appellant has no concern whatsoever with the seized kerosene oil which belongs to his brother - Sita Ram. The kerosene oil has been recovered from an open chabutara, so it cannot be said that it has been recovered from the possession of the accused. Learned counsel for the appellant further submitted that prosecution has led no evidence that kerosene oil was kept there for sale and there is no evidence to show that appellant was selling it. No instrument or material has been recovered which can show that it was kept for sale. The prosecution has failed to prove that the seized kerosene oil was recovered from the exclusive possession of the appellant. As such the conviction and sentence passed by the trial court is against the fact and law.

5. Learned AGA submitted that kerosene oil has been recovered from chabutara which is outer portion of the house of the appellant. The prosecution witnesses have proved the recovery of the kerosene oil. The accused / appellant has failed to produce any evidence in defencee that seized kerosene oil belongs to his brother - Sita Ram. The huge quantity of the kerosene oil itself indicates that it was kept for black marketing. The learned trial court has rightly examined the evidence on record and finding recorded by the trial court is reasonable and proper and there is no perversity in it.

6. Out of the four witnesses produced by the prosecution, two witnesses, namely constable - Krishna Bihari Misra - P.W.-1 and D.P. Shukla, the then Station House Officer, Sigra - P.W.-2 are the witnesses of facts. They are members of the police party that raided the house of the accused and made the recovery. Both the witnesses supporting the FIR version in their examination-in-chief have stated that two hundred litres of kerosene oil kept in a drum in the outer portion of the house of the accused in an open room was recovered by them. The site plan (exhibit ka-6) also indicates the place where the drum was kept. It is in the north-east direction inside the house of accused in an open room called Osara. Learned trial court has appreciated the entire oral evidence of both these witnesses and found it reliable. The defence has cross examined the two prosecution witnesses at length but there is nothing in their cross examination which affects their reliability. No major discrepancies or contradictions have been detected and learned trial court has rightly believed their testimony. Their oral testimony cannot be disbelieved simply for the reason that they are police personnels.

7. The contention of learned counsel for the appellant is that the recovery of kerosene oil is from the house where many families reside and appellant and his brothers were living separately in the aforesaid house and recovery has been made from an open place, so the prosecution has failed to prove that the seized kerosene oil was recovered from the exclusive possession of the appellant. Learned trial court has considered this aspect and has observed that; *"P.W.-1 - Krishna Bihari in his deposition has stated that the house where the accused resides certain other persons also reside therein but this witness has also deposed in his cross examination that the portion wherefrom the kerosene oil was recovered, was in possession of accused - Jagarnath and accused told the police party that this kerosene oil was to be given by him to his nephew - Raj Kumar."* The place of recovery is outer portion of the house but

inside the house in the form of an open room. Learned trial court has further observed that; *"the open chabutara adjacent to the road belongs to the portion of the house of the accused Jagarnath and it is commonly seen that in densely populated areas, houses are having open chabutaras or an open room type structure adjacent to the houses and the people uses these places for keeping the domestic articles."* The reasoning given by the trial court is proper and argument of the learned counsel for the appellant has no force

8. Another argument raised by the learned counsel for the applicant is that no other instrument or material has been recovered which can show that kerosene oil was kept for sale. This argument has also no force. At the relevant time, the license order was in force, so keeping two hundred litres of kerosene oil without any valid license is itself sufficient to prove the guilt. Such a large quantity of kerosene oil cannot be presumed to be kept for personal use.

9. The remaining two witnesses P.W.-3 - S.I. Harday Nand Mishra and P.W.- 4 - S.I. Rajnath Pandey are formal witnesses who have proved the other prosecution papers, like FIR, copy of the G.D., site plan and charge sheet.

10. From the evidence on record, it stands proved that two hundred litres of kerosene oil kept in a drum has been recovered from the outer portion of the house inside an open room of the accused - Jagarnath and he was in possession of it, so the findings of conviction recorded by the learned trial court is just and proper. There is no infirmity or illegality in the finding of conviction recorded by the learned trial court.

11. Learned trial court has sentenced the accused for two years rigorous imprisonment and fine of Rs. 2,000 and in default of payment of fine further six months rigorous imprisonment. The incident is of the year 1982 near about 39 years have passed since. The age of the accused according to the statement recorded under Section 313 Cr.P.C. was 40 years in October, 1993, so at present his age is about 68 years. Considering the aforesaid facts and the quantity and nature of Essential Commodity i.e. kerosene oil, it will be too harsh to send him to prison and in the opinion of this Court imposition of fine will serve the purpose of justice. So sentence is liable to be modified accordingly.

12. Appeal is partly **allowed**. Conviction of the accused under Section 3/7 Essential Commodities Act is upheld but sentence is modified and accused is punished with a fine of Rs. 10,000/- which he will deposit within one month from today. He will produce computer generated copy of the judgment attested by the counsel before the trial court enabling him to deposit the fine. In default of payment of fine accused will undergo four months simple imprisonment.

13. Lower court record along copy of the judgment be transmitted to the trial court immediately.

(2021)09ILR A240
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.09.2021

BEFORE

THE HON'BLE AJAI TYAGI, J.

Criminal Appeal No. 3987 of 2018

Mukesh @ Mukesh Kumar Gupta
...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Umesh Chandra Tiwari, Sri Bed Kant Mishra, Sri Devendra Dahma, Sri Ragvendra Singh Rathour

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

A. Criminal Law - Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code, 1860-Section 498-A, 304-B, 304(2) - Dowry Prohibition Act, 1961-Section 4-challenge to-conviction-appellant gave information of hanging of the deceased while it was found in Post-mortem that she died due to asphyxia by giving pressure on her neck-it was given the color of suicide-Provision of Section 106, Indian Evidence Act, 1872 is attracted- informant turned hostile in cross-examination-Rest witnesses turned hostile since the beginning of their examination-in-chief- conviction upheld however quantum of sentence is reduced up to seven years.(Para 1 to 22)

B. Factum of death of deceased was "especially" within the knowledge of appellant-husband, but he failed to explain-appellant admitted his presence at the place of occurrence-A denial of prosecution case coupled with absence of any explanation inconsistent with the innocence of the accused, but consistent with the hypothesis that the appellant is a prime accused in the commission of offence-the burden of proof would be on the husband to explain grounds for the unnatural death of his wife-conviction upheld however quantum of sentence is reduced up to seven years.(Para 18 to 19)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Shambhu Nath Mehra Vs St. of Ajmer(1956) AIR 404

2. Ganesh Lal Vs St. of Mah. (1992) SCC 3 106

3. Dnyaneshwar Vs St. of Mah. (2007) 10 SCC 445

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

1. This appeal has been preferred by the appellant-Mukesh @ Mukesh Kumar Gupta against the judgment and order dated 11.7.2018, passed by Sessions Judge, Sonbhadra, in S.T. No.45 of 2016 (State vs. Mukesh @ Mukesh Kumar Gupta) arising out of Case Crime No.26 of 2016, under Sections 498-A, 304-B IPC and under Section 4 Dowry Prohibition Act, 1961 *(herein after referred to as 'Act, 1961')*, Police Station-Beejpur, District-Sonbhadra, by which learned trial court convicted appellant under Section 304 (2) IPC and sentenced for eight years' rigorous imprisonment and Rs.10,000/- fine and in default of fine, one year's simple imprisonment.

2. The brief facts of the case are that informant-Rajendra Prasad Shah submitted a written report at P.S.-Beejpur on 1.2.2016 stating that his sister Kusum Shah married on 7.6.2010 with Mukesh Gupta. Enough dowry was given in the marriage according to the financial condition. After some months of marriage, his sister came to parental house and told that her husband used to take *alcohol* and beat her also. Her father Sudarshan Gupta and mother Shiv Kumari Gupta used to demand Rs.1,00,000/- (one lakh) as additional dowry and constantly torture her. The husband and her-in-laws used to torture and even after his intervention, position was not improved. On 1.2.2016 at 1:46 a.m., Mukesh told him on mobile phone that his

sister has hanged herself. On hearing it, people from her parental home went to her in-laws house and saw that a rope (*gamchha*) was hanging with the fan in her room. It is alleged that his sister's husband-Mukesh, father-in-law-Sudarshan Gupta, mother-in-law-Shiv Kumari have killed her for not meet out the demand of Rs.1 lakh as additional dowry.

3. On the basis of above written report, an FIR was lodged at P.S.-Beejpur under Section 498-A, 304-B IPC and 3/4 of Act, 1961, against Mukesh Kumar Gupta, Sudarshan Gupta and Shiv Kumari.

4. Nayab Tehsildar-Dudhi prepared inquest report and investigation took place. After investigation, the Investigating Officer submitted charge-sheet against Mukesh Kumar Gupta, Sudarshan Gupta and Shiv Kumari Gupta under Section 498-A, 304-B IPC and Section 3/4 of Act, 1961. Case was committed to the court of sessions and learned trial court framed charges against all the said persons under the aforesaid Section 498-A, 304-B IPC and Section 4 of Act, 1961. After completion of trial, learned trial court found no sufficient evidence against Sudarshan Gupta and Shiv Kumari Gupta and they were acquitted. Appellant-Mukesh @ Mukesh Kumar Gupta was not convicted for the offence under Section 302 IPC, but for the offence committed under Section 304(2) IPC and he was sentenced for eight years' rigorous imprisonment with Rs.10,000/- fine. Hence, this appeal.

5. Heard Shri Bed Kant Mishra, learned counsel for the appellant, Mr.B.A. Khan, learned AGA appearing for the State and perused the record.

6. Learned counsel for the appellant submitted that appellant has been falsely implicated in this case. On the basis of evidence on record, learned trial court came to the conclusion that there was no sufficient evidence on record for demand of dowry, torturing the deceased and killing the deceased for want of additional dowry and due to this reason learned trial court has acquitted all the three accused persons for above charges, hence in such a situation, it was not proper to convict the appellant-Mukesh Kumar Gupta under Section 304 (2) IPC because there is no evidence on record that anybody has seen the occurrence and there is no eye-witness in this case, who could depose that appellant has murdered the deceased. All the witnesses of fact produced by prosecution have turned hostile and nobody has supported the prosecution case. Learned counsel for the appellant submits that it is the appellant, who first of all, informed the brother of deceased regarding her death. It shows his *bona fide.*

7. Learned counsel for the appellant has argued that real fact is that on the fateful day, there was function of *Annprashan* of appellant's nephew in which the guests were invited from the family of deceased also, but no one came from her family in the function. On account of this fact, deceased was puzzled and probably due to that reason, she committed suicide and appellant being the husband of the deceased was implicated. Hence, this appeal be allowed.

8. Learned AGA argued that although the witnesses of fact have turned hostile and case of dowry death could not be proved, but there is enough evidence on record to prove that appellant murdered the deceased because he was present at the place of occurrence and occurrence took place inside the room. Learned counsel for

the trial court has mentioned in the judgement that there was no access of any other person in the above said room. Learned AGA also submitted that as per provisions of Section 106 of Indian Evidence Act, 1872, it was the burden on the shoulder of appellant to prove as to why the deceased committed suicide if it was so. What was happened before the occurrence, it was the fact which was in the special knowledge of the appellant, but appellant has not discharged his burden and learned trial court rightly convicted the appellant. Learned AGA also argued that defence is taken appellant before trial court that the deceased committed suicide, but the antemortem injury in postmortem report suggests otherwise. There was no ligature mark on the neck of the deceased, therefore, it was not the case of the suicide and appellant killed his wife. There is no error in judgment of trial court, hence appeal be dismissed.

9. In this case, prosecution has produced Rajendra Prasad Shah (PW1), Choteylal Shah (PW2), Jagmati (PW3), Ramcharitra Sahu (PW7) and Shiv Prasad (PW8) as the witnesses of fact to prove its case, but all the above witnesses have turned hostile. Rajendra Prasad Shah (PW1), who is informant and brother of the deceased, has supported prosecution case in his examination-in-chief, but has turned hostile during cross-examination. Rest of the above witnesses turned hostile since beginning of their examination-in-chief. Hence, trial court acquitted all the accused persons for the charges under Section 498A, 304B IPC and Section 4 of Act, 1961, because these charges were not proved, but learned trial court held that provision of Section 106 of Indian Evidence Act, 1872, is attracted in the facts and circumstances of the case. It was burden on the shoulders of appellant to explain the surrounding circumstances due to which the deceased committed suicide, if it was his defence. Hence, on the basis of alternative remedy under Section 302 IPC, trial court found that the case of Section 304 (2) IPC is well proved against the appellant-husband.

10. Dr.Manoj Kumar Ekka (PW4) has conducted the postmortem of the deceased. In his statement, he has proved the postmortem report as Ex.ka2. PW4 in his evidence has deposed that there was antemortem injury on the neck of the deceased, which was swelling and contusion measuring 3.0cm x 2.5cm and 6.5cm away from the chin. The doctor has stated the cause of death as asphyxia due to the pressure over neck. If it would have been a case of hanging, there must have been a ligature mark on the neck of the deceased, but it was not so in this case and doctor has suggested in his statement that pressure was given on the neck of the deceased, which was the cause of death. Hence, by medical evidence available on record, it is proved that it was not the case of hanging, but it was a case of asphyxia due to pressure given on the neck of the deceased.

11. Some important aspects of this case are that deceased died in her matrimonial home, rather in the room in which she used to live with her husband. Appellant made telephonic call to the brother of the deceased, who is informant and produced before trial court as PW1 and informed him about the death of the deceased. Appellant has also stated that in his statement under Section 313 Cr.P.C. that he got to know about the hanging of the deceased when he went in his room to sleep. Hence, the appellant has admitted his

presence at the place of occurrence. It is very important to note that appellant informed the brother of the deceased about hanging while according to postmortem report (Ex.ka2), it was not the case of hanging, but asphyxia due to pressure on neck.

12. Now situation is whether in view of the circumstances of this case, provision of Section 106 of Indian Evidence Act, 1872, is attracted. For ready reference Section 106 of the Act, 1872, is provided as under:

"Section 106 in The Indian Evidence Act, 1872

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."

13. It is admitted fact that (i) death was in matrimonial home of the deceased and more particularly in her room because PW7 has stated in his cross-examination that *"जिस कमरे में मेरी भांजी रहती थी उसी कमरे में फांसी लगाई थी"*. (ii) appellant gave information to PW1 regarding the death of the deceased and in his statement under Section 313 Cr.P.C. also, he admitted his presence at the place of occurrence. Hence appellant's presence at the place of occurrence is well-proved. (iii) The cause of death told by appellant to PW1 was hanging and the explanation of hanging was given by appellant in his statement under Section 313 Cr.P.C. is that *"मैं निर्दोष हूँ. मेरे चचेरे भाई के लड़के के अन्नप्राशन में मेरी बीवी के मायके का कोई नहीं आया जिससे वह काफी परेशान थी. जब कमरे में सोने गया तब घटना की जानकारी मिली"*.

This explanation is not at all plausible and does not appeal to the reasonable mind. (iv) Most importantly, appellant gave information of hanging of the deceased while it was found in postmortem that she died due to asphyxia by giving pressure of her neck.

14. In these circumstances, it is clear that the factum of death of the deceased was only within the special knowledge of the appellant. Hence, in the surrounding circumstances of the case, provision of Section 106 of Indian Evidence Act, 1872 is attracted.

15. In ***Shambhu Nath Mehra vs. State of Azmer*** *[1956 AIR 404]*, it was held that the section is not intended to shift the burden of proof (in respect of a crime) on the accused, but to take care of a situation where a fact is known only to the accused and it is extremely difficult for the prosecution to prove that fact. It is further said that this (Section 101) 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 all that duty. On the contrary, it is defined 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.

16. In ***Ganesh Lal vs. State of Maharashtra*** *[1992 SCC (3) 106]*, the accused was prosecuted for the murder of his wife inside his house. Since the death had occurred in his custody, it was held that the appellant was under an obligation to give an explanation for the cause of death in his statement under Section 313 Cr.P.C.

A denial of the prosecution case coupled with absence of any explanation was held to be inconsistent with the innocence of the accused, but consistent with the hypothesis that the appellant was a prime accused in the commission of murder of his wife.

17. In ***Dnyaneshwar vs. State of Maharashtra*** *[(2007) 10 SCC 445]*, the Hon'ble Court observed that since the deceased was murdered in her matrimonial home and the appellant had not set up a case that the offence was committed by somebody else or that there was a possibility of an outsider committing the offence, it was for the husband to explain the grounds for the unnatural death of his wife.

18. The law, therefore, is quite well-settled that the burden of proving the guilt of an accused is on the prosecution, but there may be certain facts pertaining to a crime that can be known only to the accused or are virtually impossible for the prosecution to prove. These facts need to be explained by the accused and if he does not do so, it is a strong circumstance pointing out to his guilt based on those facts.

19. In the present case in hand, it was duty of appellant-husband to offer plausible and cogent explanation regarding the circumstances under which the occurrence took place because factum of death of the deceased was 'especially' within the knowledge of the appellant-husband. But, he failed to do so and on account of this reason, the trial court came to the conclusion that on the basis of evidence available on record it is undisputedly proved that deceased died in her matrimonial home, rather in the room of accused and it was unnatural death. Learned trial court observed that Dr.Manoj Kumar Ekka (PW4) is independent witness and his evidence is most relevant. It is clear from medical evidence that deceased died by creating the pressure on her neck and it was given the colour of suicide by hanging.

20. Learned trial court also opined that the injury found on the neck of the deceased was not the result of abrasion by cloth, but it was the result by giving pressure on her neck, resulting her death. Learned trial court found the offence of the appellant under Section 304 (2) IPC, which needs no interference because this Court is also of definite opinion that on the basis of evidence available on record and surrounding circumstances of this case, the trial court rightly reached to the conclusion of the guilt of the appellant under Section 304(2) IPC and rightly convicted him, accordingly. But so far as the quantum of sentence is concerned, keeping in view the totality of circumstances, this Court finds it proper to reduce the sentence up to seven years, which will be sufficient to meet the ends of justice.

21. Hence, this appeal is liable to be dismissed with the modification of sentence, as above.

22. The appeal is **dismissed**, accordingly, with the modification of sentence.

23. Let a copy of this judgment be sent to court-below for necessary information to jail authorities.

(2021)09ILR A245
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.09.2021

BEFORE

THE HON'BLE MUNISHWAR NATH BHANDARI, A.C.J.
THE HON'BLE J.J. MUNIR, J.

Criminal Appeal No. 5013 of 2012

Pratap Singh & Ors. ...Appellants (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri Apul Misra, Sri Noor Mohammad, Sri Shivam Yadav

Counsel for the Respondent:
A.G.A., Sri Ram Babu Sharma

(A) Criminal law - appeal against conviction - The Indian Penal Code, 1860 - Section 302 read with Section 34 - The Code of criminal procedure, 1973 - Section 161,313 - right under Section 313 of the Code is very valuable right of the accused, where he can say whatever he has to in his defence - It is open there for the accused to show, particularly, the reason for a mala fide or false implication, which can then be established by entering defence and leading evidence - motive is not very relevant in a case of direct evidence, where a dependable ocular version is available. (Para - 17,68)

Informant's son, and another - applied for *Shiksha Mitra* - selected - animosity on score against the informant's son - riding a *tonga* - intercepted and waylaid by four appellants - came along riding a tractor - forced down the informant's son from the carriage - saying that *"Lets make him into a Shiksha Mitra"* - dragged by the appellants through a distance, abusing him - thrown in front of the tractor - run over and crushed the informant's son to death under the wheels of the tractor - PW-2 (Uncle of deceased) and PW-3 (another uncle of deceased) besides the PW-4 (driver) of the carriage, witnessed the incident (eye witness) - informant proceeded to the spot - seen his son's dead body lying in *situ* .(Para - 2)

HELD:- Evidence of eye-witnesses is clear, consistent and specific. It has not been shaken in any manner, during cross-examination of the three prosecution witnesses . Have clearly established beyond all reasonable doubt, the place, manner and the time of occurrence; particularly, the fact that it was the appellants alone, who acting in furtherance of a common intention, committed a premeditated murder, eliminating the deceased. Opportunity was amply afforded to the appellants under Section 313 of the Code, but not availed. Prosecution established the charge beyond all reasonable doubt and there is no warrant for us to interfere with the impugned judgment. (Para - 66,68,69)

Criminal Appeal dismissed. (E-7)

List of Cases cited:-

1. Bipin Kumar Mondal Vs St. of West Bengal, (2010) 12 SCC 91

2. Naresh Kumar Vs St., 2013 SCC Online Del 3440

3. Rana Partap & ors. Vs St. of Har., (1983) 3 SCC 327

4. Pruthiviraj Jayantibhai Vanol Vs Dinesh Dayabhai Vala & Ors. , 2021 SCC Online SC 493

5. Dhanaj Singh Vs St. of Pun., (2004) 3 SCC 654

6. Ram Bali Vs St. of U.P., (2004) 10 SCC 598

7. Abu Thakir & ors. Vs St. of T.N. , (2010) 5 SCC 91

8. Mritunjoy Biswas Vs Pranab, (2013) 12 SCC 796

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

1. The appellants here, who are four in number, have been convicted by Mr. S.N. Tripathi, the then Additional Sessions Judge, Court No. 6, Budaun of an offence under Section 302 read with Section 34 of the Indian Penal Code, 18601 and sentenced to suffer imprisonment for life, and a fine of Rs. 40,000/- each. In the event of default, the appellant concerned has been ordered to suffer an additional simple imprisonment for a period of ten months. The aforesaid judgment has been passed by the learned Additional Sessions Judge in Sessions Trial No. 213 of 2006, State v. Pratap Singh and others (arising out of Case Crime No. 212 of 2003), under

Section 302/34 of the Penal Code, Police Station - Kadar Chowk, District - Budaun, decided on 27.11.2012.

2. The First Information Report2 leading to the prosecution, that has since culminated in the impugned conviction, was lodged on 11.11.2003 at 12:25 in the afternoon hours by one Sirajuddin, son of Bajruddin, a native of Village Nauli Fatuabad, Police Station - Ushait, District - Buduan. It reported an occurrence that took place earlier in the day at 10:30 a.m. It was said in the F.I.R. that about a year and a half ante-dating the occurrence, the informant's son, Riazuddin and another resident of the village, Pratap Singh, had both applied for the position of a *Shiksha Mitra*. The informant's son, Riazuddin, was selected. Pratap Singh and his family allegedly harboured animosity on this score against the informant's son. It is claimed that Pratap Singh had told the informant's son that though the latter had succeeded in becoming a *Shiksha Mitra*, but Pratap would not spare his life. On 11.11.2003, the informant's son was riding a *tonga* (described as a *buggi*) to Kadar Chowk. The horse-driven carriage had on board Hasanuddin, son of Basaruddin and Fisauddin, son of Waziruddin, both natives of the informant's village. As the party reached between Mahmurganj and a place called Gadhiya, they were intercepted and waylaid by the four appellants, who came along riding a tractor. They are said to have forced down the informant's son from the carriage, saying that *"Lets make him into a Shiksha Mitra"*. The informant's son was forced down the carriage at about 10:30 a.m. and dragged by the appellants through a distance, abusing him. He was thrown in front of the tractor. The other three appellants are said to have exhorted Pratap Singh to run him over. Pratap Singh is alleged to have run over and crushed the informant's son to death under the wheels of the tractor. It is reported that Hasanuddin and Fisauddin, besides the driver of the carriage, witnessed the incident. The informant too said that he proceeded to the spot and had seen his son's dead body lying in *situ*, where a large crowd had congregated.

3. On the basis of the written report lodged by the informant, Ex.Ka1, the *chik* F.I.R. Ex.Ka.3, also dated 11.11.2003, giving rise to Case Crime No. 212 of 2003, under Section 302 of the Penal Code was registered at Police Station - Kadar Chowk, District - Budaun. The crime aforesaid was registered *vide* G.D. entry no. 17 at 12:25 p.m. at the police station last mentioned. A copy of the said G.D. is available on record.

4. The Police, after registration of the crime, proceeded to investigate the same. The inquest was held on 11.11.2003, commencing 01:15 p.m. and ending at 03:30 p.m. The inquest is on record as Ex.Ka.4. The dead body was sent for autopsy. The doctor undertook the necessary postmortem examination and an autopsy report dated 12.11.2003 was submitted, that is on record as Ex.Ka.2. A site plan was drawn and statements of witnesses taken down. Samples of blood-stained soil and unstained soil were also collected, besides a pair of sandals that the deceased had worn.

5. All the accused, except Pratap Singh, surrendered in Court. Pratap Singh is said to have been arrested on 21.12.2003 along with the Tractor of Sonalika make bearing registration no. UP-24B-2647.

6. PW-5, Dr. D.S. Misra, who conducted the autopsy on 12.11.2003 found

the following antemortem injuries on the body of the deceased:

"(1) A crush injury on Rt. side of skull size 7.5cm x 6 cm underneath skull bone found fractured. Meninges and brain matter found lacerated clotted blood present in brain cavity.

(2) Contusion with abrasion in front of chest in an area ranging 10cm x 5 cm. Both clavicles, 2nd, 3rd, 4th and 5th ribs on both sides found fractured. Liver and lungs found lacerated.

(3) Multiple abrasions on whole of the right upper limb size ranging from 2 x 1 cm to 4 x 2.2 cm.

(4) Multiple abrasions on whole of the left upper limb size ranging from 2.5cm x 1.5cm to 3.5cm x 2cm.

(5) An abrasion on anterior aspect of right upper leg sizing 2.5cm x 1.2 cm.

(6) An abrasion on anterior aspect of left knee sizing 4cm x 2cm.

(7) An abrasion sizing 5cm x 2.2cm on posterior aspect of the left thigh."

7. The Investigating Officer, Devendra Pandey, PW-8, submitted two charge sheet; the first bearing no.5 of 2004 dated 10.02.2004 against the appellants, Pratap Singh, Sadhu and Devendra and the other, bearing no.5A of 2004, dated 19.04.2004 against the appellant, Srikrishna. The two charge sheets are marked as Ex. Ka-13 and Ka-14, respectively. All the appellants were *challaned* for an offence punishable under Section 302 of the Penal Code.

8. The case was committed to the sessions by the learned Chief Judicial Magistrate, Budaun *vide* order dated 20.02.2006. Post committal, the case came up before the Additional Sessions Judge, Court no.5, Budaun for framing of charges on 27.09.2006. The learned Additional Sessions Judge, after hearing the learned Counsel for the parties, proceeded to frame a charge against the appellants under Section 302 read with Section 34 of the Penal Code. The appellant pleaded not guilty and claimed trial.

9. In order to prove their case, the prosecution have examined the following witnesses:

(1) PW-1, Sirajuddin (father of the deceased and informant of the case, a witness of fact);

(2) PW-2, Fisauddin (uncle of the deceased, an eye witness of the occurrence);

(3) PW-3, Hasanuddin (another uncle of the deceased, another eye witness of the occurrence);

(4) PW-4, Anwar (the driver of the *buggi*, also an eye witness of the occurrence);

(5) PW-5, Dr. D.S. Misra (the doctor who conducted postmortem examination of the deceased's corpse);

(6) PW-6, HCP Shri Krishna Sharma (who registered the case, drew up the *chik* and made the requisite G.D. Entry in the Station Diary. He is a formal witness);

(7) PW-7, S.I. Gandhi Lal Sharma (who prepared the inquest and other *fard* and sent the body for postmortem); and,

(8) PW-8, S.I. Devendra Pandey (Investigating Officer of the case).

10. The prosecution have relied on the following documentary evidences:

Sr. No.	**Exhibit No.**	**Exhibited documents with brief particulars**

1.	Ex. Ka-1	Written report lodged with the Police Station Kadar Chowk by PW-1, Sirajuddin, relating to the occurrence.
2.	Ex. Ka-2	Postmortem report of the deceased dated 12.11.2003
3.	Ex. Ka-3	Chik F.I.R. dated 11.11.2003 scribed by PW-6, HCP Shri Krishna Sharma
4.	Ex. Ka-4	Inquest report drawn up by PW-7, S.I. Gandhi Lal Sharma, dated 11.11.2003
5.	Ex. Ka-5	Sketch of the corpse (photo *Lash*), dated 11.11.2003
6.	Ex. Ka-6	Sample Seal
7.	Ex. Ka-7	*Challan Lash* (Police Form - 13), dated 11.11.2003
8.	Ex. Ka-8	Letter sent to RI, dated 11.11.2003
9.	Ex. Ka-9	Letter sent to C.M.O. for postmortem, dated 11.11.2003
10.	Ex. Ka-10	Recovery memo of slippers of the deceased
11.	Ex. Ka-11	Recovery memo of plain and blood-stained earth
12.	Ex. Ka-12	Site plan of the place of occurrence, dated 11.11.2003
13.	Ex. Ka-13	Charge-sheet no.5 of 2003, dated 10.02.2004
14.	Ex. Ka-14	Charge-sheet no.5A of 2003, dated 19.04.2004

11. The appellants, Pratap Singh, Sadhu, Devendra and Srikrishna, in their statements under Section 313 of the Code of Criminal Procdure, 19733 have denied the incriminating circumstances appearing against them and said that they have been falsely implicated on account of Village *party-bandi* and animosity. All the appellants said that they wanted to enter defence. It must, however, be remarked that no evidence in defence was led.

12. The learned Trial Judge, *vide* his judgment and order, proceeded to convict the appellants, sentencing each of them in the manner hereinbefore detailed.

13. Aggrieved, the instant appeal has been preferred.

14. Heard Mr. Apul Misra, learned Counsel for the appellants, Ms. Kumari Meena, learned A.G.A. and Ms. Manju Thakur, learned A.G.A. for the State-respondent.

15. It is submitted by Mr. Apul Misra, learned Counsel for the appellants, that the prosecution could not establish motive, enough for the appellants, to do the deceased to death and that too, brutally. He says that the motive assigned by the prosecution, that Pratap Singh harboured animosity and ill-will against the deceased due to the fact that the latter was selected as a *Shiksha Mitra*, whereas Pratap Singh was unsuccessful, hardly affords a motive for a brutal murder, like the one the prosecution seeks to establish.

16. The learned A.G.A., on the other hand, submits that both the deceased and

Pratap Singh had vied for the position of a *Shiksha Mitra* and the deceased's appointment to the said position had left Pratap Singh seething with anger. He had sworn revenge, which culminated in this crime.

17. To our outstanding, motive is not very relevant in a case of direct evidence, where a 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. If an unimpeachable ocular testimony is there to establish the prosecution case, an investigation into the motive or the sufficiency of it to result in the crime and the manner in which it has been perpetrated, would not at all brook inquiry. The testimony of PW-2, PW-3 and PW-4, as would be analyzed in greater detail later in this judgment, is broadly consistent about the time, place and manner in which the deceased was done to death by the appellants. All the three witnesses have stood by their account of the occurrence in their cross-examination. There is a broad consistency of version amongst all the three eye-witnesses, that is to say, PW-2, PW-3 and PW-4. In a case that rests on ocular evidence motive for the accused to have acted in the manner they did, is besides the point. In this connection, there is authoritative statement of the law to be found in the decision of the Supreme Court in **Bipin Kumar Mondal v. State of West Bengal**4. In **Bipin Kumar Mondal**, it has been held:

"21. The issue of motive becomes totally irrelevant when there is direct evidence of a trustworthy witness regarding the commission of the crime. In such a case, particularly when a son and other closely related persons depose against the appellant, the proof of motive by direct evidence loses its relevance. In the instant case, the ocular evidence is supported by the medical evidence. There is nothing on record to show that the appellant had received any grave or sudden provocation from the victims or that the appellant had lost his power of self-control from any action of either of the victims.

Motive

22. In fact, motive is a thing which is primarily known to the accused himself and it may not be possible for the prosecution to explain what actually prompted or excited him to commit a particular crime.

23. In *Shivji Genu Mohite v. State of Maharashtra* [(1973) 3 SCC 219 : 1973 SCC (Cri) 214 : AIR 1973 SC 55] this Court held that in case the prosecution is not able to discover an impelling motive, that could not reflect upon the credibility of a witness proved to be a reliable eyewitness. Evidence as to motive would, no doubt, go a long way in cases wholly dependent on circumstantial evidence. Such evidence would form one of the links in the chain of circumstantial evidence in such a case. But that would not be so in cases where there are eyewitnesses of credibility, though even in such cases if a motive is properly proved, such proof would strengthen the prosecution case and fortify the court in its ultimate conclusion. But that does not mean that if motive is not established, the evidence of an eyewitness is rendered untrustworthy.

24. It is settled legal proposition that even if the absence of motive as alleged 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 loses its significance. Therefore, if the genesis of the motive of the occurrence is not proved, the ocular testimony of the witnesses as to the occurrence could not be discarded only by the reason of the absence of motive, if otherwise the evidence is worthy of reliance. (Vide *Hari Shanker v. State of U.P.*[(1996) 9 SCC 40: 1996 SCC (Cri) 913], *Bikau Pandey v.State of Bihar* [(2003) 12 SCC 616: 2004 SCC (Cri) Supp 535] and *Abu Thakir v. State of T.N.* [(2010) 5 SCC 91: (2010) 2 SCC (Cri) 1258])"

18. Mr. Misra was at pains to impress upon us the fact that the motive attributed to the appellant, Pratap Singh, that is to say, his non-selection for the position of a *Shiksha Mitra* and the deceased's selection instead, does not afford a motive strong enough to kill the deceased, and that too, in the brutal fashion the crime is said to have been committed. The way a man would think and act is best known to him. We do not wish to analyze the question of motive in this case any further for the good reason that principle guides us not to investigate the motive, in a case that primarily rests on direct evidence of eye-witnesses.

19. It is next submitted by Mr. Apul Misra, learned Counsel for the appellants, that the presence of the three eye-witnesses at the scene of crime is highly suspect. He submits that each of the three witnesses, PW-2, PW-3 and PW-4 have not at all seen the occurrence. He moots the point that these witnesses have spun a false story of murder around an event involving Riazuddin's accidental death. To the above end, the learned Counsel for the appellants submits that the unexplained delay in lodging the F.I.R. is in itself an index of the absence of these eye-witnesses. He submits that in the event any of these eye-witnesses had been present along with the deceased when he was, as they say, forced down the *tonga* and brutally murdered, at least one of them would have immediately rushed to the police station and lodged an F.I.R. It is pointed out that the distance of the police station from the place of occurrence was just 4 kilometers, whereas the F.I.R. came to be lodged some one hour and fifty-five minutes after the occurrence. And to add to it, is the story that all the three eye-witnesses, instead of rushing to the police station, behaved in a queer fashion, where PW-2, Fisauddin rushed off to Riazuddin's father, Sirajuddin, then in his native village, to inform him of his son's murder. This behaviour of the three witnesses has been emphatically underscored by the learned Counsel for the appellants to submit that none of these witnesses ever saw the incident. The conduct of all the three eye-witnesses is castigated, as shown, to submit that under the circumstances obtaining, their presence at the scene of the crime has to be disbelieved.

20. Dilating on the issue, Mr. Misra submits that PW-2, Fisauddin was a relative of the deceased, the deceased being his nephew. The other eye-witness, PW-3 is also said to be an uncle of the deceased. Given this background of kinship between the two eye-witnesses, PWs-2 and 3, it is submitted that the inaction of these witnesses in not endeavouring to save the deceased when he was forced down the carriage, dragged through a distance and then crushed to death under the wheels of the tractor, is unbelievable. If these witnesses had, in fact, been present, the learned Counsel for the appellants says that they would have done a lot to save the deceased, particularly given the fact that the entire episode took about 10-15 minutes to reach its fatal culmination.

21. It is also emphatically urged that the eye-witnesses have falsely said for the first time in their dock evidence that the accused were carrying firearms, which prevented them from rescuing the deceased. This fact has never been mentioned by these witnesses in their statements to the Police under Section 161 of the Code. In this connection, our attention has been drawn to the cross-examination of PW-2, Fisauddin, to which we will presently allude. The story about the appellants being armed, that the witnesses have put forth for the first time in their dock evidence, is also assailed by the learned Counsel for the appellants on the foot of the reasoning that if this were true, the appellants would have simply shot the deceased, instead of undertaking that rather unconservative, cumbersome and inherently risky method of doing Riazuddin to death.

22. The learned Additional Government Advocate has refuted the above contentions advanced on behalf of the appellants. It is urged by the learned A.G.A. that there is consistent eye-witness account, not of a solitary witness, but three, all of whom have described the occurrence consistently in all material particulars. There is no inherent contradiction between the testimonies of PWs-2, 3 and 4 regarding the time, manner and place of occurrence; and also about the identity and role of the appellants in the crime. The learned A.G.A. submits that the ocular version is dependable, consistent and free from blemish. There is no ostensible reason for three men - the three prosecution witnesses to falsely implicate the appellants in a case that involves a heinous offence.

23. The fact that none of the three eye-witnesses immediately rushed to the police station to lodge an F.I.R. is not a circumstance that may, by itself, lead us to the conclusion that they never witnessed the occurrence. The conduct of a person, who witnesses a morbid, dangerous and bizarre occurrence, like a murder, particularly one carried out in a dastardly fashion, like the one in hand, cannot be expected to exhibit the copy-book conduct of a vigilant and educated citizen proceeding to the police station to report a crime. The behaviour of an individual in a life threatening situation, like the one these witnesses were apparently exposed to, would much differ on an individual basis governed by different parameters. The behaviour, in expecting an eye-witness to hold his nerves calm and proceed confidently to the police station to report a murder of this kind, would depend on diverse factors like the personal mental makeup of the individual concerned, his background and status in life, his personal exposure to similar situations in the past and the associated experiences, the outlook of an individual based on his profession and the training or the age and maturity of the individual, to name but a few. To illustrate these varying individualities of behaviour, one may, except a policeman or an army-man, to remain unperturbed by the fatal violence witnessed and proceed fearlessly to the police station to report the matter. Likewise, an ordinary person, who is inherently endowed with strong nerves and has not, in past, suffered any psychologically debilitating experience, may react in the ideal way that Mr. Misra submits, of walking the distance of four kilometers to report the incident to the Police.

24. By contrast, a timid man may get so scared on witnessing an occurrence of this kind that he may not share it with

anyone, let alone report it to the Police. Also, in a situation of this kind, judicial notice must be taken of the fact when evaluating evidence, that turns upon the conduct of men, that the Police generally, and without casting any stigma on them, have earned the reputation of often implicating the man, who comes to them to report a crime involving a homicide or accident; or at least detaining him and subjecting the person to searching interrogation. It may be a necessary way for the Police to do so, but it does act as a deterrent for many individuals to fearlessly step into a police station to report an incident of murder. It is for this reason that it is the closest of kin, who becomes the first informant even if he/ she is not an eye-witness. Here, if the one sees the two witnesses, PW-2 and PW-3, who were related to the deceased, one nearer than the other, what cannot be lost sight of is the fact that all these three men came from a rural and ordinary background. There is nothing to show that they were particularly resourceful or had any kind of training or position in society, that would make them boldly move to the police station and report the matter. Also, there is nothing to show that there was any background of these men that would leave them unshaken and free from fear for their own lives to make that move. If these ordinary men from a village had witnessed the appellants, murdering a kindred or an acquaintance in such a dastardly fashion, one can reasonably expect them to steer clear of the prompt action of rushing to the police station, where the one who did so could expect an immediate reprisal from the appellants and an abominable fate, similar to the deceased's. It is in these circumstances that the conduct of all the three witnesses in not promptly moving to the police station has to be evaluated. Still, one could have thought that the inaction of three men who had witnessed the crime, two related to the deceased, was a factor with some weight to doubt their presence. But, that would be so, if these witnesses were confronted with their conduct about not promptly reporting the crime to the police, shortly after the appellants' exit from the scene of crime.

25. A careful perusal of testimony of PW-2, that is to say, his cross-examination does not show that any question was put to him as to the reason he did not proceed to the police station from the place of occurrence and report the matter himself, instead of rushing back to the deceased's village to inform his father. In the absence of this witness being confronted about his conduct in not proceeding to the police station straight from the place of occurrence, it does not much lie in the appellants' mouth to urge at the hearing before us that this conduct of PW-2 makes his presence doubtful. Likewise, is the case with PW-3, where not a single word about the witness's failure to go over to the Police has been put.

26. So far as PW-4 is concerned, he is an unrelated witness and a professional driver of the *tonga*, that was carrying the deceased and other witnesses, together with other passengers when the party were waylaid. It does appear that some question was put to him about his inaction of not reporting the matter to the Police. This witness, in whatever manner confronted, has said that he did go to the Police and report the matter. He has said that *Darogaji* there took down a written information from him and made him thumb mark it. He also took this witness's statement at the station. The *Darogaji*, after about two hours and a half, proceeded to the place of occurrence, where he came across the first informant,

Sirajuddin. The relevant part of this witness's testimony during cross-examination reads:

"थाने में जाकर मैंने सूचना दी दरोगा जी ने मेरी सूचना लिखी मेरा अंगूठा लगवाया। मेरा ब्यान वहीं पर लिया था फिर दो ढाई घन्टे बाद मुझे लेकर दरोगा जी मौके पर चले गये उसके बाद मौके पर सिराजउद्दीन पहुचे फिर उसके बाद मैं सिराज उद्दीन व दरोगा जी थाने आये थे।"

27. Now, this testimony of PW-4 does show that he went to the police station and gave a written information of the occurrence. He was asked to thumb mark it. He is apparently an illiterate man, who did not know what was scripted there. No doubt, the factum of PW-4 reporting the incident to the police has been denied by the Investigating Officer, about which Mr. Misra has something else to say in criticism of the prosecution. But, that is quite another matter; that would be dealt with later on in this judgment.

28. So far as the three eye-witnesses are concerned, in the opinion of this Court, the mere fact that none of them actually lodged the F.I.R. relating to this incident does not, in the circumstances, derogate from the *factum* of their being eye-witnesses. The overall conduct of PW-2 and PW-3, in not directly proceeding to the police station and instead, going back to the deceased's father in the village, also in the circumstances, should not, in our opinion, cast suspicion about their presence at the scene of crime. In this regard, reference may be made to the observations of a Division Bench of the Delhi High Court in **Naresh Kumar v. State**5. In **Naresh Kumar**, one Ashu, a prosecution witness and a nephew of the deceased, Mukesh was an eye-witness of the occurrence, who had made no efforts to save or report the matter to the relatives or the Police. His conduct was, therefore, criticized by the appellants as unnatural and unrealistic in order to discredit his eye-witness account. In those circumstances, it was remarked by the Division Bench:

"16. It is prudent to say that in normal circumstances, it is quite grotesque of any person who is a witness of a crime to not inform the police or the relatives of the victim of the crime reporting the incident and such a behavior on the part of such eye witness normally would be considered unnatural, abnormal and ludicrous. Nevertheless, no straight-jacket formulae or principle can be laid down as to how a particular witness will react at such a situation. It may depend upon couple of circumstances depending upon the facts of each case. It is not always necessary that at a given situation similarly placed person will react in a same fashion. Much will depend on the fact situation of each incident and also the individual behavior of the person including his psyche. One may be timid or may be very bold and it is also possible that a person otherwise timid in his life may turn out to be bold at a particular moment or vice versa. The prompt reaction or the immediate outcry whether being bold or timid of the person is an important aspect which has to be taken care of while dealing with such terrifying crimes.....…"

29. On an overall view of the matter, therefore, the conduct of the three eye-witnesses in not reporting the incident to the Police promptly, after witnessing a ghastly murder, cannot lead to an inference, in our considered opinion, that these witnesses never saw the crime or that they were not present at the place of occurrence.

30. The next part of Mr. Misra's submission, by dint of which he assails the

very presence of the three eye-witnesses, is the fact that their conduct in not attempting to rescue the deceased is so unnatural that their presence on the spot has to be ruled out; at least seriously doubted. He has, particularly, emphasized the fact that PWs-2 and 3 are kinsmen of the deceased and it cannot be imagined that they would have allowed the deceased to be done to death by the appellants through a course of violence that lasted 10-15 minutes, without demur. The reason that they did not do so, according to the prosecution, is that appellants were carrying firearms. This has been criticized by Mr. Misra as an unbelievable story and afterthought. This part of the submission would be dealt with a little later.

31. For the moment, we proceed on the assumption that the appellants were not armed and did Riazuddin to death in the manner alleged. The question is: Would it be correct to assume that the prosecution witnesses' inaction to move in and save Riazuddin from the clutches of the assailants, as they perpetrated their fatal violence, over a period of 10-15 minutes, is cause enough to disbelieve that these witnesses were present at the scene of crime? The submission that the prosecution witnesses' failure, particularly that of PWs-2 and 3, to rush in and act in defence of the victim, is based on an assumption about some kind of a standard reaction of men, when placed in the circumstances that the prosecution witnesses were. It assumes a standard reaction to come from a blood relative of the victim of a murderous assault, where the relative is inevitably expected to rush in and attempt a rescue.

32. To our mind, this submission is fallacious, because the assumption of a standard behaviour, on the foundation of which it proceeds, is imaginary. It has no basis to it, inferable from the experience of mankind about individual behaviour. Quite contrary to what the learned Counsel for the appellants submits, there is no standard reaction of men when exposed to the situation, where they witness another being brutally murdered. Even for a relative, generally considered, witnessing a gruesome kind of crime, is a harrowing experience that excites generally the emotion of fear or fright. A person, depending on the individual's traits of personality, may react very differently to the situation, as said earlier. The individual's reaction, on witnessing a gruesome crime, like the present one, may vary according to his psychological makeup, his professional training, his prior exposure to like situations and the experience there. The causes that could contribute to individually varying reactions could be innumerable; and, so could be the variation in the reaction or the response of witnesses when exposed to a ruthless crime, like murder. Therefore, to say that all the three eye-witnesses, at least the two, who were related to the deceased, ought to have attempted a rescue, is a hypothesis that does not stand the test of human experience.

33. Assuming that the appellants were not armed with any deadly weapons, the eye-witness account does show extreme violence exhibited by the perpetrators, and, a particularly abominable mode of doing the victim to death. It could have been a possibility for the three witnesses to have rushed to the victim's rescue and that would be quite natural. The fact that they got a scare of their life and did not move to rescue the deceased is a possibility that is equally likely and natural. There is no element of incredibility about it. The

reaction of one of the witnesses that shows him to be frightened into moving away from the spot is well indicated in the cross-examination of PW-4, Anwar, where he says:

"जैसे ही यह घटना हुई मैं बुग्गी लेकर भाग आया था दूर हट गया था दो तीन मिनट के बाद मैं सवारियों को लेकर कादरचौक चला आया।"

34. This reaction of PW-4 upon witnessing the murder is one of the many typical responses that are to be expected of a man, circumstanced like him. PW-4 was not a relative of the deceased, but a very natural witness. He was the driver of the *tonga*, that was carrying passengers, amongst whom the deceased was one when the party was waylaid. The other two witnesses, PWs-2 and 3 did not move in to rescue the deceased. They were apparently scared into inaction. About this possible variation in the response of men, when they witness a gruesome crime, there is valuable guidance to be found in the decision of the Supreme Court in **Rana Partap and others v. State of Haryana**6. In **Rana Pratap,** it has been observed by their Lordships, thus:

"6. Yet another reason given by the learned Sessions Judge to doubt the presence of the witnesses was that their conduct in not going to the rescue of the deceased when he was in the clutches of the assailants was unnatural. We must say that the comment is most unreal. Every person who witnesses a murder reacts in his own way. Some are stunned, become speechless and stand rooted to the spot. Some become hysteric and start wailing. Some start shouting for help. Others run away to keep themselves as far removed from the spot as possible. Yet others rush to the rescue of the victim, even going to the extent of counter-attacking the assailants. Every one reacts in his own special way. There is no set rule of natural reaction. To discard the evidence of a witness on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way."

35. In view of what has been said above, we are clearly of opinion that the submission advanced on behalf of the appellants about the absence of eye-witnesses at the place of occurrence urged to be inferable from their inaction in attempting a rescue, deserves to be negatived.

36. The next part of Mr. Misra's submission, inviting us to disbelieve the presence of the eye-witnesses, is a part of his submission that we have just disposed of. It is about the incredibility of eye-witnesses' explanation why they did not come to the aid of the deceased when assaulted by the appellants. The explanation, why the eye-witnesses did not come to the deceased's rescue, that has fallen for Mr. Misra's criticism, is the fact that the perpetrators are said to have been armed. It is said unanimously by all the witnesses that the appellants were wielding country-made pistols, which deterred each of them from rescuing Riazuddin. We have held, while disposing of the earlier part of this submission, that assuming that the appellants were not armed, there is no reason to expect the prosecution witnesses to behave in a particular way, where their failure to rescue the deceased, must inevitably lead to an inference about their absence from the scene of crime. In view of the said finding, the fact whether the

appellants were armed or not, would not be very material. Nevertheless, once the prosecution witnesses have come up with the assertion in their dock evidence that has been much criticized by Mr. Misra, it must be taken due note of also. Learned Counsel for the appellants, particularly emphasizes that the fact that the appellants were armed with country-made pistols etc., does not find mention in the F.I.R., which otherwise carries wholesome detail of the occurrence.

37. Learned Counsel for the appellants also says that the fact that the appellants wielded firearms, that they are said to have pointed at the witnesses, does not find mention in the statements of PWs-2, 3 and 4 recorded by the Police. This particular feature of the prosecution case is an improvement made by the witnesses during trial for the first time when they have taken stand in the dock. It is true that the F.I.R. does not mention the appellants' wielding firearms. It is also true that the F.I.R. narrates the incident in some detail. But, as is well known, the law does not expect the F.I.R. to mention every detail, particularly when it is an information by a person, who is not an eye-witness. So far as absence of the fact that the appellants were carrying firearms in the statements of PWs-2, 3 and 4 is concerned, to our understanding, it is not very decisive under the circumstances, though it may be a cause for eyebrows to be raised. In the total scheme of the evidence, it can be nothing more than that. PW-2, Fisauddin, who is the deceased's father's brother, has stated thus in his cross-examination on the issue:

"..... मुलजिमान पर असलहे थे इसलिये छुड़ाने का प्रयास नही किया हम लोग बीस कदम दूर भाग गये थे। मुलजिमान पर तमँचे थे।

मैने दरोगा जी को यह बात बतायी थी कि मुलजिमान पर असलहे थे उन्होने दिखाये थे व हम लोग बीस कदम भाग गये थे यदि यह बात मेरे 161 के ब्यान में नही है तो वजह नही बता सकता।

यदि मुलजिमान पर असलहे नही होते तो हम मृतक को बचा लेते। मुलजिमान पर असलाह होने वाली बात दिखाने वाली बात मैने रपट लिखने से पहले सिराजुद्दीन व अब्दुल स्लाम भंद्रा वालो की बतायी थी।"

38. This witness has adequately asserted the fact about the appellants wielding firearms and blamed the absence of a mention of this fact in the statement under Section 161 on the Investigating Officer. There is no reason to disbelieve him.

39. PW-3, on the other hand, has acknowledged the fact that he did not disclose the information about the appellants carrying firearms to the Investigating Officer, but that omission, as already said, in the totality of circumstances, cannot lead us to doubt the prosecution in all its complete detail.

40. PW-4 has again said in his cross-examination that he did tell the Investigating Officer that one of the appellants was carrying a gun, though he cannot say which of them was wielding it. He has also said that but for the gun pointed at them by the appellants, the witnesses would have rescued the deceased. This witness, like PW-2, has said that he did tell the Investigating Officer about the appellants carrying firearms and also said that the reason why the said fact has not been recorded by the Investigating Officer, is not known to him. As already said, on the totality of the evidence, there is

no reason to disbelieve the eye-witnesses that the appellants were, in fact, carrying firearms.

41. Learned Counsel for the appellants has also strongly cajoled us into disbelieving the fact that the appellants were carrying firearms, and, in fact, the entire prosecution on the foundation of his reasoning that if the appellants were carrying firearms, there was no necessity for them to have resorted to the unconservative, cumbersome and gruesome method of murdering the deceased by crushing him under the wheels of a tractor. They could have simply shot him dead. The argument is, indeed, attractive, but not one which holds no substance. The manner in which the author of a crime would choose to perpetrate it, is known to him alone. The *factum* of the crime cannot be discredited or doubted, because the perpetrator had an easier way out to achieve the result. Unless the *modus operandi* be so demonstrably absurd that it is fantastic or incredible under the circumstances, there is no reason to disbelieve a credible eye-witness account, banking on an unfamiliar, rare or unconservative manner of perpetration of the crime. We do not find from the eye-witness account, of the three witnesses, who are *ad idem* about the manner in which the deceased was done to death, any reason to doubt their version, merely because the appellants had an easier way to eliminate the deceased. Here, the fact, that the medico-legal evidence broadly supports the ocular version, would also be relevant, which we shall presently dwell upon in this judgment. Evaluating the evidence as a whole, we do not find any force in the submission of the learned Counsel for the appellants that the three eye-witnesses, PWs-2, 3 and 4 were not present at the scene of crime and did not witness it.

42. It is next submitted by the learned Counsel for the appellant that there is irreconcilable discrepancy between the ocular version and the medico-legal evidence, which renders the prosecution case utterly unsustainable. He submits that the injuries received by the deceased could never have been caused in the manner described by the eye-witnesses. It is urged that the case about the tractor running over the deceased does not explain the injuries caused to him on the head and chest. Mr. Misra has, during the submissions, drawn our attention to the testimony of PW-3, where he has said during his cross-examination that the appellants, after forcing the deceased down from the *tonga*, assaulted him employing sticks, delivering blows to his limbs, as they dragged him across a distance to the tractor, where he was thrown under its wheels. Learned Counsel points out that the injuries in the autopsy report do not disclose anything that may be attributed to those blows that the appellants are said to have inflicted, employing sticks *(danda)*. It is particularly emphasized that there are no contusions that would inevitably be there in case of blows from a stick. Instead, there are generally abrasions that are not compatible with an ante-mortem assault by sticks that the deceased is said to have suffered. It is for this reason, according to the learned Counsel for the appellants, that the ocular version of the three witnesses deserves to be disbelieved.

43. Learned A.G.A. has refuted the appellants' contention on this score and said that the crush injury on the skull is enough to establish the prosecution case.

44. The three eye-witnesses, that is to say, P.Ws. 2, 3 and 4 are consistent about the fact that the deceased was forced down

the tractor by the appellants and dragged through a distance. He was thrown under the wheels of the tractor by appellant nos. 2, 3 and 4, whereas the first appellant, Pratap Singh, drove the tractor, crushing the deceased under its wheels. The most graphic description of the precise manner of commission of this crime has come from PW-2 in his cross-examination, where he has said :

"ट्रैक्टर मृतक के सिर से चढाया था और पहिया सिर चेहरा से होता हुआ सीने से उतर गया। खून सब बाहर निकल गया था भेजा भी बाहर निकल गया था। खून जमीन पर गिरा था काफी खून जमीन पर गिरा। दरोगाजी बटोर कर लाये।"

45. In his examination-in-chief, this witness has described the incident in the following words :

"जब हम लोग गढिया व मामूर गंज के बीच में पहुंचे तो पीछे से एक ट्रैक्टर आ रहा था जिसे प्रताप चला रहा था उसमे श्री कृष्ण देवेन्द्र व साधू बैठे थे। यह लोग मेरे गाँव नौली फतुहाबाद के थे। इन लोगो ने अनवार की वुग्गी रुकवा ली और ट्रैक्टर स्टार्ट किये हुये प्रताप बैठा रहा। वाकी तीनो लोग उतर कर आये और कहा कि साले को आज शिक्षा मित्र बना दो। यह कहते ही रियासउद्दीन को वुग्गी से उतार लिया व घसीटते हुये लाकर ट्रैक्टर के नीचे पटक दिया और तीनो ने कहा कि प्रताप चढा दे ट्रैक्टर इसके ऊपर। तभी प्रताप ने रियासउद्दीन के उपर ट्रैक्टर चढा दिया व ट्रैक्टर चढा कर मार डाला। फिर मुलजिमान ट्रैक्टर लेकर भाग गये।"

46. Likewise, PW-3 has described the incident in his examination-in-chief thus:

"जब ताँगा मामूर गंज व गढ़िया के बीच में पहुँचा तो ट्रेक्टर प्रताप चला रहे थे, प्रताप वुग्गी से आगे आये और कहा वुग्गी रोक लो। उस ट्रेक्टर पर श्री कृष्ण साधू देवेन्द्र भी थे। मुलजिमान वुग्गी में से रियासउद्दीन को पकड़ कर खेचते हुये ले आये। प्रताप ट्रेक्टर स्टार्ट किये खडे थे। गाली गलौच की और आज इसे शिक्षा मित्र बना दो व गाडी के नीचे डाल दो। तभी श्री कृष्ण, साधू व देवेन्द्र ने ट्रेक्टर के आगे रियासउद्दीन को पटक दिया व प्रताप ने ट्रेक्टर चडा दिया हम हट गये दूर से देखते रहे शोर मचाया तो पडोस के मामूर गंज के लोग आ गये मुझे उनके नाम नही पता। फिर मुलजिमान ट्रेक्टर लेकर भाग गये।"

47. Particularly, this witness has described the assault prior to the deceased being run over by the tractor, in his cross-examination, in these words :

"मुलजिमान मृतक को लात घूँसे, डन्डो से मारते पीटते व घसीटते ले गये थे व पहियों के नीचे डाल दिया था। हम डन्डे गिन नही पाये दस पाँच डन्डे मारे होगे। डन्डे मारने वाली बात आज पहली बार बता रहा हूँ। सिराजुद्दीन व दरोगा जी को नहीं बतायी थी। पैरों में चूतड़ो पर व हाथ में डन्डे मारे थे।"

48. PW-4 Anwar has narrated the occurrence in his examination-in-chief in the following words :

"आज से करीब छै साल पहले की बात है। दिन के साढे दस बजे की बात है। जब मै अपने ताँगा बुग्गी से अपने गाँव के हसनुद्दीन, फिसाउद्दीन व रियासुद्दीन को लेकर कादरचौक होता हुआ बदायूँ जा रहा था कि जब हमारी बुग्गी मामूरगंज व गडिया के बीच में पहुची तो पीछे से मुल्जिम प्रताप, श्रीकृष्ण, साधू व देवेन्द्र ट्रैक्टर से आ गये जिसको प्रताप चला रहे थे कि जैसे ही बुग्गी के पास पहुचे तो रियासुद्दीन से बोले कि आज इसे शिक्षामित्र बना दो तभी

श्रीकृष्ण साधू व देवेन्द्र ने ट्रैक्टर से उतरकर रियासुद्दीन को बुग्गी से उतार लिया व घसीटते हुए व गाली देते हुए ट्रैक्टर के सामने पटक दिया और प्रताप से कहा कि इसके उपर ट्रैक्टर चढा दो तभी प्रताप ने रियासुद्दीन के उपर ट्रैक्टर चढ़ाकर कुचल दिया और उसकी मौके पर ही मृत्यु हो गयी तभी मुल्जिमान जिधर से आये थे उधर ही अपने गाँव की तरफ चले गये"

49. In his cross-examination, he has detailed the occurrence in the following words :

"मृतक को घसीटकर मुल्जिमान कितनी दूर ले गये 5-6 कदम ले गये थे फिर यह कहा मुल्जिमानों ने मृतक को जमीन पर गिरा दिया फिर खीचकर ट्रैक्टर के सामने ले गये तीनो उसे पकडे रहे हाथ पैर गिराकर दाब लिये थे हाथ पैर पकड़े रहे और फिर एक ने ट्रैक्टर पर जाकर ट्रैक्टर स्टार्ट कर ट्रैक्टर उस पर चढ़ा दिया फिर कहा ट्रैक्टर स्टार्ट था प्रताप ट्रैक्टर पर बैठा था मुल्जिमानों ने मृतक को मेरी बुग्गी से उतार लिया और कहा कि आज तुझे पक्का शिक्षा मित्र बनाते है। मृतक उनके हाथ से छूटकर नहीं भाग पाया था "पक्का शिक्षामित्र बनाये देते हैं" यह बात मैंने दरोगा जी को बता दी थी यदि दरोगा जी ने पक्का शब्द नहीं लिखा है। तो इसकी वजह नहीं बता सकता।"

50. A perusal of the three versions about the occurrence, all by the three eye-witnesses, makes it vivid that they are broadly consistent about the place, time and the manner of occurrence. All of them say that they were all riding the *tonga*, also described as *buggi*, from the parties' native village to Budaun via a place called Kadar Chowk. The *tonga* was driven by PW-4 Anwar. It had, on board, PW-2 Fisauddin, PW-3 Hasnuddin and deceased Riazuddin, amongst others. The party was waylaid by the appellants, who came riding along a tractor driven by Pratap Singh, appellant no. 1. The deceased was forced down from the carriage and dragged through the distance between the stalled carriage and the waiting tractor. He was thrown before the tractor, where the appellant Pratap Singh was on the wheel. The deceased was crushed under the wheels of the tractor by Pratap Singh. All the witnesses have said that appellant nos. 2, 3 and 4 exhorted appellant no. 1 to run over the deceased, employing the tractor.

51. It must be remarked that the witnesses testified in the dock between 3-6 years after the occurrence. The earliest testimony of PW-2 was recorded on 29.11.2006, whereas the incident is one dated 11.11.2003. By the time PW-4 testified, it was already well into the month of December, 2009, that is to say, six years from date of occurrence. During all this while, the witnesses are to be given due allowance for some inaccuracy, on account of fading memories. But, still, the account is remarkably consistent.

52. Now, given the fact the the ocular testimony is broadly consistent, the submission advanced on behalf of the appellants that it is irreconcilable with the medico-legal evidence to an extent that the ocular version must be rejected, requires careful consideration. The autopsy report, Ex.Ka.2, shows that injury no. 1 is a crush injury that has led to a fracture of the skull, rupture of the meninges and the brain matter torn out, with clotting of blood. This kind of an injury is *ex-facie* compatible with the version about the wheel of the tractor crushing the deceased's head. The second injury is located on the chest, which is a contusion with abrasion. The dimensions are 10 cm. x 5 cm. Both the

clavicles are fractured and rib nos. 2, 3, 4 and 5 on both sides of the rib cage are also fractured. If one were to go with the closest detail in the ocular version about the crime, a description of it in the cross-examination of PW-2 shows that the wheel of the tractor went over the deceased's head, face and chest. *Ex-facie*, in our opinion, the kind of injuries that one can expect, compatible with this ocular version, are those described as injury nos. 1 and 2 in the autopsy report. The doctor, testifying as PW-5 in the dock, has faced a very brief cross-examination on behalf of the appellants, where he has said :

"वाहन से कुचलने पर इस प्रकार की चोटों की आने की संभावना ज्यादा है। यह चोटें दुर्घटना में वाहन से आने की संभावना है।"

53. The doctor does not, at all, rule out the injuries being caused by being crushed under the wheels of a vehicle. He has not been subjected to any further cross-examination on behalf of the appellants in order to elicit whether the two injuries are, in any manner, fundamentally incompatible with the ocular version.

54. Now, we may consider the other part of Mr. Misra's submissions that there are no contusions consistent with that part of the ocular testimony which says that the deceased was thrashed with sticks, where blows were delivered to his limbs. This Court is of opinion that the absence of contusions on the limbs or their mention in the autopsy report, where the deceased was subjected to a violent death of this kind, may not have been very consequential. Once the ocular version is broadly compatible with the medico-legal injuries, some contradictions about the absence of certain injuries that ought to have been there, given the ocular version, would not lead to a consistent version of three eye-witnesses, being rejected. A consistent and dependable ocular version is generally to be preferred over medico-legal evidence, unless the two be so fundamentally repugnant that they cannot co-exist. There is no such fundamental repugnance here in the ocular version and in the medico-legal evidence. In our opinion, the absence of contusions on the limbs of the deceased in the autopsy report is not an incompatibility of such a fundamental kind which may render the ocular version liable to be discarded. This question fell for consideration recently before the Supreme Court in **Pruthiviraj Jayantibhai Vanol v. Dinesh Dayabhai Vala & Others**7. The issue there was that incompatibility between the ocular version and medico-legal evidence had led the High Court to acquit the appellant, because the testimony of witnesses described the weapons of assault as iron pipes, steel rods and sticks, whereas the injuries were three stab wounds and nine incised wounds. The nature of the injuries found in the autopsy and the ocular version, describing the weapons of assault, had led the High Court to acquit the appellant on account of inconsistency between the ocular version and medical evidence. In this connection, the following holding of their Lordships is direct on the point under consideration here :

"18. Ocular evidence is considered the best evidence unless there are reasons to doubt it. The evidence of PW-2 and PW-10 is unimpeachable. It is only in a case where there is a gross contradiction between medical evidence and oral evidence, and the medical evidence makes the ocular testimony improbable and rules out all possibility of ocular evidence being true, the ocular

evidence may be disbelieved. In the present case, we find no inconsistency between the ocular and medical evidence. The High Court grossly erred in appreciation of evidence by holding that *muddamal* no. 5 was a simple iron rod without noticing the evidence that it had a sharp turn edge.

19. The aforesaid discussions leads us to the conclusion that the acquittal by the High Court is based on misappreciation of the evidence and the overlooking of relevant evidence thereby arriving at a wrong conclusion. It is not a case where two views are possible or the credibility of the witnesses is in doubt. Neither it is a case of a solitary uncorroborated witness. The conclusion of the High Court is therefore held to be perverse and irrational. The acquittal is therefore held to be unsustainable and is set aside. In the nature of assault, Section 304 Part II, IPC has no application. The conviction of respondent nos. 1 to 4 by the Trial Court is restored."

55. To our understanding, the presence of witnesses at the scene of crime not being found doubtful, there is no reason for us to doubt their testimony, which, in our considered opinion, puts forth a dependable eye-witness account. There is no such inherent inconsistency between the ocular version and the medico-legal evidence that may persuade us to reject the prosecution case on that score. We hold, accordingly.

56. It is next submitted by the learned Counsel for the appellants that the Police have not fairly investigated the case and have suppressed the earliest version of the occurrence that they received through PW-4, Anwar, the *tonga* driver. He has drawn the attention of the Court to the testimony of PW-4, where this witness has said that he went to the police station and informed the Police about the incident. The witness has also stated that the *Daroga* at the station took down the information and got it thumb marked by him. He has further said that the Police also took down his statement. About this testimony of PW-4, Mr. Misra submits that the Police have not brought the information given by PW-4 on record. It is pointed out that the Investigating Officer, in his evidence, has completely denied the fact that PW-4, Anwar, came over to the police station and laid any information. It is submitted by the learned Counsel further that the conduct of PW-4 going over to the police station and informing the Police, was a natural and spontaneous conduct. The Police, by keeping back the information that they received about the occurrence from PW-4, have rendered the investigation tainted by withholding vital facts and evidence from the Court.

57. The learned Counsel for the appellants submits that the fact that the earliest information about the occurrence, received by the Police from PW-4, has been hidden away from the eyes of the Court, throws a cloud of doubt over the prosecution version. Mr. Misra has also drawn the attention of the Court to that part of the cross-examination, where PW-4 has said that he had earlier given an affidavit in favour of the appellants, and said in the next breath, during the cross-examination, that he never did so. About this fact, Mr. Misra submits that this witness is unreliable. We must remark here that the cross-examination of this witness does not show that he was confronted with the affidavit or that it was put to him. Largely, the submission, therefore, put forward by the learned Counsel for the appellants, is that investigation done by the prosecution

is not fair and forthright. The earliest account of the occurrence coming from PW-4 has been suppressed from the Court.

58. The learned Counsel for the appellants has also pointed out that the Investigating Officer has not inquired into the angle of enmity between parties that could have led to a patently false implication. It is also urged that the failure of the Investigating Officer in not ensuring a technical examination of the tractor, which is the weapon of offence in this crime, or seizing and producing it as case property, is fatal to the prosecution. It is also emphasized that the Investigating Officer has not looked into the appointment letter of the deceased, appointing him to the post of a *Shiksha Mitra*. The attention of the Court has also been drawn by the learned Counsel for the appellants to that part of the Investigating Officer's cross-examination, where he has acknowledged that there was a discrepancy in the distance of the police station from the place of occurrence given in the F.I.R. and the inquest report. Our attention has been drawn to this discrepancy to show that the distance entered in the F.I.R. is four kilometers, whereas, in the inquest report it is five kilometers. To sum up, it is submitted by Mr. Misra that the prosecution stands on shaky ground because of these discrepancies in investigation, and that, therefore, the conviction should be overturned.

59. The learned A.G.A. has said that whatever has been pointed out by the learned Counsel for the appellants is nothing more than some discrepancies in investigation. The prosecution case is well established by a dependable eye-witness account of the three witnesses, PWs-2, 3 and 4.

60. We must remark at the outset that the submissions of Mr. Misra, presently under consideration, can be divided into two parts. The first part, though short, is distinct from the rest. That short submission is about the veracity of PW-4, which has been sought to be impeached by the appellants on ground that he had tendered some kind of affidavit, disowning his statement to the Police, about which he has said, during his cross-examination in the first go that he did give such an affidavit, and in the next breath, disowned it. As already remarked by us, the contents of the affidavit were not put to the witness, during his cross-examination, and, therefore, it is no part of the evidence. PW-4 has been acknowledged by the appellants to be an independent witness and to our mind also, he is a natural witness. Though the contents of the affidavit have not figured in the testimony, even if at some point of time, the witness, on account of some consideration, spoke exculpatory on affidavit tendered to some Authority or the Court prior to commencement of trial, his clear and unequivocal evidence in the dock, cannot be impeached on that account. During investigation, and some times during trial, witnesses are known to vacillate and prevaricate owing to different kinds of pressures and succumbing to myriad human feelings. What has to be seen, however, particularly in the case of an eye-witness account, is whether the witness is essentially truthful, consistent and dependable in his account of the occurrence in the witness-box. If the witness has not been fundamentally shaken during his cross-examination, there is no reason to discard his testimony or to hold him discredited. As we have already remarked, the testimony of PW-4 in his examination-in-chief and cross-examination, is fairly consistent and inherently inspires

confidence. For the said reason, we are not inclined to doubt him on account of the fact that at some point of time, prior to commencement of trial, he might have said something on affidavit, not supportive of the prosecution.

61. The next part of the appellants' submission can be conveniently dealt with under one head, and that is about failures on the part of the Investigating Officer to produce relevant evidence, even keeping back some evidence, that is said to be an instance of unfair investigation. It is trite law that unless failures, discrepancies or even unfairness of investigation prejudices the accused, mere lapses of investigation or some taints there, cannot be permitted to get better of the law. A case, that is well proven by evidence, that comes before the Court, cannot be thrown out merely because the Investigating Officer, by incompetence or design, produces some fallacies. To consider the failures of investigation or what Mr. Misra says, clear instances of unfair investigation, this Court may look into the specific instances. It is pointed out, amongst those failures or instances of unfair investigation, that the Investigating Officer has kept back the earliest written account of the occurrence, that the Police received from PW-4. We may notice that PW-4 has not been cross-examined at all on the point whether in his alleged written information given to the Police at the station, had he come up with a different version, other than the one that he has come up with in the dock. We find that nothing has been asked of PW-4 as to what his earliest version to the Police was. In the absence of that question, there is no reason to believe that even if an information, that the witness says, was given to the Police by him earliest in point of time, anything different would have been said there. Also, the Investigating Officer has been emphatic that no such information was given by PW-4 to the Police at any point of time. We do not find anything in the testimony of the Investigating Officer to disbelieve him on that count.

62. Now, so far as the question of the Investigating Officer not proving the enmity that might have led to a false implication of the appellants is concerned, by looking into the appointment letter of the deceased, which is said to relate to his placement as a *Shiksha Mitra*, these are no more than lapses of investigation, if at all. Likewise the more serious issue about not seizing or producing the tractor by sending it for a technical examination, also does not go beyond a mere lapse of investigation. Likewise, is the case with the varying mention of the distance between the place of occurrence and the police station on the F.I.R. and the inquest. It is, as already said, trite law that lapses in investigation or failures of the Investigating Officer, or even deliberate manipulation at his hands, cannot brook advantage to the accused, unless the lapse or the taint in investigation be such that it has prejudiced the accused in his defence. That is not the case here, because the eye-witness account of the three witnesses, whose presence at the scene of crime, we have no reason to doubt, is clear, unambiguous and inculpatory. The outcome depends on what evidence comes before the Court and not the way the investigating agency collects the evidence or reaches its conclusions. The conclusions of the investigating agency are no more than a proposal or a claim, the worth of which has to be judged by the Court, on the evidence produced before it in the dock. Even if the investigating agency has failed somewhere or corrupted the prosecution by its lapses, incompetence or design, that

cannot stand in the Court's way of reaching its conclusion on the evidence before it. Here, whatever has been pointed out on behalf of the appellants, does not, in any way, derogate from the dependable and consistent account of the three eye-witnesses. In this connection, reference may be made to the decision of the Supreme Court in **Dhanaj Singh v. State of Punjab**8, where it has been held:

"5. In the case of a defective investigation the court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective. (See *Karnel Singh v. State of M.P.* [(1995) 5 SCC 518 : 1995 SCC (Cri) 977])

6. In *Paras Yadav v. State of Bihar* [(1999) 2 SCC 126 : 1999 SCC (Cri) 104] it was held that if the lapse or omission is committed by the investigating agency or because of negligence the prosecution evidence is required to be examined dehors such omissions to find out whether the said evidence is reliable or not, the contaminated conduct of officials should not stand in the way of evaluating the evidence by the courts; otherwise the designed mischief would be perpetuated and justice would be denied to the complainant party.

7. As was observed in *Ram Bihari Yadav v. State of Bihar* [(1998) 4 SCC 517 : 1998 SCC (Cri) 1085] if primacy is given to such designed or negligent investigation, to the omission or lapses by perfunctory investigation or omissions, the faith and confidence of the people would be shaken not only in the law-enforcing agency but also in the administration of justice. The view was again reiterated in *Amar Singh v. Balwinder Singh* [(2003) 2 SCC 518 : 2003 SCC (Cri) 641]. As noted in *Amar Singh* case [(2003) 2 SCC 518 : 2003 SCC (Cri) 641] it would have been certainly better if the firearms were sent to the Forensic Test Laboratory for comparison. But the report of the ballistic expert would be in the nature of an expert opinion without any conclusiveness attached to it. When the direct testimony of the eyewitnesses corroborated by the medical evidence fully establishes the prosecution version, failure or omission or negligence on the part of the IO cannot affect the credibility of the prosecution version.

8. The stand of the appellants relates essentially to acceptability of evidence. Even if the investigation is defective, in view of the legal principles set out above, that pales into insignificance when ocular testimony is found credible and cogent. Further effect of non-examination of weapons of assault or the pellets, etc. in the background of defective investigation has been considered in *Amar Singh* case [(2003) 2 SCC 518 : 2003 SCC (Cri) 641]. In the case at hand, no crack in the evidence of the vital witnesses can be noticed."

63. Again, in **Ram Bali v. State of U.P.**9, it was held in the context of omissions, lapses or even negligence in investigation, thus:

"14. As was observed in *Ram Bihari Yadav v. State of Bihar* [(1998) 4 SCC 517 : 1998 SCC (Cri) 1085] if primacy is given to such designed or negligent investigation, to the omission or lapses by perfunctory investigation or omissions, the faith and confidence of the people would be shaken not only in the

law-enforcing agency but also in the administration of justice. The view was again reiterated in *Amar Singh v. Balwinder Singh* [(2003) 2 SCC 518 : 2003 SCC (Cri) 641] . As noted in *Amar Singh* case [(2003) 2 SCC 518 : 2003 SCC (Cri) 641] it would have been certainly better if the firearms were sent to the Forensic Test Laboratory for comparison. But the report of the ballistic expert would merely be in the nature of an expert opinion without any conclusiveness attached to it. When the direct testimony of the eyewitnesses corroborated by the medical evidence fully establishes the prosecution version, failure or omission or negligence on the part of the IO cannot affect the credibility of the prosecution version."

64. The same principle finds eloquent mention in **Abu Thakir and others v. State of Tamil Nadu represented by Inspector of Police, Tamilnadu**10, where it has been observed:

"36. We may have to deal with yet another submission made by the learned Senior Counsel for the appellants that the investigation was not fair as there were many missing links in the process of investigation. This submission was made by the learned counsel contending that the investigation does not reveal as to how the investigating officer came to know about the presence of PWs 2 to 4 at the scene of occurrence and for recording their statements in that regard.

37. This Court in *State of Karnataka v. K. Yarappa Reddy* [(1999) 8 SCC 715 : 2000 SCC (Cri) 61] held that: (SCC p. 720, para 19)

"19. ... even if the investigation is illegal or even suspicious the rest of the evidence must be scrutinised independently of the impact of it. Otherwise the criminal trial will plummet to the level of the investigating officers ruling the roost. ... Criminal justice should not be made a casualty for the wrongs committed by the investigating officers in the case. In other words, if the court is convinced that the testimony of a witness to the occurrence is true the court is free to act on it albeit the investigating officer's suspicious role in the case."

The ratio of the judgment in that case is the complete answer to the submission made by the learned Senior Counsel for the appellants."

65. Of particular relevance, there is the guidance of their Lordships of the Supreme Court in **Mritunjoy Biswas v. Pranab**11, where there was no recovery of the weapon of offence from the accused and that was mooted as a fatal flaw in the prosecution. In that connection, it was held:

"33. The learned counsel for the respondent has urged before us that there has been no recovery of weapon from the accused and hence, the prosecution case deserves to be thrown overboard and, therefore, the judgment of acquittal does not warrant interference.

34. In *Lakshmi v. State of U.P*. [(2002) 7 SCC 198 : 2002 SCC (Cri) 1647] this Court has ruled that : (SCC p. 205, para 16)

"16. Undoubtedly, the identification of the body, cause of death and recovery of weapon with which the injury may have been inflicted on the deceased are some of the important factors to be established by the prosecution in an ordinary given case to bring home the charge of offence under Section 302 IPC. This, however, is not an inflexible rule. It cannot be held as a general and broad proposition of law that where these aspects

are not established, it would be fatal to the case of the prosecution and in all cases and eventualities, it ought to result in the acquittal of those who may be charged with the offence of murder."

35. In *Lakhan Sao v. State of Bihar* [(2000) 9 SCC 82 : 2000 SCC (Cri) 1163] it has been opined that : (SCC p. 87, para 18)

"18. The non-recovery of the pistol or spent cartridge does not detract from the case of the prosecution where the direct evidence is acceptable."

36. In *State of Rajasthan v. Arjun Singh* [(2011) 9 SCC 115 : (2011) 3 SCC (Cri) 647] this Court has expressed that : (SCC p. 122, para 18)

"18. ... mere non-recovery of pistol or cartridge does not detract the case of the prosecution where clinching and direct evidence is acceptable. Likewise, absence of evidence regarding recovery of used pellets, bloodstained clothes, etc. cannot be taken or construed as no such occurrence had taken place."

Thus, when there is ample unimpeachable ocular evidence and the same has been corroborated by the medical evidence, non-recovery of the weapon does not affect the prosecution case."

66. The evidence of eye-witnesses here is clear, consistent and specific. It has not been shaken in any manner, during cross-examination of the three prosecution witnesses, who, in our opinion, have clearly established beyond all reasonable doubt, the place, manner and the time of occurrence; particularly, the fact that it was the appellants alone, who acting in furtherance of a common intention, committed a premeditated murder, eliminating the deceased. The discrepancies in investigation, whatever, have been pointed out by the learned Counsel for the appellants, cannot vitiate the prosecution, that has thoroughly succeeded in establishing the charge beyond reasonable doubt.

67. We have carefully gone through the findings recorded by the learned Sessions Judge and independently reappraised the entire evidence. There is no reason for us to take a different view of the evidence, which in our opinion, is clear, cogent and unimpeachable.

68. Here, it also requires mention that the appellants, in their statements under Section 313 of the Code, have not assigned any particular motive to the witnesses to falsely implicate them. There is a stereotype answer in response to the question put to each of the appellants, as to why the concerned appellant was prosecuted. The answer is: *'village party-bandi* and animosity'. There is not a whisper there as to what are the particulars of the village *party-bandi* or the animosity, *vis-a-vis* each of the appellants and the *animus* of the prosecution witnesses. The appellants have indicated their inclination to lead evidence in defence, but they did not enter defence, as already said. Then in answer to a general question put to each of the appellants, if the concerned appellants had anything else to say, the identical answer is: 'No'. The right under Section 313 of the Code is very valuable right of the accused, where he can say whatever he has to in his defence. It is open there for the accused to show, particularly, the reason for a *mala fide* or false implication, which can then be established by entering defence and leading evidence. Here, that opportunity was amply afforded to the appellants, but not availed.

69. To sum up, this Court is of opinion that the prosecution have

established the charge beyond all reasonable doubt and there is no warrant for us to interfere with the impugned judgment.

70. In the result, this appeal fails and is **dismissed.** The impugned judgment passed by the learned Additional Sessions Judge is affirmed. The appellants, Sadhu, Devendra and Srikrishna are on bail. They shall surrender immediately before the Trial Court to serve out the sentences, awarded to each of them. In the event of default, the Trial Court shall take immediate steps to take them into custody and commit them to prison.

71. Let this order be certified to the Trial Court by the office and separately communicated by the Registrar (Compliance) through the learned Sessions Judge, Budaun. Let a copy of this order be also communicated to appellant no.1, Pratap Singh, who is in jail, through the Jail Superintendent, Budaun, or wherever he is serving his sentence, by the Registrar (Compliance).

72. The lower court records shall be sent down forthwith.

(2021)09ILR A268
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.12.2020

BEFORE

THE HON'BLE AJIT SINGH, J.

Criminal Appeal No. 5884 of 2019

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

Counsel for the Appellant:
Sri Kailash Singh Yadav

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

(A) Criminal law - appeal against conviction - The Indian Penal Code, 1860 - Section 304 - Doctrine 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 - Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically - Purpose of just punishment - society may not suffer again by such crime - courts must not only keep in view the right of victim of crime but also society at large. (Para -10,11,13)

Accused /appellant (cobbler by profession) - in drunken state - assaulted and caused serious injuries to nephew of complainant - with sharp edged weapon (joote ghantane wali rapi) on his thigh repeatedly - died during treatment - Appellant does not propose to challenge the impugned judgement and order on merits - prayed for modification - order of the sentence for the period already undergone - ground - incident was neither preplanned nor premeditated - result of a sudden assault - no intention to commit the murder of the deceased . (Para 2,4)

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. Conviction of the appellant is upheld. Ends of justice would be met if the accused is sentenced with the period already undergone by him in prison. Sentence modified by the period already undergone and served out by the appellant in prison.(Para - 14,15,16)

Criminal Appeal partly allowed. (E-7)

List of Cases cited:-

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 St. (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 UP, (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 Punj.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. This criminal appeal has been filed against a judgement dated 25.7.2019 passed by the Additional Sessions Judge/FTC, Court no. 52, Kanpur Nagar in S.T. No. 265 of 2015 (State vs. Ram Narayan), arising out of Case Crime no. 231 of 2015, under Section 304 I.P.C., P.S. Bidhanu, district-Kanpur Nagar, whereby learned Judge convicted and sentenced the appellant to 7 years simple imprisonment

2. The prosecution story in brief is that on 17.4.2015 at about 9:00 p.m. nephew of the complainant, namely, Manish Savita son of late Brij Lal Savita, was present in his saloon which situates at Rodhakpur road near Nihal Baba temple and besides his shop there is a cobbler shop of Ram Narain who in drunken state assaulted and caused serious injuries to the nephew of the complainant with sharp edged weapon *(joote ghantane wali rapi)* on his thigh repeatedly. The injured was taken to the hospital by his family members, namely, Suni Sangeet and Raj Kumar for treatment, where during treatment he died.

3. 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.

4. Learned counsel for the accused-appellant submits that the incident was neither preplanned nor premeditated but was a result of a sudden assault and there was no intention on the part of the accused to commit the murder of the deceased. He also submits that the accused-appellant is a poor handicapped person, who is cobbler by profession and he is the only bread earner in his family and his family is at the verge of starvation. The accused appellant had been in jail during trial and after

conviction he is in jail. As such, the accused has already served out more than five years of the sentence. 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 conjuncture while the appellant is 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 lenient view considering the age of the accused and his age related ailments.

5. 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.

6. 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.

7. 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."

8. 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."

9. 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."

10. 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.

11. 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.***

12. 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.

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. Since the learned counsel for appellant has not pressed the appeal on merits, however, this Court after perusal of the entire evidence on record and judgment of the learned Trial Court considers that the appeal is devoid of merit and is liable to be dismissed. Hence, the conviction of the appellant is **upheld.**

16. So far as the quantum of sentence is concerned, this Court considers that the ends of justice would be met if the accused is sentenced with the period already undergone by him in prison.

17. Accordingly, the conviction is upheld. The appeal is **partly allowed** with the modification of the sentence by the period already undergone and served out by the appellant in prison. The appellant be released from the jail.

18. 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.

19. 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.

20. 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)09ILR A273
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.03.2021

BEFORE

THE HON'BLE SURESH KUMAR GUPTA, J.

Criminal Appeal No. 6093 of 2017

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

Counsel for the Appellant:
Sri R.K. Sinha, Sri R.K. Mishra, Sri Anand Kumar Mishra

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

(A) Criminal law - appeal against conviction - The Indian Penal Code, 1860 - Section 376 - The Code of criminal procedure, 1973 - Section 161,313 - Just punishment is the collective cry of the society - While the collective cry has to be kept uppermost in the mind - Principle of proportionality between the crime and punishment cannot be totally brushed aside - Principle of just punishment is the bedrock of sentencing in respect of a criminal offence.(Para - 22)

Father (PW-1) of victim (PW-2) lodged an F.I.R. against appellant - allegation - on 25.5.2012 at about 2.30 p.m. - his daughter (PW-2 , victim) aged about 7 years - playing near the hand-pump - appellant has taken her away near trees of dates & forcefully raped her - victim screamed - brother of the first informant reached on the spot - saw the alleged incident - appellant absconded from the place of occurrence - trial court convicted the accused-appellant - hence appeal.

HELD:-The conviction of appellant-accused under section 376 I.P.C. is confirmed but the rigorous imprisonment of 10 years reduced to period already undergone by the appellant-accused in jail but fine clause shall be unaltered. (Para -25)

Criminal Appeal partly allowed. (E-7)

List of Cases cited:-

1. Sevaka Perumal etc. Vs St. of T.N., AIR 1991 SC 1463,

2. Dhananjoy Chatterjee Vs St. of W. B., [1994] 2 SCC 220,

3. Ravji v. St. of Raj., [1996] 2 SCC 175

4. Ahmed Hussein Vali Mohammed Saiyed & anr. Vs St. of Guj., (2009) 7 SCC 254

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

6. Guru Basavaraj @ Benne Settapa Vs St. of Karn. (2012) 8 SCC 734

7. Gopal Singh Vs St. of Uttarakhand, JT 2013 (3) SC 444

(Delivered by Hon'ble Suresh Kumar Gupta, J.)

1. This appeal has been preferred by appellant against the judgement and order dated 30.8.2017 passed by Additional Sessions Judge (Fast Track Court), Court No. 2, Bulandshahar in Sessions Trial No. 704 of 2012 (State Vs. Gautam) in Case Crime No. 306 of 2012, under section 376 I.P.C., Police Station Kotwali Dehat, District Bulandshahar by which appellant

was convicted under section 376 I.P.C. and awarded 10 years rigorous imprisonment and Rs. 10,000/- fine in case default of payment of fine he will have to undergo additional imprisonment for three months.

2. As per version of first informant report, father of victim namely, Bhumesh, has lodged an F.I.R. against the appellant namely, Gautam, with allegation that on 25.5.2012 at about 2.30 p.m. when his daughter namely, Shivani, aged about 7 years, was playing near the hand-pump then at that time appellant has taken her away near trees of dates and forcefully raped her. When victim has screamed, brother of the first informant namely, Pappu, reached on the spot and saw the alleged incident. After seeing Pappu, appellant absconded from the place of occurrence.

3. On the basis of above submission, written report of the first informant, first information report was lodged on same day i.e. 25.5.2012 at 16.10 p.m. at police station Kotwali Dehat, Bulandshahar as Case Crime No. 306 of 2012 under section 376 I.P.C.

4. After lodging the F.I.R. under section 376 I.P.C., investigation of this case was entrusted to the investigating officer, Sanjay Kumar Pandey. During investigation, after recording the statement of Constable / Clerk, Investigating Officer has recorded statement of the first informant, Bhumesh, and victim, Shivani, and also entered into gist of medical examination of victim in Case Diary and on pointing out of witness, Pappu, prepared the site plan of the alleged incident. The investigating officer has arrested the appellant / accused on 26.5.2012 and after completing formalities of investigation, charge-sheet was filed on 6.6.2012 under section 376 I.P.C. before the Additional Chief Judicial Magistrate, Bulandshahar where the Additional Chief Judicial Magistrate has taken cognizance and case was committed to sessions court for trial as Sessions Trial No. 704 of 2012. This sessions trial case was transferred to learned Additional Sessions Judge, Court No. 15 for trial. Charge was framed against the appellant on 14.9.2012 under section 376 I.P.C. After framing of charge, the same was read over to the appellant and appellant denied the charge levelled against him by the trial court and claim to be tried.

5. In order to prove its case, prosecution has examined seven witnesses:-

i. PW-1, Bhumesh Kumar, father of victim has stated before the court that the appellant has committed forcefully rape upon her daughter and he proved the F.I.R. as Ex. Ka-1.

ii. PW-2 / Shivani is the victim of this case. For testing her competency, trial court asked some questions to her and after satisfying with the same, victim was examined before the court. She has stated in her statement that appellant has committed rape upon her and when she screamed, her uncle, Pappu, reached there and saw the alleged incident. Due to sexual assault blood was oozing out from internal part of her body.

iii. PW-3 / Dr. Hempratibha Sharma was examined before the court on 19.9.2015. She deposed that she has medically examined the victim on 25.5.2012 at 6.00 P.M. At the time of examination, victim, was fully conscious but there was no internal injury on any part of her body except bleeding which was continued from her private part. Hymen

was torn and fresh blood was present and vaginal smear taken by doctor for confirmation of spermatozoa and she was being referred to the Chief Medical Officer for age determination. Due to internal bleeding, victim, was referred to medical college for further treatment. PW-3 has proved the medical report as Ex. Ka-2. On the basis of pathology report and X-ray report supplementary report was also prepared by this witness. As per supplementary report radiological age of victim was about 7 years and as per pathology report no spermatozoa dead or alive found on the vaginal smear of the victim. On the basis of these two reports no definite opinion about rape can be given. Supplementary report is also proved by PW-3 as Ex. Ka-3.

iv. PW-4 / Sanjay Kumar Pandey, was examined on 18.1.2016, who has investigated this case and prove the site plan as Ex. Ka-4 and during investigation he has taken blood infested pajami of victim and prepared the recovery memo and prove the same as Ex. Ka-5. After completion of the investigation, charge-sheet was filed by the investigating officer before the court as Ex. Ka-6.

v. PW-5 / Dr. Aruna Verma was examined on 25.1.2016, who has submitted original report of victim which is proved by her as Ex. Ka-6-A and Ex. Ka-7 and also proved the original report of the C.M.O. as Ex. Ka-8.

vi. PW-6 / Dr. Dinesh Kumar was examined on 19.3.2016 and he prove the x-ray report of the victim as Ex. Ka-9 and age determination report of C.M.O as Ex. Ka-10.

vii. PW-7 / C.C. 684 Mohd. Abbas was examined on 12.4.2016 and he deposed before that he prepared Chek Report No. 83/12 and prove the same as Ex. Ka-11 and also prepared the G.D. Entry and prove the same as Ex. Ka-12.

6. Apart from these witnesses two more witnesses have been examined as court witness.

i. CW-1 / Smt. Bala, was examined on 25.2.2013 and she deposed that appellant, Gautam, was her son and at the time of alleged incident, he was minor.

ii. CW-2 / Bhagwati Sharma, was examined on 15.4.2013, Head Principal of Primary Pathashala, No. 2, Village Dariyapur deposed that as per S.R. Report of appellant, his date of birth is 7.9.1998. So as per school certificate, age of victim as per alleged date of incident was about 13 years old.

7. Thus the prosecution relies on the oral evidence of PW-1 to PW-8 and documentary evidence as Ex. Ka-1 to Ka-12.

8. After completion of prosecution evidence, statement of accused-appellant was recorded under section 313 Cr.P.C. in which he deposed that false F.I.R. was lodged against him and victim as well as the first informant has falsely deposed against him before the court and he was falsely implicated in this case by the first informant due to village *partibandi* and enmity.

9. Learned trial court after hearing the prosecution as well as defence side convicted the accused-appellant as aforesaid.

10. Feeling aggrieved and unsatisfied by the judgement and order dated

30.8.2017 of trial court, the accused-appellant has preferred this appeal.

11. I have heard Sri R. K. Sinha, learned counsel for the appellant, the learned A.G.A. and perused the record.

12. Learned counsel for the appellant submits that there is contradiction in the first information report and statements of PW-1 and PW-2. In the F.I.R., victim has mentioned that she was playing near the hand-pamp but again victim has stated in her statement that she was playing on the boundary of Ansar. Learned counsel further submits that due to village *partibandi*, appellant has been falsely implicated in the abovementioned case. Learned trial court has convicted the appellant without appreciating the evidence available on record, so impugned judgment and order dated 30.8.2017, passed by trial court is perverse and liable to be set aside. Lastly, counsel for the appellant submits that he only wants to advance his submission only on quantum of sentence imposed upon appellant-accused.

13. Learned AGA on behalf of the State supported the impugned judgment and order of learned trial court and submitted that victim is a minor girl and act of the appellant is heinous in nature and trial court after appreciating all the evidence available on record, rightly convicted the appellant for the offence under section 376 I.P.C., The appellant deserves no leniency, hence appeal has no force and is liable to be dismissed.

14. Not pressing the criminal appeal after the conviction of appellant-accused by the court below is like the confession of the offence by the accused. The courts generally take lenient view in the matter of awarding sentence to an accused in criminal trial, where he voluntarily confesses his guilt, unless the facts of the case warrants severe sentence.

15. In the case of ***Sevaka Perumal etc. Vs. State of Tamil Nadu AIR 1991 SC 1463,*** the Apex Court in the matter of awarding proper sentence to the accused in a criminal trial has cautioned the Courts as under:

"Undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc."

16. In the case of ***Dhananjoy Chatterjee Vs. State of W. B. [1994] 2 SCC 220,*** this Court has observed that shockingly large number of criminals go unpunished thereby increasingly, encouraging the criminals and in the ultimate making justice suffer by weakening the system's creditability. The imposition of appropriate punishment is the manner in which the Court responds to the society's cry for justice against the criminal. Justice demands that Courts should impose punishment befitting the crime so that the Courts reflect public abhorrence of the crime. The Court must not only keep in view the rights of the criminal but also the rights of the victim of the crime and the society at large while considering the imposition of appropriate punishment. Similar view has also been expressed in ***Ravji v. State of Rajasthan, [1996] 2 SCC 175***. It has been held in the said case that it

is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal". If for extremely heinous crime of murder perpetrated in a very brutal manner without any provocation, most deterrent punishment is not given, the case of deterrent punishment will lose its relevance.

17. Argument in the aforesaid case was that awarding of the maximum sentence of life imprisonment to the accused who is heading towards his old age is too harsh a sentence because the accused does not fall in the category of "rare cases" and the ends of justice could be met if the sentence of accused is reduced from life imprisonment to the period already undergone.

18. Appropriate sentence is the cry of the society. It is therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed.

19. This position was reiterated by a three-Judge Bench of the Apex Court in ***Ahmed Hussein Vali Mohammed Saiyed and Anr. vs. State of Gujarat, (2009) 7 SCC 254,*** wherein it was observed as follows:-

"99.....The object of awarding appropriate sentence should be to protect the society and to deter the criminal from achieving the avowed object to law by imposing appropriate sentence. It is expected that the courts would operate the sentencing system so as to impose such sentence, which reflects the conscience of the society and the sentencing process has to be stern where it should be. Any liberal attitude by imposing meager sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result-wise counter productive in the long run and against the interest of society which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.

100. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime.

The court must not only keep in view the rights of the victim of the crime but the society at large also while considering the imposition of appropriate punishment. The court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which both the criminal and the victim belong."

20. In ***Jameel vs. State of Uttar Pradesh (2010) 12 SCC 532,*** this Court reiterated the principle by stating that the punishment must be appropriate and proportional to the gravity of the offence committed. Speaking about the concept of sentencing, this Court observed thus:

"15. In operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing process be stern where it should be, and tempered with mercy where it warrants to be. 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.

It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence."

21. In ***Guru Basavaraj @ Benne Settapa vs. State of Karnataka, (2012) 8 SCC 734,*** while discussing the concept of appropriate sentence, this Court expressed that:

"It is the duty of the court to see that appropriate sentence is imposed regard being had to the commission of the crime and its impact on the social order. The cry of the collective for justice, which includes adequate punishment cannot be lightly ignored."

22. In ***Gopal Singh vs. State of Uttarakhand JT 2013 (3) SC 444*** held as under:-

"18. Just punishment is the collective cry of the society. While the collective cry has to be kept uppermost in the mind, simultaneously the principle of proportionality between the crime and punishment cannot be totally brushed aside. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence….."

23. It is not disputed that the accused is continuously in jail since 26.5.2012 and the occurrence is said to have taken place on 25.5.2012. Appellant is languishing in jail about 9 years. Keeping the accused in jail since long would not serve any purpose.

24. Thus, considering the law laid down by the Hon'ble Apex Court in the above mentioned case and the facts and circumstances of this case, in my opinion, that the appellant-accused serve out about 9 years rigorous imprisonment as awarded by sessions court so end of justice would be met if the imprisonment of the appellant-accused under Section 376 IPC for period has already been undergone in jail without reducing the amount of fine imposed by the trial Court upon the accused-appellant.

25. In view of the aforesaid reasons, **the appeal is partly allowed. The conviction of appellant-accused under section 376 I.P.C. is confirmed but the rigorous imprisonment of 10 years reduced to period already undergone by the appellant-accused in jail but fine clause shall be unaltered.**

26. Record of this case be transmitted to the trial court for necessary compliance.

(2021)09ILR A279
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.09.2021

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.
THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Criminal Appeal No. 6693 of 2010

Sayeed @ Sahid & Anr.
...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Smt. Nayan Shri, Sri I.M. Khan, Sri Sudhanshu Srivastava

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

(A) Criminal Law - appeal against conviction - Indian Penal Code, 1860 - Section 302/34 , 307/34 - The Code of criminal procedure, 1973 - Section 313, Arms Act, 1959 - Sections 25/4 - oral testimony of a witness cannot be discarded or ignored merely on the ground that he is an interested witness or a related witness - witness cannot be totally disbelieved merely because there is some false statement in his testimony - entire oral testimony is to be appreciated as a whole and only then any conclusion about his trustworthiness can be drawn - defects in the investigation itself cannot be a ground for acquittal so these discrepancies or omissions will not in any way adversely affect the prosecution case - in case of direct evidence, motive becomes irrelevant but if the prosecution assigns any motive then it has to prove it.(Para -12, 14,18,20)

Complainant (PW-1) along with his father & 3 brothers - after offering Namaz - coming out from the Mosque - accused-persons armed with knives/ chhura - saying that today no one should be let alive suddenly with the intention to kill, attacked them - All the four accused persons seriously injured three brothers of complainant - Injured brothers were taken to the District Hospital by the complainant and his father with the aid of other villagers - 2 brothers dead - PW-2 (another brother) under treatment - incident witnessed by complainant and his father and other villagers in the electric light. (Para - 3)

HELD:-Oral testimony of accused informant/ eye witness (P.W.-1) and injured witness (P.W.-2) is reliable, both these witnesses have supported the prosecution case and have corroborated the FIR version and their oral testimony is fully corroborated by medical evidence and there is no contradiction between the two. Eye witness account of the incident produced by the prosecution is reliable and trustworthy and also gets support from the medical evidence. Weapons used in the incident have been recovered at the instance of the accused and recovery is also proved which further corroborates the prosecution case. So from evidence on record the prosecution case stands proved. No perversity or illegality in the findings recorded by the trial court. Findings of conviction recorded by trial court are liable to be upheld. Sentence awarded is also appropriate and needs no interference. Criminal appeal is liable to be dismissed.(Para - 22)

Criminal Appeal dismissed. (E-7)

List of Cases cited:-

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

2. Jarnail Singh Vs St. of Pun., (2009) 9 SCC 719

3. Baleshwar Mahto Vs St. of Bihar, (2017) 2 SCC (crl.26)

4. Rajesh Singh Vs St. of U.P., (2011) 11 SCC (page-144)

5. C. Muniappan & ors. vs St. of T.N.u, (2010) 9 SCC 567

6. U.O.I. Vs Prakash P. Hinduja & anr. , AIR 2003 SC 2612

7. Sambhu @ Bijoy Das & anr. Vs St. of Assam, AIR 2010 SC 3300

(Delivered by Hon'ble Syed Aftab Husain Rizvi, J.)

1. Heard Sri I.M. Khan, learned counsel for the appellants, learned A.G.A. for the State and perused the record.

2. This criminal appeal has been filed against the common judgment and order dated 26.08.2010 passed by the Additional Sessions Judge, court no.6 Saharanpur in S.T.s No. 742 of 2005 *(State vs. Sayeed alias Shahid)* in case crime no.448/05 under Section 302 and 307 IPC, S.T. No.744 of 2005 *(State vs. Sayeed alias Shahid)* in case crime no.453/05 under Sections 25/4 of Arms Act, and S.T. No.746 of 2005 *(State vs. Zahid)* Case Crime No.470/05, under Section 25/4 of Arms Act, P.S. Kotwali Dehat, District-Saharanpur, convicting the accused-appellants (Sayeed @ Shahid and Zahid) under Section 302/34 and sentencing each of them to undergo life imprisonment, and a fine of Rs.5000/- and in default of payment of fine, three months simple imprisonment, under Section 307/34 to undergo rigorous imprisonment for seven years and fine of Rs. 3,000/- and in default of payment of fine, three months simple imprisonment and further convicting the accused-appellant (Sayeed @ Shahid) under Section 25/4 of Arms Act and sentencing him to undergo rigorous imprisonment for one year and a fine of Rs.1000/- and in default of payment of fine, one month simple imprisonment and accused-appellant (Zahid) under Section 25/4 of Arms Act and sentencing him to undergo rigorous imprisonment for one year and imposing a fine of Rs.1000/- and in default of payment of fine, one month simple imprisonment. All the sentences to run concurrently.

3. In brief the prosecution case is that complainant- Furkan gave a written information dated 09.09.2005 at Police Station- Kotwali Dehat, District-Saharanpur that today on 09.09.2005 at about 7:00 p.m. he along with his father Rashid Ahmad and brothers Nasir, Kabir and Abdul Qadir after offering Namaz were coming out from the Mosque situated at pooja road, village- Rasoolpur when accused-persons Islam, Shahid, Zahil (correct name-Zahid) and Israr who are the resident of the same village armed with knives/ chhura and saying that today no one should be let alive suddenly with the intention to kill, attacked them. His brothers Nasir and Kabir got seriously injured and Abdul Qadir also received serious injuries. Fear and panic prevailed. The devotees coming out from the Mosque ran helter-skelter bare footed to save their lives and the neighbourers out of fear shut the doors and windows of their houses. All the four accused persons seriously injured the three brothers of the complainant. Complainant and his brothers ran towards their house to save their lives, the accused-persons chased them and entered into their house because of which the female members of the house ran outside towards the forest to save their lives. Injured Nasir, Kabir and Qadir were taken to the District Hospital by the complainant and his father with the aid of other villagers where the doctor declared Nasir and Kabir dead while Abdul Qadir is under treatment. The incident has been witnessed by the

complainant and his father and other villagers in the electric light.

4. On the aforesaid written information, case crime no.448 of 2005 under Sections 307 and 302 IPC was registered against Islam, Sayeed, Zahil and Israr all sons of Phullu and the investigation commenced, the inquest report and related papers of the dead bodies of Nasir and Kabir were prepared, the dead bodies were sealed and sent for post-mortem. The Investigating Officer visited the place of occurrence and collected the blood stained and plain soil from the spot and sealed it in separate containers, prepared the site plan, recorded the statement of complainant and other witnesses.

During the course of the Investigation on 14.09.2005, the police party comprising Investigating Officer S.O. Vijay Kumar Yadav, HCP Madanlal Singh, Constable- Sudhir Kumar, Constable- Sunil Kumar and Constable (driver)- Surendra Singh at about 4:30 a.m. arrested the accused Sayeed and Islam and on interrogation they furnished the information that the knife and Chhuri used by them in the incident was concealed and on the aforesaid information, one knife was recovered at instance of accused Sayeed alias Shahid under the trees towards west of Kothi situated at Maqbool Nursery and another knife was recovered at the instance of Islam from other place in presence of public witnesses Furkan Ahmed and Mohd. Ishaq at about 6:30 a.m. The recovered knives were sealed on the spot and recovery memo was prepared and on the basis of recoverey memo, a separate FIR case crime no.453 of 2005 under Section 4/25 of Arms Act against Sayeed alias Shahid and case crime no.454 of 2005 under Section 4/25 of Arms Act against Islam were registered on 14.09.2005 at 8:30 a.m. at police station-Kotwali Dehat, Saharanpur.

Further on 20.09.2005, the police party comprising Investigating Officer S.O. Vijay Kumar Yadav, HCP- Madanlal Singh, Constable- Rajveer Singh, Constable-Dalchandra, Constable (driver)- Surendra Singh arrested accused Zahid at 7:00 am and on his interrogation he also disclosed that he has concealed the knife used in the incident and on his instance the same was recovered at about 7:50 am from the western boundary of Moonji field of Maqbool. The recovery memo was prepared on the spot and the knife was sealed and a case crime no.470 of 2005 under Section 4/25 of Arms Act was registered against accused-Zahid.

The investigation of the aforesaid two cases was conducted by S.I.- Ashok Kumar and S.I.- Adesh Kumar respectively who visited the place of occurrence, prepared the site plan, recorded the statement of witnesses and submitted the charge-sheets.

The investigation of the main case under Section 302 and 307 was completed by Inspector Vijay Kumar Yadav- SHO, Kotwali Dehat, Saharanpur and he submitted the charge-sheet against all accused-persons namely Israr, Islam, Sayeed *alias* Shahid and Zalim *alias* Zahid under Section 307 and 302 IPC.

5. Accused Israr and Islam being juvenile, their cases were separated and transmitted to Juvenile Justice Board for further proceedings. Accused Sayeed *alias* Shahid and Zalim *alias* Zahid were tried for offence under Sections 307 and 302 IPC and also under Section 4/25 of Arms Act in the three Sessions Trial which have been consolidated and decided by the impugned common judgment.

6. The trial court framed the charges under Section 302/34 and 307/34 IPC

against accused Sayeed alias Shahid and Zalim alias Zahid and the separate charge under Section 4/25 of against each accused Sayeed alias Shahid and Zahid. Accused denied the charges and claimed for trial. The prosecution has examined 10 witnesses who have proved 33 prosecution papers marked as Ex.Ka-1 to Ex.Ka-33. Four material exhibits (Ex.1 to 4) were also produced before the trial court. The statement of accused were recorded under Section 313 Cr.P.C. in which they have denied the prosecution case. The accused have also stated that injury report and Bed Head Ticket (BHT) of injured Qadir have been fabricated on legal advice, the Investigation has been conducted showing ante-time proceedings. They have also stated that they have been arrested from their houses and falsely implicated and they are innocent. No evidence in defence was produced.

7. The injured Abdul Qadir was medically examined on 09.09.2005 at 10:00 p.m. by Dr. Mahesh Grover, Emergency Medical Officerr of District Hospital, Saharanpur. Following injury was found on his body:

Incised wound 3 cm X 1cm X muscle deep on left side head, behind left year, fresh bleeding was present.

In the opinion of the doctor, the injury was caused by some sharp object and duration was fresh, injured was admitted. Dr. Mahesh Grover (P.W.-3) has proved the injury report as Ex.Ka-2 and has further stated that the injury of the injured may have been received at 7:00 pm and may be caused by knife/ choori. Dr. Mahesh Grover (P.W.-3) has also proved the BHT of injured Abdul Qadir marked as Ex. Ka-3 according to which the injured was admitted in SBD District Hospital, Saharanpur on 09.09.2005 at 10:00 p.m. and was discharged from hospital on 10.09.2005. The details of treatment given to the injured (patient) are also recorded in it.

8. The postmortem of deceased-Nasir was conducted on 10.09.2005 at 4:30 a.m. by Dr. R.K. Gupta and according to post-mortem report Ex.Ka-4 the age of the deceased was about 16 years, average built body, Rigor Mortis was present all over the body and there was no decomposition, eyes were closed. Following ante-mortem injuries were found on the body.

i. Incised wound 1cm X 0.5cm X muscle deep on right side nose, 2cm below right eye-brow.

ii. Abrasion 5cm X 3cm on right side neck, 4 cm below right ear.

iii. Abrasion 2cm X 2cm on left side chest, 7cm above left nipple at 1 O'clock position.

iv. Incised wound 4cm X 2cm X abdominal cavity deep on front of abdomin, in mid-line, 13cm above imbilicus.

In the internal examination both lungs were pale, right chamber of heart contained blood, peritoneum was lacerated and one litre blood was in the cavity, stomach contains 100gm semi digested food, in small intestine and large intestine gases and fecal matters were present, gallbladder was full, spleen and kidneys were pale.

In the opinion of doctor, the death was due to shock and haemorrhage, as a result of injuries sustained and duration of death was about half day.

9. The postmortem of other deceased-Kabir was conducted on 10.09.2005 at 3:45

a.m. by Dr. R.K. Gupta and according to postmortem report (Ex.Ka-5) the age of the deceased was about 22 years, average built body, Rigor Mortis was present all over the body, no decomposition present, eyes were closed.

Following ante-mortem injuries were found on the body:

i. Incised wound 4cm X 0.25cm, muscle deep on left side of forehead, 2cm above left eye brow.

ii. Incised wound 3cm X 0.25cm X muscle deep on left side forehead, 3cm above left eye brow and this injury was communicating to injury no.1.

iii. Incised wound 7cm X 0.5cm X bone deep on right side head, 7cm above right ear.

iv. Incised wound 5cm X 3cm X abdominal cavity deep, 6cm above imblicus at 11.45 O'clock position. Loops and omentum of intestine coming out of wound.

v. Incised wound 5cm X 1cm X muscle deep on left side back of chest, 3cm below inferior angle of left scapula.

vi. Incised wound 5cm X 2cm X muscle deep on left side back of chest, 10cm below injury no.5.

vii. Incised wound 8cm X 3cm X muscle deep on back right side chest, 7cm below inferior angle of right scapula.

In internal examination both lungs were pale, right chamber of heart contains blood, peritoneum was lacerated and one litre blood was present, stomach was empty, in small intestine and large intestine gases and fecal matters were present, gallbladder was full and lever was lacerated and pale, spleen and kidneys were pale.

In the opinion of doctor, death was due to shock and haemorrhage, as a result of injuries sustained and duration was about half day.

Both postmortems were done under artificial light by the order of ADM (F) and CMS, SBD Hospital, Saharanpur.

10. The prosecution case is based on direct evidence and two eye witnesses Furkan (P.W.-1) and Abdul Qadir (P.W.-2) have been produced by the prosecution. Furkan (P.W.1) is also the complainant while P.W.-2 is injured, they are also brothers of the deceased Nasir and Kabir and hence related witnesses. The examination in chief of Furkan (P.W.-1) has been recorded twice, first on 07.01.2008 and thereafter on 16.04.2008 when the case of co-accused Islam was consolidated but later on it was separated and sent to Juvenile Justice Board. In examination in chief recorded on 16.04.2008 the witness has said that the incident is about two years and six months before. It was 7:00 pm when he was coming out of the Mosque after offering Namaz; Kabir, Qadir, Nasir and his father Rashid were also with him, when we came out the accused-persons namely Sayeed, Zahid, Islam and Israr armed with knives/Chhuri were standing there and said that none of them should go alive and all the accused persons attacked Kabir and Nasir with knives and Chhuri. When Qadir came to rescue them, they also stabbed him with knife on his upper part of the neck. Accused also chased him but he ran away. In this attack Kabir, Nasir and Qadir received injuries, and he, his father and other persons of the village carried the injured persons to the hospital where doctor declared Nasir and Kabir dead while Abdul Qadir was admitted in the hospital and medically examined. At the place of occurrence, there was electric light. The witness has further stated that he got the

report of the said incident written by Killan Saheb (Advocate) in the hospital and lodged the report at police station. The witness has proved the *Tehrir* marked as Ex.Ka-1.Witness has further stated that panic prevailed in village due to this incident.

11. Abdul Qadir (P.W.-2) in his examination in chief has also supported the prosecution case and said that the incident took place about three years ago. It was 7:00 pm when he along with his brothers Kabir, Nasir, Furkan and father Rashid were coming out from the Mosque after offering Namaz. This Mosque is near his house. The accused-persons Zahid, Sayeed, Islam and Israr met outside the Mosque, they were armed with knives/ Chhuri and with the intention to kill, they attacked them with the aforesaid weapons because of which he, Kabir and Nasir received injuries. There was electric light at the place of occurrence. The incident was also seen by his brother Furkan and father. The other persons ran away barefooted and there was a state of panic in the village. After inflicting injuries the accused-persons ran away. After the incident we were brought to District Hospital, Saharanpur by our father and Samir, Naseem, Furkan where he was medically examined and admitted in the hospital. Nasir and Kabir were declared dead. The report of this incident was lodged by his brother. He was admitted in the hospital for eight days, where he got treatment.

12. Learned counsel for the appellants contended that both the public witnesses Furkan (P.W.-1) and Abdul Qadir (P.W.-2) are real brothers and also the brothers of the deceased and, therefore, related and interested witness. There is no independent witness of the incident. Even in the FIR no independent public witness has been named while the place of occurrence is a public place and it has come in the evidence that people after offering prayers were coming out from the Mosque. The Imam of the Masque was also present and seen the alleged incident. There is one tea-shop in the southern side of the Mosque where people remain till 8:30 - 9:00 pm and there is also a factory where people work till 8:00 - 8:30 pm. Learned counsel further contended that the presence of Furkan (P.W.-1), is highly doubtful as he has admitted in his cross-examination that he lives in another house which is in other village Ramzanpura situated at a distance of about 1- k.m. from the place of occurrence. It is also in the evidence that there is another Mosque in the village Ramzanpura which is near the house of witness Furkan (P.W.-1) so it is unnatural and improbable that he should have come to the Mosque of village Rasoolpur for offering Namaz. It is further contended that he has not received any injury and further in the medico- legal report of Abdul Qadir, the name of Sameer is mentioned as the person who brought the injured to the hospital, the name of Furkan (P.W.-1) is not there which also creates serious doubts about the presence of this witness at the time of incident. The learned counsel further contended that P.W.-2 Abdul Qadir has denied that evenings prayer *(Maghrib Namaz)* in all Mosques is offered simultaneously and has said that it is offered with time difference of 15 minutes which is totally incorrect and this false statement has been intentionally made just to show the presence of Furkan (P.W.-1) at the time of incident.

Learned A.G.A., on the other hand contended that the house of Furkan (P.W.-1) is only 100 meters away from the

place of occurrence, just south to the road. The Mosque situated at village Rasoolpur is nearer to his house while it has come in the evidence that the other Mosque situated at village Ramzanpura was under construction at the time of the incident. Both the witnesses Furkan and Kabir have fully supported the prosecution version and there is consistency in their statements. Except some minor discrepancies, there is no other major discrepancy or contradiction which creates doubts on their presence or makes them untrustworthy. Further Abdul Qadir is also an injured witness and his presence at the place of occurrence in no way can be doubted.

It is a settled principle of law that the oral testimony of a witness cannot be discarded or ignored merely on the ground that he is an interested witness or a related witness. What is required is cautious approach in scrutiny and appreciation of his oral statement. Both the witnesses have supported the prosecution case and corroborated the allegation of FIR regarding genesis of occurrence, manner of assault, date, time and place of occurrence and nature of injuries. Their oral testimony got fully corroborated by medical evidence and there is no contradiction between the two. According to medical evidence both the deceased have suffered *incised wounds*, and injured Kabir has also suffered one *incised wound* on the back of his neck. The date and time of the incident is also corroborated from the medical evidence as the doctor has opined that said injuries can be caused on 09.09.2005 at 7:00 pm with knife/ chhuri and the injuries of the deceased Nasir and Kabir were sufficient in the ordinary course of nature to cause death. The two witnesses Furkan (P.W.-1) and Abdul Qadir (P.W.-2) have been put at lengthy cross-examination by the defence to test their trustworthiness but there is no major discrepancy or contradiction in their statements which creates any kind of doubt or suspicion about their presence and seeing of occurrence. From the evidence on record it is established that incident has occurred in a very daring and gruesome manner. The complainant and his brother when they came out from the Mosque were suddenly attacked by the accused-persons holdings knives/ Chhuries chased in the public way and were inflicted knives blow on vital parts of their body. So it was natural and probable that the persons present there, out of fear have escaped to save their lives and in this situation, it is not expected that anyone would have dared to come forward. Further the injured/ deceased and accused are resident of the same village and are also neighbourers. Considering all these facts and situation, production of independent public witnesses cannot be insisted and only on this ground the cogent and consistent oral testimony of eye witness and injured witness cannot be discarded. It has come in evidence that Qadir, Nasir and Kabir all these injured were carried to hospital by complainant, his father, Sameer and other villagers. It is also clear from evidence on record that Nasir and Kabir were seriously injured and ultimately succumbed to their injuries. It is probable that complainant may be with his seriously injured brothers and Qadir whose injury was not so serious was accompanying Sameer at the time of his medical examination so his name was recorded as the person who brought the injured. The presence of complainant Furkan at the place of occurrence cannot be doubted on this ground.

13. Learned counsel for the appellants further contended that prosecution is not clear about the place of occurrence and according to prosecution initially the

incident has occurred at one place then prosecution developed its case and said that it occurred at two places and lastly it was said that incident has also occurred inside the house. Learned counsel submitted that the witnesses in their oral testimony has not supported the allegations of FIR in this respect. No witness has supported this allegations of the FIR that accused entered into their house and female members ran outside towards the forest to save their lives, so there is utter confusion and major discrepancy in prosecution case regarding place of occurrence. Learned counsel further contended that Investigating Officer has also collected blood from only one place while it has come in the evidence that one of the deceased fell near the entrance of the Mosque and the other fell outside the door of his house, so the place of occurrence is not established.

According to site plan Ex.Ka-18, the house of the injured/ deceased is in north-west of the Mosque with Southern entrance, 44 paces away from the eastern entrance of the Mosque and there is a *Rasta* in between. From the evidence on record, it is clear that the incident started at the southern entrance of the Mosque. Accused-attacked the complainant and his brothers with knives/ chhuries when they came out from the Mosque chased them and inflicted knives blow. One of the injured fell down near the southern entrance of the Mosque while the other fell down near the main door of his house. The third one received injury on his neck while trying to rescue his brothers and complainant saved himself by running away. The two places where deceased fell down have been shown by the letters- "A' & "B' in the site plan and the Investigating Officer collected the blood stained and plain soil from both these two places which is mentioned in the site plan itself. So the place of occurrence is clear from the evidence on record and there is no doubt about it. It also established that one deceased fell just outside main entrance of his house, so it is natural and probable that family members may have come outside. The allegation that accused entered into the house and female members ran towards the forest may be exaggeration but this does not create any kind of doubt about the place of occurrence or the manner in which incident has occurred. It is clearly established from the evidence on record that the incident has started at the eastern entrance of the mosque and culminated at the door of the house of injured/ deceased in an area of about 44 paces.

Learned counsel for the appellants also disputed the place of occurrence submitting that HCP- Sunil Kumar (P.W.-6) who is Head Moharir and writer of Chick and GD of crime no.448/05 under Section 307 and 302 IPC, in his cross-examination has said that:-

"ये बात सही है कि इस घटना के सिलसिले में थाना जनकपुरी से भी सूचना आई थी जिसका उल्लेख GD की रपट नं० 51 पर किया गया है।"

On the aforesaid, the learned counsel tried to build up the argument that there was no occasion of receiving any information from another police station about this incident and it clearly indicates that the incident has occurred at some other place.

P.W.-6 has stated that some information was also received from police station- Janakpuri regarding this incident which was mentioned in the GD No.51 but it is not clear from his statement what that information was. The copy of the said GD is also not on record to make it clear. It also appears that at the time of cross-examination, the original GD was brought

by the witness and after its perusal, he has made this statement. If this information was of such a nature which was creating any doubt about place of occurrence, it was on the part of the defence to bring it on record. It appears that the defence counsel has very intelligently cross-examined the witness and knowingly and willingly left it unexplained just to create a doubt. On the aforesaid statement which is not clear about the kind of information, no inference can be drawn that the place of occurrence is somewhere else. It creates no suspicion about the place of occurrence. It also appears from the material on record that after the incident, the situation became tense in the village, so there is probability that some instructions may be given by the higher authorities regarding law and order and the information referred to in the statement of the witness may be related to it.

14. Learned counsel for the appellants further contended that the injury of P.W.-2 Abdul Qadir is simple in nature and fabricated, just to make him an injured witness. This injury may be self inflicted, so no reliance can be placed on the oral testimony of P.W.-2 Abdul Qadir only for the reason that he is an injured witness. Learned counsel further submitted that P.W.-2 Abdul Qadir in his cross examination has also stated that Israr was arrested on spot by the police. He was taken away by the police with knife while according to the statement of Investigating Officer- Vijay Kumar Yadav (P.W.-5) Israr was arrested on 11.09.2005. Learned counsel submitted that it is a major contradiction affecting the reliability of the witness.

According to medical evidence Abdul Qadir (P.W.-2) has received one *incised wound 3 cm x 1 cm x muscle deep on left side of head behind left ear.* He was medically examined just after the incident at 10:00 pm at District Hospital. In medical examination fresh blood was present. In the opinion of the doctor the injury was caused by sharp object and duration was fresh. The injury although simple but it is on the vital part of the body, so it cannot be self inflicted or fabricated. It is true that there is discrepancy in the statement of the witness about the arrest of accused- Israr on the spot. This part of the statement may be untrue and exaggeration but his remaining oral testimony is consistent and there is no other major discrepancy. It is settled principle of law that a witness cannot be totally disbelieved merely because there is some false statement in his testimony. The entire oral testimony is to be appreciated as a whole and only then any conclusion about his trustworthiness can be drawn. So merely on the basis of one incorrect statement, the entire oral testimony of P.W.-2 cannot be brushed aside. P.W.-2 Abdul Qadir is an injured witness so due credence needs to be accorded to his testimony. In the case of ***Abdul Sayeed vs. State of M.P., (2010) 10 SCC 259*** Hon'ble Apex Court has held as under:

"28. The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. "Convincing evidence is required to discredit an injured witness."

And a similar view in the case of ***Jarnail Singh vs. State of Punjab, (2009) 9 SCC 719,*** has been taken in the Hon'ble Apex Court with following observations:

"28. Darshan Singh (PW 4) was an injured witness. He had been examined by the doctor. His testimony could not be brushed aside lightly. He had given full details of the incident as he was present at the time when the assailants reached the tubewell. In Shivalingappa Kallayanappa v. State of Karnataka [1994 Supp (3) SCC 235 : 1994 SCC (Cri) 1694] this Court has held that the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies, for the reason that his presence on the scene stands established in case it is proved that he suffered the injury during the said incident.

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

In the case of ***Baleshwar Mahto vs. State of Bihar, (2017) 2 SCC (crl.26)***, the Hon'ble Apex Court relying on the above case laws held as under:

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

15. Learned counsel for the appellants also contended that the incident is of night and the Investigating Officer (P.W.-5) Vijay Kumar Yadav in his cross examination has admitted that he has not shown any bulb outside the Mosque in the site plan. So the source of light is not established. It is true that in the site plan the Investigating Officer has not shown the place where electric bulb was on but all the witnesses in their oral evidence has said that there was electric light in which they have seen the occurrence. Further the place of occurrence is in abadi, the accused-persons and the witnesses are also neighbours so the identity of the accused cannot be doubted and the omission on part of the Investigating Officer to show the place of electric bulb in the site plan will not create any suspicion about the identity of the accused. The identity of the accused is fully established.

16. Learned counsel for the appellants further contended that the FIR is written by an Advocate in presence and with connivance of local Pradhan who is against the accused-persons. The FIR is prepared after due deliberation and consultation,

there is chance of false implication and hence no reliance can be placed on it.

FIR is prompt. Informant Furkan (P.W.-1) while proving it has confirmed that it was written at his instance by the scribe. The presence of Pradhan at hospital is natural and probable being head of the village. There is no material on record to suggest that Pradhan is inimical to the accused. There is also no evidence of any previous enmity between the parties, so merely because the scribe is an Advocate, it cannot be presumed that report has been manipulated to frame innocent persons. False implication of accused-persons sparing the real assailants of such an incident of double murder is highly improbable in the circumstances. The accused have also failed to give any reason of their false implication.

17. Learned counsel for the appellants further contended that the FIR and other papers are ante-time. The Investigating Officer- Vijay Kumar Yadav (P.W.-5) has admitted that in Ex.Ka-10 and Ex.Ka-11 unknown is written in column of time of the incident and time of death, in the inquest report only crime number and sections are written and other particulars are not mentioned. Dr. R.K. Gupta (P.W.-4) who has conducted the postmortem examination of the deceased has admitted that at the time of post-mortem FIR was not before him. Constable- Harendra Singh (P.W.-10) who has brought the dead bodies for post-mortem examination has said that he handed over the dead bodies to the doctor on next day at 11:00 am. The inquest report has been prepared by S.I. Adarsh Tyagi but his signatures are not there on the papers. All these clearly establishes that at the time of inquest proceedings and even at the time of post-mortem, FIR was not registered. It has been registered later, ante timing it and other papers prepared are also ante timed.

Learned AGA submitted that crime number, sections and other particulars relating to time etc, duly proper filled in every column of the inquest report. So FIR was very much in existence at the time of inquest proceedings and it is not ante-timed. Learned AGA further submitted that merely signature of CO does not bear any date or FIR has been sent to the concerned magistrate with some delay, it cannot be said that FIR is ante-timed. He placed reliance on ***Rajesh Singh vs. State of U.P., (2011) 11 SCC (page-144)***. The Hon'ble Apex Court in the aforesaid case in para no.12, 13 & 14 has made following observations:

"12. The first such finding by the trial Court was that the FIR was ante-timed on the ground that as per the evidence of Chandra Shekhar Yadav (PW-4), the investigating officer, the dead body of deceased Deepak was dispatched from the spot after being sealed at 9 p.m. for the police lines. However, in the record of the police lines, it was shown to have received at 10 a.m. on 12.4.1993. The FIR was also criticized by the trial Court and the defence counsel here on the ground that there was no evidence offered by the prosecution to suggest that the special report of the crime was sent to the higher authorities.

13. The High Court has found that this criticism was not justified. The High Court has given the reasoning that the FIR was lodged by the witness Virendra Kumar (PW-1) on 11.4.93 itself at 6.40 p.m. Thus, if the incident happened at about 5 O'Clock in the evening, the recording of the FIR at 6.40 p.m. in a police station which was 8 Kms. away from

the spot of occurrence could not be said to be late reporting. The High Court has also relied upon the evidence of Chandra Shekhar Yadav (PW-4) that the FIR had been lodged in the police station when he was not present there and he was informed about it only on wireless and, therefore, he happened to reach the spot directly with ASI and started the investigation of the case and was busy there in drawing of Panchnama etc. right up to 11 p.m. and merely because the copy of FIR was received in the office of the circular officer on 13.4.1993, it should not lead to the conclusion that the FIR was ante-timed. The High Court has also found that if the dead body reached the police lines late at mid night and if it was shown in the record that it was received at 10 a.m. on 12.4.93, there was nothing significantly doubtful.

14. We have also gone through the record as well as the evidence of the investigating officer Chandra Shekhar Yadav (PW-4) and though the timing is slightly irregular, that alone would not be sufficient to reach a conclusion that the FIR was ante-timed. After all nothing was going to be gained by the prosecution by ante-timing the FIR. Had the FIR been ante-timed, the Panchnama could not have been commenced at 7.30 p.m. We do not find any significant cross examination of the Panchas and the police officers, particularly, on the aspect of timing thereof. We do not find this circumstance to be of such a nature so as to throw the whole prosecution story which was proved by two eye witnesses, one of them being the father of the boy."

In inquest report, case crime number and sections are mentioned and all other columns of date time is properly filled. If some particulars are lacking or there are some omissions on related papers, only on this basis it cannot be inferred that at the time of the inquest, FIR was not in existence. It shows only lapse on part of the Investigating Officer and Officer who prepared the inquest report. S.I. Vijay Kumar Yadav (P.W.-5) has said that inquest report was prepared by S.I. Adarsh Tyagi under his direction, he has also proved his signatures on the inquest report. The statement of constable Harendra Singh (P.W.-10) that he handed over the dead bodies to the doctor on the next day at 11:00 am is against the documentary as well as the oral evidence on record. The postmortem Ex.Ka4 and Ex.Ka-5 and oral statement of doctor R.K. Gupta confirm that postmortem was conducted in early morning of 10.09.2005 and it is also specifically mentioned that postmortem was conducted in artificial light under the orders of ADM (F) and CMS, SBD Hospital Saharanpur. Doctor has no interest in preparing false document or giving false statement in this regard. So there is no question of handing over the bodies to the doctor for post-mortem at 11:00 am. The statement is wholly incorrect and it appears that the witness has failed to recollect it. These discrepancies will not in any way adversely affect the prosecution case and no adverse inference can be drawn on its basis about ante-timing of papers.

18. Learned counsel further contended that no timing is mentioned in the case diary, the signatures of CO on case diary is undated. It is also not clear that which *parcha* of case diary on which date was sent to CO. The statement of scribe *Rao Killan* is not recorded by the Investigating Officer. The GD is on plain paper and not on printed proforma and it contains no seal of police department and signatures of CO on it, is also undated and all these facts have been admitted by the

Investigating Officer and G.D./ chik writer in his cross-examination. Learned counsel contended that Investigating Officer has manipulated the papers in his own manner which was suitable for him.

Regarding GD, it has come in evidence that printed proforma was not available, hence it was prepared on plain paper. It is a settled principle of law that defects in the investigation itself cannot be a ground for acquittal so these discrepancies or omissions will not in any way adversely affect the prosecution case. In the case of ***C. Muniappan and Others vs State of Tamil Nadu, (2010) 9 SCC 567*** it has been held:

"Defect in the investigation by itself cannot be a ground for acquittal. Investigation is not the solitary area for judicial scrutiny in a criminal trial. Where there has been negligence on the part of the investigating agency or omissions, etc, which resulted in defective investigation, there is a legal obligation on the part of the court to examine the prosecution evidence dehors such lapses carefully to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the objects of finding out the truth. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation."

In the case of ***Union of India vs. Prakash P. Hinduja and another, AIR 2003 SC 2612,*** it has been held:

"An error, illegality or defect in investigation cannot have any impact unless miscarriage of justice is brought about or serious prejudice is caused to the accused."

In the case of ***Sambhu alias Bijoy Das and another vs. State of Assam AIR 2010 SC 3300,*** it has been held that:

"If the prosecution case is established by the evidence adduced, any failure or omission on the part of the Investigating Officer cannot render the case of the prosecution doubtful."

19. Prosecution has also relied on another peace of evidence, the recovery of weapons (knife & chhuri) used in the incident. The Investigating Officer- SHO, Vijay Kumar Yadav (P.W.-5) has made these recoveries and in his examination in chief on this point he has said that on 14.09.2005 at 04:30 am on the information received from informer, he arrested the accused Sayeed alias Shahid and on his interrogation he disclosed that he has concealed the knife used in the incident near Kotha of Maqbool Nursery under the trees and at 06:30 a.m. at the instance of the accused, blood stained knife was recovered from the aforesaid place. The knife was sealed on the spot and the recovery memo marked as Ex.Ka-20 was prepared. The copy of the recovery memo was given to the accused and his thumb impression was obtained. He has further stated that he also prepared the site plan of the place of recovery marked at Ex.Ka-21 and has also proved the knife as material Ex.-1. The witness has further stated that on 20.09.2005 at 7:00 am, he arrested the other accused Zahid and on his interrogation he disclosed that the knife used in the alleged incident has been concealed by him near Moonji Field of Maqbool and at the instance of the accused Zahid, the said knife was recovered at 7:50 am which was sealed on the spot and recovery memo of Ex.Ka-22 was prepared. He has further stated that he prepared the

site plan of the place of recovery marked as Ex.Ka-23 and has also proved the knife as material Ex.2.

Learned counsel for the appellants contended that there is no independent witness of recovery and it has been made from open public place where any person can reach without any hindrance or obstruction. The only evidence about recovery is the sole testimony of Investigating Officer, Vijay Kumar Yadav. Hence it cannot be relied.

Vijay Kumar Yadav (P.W.-5) by his oral evidence has proved the fact of recovery and there is nothing in his cross-examination which affect the reliability of the witness. Merely because he is a police person and Investigating Offcer, his oral evidence cannot be discarded. The recovered knives has been sent for chemical examination and its report also confirms that the knife recovered at the instance of accused- Zahid was stained with human blood. So the forensic report also corroborates the oral testimony of (P.W.-5) Vijay Kumar Yadav. The evidence of recovery is admissible under Section 27 of the Evidence Act.

20. Learned counsel for the appellants lastly contended that there is no motive of the incident. Neither in the FIR nor in the oral statements of the witnesses, any motive has been assigned. The Investigating Officer has tried to assign the motive through the mouth of accused themselves in their confessional statements.

In this respect, it is sufficient to say that it is a case of direct evidence where eye witness account of the incident has been produced by the prosecution, the motive is immaterial. It is a settled principle of law that in case of direct evidence, motive becomes irrelevant but if the prosecution assigns any motive then it has to prove it. In this case prosecution has not assigned any motive, hence there is no relevance of motive.

21. The remaining witnesses are formal in nature, Constable Brahmpal Singh (P.W.-7) is chik and GD writer of crime number 453/05 under Section 4/25 and S.I. Ashok Kumar (P.W.-8) and S.I. Adesh Kumar (P.W.-9) are the Investigating Officers of cases under Section 4/25 of Arms Act. The aforesaid witnesses have proved the papers and the proceedings conducted by them.

22. The oral testimony of accused informant/ eye witness Furkan (P.W.-1) and injured witness Abdul Qadir (P.W.-2) is reliable, both these witnesses have supported the prosecution case and have corroborated the FIR version and their oral testimony is fully corroborated by medical evidence and there is no contradiction between the two. The eye witness account of the incident produced by the prosecution is reliable and trustworthy and also gets support from the medical evidence. The weapons used in the incident have been recovered at the instance of the accused and recovery is also proved which further corroborates the prosecution case. So from evidence on record the prosecution case stands proved. There is no perversity or illegality in the findings recorded by the trial court. The findings of conviction recorded by trial court are liable to be upheld. The sentence awarded is also appropriate and needs no interference. This criminal appeal is liable to be dismissed.

22. According, the criminal appeal is hereby ***dismissed.***

23. Copy of this judgment along with lower court record be transmitted to the learned trial court immediately.

(2021)09ILR A293
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.08.2021

BEFORE

THE HON'BLE SANJAY KUMAR SINGH, J.

Crl. Misc. Bail Application No. 1665 of 2021

Jasman Singh @ Pappu Yadav
...Applicant (In Jail)
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicant:
Sri Bhagwan Das Singh

Counsel for the Respondents:
A.G.A., Sri Prashant Kumar Singh

A. Bail - The Court rejected the bail application on account of rape on minor child and suppression of his criminal history. (Para 7)

Bail Application Rejected. (E-10)

List of Cases cited:

1. Neeru Yadav Vs St. of U.P. (2015) 3 SCC 527 *(followed)*

2. Sudha Singh Vs St. of U.P. & anr. 2021 (4) SCC 781 *(followed)*

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

1. Despite being service of notice upon the informant, no one has put in appearance on behalf of informant.

2. Heard Mr. Bhagwan Das, learned counsel for the applicant, Mr. Virendra Kumar Maurya, learned Additional Government Advocate assisted by Mr. Prashant Kumar Singh, learned brief-holder, representing the State and perused the record of the case.

3. By means of this application, applicant-Jasman Singh alias Pappu Yadav, who is involved in Case Crime No. 30 of 2019, under sections 323, 376(2)(1), 452 and 506 IPC, and section 3/4 of Protection of Children From Sexual Offences Act, police station Jakhaura, district Lalitpur, seeks enlargement on bail during the pendency of trial.

4. As per prosecution case, in brief, Smt. Kalawati, the informant, who is aunt of the victim lodged first information report on 17.02.2019 at 1.15 hours in respect of incident, which took place on 16.02.2019 at 16.30 hours against the applicant alleging inter alia therein that on 16.02.2019 at about 4.30 p.m. the victim, aged about 13 years, who after the death of her mother residing with the informant, was alone in the house for doing some house-hold work and all the family members had gone to agricultural field for cutting fodder. The applicant taking the advantage of the situation, forcibly entered into the house of the informant and threatening to kill the victim, she was dragged to inside the room by grabbing her hair, and forcibly committed rape upon the victim. At that time, suddenly the informant, her son Rohit and one Magan came to the house and knocked the door, but when they entered the house, they saw the victim lying unconscious in a naked condition and the applicant tried to fled away by climbing the wall, but he was caught hold by Rohit, Magan Vishwakarma, Arjun and Madhav alias Chotu at the spot. When the victim gain consciousness, she narrated the whole

incident. Thereafter, the police was informed about the incident on phone by the family members of the informant, on which the applicant was arrested by the police from the house of the informant.

5. It is argued by the learned counsel for the applicant that there was love affair between the victim and the applicant. She herself called the applicant, but he was caught hold by the family members of the victim. It is also submitted by the learned counsel for the applicant that there is also dispute between the informant and the applicant regarding the land, therefore, the applicant has been falsely implicated in the present case, averment in this regard has been mentioned in paragraph 14 of the bail application. It is also submitted that the applicant has no criminal antecedent to his credit and is facing detention since 16.02.2019. It is next contended that there is no chance of the applicant of fleeing away from the judicial process or tampering with the prosecution evidence. Learned counsel for the applicant lastly submitted that if the applicant is released on bail, he will not misuse the liberty of bail and will cooperate in the early disposal of the case.

6. Per contra, learned Additional Government Advocate has opposed the bail prayer of the applicant by contending that as per medical examination report, the victim is minor child, aged about 13 years. The applicant has committed rape upon the victim in her own house and he was apprehended by the family members of the victim at the spot. It is also submitted that the victim in her statement under section 164 Cr.P.C. has made allegation of committing rape upon her forcibly by the applicant and also supported the prosecution case. It is next submitted by learned A.G.A. that the applicant has a criminal history of six cases, as mentioned in bail rejection order of the applicant dated 23.10.2020, but in paragraph 19 of the bail application, it is mentioned that the applicant has no criminal history.

7. After having heard the arguments of learned counsel for the parties, this Court finds that the applicant has a criminal history of six cases as mentioned in bail rejection order of applicant dated 23.10.2020, but in paragraph 19 of the bail application it is mentioned that the applicant has no criminal history, as such the applicant has not come with clean hands before this Court and suppressed his criminal history. In paragraph 14 of the bail application, it is mentioned that there is dispute between the applicant and informant regarding the land, but no material in this regard has been brought on record. The victim, aged about 13 years, is studying in fifth standard. According to medical examination report of the victim, all epiphysis are not fused. In the opinion of the doctor, who conducted the medical examination of the victim, sign of violence seen and sexual violence cannot be ruled out. The offence of committing rape upon a minor child is heinous in nature.

8. In view of judgment of Hon'ble the Apex Court in the case of ***Neeru Yadav vs. State of U.P.*** (2015) 3 SCC 527, criminal antecedents of the accused cannot be ignored while deciding bail application, discretionary powers of Courts to grant bail must be exercised in a judicious manner in case of a habitual offender. The said judgement has been further followed in a recent judgment of Apex Court in the case of ***Sudha Singh vs. State of U.P. and another***, 2021 (4) SCC 781.

9. In this case, a small innocent girl has been raped, who does not understand

its meaning. Little girls are worshiped in our country, but the cases of pedophilia are increasing. Rape is a heinous crime. The victim suffers from psychological effects of embarrassment, disgust, depression, guilt and even suicidal tendencies. Many cases go unreported. In almost rape cases, the victim was unwilling to report the name of the abuser. The families of the victim remain silent about the sexual offences in order to protect the family image. The victim/female small child experience sexual abuse once tend to be more vulnerable to abuse in adult life. Healing is slow and systematic. In such a situation, if the right decision is not taken from the Court at the right time, then the trust of a victim/common man will not be left in the judicial system. This is the time to strictly stop this kind of crime.

10. Considering the facts and circumstances of the case, submissions advanced on behalf of parties, gravity of the offence and severity of the punishment, I do not find any good ground to grant bail to the applicant.

11. Accordingly, the bail application is rejected.

12. However, it is clarified that the observation, if any, made here-in above shall be strictly confined to the disposal of the bail application and must not be construed to have any reflection on the ultimate merits of the case.

13. Office is directed to send a copy of this order to the informant of this case within two weeks.

14. It is directed that in case, certified copy of this order is not issued due to COVID-19 pandemic, the copy of the order downloaded from the official website of the Allahabad High Court shall be acted upon.

(2021)09ILR A295
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.08.2021

BEFORE

THE HON'BLE ARVIND KUMAR MISHRA - I, J.

Crl. Misc. Anticipatory Bail Application No. 9323 of 2021

Smt. Anita Sharma & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Rajesh Mishra, Sri Akhilesh Chandra Shukla

Counsel for the Opposite Parties:
A.G.A., Sri Amit Daga, Sri Namman Raj Vanshi, Sri Onkar Singh, Sri Sachin Malik, Sri Vipul Shukla

A. Anticipatory Bail - The Court rejected the anticipatory bail application on finding that offence committed prima facie is found to be intentional, for the reason that the first information report contains specially the very cell phone number by which the victim/ deceased was called at the house of the applicant where he was beaten as a result of which he sustained injuries, and 'septicemia' developed during the course of the treatment. At last, he succumbed to his injuries. 'Septicemia' has direct nexus with the injury caused to the deceased. (Para 20-22)

Bail Application Rejected. (E-10)

List of Cases cited:

1. St. of Telangana Vs Habib Abdullah Jeelani (2017) 2 SCC 779

2. M/s Neeharika Infrastructure Pvt. Ltd. Vs St. of Mah. & ors. LL 2021 SC 211

(Delivered by Hon'ble Arvind Kumar Mishra - I, J.)

1. Learned counsel for the applicants does not want to press this application in respect of applicant no.2- Devesh Dixit because he is minor aged about six years. Therefore, his anticipatory bail application may be dismissed as not pressed.

2. Accordingly, this Criminal Miscellaneous Anticipatory Bail Application in respect of applicant no.2- Devesh Dixit is dismissed as not pressed.

3. Heard Sri. Akhilesh Chandra Shukla, learned counsel for the applicant no.1- Smt. Anita Sharma, Sri Amit Daga and Sri Namman Raj Vanshi, learned counsels for the informant, learned A.G.A. for the State and perused the record.

4. This anticipatory bail application has been filed on behalf of the applicant no.1 - Smt. Anita Sharma, seeking anticipatory bail in Case Crime No.30 of 2021, under Sections - 147, 148, 302, 504, 506, 394 I.P.C., Police Station - Paratapur, District - Meerut, during the pendency of trial.

5. At the outset, objection was raised by Sri Amit Daga, learned counsel for the informant that the present case is barred by Section ? 438 (6) Cr.P.C. as the offence inter-alia, is under Section ? 302 I.P.C., therefore, it is not cognizable by this Court.

6. At this stage, learned counsel for the applicant has submitted that he has filed supplementary affidavit but the same is not on record, however, office copy of supplementary affidavit dated 29.06.2021 supplied in Court is taken on record. Learned A.G.A. assented to the receipt of the supplementary affidavit given by the counsel for the applicant.

7. Learned counsel for the applicant has placed reliance on the observation of the division Bench of this Court in Criminal Misc. Writ petition No. 3194 of 2021, copy whereof is at Page Nos. 8 and 9 in the supplementary affidavit, wherein the prayer for quashment of the first information report was refused on 12.05.2021. However, certain observation was made in the last paragraph of the aforesaid order that the deceased died out of 'septicemia', therefore, prima facie provisions of Section 302 I.P.C. will not be attracted in this case, whereas, Section - 304 I.P.C. Hence, the bar in filing anticipatory bail application would not come in the way of the petitioner-applicant and it may be treated to be a case under Section - 304 I.P.C. That being the position, this anticipatory bail application, apart from its merit, just for the sake of aforesaid observation be entertained, as such. Now, the merit of this claim is to be gone into at this stage.

8. Before proceeding further in this case, it would be relevant to take note of the fact (as alleged in the F.I.R.) - the very genesis of the F.I.R. registered against the applicant. Bare perusal of the F.I.R. itself is reflective of fact that as per the version contained in the first information report, a call was given to the informant on the cell phone no.9997699155 on 12.01.2021 at about 3:00 a.m. by accused Dr. Pradeep son of Beg Raj by his cell phone no.9358672920, the informant (father of the victim-Akash) reached the house of the applicant, whereupon he saw Dr. Pradeep

and his wife and his son assaulting Vikas alias Akash aged about 18 years by lathi, danda and iron rod. Apart from that, they were also abusing him. The informant rushed to the spot and tried to save his son. When the informant asked to know about the matter, then he too was abused and threatened by the accused persons. The informant took his son to the hospital whose condition was serious. It has been alleged in the F.I.R. that the treatment is underway but the injured is serious. As per the version contained in the F.I.R., it appears that the informant Richhpal son of Ram Sharan handed over the report to the police on 13.01.2021, whereupon the F.I.R. was registered at Case Crime No. 30 of 2021, under Sections ? 323, 504, 307, 352, 506, 325 I.P.C. on 16.01.2021. Lastly, the injured died on 29.01.2021, therefore, Sections - 302 and 394 I.P.C. were added against the accused during investigation.

9. Learned counsel for the applicant has placed reliance on the statement of the informant, which has been brought on record, copy whereof is annexed as Annexure No. S.A.-2 to the supplementary affidavit filed in support of this application and claimed that the prosecution story has been changed, therefore, the same is full of embelishment and improved one.

10. Now, insofar as the observation of the Hon'ble Division Bench of this Court is concerned as above, it is noticeable that there is no such direction that in all eventualities, the application should and must be treated to be the one under Section ? 304 I.P.C. but insofar as the facts of this case and the contents of the F.I.R. are concerned, there is no denial of fact that the deceased was called on the cell phone by one of the accused, Dr. Pradeep - the husband of the applicant by using his mobile.

11. Submission of learned counsel for the applicant is to the ambit that the first information report lodged against the applicant on 16.01.2021 is belated, whereas, the incident took place at 3:00 a.m. on 12.01.2021, therefore, the first information report itself speaks about high deliberation between the police and the informant. Further learned counsel for the applicant claimed that assuming it to be that the deceased came to the house of the applicant to commit robbery and in such situation the right to private defence can be exercised by the applicant, which she in fact did. No point that death of the victim was ever intended. Insofar as the allegation contained in the first information report is concerned, there is whisper of the applicant being present at her home. If the F.I.R. is believed to be true, then the statement of the informant recorded under Section ? 161 Cr.P.C. becomes different version of the incident, wherein other persons are also involved in the commission of the crime. The emphasis was laid that the deceased entered into the house of the applicant at 3:00 a.m. with the intention to commit robbery and that way right to private defence accrued and exercised, otherwise there was no motive to commit the offence as such, either to cause any fatal injury to the deceased or to intend his death. There is no injury report of the sort, as such.

12. Per contra, opposing the aforesaid contention of the learned counsel for the applicant, Sri Amit Daga, learned counsel for the informant reiterated his stand raised in the form of objection that the anticipatory bail application is not maintainable. Further, he submitted that so far as the observation of the division Bench

of this Court regarding death caused by 'septicemia' is concerned, the same does not, out and out, reject allegation of the F.I.R. and does not negate the circumstances and facts of this case, which spell out and bring this case within the purview of Section ? 302 I.P.C., therefore, the bar raised under Section ? 438 (6) Cr.P.C. is very much applicable to this case.

13. Learned A.G.A. has contended that time and again the victim was asked to give statement but he was not in fit physical condition to make any statement which also goes to prove severity and magnitude of hard beating given to the victim by the applicant and the inmates of her family.

14. Also considered the rival submissions and perused the record.

15. Bare perusal of the material available on record shows that the incident in question took place on 12.01.2021 at 3:00 a.m., whereas, the deceased was taken to the hospital by the informant, where he was given treatment and after few days, he died on 29.01.2021. The post mortem examination was conducted the very same day. In the post mortem examination report, injury in the form of abrasion ad-measuring 4 cm x 1.5 cm present on the left side of parietal skull and it was stated to be old one and the cause of death was shown to be 'septicemia'.

16. Now, the point of injury being caused cannot be scrutinized vastly on its merit, however, it is obvious that call was given by the cell phone of the applicant's husband, only when the deceased came to the house of the applicant. Then, how can it be claimed that the deceased entered into the house of the applicant for committing robbery when he was called by one of the co-accused by using cell phone. However, the death is admittedly caused due to 'septicemia' as shown in the post mortem examination report but that particular aspect needs to be scrutinized by the trial court concerned itself while the applicant faces trial, for the specific reason that the seat of assault was on the left skull of the deceased.

17. At this stage to opine that this case is not covered under Section- 302 I.P.C. would be an oversight as the entire merit of the case cannot be scanned by this Court. The jurisdiction of this Court is confined only to the extent of scrutiny within the four corners of Section - 438 Cr.P.C. and not beyond that. Bare perusal of the F.I.R., the attendant facts and circumstances of the case and the statement on record should alone be taken into account. The assault was allegedly caused on the left parietal skull and the deceased was called by using the cell phone of the husband of the applicant. Admittedly, it is not a case that the applicant-wife of Dr. Pradeep was not present inside the house at that point of time, when the incident occurred.

18. Insofar as the facts of this case are concerned, in the light of various citations namely the ***State of Telangana Vs. Habib Abdullah Jeelani (2017) 2 SCC 779 and M/s Neeharika Infrastructure Pvt. Ltd. Vs. State of Maharashtra and others, LL 2021 SC 211*** and considering the provisions of Section 438 Cr.P.C. as recently amended by the State of U.P., it can be assumed that in this case, the incident took place on 12.01.2021, whereas, the first information report was lodged against the applicant on 16.01.2021 alleging therein that the victim

was allegedly assaulted / beaten by three accused including the applicant and the victim remained under treatment for about 10 to 17 days, lastly the victim succumbed to his injury on 29.01.2021, as septicemia was said to be the cause of death in the post mortem examination report.

19. In the wake of the aforesaid fact position, the argument advanced on behalf of the applicant to the extent that this case would not be covered under Section 302 I.P.C. but at the most - the entire act alleged when taken together as a whole under facts and circumstances of the case, would amount to commission of culpable homicide not amounting to murder as defined under Section 299 I.P.C. and punishable under Section 304 I.P.C. Insofar as that argument and the contention is concerned, this Court is of the opinion that advantage should go to the applicant only for the purpose of disposal of this application under Section 438 Cr.P.C. and nothing more, though this observation should not come in the way of the trial court or the lower court concerned which would be dealing with the offence and vested with the jurisdiction to try the case and it would not be binding on the trial court as such. Therefore, for the sake of the above argument, this application is deemed to be entertained for offence under Section 304 I.P.C., as such maintainable.

20. Now the point is whether this development from 12.01.2021 to 29.01.2021 would itself entitle the applicant to interim protection under Section - 438 Cr.P.C.. In that regard, after considering the case from viewpoint of Section 438 Cr.P.C. as amended by U.P. Amendment Act, 2018 (U.P. Act 4 of 2019) it can be said that the act of the applicant was intentional. In that regard though I would not explore merits of the case at this stage but the offence committed prima facie is found to be intentional, for the reason that the first information report contains specifically the very cell phone number by which the victim / deceased was called at the house of the applicant where he was beaten as a result of which he sustained injuries, and 'septicemia' developed during course of the treatment and lastly he succumbed to his injury. Can 'septicemia' caused here be treated to be extraneous to the act of causing assault by the applicant. Certainly, the answer is in the negative.

21. Thus, 'septicemia' has direct nexus with the injury caused to the deceased.

22. In view of the above fact situation, I do not find it a fit case for leniency being shown to the applicant because the entire application is silent on the point of denial of fact, whether the mobile cell phone as the one shown to have been used for calling the victim / deceased at the place of occurrence / house of the applicant was not used, as such.

23. In view of the discussion made herein above, the prayer for anticipatory bail is refused. Accordingly, the instant anticipatory bail application is devoid of force, and the same is ***dismissed.***

24. It is made clear that observation made in this order shall have no bearing on the merits of the case and the same is confined to the disposal of this application and the trial court will not be prejudiced by the same while deciding the case on its merit or hearing the case on charge/discharge.

(2021)09ILR A300
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.08.2021

BEFORE

THE HON'BLE SAMIT GOPAL, J.

Crl. Misc. Bail Application No. 28763 of 2021

Sher Ali ...Applicant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Zia Uddin Ahmad, Ms. Tanisha Jahangir Monir

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

A. Bail - The Court rejected the bail application of the applicant who was in a police force, a pious duty of maintaining law and order and protecting citizens, on account of facing trial of committing custodial torture and death. (Para 19)

Bail Application Rejected. (E-10)

List of Cases cited:

1. D.K. Basu Vs St of W.B. (1997) 1 SCC 416 *(followed)*

2. Shakila Abdul Gafar Khan Vs Vasant Raghunath Dhoble & anr. (2003) 7 SCC 749 *(followed)*

(Delivered by Hon'ble Samit Gopal, J.)

1. Heard Sri Zia Uddin Ahmad, learned counsel for the applicant and Sri Sanjay Kumar Singh, learned AGA for the State and perused the material on record.

2. This bail application under Section 439 of Code of Criminal Procedure has been filed by the applicant Sher Ali, seeking enlargement on bail during trial in connection with Case Crime No. C-37 of 1997, under Sections 364, 304, 506 IPC, registered at Police Station Phoolpur, District Varanasi.

3. The prosecution case as per the First Information Report registered by Sanjay Kumar Gupta the son of the deceased Gokrakhnath @ Om Prakash Gupta against Shankhdhar Dwivedi Sub-Inspector, Sher Ali, Digvijay Pandey, Jagat Singh, R. Rajan, Suresh Prasad Agarwal, Mahesh Chandra Agarwal and one unknown person of Kumar Guest House, Lanka, Varanasi and some other persons on 28.02.1997 at about 04:00 AM is as follows:-

(i) On 27.02.1997 at about 07:00 PM, one person whose name is not known but can be identified by the first informant and lives in Kumar Guest House, Lanka, Varanasi who if appears can be identified along with Mahesh Chandra Agarwal the brother of a transporter Suresh Prasad Agarwal of Shahdol, Madhya Pradesh came to the house of the first informant and inquired about his father to which he stated that his father will come in the night. On asking about the work the said person replied that he has to place an order for bricks.

(ii) On 28.02.1997 at about 04:00 AM, the same person of Kumar Guest House came along with Shankhdhar Dwivedi Sub-Inspector, Police Station Kotwali, District Shahdol, Madhya Pradesh and the police personnels of the said Police Station namely Sher Ali (the present applicant), Digvijay Pandey, Jagat Singh along with the transporter of Shahdol Suresh Prasad Agarwal and Mahesh Chandra Agarwal and some unknown persons in three vehicles being a Maruti Van No. M.P. 20A 9700, a Commander

Jeep No. M.P.18 2399 and one Trax Jeep having a closed body of white colour to the house of the first informant and shouted Om Prakash Gupta the name of the father of the first informant, called him, on which, father of the first informant came out and then the said persons forcibly caught hold of his father, and while assaulting took him inside the Commander Jeep. The first informant, his brothers Ajay, Vijay, Arvind and his mother Smt. Nirmala Devi inquired about the reason for the same, to which, the persons did not tell them anything and kidnapped his father and also the cleaner of Truck No. URH 8449 Kariya Yadav and also took away the truck.

(iii) The first informant then went to Police Station Phoolpur and to different Police Stations in District Varanasi to know the whereabouts of his father and even at the district court and other places but could not know anything and then in the afternoon informed the S.S.P., Varanasi through a telegram. On an inquiry from Kumar Guest House, Lanka he came to know that the police of District Shahdol have taken away his father. The said unknown persons who had come to his house were also not available at the Guest House. On 01.03.1997 he sent a telegram to the S.S.P., Varanasi and S.P. Shahdol.

(iv) He kept on inquiring about his father and subsequently on 02.03.1997 at about 08:00 AM, a police constable from Police Station Phoolpur came and told him that a wireless message was received from Shahdol that his father has died due to heart attack. On getting the said information, the first informant along with his relatives Umashankar Jaiswal, Rajendra Prasad Jaiswal, Pratap Narayan Kanaujia, Om Prakash Gupta and Arvind Kumar Singh went to Shahdol on a Jeep and reached their in the morning of 03.03.1997. From the newspaper in Shahdol, he came to know that the dead body of his father is lying in the District Hospital and the postmortem examination has been conducted. He came to know in Shahdol that his father have brought from Varanasi to Police Station Kotwali, District Shahdol by the District Inspector, Kotwali Incharge R. Rajan, Sub-Inspector Shankhdhar Dwivedi, police personnels, Sher Ali, Digvijay Pandey, Jagat Singh and others and they mercilessly and inhumanly assaulted his father due to which his father died in the Police Station itself on 01.03.1997 at about 08:00 PM and the police in order to conceal the factum of murder in conspiracy with the doctors of District Hospital, Shahdol have shown the admission of his father in the hospital one hour prior to his death and have shown the death in the hospital whereas his father had died at Police Station Kotwali itself. The cleaner Kariya was illegally detained by the police on the said day. The police did not let them see the dead body till 04:00 PM.

(v) On the said day at about 02:00 PM, the first informant gave a tehreer to the Inspector In-charge Police Station Kotwali, District Shahdol about the kidnapping and murder of his father but no First Information Report was registered.

(vi) On 03.03.1997 at about 04:00 PM after great persuasion and hectic efforts, the first informant and his companions were allowed to see the dead body of his father. The dead body was in a swollen condition and foul smell was coming from it and there were injury marks at various places. The first informant and his companions wanted to bring the dead body to Varanasi but the Inspector In-charge Kotwali R. Rajan and other police personnels threatened them that they will also meet the same fate as there father are else, they should cremate the body in Shahdol only. R. Rajan and other police

personnels under their supervision got the dead body shifted to near a river near Akasvani Shahdol and they themselves arranged for the wood and got the body cremated and threatened the first informant and other persons that they should not be seen now otherwise they will also be killed.

(vii) On 04.03.1997 the first informant reached Varanasi and they went to Police Station Phoolpur and told them the entire incident and give the information who assured that they will look into the matter and he may go and do the remaining last rites ceremonies of his father. The first informant then did the 13th day ceremony of his father and then on 16.03.1997 went to Police Station Phoolpur to inquire about the developments to which he was told that no further information has been received from Shahdol and he may inquire about it after a week. On 25.03.1997 he again went to the Police Station Phoolpur where the constable police told him to give an application to the S.S.P. otherwise no action would be taken in the matter.

(viii) In the various newspapers in Shahdol, the news about the custodial death of his father was printed and various political leaders of different parties had moved applications against the In-charge Sub-Inspector Kotwali and other police personnels for getting a case registered for murder against them and a high level inquiry be set up and an immediate action was demanded for which even agitations were being done. The information was given by the said persons to the first informant and even the copies of the said newspapers were made available to him. Later on, the newspapers of Shahdol published a news item that inquiry is being demanded in the matter. The first informant then sent an application about the incident to the S.S.P. Varanasi by registered post but no action was taken on it.

(ix) The said persons had kidnapped his father and have murdered him and as such a case be registered and investigation be done in the interest of justice.

4. The First Information Report was registered on the basis of an application dated 21.04.1997 moved by Sanjay Kumar Gupta, the first informant under Section 156(3) Cr.P.C. before the Chief Judicial Magistrate, Varanasi with the prayer that appropriate orders be passed for registration of the case and investigation therein.

5. The postmortem examination of the deceased Gorakhnath @ Om Prakash Gupta was conducted on 02.03.1997 at 12:45 PM by a team of three doctors of District Shahdol. The doctors found two injuries on the body of the deceased which are as follows:-

(i) Contusion, margins reddish blue. Centre pale of 6cm x 2cm transversely placed over the lateral aspect of lower part of left thigh.

(ii) Contusion, margins reddish blue. Centre pale of 5cm x 2cm was present just above the injury no.1.

For the noted injuries, the doctors opined as follows:-

"Injury No. 1 and 2 mentioned on page No. 3 are antemortem in nature and caused by hard and blunt object."

In so far as the cause of death is concerned, the team of doctors was of the following opinion:-

"No definite opinion can be given. Facts and findings have been described in detail. The viscera was preserved for chemical and histopathological examination. The time since death was within 24 hours."

6. After registration of the First Information Report, the matter was under investigation by the local police, but vide order dated 09.10.1997 of the S.P. (Rural), Varanasi, the same was transferred to S.I.S. Branch, Varanasi for investigation. The S.I.S. concluded the investigation and submitted a Final Report No. 18 of 1998 dated 23.10.1998.

7. Against the final report as submitted by the S.I.S., Varanasi on 23.10.1998, the first informant filed a protest petition dated 31.01.2001 along with his affidavit. The Court of the Chief Judicial Magistrate, Varanasi vide order dated 05.06.2007 accepted the said protest petition and rejected the final report as submitted by the police and summoned the accused persons for offences under Sections 364, 304, 506 IPC. Non bailable warrants were also issued simultaneously and the case was ordered to be registered as a State case. The said order is annexed as annexure 26 to the affidavit.

8. Against the order dated 05.06.2007, an application under Section 482 Cr.P.C. was filed by R.Rajan before this Court which was numbered as Criminal Misc. Application (U/s 482 Cr.P.C.) No. 22539 of 2007 (R. Rajan Vs. State of U.P. and another) in which vide order dated 13th September, 2007 the further proceedings of the said case were stayed. The said matter was heard finally on 27.08.2012 and the judgment was reserved. The judgment could not be delivered and the matter was directed to be listed for rehearing before the appropriate Bench vide order dated 14.02.2013. The interim order passed therein was directed to continue till the next date fixed.

9. The first informant Sanjay Kumar Gupta then filed a Writ Petition (Criminal) No. 8 of 2018 before the Apex Court titled as "Sanjay Kumar Gupta Vs. State of U.P. and another" in which vide order dated 23.09.2020, the Apex Court vacated the order dated 13.09.2007 passed in the said 482 Cr.P.C. petition and directed the Chief Judicial Magistrate, Varanasi to proceed with the matter in accordance with law. The writ petition was allowed. The order passed by the Apex Court is extracted herein-below:-

"The office report is that respondent No.2 has refused to accept notice and thus, is deemed to have been served.

The facts of the case make a shocking reading as the allegation is of custodial death of the father of the petitioner - Late O.P. Gupta which, as per the medical report, occurred on 01.03.1997 after his arrest from Varanasi on 28.02.1997. The case was sought to be made out as one of heart attack, but the petitioner relies upon the medical report of his father dated 21.02.1997 which shows that he had a normal cardiac condition. This also did not substantiate the fact that there were ante mortem injuries on the body. On the petitioner moving an application under Section 156(3) of the Cr.P.C., the SHO, Phoolpur, Varanasi (U.P.) was directed to register an FIR and investigate the matter.

Case Crime No.C-37/97 was lodged under Sections 364, 304 and 506 of the IPC against respondent No.2 and other police personnel. The investigation was transferred to the SIS Branch, Varanasi and the final report dated 23.10.1998 was filed by the I.O., against which the petitioner filed a protest petition, pursuant whereto the Chief Judicial Magistrate, Varanasi rejected the closure report, accepted the protest petition and consequently issued

summoning orders under Sections 364, 304 and 506 IPC and non-bailable warrants against the accused persons in terms of an order dated 05.06.2007. The order records that the investigation revealed that Late O.P.Gupta has picked up from his residence by the M.P.Police without authority of law on 28.02.1997.

The aforesaid summoning order was challenged by respondent No.2 before the Allahabad High Court in Criminal Miscellaneous Application No.22539 of 2007 for stay of proceedings of the case being Case No.6497 of 2007 in which notice was issued and an interim stay order was granted on 13.09.2007. The matter has continued in that position since then for the last 13 years with the criminal proceedings stayed. In fact, at one stage, orders were reserved on the proceedings on 14.02.2013, but were again listed for rehearing on 06.03.2013, which till date has not produced results.

The issue has also arisen as respondent No.2was then in services of the State of Madhya Pradesh. The counter affidavit of respondent No.1,State of Uttar Pradesh practically supports the stand of the petitioner.

We thus, vacate the order dated 13.09.2007 passed in Criminal Miscellaneous Application No.22539 of 2007 by the Allahabad High Court and direct the Chief Judicial Magistrate, Varanasi to proceed with the matter in accordance with law.

We consider appropriate also to direct that this order be placed before the Chief Justice of the Allahabad High Court for administrative action as to why such a situation came to pass and why the trial Court order remained stayed for 13 years by an ad interim order in case of a custodial death. The Chief Justice may call upon the Registrar of the High Court to look into the matter and thereafter a report be submitted on the Administrative Side before this Court.

The writ petition is allowed in the above terms leaving parties to bear their own costs.

Needless to say, in view of this long passage of time of 13 years, the trial court will proceed with the trial almost on a day to day basis as far as possible in the given circumstances and endeavour to conclude the trial within a period of one year from its commencement.

Pending application(s) stand(s) disposed of."

10. The said 482 petition being Criminal Misc. Application (U/s 482 Cr.P.C.) No. 22539 of 2007 (R. Rajan Vs. State of U.P. and another) was connected with two other petitions being Criminal Misc. Application (U/s 482 Cr.P.C.) Nos. 24013 of 2007 (Shankhdhar Dwivedi and others Vs. State of U.P. and others) and 24145 of 2007 (Suresh Chandra Agrawal Vs. State of U.P. and another) which were disposed of vide order dated 08.10.2020 of this Court in view of the order dated 23.09.2020 of the Apex Court in Writ Petition (Crl.) No. 8 of 2018.

11. The order dated 08.10.2020 of this Court was then challenged before the Apex Court in Special Leave to Appeal (Crl.) No. 5499 of 2020 (R.Rajan Vs. State of U.P. and another) which was dismissed vide order dated 19.11.2020. The said order is extracted herein-below:-

"Despite the best persuasion of learned counsel for the petitioner, who argued at some length, we are unable to persuade ourselves to interfere with the impugned order under Article 136 of the

Constitution of India in the given facts of the case.

The special leave petition is accordingly dismissed.

Pending applications shall also stand disposed of."

12. Subsequently, co-accused Jagat Singh and the present applicant Sher Ali preferred a Crl. Misc. Anticipatory Bail Application No. 7440 of 2021 (Jagat Singh and another Vs. State of U.P.) which vide order dated 06.04.2021 was allowed and it was ordered that in the event of arrest of the applicants therein they shall be released on anticipatory till the conclusion of trial subject to the conditions in the said order. The said order is extracted herein-below:-

"1. Heard learned counsel for the applicants and learned A.G.A. for the State.

2. This anticipatory bail application has been filed on behalf of the applicants - Jagat Singh and Sher Ali, seeking anticipatory bail in Case Crime No. C-37 of 1997, under Sections - 364, 304 and 506 I.P.C., Police Station - Phoolpur, District - Varanasi, during pendency of trial.

3. At the outset, it is stated that in exact similar circumstance Shankhdhar Dwivedi, the co-accused who was Sub-Inspector at the relevant time has already been granted anticipatory bail in Criminal Misc. Anticipatory Bail Application U/S 438 Cr.P.C. No. 1195 of 2021, vide order dated 03.02.2021. The other co-accused R. Rajan is also stated to have similarly enlarged on anticipatory bail in Criminal Misc. Anticipatory Bail Application U/S 438 Cr.P.C. No. 9211 of 2020, vide order dated 03.02.2021. For the reasons contained in those orders, the present applicants against whom similar allegations have been made are also entitled to similar protection.

4. In view of the above, no useful purpose would be served in keeping the present application pending or calling for counter affidavit at this stage. Without expressing any opinion on the merits of the case, the applicant is entitled to anticipatory bail in this case, at this stage.

5. In the event of arrest of the applicants - Jagat Singh and Sher Ali, involved in the aforesaid case crime, they shall be released on anticipatory bail till conclusion of the trial, on their furnishing a personal bond of Rs. 50,000/- each with two sureties of the like amount to the satisfaction of the Station House Officer of the police station concerned on the following conditions:

(i) The applicants shall make themselves available for interrogation by a police officer as and when required.

(ii) The applicants shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the court or to any police officer or tamper with the evidence.

(iii) The applicants shall not leave India without the previous permission of the court.

(iv) In default of any of the conditions mentioned above, the investigating officer shall be at liberty to file appropriate application for cancellation of anticipatory bail granted to the applicants.

6. Present application stands disposed of."

13. Co-accused R.Rajan had also filed Crl. Misc. Anticipatory Bail Application No. 9211 of 2020 (R. Rajan Vs. State of U.P.) and vide order dated 03.02.2021 he

was also granted anticipatory bail. The said order was challenged before the Apex Court in SLP (Crl.) Nos. 1928-1929 of 2021 (Sanjay Kumar Gupta Vs. State of U.P. and another) and also the order dated 06.04.2021 passed in Crl. Misc Anticipatory Bail Application No. 7440 of 2021 was also under challenge before the Apex Court in SLP (Crl.) No. 3496 of 2021. Both the SLPs were connected together and were disposed of vide order dated 25th May, 2021. The said order is extracted herein-below:-

"SLP(Crl.)Nos. 1928-1929 of 2021

Leave granted.

In these appeals, the informant of Case Crime No. C-37 of 1997, under Sections 364, 304 and 506 IPC, Police Station - Phoolpur, District - Varanasi, has challenged the order dated 03.02.2021 passed by the High Court of Judicature at Allahabad in Criminal Miscellaneous Anticipatory Bail Application No. 1195 of 2021, granting anticipatory bail to the respondent No. 2-Shankhdhar Dwivedi in SLP(Crl.) No. 1928 of 2021; and another order of even date by the High Court in Criminal Signature Not Verified Miscellaneous Anticipatory Bail Application No. 9211 of 2020, granting anticipatory bail to the respondent No. 2-R. Rajan in SLP(Crl.) No. 1929 of 2021.

The allegations in this matter are of custodial death of the father of the appellant on 01.03.1997, after his arrest from Varanasi on 28.02.1997. After having gone through the routes of the application under Section 156(3) of the Criminal Procedure Code, 1973; filing of negative final report dated 23.10.1998; filing of protest petition by the appellant; acceptance of the protest petition; and certain miscellaneous applications in the High Court for stay of proceedings, ultimately, the matter was taken up by this Court in Writ Petition (Crl.) No. 8 of 2018.

The said writ petition was decided by the order dated 23.09.2020 by a 3-Judge Bench of this Court to which, one of us (Aniruddha Bose, J.) was a party. Therein, after taking note of the relevant background aspects and while expressing dissatisfaction that the criminal proceedings relating to the allegations of custodial death had remained stayed for 13 years, this Court effaced the order/s which were hindering the progress of the matter; and directed expeditious proceedings in the trial. This Court also directed that the Trial Court shall proceed with the trial almost on day-to-day basis and make an endeavour to conclude the same within a period of one year from the date of its commencement.

We are not recounting several other proceedings in the matter at different stages, for being not relevant for the present purpose. The relevant part of the matter is that pertaining to the applications seeking anticipatory bail by the respondents.

Though in the impugned order dated 03.02.2021 in Criminal Miscellaneous Anticipatory Bail Application No. 1195 of 2021, the High Court noticed the aforesaid order of this Court dated 23.09.2020 but, proceeded to grant anticipatory bail to the respondent No. 2-Shankhdhar Dwivedi with the observations and consideration which read as under:-

"7. After considering the rival submissions this court finds that there is a case registered against the applicant. It cannot be definitely said when the police may apprehend him. After the lodging of FIR the arrest can be made by the police at will. There is no definite period fixed for the police to arrest an accused against

whom an FIR has been lodged. The courts have repeatedly held that arrest should be the last option for the police and it should be restricted to those exception cases where arresting the accused is imperative or his custodial interrogation is required. Irrational and indiscriminate arrests are gross violation of human rights. In the case of Joginder Kumar v. State of Uttar Pradesh AIR 1994 SC 1349 the Apex Court has referred to the third report of National Police Commission wherein it is mentioned that arrests by the police in India is one of the chief source of corruption in the police. The report suggested that, by and large, nearly 60 percent of the arrests were either unnecessary or unjustified and that such unjustified police action accounted for 43.2 percent of expenditure of the jails. Personal liberty is a very precious fundamental rights and it should be curtailed only when it becomes imperative. According to the peculiar facts and circumstances of the peculiar case the arrest of an accused should be made.

8. Hence without expressing any opinion on the merits of the case and considering the nature of accusations and antecedents of applicant, he is directed to be enlarged on anticipatory bail as per the Constitution Bench judgment of the Apex Court in the case of Sushila Aggarwal vs. State (NCT of Delhi)-2020 SCC Online SC 98. The future contingencies regarding anticipatory bail being granted to applicant shall also be taken care of as per the aforesaid judgment of the Apex Court."

After granting anticipatory bail to the respondent- Shankhdhar Dwivedi, the High Court, by a separate order of even date in Criminal Miscellaneous Anticipatory Bail Application No. 9211 of 2020, extended the same benefit of anticipatory bail to the other respondent-R. Rajan, while observing that his case was on identical footing.

The petitions seeking leave to appeal by the informant against the aforesaid orders of the High Court were taken up for consideration on 25.02.2021 by another 3-Judge Bench of this Court wherein too, one of us (Dinesh Maheshwari, J.) was a party. After granting permission to file the petition, and while issuing notices, this Court specifically stayed the operation of impugned order granting anticipatory bail.

It was later on brought to the notice of this Court that the learned Chief Judicial Magistrate, Varanasi declined to take the requisite steps against the accused persons, even though the order of the High Court granting anticipatory bail stood in abeyance because of the stay order of this Court. In the order dated 07.04.2021, this Court found that the order passed by the Chief Judicial Magistrate was not in sync with the stay order dated 25.02.2021. This Court expressed clear views that the respondents ought to be taken into custody; and also observed that the Court would be inclined to hear them only thereafter on the issue as to whether the anticipatory bail granted by the High Court was sustainable or not. Having said so, this Court accepted the submissions at that stage by the learned senior counsel for the respondents that they will surrender within one week.

Thereafter, it was reported before the Court on 06.05.2021 that the respondents had since surrendered and the matter was ordered to be listed before the vacation Bench while giving liberty to the respondents to file counter affidavit. The respondents, as per the submissions made, had surrendered on 14.04.2021 and 15.04.2021 respectively.

The respondents have filed a detailed counter affidavit seeking to support the orders granting anticipatory bail with reference to the factual aspects of the case as also with reference to the decision

of this Court in Sushila Aggarwal vs. State (NCT of Delhi): 2020 SCC Online SC 98. Further, the plea for setting aside the order granting anticipatory bail is opposed with reference to the decision of this Court in Dolat Ram v. State of Haryana: (1995) 1 SCC 349.

The submissions have been opposed on behalf of the appellant with reference to the gravity of offences as also the observations and directions of this Court in the aforesaid order dated 23.09.2020, as passed in Writ Petition (Crl.) No. 8 of 2018. The submissions of the appellant have been duly supported on behalf of the State.

Having examined the matter in its totality, we do not find it necessary to dilate on the submissions pertaining to merits of the case, lest any prejudice is caused to any of the parties in relation to the pending trial. Suffice it to observe for the present purpose that, prima facie, we have not been able to persuade ourselves to endorse the approach of the High Court in granting anticipatory bail with the observations in the above-quoted paragraphs 7 and 8 of the order impugned. It needs hardly any elaboration that the bail plea in a particular case cannot be considered and decided merely with generalised observations about the processes of law, or the fundamental rights, or any particular study report.

Be that as it may, even while expressing disagreement with the approach of the High Court, we would prefer not to make any further comment in the matter because of the other relevant factors that: (a) the Trial Court is bound to proceed expeditiously as already directed by this Court in the order dated 23.09.2020; and (b) the respondents have indeed surrendered and are in custody.

As indicated hereinabove, it is difficult to endorse the order impugned, whereby anticipatory bail came to be granted, essentially with generalised observations and without adverting to the relevant considerations and material circumstances of the case. In any case, now when the respondents have surrendered and taken into custody, all the aspects related with the prayer of grant of anticipatory bail are practically rendered redundant.

However, after the respondents have surrendered and have been taken into custody, their right to seek regular bail during the pendency of the trial is not taken away. Of course, such a plea ought to be initially considered by the Court concerned upon making of a proper application in that regard and subject to the submissions of the relevant parties.

In view of the above, even while we are inclined to allow these appeals and to set aside the impugned orders while rejecting the applications made by the respondents for anticipatory bail, we would leave it open for them to apply for regular bail. If any such prayer is made by them, the same may be considered by the Court concerned in accordance with law, uninfluenced by any observations occurring in this matter in any of the orders pertaining to the plea for anticipatory bail and irrespective of any observation made in these appeals.

In the interest of justice, we also deem it appropriate to observe that if the respondents apply for regular bail, their prayer be given due consideration expeditiously by the Court concerned.

The appeals are disposed of in the above terms.

All pending applications also stand disposed of.

SLP(Crl.) No. 3496 of 2021.

Leave granted.

This appeal is directed against another order dated 06.04.2021 relating to

the same Case Crime No. C-37 of 1997, by the High Court of Judicature at Allahabad in Criminal Miscellaneous Anticipatory Bail Application No. 7440 of 2021, whereby the High Court granted anticipatory bail to other two co-accused persons, respondent Nos. 2- Jagat Singh and 3-Sher Ali on the basis of the aforesaid orders dated 03.02.2021.

So far as the impugned order dated 06.04.2021 is concerned, the same is in the teeth of the stay order dated 25.02.2021 passed by this Court in SLP(Crl.) Nos. 1928-29 of 2021, whereby operation of the relied upon order was stayed by this Court. It appears that the said stay order of this Court was not brought to the notice of the High Court because, the High Court could not have passed the order dated 06.04.2021 with reference to an order which was not in operation in view of the stay order of this Court.

Thus, the order so passed by the High Court on 06.04.2021 cannot be approved for the reasons and observations in the preceding part of this order; and additionally for the reason that the impugned order dated 06.04.2021 stands in conflict with the stay order passed by this Court on 25.02.2021.

In this matter, by an order passed by this Court on 28.04.2021, operation of the impugned order dated 06.04.2021 was stayed with directions to the respondent Nos. 2 and 3 to surrender. It has been submitted by the learned counsel for these respondents that they have surrendered on 19.05.2021.

Taking note of the submissions so made and for the reasons foregoing, this appeal is also allowed and while setting aside the impugned order and rejecting the application made by the respondents for anticipatory bail, we would extend the same liberty and observations for these respondents that it would be open for them to apply for regular bail and if any such prayer is made by them, the same may be considered expeditiously by the Court concerned in accordance with law, uninfluenced by any observations occurring in this matter in any of the orders pertaining to the plea for anticipatory bail and irrespective of any observation made in this appeal.

The appeal stands disposed of in the above terms.

All pending applications also stand disposed of."

14. The Apex Court had set aside the orders of anticipatory bail granted in the petition of the applicant and co-accused persons and had rejected the said applications and directed them to apply for regular bail and directed that if any such prayer is made by them, the same be considered expeditiously in accordance with law.

15. The applicant surrendered on 19.05.2021 before the court below at Varanasi and filed application for bail which was rejected vide order dated 30.06.2021 passed by the Additional Sessions Judge, Court No. 1 Varanasi and as such the present bail application has been filed before this Court.

16. The series of prolonged litigation ends here with the applicant surrendering and before the court concerned and then resorting to filing bail application under Section 439 Cr.P.C.

17. Learned counsel for the applicant argued that:-

(i) The applicant has been falsely implicated in the present case.

(ii) The deceased Gorakhnath @ Om Prakash Gupta was involved in Case Crime No. 103 of 1997 under Section 420, 406 IPC, Police Station Kotwali, District Shahdol in which he was arrested and subsequently a charge sheet was also submitted against him and Kariya @ Chandrabali on 25.07.1997. Shiv Shankar Gupta to whom the paper loaded in the said truck was sold is also an accused in the said charge sheet but as an absconder.

(iii) The deceased while being in custody at Police Station Kotwali, District Shahdol complained about chest pain and wanted to ease himself after which he was taken to the toilet by the applicant who was present there but he fell on the stairs due to severe heart attack.

(iv) The deceased was taken to the hospital and was admitted there who died later on, for which the doctors after the postmortem could not give any definite opinion about the cause of death and preserved the viscera which was examined by the Forensic Science Lab and the report thereof does not mention of any poison being found in the body of the deceased. The death of the deceased was a natural death.

(v) After lodging of the First Information Report on the basis of an application under Section 156(3) Cr.P.C., the matter was being investigated by the local police but vide order dated 09.10.1997 passed by the S.P. (Rural) Varanasi, the investigation was transferred to S.I.S. Branch, Varanasi.

(vi) The investigation concluded by way of submission of a final report in the Court on 23.10.1998 after which a protest petition was filed on 31.01.2001 which was allowed and the final report was rejected and the applicant and other accused persons being a total of six accused named in the First Information Report were summoned to face trial.

(vii) The First Information Report is based on totally false and frivolous allegations. There is no corroboration of the version of the prosecution that the deceased died a custodial death. The death was a natural death. The applicant is a retired government servant and his implication therein is false.

(viii) The applicant is having no criminal history as stated in para 84 of the affidavit and is in jail since 19.05.2021.

18. Per contra, learned AGA for the State opposed the prayer for bail and argued that:-

(i) The deceased was taken away from his house by the applicant and co-accused persons which is not disputed.

(ii) The deceased was under police custody at Police Station Kotwali, District Shahdol on the date of his death.

(iii) The death has occurred while the deceased was under police custody.

(iv) The order summoning the accused while allowing the protest petition and rejecting the final report is a well considered.

(v) The beating of the deceased while being in police custody is evident from the fact that he has received two contusions on his body and the site of the injuries are fleshy part of the body which can be received only after being assaulted.

(vi) On the own showing of the applicant as per the argument and while referring to the pleading of para 23, it was the applicant who was present when the deceased felt unwell.

(vii) The present case is a case of custodial death in which the deceased has received injuries on his body as is evident from the postmortem report itself.

(viii) The postmortem report and the opinion of the doctors therein is not

suggestive of any heart attack or heart problem.

(ix) The release of the applicant at the stage when the trial has been expedited by the Apex Court vide order dated 23.09.2020 may have an adverse affect therein as he is a resident of a different State being Madhya Pradesh.

(x) The matter is serious in nature as it concerns custodial death.

(xi) The prayer for bail of the applicant be rejected.

19. After having heard learned counsels for the parties and having gone through the records, it is evident that the applicant is named in the First Information Report. The case of the prosecution that the deceased was taken away to Police Station Kotwali, District Shahdol is not under dispute. The applicant is named specifically and has been assigned the role of taking away the deceased from Varanasi to Shahdol along with other co-accused persons. The presence of the applicant even at the Police Station and he being there has been argued and pleaded in para 23 of the bail application and even it is pleaded that when the deceased feel ill the applicant was present there. The deceased as per the postmortem report has received injuries on his body which are suggestive of assault on him by hard and blunt object. There is no finding in the postmortem examination report which would be suggestive of any heart problem or cardiac arrest/heart attack. There is nothing to show that the death was natural. The present case is a case of custodial torture and death. The Apex Court vide order dated 23.09.2020 passed in Writ Petition (Crl.) No. 8 of 2018 has directed the trial court to proceed with the trial on a day today basis and make an endeavour to conclude it within a period of one year. The applicant is a resident of a different State. He has been in the police force which is a disciplined force and enshrined with the pious duty of maintaining law and order and protecting citizens. His release may have an adverse effect in the trial.

20. Custodial violence, custodial torture and custodial deaths have always been a concern for civilized society. Times and again the judicial verdicts of the Apex Court and other Courts have shown their concern and anguish in such matters.

21. In the celebrated case of **D.K. Basu Vs. State of West Bengal : (1997) 1 SCC 416** the Apex Court while expressing its anguish in cases of custodial deaths has observed as follows:

"22. Custodial death is perhaps one of the worst crimes in a civilised society governed by the rule of law. The rights inherent in Articles 21 and 22(1) of the Constitution require to be jealously and scrupulously protected. We cannot wish away the problem. Any form of torture or cruel, inhuman or degrading treatment would fall within the inhibition of Article 21 of the Constitution, whether it occurs during investigation, interrogation or otherwise. If the functionaries of the Government become law breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchanism. No civilised nation can permit that to happen. Does a citizen shed off his fundamental right to life, the moment a policeman arrests him? Can the right to life of a citizen be put in abeyance on his arrest? These questions touch the spinal cord of human rights jurisprudence. The answer, indeed, has to be an emphatic

"No". The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, undertrials, detenues and other prisoners in custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by law.

23. In Neelabati Bahera v. State of Orissa, (1993) 2 SCC 746 (to which Anand, J. was a party) this Court pointed out that prisoners and detenues are not denuded of their fundamental rights under Article 21 and it is only such restrictions as are permitted by law, which can be imposed on the enjoyment of the fundamental rights of the arrestees and detenues. It was observed: (SCC p. 767, para 31)

"It is axiomatic that convicts, prisoners or undertrials are not denuded of their fundamental rights under Article 21 and it is only such restrictions, as are permitted by law, which can be imposed on the enjoyment of the fundamental right by such persons. It is an obligation of the State to ensure that there is no infringement of the indefeasible rights of a citizen to life, except in accordance with law, while the citizen is in its custody. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, undertrials or other prisoners in custody, except according to procedure established by law. There is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life. His liberty is in the very nature of things circumscribed by the very fact of his confinement and therefore his interest in the limited liberty left to him is rather precious. The duty of care on the part of the State is strict and admits of no exceptions. The wrongdoer is accountable and the State is responsible if the person in custody of the police is deprived of his life except according to the procedure established by law."

24. Instances have come to our notice where the police has arrested a person without warrant in connection with the investigation of an offence, without recording the arrest, and the arrested person has been subjected to torture to extract information from him for the purpose of further investigation or for recovery of case property or for extracting confession etc. The torture and injury caused on the body of the arrestee has sometimes resulted into his death. Death in custody is not generally shown in the records of the lock-up and every effort is made by the police to dispose of the body or to make out a case that the arrested person died after he was released from custody. Any complaint against such torture or death is generally not given any attention by the police officers because of ties of brotherhood. No first information report at the instance of the victim or his kith and kin is generally entertained and even the higher police officers turn a blind eye to such complaints. Even where a formal prosecution is launched by the victim or his kith and kin, no direct evidence is available to substantiate the charge of torture or causing hurt resulting into death, as the police lock-up where generally torture or injury is caused is away from the public gaze and the witnesses are either police men or co-prisoners who are highly reluctant to appear as prosecution witnesses due to fear of retaliation by the superior officers of the police. It is often seen that when a complaint is made against torture, death or injury, in police custody, it is difficult to secure evidence against the policemen responsible for resorting to third degree methods since they are in charge of police

station records which they do not find difficult to manipulate. Consequently, prosecution against the delinquent officers generally results in acquittal. State of Madhya Pradesh v. Shyamsunder Trivedi & Ors., (1995) 4 SCC 262 is an apt case illustrative of the observations made by us above. .....…"

22. Further in the case of **Shakila Abdul Gafar Khan Vs. Vasant Raghunath Dhoble and another: (2003) 7 SCC 749** the Apex Court has again shown its anguish in the matters of custodial violence, torture and abuse of police powers. It has been observed as follows:

"If you once forfeit the confidence of our fellow citizens you can never regain their respect and esteem. It is true that you can fool all the people some of the time, and some of the people all the time, but you cannot fool all the people all the time", said Abraham Lincoln. This Court in Raghbir Singh v. State of Haryana (1980 (3) SCC 70), took note of these immortal observations (SCC p. 72, para 4) while deprecating custodial torture by the police.

2. Custodial violence, torture and abuse of police power are not peculiar to this country, but it is widespread. It has been the concern of international community because the problem is universal and the challenge is almost global. The Universal Declaration of Human Rights in 1948 which marked the emergence of a worldwide trend of protection and guarantee of certain basic human rights stipulates in Article 5 that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment of punishment". Despite this pious declaration, the crime continues unabated, though every civilized nation shows its concern and makes efforts for its eradication.

3. If it is assuming alarming proportions, now a days, all around it is merely on account of the devilish devices adopted by those at the helm of affairs who proclaim from roof tops to be the defenders of democracy and protectors of people's rights and yet do not hesitate to condescend behind the screen to let loose their men in uniform to settle personal scores, feigning ignorance of what happens and pretending to be peace loving puritans and saviours of citizens' rights.

4. Article 21 which is one of the luminary provisions in the Constitution of India, 1950 (in short "the Constitution") and is a part of the scheme for fundamental rights occupies a place of pride in the Constitution. The article mandates that no person shall be deprived of his life and personal liberty except according to the procedure established by law. This sacred and cherished right i.e. personal liberty has an important role to play in the life of every citizen. Life or personal liberty includes a right to live with human dignity. There is an inbuilt guarantee against torture or assault by the State or its functionaries. Chapter V of the Code of Criminal Procedure, 1973 (for short "the Code") deals with the powers of arrest of persons and the safeguards required to be followed by the police to protect the interest of the arrested person. Articles 20 (3) and 22 of the Constitution further manifest the constitutional protection extended to every citizen and the guarantees held out for making life meaningful and not a mere animal existence. It is therefore difficult to comprehend how torture and custodial violence can be permitted to defy the rights flowing from the Constitution. The dehumanizing torture, assault and death in custody which have assumed alarming

proportions raise serious questions about the credibility of rule of law and administration of criminal justice system. The community rightly gets disturbed. The cry for justice becomes louder and warrants immediate remedial measures. This Court has in a large number of cases expressed concern at the atrocities perpetuated by the protectors of law. Justice Brandies' observation which have become classic are in following immortal words:

Government as the omnipotent and omnipresent teacher teaches the whole people by its example, if the Government becomes a lawbreaker, it breeds contempt for law, it invites every man to become a law into himself. (In Olmstead v. United States, 277 US 438, US at p. 485, quoted in Mapp v. Ohio, 367 US 643, US at p. 659)

5. The diabolic recurrence of police torture resulting in a terrible scare in the minds of common citizens that their lives and liberty are under a new and unwarranted peril because guardians of law destroy the human rights by custodial violence and torture and invariably resulting in death. The vulnerability of human rights assumes a traumatic torture when functionaries of the State whose paramount duty is to protect the citizens and not to commit gruesome offences against them, in reality perpetrate them. The concern which was shown in Raghubir Singh case (1980 (3) SCC 70) more than two decades back seems to have fallen to leaf ears and the situation does not seem to be showing any noticeable change. The anguish expressed in Gauri Shanker Sharma v. State of U. P. (AIR 1990 SC 709), Bhagwan Singh and Anr. v. State of Punjab (1992 (3) SCC 249), Smt. Nilabati Behera @ Lalita Behera v. State of Orissa and Ors. (AIR 1993 SC 1960), Pratul Kumar Sinha v. State of Bihar and Anr. (1994 Supp. (3) SCC 100), Kewal Pati (Smt.) v. State of U. P. and Ors. (1995 (3) SCC 600), Inder Singh v. State of Punjab and Ors. (1995 (3) SCC 702), State of M. P. v. Shyamsunder Trivedi and Ors. (1995 (4) SCC 262) and by now celebrated decision in D. K. Basu v. State of West Bengal (1997 (1) SCC 416) seems to have caused not even any softening attitude to the inhuman approach in dealing with persons in custody.

6. Rarely, in cases of police torture or custodial death, direct ocular evidence of the complicity of the police personnel alone who can only explain the circumstances in which a person in their custody had died. Bound as they are by the ties of brotherhood, it is not unknown that the police personnel prefer to remain silent and more often than not even pervert the truth to save their colleagues - and the present case is an apt illustration - as to how one after the other police witnesses feigned ignorance about the whole matter.

7. The exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt by the prosecution, at times even when the prosecuting agencies are themselves fixed in the dock, ignoring the ground realities, the fact-situation and the peculiar circumstances of a given case, as in the present case, often results in miscarriage of justice and makes the justice delivery system suspect and vulnerable. In the ultimate analysis the society suffers and a criminal gets encouraged. Tortures in police custody, which of late are on the increase, receive encouragement by this type of an unrealistic approach at times of the courts as well because it reinforces the belief in the mind of the police that no harm would come to them if one prisoner dies in the lockup because there would hardly be any evidence available to the prosecution to directly implicate them with the torture. The courts must not lose

sight of the fact that death in police custody is perhaps one of the worst kind of crimes in a civilized society, governed by the rule of law and poses a serious threat to an orderly civilized society. Torture in custody flouts the basic rights of the citizens recognized by the Indian Constitution and is an affront to human dignity. Police excesses and the maltreatment of detainees/under - trial prisoners or suspects tarnishes the image of any civilised nation and encourages the men in "khaki" to consider themselves to be above the law and sometimes even to become law unto themselves. Unless stern measures are taken to check the malady of the very fence eating the crops, the foundations of the criminal justice delivery system would be shaken and the civilization itself would risk the consequence of heading, towards total decay resulting in anarchy and authoritarianism reminiscent of barbarism. The courts must, therefore, deal with such cases in a realistic manner and with the sensitivity which they deserve, otherwise the common man may tend to gradually lose faith in the efficacy of the system of judiciary itself, which if it happen will be a sad day, for anyone to reckon with."

23. Considering the totality of the case in particular, nature of evidence available on record, I am not inclined to release the applicant on bail.

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

25. The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad.

26. The computer generated copy of such order shall be self attested by the counsel of the party concerned.

27. 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)09ILR A315
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.09.2021

BEFORE

THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

Crl. Misc. Ist Bail Application No. 48444 of 2020
connected with
Crl. Misc. Bail Application No. 49354 of 2020

Vinay Kumar Tiwari ...Applicant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Satyendra Singh, Sri V.P. Srivastava (Senior Adv.)

Counsel for the Opposite Party:
G.A.

A. Bail - The Court rejected the bail applications on seeing that the nature of the offence and the amount of culpability is serious, heinous, shocking and unprecedented. It is evident from the discussions that the main accused persons had prior information of the police raid which was released by the police. This not only made the accused person alert but also provided them the fullest opportunity to prepare for attack and commit such a horrendous crime of killing 8 police personnel including Circle Officer, who succumbed to his injuries. Moreover, they are also accused of having a good relationship with the main accused. (Para 46)

Bail Application Rejected. (E-10)

List of Cases cited:

1. Prem Chand (Paniwala) Vs U.O.I. AIR 1981 SC 613

2. Vineet Narain Vs U.O.I. AIR 1998 SC 889

3. Prakash Singh Vs U.O.I .(2006) 8 SCC 1

4. Dalvir Hussain Vs St. of Guj AIR 1991 SC 56

5. Pawan Kumar Vs St. of U.P. 2015 (90) ACC 9 (SC)

6. Mukesh Kumar Kashyap Vs St. of Uttarakhand 2015 (89) ACC 903

7. St. of U.P. Vs Rajju 2005 (53) ACC 343

8. K R Purushottaman Vs St. of Kerala 2006 (54) ACC 255 (SC)

(Delivered by Hon'ble Pradeep Kumar Srivastava, J.)

1. Since both the bail applications are connected and arisen from same case crime number, therefore, both the bail applications are being disposed off by a common order.

2. Heard Shri V.P. Srivastava, learned Senior Counsel assisted by Shri Satyendra Singh, learned counsel for the applicant (Vinay Kumar Tiwari), Shri Shyam Narayan Verma, Shri Anurag Pathak and Shri Harshit Pathak, learned counsel for the applicant (K.K. Sharma) and Shri Manish Goyal, learned Additional Advocate General assisted by Shri Rajesh Mishra, Shri R.P. Pandey, Shri Kaushalesh Prasad Tiwari and Shri Mayank Mishra, learned AGA, Shri Abhijeet Mukherjee, learned Brief Holder for the State and perused the record.

3. The present bail applications have been filed by the accused-applicants Vinay Kumar Tiwari and K.K. Sharma in Case Crime No. 0192 of 2020, under sections 147, 148, 149, 302, 307, 504, 506, 353, 332, 333, 396, 412, 120B, 34 IPC, section 7 of Criminal Law Amendment Act and section ¾ of Explosive Substances Act, P.S.- Chaubeypur, District - Kanpur Nagar.

4. In the year 1981, in **Prem Chand (Paniwala) vs Union Of India, AIR 1981 SC 613**, *Justice V. R. Krishna Iyer opened the judgment with a question "Who will police the police?"* About 40 years have passed, but, that question is still there with a bigger question mark. On the date of incident, the raid conducted by police force was countered by the gangster Vikas Dubey and member of his gang in a very planned way and 8 police personnels including Circle Officer of the area were brutally killed and several police personnels sustained serious firearms injuries. The accused persons were carrying sophisticated firearms and the accusation against the accused-applicants is that they were in collusion with the gangster and his associates. Under a conspiracy, they leaked information of police raid and gave them opportunity to remain in preparedness and did not render due support to police personnels nor informed the police force regarding their preparedness to effectively counter the raid and their being equipped with sophisticated firearms.'

5. As per FIR version and police papers, the brief facts are that on 03.07.2020, at 1 AM in the midnight, the incident took place in respect of which on the same day in the early morning at 5:35 AM, the FIR was lodged in which 21 accused persons were named with 60 to 70 unnamed accused persons and the allegation was that an FIR was registered on 02.07.2020, Crime No. 191/20, under

section 147, 148, 504, 323, 364, 342, 307 IPC and section 7 of Criminal Law Amendment Act, 1932 against Vikas Dubey, Sunil Kumar, Bal Govind, Shivam Dubey and Amar Dubey. In order to arrest the accused persons, with reference to GD No. 5 at 00:27 AM midnight, SO Vinay Kumar Tiwari with other SI and Constables keeping weapon and cartridges reached at Bela crossing, where, as planning CO Bilhaur Shri Devendra Kumar Mishra with other police officers along with Govt. Vehicle and Driver and SHO Bithoor, Shri Kaushalendra Pratap Singh with other police officers along with Government Vehicle and Driver and also SHO Shivrajpur, Shri Mahesh Yadav with SI and Constables (all mentioned in the FIR by name), after due consideration, set out from the place in search and arrest of the accused persons. Between the police parties of three police stations mentioned above, in view of fencing around the house of accused which is surrounded by big walls of adequate heights with barbed wire fencing and huge iron gates in different directions, it was decided that on reaching on the main gate in the leadership of CO Bilhour, the police will be divided into three teams. The first police team was led by CO Bilhour, the second by SHO Bithoor and the third by SO Chaubepur. The police teams and police officers ensured that there was no illegal article with them. Thereafter, the police party departed from *Diwedi Atta Chakki* to Bikru village and the moment they reached 20 meters close to the house of accused Vikas Dubey (now dead), it was found that on the road, a JCB machine was standing horizontally in such manner that the road was almost blocked. The police party anyhow, from the remaining space, managed to reach to the *Tiraha* close to the house gate of accused Vikas Dubey. The first police party lead by CO Bilhour stopped at the gate and the second party led by SO, Bithoor proceeded towards left side in east direction, and from the right side towards south direction the third police group led by SO Chaubeypur was proceeding.

6. All the police personnels were in police uniform except one Guard who was in civil dress. There was sufficient light of electricity and dragon light. Suddenly, from the room situating on the first floor on the north east side from the roof of Vikas Dubey, accused Vikas Dubey and other co-accused persons with rifle, pistol and firearms in their hands, in a preplanned way, with intention to kill the police personnels, opened fire shouting loudly how the police personnels dared to raid and nobody would escape alive from this place. Side by side, from the roof of Raja Ram alias Prem Kumar Pandey, situating in front of the house of accused Vikas Dubey, Prem Kumar Pandey and other accused persons Shyam Bajpai, Chhotu Shukla, Monu, Jahan Yadav and others, and from the roof of the house of Atul situating in the west of the house of accused Vikas Dubey, Atul Dubey, Dayashankar Agrahari, Shashikant Pandey, Shiv Tiwari, Vishnu Pal Yadav, Ram Singh, Ramu Bajpai and other co-accused persons opened firing in a planned way with intention to kill the members of the police party. Because of this sudden and indiscriminate firing, most of the policemen of the first group and second group were seriously injured. Some of the members of police party after positioning themselves proceeded towards the house of Rajaram Pandey and some proceeded towards the open land of Pappu Mishra. At the same time when the police party was so proceeding, the accused persons from the roof of their house came down and started firing on already injured police personnel.

The police party led by SO Caubeypur, because of indiscriminate firing, did not proceed further. There was no place to shelter and there was regular firing by the main accused persons from the roof. They, therefore, covered the firing in order to reach at a safe place. The accused persons coming from all sides surrounded the police personnel, fired and killed SI Anoop Kumar Singh Chawki in-charge Mandhana, Constable Jitendra Pal, Constable Bablu Kumar, Constable Rahul Kumar and Constable Sultan Singh by causing gunshot injuries. In the varanda of the house of accused Rajaram Pandey, SO Shivrajpur, Shri Mahesh Yadav and SI Nimbu Lal were also killed by the accused persons. CO Bilhour was dragged inside the house of Prem Kumar Pandy by accused Vikas Dubey, Prem Kumar Pandey, and Amar Dubey, Prabhat Mishra, Gopal Saini, Heeru Dubey, Bauwan Shukla, Shivam Dubey, Balgovind, Bauwa Dubey, and other co-accused persons and was killed brutally by them by causing injuries by fire arms and sharp weapons.

7. Meanwhile, remaining members of first, second and third police party, in their self-defense, started firing and saved 7 police personnels including SO Bithour, Shri Kaushalendra Singh, SI Sudhakar Pandey, Constable Shiv Moorat Nishad, Home Guard Jai Narayan Katiyar, Constable Ajay Kumar Kashyap, Constable Ajay Singh Sengar and took them to safe place. During the incident the accused persons looted the Govt. pistol of injured SO Bithour, but because of cover firing caused by the police party, the accused persons could not succeed in causing death of SO Bithour, Kaushalendra Singh. The accused persons looted the Government arms form the police personnels and absconded away. The alive policemen, in the light of electricity and other light, recognized the accused persons. Injured policemen were admitted in the Regency Hospital for their treatment. Thereafter, the police reached at the place of occurrence and found the dead body of the policemen lying there. 9MM pistol with 10 cartridges of SO Mahesh Chandra Yadav, 9MM pistol with 10 cartridges of SI Anoop Kumar Singh, AK-47 with 30 cartridges of Constable Jitendra Kumar, insas rifle with 20 round cartridges magazine of Constable Sultan Singh were already looted by the accused persons during incident. Besides the named accused persons, there were 60 to 70 more armed accused persons who in a very planned way, initially hiding themselves at a high place, with intention to kill the policemen, caused fire and subsequently, they jumped down from the roof and from very close range they committed brutal murder of the policemen. The policemen also fired, but, because of this incident and indiscriminate and daring firing by the accused persons, a situation of lawlessness and sense of fear was created. The accused persons were led by accused Vikas Dubey was a known gangster and history sheeter of the area and there remained fear and terror of the gangster and his gang around the vicinity. Because of the criminal activities, the gang had gained a lot of movable and immovable properties. The police inspected the place of occurrence where cartridges were scattered here and there and the sign of firing was also present on the walls around and other places. Human blood was also scattered all over the place. On this basis, the FIR was lodged by SO Vinay Kumar Tiwari, who is presently one of the accused applicants.

8. The statement of informant was recorded by the Investigating Officer. The dead bodies were also taken into

possession, inquest report was prepared, dead bodies were sealed and were sent for postmortem. The statement of SI Azhar Ishrat was recorded on the same day who stated in accordance with the FIR version. Thereafter, the statement of SI Vishwanath Mishra, P.S. Chaubepur, was also recorded who also stated to the tune of FIR and had additionally stated that from the roof of the house of the Vikas Dubey some women were loudly shouting that no police personnel should escape today and they were instigating the accused persons to kill the policemen. These women were Smt. Chhama, Smt. Khushi, Smt. Rekha Agnihotri, a maid of accused Vikas Dubey who used to live in the house of accused Vikas Dubey and she was also involved in his criminal activities.

9. Thereafter, SO Vinay Kumar Tiwari was suspended by order dated 4th July, 2020 of SSP, Kanpur Nagar on account of his inaction, suspicious role and for not apprising the police force about the kind and quality of weapon accused Vikas Dubey and the members of his gang were keeping, nor he apprised about the way to get away from the place of occurrence. It was also found that when the firing started from the side of accused persons, the applicant did not lead his team and escaped from the place. Because the police personnels were not having any knowledge about the way to get away from the place, a number of them were killed and in a great number sustained injuries.

10. The IO recorded the statement of constable Rajeev Kumar who stated to the tune of SI Vishwanath Mishra and further added that SI Krishna Kumar Sharma and SO Vinay Kumar Tiwari of the police station were closely related with accused Vikas Dubey and prior to the incident, SI Krishna Kumar Sharma talked with Vikas Dubey for 20 minutes on mobile. He has also stated that these police officers (accused-applicants) were conspired with accused Vikas Dubey to humiliate and give lesson to CO Bilhour out of jealous and bad relationship.

11. Statement of constable Abhishek Kumar was also recorded and he also stated that SI Krishna Kumar Sharma and SO Vinay Kumar Tiwari were closely related with accused Vikas Dubey. He has also supported the statement of Constable Rajeev Kumar on that point. Statement of co-accused Suresh Verma was also recorded and he also stated in similar fashion showing the closeness of these two with accused Vikas Dubey and the prior talk with SI Krishna Kumar Sharma with him just before 20 minutes from the time of incident.

12. SI Azhar Ishrat was again examined by the IO, and despite that he supported the FIR version, he also stated about the involvement of the women who instigated the accused persons for commission of the offence and said that he saw Sanjay Dubey @ Sanju who was firing on the police party who was known to him because he used to come to the police station regularly. Co-accused Suresh Verma was also instigating the other accused persons. On being asked by the IO, he stated that SI K.K. Sharma was not present there during the raid who was present in the police station but deliberately did not join the raid. He was asked to join but he avoided. He had already given information about the raid much before the time of incident to gangster Vikas Dubey with whom he was closely related. He has also stated that he knew the accused persons with name because he is posted in

the police station from the last about 3 years and he had gone to the village of Vikas Dubey several times in respect of his official duty and Vikas Dubey and his other associates were well known to him. He saw and recognized the accused persons in the solar light which is installed at the main gate of Vikas Dubey and also in the light on the roof of the house of Vikas Dubey, Prabhat Dubey, Gopal Ji Saini, Govind Saini, Raja Ram @ Prem Kumar Pandey. He identified the other accused persons going from the side of house of Agar Dubey to the house of Vikas Dubey. The witness has stated that he also fired 7 times but realizing that by firing his location will be exposed, he stopped firing and concealed himself in the veranda of the neighbour of the Prabhat Mishra. Constable Navneet also concealed himself there. Thereafter there was power cut and Prabhat Mishra who was firing from his roof came down with his rifle and seeing them, he fired on Constable Navneet but because the witness intervened by slapping on the *but* of rifle, constable Navneet escaped and thereafter he and constable Navneet, because they were fully acquainted with the geographical situation, through the field, came to the road. The JCB driver was Rahul Pal and not Monu as he had stated earlier. He has named the accused persons who fired on the members of the police party.

13. Subsequent statement of SI Vishwanath Mishra was recorded and he has given detailed statement and besides that he supported the FIR version, he has also stated that the accused persons were firing from the roof of Prabhat Mishra. He has stated that Vikas Dubey was a known criminal and, in the area, he used to possess and grab lands of others with the help of police. He used to create terror and organize gambling. SO Vinay Kumar Tiwari was in his contact through SI K.K. Sharma and they used to regularly associate with them. This came in the knowledge of CO Bilhour and he had submitted adverse report about them to the superior authority. On the date of incident, K.K. Sharma deliberately avoided in participating in the raid and during the period he was regularly in touch with the accused persons. He and SO Vinay Kumar Tiwari just to lower down the image of CO Bilhour, conspired with the criminals and consequently 8 police persons were killed and 7 police persons sustained serious injuries.

14. SI Ajhar Ishrat was re-examined by IO and he also stated that the accused persons were well informed about the raid which is also clear from electronic surveillance and other evidence. The relationship between SO Chaubepur and Circle Officer was bad and the CO had sent adverse report regarding misconduct of SO Vinay Kumar Tiwari to superior officer. He stated that SI K.K. Sharma and SO Vinay Kumar Tiwari were in contact with accused Vikas Dubey and used to regularly associate with him and therefore, the accused persons succeeded in causing such a horrible incident only because SI K.K. Sharma and SO Vinay Kumar Tiwari leaked the information about raid to them. He has also stated that he recognized the accused persons in the road light and accused persons were also lighting torch from their roof and were shouting.

15. Certain call details have been also annexed at page 156 and onward showing that accused-applicant K.K. Sharma had talked with the gangster and his gangmen. The learned counsels for the applicants have contended that constable Rajeev Kumar was also in touch with Vikas

Dubey. The audio conversation of Constable Rajeev Kumar with Vikas Dubey has also been annexed to show that he was in regular touch with Vikas Dubey and he has not been made accused. Constable Rajeev Kumar has been subsequently examined and he has stated that Vikas Dubey was having prior knowledge of the police raid and he rang him on mobile phone but, being occupied in work, he could not pick up the same and when he saw that there was miss call of Vikas Dubey, he dialed him and Vikas Dubey gave a lot of threatening and abuse and threatened that he will kill all the police personnels who will be found on the police jeep and he would commit such a big offence which will be unprecedented. The witness has stated that he recorded the phone call and told about this threatening to Vinay Tiwari, SO, Chaubepur and also said that the gangster has prior information of police raid, but, SO Vinay Tiwari ignored and did not take him seriously. He was also accompanying SO Vinay Tiwari during the raid. He recognized most of the accused persons. He has stated that Chhama Dubey, Khushi Dubey and Shanti Devi from the roof of Atul Dubey were disclosing the location of police personnels to the accused persons and were instigating them to kill the policemen. The accused persons continued firing from 1 AM in the night for 30 to 35 minutes.

16. From the description above, it is clear that 8 police personnel including the Circle Officer were brutally murdered by the accused persons and 7 police personnel sustained serious injuries. The accused persons who were named in the FIR with 60-70 more accused persons constituted unlawful assembly with firearms and deadly weapons killed eight police personnels in a brutal way and injured the police personnel very badly by causing firearm injuries. Some of the police personnels were killed and part of their limbs was also separated from body. The police witnesses who were one time colleagues of the accused applicants have given statement that the accused applicants were very close to gangster Vikas Dubey and his gangmen and they leaked the information of raid which gave opportunity to the accused persons to prepare and plan the brutal murder of the police personnels.

17. Submission of the learned Senior counsel for accused applicant Vinay Tiwari is that there is no direct or indirect evidence against him. It was a police raid conducted by the police party which was countered by the main accused persons and in the incident 8 police persons were killed by gunshot injuries and 7 policemen also sustained gunshot injuries. The accused applicant was himself leading one of the police party. He himself lodged the FIR against the main accused persons and he also lodged FIR on the basis of information given by Rahul Tiwari implicating them. Therefore, it has been submitted that there is no question of the accused-applicant being involved in the commission of the offence. He has no motive nor there was any reason for him to enter into so called conspiracy which resulted in such a heinous crime. Further submission is that the witnesses have changed their version when they were subsequently examined by IO and all of them in a tutored way have stated about the closeness of the accused-applicants with gangster Vikas Dubey and his gang. There is no substantial evidence and there is only some scattered evidence against the accused applicants which is insufficient for the accusation of criminal conspiracy. Nothing can be concluded against them on the basis of CDR,

particularly against SO Vinay Tiwari who never made any communication on mobile with either Vikas Dubey or his gangmen. There is no such CDR collected by the Investigating Officer.

18. It has been further submitted that the applicants have been falsely implicated. Late CO Devendra Mishra was informed about the incident of Rahul Tiwari who directed him not to make entry in GD as the police is going to take stern action and this will alert gangster Vikas Dubey. The policemen including CO Devendra Kumar Mishra were posted there for much longer period and were well-versed with history sheeter Vikas Dubey. The accused-applicants had no cordial relation with them. The said viral letter of CO indicating close relation is forged and has been obtained from social media. No such letter was sent by CO Mishra to SP, Kanpur Nagar nor the applicant was put to any departmental proceeding nor any explanation was asked from him. It has also not been mentioned in his suspension order. The allegations regarding his conduct during raid are vague, imaginary and false and is not supported by any evidence.

19. On the contrary, the learned additional Advocate General Shri Manish Goyal has argued that it is not a case of simple crime and the crime has been committed because the police assisted the gangster and leaked the information with regard to raid and, because of the prior information about the raid, the gangster was in preparedness and he planned the murder of the policemen and it is why so many accused persons assembled with the main accused and were active at the time of raid. They were inhabitants of area falling within the same police station in which house of the gangster situated and where the incident took place. Being the member of police force and working at the local police station, the accused-applicants had enough information about the geographical situation and path ways around the vicinity. The police force reached to the place of gangster and could not get away from the place as the accused applicants did not render support nor cooperated and remained inactive. The role of SI K.K. Sharma is rather evident in view of the fact that he was regularly in touch with Vikas Dubey and his gang and through him SO Vinay Tiwari was also in his touch. Both the accused applicants certainly helped them and always closed their eyes towards the criminal activities of the gang. They, during the incident, maintained distance from the other police party and went away to save themselves. In case of such an organized crime where members of police force were assisting the gangster and his group, it is not possible to have a direct evidence. Moreover, in a case of conspiracy, there is no possibility of direct evidence. The evidence which can be available is only circumstantial in nature and may be in the form of inaction on the part of the accused applicants who, in their endeavor to assist the accused persons, kept themselves out from the picture. Therefore, the conclusion of conspiracy is to be drawn from the circumstances of the case and the situation that the applicants, being member of police force, were indulged in assisting gangster Vikas Dubey and his gang, and all the paper work was done by them. It has been submitted that the IO examined several witnesses of police force who worked with the accused applicants and they have stated about conspiracy and their close links with the gangster and his gang.

20. Moreover, it has been also pointed out on behalf of the State that, on being

arrested, gangster Vikas Dubey gave statement to the IO revealing that the accused applicants used to give prior information of police activities and on the date of incident also he was informed about the police raid. The gangster is dead and his statement given to police is legally admissible as the same is statement of a dead man. Therefore, it has been submitted that taking into consideration over all circumstances, the culpability is writ large and the accused applicants do not deserve to be released on bail.

21. This case raises certain serious questions which relate to administration of criminal justice system in the country with reference to organized crime and criminals and the role and efficiency of police force in combating the problem. The police force is one of the most important force with great potential, easily approachable to the people facing criminal wrong and law and order problem and the most visible component of the criminal justice system. Like other departments, there has been a general fall and deterioration in the standard of functioning of the police force also. With time, it has been seen that the police force, not as a whole, but in small groups, has gone through a phase of moral and professional deterioration. There are black sheep also in the police force and they reflect upon the whole department which has led to growing concern, and a number of attempts have been made to mend this situation. In this direction, the past few years have been particularly eventful, with a number of positive developments having taken place towards a solution of the problem and the state appears to have observed zero tolerance policy towards organized crime and criminals. Strict and rigorous steps have been taken to break and demolish financial network of gangsters. In future, this shall certainly bring about more and more positive results towards restricting criminal activities and organized crime.

22. Organized crime is not confined to a single state, or any one country and has become an international problem in view of their wide spread network and sometimes they have been also found to be a natural ally of terrorist groups. Organized crime is an act of threat involving murder, kidnapping, gambling, arson, robbery, burglary, extortion or dealing in narcotics or dangerous drugs and other crime. The basic features of organized crime involves a group of individuals that is structured, sophisticated and widely spread across nations; it is a section of society that seeks to operate outside control of the people and government and it is a self-perpetuating, continuing criminal conspiracy for profit and power, using fear and corruption and seeking protection from law. The focus areas of organized crime are smuggling, drug trafficking, women and child trafficking, arms trade, *hawala*, circulation of fake currency, extortion and contract killing. With financial solidarity, these criminals have entered into business of film financing, hotel business, house building, government contracts and the like. The gangsters are divided into three categories, namely, sharp shooters, money collectors and liaison agents. The liaison agents deal with lawyers and law enforcement officials to resolve legal problems and to ensure easy bail to gangsters. **(For details see S M Sharma The Organized Crime in India, Tokyo: United Nations Asia and Far East Institute (UNAFEI), 1999, Vol. 54, pp 24,88)**

23. The police force faces some real difficulty in combating with organized

crime and criminal activities. The police personnels are mostly not provided with that kind of sophisticated arms which are available in plenty to the gangsters and their gang members. The police stations are mostly under-manned and the strength of police force is remarkably less in comparison to the population. The police has to act in accordance with legal norms and while acting so, they are required to avoid any excesses and human rights violation. They have to behave like a disciplined force actuated to uphold rule of law and motivated by sense of public security and service. The force also face the problem of some police personnels who may be close and in collusion with the local mafia. They can leak the confidential informations and strategy of police for taking action and conducting raid to arrest the gangsters. On the contrary, the organized criminals keep with them all kinds of sophisticated weapons, they use the same indiscriminately and they can cause any amount of damage to the human life and property. Where they are having support from some members of police force, their potential to execute criminal act is adequately enhanced.

24. The problems of police force has been time and again highlighted by several Law Commissions appointed for making recommendations for police reforms and needless to point out that several recommendations have been suggested from time to time. It is pertinent to mention that the Supreme Court has also issued directions in view of recommendations in some of the judgments such as **Vineet Narain v Union of India, AIR 1998 SC 889** and **Prakash Singh v Union of India, (2006) 8 SCC 1**. *Professor M P Singh*, in his book **Police Problems and Dilemmas in India 10 (1989)** has discussed the fundamental complexities of Indian police system and has remarked that the police in the country faces tremendous challenges and works under extreme pressure due to a number of reasons such as growing unemployment, deterioration in educational environments, conflicting claims of socio-economic components, fluctuations in political order, rampant corruption etc. Frequent transfers to unfavorable positions or locations have demoralizing effects on the police force and it becomes a survival technique for police to have close relationship with one or other political person.

25. The purpose of the above discussion is to show the prevalent conditions in which the police has to perform the complicated and difficult job of ensuring law and order, maintaining security and peace, preventing crime and taking action against and causing arrest of offenders. These all require home work and team work and if any member of police force starts giving clues about and leak the police strategy, the strategies are bound to fail and shall certainly result sometimes, particularly when police is confronting against organized crime and criminals, in disastrous situation as has resulted in this case. In such situation, policing such police personnels is a big task and it requires early identification of such black sheep, monitoring of their conduct, isolating them and taking immediate strict disciplinary action against them.

26. Now coming to the facts of this case. The accusation against the accused-applicants is that they had close friendly relationship with the gangster Vikas Dubey who and the members of his gang were running organized criminal activities of all sorts and was residing and flourishing

within the local jurisdiction of the police station in which both the applicants were posted. IO has examined several witnesses and they have stated about the close relationship of the applicants with the gangster Vikas Dubey and gang. Submission of the learned senior counsel and other counsel for the the applicants is that the witnesses have stated against the applicants only when they have been examined subsequently on second and third time and their subsequent statement is after thought to meet the case against the applicants. Otherwise, the witnesses had not stated anything against the applicants.

27. It is pertinent to mention that gangster Vikas Dubey was arrested in Ujjain and while he was being brought to Kanpur Nagar, the Investigating Officer took his statement. On the way, the police vehicle suffered accident. Vikas Dubey snatched the pistol of IO and attempted to run away from the police custody. He opened fire on police personnels and by police firing in self-defense, he was shot dead. The IO got hospitalized and after being discharged, he wrote the said statement of Vikas Dubey in CD. Some of the part of his statement has been also quoted in the bail application. In brief, Vikash Dubey, giving detailed description of the incident, has stated to the IO that on 2/3.07.2020, he had prior information of police raid at about 04:00 PM and the information was given by SI K.K. Sharma. The JCB of Sultaan Ahmad was working there from the last one and half months and in the night at about 12:00 PM, he called upon driver Rahul Pal with JCB and he got obstructed the road by JCB so that the police suddenly might not come to his house. He further stated that one Rahul Tiwari was harassing him by giving false complaints against him and the police was also supporting him. Therefore, hatred was generated in him towards the police and he had decided that he might be killed but he will give lesson and kill as many as police personnels as he can. He called his associates Raja Ram @ Prem Kumar (maternal brother), Shashi Kant, Shyamu Vajpayee, Chotu Shukla, Jahaan Yadav, Atul Dubey, Daya Shanker Agnihotri, Shiv Tiwari, Vishnu Pal Yadav, Ram Singh, Ramu Vajpayee, Amar Dubey, Prabhat Mishra, Gopal Shaini, Govind Shaini, Dharmendra @ Jeeru Dwivedi, Manish @ Veeru Dwivedi, Dheeraj @ Dheeru Dwivedi, Vitul, Uma Kant @ Guddan @Bada Bauwan, Shivam Dubey, Bal Govind Dubey, Pauwa @ Pradhan Dubey, Shivam @ Dalal, Nandu Yadav and Balloo Musalmaan. Licence holders came with their arms and to the remaining persons, he provided guns, country made pistols and cartridges. CO, Bilhaur, Devendra Mishra was behind him and, therefore, he was brutally killed. He was having animosity with SO, Shivrajpur also as in February, 2020, in the election in Kota, his nephew Aman Tiwari was contesting election and SO Shivrajpur got his man arrested with illegal pistol whereupon he felt very humiliated. His close companions were on the roof with arms and he had made planning on every pathway coming to his house to kill the police personnels. Fortunately, the police force came from the way on which J.C.B. was planted and it made the task very easy and they surrounded the police officials and killed them. When there was power cut, he used code words which was a signal to run away from the place. He had also intended to kill his distant associates in order to implicate the police force but this could not happen. The women of his family and close to him such as Rekha Agnihotri, Kshama, Khushi, Shanti Devi were told to cry seeing the

police personnel as *"thief-thief"*. Manu Pandey was also having the knowledge of planning. Thereafter, with the help of his close associates, he went to Ujjain Mahakal Temple.

28. Submission, in this respect, from the side of accused-applicants has been two fold- that the statement of Vikas Dubey is not relevant against accused-applicants as he was the prime accused in the FIR and secondly, he did not state any thing against SO Vinay Tiwari and has only taken the name of SI K K Sharma. From the side of State, it has been contended that the statement of Vikas Dubey is statement of a dead man and it has legal effect under section 32(3) of the Indian Evidence Act. Moreover, other witnesses have stated that SO Vinay Tiwari was very much close to Vikas Dubey through SI K K Sharma and therefore, the statement can be well considered against both the applicants. Section 32(3) provides as follows:

"32 Cases in which statement of relevant fact by person who is dead or cannot be found, etc, is relevant. --Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:--(3) or against interest of maker. -- When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages."

29. It is clear from the reading of section 32(3) that statement of a dead man has been legally recognized and used in evidence even though the same does not relate to the cause of his death. Although, a final view is not required to be expressed at this stage as the same will be considered by the trial court, yet, this much is clear that the statement is of a dead man and the same has legal relevance in view of the provision of the Evidence Act.

30. CDR has been annexed with the bail application at page 156 to 163 to show the relationship of accused-applicants with the gangster. On the basis of study of CDR, the IO has noted that on the date of incident, prior to incident, the accused persons contacted each other and this call pattern is exceptional in the last one month as this type of communication between them is unique; the CDR of the mobile number of Vikas Dubey shows that his location was in Village Bikaru where the incident took place; between Vikas Dubey and co-accused persons of his gang, there is 15 calls by the gangster, again a unique pattern, by which he talked to the co-accused persons which indicates that he was preparing for the incident; Vikas Dubey talked with one police personnel Rajiv Kumar prior to incident which is full of abusive language and threatening to kill police personnels and of committing big criminal incident; it further indicates that he was having prior information of police raid and he was in full preparedness to commit the offence and kill police personnels as many as he can; and call details also show that between co-accused Ramsingh and applicant K.K. Sharma, there were two calls and the location was in Village Bikaru, and as such by the mobile of Ramsingh, Vikas Dubey was in contact before and during the incident. The accusation is that the accused-applicants, particularly accused-applicant K.K. Sharma, were giving information to the

gangster and were working as agent to the aid and assistance of the gangster and it is why accused K.K. Sharma kept himself in the police station deliberately and both the accused-applicants had conspired with Vikas Dubey and gang as it was not possible for the accused-applicant Vinay Kumar Tiwari to contact the gangster at the time or during the incident.

31. The learned Senior Counsel for the accused-applicant Vinay Kumar Tiwari has submitted that constable Rajiv himself had also contacted on mobile with Vikas Dubey and as such he should have been also made accused on the basis of the analogy put forward by the State. Moreover, there appears to be no such communication by applicant Vinay Kumar Tiwari with the gangster or his gang-men. The statement of constable Rajiv however shows that he found a miss call of Vikas Dubey and he called back to him. In respect of second argument, it has been submitted by State that applicant Vinay Tiwari used to be in contact with the gangster through K.K. Sharma. Whatever the truth may be, this much is clear that the accused-applicants who were posted in the same police station could not have any professional relationship with the gangster and his men and communication on mobile with him is certainly a relevant circumstance which can be considered during trial.

32. From the side of the State it has been also pointed out that the incident took place in the notified area under the UP Dacoity Affected Area Act and due attention is required to be given to the law provided under section 10 of the Act. The relevant part of Section 10 is as below:

"10. Special provisions regarding bail. - Notwithstanding anything contained in the Code of Criminal Procedure, 1973, no person accused or convicted of a scheduled offence shall, if in custody, be released on bail or on his own bond, unless-

(a) the prosecution has been given an opportunity to oppose the application for bail, and

(b) where the prosecution opposes the application for bail, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence:.....…"

Submission is that after investigation, finding sufficient evidence, charge-sheet has been already submitted by police and at this stage there is no reason to believe that the accused- applicants are innocent.

33. From the side of accused-applicants, it has been pointed out that the witnesses examined by the IO initially did not state any thing against the accused-applicants and only in their second and third statements, they have started making allegations against them. As such, their subsequent statement is nothing but an after thought in order to falsely implicate the accused-applicants. It has been specifically mentioned that the allegations have been made by the witnesses mostly in the last part of their statements and a reading thereof shows that the words and expressions used are same and similar which is not possible if statements have been given by the witnesses individually and separately. This contention appears to have no weight as it has been rightly pointed out on behalf of the State that all the statements are part of CD and a view at this stage has to be taken after due consideration to all the material on record.

34. The bail applications have been also opposed on behalf of State on the

ground that applicants are police officers and they are in a position to influence the witnesses if they are released on bail. They hatched conspiracy with the gangster and deliberately acted in such a manner which helped the gang in the commission of this offence. It has been submitted that in the counter affidavit dated 25.1.2021, in order to save skin, accused-applicant Vinay Tiwari set up a false case that while he was on patrolling duty on 2.7.2020, he saw Vikas Dubey and his gang-men beating one Rahul Tiwari and while he confronted him, Vikas Dubey pointed his rifle on him and to save himself, he came back and convinced Rahul Tiwari to lodge FIR against Vikas Dubey. The falsity of this version is clear from the two facts, one, this has not been mentioned by the accused-applicant in the relevant GD, and two, this fact has been nowhere mentioned in the FIR of Rahul Tiwari nor it has been mentioned therein that he saved the informant during the said incident. Further submission is that applicant Vinay Kumar Tiwari himself lodged FIR and all papers were either prepared by him or on his direction, and he made all efforts to save his skin and after the applicants were made accused in this case, during investigation, incriminatory things have been revealed against them.

35. Further submission is that the applicant as SHO of concerned police station was very much aware about the activities of Vikas Dubey and was having healthy relation with him. The then Circle officer Sri Devendra Mishra (deceased) had also made a complaint against the working of the applicant highlighting his close relationship with gangster Vikas Dubey. On the date of incident, the raid was planned which is clear from GD entry of 03.07.2020 of 12:27 AM in the mid night about movement of the police team. When the police team reached near the house of accused Vikas Dubey led by Circle Officer, Bilhaur, late Sri Devendra Mishra and SO Shivraj Pur, SHO Bithoor, the applicant requested to be the part of third team and convinced CO, Bilhaur to lead the main team and to enter from the main gate and while the team of CO proceeded towards the gate, they found that a JCB had blocked the main gate and a narrow passage was left there. Anyhow, when they reached close to the gate, suddenly from all the three sides, indiscriminate firing was started from the side of the gangster and his associates. The accused-applicant as per plan had to conduct raid from the right side. But neither he proceeded towards the right side nor he provided any help to the other teams. As such, the conduct of the accused-applicant shows that he was having knowledge of the plan of Vikas Dubey and he was also aware about the topography of the place and he knowingly avoided to lead the team which raided from the main gate and on account of conspiracy, the accused-applicant did not provide necessary information.

36. All the aforesaid contentions relate to one or other circumstance and they will be examined during trial and, therefore, it is not desirable to express any final opinion. The fact is that in the incident, CO Devendra Mishra, SHO Mahesh Kumar Yadav, two Sub Inspectors Anoop Kumar Singh, Nebulal and four Constables Jitendra Kumar, Sultan Singh, Rahul Kumar and Babloo Kumar were brutally murdered and seven police personnels SI Kaushalendra Pratap Singh, SI Sudhakar Pandey, Home Guard Jairam Katiyar, constables Ajay Singh Sengar, Shiv Murat Nishad and Ajay Kumar Kashyap received gun shot injuries and one

person also received injury. Perusal of injuries found on the dead bodies shows that several gunshot injuries were caused to them and it was ensured that they could not survive. The gunshot injuries of all the deceased police personnels affirm that injuries were caused from close range as blackening and charring has been found. This also shows intention and knowledge in causing death and extreme culpability on the part of the main accused persons.

37. At no point of time, applicant Vinay Tiwari along with the members of his team responded to provide any backup to the team. While the members of other two teams, late Sri Devendra Mishra, late Sri Mahesh Chandra Yadav and late Nabu Lal, Sub Inspector and from second team SHO Bithur Kaushlendra Singh sustained fire arm injury and from his team five other police personnels including Sub Inspector Anoop Kumar were shot dead, only two persons from the team of accused-applicant sustained injuries who, as submitted, by default joined the first team at the time of firing. The accused-applicant did not receive any injury and this also shows that he avoided active participation in the raid. The accused-applicant deliberately concealed the availability of automatic weapons with gangster Vikas Dubey and also concealed the incident which took place at the time of alleged saving of Rahul Tiwari. For this lapse and misconduct, the accused-applicant was suspended.

38. During the course of investigation, several witnesses present at the time of incident have stated that the accused-applicants were having cordial relationship with accused Vikash Dubey. Constable Rajeev Kumar who was the fellow of applicant Vinay Tiwari has in his first statement stated that the applicant Vinay Tiwari, co-accused Sub Inspector K.K Sharma were having cordial relationship with gangster Vikash Dubey. Constable Abhishek Kumar and others have also stated the same facts. The call details show that Sub Inspector K.K. Sharma on 02.07.2020 made several calls to the gangster and informed them about the raid as he talked with the accused for more than 20 minutes in different calls. There is enough evidence on record to show that the accused-applicants were having very good relationship and soft corner towards Vikas Dubey. This fact has also been stated by accused Kshama and Rekha Agnihotri in their statements.

39. The witnesses have stated that Sub Inspector K.K. Sharma was regularly in touch with the main accused and was regularly informing him about the movement of police team. The call details of K.K. Sharma sufficiently demonstrate his involvement in the crime. Moreover, Applicant Vinay Kumar Tiwari was having jealous and bad relation with Circle Officer Devendra Mishra and it is why he was convinced by accused-applicant to lead from the main gate as a result of which 8 police personnels were killed and 7 policemen received gunshot injuries. After investigation, sufficient credible evidence was found against the accused-applicants showing their involvement in the whole criminal conspiracy which led to the commission of such a horrendous crime. They conspired with gangster Vikas Dubey, leaked confidential information about the raid and facilitated the gangster and his gang to commit such a crime which resulted in death of 8 police officers. The enmity and bad relation of accused-applicant with Circle Officer Devendra Mishra is very much evident and the Investigating Officer has taken note of the

viral letter in his CD in which Circle Officer Devendra Mishra had intimated to higher authorities that integrity of Vinay Tiwary was completely doubtful and he was regularly meeting with Vikas Dubey and was communicating with him. It was also complained that if Vinay Tiwari does not modify his conduct, any time some serious incident can take place. With the CD, the report of Sri Devendra Mishra, Circle Officer has been annexed by the accused-applicant in his rejoinder affidavit dated 22.02.2021. At this stage, it cannot be ruled that the said letter of Devendra Mishra is fake as contended on behalf of accused-applicants.

40. It has been also argued from the side of accused-applicants that investigation has been completed and charge-sheet has been already filed in this matter. The applicants are in jail from the last more than one year. Their pretrial detention for such a long period is resulting in deprivation of their right to liberty and freedom. The learned counsel for applicant K.K. Sharma, has relied on the judgments of **Dalvir Hussain v State of Gujarat, AIR 1991 SC 56, Pawan Kumar v State of UP, 2015(90) ACC 9 (SC), Mukesh Kumar Kashyap v State of Uttarakhand, 2015(89) ACC 903, State of UP v Rajju, 2005(53) ACC 343,** and **K R Purushothaman v State of Kerla, 2006(54) ACC 255(SC).** Therefore, it has been requested that, taking into consideration overall circumstances and the long period to which they are in jail, the court should take sympathetic view and the applicants should be released on bail.

41. This court is not oblivious about the fact that the release on bail is crucial to the accused as the consequences of pretrial detention are grave. If release on bail is denied to the accused, it would mean that though he is presumed to be innocent till the guilt is proved beyond reasonable doubt, he would be subjected to the psychological and physical deprivations of jail life. The jailed accused loses his job and is prevented from contributing effectively to the preparation of his defence. Equally important, the burden of his detention frequently falls heavily on the innocent members of his family. But, if the accused is involved in a conspiracy for commission of a heinous offence by a hardened criminal, his release on bail will give him an opportunity to abscond or temper with witnesses. Against such crime, social reaction is also sharp. Therefore, a balance between the need for protection of individual liberty which is so important and the requirements of the society for being shielded from the hazards of being exposed to the misadventures of organized crime has to be maintained.

42. The criminal justice system is often criticized for its pro-active approach towards the accused. The rights of the accused are protected not only during trial but also during investigation and even after the delivery of judgment, more particularly when the case has resulted in conviction. The accused cannot be kept in police custody unless with the order of Magistrate and that too is possible only within first fifteen days of his arrest. The bail provisions are liberal and for arresting the accused there must be prima facie evidence collected by the Investigation Officer. He can also be released on anticipatory bail. The accused cannot be put to cruel or inhuman treatment at any stage. There is a strong presumption of innocence in favor of accused and consequently, it creates a heavy burden on prosecution to establish the guilt beyond any shadow of reasonable

doubt. The accused has been given constitutional protection against self incrimination and he has right to keep silence throughout and his silence will not be taken adversely against him. Moreover, he enjoys all the rights associated with his fair trial claim including free legal aid and impartial justice delivery. Thus, protection of rights of accused is natural feature of democracy which is accorded for the simple reason that the criminal law machinery is controlled by the State. Accused is given free food, free lodging, free clothes etc. and if he has been directed to undergo rigorous imprisonment, he will have to be paid by the state for the work he has rendered during jail life. But, the victim who is the most adversely affected person by the criminal incident has no such claim. The guilty man is lodged, fed, clothed, entertained and educated by the state at the expense of the public, but ironically, the victim is left to pay for even his medical expenses which may be the result of that criminal event. There is no free education, free housing, free clothing and free food for the victim. The injured party, in the criminal law, often takes a back seat and after being examined in court as witness, he stands aside waiting and watching the criminal justice in action satisfied by conviction and sentence. He is fortunate if he gets a little compensation or even expenses of the litigation. The administration of criminal justice inspired and dominated by human rights and humanitarian causes does every effort to reform, treat and rehabilitate the offender, but does not show equal concern for the poor victim who has suffered loss or injury. (**See for details Stephen Schafer, Restitution to victim of crime, Stevens & Sons Ltd., London (1960) p. VII as quoted by Bharat C. Das, Victims in the criminal justice system , 19 (New Delhi), APII Publishing Corporation, 1997, Proff. S.V. Joga Rao, Victim Restitution, the Lawyer, June 1990, p. 17 and Proff. A. Lakshminath & Dr. J. Krishnakumari, Criminal Trial and Justice, ALT publication (2003) p. 258**)

43. Crime, corruption and population are three major problems the society is facing at present. While against crime and corruption, particularly when it is organized crime and corruption, strict state action and intervention is necessary to restrict and minimize the same to maximum extent, control over population growth requires legal steps and strategy inclusive of motivation, spread of education and awareness and some positive incentive to those who opt for family planning. Against crime and corruption, the State must continue with the policy of zero tolerance. The political parties should rise above board against crime and corruption without being influenced by consideration of "his man" and "our man" as this approach will not only undermine rule of law but will also damage the democratic set up of the nation.

44. This is not an unknown phenomenon that there are policemen, may be very few in numbers, who show their loyalty more to such gangster than to their department for the reasons best known to them. Such policemen tarnish the image, name and fame of police and it is necessary that suspicious police personnels should be taken to task and their conduct should be regularly monitored for which a mechanism should be evolved, and if it exists already, the same should be geared up at different levels. There is a concerning trend that one or other political party welcomes gangsters and criminals involved in organized crime in the party and try to back and protect

them, painting and spreading an imaginary image of Robinhood. They are given tickets to contest elections and sometimes they win also. This trend needs to be stopped as soon as possible. All the political parties should sit and together a decision is required to be taken by them that gangsters and criminals will be discouraged in politics and no political party will give ticket to them in public elections. The political parties should rise to the occasion and must guide themselves keeping in view that there cannot be a concept of *"my criminal"* and *"his criminal"* or *"my man"* and *"his man,"* as a gangster is gangster only and is required to be condemned from all corners and even people/voters should also take note of it while making their choice for a candidate in a general election. We must have the idea in mind that if we are entrusted with responsibility of nation building, our responsibility is to think about the future generation to whom we have to handover a legacy. We need to ponder what kind of nation and society we want to leave for our future generation. A sooner decision is necessary lest one day these gangsters and criminals will become *"Bhasmasur"* and will give such serious dent to the country and democratic set up which cannot be repaired.

45. The pursuit of life, liberty and peace includes freedom from crime. The State's foremost duty is to provide these basic rights to each citizen. The success of a Criminal Justice System can only be measured by how successful it is in ensuring these rights in word and spirit. The extent to which these rights are successfully protected, will be reflected in the confidence of the public in the system. The organized crime should be treated differently from traditional individual criminality. Conspiracy is an integral aspect of organized crime. There cannot be a direct evidence of conspiracy in such cases and the law has to deal with organized crime on a footing different from that of individual or conventional crime, as regards admissibility and appreciation of the evidence.

46. The discussion aforesaid certainly goes to show that the nature of offence and amount of culpability is serious, heinous, shocking and unprecedented. It is also evident that the main accused persons had prior information of the police raid and naturally, in the present set of facts, this information was revealed by police which not only made the main accused persons alert but also provided them fullest opportunity to prepare for attack and commit such a horrendous crime in which 8 police personnels including the Circle Officer sustained gunshot injuries and died. The situation of crime was such and so sudden that the police force could not get opportunity to sustain and counter and could do nothing. The accusation against the accused-applicants is that they conspired with the main accused for the commission of the offence because of their good relationship and loyalty with main accused and also they wanted to score their personal grudge with the Circle Officer. It is not possible to give a final opinion at this stage. Certain witnesses who were part of the police raid have given evidence against the accused-applicants showing their closeness with the main accused persons which is supported by circumstances such as the magnitude of the crime and the preparedness on the part of gangster Vikas Dubey and his associates; the statement of Vikas Dubey given to the IO before his death that he had prior information about the raid; the conduct of the accused-applicants before and during incident;

applicant Vinay Kumar Tiwari though leading one team but did not give any backup support nor sustained any injury and showed complete inaction; and applicant K K Sharma deliberately avoided in participating in raid and the accusation is that he stayed and was deliberately left on police station to pass information to the gangster.

47. In view of the above discussion, the serious and heinous nature of the offence, complicity of the accused-applicants in the conspiracy and taking into consideration overall circumstances of the case, I do not find any reason sufficient to allow the bail applications. Hence, the bail applications of accused-applicants **Vinay Kumar Tiwari** and **K. K. Sharma** are rejected.

48. The learned trial court to expedite the trial. If the case is not disposed nor a substantial development is found towards progress of trial in one year, the accused-applicants will be at liberty to move fresh bail application.

49. It is also made clear that no observation of this Court in this order will have any binding effect on the trial court and the case shall be decided on the basis of evidence adduced during trial.

(2021)09ILR A333
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.09.2021

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE PIYUSH AGRAWAL, J.

Crl. Misc. Writ Petition No. 2998 of 2021

Ajay Kumar Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sarvesh Chaubey

Counsel for the Respondents:
A.G.A., Sri Sanjay Kumar Yadav, Sri Gyan Prakash

A. Criminal Law - Constitution of India,1950-Article 226 & Indian Penal Code, 1860-Sections 302, 394, 452, 504-application-fair investigation- Prima facie officers of the I.P.S. rank also have some involvement in the murder of the deceased, who died in police custody, allegedly due to brutal beating by the accused policemen-Post-mortem report and slip issued by District Hospital also prima facie appears to have been managed/fabricated-Investigation is transferred/entrusted forthwith to the respondent No. 5. (Para 1 to 34)

B. The criminal justice system mandates that any investigation into the crime should be fair, in accordance with law and should not be tainted. It is equally important that interested or influential persons are not able to misdirect or hijack the investigation, so as to throttle a fair investigation resulting in the offenders escaping punitive course of law. Breach of rule of law amounts to negation of equality under Article 14 of the Constitution of India. Article 21 of the Constitution of India makes it clear that the procedure in criminal trials must be right, just and fair and not arbitrary, fanciful or oppressive.(32,33)

The writ petition is allowed. (E-6)

List of Cases cited:

1. K.V. Rajendran Vs Superintendent of Police Vs CBCID, South Zone,Chennai & ors. (2013) 12 SCC 480

2. Rubabbuddin Sheikh Vs St. of Guj. & ors. (2010) 2 SCC 200

3. Mithilesh Kumar Singh Vs St. of Raj & ors. (2015) 9 SCC 795

4. Menka Gandhi Vs U.O.I. (1978) AIR SC 597

5. Vinubhai Haribhai Malviya & ors. Vs St. of Guj. & anr. (2019) AIR SC 5233

6. Subramanian Swamy Vs C.B.I. (2014) 8 SCC 682

7. Commr. of Police, Delhi Vs Registrar, Delhi High Court,New Delhi (1997) AIR SC 95

8. Rampal Pithwa Rahidas Vs St. of Mah. (1994) Suppl. 2 SCC 73

9. Sasi Thomas Vs State (2006) 12 SCC 421

(Delivered by Hon'ble Surya Prakash Kesarwani, J.
&
Hon'ble Piyush Agrawal, J.)

1. Heard Sri Sarvesh Chaubey, learned counsel for the petitioner, Sri S.K. Pal, learned Government Advocate assisted by Sri Roopak Chaubey, learned AGA for the State-respondent Nos. 1, 2, 3 & 4 and Sri Gyan Prakash, assisted by Sri Sanjay Kumar Yadav, learned counsel for the respondent no. 5.

2. It is a case of custodial death of a young boy aged about 24 years, namely, Krishna Yadav @ Pujari. As per FIR No.0038/21, dated 12.02.2021 under Sections 302, 394, 452 & 504 I.P.C. P.S. - Baksa, District - Jaunpur, the SOG team and SO Baksa, Ajay Kumar Singh came to the house of the deceased on 11.02.2021 about 03:00 P.M. and took away the deceased with an intent to implicate him falsely and the deceased was detained at the police station. At about 08:00 P.M. the S.O. Baksa and other policemen (ten in numbers) forcibly entered in the house of the informant and after breaking lock of the box took away Rs.60,000/- and other articles and used filthy language against women family members of the deceased. At about 12.30 P.M. the incharge SOG and SO Baksa, Ajay Kumar Singh and 10 - 12 policemen brought the deceased who was not even able to stand and was loudly crying "माँ-माँ मुझे बचा लो पुलिस वाले मुझे जान से मार देगें।" Policemen also took away the motorcycle kept in the house and when the informant went to the police station he was not allowed to meet with his brother (deceased) and in the morning, information was received that his brother Krishna Yadav @ Pujari died in police custody who has been murdered by the policemen.

3. On the other hand, the police has developed a story that as per G.D. Entries Nos.05 and 06, dated 12.02.2021, the deceased was apprehended while he was driving a motorcycle who fell, received injuries and could not fled away and he told that in the afternoon of 11.02.2021 he was hit by a motorcycle and the public beaten him. The arrest of the deceased has been shown at 10:25 P.M. on 11.02.2021. As per G.D. the deceased was brought to the police station Baksha at 01:30 A.M. on 12.02.2021 and at the same time he was sent for first aid alongwith Sub Inspector Sunil Kumar Tiwari, constable Manish Kumar and constable Samir Kumar and the Doctor at the CHC referred the deceased for treatment to District Hospital, Jaunpur and by the time they reached at the District Hospital Jaunpur, Krishana Yadav @ Pujari died and thus he was brought to the District Hospital as dead. Copy of G.D. No.05

dated 12.02.2021 has been filed by the respondent no.2 as Annexure C.A. -2 to the counter affidavit dated 01.09.2021 and the G.D. Entry No.06 of even date and time i.e. 12.02.2021 time 01:30 A.M., has been produced today by the learned A.G.A. before us stating that inadvertently these pages could not be annexed with the counter affidavit. In G.D. No.05 dated 12.02.2021 time 01:30 A.M. it has been mentioned that :

"**अभियुक्त द्वारा बारबार कराहने पर पूँछने पर बताया** कि साहब आज करीब 2.00 बजे दोपहर में ग्राम विरहदपुर के पास एक मोटर साइकिल से टक्कर लग गया था। राहगीर मुझे उसके साथ मिलकर मुझे काफी मारे पीटे थे। जिसकी वजह से मेरे **शरीर में जगह जगह चोटे** आयी है। जिसके कारण दर्द हो रहा है। **गिरफ्तारी की सूचना उसकी माँ को मौके पर ही दी जा रही है। किन्तु गवाही पर हस्ताक्षर करने से मना कर रही है।** दौरान गिरफ्तारी व बरामदगी मानवाधिकार आयोग व मानवीय सर्वोच्च न्यायालय के निर्देशों का पालन किया गया अभियुक्त का यह कृत्य धारा 392/411/414 भादवि का अपराध है। **अतः कारण गिरफ्तारी बताकर समय करीब 22.25 बजे हिरासत पुलिस में लिया गया फर्द** मौके पर टार्चो व बिजली की रोशनी में लिखकर पढ़कर सभी सम्बन्धित के अलामात बनवाये जा रहे है। फर्द की प्रति अभियुक्त को दी जा रही है।"

4. The F.I.R. lodged by the brother of the deceased being the first information report No.0038/21, dated 12.02.2021 (at 16:35 hours) under Sections 302, 394, 452 & 504 I.P.C. P.S. - Baksa, District - Jaunpur, (in which SOG Team Jaunpur, Station House Officer Baksa, namely, Ajay Kumar and police personnel of police station Baksa are named as accused), is reproduced below:

सेवा में श्रीमान पुलिस अधीक्षक जौनपुर महोदय सविनय निवेदन है कि प्रार्थी अजय कुमार यादव S/O तिलकधारी यादव ग्राम पकड़ी चकमिर्जापुर थाना बक्शा जिला जौनपुर का निवासी हूँ घटना दिनांक 11.02.2021 समय 3 बजे दिन में SOG टीम व S.O. बक्शा अजय कुमार सिंह मय हमराही पूरी फोर्स के साथ मेरे घर पर आये और मेरे भाई कृष्ण कुमार यादव उर्फ पुजारी पुत्र तिलकधारी उम्र 24 वर्ष पकड़कर थाने ले गये। जबकि मेरे भाई के विरूद्ध कोई आपराधिक मुकदमा जनपद के किसी थाने में नही है। मेरा भाई व्यवहार कुशल व्यक्ति थाना मेरे भाई को S.O.G. टीम व S.O. बक्शा अजय कुमार सिंह फर्जी मुकदमें में फँसाने के नियत से थाने में बैठाये थे रात्रि 08.00 बजे S.O. बक्शा मय हमराहियों व पुलिस वालो 10 की संख्या थी आये और घर में घुसकर बक्से का ताला तोड़कर 60,000 रूपया व सामान S.O. बक्शा अजय कुमार सिंह व पुलिस वाले उठा ले गये। मना करने पर कि महिलाओ को भद्दी–2 गालियाँ दिये पुनः 12.30 बजे रात्रि में S.O.G. प्रभारी व S.O. बक्शा अजय कुमार सिंह मय हमराहियों बोलेरो 10 मोटर साइकिल से 10 से 12 पुलिस वालो के साथ मेरे भाई को मेरे घर लेकर आये मेरा भाई खड़ा नही हो रहा था जोर–जोर चिल्ला रहा था माँ–माँ मुझे बचा लो पुलिस वाले पुलिस वाले मुझे जान से मार देगे। और घर पर रखी मोटर साइकिल भी उठा ले गये। मै थाने पर गया मुझे पुलिस वाले मिलने नही दिये। सुबह सूचना मिली कि पुलिस कस्टडी मे मेरे भाई कि मौत हो गयी मेरे भाई की हत्या उपरोक्त पुलिस वालो द्वारा की गयी है। अतः श्रीमान जी से अनुरोध है कि S.O. बक्शा को आदेशित करें कि तत्कालीन S.O. बक्शा व S.O.G. टीम मय हमराहीयों के विरूद्ध हत्या व लूट का मुकदमा दर्ज करें आवश्यक कार्यवाही करें। प्रार्थी अजय कुमार यादव S/O तिलकधारी यादव ग्राम पकड़ी चकमिर्जापुर थाना बक्शा जौनपुर MO 9984669989 हस्ताक्षर अजय यादव। नोट– उक्त तहरीर व कायमी हे0मो0 सुरेन्द्र कुमार द्वारा बोल–बोलकर अक्षरशः कम्प्यूटर में फीड करवाया गया।"

5. As per the alleged post mortem report, the injuries are as under:-

1. Contusion present in both buttocks of size 30X 20 cm which bluish brown in colour.

2. Contusion present in lower scapular region of size 15 X 8 cm which is bluish brown colour.

3. Contusion present Lt. Arm lateral of size 10X 3 cm which is bluish brown colour.

6. As per post mortem report, the cause of death of deceased was "shock and Syncope as a result of ante mortem, myocardial and Infarction".

7. **Due to custodial death,** a judicial inquiry was entrusted in the matter to the Chief Judicial Magistrate, Jaunpur, who recorded statements of 16 inquiry witnesses. The first set of inquiry witnesses are the family members of the deceased, the second set of inquiry witnesses are independent witnesses and the 3rd set of inquiry witnesses are doctors and the policemen including the Sub-Inspector Sunil Kumar Tiwari (IW-14), Constable Manish Kumar (IW-12) Constable Samir Kumar (IW-13). **The statement of inquiry witnesses IW-12 Constable Manish Kumar, IW 13 Constable Samir Kumar and IW-14 Sub-Inspector Sunil Kumar Tiwari** as recorded by the Chief Judicial Magistrate and incorporated by him in his **report dated 25.06.2021** filed as Annexure CA -12 to the counter affidavit of the respondent no.2 dated 01.09.2021, **are reproduced below :**

"साक्षी आई० डब्लू० 12 का० मनीष कुमार, थाना बक्शा ने ब्यान किया है कि-

"दिनांक 11.02.2021को रात्रि गश्त में था। रात्रि 10.25 से रात्रि गश्त में ड्यूटी में था। मैं एस०आई० सुनील कुमार तिवारी के साथ था व हमराही का० समीर कुमार के साथ रात्रि गश्त की ड्यूटी में था। **रात्रि 01.30से पौने 2.00 के बीच थाने से फोन आया और हम लोगों को थाने पर बुलाया गया। थाने पर जाकर पूछने पर हम लोगों को बताया कि किसी मुलजिम की तबीयत खराब हो गयी है, उसको अस्पताल जाना है।** मुलजिम का नाम एस०एच०ओ० साहब ने दरोगा जी को बताया था कि उसका नाम कृष्णा उर्फ पुजारी है और **यह भी बताया था कि कि इसके पेट में दर्द हो रहा है। फिर रात्रि दो बजे के लगभग मैं व एस०आई० सुनील कुमार तिवारी व का० समीर कुमार द्वारा मुलजिम को प्राथमिक स्वास्थ्य केन्द्र नौपेडवा ले जाया गया।** मैं कृष्णा यादव के शरीर पर कोई चोट नही देखा। कृष्णा यादव ने ऐसा कोई कथन नही किया था कि उसके साथ किसी पुलिसकर्मी ने मारपीट की है। अस्पताल थाने से लगभग दो कि०मी० की दूरी पर है। अस्पताल से डाक्टर साहब ने कृष्णा यादव को जिला अस्पताल रेफर कर दिया था। **उसकी तबीयत उस समय काफी खराब थी परन्तु वह मार पीट किये जाने की कोई बात या शिकायत नही कर रहा था। सामुदायिक चिकित्सालय से कृष्णा यादव को जिला अस्पताल एंबुलेन्स द्वारा ले जाया गया था। मैं जिला अस्पताल नही गया था।** "

साक्षी आई० डब्लू० 13 का० समीर कुमार, थाना बक्शा ने बयान किया है कि-

"दिनांक 11.02.2021 को रात्रि में मै एस०आई० सुनील कुमार तिवारी व हमराही का० मनीष कुमार के साथ रात्रि गश्त में था कि **रात्रि 01.30 से पौने 2.00 के बीच थाने से फोन आया** और हम लोगों को थाने पर बुलाया गया। थाने पर जाकर पूछने पर हम लोगों को बताया कि किसी मुलजिम की तबीयत खराब हो गयी है, उसको अस्पताल जाना है। मुलजिम का नाम एस०एच०ओ० साहब ने दरोगा जी को बताया था कि उसका नाम कृष्णा उर्फ पुजारी है और यह भी बताया था कि इसके पेट में दर्द हो रहा है। फिर रात्रि दो बजे के लगभग मुलजिम को मेरे

एस०आई० सुनील कुमार तिवारी व का० मनीष कुमार द्वारा प्राथमिक स्वास्थ्य केन्द्र नौपेडवा ले जाया गया। मैनें कृष्णा यादव के शरीर पर कोई चोट नही देखी। कृष्णा यादव ने ऐसा कोई कथन नही किया था कि उसके साथ किसी पुलिसकर्मी ने मारपीट की है। अस्पताल थाने से मात्र दो कि०मी० की दूरी पर है। अस्पताल से डाक्टर साहब ने कृष्णा यादव को जिला अस्पताल रेफर कर दिया था। उसकी तबीयत उस समय काफी खराब थी। परंतु वह मारपीट किये जाने की कोई बात या शिकायत नही कर रहा था। सामुदायिक चिकित्सालय से कृष्णा यादव को जिला अस्पताल एंबुलेन्स द्वारा ले जाया गया था। **मैं जिला अस्पताल नही गया था। वही से थाने वापस आ गया था।"**

<u>साक्षी आई० डब्लू० 14 उपनिरीक्षक सुनील कुमार तिवारी,</u> थाना बक्शा ने बयान किया है कि-

"दिनांक 11.02.2021 को थाना बक्शा पर रात्रि अधिकारी के रूप में मेरी ड्यूटी थी। मैं अपने हमराहियों का० मनीष कुमार व का०समीर कुमार के साथ लगभग 10.40 बजे थाने से रवाना होकर रात्रि गश्त में भ्रमण पर था कि **रात्रि 01.30से पौने 2.00 के बीच थाने से फोन आया** और हम लोगों को थाने पर बुलाया गया। थाने पर जाकर पूछने पर हम लोगों को बताया कि किसी मुलजिम की तबीयत खराब हो गयी है, उसको अस्पताल जाना है। थानाध्यक्ष महोदय से पूछने पर उन्होनें बताया मुलजिम का नाम कृष्णा यादव उर्फ पुजारी है और यह भी बताया था कि इसके पेट में दर्द हो रहा है। फिर तुरंत ही मैं उपनिरीक्षक अपने हमराहियों के साथ मुलजिम कृष्णा यादव उर्फ पुजारी को लेकर प्राथमिक स्वास्थ केन्द्र नौपेडवा गये। **जहाँ पर वह स्वंय ही गाड़ी से उतर कर अस्पताल के अंदर गया था तथा डाक्टर साहब द्वारा उसको देखा गया व उसका इलाज किया गया। मैनें मुलजिम कृष्णा यादव उर्फ पुजारी के शरीर पर कोई चोट व खरोंच नही देखा था तथा उसने मुझसे व मेरे हमराहियों से भी कोई मारपीट, चोट खरोंच का जिक्र नही किया था। डाक्टर साहब द्वारा जब उससे पूछा गया तो उसने बताया था कि पेट में दर्द हो रहा है। यह बात मैनें अस्पताल में उसके मुँह से सुना था।** अस्पताल थाने से करीब दो किलोमीटर की दूरी पर है। डाक्टर साहब ने वहाँ पर मौजूद किसी अन्य व्यक्ति से 108नम्बर पर फोन करवाया था तथा बताया कि इसकी तबीयत खराब है, इसको जिला चिकित्सालय रेफर किया जा रहा है। **तुरंत ही फोन करने पर 108 एंबुलेंन्स सी०एच०सी० नौपेडवा पर आयी व कृष्णा यादव उर्फ पुजारी को जिला चिकित्सालय जौनपुर लेकर गयी थी। लेकिन मैं थानाध्यक्ष महोदय को सारी बात बताकर वापस रात्रि गश्त भ्रमण हेतु थाना क्षेत्र चला गया था।"**

8. The IW 16 Kansraj Yadav (an independent witness) has stated before the Judicial Magistrate on 11.02.2021 as under :

"<u>साक्षी आई०डब्लू०16 कंसराज यादव</u> ने बयान किया है कि-

"मैं चाय की दूकान लगाता हूँ। दिनांक 11.02.2021 मे मै अपनी दूकान पर था। दूकान के सामने एस०ओ० बक्शा की गाड़ी खड़ी थी। उस समय लगभग 03.30 बज रहे थे। वहां पर 10-12 पुलिस वाले थे। वहाँ सौरभ पाठक कृष्णा यादव उर्फ पुजारी को बैठाकर लेकर आया और मेरू दूकान के सामने आकर मोटरसाईकिल रोक दी। पीछे से चन्द्रबदन व अजय यादव मोटरसाईकिल से आये। कृष्णा यादव को पुलिसवालों ने गाड़ी में डाल लिया। अजय व चन्द्रबदन ने पुलिसवालो से पूछताछ की यह हमें नही मालूम है। कृष्णा यादव से मेरी दूकान के सामने किसी ने मारपीट नही की थी। वे लोग उसे लेकर वहां से चले गये थे। अगले दिन मुझे पता चला कि कृष्णा यादव की मृत्यु हो

गयी है। मेरे सामने कृष्णा यादव से किसी ने कोई मारपीट नही की थी। मुझे इसके अलावा और कोई जानकारी नही है।"

9. IW-2 (Smt. Satta mother of the deceased) and IW-3 (Ajay Kumar Yadav informant and brother of the deceased) and IW-4 (Pradip Yadav, brother of the deceased) have stated before the Chief Judicial Magistrate as under :

"**साक्षी आई०डब्लू०2 श्रीमती सत्ता** ने बयान किया है कि-

" मेरे तीन लड़के थे। बडे का नाम अजय यादव, दूसरे बेटे का नाम कृष्णा उर्फ पुजारी तथा छोटे बेटे का प्रदीप यादव है। सौरव पंडित मेरे घर आये थे। तारीख याद नही है। बोले कि बक्शा के दरोगा जी कृष्णा यादव को बुलाये है। 03.00 बजे सांय कृष्णा यादव को सौरव पंडित अपनी गाडी पर बैठाकर ले गये थे। अजय यादव व गांव के चन्द्रबदन को मैं थाने पर भेजी थी,कि क्या बात है जो कृष्णा यादव को पुलिस बुलायी है। फिर रात में 08.00 बजे 10-12पुलिस वाले जिसमें कुछ सादी वर्दी में थे, मेरे घर आये और घर में तोड-फोड करने लगे। पेटी का ताला तोडकर 60,000/- रूपये लूट लिये। मैनें रोकना चाहा तो मुझे घसीटकर बाहर कर दिया। पुलिस वाले लूटामार करके 60,000/- रूपये लूट कर चले गये। रात में12.30 बजे पुलिस वाले मेरे लड़के कृष्णा यादव को जिसको बहुत मारपीट रखा था को लेकर मेरे घर आये और कहा कि डेढ लाख रूपया दो नही तो तुम्हारे लड़के को जान से मार देंगे। मैनें कहा कि मैं पैसा नही दे सकती। फिर पुलिस वाले मेरे लड़के को लेकर वापिस चले गये। अगले दिन सुबह 05.00 बजे पता चला कि कृष्णा की मृत्यु हो गयी है। मेरे घर में मेरे सामने कृष्णा यादव को पुलिस वालो ने नही मारा था परंतु वह बुरी चोटिल था।"

साक्षी आई० डब्लू० 3 अजय कुमार यादव ने बयान किया है कि-

"मै ए०सी० मैकेनिक के हैल्पर के रूप में एक साल से काम कर रहा हूँ। उसके पहले पढता था। हम तीन भाई थे। मृतक कृष्णा यादव उर्फ पुजारी मंझला भाई था। दिनांक 11.02.2021 को समय 03.00 बजे सौरभ पाठक पुत्र जितेन्द्र पाठक बाईक से आया जोकि कृष्णा यादव के पास आता जाता था। मैनें उसको आते हुए देखा था। वो आकर बोला कि एस०ओ० साहब रोड पर खडे है और तुझको बुला रहे है। रोड घर से 150 मीटर दूरी पर है। कृष्णा उसकी बाईक पर बैठकर चला गया। मैं और चन्द्रबदन उसके पीछे-पीछे बाईक से गये थे। रोड पर जाकर सौरभ बाईक रोक दिया। जहाँ पर पुलिस वाले थे, जिसमें से कुछ वर्दीधारी नहीं थे। रोड से कृष्णा यादव को जबरदस्ती बैठाने लगे तो मैनें विरोध किया। तो उन्होनें कहा कि मै एस०ओ०जी० से है पूछताछ के लिए ले जा रहे है। उस टीम में एस०ओ० अजय कुमार भी थे। बाकि के लोग को मैं नही पहचानता। फिर पुलिस वाले कृष्णा यादव उर्फ पुजारी को गाड़ी में बैठाकर ले गये। ये घटना कंसराज यादव जिसकी रोड पर चाय की दुकान है ने भी देखी। मैं वापस घर चला आया। घर आकर घटना के बारे में लोगों को बताया। करीब 04.30 बजे मै तथा चन्द्रबदन थाना बक्शा गये। जब हम थाने पर गये तो देखा कि कृष्णा जमीन पर बैठा था। उसने हमको बताया कि पुलिस वाले उसको मारे-पीटे है। वह कह रहा था कि भाई हमको बचा लो, पुलिस वाले बहुत मार रहे है। हमको पुलिस वालो ने उससे मिलने नही दिया और पुजारी को उठाकर अंदर ले गये। हम लोगों को गाली देकर ताने के भगा दिया। वहां से मैनें बाहर निकलकर एस०पी० साहब को फोन करके तथा व्हाटसएप करके बताया। परंतु एस०पी० साहब ने संतोषजनक जवाब नही दिया। मेरी उनसे फोन पर बात हुई थी। फिर मै घर चला गया । रात के 08.00 बजे के करीब 10-12 पुलिसवाले जिसमें कुछ वर्दीधारी नही थे आये और घर में घुस गये तथा दरवाजा पीटने लगे। मैं

तथा मेरी माताजी ने कृष्णा यादव के बारे में पूछा तो उन लोगो ने कहा कि वो थाने पर है। फिर पुलिसवालो ने मेरे छोटे भाई की पत्नी कोमल जो अंदर के कमरे में सोई थी उसको जबरदस्ती दरवाजा खुलावकर हाथ से पकड़कर निकाल दिया। दो मोबाईल और मोटरसाईकिल जबरदस्ती ले गये। **रात में पुनः 12.30 बजे 10-12पुलिसवाले मेरे भाई को लेकर आये जिसमें एस०ओ० अजय कुमार सिंह भी थे। मेरा भाई रो पीट रहा था और चल नही पा रहा था। दो पुलिसवाले उसको पकड़ कर लाये और बाहर पड़ी चारपाई पर डाल दिया। मेरा भाई जोर- जोर से कह रहा था कि जो भी पैसा हो इनको लाकर दे दो और हमको बचा लो नही तो ये लोग मुझे मार डालेंगे।** मेरी माताजी मेरे भाई को पकड़कर रोने लगी ,कहने लगी जो भी पैसा था वो तो आप लोग पहले ही लूट चुके हो **फिर एस०ओ० अजय कुमार ने कहा कि साला प्रधानी लडेगा, मै इसको प्रधानी लड़ाता हूँ। फिर एस०ओ० अजय कुमार सिंह ने कहा कि अगर अपने लड़के को सही सलामत देखना चाहते हो तो डेढ लाख रुपया लेकर थाने आओ नही तो इसे गोली मार देंगे।** हम रात में थाने पर नही गये। सुबह 06.00 - 06.30 बजे हल्ला होने लगा कि कृष्णा यादव उर्फ पुजारी को पुलिस वालो ने जान से मरा दिया। इसके बाद **लगभग 08.00 बजे एस०पी० सिटी के आवास पर गया और उनको पूरी बात बतायी। एस०पी० सिटी ने दिलाशा देकर कहा कि ऐसी कोई बात नही है तुम्हारा भाई जल्दी छूट जायेगा। एस०पी०सिटी ने एक दरोगा को बुलाया जिनका नाम राजेश यादव है जो शायद सरपतहां थाने से है बुलवाया। फिर एस०पी० सिटी अंदर चले गये और एस०ओ० राजेश यादव हमको बाहर ले गये। मुझे बताया कि तुम्हारे भाई की मृत्यु हो गयी है।** वो बोले जो होना था वो हो गया,उनको ऐसा नही करना चाहिए था। **फिर वो मुझे गाड़ी में बैठाकर जबरदस्ती सदे अस्पताल ले गये।वहां पर 100-200 पुलिसवाले पहले से मौजूद थे। और तमाम लोग भी थे। बड़ी कहने सुनने के बाद हमे तथा प्रमोद यादव को हमारे भाई का मुंह दिखाये। मेरे भाई के हाथ काले हो रहे थे। पूरी पीठ काली हो गयी थी। रीढ की हड्डी के पास खून निकल रहा था। फिर हम लोगो को बाहर निकाल दिये।** पुलिस वाले रिपोर्ट लिखने को तैयार नही थे, जब लोगों ने दबाव बनाया तो सांय के समय रिपोर्ट लिखी गयी। रिपोर्ट मैनें लिखायी थी। जो दोपहर में 03.00 बजे पुलिसवाले रोड पर से पुजारी को उठा कर ले गये थे तो उस समय उसे कोई नही मारा था। जब हम थाने पर गये पुलिसवाले जो 4-5 की संख्या में थे डण्डे व बेल्ट से मार रहे थे। जब रात में पुलिसवाले घर लेकर आये थे तब किसी पुलिसवाले ने ने नही मारा था। मेरी माताजी को प्लास्टिक का पाईप मारे थे। सब पुलिसवाले भद्दी-भद्दी गालियाँ दे रहे थे। **मेरे भाई का कोई आपराधिक इतिहास नही था। वह सीधा-सीधा व्यक्ति था। मेरे भाई को उठाने में सौरभ पाठक का पूरा हाथ है** परंतु पुलिसवाले उसके खिलाफ कोई कार्यवाही नही कर रहे है। **मेरा भाई पूर्ण रूप से स्वस्थ था, उसे कोई बिमारी नही थी। उसकी मृत्यु पुलिसवालों के मारने के कारण से हुई है।**"

साक्षी आई०डब्लू०4 प्रदीप यादव ने बयान किया है कि-

"हम लोग तीन भाई थे। जिसमें मै सबसे छोटा हूँ। अजय यादव सबसे बडा, कृष्णा यादव उर्फ पुजारी बीच वाला भाई था। मै मुम्बई में रहकर ए०सी० मैकेनिक का काम करता हूँ। मेरे पिताजी भी मुम्बई में रहकर गाड़ी चलाते है। दिनांक 11.02.2021 को मेरी पत्नी कोमल यादव ने फोन करके बताया कि मेरे भाई कृष्णा को पुलिस उठा ले गयी है। मेरे पूछने पर उसने बताया कि थाना बक्शा की पुलिस जिस में एस०ओ० अजय सिंह व एस०ओ०जी० की टीम रोड पर से उठा कर ले गयी है। उसने बताया कि सौरभ पाठक उसको बुलाकर ले गया था।

पुलिसवाले कह रहे थे कि पूछताछ करके छोड़ देंगे और हम लोग निश्चिंत हो गये। फिर मेरी पत्नी ने फोन करके बताया कि पुलिसवाले घर पर आकर पैसा और घर का सामान लूट ले गये है, तब हम घबरा गये और अन्य लोगो से बातचीत किया। परंतु उन लोगों द्वारा कोई संतोषजनक जवाब नही दिया गया। **रात 12.30 के बाद मेरी पत्नी द्वारा पुनः फोन करके रोते हुए बताया गया कि पुलिसवाले भईया को लेकर आये थे।** कुल 10-12 की संख्या में थे। कुछ वर्दी नही पहने थे।उसने बताया कि पुलिसवाले ज्यादामार दिये है, जिससे वह चल नही पा रहा है। **भईया रो रहे थे कि जो भी पैसा है देकर मेरी जान बचा लो नही तो ये लोग मुझे जान से मार देगें। एस०ओ० अजय सिंह ने भद्दी -भद्दी गालियां दी और कहा कि अगर पैसा नही दोगे तो सुबह तेरे बेटे की लाश मिलेगी।** यह बात मेरी पत्नी द्वारा मुझे फोन करके बतायी गयी थी। सुबह 06.00 बजे को 12 तारीख को मेरी पत्नी का फोन आया कि पुलिसवालो ने कृष्णा यादव को मार डाला है और सदर अस्पताल में छोड़कर चले गये है। हम लोग उन्हें देखने जा रहे है। फिर मैं, मेरे पिताजी, मेरे बडे पापा का लड़का विनोद यादव फलाईट द्वारा जौनपुर आये। जौनपुर सदर अस्पताल सांयकाल 06.30 - 07.00 बजे के बीच में पहुँचे। मैनें और मेरे पूरे परिवार ने भाई के शव को देखा था। इसकी कमर पर व आँख, नाक व कान से खून आ रहा था। फिर हम लोगों को अस्पताल से हटा दिया गया।"

<u>साक्षी आई०डब्लू०5 डा० मनीष कुमार केसरवानी</u> सी०एच०सी० सुजानगंज(पोस्टमार्टम कर्ता) ने ब्यान किया है कि-

" मुख्या चिकित्साधिकारी, जौनपुर के आदेश के अनुसार मेरी ड्यूटी दिनांक 12.02.2021 को पोस्टमार्टम हाऊस, जौनपुर लगायी गयी थी। मेरे अलावा मेरे पैनल में डा० शाहिद अख्तर, सी०एच०सी० मडियाहूँ व डा०प्रवीण कुमार, सी०एच०सी० रेहटी एंव फार्मासिस्ट अवधेश कुमार, पुलिस लाईन अस्पताल मौजूद थे। दिनांक 12.02.2021को ए०डी०एम० के आदेशानुसार रात्रि 09.10 पी०एम० पर कृष्णा यादव उर्फ पुजारी का शव विच्छेद शुरू किया गया। शव विच्छेद की कार्यावाही की विडियोग्राफी शुभम मौर्या द्वारा की गयी। शव को का० अरविन्द कुमार व का० मनीष कुमार थाना बक्शा द्वारा पोस्टमार्टम हाऊस लाया गया था। पोस्टमार्टम रिपोर्ट पर मेरे पैनल द्वारा निम्न चोटे पायी गयी-

(1) Contusion of size 30 x 20 cm दोनों नितम्बों पर जोकि लाल भूरा रंग लिये हुए था।

(2) Contusion of size 15 x 08 cm लगभग उपरी पीठ पर दोनो तरफ कंधो के पास जोकि लाल भूरा रंग लिये हुए था।

(3) Contusion of size 10 x 08 cmलगभग बाये भुजा पर बाहर तरफ था जोकि नीला रंग लिए हुए था।

उक्त तीनों चोटों के अलावा अन्य कोई जाहिरा चोट नही थी। कोई हड्डी भी टूटी नही थी। किसी धारदार हथियार की भी कोई चोट नही थी।

उक्त चोटे ऐसी प्रकृती की नही थी, जिसमें कि किसी की मृत्यु प्रायः सम्भाव्य हो।

जब शव का विच्छेद किया गया तो प्रथमतः छाती खोलने पर यह पाया गया कि दोनो फेफड़ो में खून भरा हुआ था। पसली में कोई दिक्तत नही थी। सांस नली सामान्य थी। गर्दन में कोई दिक्कत नही थी। हृदय के दो चैम्बरों में खून भरा था। हृदय के दाहिने चैम्बर ' Ventricle' की पिछली दिवार पर 2 x 1 cm का सफेद धब्बा था। जो कि चिन्हित करता है कि उक्त धब्बा MI (दिल का दौरा) 'हृदयाघात' होने की वजह से सम्भाव्य है।"

10. As per story developed by the police, the deceased was brought to the police station at about 01:30 A.M. on

12.02.2021 after his arrest at about 10:25 P.M. on 11.02.2021 and he was sent to CHC Naupedwa, Jaunpur, at about 02:00 AM on 12.02.2021 for first aid, where Doctor referred him for District Hospital and when the deceased was brought to District Hospital by ambulance he was found dead.

11. Learned A.G.A. has produced before us case diary to impress that as per an alleged slip issued by the Doctor on emergency duty in Amar Sahid Uma Nath Singh District Hospital Jaunpur dated 12.2.2021, the deceased Krishna Yadav was brought dead at the Hospital at about 03:35 A.M. by the Constable Manish Kumar and Constable Samir Kumar, P.S. Baksa.

12. A supplementary affidavit dated 09.08.2021 has been filed by the petitioner annexing therewith three photographs of the dead body of the deceased Krishna Yadav. Averments in this regard have been made by the petitioner in paragraph 3 of the supplementary affidavit dated 09.08.2021 which have not been denied or disputed by the respondent No.2 and the respondent No.3 in separate counter affidavits filed by them. The counter affidavit has been filed on behalf of respondent no.2 by Chaub Singh, Circle Officer Badlapur, District - Jaunpur who replied the contents of paragraphs 2 and 3 of the aforesaid supplementary affidavit, in paragraph 33 of his counter affidavit as under :

"That the contents of paragraph nos. 2 & 3 of the supplementary affidavit refer to post mortem report dated 12.02.2021 and ***colour photographs of the deceased Krishna Yadav @ Pujari*** *and as per the post mortem report there were three injuries on the person of the deceased and as per opinion of the doctor the said injuries are not sufficient for death and the cause of death of deceased is Shock & Syncope as a result of ante-mortem myocardial infraction and the viscera was preserved for any intoxication. As per the viscera report dated 01.07.2021 issued by the Forensic Science Laboratory, Ram Nagar , Varanasi no Chemical poison was found in viscera."*

13. In his counter affidavit dated 06.09.2021, Sri Ajay Kumar Sahani, Superintendent of Police, Jaunpur, has replied paragraph 3 of the aforesaid supplementary affidavit, as under :

"That in reply to the contents of paragraph no.3 of the supplementary affidavit, it is submitted that the post-mortem report shows that there were 3 injuries on the person of deceased and as per the penal of doctors these injuries were not sufficient for death. The cause of death was due to shock and syncope as a result of ante-mortem myocardial infarction."

14. On 03.09.2021 this writ petition was heard at length and a detailed order dated 03.09.2021 was passed, observing as under :-

Despite all these facts well on record and for the reasons best known to the respondents, they have not taken any action against the accuseds pursuant to the impugned FIR but as a matter of eye wash transfer or suspension or attachment order of accuseds were passed. The custodial death of deceased is undisputed. Serious allegations supported by the inquiry witnesses are well on record and and yet for the reasons best known to the respondents, no action has been taken against the accused, instead, it prima facie

appears that effort is being made to linger the investigation and carry it in a direction so the accused policemen may escape.

15. When this matter was heard on 06.09.2021 in presence of the Superintendent of Police Jaunpur, this court noted in the order the admission and submissions made by the State-respondents, as under :

"Heard Sri Sarvesh Chaubey, learned counsel for the petitioner, Sri S.K. Pal, learned Government Advocate assisted by Sri Roopak Chaubey, learned AGA for the State-respondents.

On oral request, learned counsel for the petitioner is permitted to implead Central Bureau of Investigation through its Director as respondent no. 5 in the array of parties. He undertakes to serve a copy of the writ petition along with supplementary affidavit and a copy of this order upon the counsel appearing on behalf of C.B.I., during course of the day.

Counter affidavit on behalf of respondent no. 3 dated 6.9.2021 has been filed today, which is taken on record. Sri Ajay Kumar Sahni, Superintendent of Police, Jaunpur is present in the Court in compliance of the order dated 3.9.2021.

Learned Government Advocate admits that the photographs of the deceased filed along with the supplementary affidavit dated 9.8.2021 is undisputed. The contents of paragraph no. 3 of the supplementary affidavit dated 9.8.2021 regarding the aforesaid photographs, have neither been disputed nor denied by the respondent no. 3 in paragraph no. 43 of the counter affidavit dated 6.9.2021. He states that accused police men are absconding and efforts are being made for their arrest. He submits that the present Superintendent of Police namely Sri Ajay Kumar Sahni has taken the charge on 17.6.2021 and thus he was not the Superintendent of Police at the time of registration of first information report no. 0038 of 2021 dated 12.2.2021 under Section 302, 394, 452, 504 IPC in which the SOG team Jaunpur, S.O. Baksa, Ajay Kumar Singh and S.O. Hamrah, Thana Baksa Jaunpur were the accused. He states that one Sri Rajkaran Naiyar was the then Superintendent of Police, Jaunpur.

Learned counsel for the petitioner prays for and is granted a day's time to file rejoinder affidavit.

Put up as fresh on 8.9.2021 at 10:00 A.M. for further hearing before this Bench."

16. The facts as briefly noted above prima facie reveal that the deceased was lifted by the S.H.O. Police Station Baksa and other policemen on 11.02.2021 and, thereafter he remained in the custody. The story of accident of the deceased in the afternoon of 11.02.2021 is a story prima facie developed by the police so as to give a different colour for the death of the deceased. As per own case of the police and G.D. entry, the deceased was arrested at about 10:25 A.M. on 11.02.2021 but he was brought to the police station at about 01:30 A.M. on 12.02.2021 and no treatment was required. Surprisingly, telephone calls were made to Sub-inspector Sunil Kumar Tiwari, Constable Manish Kumar and Constable Sameer Kumar between 01:30 A.M. to 01:45 A.M. requiring them to come to the police station to carry the deceased for first aid/ treatment. As per statement given by these three police personnel before the C.J.M., Jaunpur, they took the deceased at about 02:00 A.M. on 12.02.2021 to bring him to C.H.C. Naupedwa, Jaunpur.

17. As per police story, the aforesaid S.I. Sunil Kumar Tiwari, Constables Manish Kumar and Sameer Kumar also brought the deceased to District Hospital, Jaunpur. But perusal of their statement before the C.J.M. reveals that they had neither carried nor brought the deceased to the District Hospital rather they returned from C.H.C. Nawpedwa. **As per photo-stat copy of the entry in the register at C.H.C. Nawpedwa, Jaunpur at serial No.E-3092, Krishna Yadav, when brought to the C.H.C., Naupedwa, Jaunpur, was unconscious and his B.P. and P.P. were not found** and after thorough examination, **the doctor referred him to District Hospital, Jaunpur at 01:55 A.M**. The aforesaid photo stat copy of the register of C.H.C. Naupedwa, Jaunpur, has been produced before us by the learned A.G.A. stating it to be part of the case diary. Thus, when as per own case of the respondents, they took the deceased Krishna Yadav at about 02.00 A.M. on 12.02.2021 from the police station Baksa, then how it is possible that the doctor after thorough examination, has referred the deceased for District Hospital at 01:55 A.M. That apart, the doctor at the C.H.C. has found the deceased in an unconscious condition and his B.P. and P.P. were not found whereas the G.D. entry shows that the deceased was merely making some complain of pain in stomach. Surprisingly, the aforesaid three policemen who brought Krishna Yadav to C.H.C. Naupedwa, have stated that they have not seen any scratch or injury on the body of Krishna Yadav who has also not told about injuries and who told the doctor about pain in stomach, **WHEREAS** as per entries made by the doctor in the register at the C.H.C. Naupedwa, the Krishna Yadav was unconscious and his B.P. and P.P. were not found. Thus, the police story and G.D. entries are prima facie false and a criminal act to divert investigation in a wrong direction by manipulating evidences so as to defeat the rule of law and fair investigation. The respondents have set up a case that the deceased was carried by the aforesaid Sub Inspector Sunil Kumar Tiwari, Constable Manish Kumar and Constable Sameer Kumar from the police station to C.H.C. Naupedwa, Jaunpur and thereafter from the C.H.C., Naupedwa to the District Hospital Jaunpur, but these three persons have stated in their statement before the C.J.M., Jaunpur that they carried the deceased only upto C.H.C. Naupedwa Jaunpur and thereafter, they came back. Thus, the story developed by the respondents that the deceased was brought to District Hospital, Jaunpur by the aforesaid Sub Inspector and Constable, is itself not supported by their statements.

18. It is admitted case of the respondents that the deceased had received various injuries, which is reflected from the G.D. Entry No. 05. The statement made by the mother and brother of the deceased before the C.J.M., Jaunpur regarding brutal beating by the police and consequent injuries to the deceased, prima facie corroborates with the photographs of the deceased and a little reference in the G.D. entry No. 5. Surprisingly, the **post mortem report does not contain the injuries present on vital part of the** body of the deceased which can be easily seen in the undisputed photographs filed alongwith the supplementary affidavit. Thus, *prima facie*, post mortem report also appears to be manipulated or procured under undue influence.

19. In paragraph 6 of the writ petition the petitioner has stated that the incident of lifting the deceased by the Police on

11.02.2021 was informed to the Superintendent of Police Jaunpur over telephone (mobile phone) and by sending messages but no action was taken. Copy of call details and messages have been filed as Annexure No.3 which have not been disputed by the Respondent Nos. 2 & 3 both in their counter affidavits. In paragraph 5 of the writ petition the petitioner has stated about some independent eye witnesses and some family members who submitted their notarized statement before the District Magistrate and the Superintendent of Police, Jaunpur. Copies of statements of Ajay, Kanshraj, Chandrabhan and Saraswati Devi have been filed collectively as Annexure No.2. But in their counter affidavits the respondent Nos. 2 and 3 vaguely denied it without denying the fact of statements and its contents. From the records of the writ petition and the report of the C.J.M., Jaunpur dated 25.6.2021 it appears that the deceased was preparing for election of Village Panchayat and he was threatened by the SHO Baksha.

20. The statements given by witness and filed alongwith the writ petition as referred in paras above, are reproduced below :-

Statement of Ajay Kumar Yadav

सेवा में,

श्रीमान जिलाधिकारी/ पुलिस अधीक्षक जौनपुर

<u>विषयः- मु० अ० सं०- 38/2021 अन्तर्गत धारा-30, 394, 504 आई० पी० सी० थाना-बक्शा, जिला-जौनपुर में 161 Cr.P.C के बयान के सम्बन्ध में-</u>

हलफनामा मिनजानिब अजय पुत्र तिलकधारी उम्र त० 30 वर्ष सा० मौ०- चकमिर्जापुर, थाना-बक्शा, जिला-जौनपुर हस्ब जैल हैः-

दफा-1 मैं बहलफ बयान करता हूँ कि मैं उपरोक्त नाम व पते का मूल निवासी हूँ तथा मेरे नाम व बल्दियत का कोई अन्य व्यक्ति मेरे मौजे मे नही है।

दफा-2 मैं बहलफ बयान करता हूँ कि मुकदमा उपरोक्त में वादी हूं।

दफा-3 मैं बहलफ बयान करता हूँ कि कृष्णा उर्फ पुजारी पुत्र तिलकधारी उ० त० 24 वर्ष सा० मौ- चकमिर्जापुर, थाना-बक्शा, जिला-जौनपुर मेरा छोटा भाई था।

दफा-4 मैं बहलफ बयान करता हूँ कि मेरा छोटा भाई कृष्णा उर्फ पुजारी के ऊपर जनपद जौनपुर के किसी भी थाने में कोई मुकदमा नही था कृष्णा एक सीधा-साधा व्यवहार कुशल लड़का था। और वह प्रधान पद के लिये तैयारी कर रहा था।

दफा-5 मैं बहलफ बयान करता हूँ कि दिनांक 11.02.2021 को समय करीब 3 बजे दिन की है। मैं व मेरा छोटा भाई कृष्णा और मेरे मित्र चन्द्रबदन यादव घर पर बैठकर बातचीत कर रहे थे कि मोटर साइकिल से सौरभ पाठक पुत्र जितेन्द्र पाठक सा० मौ०-सिहीपुर, थाना लाइन बाजार, जिला-जौनपुर कृष्णा के घर पर आये तथा कृष्णा से कहे की रोड पर चलो बक्शा S.O अजय कुमार सिंह बुला रहे है। तब कृष्णा सौरभ पाठक की मोटर साइकिल पर बैठकर उसके साथ चला गया।

दफा-6 मैं बहलफ बयान करता हूँ कि मैं अजय व मेरे मित्र चन्द्रबदन के साथ उनके पीछे-पीछे मेन रोड पर पहुँचा तो सौरभ ने मोटर साइकिल ले जाकर कंशराज यादव की दुकान के सामने मेन रोड पर रोक दिया। वहां पहले से खड़े S.O बक्शा अजय कुमार सिंह व कुछ पुलिस वाले वहां थे कृष्णा को जबरदस्ती अपनी गाड़ी में बैठाकर लेकर जाने लगे मैं व चन्द्रबदन ने पुलिस वालो से पूछा क्यों ले जा रहे है तो कुछ पुलिस वाले बोले की हम लोग S.O.G से है

पूछताछ के लिए ले जा रहे है सौरभ भी पुलिस वालो की गाड़ी के साथ-साथ अपनी मोटर साइकिल से गया।

दफा-7 मैं बहलफ बयान करता हूँ कि कृष्णा को पुलिस वाले को ले जाते समय अजय व कंशराज यादव व मैं तथा गाँव व अगल-बगल के तमाम लोगो ने देखा।

दफा-8 मैं बहलफ बयान करता हूँ कि कृष्णा यादव को थाना बक्शा पुलिस ले जाने के बाद मैं व चन्द्रबदन यादव भी थाना बक्शा गये मैं व मेरे मित्र चन्द्रबदन ने देखा मेरे भाई कृष्णा को पुलिस वाले लांकअप में बन्द किये थे मेरा भाई रो रहा था। मैं व चन्द्रबदन ने कृष्णा से मिलने का प्रयास किया तो पुलिस वाले मुझे व चन्द्रबदन को गाली-गुफ्ता देते हुए थाने से भगा दिये।

दफा-9 मैं बहलफ बयान करता हूँ कि थाने में पुलिस वालो द्वारा मेरे भाई कृष्णा को लाँकअप में बन्द करने पर मुझे विश्वास हो गया कि मेरे भाई को पुलिस वाले किसी फर्जी मुकदमें में चालान कर देंगे।

दफा-10 मैं बहलफ बयान करता हूँ कि अपने छोटे भाई कृष्णा को फर्जी मुकदमें में फंसाने व प्राण रक्षा के लिए श्रीमान पुलिस अधीक्षक जौनपुर के मौ०- नं०- 9454400280 पर अपने मोबाइल नं०-9984669989 से दो बार फोन लगभग 5.35 बजे शाम दिनांक 11.02.2021 को फोन किया तथा सही जबाव न मिलने पर श्रीमान पुलिस अधीक्षक जौनपुर के मोबाइल वाट्सअप पर अपने भाई के बारे में थाना बक्शा जबरदस्ती उठा ले जाने के बावत मैसेज भी किया था। जिसका रिकार्ड मेरे पास है।

दफा-11 मैं बहलफ बयान करता हूँ कि दिनांक 11.02.2021 को समय रात्रि 8 बजे मैं अजय यादव व मेरी पत्नी सुनीता, मेरी माता सरस्वती देवी, भाभी गुड़िया, चचेरे भाई प्रमोद यादव ओसार में बैठकर बातचीत कर रहे थे। और हमारे छोटे भाई प्रदीप यादव की पत्नी कोमल यादव की तबियत खराब होने की वजह से वह घर के अन्दर सोई थी। हम सब परिवारजन कृष्णा को पुलिस वाले बिना वजह के क्यों लेकर गये इसी विषय में बातचीत कर रहे थे। तभी थाना बक्शा S.O अजय कुमार सिंह व 10-12 पुलिस वाले कुछ वर्दी में कुछ सादे वर्दी में मेरे घर पर आये। और भद्दी- भद्दी गाली देने लगे। मेरे व परिवार के पूछने पर कि मेरा भाई कहा है तो पुलिस वाले ने बताया कि तुम्हारा भाई कृष्णा थाने में है।

दफा-12 मैं बहलफ बयान करता हूँ कि मेरे व परिवार वालो के विरोध करने पर बन्दूक दिखाकर चुप करा दिया। और दरवाजा पीटने लगे। अन्दर मेरे छोटे भाई प्रदीप यादव की पत्नी कोमल यादव शोरगुल और दरवाजा जोर-जोर से पीटने की वजह से दरवाजा खोला। तो उसको भद्दी-भद्दी गाली देते हुए हाथ पकड़कर धक्का देते हुए घर से बाहर निकाल दिया। घर में घुसकर बक्शे का ताला तोड़कर बक्शे में रखा 60 हजार रूपया जो मैने अपने मौसा संतोष यादव पुत्र ज्वाला यादव से खेत जो मेरा रेहन पर था छुड़ाने के लिए लिया था।

दफा-13 मैं बहलफ बयान करता हूँ कि घर के अन्दर रखा हुआ खाना-पीना फेक दिया और धमकाते हुए व भद्दी-भद्दी गाली देते हुए बोले कि अगर तुम लोग हल्ला- गुल्ला करोगे तो तुम सबको मारेंगे। और कृष्णा को जान से मार देंगे। जाते समय घर पर खड़ी अपाचे जिसका नम्बर-UP 62/BF3621 भी उठा ले गये।

दफा-14 मैं बहलफ बयान करता हूँ कि 11/12.02.2021 को रात्रि लगभग 12.30 बजे वही पुलिस वाले जो रात्रि 8 बजे आये थे वही पुलिस वाले मेरे भाई कृष्णा यादव को घसीटते हुए घर पर लाये तो मेरे भाई ठीक से खड़ा नही हो पा रहा था। बाहर पड़ी चारपाई पर उसे फेक दिये। मेरा भाई जोर-जोर से कराह रहा था मां-मां मुझे बचा लो। उसके बाद पुलिस वाले मेरे भाई का बाल पकड़कर चारपाई से जमीन पर पटक दिया। और पुलिस वाले बोले साले प्रधानी लड़ेगा तो तुझे उस लायक नही छोड़ूगा।

दफा-15 मैं बहलफ बयान करता हूँ कि मेरे व परिवार के पूछने पर कि साहब मेरे भाई ने क्या गलती की है जो आप इसे इतना मारे है और हम गरीब लोगो को क्यो सता रहे है। तो S.O अजय कुमार सिंह ने गाली देते हुए कहा कि चुप रहो नही तो तुम्हारा भी यही हाल करेंगे। और पैसा लाओ तभी तुम्हारे भाई को छोड़ेगे अगर पैसा नही दोगे तो तुम्हारे भाई की जान ले लेंगे। हत्या कर देंगे। मैं व मेरा पूरा परिवार पुलिस वालो के सामने हाथ जोड़कर रोने लगे कि साहब मेरे भाई को छोड़ दो। लेकिन भद्दी-भद्दी साली देते हुए मेरे भाई को घसीटते हुए लेकर चले गये।

दफा-18 मैं बहलफ बयान करता हूँ कि मुझे अफवाहन सुबह 12.02.2021 को 8 बजे पता चला कि मेरे भाई को अजय कुमार सिंह व S.O.G टीम व पुलिस वाले द्वारा हत्या कर दी गयी।

दफा-19 मैं बहलफ बयान करता हूँ कि मै उक्त सूचना पर क्षेत्राधिकारी सदर के यहाँ गया तो क्षेत्राधिकारी सदर ने थाने पर फोन कर पता किया पता करने के बार मुझे सदर अस्पताल जौनपुर ले गये जहां पर मेरे भाई का शव पड़ा था।

दफा-20 मैं बहलफ बयान करता हूँ कि पुलिस वाले मेरे भाई का पोस्टमार्टम कराने व शव जलाने का दबाव बनाने लगे। मैने कहा कि पहले मेरे भाई की हत्या का मुकदमा पुलिस वालो पर दर्ज किया जाय तब पोस्टमार्टम हेतु लाश भेजी जाय।

दफा-21 मैं बहलफ बयान करता हूँ कि उक्त घटना की सूचना मुख्यमंत्री उ० प्र० सरकार को I.G.R.S के माध्यम तथा मानवाधिकार आयोग के फैक्स के माध्यम से सूचना दिया व अपने परिवार वालो को सूचना दिया।

दफा-22 मैं बहलफ बयान करता हूँ कि अगल-बगल गांव कुछ सम्भ्रान्त व्यक्तियों द्वारा प्रदर्शन सदर अस्पताल में किया गया काफी दबाव के बाद मेरे भाई के हत्या के बावत मुकदमा उपरोक्त दर्ज हुआ।

दफा-23 मैं बहलफ बयान करता हूँ कि उक्त अजय कुमार सिंह थानाध्यक्ष बक्शा व S.O.G टीम व पुलिस वालो के मारने से पुलिस कस्टडी में मेरा भाई मर गया तथा झूठी कहानी बनाकर मेरी भाई के ऊपर झूठा मुकदमा लिखकर घटना कि लिपा पोती पुलिस द्वारा की जा रही है।

दफा-24 मैं बहलफ बयान करता हूँ कि उक्त बातें मेरा 161 सी० आर० पी० सी० का बयान मानते हुए सम्बन्धित विवेचक को प्रेषित करने की कृपा करें।

अतः श्रीमान जी से अनुरोध है कि उक्त बयान हलफी को मेरा 161 सी०आर०पी० सी० के बयान के रूप में दर्ज करने की कृपा करें।

Statements of Kanashraj Yadav

समक्ष,

श्रीमान जिलाधिकारी/ पुलिस अधीक्षक जौनपुर

<u>विषयः- मु० अ० सं०- 38/2021 अन्तर्गत धारा-302, 394, 504, 452 I.P.C थाना-बक्शा, जिला-जौनपुर में 161 Cr.P.C के बयान के सम्बन्ध में-</u>

हलफनामा मिनजानिब कंशराज यादव उ० त० 40 वर्ष पुत्र जलन्धर यादव ग्राम-चकमिर्जापुर, थाना-बक्शा, जिला-जौनपुर हस्ब जैल हैः-

दफा-1 मैं बहलफ बयान करता हूँ कि उपरोक्त नाम पते का स्थायी निवासी हूं मेरी दुकान मेन रोड पर यादव जलपान, कृष्णा डेरी के नाम से है।

दफा-2 मैं बहलफ बयान करता हूँ कि मेरी दुकान इलाहाबाद रोड पर है। दिनांक 11.02.2021 समय लगभग 3 बजे दिन मेरी दुकान के सामने S.O बक्शा अजय कुमार सिंह व करीब 10-12 पुलिस वाले दो गाड़ी से खड़े थे तभी सौरभ पाठक, कृष्णा यादव उर्फ पुजारी पुत्र

तिलकधारी मोटर साइकिल से लेकर पुलिस वाले के पास आया और पीछे से अजय यादव, कृष्णा का भाई व चन्द्रबदन यादव भी आ गये।

दफा-3 मैं बहलफ बयान करता हूँ कि अजय यादव पुलिस वालो से कृष्णा को ले जाने का कारण पूछा तो पुलिस वाले बोले की S.O.G से ही पूछताछ के लिए ले जा रहे है। मेरे सामने ही S.O बक्शा अजय कुमार सिंह व S.O.G टीम के पुलिस वालो द्वारा कृष्णा यादव उर्फ पुजारी को पकड़कर ले गये।

दफा-4 मै बहलफ बयान करता हूँ कि 12.02.2021 को गाँव के अफवाहन पता चला कि कृष्णा यादव की पुलिस कस्टडी मे मौत हो गयी है लाश सदर अस्पताल में पड़ी है।

दफा-5 मैं बहलफ बयान करता हूँ कि कृष्णा की मौत पुलिस वालो के मारने से आयी चोटो के कारण हुई है।

दफा-6 मैं बहलफ बयान करता हूँ कि हलफनामा मेरे निजी ज्ञान मे सच व सही है न कोई बात झूठ है न छिपायी गयी, ईश्वर मेरी मदद करें।

Statements of Chandrabadan Yadav

सेवा में,

श्रीमान जिलाधिकारी/ पुलिस अधीक्षक जौनपुर

<u>विषयः- मु० अ० सं०-38/2021 अन्तर्गत धारा-302, 394, 504, 452,I.P.Cथाना-बक्शा, जिला-जौनपुर में 161 Cr.P.C के बयान के सम्बन्ध में-</u>

हलफनामा मिनजानिब चन्द्रबदन पुत्र बाबूराम यादव उम्र त० 25 वर्ष सा० मौ०-चकमोलनापुर, थाना-बक्शा, जिला-जौनपुर हस्ब जैल हैः-

दफा-1 मैं बहलफ बयान करता हूँ कि मैं उपरोक्त नाम व पते का मूल निवासी हूं तथा मेरे नाम व बल्दियत का कोई अन्य व्यक्ति मेरे मौजे मे नही है।

दफा-2 मैं बहलफ बयान करता हुं कि कृष्णा यादव उर्फ पुजारी मेरा मित्र का भाई था।

दफा-3 मैं बहलफ बयान करता हूँ कि कृष्णा उर्फ पुजारी मेरे मित्र का छोटा भाई था जनपद के किसी भी थाने में कोई मुकदमा नही था कृष्णा एक सीधा सादा व्यवहार कुशल लड़का था और वो प्रधान पद के लिए तैयारी कर रहा था।

दफा-4 मैं बहलफ बयान करता हुं कि दिनांक 11/2/2021 को समय 2 बजे से अजय के साथ उनके घर पर था दिनांक 11/2/2021 को समय करीब 3 बजे मोटरसाइकिल से सौरभ पाठक पुत्र जितेन्द्र पाठक सा० मौ०- सीहीपुर थाना लाइन बाजार जिला जौनपुर कृष्णा के घर पर आये तथा कृष्णा से कहे रोड पर चलो बक्सा एस० ओ० अजय कुमार सिंह बुला रहे हैं कृष्णा सौरभ पाठक कि बाइक पे चले गये।

दफा-5 मैं बहलफ बयान करता हूँ कि मैं व अजय, सौरभ पाठक के पिछे पिछे कंशराज यादव कि दुकान के सामने मेन रोड पे गये तो मैने देखा सौरभ ने मोटरसाइकिल ले जाकर कंशराज यादव के दुकान के सामने मेन रोड पे रोक दिया तो वहां पहले से खड़े एस० ओ० बक्सा अजय कुमार सिंह व कुछ पुलिस वाले थे कृष्णा को दबरदस्ति अपनी गाड़ी लेकर जाने लगे मैं व अजय ने पुलिस वाले से पुछा क्यु लेकर जा रहे है तो कुछ पुलिस वाले बोले कि हम एस० ओ० जी० से है पूछताछ के लिए ले जा रहे है सौरभ पाठक भी पुलिस वालो कि गाड़ी के साथ साथ अपनी मोटरसाइकिल से गया।

दफा-6 मैं बहलफ बयान करता हुं कि कृष्णा को पुलिस वाले को ले जाते समय अजय व कंशराज यादव व मैं तथा गाँव व अगल बगल के तमाम लोगो ने देखा।

दफा-7 मैं बहलफ बयान करता हुं कि कृष्णा यादव को थाना बक्सा पुलिस ले जाने के बाद मैं व अजय भी थाना बक्सा गये मैं व

अजय ने देखा कृष्णा को पुलिस वाले लांकअप में बन्द किये थे कृष्णा रो रहा था मैं व अजय ने कृष्णा से मिलने का प्रयास किया तो पुलिस वाले गालीगुप्ता देते हुए थाने से भगा दिये।

दफा-8 मैं बहलफ बयान करता हुं कि पुलिस वालो द्वारा मेरे मित्र के भाई कृष्णा यादव को लांकअप में बन्द करने पर मुझे विश्वास हो गया कि कृष्णा को पुलिस वाले किसी फर्जि मुकदमें में चलान कर देंगे।

दफा-9 मैं बहलफ बयान करता हुं कि कृष्णा को फर्जि मुकदमें मे फंसाने व प्राण रक्षा के लिए मेरे मित्र अजय ने श्रीमान पुलिस अधीक्षक जौनपुर के मो० नं०- 9454400280 पर अपने मोबाइल नं० 9984669989 से दो बार फोन लगभग 5.35 बजे साम दिनांक 11/2/2021 को फोन किया तथा सही जबाव न मिलने पर श्रीमान पुलिस अधीक्षक जौनपुर के मो० वाट्सप पर अपने भाई के बारे थाना बक्सा जबरदस्ती उठा ले जाने के बावत मैसेज भी किया था जिसका रिकार्ड अजय के पास है।

दफा-10 मैं बहलफ बयान करता हुं कि सुबह पता चला पुलिस वाले एस० ओ० बक्सा अजय कुमार सिंह व एस० ओ० जी० रात मे कृष्णा के घर आये घर में घुसकर 60 हजार रूपया व मोटरसाइकिल नं० यू० पी० 62 बी० एफ० 3621 उठा ले गये मना करने पर परिवार वालो को भद्दी भद्दी गाली गुप्ता दिये।

दफा-11 मैं बहलफ बयान करता हुं कि सुबह अफवाहन पता चला कि कृष्णा यादव कि पुलिस द्वारा मारने पिटने के वजह से उसकी मृत्यु हो गयी।

दफा-12 मैं बहलफ बयान करता हुं कि जब मैं सदर जौनपुर पहंचा तो कृष्णा यादव कि लाश मर्चरी पर पड़ी थी उसके शरीर पर मारने पिटने कि वजह से गम्भीर चोट के काले निसान थे जो मैने अपने मोबाइल से विडीयो रिकार्ड किया जो मेरे पास है।

दफा-13 मैं बहलफ बयान करता हुं कि कृष्णा यादव कि मृत्यु पुलिस वाले के मारने पिटने से आई गम्भीर चोटो के कारण थाने के अन्दर हि हो गयी थी।

दफा-14 मैं बहलफ बयान करता हुं कि पुलिस वाले अपने को बचाने के लिए कृष्णा यादव पर झुठा मुकदमा लगा कर मामले कि लिपा पोती कर रहे हैं।

दफा-15 मैं बहलफ बयान करता हुं कि उक्त बाते मेरा 161 सी० आर० पी० सी० का बयान मानते हुए सम्बन्धित विवेचक को प्रेषित करने कि कृपा करें।

अतः श्रीमान जी से अनुरोध हैं कि उक्त बयान हलफी को मेरा 161 सी० आर० पी० सी० के बयान के रूप में दर्ज करने कि कृपा करें।

Statements of Saraswati Devi

सेवा में,

श्रीमान जिलाधिकारी/ पुलिस अधीक्षक जौनपुर

<u>विषयः- मु० अ० सं०-38/2021 अन्तर्गत धारा-302, 394, 504, 452, I.P.Cथाना-बक्शा, जिला-जौनपुर में 161 Cr.P.C के बयान के सम्बन्ध में-</u>

हलफनामा मिनजानिब सरस्वती देवी पत्नी तिलकधारी उम्र त० 55 वर्ष सा० मौ०-चकमिर्जापुर, थाना-बक्शा, जिला-जौनपुर हस्ब जैल हैः-

दफा-1 मैं बहलफ बयान करती हूँ कि मैं उपरोक्त नाम व पते की मूल निवासिनी हूं तथा मेरे नाम व वल्दियत का कोई अन्य महिला मेरे मौजे मे नही है।

दफा-2 मैं बहलफ बयान करती हूँ कि कृष्णा यादव उर्फ पुजारी मेरा लड़का था।

दफा-3 मैं बहलफ बयान करती हूँ कि दिनांक- 11.02.2021 को समय लगभग 3.00 बजे करीबी सौरभ पाठक नाम का लड़का मोटरसाईकिल से मेरे घर पर आया कृष्णा यादव से कहे चलो तुम्हें एस० ओ० बक्शा बक्शा अजय कुमार सिंह बुला रहे हैं। मेन रोड पर खड़े है। जब मेरा लड़का कृष्णा सौरभ पाठक गाड़ी पे

बेठकर चला गया तब मेरा बड़ा लड़का अजय व चन्द्रबदन भी कृष्णा के पीछ-पीछे रोड पर गया था जहां से पुलिस वालें मेरे लड़के कृष्णा को अजय व चन्द्रबदन के सामने गाड़ी में बैठाकर लेकर चले गयें।

दफा-4 मैं बहलफ बयान करती हूँ मेरे लड़के कृष्णा को ले जाने के बाद दिनांक 11.02.2021 रात्रि 8.00 बजे मैं व मेरा परिवार ओसार में बैठकर बात चीत कर रहे थे हमारी छोटी बहु कोमल यादव की तबियत खराब होने की वजह से घर के अन्दर सोई थी बिना वजह कृष्णा को पुलिस वालें क्यों लेकर गये इसी विषय मे बात चीत कर रहे थे। तभी थाना एस० ओ० अजय कुमार सिंह व 10-12 पुलिस वालें कुछ वर्दी मे कुछ सादे वर्दी में मेरे घर पर आये और भद्दी- भद्दी गाली देने लगे मेरे व मेरे परिवार के पुछने पर की मेरा बेटा कहा है तो पुलिस वालें ने गाली देते हुए बोला तुम्हारा लड़का थाने में है।

दफा-5 मैं बहलफ बयान करती हूँ कि मेरे व परिवार वालों के विरोध करने पर बन्दूक दिखाकर चुपकरा दिया और दरवाजा जोर- जोर से पिटने लगें अन्दर मेरी छोटी बहु कोमल शोर-गुल और दरवाजा जोर- जोर से पीटने की वजह से दरवाजा खोला तो उसको भद्दी-भद्दी गाली देते हुए हाथ पकड़क धक्का देते हुए घर से बाहर निकाल दिया घर मे घुसकर बक्शे का ताला तोड़कर बक्शे मे रखा हुआ 60 हजार रूपया निकाल लिये और घर के अन्दर रखा हुआ खाना पीना फेक दिया और धमकाते हुए व भद्दी- भद्दी गाली देते हुए बोले की अगर तुम लोग हल्ला गुल्ला करोगे तो तुम सब को भी मारेंगे और तुम्हारे लड़के को जान से मार देगे। जाते समय घर पर रखी अपाची मोटरसाईकिल यू० पी० 62 बी० एफ० 3621 उठा ले गये।

दफा-6 मैं बहलफ बयान करती हूँ कि पुनः 11/12.02.2021 रात्रि 12.30 बजे मेरे घर पर वही पुलिस वालें जो रात्रि 8.00 बजे आये थे वही पुलिस वाले मेरी लड़के कृष्णा यादव को घसीटते हुए घर पर लायें तो मेरे लड़का ठीक से खड़ा नहीं हो पा रहा था। दो पुलिस वालें पकड़े हुए थे। बाहर पड़ी चारपाई पर उसे फेक दिया। मेरा लड़का जोर-जोर से कराह रहा था मां, मां मुझे बचा लो। पुलिस वाले मुझे बहुत मारे है और मेरी हत्या कर देंगे घर में जो कुछ पैसा हो लाकर इन्हें दे दो और मेरी जान बचा लो। उसके बाद पुलिस वालें मेरे लड़के का बाल पकड़ कर चारपाई से जमीन पर पटक दिया।

दफा-7 मैं बहलफ बयान करती हूँ कि पुलिस वाले से पुछी साहब मेरे लड़के की क्या गलती है जो आप इसे इतना मारे है और हम गरीब लोगों को क्यों सता रहे हैं। फिर पुलिस वालें भद्दी-भद्दी गाली देते हुए मेरे लड़के को घसीटते हुए लेकर चले गये। और पुलिस वाले ने बोला पैसा लाओं तभी तुम्हारे लड़के को छोड़ेगे नहीं तो जान से मार देगें।

दफा-8 मैं बहलफ बयान करती हूँ कि पुलिस वालें एस० ओ० बक्शा व एस० ओ० जी० टीम के लोगों द्वारा मेरे बेटे की बुरी तरह से मारा पीटा गया है। जब मेरा बेटा मर गया तो उसकी लाश सदर अस्पताल में ले जाकर रखकर भाग गये। यह बात दिनांक 12.02.2021 की सुबह गाँव में अफवाहन पता चला तब मेरा बड़ा लड़का अजय सी० ओ० सदर के यहां गया वहां से जानकारी हुई कि कृष्णा की लाश सदर अस्पताल में है। हम लोग सदर अस्पताल गये मेरे बेटे की मृत शरीर मरचरी पर पड़ा था।

दफा-9 मैं बहलफ बयान करती हूँ कि मेरे बेटे कृष्णा उर्फ पुजारी की मृत्यु पुलिस वालों के द्वारा मारने पीटने से हुई। अब पुलिस वालों द्वारा मेरे बेटे के ऊपर झूठा मुकदमा करके मनगढ़न्त कहानी बना रहे है पुलिस वालों द्वारा लीपा-पोती की जा रही है।

दफा-10 मैं बहलफ बयान करती हूँ कि हलफनामा मेरे निजी ज्ञान में सच व सही है न कोई बात झूठ है न छिपायी गयी, ईश्वर मेरी मदद करें।

21. Call details filed alongwith the writ petition prima faice showing the complaint made by the petitioner to the Superintendent of Police, Janupur on 11.02.2021, as referred in paragraph 19 of this order, is reproduced below :-

"Messages and calls are end-to-end encrypted. No one outside of this chat, not even WhatsApp can read or listen to them. Tap to learn more

Sir mai Ajay Yadav pakadi chak mirjapur se mera chota bhai chunav ki taiyari kar raha hai prachar prasar kar raha tha chetra me baksha thana utha ke le gai hai muje asanka hai kahi farji mukada na laga de sir hamari madad kare praadam sir

5:39 PM

Krishna Yadav putra Tilakdhari Yadav

5:39 PM

Call History S

094544 00280

Mobile, 5:55 PM Sp Junpur (S. P Jaunpur)

+ Add tag

094544 00280

Mobile, Yesterday 5:34 PM CALL MESSAGE BLOCK

In your contacts

094544 00280

Mobile, Yesterday 5:32 PM (35s) 094544 00280

Mobile – BSNL

View call history

policejunpur@gmail.com

Uttar Pradesh East, India

Message +91 94544 00280"

22. As per the alleged Hospital slip being part of the case diary produced today in court by the learned Government Advocate in presence of the respondent No.3, the deceased was **brought dead** by the Police at District Hospital Jaunpur at about 3:35 A.M. On 12.02.2021, whereas, the Superintendent of Police Jaunpur and the District Magistrate Jaunpur have stated in their letters all dated 12.02.2021 sent to the National Human Rights Commission New Delhi and the District Judge Jaunpur that KRISHNA Yadav had **died during treatment** at 03:35 P.M. at District Hospital, Jaunpur. These facts have been mentioned by us only as instances.

23. Sri Gyan Prakash, learned counsel for the respondent No.5 submits that if this court directs then investigation shall be carried by the respondent No.5.

24. Perusal of the counter affidavit and copy of the case diary as produced before us by the learned G.A. **Prima facie** shows that entire effort of the police is to some how give clean chit to the accuseds and for this purpose important evidences are being left and some evidences are being created and manipulated. But presently we do not want to comment any more since fair investigation is yet to be carried by an independent and impartial Agency.

25. The facts mentioned above have been noted by us and brief discussion has been made by us only for the purposes to see as to whether investigation by the police has been carried honestly, fairly, diligently or attempt is being made to shield guilty police officers/policemen and to manufacture/create false evidences. Ultimately, whether the accused policemen have committed offence of murder and other offences and whether the then

Superintendent of Police, Jaunpur and Circle Officer, Jaunpur were influencing the investigation and are creating false evidences, are matters of investigation. There are sufficient material on record which prima facie reveal commission of offence by the accuseds and involvement of higher officers in consiperacy, destroying evidences and creating false evidences to protect the accuseds. Fair investigation is the foundation for a fair trial. In the present set of facts fair investigation by State Police appears to be not possible in view of all the brief facts and circumstances noted above.

26. This court in writ jurisdiction does not intend to enter into these areas, but with the sole purpose as to whether fair investigation is being done or not, the facts in brief have been noted by us. Therefore, the investigation by any agency in a fair manner, shall not be influenced by any of the observations made by us.

27. Today, learned Government Advocate has stated before us that from the last three days, **efforts are being made for arrest of the accused, but they are absconding** and therefore, N.B.Ws. have been obtained for their arrest, but they could not be arrested so far.

28. The facts as briefly noted above would further prima facie reveal that officers of the I.P.S. rank also have some involvement in the murder/death of the deceased Krishna Yadav, who died in police custody, allegedly due to brutal beating by the accused policemen.

29. Post mortem report as well as alleged slip dated 12.02.2021 issued by the District Hospital also prima facie appears to have been managed/fabricated. Serious allegations have been made against the police personnel, which cannot be said to be completely without evidence.

30. In the case of **K.V. Rajendran vs. Superintendent of Police vs. CBCID, South Zone, Chennai and others (2013) 12 SCC 480 (Paras-13, 14 and 17),** Hon'ble Supreme Court observed that investigation can be transferred from the State Investigating Agency to any other independent agency like CBI and the power of transferring such investigation should be exercised in rare and exceptional cases where the court finds it necessary in order to do justice between the parties and to instil confidence in the public mind or where investigation by the State Police lacks credibility and it is necessary for having "a fair, honest and complete investigation" and particularly when it is imperative to retain public confidence in the impartial work of the State Agencies. In the aforesaid case, Hon'ble Supreme Court referred to its decision in **Rubabbuddin Sheikh v. State of Gujarat & Ors (2010) 2 SCC 200** and observed that in order to do justice and instil confidence in the minds of the victims as well of the public, the State Police Authorities could not be allowed to continue with the investigation when allegations and offences were mostly against top officials. It was further observed that where high officials of State authorities are involved, or the accusation itself is against the top officials of the investigating agency thereby allowing them to influence the investigation, and further that it is so necessary to do justice and to instil confidence in the investigation or where the investigation is prima facie found to be tainted/biased, the court could exercise its Constitutional powers for transferring an investigation from the State investigating agency to any other

independent investigating agency like CBI only in rare and exceptional cases.

31. In **Mithilesh Kumar Singh vs. State of Rajasthan and others (2015) 9 SCC 795 (Para-15),** Hon'ble Supreme Court while emphasizing the need of fair, proper and impartial investigation, considered the transfer of investigation to CBI and held as under:

"15. Suffice it to say that transfers have been ordered in varied situations but while doing so the test applied by the Court has always been whether a direction for transfer, was keeping in view the nature of allegations, necessary with a view to making the process of discovery of truth credible. What is important is that this Court has rarely, if ever, viewed at the threshold the prayer for transfer of investigation to CBI with suspicion. There is no reluctance on the part of the Court to grant relief to the victims or their families in cases, where intervention is called for, nor is it necessary for the petitioner seeking a transfer to make out a cast-iron case of abuse or neglect on the part of the State Police, before ordering a transfer. Transfer can be ordered once the Court is satisfied on the available material that such a course will promote the cause of justice, in a given case."

32. The criminal justice system mandates that any investigation into the crime should be fair, in accordance with law and should not be tainted. It is equally important that interested or influential persons are not able to misdirect or hijack the investigation, so as to throttle a fair investigation resulting in the offenders escaping punitive course of law. These are important facets of the rule of law. Breach of rule of law amounts to negation of equality under Article 14 of the Constitution of India. Article 21 of the Constitution of India makes it clear that the procedure in criminal trials must be right, just and fair and not arbitrary, fanciful or oppressive, vide **Menka Gandhi vs. Union of India AIR 1978 SC 597** (para-7) and **Vinubhai Haribhai Malviya and others vs. State of Gujrat and another AIR 2019 SC 5233** (paras-16 and 17) and **Subramanian Swamy vs. C.B.I. (2014) 8 SCC 682 (para-86).** Article 21 enshrines and guarantees the precious right of life and personal liberty to a person which can only be deprived on following the procedure established by law in a fair trial which assures the safety of the accused. **The assurance of a fair trial is the first imperative** of the dispensation of justice, vide **Commissioner of Police, Delhi vs. Registrar, Delhi High Court, New Delhi AIR 1997 SC 95 (para-16).** The ultimate aim of all investigation and inquiry whether by the police or by the Magistrate is to ensure that those who have actually committed a crime, are correctly booked and those who have not, are not arraigned to stand trial. This is the minimal and fundamental requirement of Article 21 of the Constitution of India. Interpretation of provisions of Cr.P.C. needs to be made so as to ensure that Article 21 is followed both in letter and in sprit. "A speedy trial" is the essence of companion in concept in "fair trial". Both being inalienable jurisprudentially, the guarantee under Article 21 of the Constitution of India embraces both life and liberty of the accused as well as interest of the victim, his near and dear ones as well as of the community at large and, therefore, cannot be alienated from each other. A fair trial includes fair investigation as reflected from Articles 20 and 21 of the Constitution of India. If the investigation is neither

effective nor purposeful nor objective nor fair, the courts may if considered necessary, may order fair investigation, further investigation or reinvestigation as the case may be to discover the truth so as to prevent miscarriage of justice. However, no hard and fast rules as such can be prescribed by way of uniform and universal invocation and decision shall depend upon facts and circumstances of each case.

33. Fair and proper investigation is the primary duty of the investigating officer. In every civilized society, the police force is invested with powers of investigation of a crime to secure punishment for the criminal and it is in the interest of the society that the investigating agency must act honestly and fairly and not resort to fabricating false evidence or creating false clues only with a view to secure conviction because such acts shake the confidence of the common man not only in the investigating agency but in the ultimate analysis in the system of dispensation of criminal justice. Proper result must be obtained by recourse to proper means, otherwise it would be an invitation to anarchy, vide **Rampal Pithwa Rahidas vs. State of Maharastra 1994 Suppl, (2) SCC 73** (para-37). Investigation must be fair and effective and must proceed in the right direction in consonance with the ingredients of the offence and not in a haphazard manner moreso in serious case. Proper and fair investigation on the part of the investigating officer is the backbone of rule of law vide **Sasi Thomas vs. State (2006) 12 SCC 421** (para-15 and 18).

34. Therefore, considering the fact and circumstances of the case in its entirety and applying the principles of law aforenoted, we direct the **respondent no.5** to investigate forthwith in FIR No. 0038/2021, dated 12.02.2021 under Sections 302, 394, 452 & 504 I.P.C. P.S. - Baksa, District - Jaunpur, and accordingly investigation is transferred/entrusted forthwith to the respondent No.5. The respondent nos. 1, 2, 3 & 4 shall ensure that the entire evidences and papers relating to the aforesaid case crime/FIR are transferred to Investigating Officer of the respondent No.5 for investigation. An affidavit of compliance shall be filed on behalf of the respondent no.5 and also by the State-respondents on or before the next date fixed.

35. **Put up as a fresh case on 20.09.2021 at 02:00 P.M. before this bench for further hearing.**

(2021)09ILR A353
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.08.2021

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE PIYUSH AGRAWAL, J.

Crl. Misc. Writ Petition No. 6295 of 2021

Vishal Gupta ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Anil Kumar Srivastava

Counsel for the Respondents:
A.G.A.

A. Criminal Law - Code of Criminal Procedure, 1950 - Article 226 - Indian Penal Code, 1860-Sections 420, 188 & Copy right Act, 1957-Section 63-quashing of FIR-the petitioner was carrying 8 bundle of betel-nuts and tobacco-On

being asked by the informant Sub-Inspector, the petitioner could not show valid papers relating to transportation of betel-nuts and tobacco-none of the ingredients of cheating is reflected nor the petitioner disobeyed the public servant, Thus prima facie bare reading of FIR no offence is made out u/s 420/188 IPC-allegation of commission of offence u/s 63 Copyright Act is prima facie not made out-it appears to be malicious and grave abuse of power by the informant Sub-Inspector-if the goods were not accompanied by proper documents for transportation, it is only the authorities under the U.P. Goods and Service Tax Act, 2017, are empowered to check and take action-police has no authority to check invoices etc. and accounting the goods during transportation. (Para 1 to 10)

The writ petition is disposed off. (E-6)

(Delivered by Hon'ble Surya Prakash Kesarwani, J.
&
Hon'ble Piyush Agrawal, J.)

1. Heard Sri Anil Kumar Srivastava, learned counsel for the petitioner and Sri M.C. Chaturvedi, learned Additional Advocate General assisted by Sri Shiv Kumar Pal, learned Government Advocate, Sri Rishi Chaddha, Sri A.K. Sand and Sri Patanjali Mishra, learned A.G.As. for the State-respondents.

2. On 13.08.2021 and 24.08.2021, this court passed the following orders:-

"Order Dated 13.08.2021

Heard learned counsel for the petitioner and learned A.G.A. for State respondents.

On oral request of Learned counsel for the petitioner, "Sub Inspector Kedar Singh, Police Station- Nadi Gaon, District- Jalaun" i.e. informant, is allowed to be impleaded as respondent no. 3.

Notice on behalf of newly impleaded respondent no. 3 has been accepted by the learned A.G.A.

This writ petition has been filed praying for the following reliefs:-

"(a) Issue a writ order or direction in the nature of certiorari quashing the first information report dated 20.02.2021, registered as Case Crime No. 0015 of 2021 under section 420, 188 I.P.C. & section 63 Copy right act police station Nandi Gaon District Jalaun.

(b) Issue a writ, order or direction in the nature of mandamus commanding the respondents not to arrest the petitioner which is registered in Case Crime No. 0015 of 2021 under section 420, 188 I.P.C. & section 63 Copy right act police station Nandi Gaon District Jalaun.

(c) Issue a writ order or direction in the nature of mandamus commanding the concerned respondents authority to not adopt any coercive measure against the petitioners in the above mentioned case."

The impugned first information report No. 0015/2021 dated 22.02.2021, under Sections 420, 188 IPC and Section 63 of Copy Right Act, 1957, Police Station Nadi Gaon, District Jalaun is reproduced:-

"फर्द बरामदगी 05 बोरी मे महादेव ब्राण्ड कटी सुपाडी पैकेट में व 03 बोरी मे महादेव गोल्ड अनिर्मिति तम्बाकू पैकेट मे नाजायज व गिरफ्तारी एक नफर अभियुक्त अन्तर्गत धारा 420/188 आई.पी.सी व 63 कापी राइट अधिनियम 1957 आज दिनांक 20-2-21 को मै उ०नि० केदार सिंह मय हमराह का० 1258 तेजवीर सिंह व का० 756 जितेन्द्र सिह के थाना हाजा से वहवाले र०नं० 30 समय 18.37 बजे रवाना होकर वास्ते विवेचना व जांच अहकामात व गस्त मे कस्बा नदीगांव मे नावली तिराहा कोच रोड पर मौजूद थे कि जरिये

मुखबिर खास सूचना मिली कि एक सफेद ओमनी बैन गाडी मे अवैध सुपाडी व तम्बाकू गुटका कही ले जाया जा रहा है गाडी परासनी गांव की तरफ से आने वाली है।और मुखविर बताकर चला गया कि इस सूचना पर विश्वास करके घिलौर मोड पहुँचकर आसनाह राह से गवाहान फराहम करने की कोशिश की गई तो रात्रि व सुनसान स्थान होने के कारण कोई गवाहान फराहम नही हो सका कि थोडी देर बाद परासनी गांव की ओर से एक ओमनी गाडी आती हुई दिखाई दिया जिसे हम लोगो द्वारा घिलौर मोड पर ही हाथ का इशारा देकर रोका गया तो गाड़ी रोक कर चालक को उतार कर नाम पता पूंछते हुए गाडी की जामा तलाशी व चेकिंग की गयी तो गाडी **ओमनी सफेद में आगे रजिस्ट्रेशन न० UP 92 N 1998** अंकित होना पाया गया तथा चालक ने अपना नाम विशाल गुप्ता पुत्र राजू गुप्ता नि० कस्बा व थाना रेढर जनपद जालौन बताया तथा ओमनी गाडी के अन्दर चेक किया गया तो **आठ बण्डल सुपाडी व तम्बाकू भर बोरियों के बण्डल मौजूद मिले सुपाडी व तम्बाकू परिवहन करने का लाइसेंस चालक से मागा गया तो चालक नहीं दिखा सका एव अपना ड्राईवरी लाइसेंस व गाडी के कागजात नहीं दिखा सका चूकि बरामद सामग्री है** इस कारण खाद्य सुरक्षा अधिकारी कोच को जरिये मोबाइल अवगत कराया गया कुछ समय पश्चात श्री राहुल शर्मा मय खाद्य सहायक सुरक्षा अधिकारी श्री रमेशचन्द्र मौके पर उपस्थित हुए जिसके द्वारा गाडी मे **भरी सुपाडी गुटका व तम्बाकू को चेक किया गया तो सुपाडी पैकेट में बैच न० निर्माण तिथि** व निर्माता का पता व कम्पनी का रजिस्ट्रेशन नम्बर आदि अंकित न पाये जाने के कारण अवैध बताया गया तथा अवैध सुपाड़ी गुटका की एक चोरी से **वंद पैकेट बतौर नमूना खाद्य अधिकारी श्री राहुल शर्मा द्वारा** अपने कब्जे में जांच कराने हेतु लिया गया एक पैकेट में 12 पाउच भरे है। वोरियों को खोलकर मेरे द्वारा भी देखा गया तो चार बोरियों में पांच झोलें भरे मिले जिसमें एक झोले में 10 पैकेट तथा एक पैकेट में 12 पाउच सुपाडी महीन कटी भरी पाई गई तथा पांचवी वोरी में तीन झोले भरे मिले जिसमें एक झोले में 10 पैकेट जिसमें एक, पैकेट में 12 पाउच कटी सुपाडी महीन भरी पाई गई जिसमें से एक बोरी से 4 पैकेट सुपाडी महीन कटी हुई अपने कब्जे में जांच हेतु बतौर नमूना लिया गया पाउच को खोलकर देखा गया तो लाल हरी पन्नी का पाउच है जिसमें एक तरफ असली उरई वालों की सुप्रीम **श्री महादेव** शुद्ध सुपाडी दाना तथा दूसरी तरफ असली उरई वालो की सुप्रीम सोने **जैसे खरा** KANTHA शुद्ध सुपाडी दाना मिश्रण सुपाडी लोंग इलाइची निर्माता दिव्या केमिकल GSTIK-09AKY PG8617L1Z-9 जिसमें एक वोरी में 04 पैकेट तथा दो वोरियों में 6-6 पैकेट जिसमें एक पैकेट में 15-15 पाउच भरे है तथा चार पैकेट वाली बोरी में 25-25 **पाउच तम्बाकू के पाये गये** तम्बाकू के पाउच लाल हरी व गोल्डन पन्नी का है जिसमें एक तरफ तम्बाकू में दर्दनाक मौद होती है आज ही छोडे काल करें 1800-11-2356 असली महादेव पन्नी का अनिर्मित तम्बाकू अंकित है। तथा दूसरी तरफ अंग्रेजी में **TOBACCO CAUSES PAINFUL** DEATH MRP1-00 PACKD BY DC TRADIMG COMPANY तुलसी नगर उरई जालौन GSTIN 09B2FPG5590JIZQ **MAHADAV** अंकित है तथा तम्बाकू पाउच में बैंच न० निर्माण तिथि निर्माता का पता व कम्पनी का रजिस्ट्रेशन न० आदि न पाये जाने के कारण **तम्बाकू को बोरी से एक 2 पैकेट बतोर नमूना परीक्षण हेतु लिया गया शेष सभी माल को उन्ही बोरियों में भरकर सिलकर सर्वमुहर कर नमूना मुहर तैयार किया गया अभियुक्त विशाल गुप्ता उपरोक्त को मय बरामद माल सुपाडी** व तम्बाकू मय गाडी के समय करीब 21.30 कब्जा पुलिस में लिया गया गाडी के कागजात न होने के कारण/सवारी गाडी मे अवैध माल ढोने के

*कारण अन्तगर्त धारा **207 M.V.ACT** में सीज की जाती है। तथा अभियुक्त को अवैध सुपाडी गुटका व तम्बाकू के परिवहन के सम्बन्ध में वेद कागजात न दिखाये जाने व प्रवचित होने व किसी कम्पनी की नकल करने (दिब्या केमिकल्स) आदि पर जुर्म धारा 420/188 IPC व 63 कापी राइट अधि० से अवगत कराया गया। फर्द टार्चो की रोशनी में मौके पर तैयार की गई फर्द को पढकर सुनाकर हमराही कर्म०गण व अभियुक्त के हस्ताक्षर कराये गये व मौके पर गिरफ्तारी प्रपत्र तैयार किया गया। दोरान गिरफ्तारी मा० सर्वोच्य न्याया० व मानवधिकार आयोग के आदेशो-निर्देशों का अक्षरशः पालन किया गया। गिरफ्तारी की सूचना अभियुक्त के परिवारी जन को थाने पहुंच कर उचित माध्यम से दी जायेगी। एसडी अपठनीय SI 20/2/21 **(केदार सिंह) थाना नदीगांव एसडी** Vishal **एसडी** का० 1528 तेजवीर सिंह एसजी का० जितेन्द्र नोट- फर्द की एक प्रति अभियुक्तों को दी गई। एसडी अपठनीय SI 20/2/21 (केदार सिंह) थाना नदीगांव एसडी Vishal विशाल"*

In paragraph 8 of the writ petition it has been stated that the petitioner is engaged in supply of goods in market. As per allegations in the impugned first information report, the petitioner was carrying 8 bundle of betel-nuts and tobacco. The only allegation in the impugned first information report is that on being asked by the informant Sub Inspector, the petitioner could not show valid papers relating to transportation of betel-nuts and tobacco and for that reason the impugned first information report has been registered under Sections 420/188 IPC and Section 63 of the Copy Right Act, 1957. Sections 188, 415 and 420 I.P.C. read as under:-

*"**188. Disobedience to order duly promulgated by public servant.**-Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction,*

shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed, be punished with simple imprisonment for a term which may extend to one month or with fine which may extend to two hundred rupees, or with both;

and if such disobedience causes or trends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both."

*"**415. Cheating.**-Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat"."*

*"**420. Cheating and dishonestly inducing delivery of property.**- Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."*

Basic ingredient of cheating is whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property. None of the ingredients of cheating, as defined under Section 415 is reflected from the impugned first information report.

That apart, the basic requirement of presence of two persons is also absent. Since the alleged act does not prima facie falls within the meaning of word "cheating", consequently no case is made out under Section 420 I.P.C. on bare reading of the impugned first information report. Section 188 I.P.C. relates to disobedience of the order promulgated by a public servant. There is no allegation in the impugned first information report that the petitioner has disobeyed the order promulgated by a public servant. Thus, prima facie from bare reading of the impugned first information report no offence is made out under Section 420/188 I.P.C.

Similarly, mere alleged failure to show the invoices to the informant Sub Inspector at the time of interception of the vehicle and without presence of any of the ingredients of an offence under Section 63 of the Copy Right Act, the allegation of commission of offence under Section 63 is prima facie not made out.

Prima facie the impugned first information report appears to be malicious and grave abuse of power by the informant Sub Inspector i.e. respondent no. 3. If the goods were not accompanied by proper documents for transportation, it is only the authorities under the U.P. Goods and Service Tax Act, 2017/Central Goods and Service Tax Act, 2017 and I.C.S.T. Act, 2017, as the case may be, are empowered to check and take action in accordance with law, as provided under the relevant Acts and Rules. But the police has no authority to check invoices etc. and accounting the goods during transportation.

The impugned first information report, on the very face of it, prima facie, reflects ill intention of the informant and obstruction in free flow of trade and commerce.

The Petitioner has filed copy of tax invoices of Divya Chemicals, M/s Sijariya Traders and D.C. Trading Company as Annexure-2 to the writ petition. If these tax invoices suffer from any irregularity or infirmity, it is the tax authority under GST Act to look into and take action in accordance with law, including seizure of the goods under Section 129 of the U.P. GST/CGST Act.

Let a counter affidavit be filed by the respondents by means of a personal affidavit of Superintendent of Police, Jalaun within three days. In his counter affidavit, the respondents shall also show cause that in the event the impugned first information report, lodged by the informant-respondent no. 3 (Sub Inspector), is found to be malicious and abuse of power, then why exemplary cost may not be imposed upon respondent no. 3, to be recovered from his personal assets. If the Superintendent of Police, Jalaun finds that wrong has been committed by the Sub Inspector (respondent no. 3), then before filing his affidavit, he may take appropriate action in accordance with law.

Put up as a fresh case on 18.08.2021 at 10.00 a.m.

Considering the facts and circumstances of the case, as an interim measure it is provided that till the next date fixed, the petitioner shall not be arrested pursuant to the impugned first information report.

Order Dated 24.08.2021

Heard Sri Anil Kumar Srivastava, learned counsel for the petitioner, Sri M.C. Chaturvedi, learned Additional Advocate General assisted by Sri Shiv Kumar Pal, learned Government Advocate and Sri Rishi Chadhdha, learned AGA for the State-respondents.

A personal affidavit dated 23.8.2021 of Sri Avanish Kumar Awasthi, Additional Chief Secretary, Home, Government of UP and a personal affidavit dated 24.8.2021 of Sri Ravi Kumar, Superintendent of Police, Jalaun, have been filed today, which are taken on record.

We have confronted learned Additional Advocate General with the orders dated 13.8.2021 and 18.8.2021 and contents of the aforesaid two affidavits filed today by the respondent no. 1 and 4 respectively and we are constrained to observe that misleading affidavits have been filed by respondent nos. 1 and 4 both.

Despite our repeated orders, the respondents are not able to show their authority to interfere with the movement of goods in the normal course of business. They have also not been able to show the commission of any cognizable offence under Indian Penal Code or under any other criminal law as well as their authority to register the impugned FIR with respect to the goods in question.

For the detailed reasons mentioned in our earlier orders dated 13.8.2021 and 18.8.2021, it appears that there have been no change in the approach of respondents authorities to protect their gross illegal, arbitrary and unconstitutional action. Consequently, this Court is left with no option except to direct the respondent nos. 1, 3 and 4 to remain personally present before this Court, tomorrow to show cause that why appropriate orders, adverse to them, may not be passed and why the exemplary cost may not be imposed.

Let the policy of 'Ease of Doing Business' be also produced by the Additional Chief Secretary, Home, tomorrow.

Put up tomorrow i.e. 25.8.2021 at 10.00 a.m., as fresh for further hearing."

3. In compliance to our order dated 24.08.2021, Sri Avanish Kumar Awasthi, Additional Chief Secretary (Home), Sri Ravi Kumar, Superintendent of Police and Sri Kedar Singh, Sub-Inspector, P.S. Nadigaon, District Jalaun, are personally present in court.

4. The Additional Chief Secretary and Superintendent of Police stated before this court through the learned Additional Advocate General that charge-sheet has been expunged and now a final report in relation to the impugned first information report has been submitted and, therefore, no cause of action survives in the present writ petition.

5. The Additional Chief Secretary (Home) and the Superintendent of Police, both have separately filed their personal affidavits today, which are taken on record. In paragraphs 7 to 14 of his personal affidavit, the Additional Chief Secretary (Home), has stated as under:

"7. That there are certain developments, which are being brought on

record by means of the present personal – affidavit.

8. That the deponent tenders his unconditional and unfettered apology before this Hon'ble Court for the inconvenience caused to this Hon'ble Court, though the same was inadvertent.

9. That vide order dated 24.08.2021, ***the Superintendent of Police, Jalaun has passed suspension order by which the Sub-Inspector, namely Kedar Singh has been put under suspension in contemplation of departmental inquiry****. It is relevant to submit that Kedar Singh was the first informant of case crime no.0015 of 2021 under section 420, 188 IPC and section 63 of Copy Right Act, Police Station Nadigaon, District Jalaun.*

10. That it is further submitted that vide order dated 24.08.2021, the ***Superintendent of Police, Jalaun has also passed a suspension order in contemplation of departmental inquiry against Sub-Inspector, namely Mr. Dinesh Kumar Giri.*** *The abovenamed Sub-Inspector was the investigating officer of case crime no. 15 of 2021 under sections 420; 188 IPC and section 63 of Copy Right Act, Police Station Nadigaon, District Jalaun.*

11. That vide order dated 24.08.2021 passed by the Superintendent of Police, Jalaun, ***the Incharge Inspector (the then SHO of police station Nadigaon), namely Roop Krishna Tripathi, has also been suspended in contemplation of the departmental inquiry.***

12. That ***Vide order dated 24.08.2021*** *passed by the Superintendent of Police, Jalaun, the* ***investigation of case crime no. 15 of 2021 under sections 420, 188 IPC and section 63 of Copy Right Act has been transferred to the Circle Officer City, namely Mr. Santosh Kumar.***

13. That Mr. Santosh Kumar, ***Circle Officer City, district Jalaun, has submitted a report before the Superintendent of Police, Jalaun recommending therein that the charge sheet dated 16.06.2021 may be cancelled. The Superintendent of Police, Jalaun*** *after going through the report, has* ***permitted the cancellation of the charge sheet dated 16.06.2021*** *submitted in case crime no. 15 of 2021 under sections 420, 188 IPC and section 63 of Copy Right Act lodged at police station Nadigoan, district Jalaun.*

14. That the ***Circle Officer City, district Jalaun has submitted final report bearing final report no. 01 of 2021 dated 24.08.2021*** *in case crime no. 15 of 2021 under sections 420, 188 IPC and section 63 of Copy Right Act registered at police station Nadigaon, district Jalaun."*

6. In his personal affidavit, the Superintendent of Police, Jalaun has also made averments similar to the averments made by the Additional Chief Secretary in his personal affidavit.

7. During the course of submissions, the Additional Chief Secretary (Home) through the learned Additional Advocate General, has produced a note on "Ease of Doing Business" policy but perusal thereof shows that no step has yet been taken by the State Government to protect trade, commerce and industry from grossly illegal, unauthorised or unconstitutional actions of government officers/ employees at all level, particularly at the ground level. If steps in this regard are taken by the State Government then it may prove to be a boon for the policy of "Ease of Doing Business," economy of the State and job opportunities to people, on one hand and on the other

hand it may strengthen public faith in the Rule of Law.

8. Since in relation to the impugned first information report, a final report has been submitted as stated in the afore-quoted paragraphs of the personal affidavit of the Additional Chief Secretary (Home), therefore, we do not find any good reason to proceed further in the matter. Therefore, the writ petition is disposed off with the direction that the Additional Chief Secretary (Home) shall take all necessary steps to ensure that police authorities may not act without authority of law and may not interfere with the movement of goods in the ordinary course of business except by authority of law and the policy of the State Government "Ease of Doing Business" is implemented in letter and spirit. The respondent No.1 and 4 shall ensure that the departmental proceedings initiated against the erring officers as stated in the aforequoted paragraphs of the affidavit of Additional Chief Secretary (Home), are concluded in accordance with law within THREE MONTHS.

9. Personal presence of all the afore-noted officers, is exempted.

10. With the aforesaid directions, **the writ petition is disposed off.**

(2021)09ILR A360
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.09.2021

BEFORE

THE HON'BLE MANISH MATHUR, J.

FAFO No. 296 of 2003

Smt. Manju Yadav ...Appellant

Versus

Union of India ...Respondent

Counsel for the Appellant:
British Kumar

Counsel for the Respondent:
Mahendra Kumar Misra

Railway Act, 1989 - Sections 123 & 129 - Claim of compensation rejected-on ground of suicide being committed by the deceased-as journey ticket absent-mere absence of journey ticket-will not negate the claim of bonafide passenger-eye witness account and affidavit by claimant-deceased a bonafide passenger-no divine camera to indicate the actual manner of fatality-inexorable conclusion of untoward train accident u/s 123 of Railways Act-compensation in terms of section 129 of the Railway Act, 1989. Amount enhanced.

Appeal partly allowed. (E-9)

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

1. Heard Mr. Shantanu Gupta, learned counsel holding brief for Mr. Pritish Kumar, learned counsel for appellant and Mr. Mahendra Kumar Mishra, learned counsel appearing on behalf of respondent.

2. First appeal from order has been filed under Section XXIII of the Railway Claims Tribunal Act,1987 against the judgment and award dated 16.12.2002 passed in Claim Case No.0A0100204 (Smt. Manju Yadav Vs. Union of India) whereby claim of appellant has been rejected on the ground that death of predecessor-in-interest of the claimants has occurred on account of suicide having been committed by him and is thus not liable for compensation in terms of Section 124-A of the Railways Act 1989.

3. In the claim petition, it is averred that the deceased had travelled from Etawah to New Delhi by train no.4517 Unchahar Express on 06.10.2000, and as per assertion of the claimants the deceased was having second class general journey ticket. It was claimed that when the train was passing Jaswant Nagar Railway Station, the deceased accidentally fell from the compartment and sustained injuries resulting in his instant death. It was claimed that the journey ticket was lost during course of incident. It was also claimed that the entire incident has been witnessed by an eye witness namely Netra Pal Singh Yadav who was produced as plaintiff witness to substantiate and corroborate the claim petition.

4. The respondent-claimant had filed written statement denying its liability primarily on the ground that the deceased was not a passenger in the aforesaid train and since he was not a bona fide passenger, the alleged accident does not come within the ambit of an 'untoward incident' and therefore the railways is not liable to compensate under the exception provided under Section 124-A of the Act.

5. The tribunal has framed four issues which are as follows:-

"1. Whether applicants are only dependents of the deceased Amod Yadav within the meaning of Section 123(b) of the Railways Act ?

2. Whether on 06.10.2000, the deceased Amod Yadav was bonafide passenger of the train no.4517, Unchahar Express ?

3. Whether on 06.10.2000, death of the deceased was caused due to an untoward incident as defined in Section 123(c) of the Railways Act?

4. Relief & costs?"

6. With regard to issue no.1, the tribunal has held in favour of the claimants while issues no.2 and 3 were decided conjointly in which the tribunal has held against the claimants while recording a finding that the deceased was not a bona fide passenger and was not victim of the incident of accidental falling from the train due to which the railways was protected under exception indicated in Section 124 (A) of the Act.

7. From material on record, it is evident that the Panchnama being paper no.11/1 to 11/4 and the post mortem report being paper no.11/5 are on record which relate to an unknown male person having died due to decapitation on account of falling down from the train. Since there is no dispute about claimants being dependents of deceased the following points for determination are being framed:

(a) whether the deceased Amod Yadav can be said to be a bona fide passenger of the train no.4517 Unchahar Express and died owing to an accident on 06.10.2000.

(b) whether the railways would be liable to satisfy the claim of the claimant in view of Sections 123 and 124A of the Act.

8. The aforesaid issues being conjoint are therefore being decided together.

9. Learned counsel for appellant has submitted that the tribunal has erred in failing to consider the testimony of eye witness account of one Netra Pal Singh Yadav who was co-passenger of the deceased and had clearly established that death of the deceased had occurred due to

an accident in which he fell off the passenger train. It is submitted that eye witness account of the said witness has been disbelieved on extraneous factors. It is also submitted that the judgment and award under challenge is not in consonance with the evidence on record and judgment on the said point. Learned counsel has also submitted that the incident in which the deceased passed away has been clearly and conclusively proved by evidence on record which has been unnecessarily disbelieved.

10. Learned counsel appearing on behalf of respondent has refuted the submission advanced by learned counsel for appellant with the submission that the tribunal has recorded a perfectly cogent finding which is established by material on record and by pertinent case laws on the subject in which it has been clearly held that in case of death occurring due to decapitation of the deceased, there is no occasion for an accident to have taken place and it was therefore a clear case of suicide for which the railway is not liable. It is further submitted that the tribunal has correctly recorded a finding that deposition of the eye witness was not liable to be believed in view of the circumstances of the aforesaid accident.

11. Upon consideration of material on record and submission of learned counsel for parties it is admitted that no journey ticket was produced in the proceedings by the claimant to indicate or substantiate that the deceased was a bona fide passenger in the aforesaid train. However, it has been submitted that in the muddle following the incident, journey ticket of the deceased was lost. From the deposition of Netra Pal Singh Yadav, as plaintiff witness, it is evident that the aforesaid witness has introduced himself as eye witness of the incident. In his examination in chief, the aforesaid plaintiff witness has clearly stated in paragraph 2 of the affidavit that he had purchased journey ticket for the said train along with deceased Amod Kumar. It has also been stated that both persons thereafter met the Traveling Ticket Examiner for purposes of reservation, which was denied where after the deceased had put his railway ticket in his hand bag. The said plaintiff witness has also stated that both persons had thereafter travelled in the general compartment in train and had sat near the door since there was no availability of seat in the compartment. It has further been stated in his deposition that just as the train passed Jaswant Nagar Railway Station, at about 01.00 AM, there was a sharp jerk in the train due to which deceased Amod Kumar fell from train along with his hand bag. It has been stated that the deceased had fallen head first and although the plaintiff witness along with other co-passenger had raised hue and cry but the train could not be stopped since there was no such provision in the compartment. It is stated that upon happening of the incident, plaintiff witness had informed brother of the deceased.

12. The aforesaid witness was cross-examined on 25.09.2002, which is on record. However, it is a mere repetition of the examination in chief with nothing being elicited from plaintiff witness which was contrary to the stand taken in the examination in chief.

13. The aforesaid statement clearly indicates the fact that the plaintiff witness was an eye witness not only to the alleged incident but also to the fact that deceased had purchased a journey ticket for travelling in general compartment of the train in question. However, it is admitted

that no such journey ticket was found upon person of deceased.

14. Hon'ble the Supreme Court in the case of ***Union of India vs. Rina Devi*** reported in ***AIR 2018 Supreme Court 2362*** has considered regarding burden of proof upon a body found on railway premises without journey ticket and definition of passenger; it has been elucidated in paragraph 17.4 which is as follows:-

"17.4 We thus hold that mere presence of a body on the Railway premises will not be conclusive to hold that injured or deceased was a bona fide passenger for which claim for compensation could be maintained. However, mere absence of ticket with such injured or deceased will not negative the claim that he was a bona fide passenger. Initial burden will be on the claimant which can be discharged by filing an affidavit of the relevant facts and burden will then shift on the Railways and the issue can be decided on the facts shown or the attending circumstances. This will have to be dealt with from case to case on the basis of facts found. The legal position in this regard will stand explained accordingly."

15. The aforesaid judgment is squarely covering the issue whereunder it has been held that mere absence of ticket with such injured or deceased will not negative the claim that he was a bona fide passenger. Initial burden will be on the claimant to prove this such fact which can be discharged by filing an affidavit of the relevant fact whereafter the burden would shift to the railways and issue can be decided on the facts shown on attending circumstances. Upon applicability of the said judgment in present case, it is apparent that initial burden has been discharged by the claimant upon production not only of affidavit but also the eye witness who has squarely deposed that deceased had purchased a journey ticket along with the eye witness for journey upon the train in question. In the considered opinion of this Court, the initial burden as such has been discharged by the claimant but the same could not be refuted by the railways upon production of any documentary or oral evidence. In view of aforesaid judgment of Hon'ble the Supreme Court as applicable upon the facts and circumstances of the case, it is held that the deceased Amod Yadav was clearly a bona fide passenger in the train in question.

16. With regard to establishment of the alleged accident, the same has also been corroborated and established by the eye witness account of Netra Pal Singh Yadav who was produced as plaintiff witness. From deposition of the said plaintiff witness, it is evident that examination in chief and the cross examination are virtually the same with nothing contradictory elicited from the said witness by the railway. However, deposition of the said eye witness has been disbelieved by the tribunal on the ground that it is not in consonance with circumstances of the case.

17. Once it is seen that there is an eye witness account with regard to accident in question and nothing contradictory could be elicited by railways in cross examination, it is to be seen as to whether discarding of eye witness account by the tribunal was sustainable or not. With regard to the said proposition, Hon'ble the Supreme Court in the case of ***Union of India vs. Prabhakaran Vijaya Kumar and Others*** reported in ***(2008)9 SCC 527*** has held as follows:

"6. Before the Tribunal PW 2, K. Rajan, deposed that while he was at Varkala Railway Station he found one passenger falling from the Parasuram

Express and that the train had stopped. He further stated in his evidence that he went to the north side of the platform and saw the injured lying on the platform. He further stated that the person falling down was the lady who died on the spot. He also stated that the deceased fell down from the compartment of the train when the train was moving.

7. The Tribunal strangely enough held that PW 2 was an interested witness because if he was present on the spot he would have definitely helped the Station Master in removing the dead body from the railway track. Further, the police would have definitely recorded his evidence. For this reason, the Tribunal disbelieved the evidence of PW 2. We are, however, of the opinion that there was no good reason to disbelieve PW 2 because there is nothing to show that he had any motive to give false evidence, or that he was an interested witness. Further, his evidence could not have been discarded merely because he did not go to the spot and help in removing the dead body from the railway track. Moreover, merely because the police did not record his statement does not mean that he was not present or gave false evidence. It is common knowledge that in our country often there is a large crowd on railway platforms, and it is simply not possible for the police to take the statements of everyone there."

18. Upon applicability of the aforesaid judgement in the facts and circumstances of the present case, it is seen that eye witness account has been disbelieved by the tribunal only on account of the fact that the eye witness did not disembark from the train despite dis-balanced accidental falling of co-traveller. The tribunal could not believe that the eye witness thereafter undertook his entire journey upto New Delhi and did not break the same on the next stoppage of the train. On the said basis, the tribunal has recorded a conclusion that the eye witness had not travelled by the train in question and his deposition was not reliable. The tribunal has also disbelieved eye witness account on the basis of the Panchnama in which it is indicated that the body was lying about 300 yards away towards West of the Railway Station on railway track and neck and head of the deceased were found separated from the body. The tribunal has further recorded a finding that eye witness account was liable to be disbelieved since the position of the body was not in consonance with the running direction of the train. On that basis, the tribunal has recorded a finding that death had occurred due to injuries inflicted not on account of accidental falling of deceased from the train but as a result of suicide committed by him.

19. With regard to the aforesaid finding of the tribunal, it is apparent that while disbelieving the version of eye witness, explanation for the said factor as indicated in his deposition has been ignored by the tribunal. The said plaintiff witness not only in his examination-in-chief but also in his cross-examination has clearly indicated that upon the accident taking place, witness had not disembarked since the area in which they were passing was not a safe area. The witness has further stated that upon the incident happening, he alongwith other co-passengers had raised hue and cry but since there was no provision for stopping the train in the compartment nothing further could be done. The said fact has been indicated by the witness in his cross examination. In view of the specific statements of the eye witness, there was no occasion for the tribunal to reject the claim only on the basis of assumption and surmises.

20. The case of ***Prabhakaran*** (supra) has clearly indicated the conditions under which an eye witness account can be disbelieved. None of the conditions indicated in the aforesaid judgment are applicable in the present case particularly since no finding had been recorded by the Tribunal that the eye witness produced as plaintiff witness had any motive to give false evidence or that he was an interested witness. The mere fact that he did not go to the spot or did not get off from the train on the next station would not automatically lead to a conclusion that he was not present or had given false statement. In view of aforesaid, it is apparent that the tribunal has clearly fell in error in discarding the eye witness testimony of said Netra Pal Singh Yadav.

21. The tribunal has thereafter recorded a finding with regard to the accident having taken place as a result of suicide. Regarding the said finding, the tribunal has indicated position of the body which was in a North-South direction whereas railway track in question runs from East to West. The tribunal has also noticed that except for the decapitation, there was no other injury found on the body of the deceased and as such has concluded that the nature of injury and position of the body indicated that death was not caused due to accidental falling of the deceased but as a result of suicide.

22. The tribunal has found the aforesaid finding to be corroborated by the Panchnama. The tribunal has also found that in case of a person accidentally falling from the train, there is no occasion for the body to be cut into two pieces and at best death can occur on account serious injury on the body of the person.

23. With regard to the aforesaid finding recorded by the tribunal, it is apparent that the position of the body was not in consonance with running track of the train.

24. With regard to the aforesaid facts, the Hon'ble the Supreme Court in the case of ***Solanki Chimanbhai Ukabhai vs. State of Gujarat*** reported in ***AIR 1983 Supreme Court 484*** has held as follows:

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

25. The aforesaid judgment clearly indicates that medical evidence is only corroborative and proves that injuries could have been caused in the manner alleged and nothing more. The use of medical evidence can only be to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit eye witness. However the testimony of the eye witness cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence.

26. Regarding finding of Tribunal that severing of body into two parts indicates suicide and not death by falling from train the High Court of Delhi in the case of **SH.**

Prempal Singh & Another vs. Union of India in **F.A.O.No. 211 of 2014** has in its judgment and order dated 24.04.2018 held as follows:

"7. The reasoning in the impugned order that because the deceased was cut into halves: one part found inside the railway tracks and the other outside, the death could not have been caused due to accidental falling from a moving train, is flawed. The impossibility of a passenger being so crushed after a fall from a moving train has not been conclusively established in law, so as to obviate all such claims for compensation. It is possible that thedeceased while standing near the overcrowded passenger compartment door, slipped down while holding on to the door- railing, and frantically tried to recover and re-board the train - with his legs flailing violently, and in the valiant and violent melee his legs or his body could have unfortunately come under the wheels of the train leading to his being consumed in the fatal accident. As long as such possibility exists, the claim cannot be ousted or denied on technical assumptions. There is not a divine camera which could replay the actual manner of the fatality, but all factors lead to the inexorable conclusion that a bonafide passenger died in an untoward train accident. There is also no reason why the deceased would be walking the railway tracks in an odd place en-route his destination - his home. It is not that he lived near the site of the accident or that he had any regular business anywhere near the place of the accident. Thus the inference that he died while crossing the tracks, is unwarranted and untenable."

27. The same observations have been made by the Delhi High Court in the case of ***Smt. Ram Payari vs. Union of India*** in ***FAO No.142 of 2012 vide judgment and order dated 31.03.2014*** in which also the same reasoning has been followed.

28. The same reasoning has also been indicated by High Court at Calcutta in the case of ***Suchitra As (Ash) vs. Union of India*** in ***F.M.A. 384 of 2015*** vide judgment and order dated 11.04.2019. The Division Bench at Calcutta High Court has held as follows:

"Whether a person would commit suicide by laying or putting his body before a moving train, or causing a person's body to put in front of a moving train', while crossing the track carelessly could be conveniently ascertained from the facts and circumstances involved in a particular case together with the attending circumstances, if therebe any. The intention behind of the deceased is of paramount consideration, which has to be gathered from the facts and circumstances together with the attending circumstances of a particular case. It is a case, where the deceased victim had no mental depression conducive for commission of suicide. The victim even had purchased monthly ticket with effect from 1.4.04. The deceased suffered death in course of his return journey. The place of occurrence where the dead body of the deceased was found to exist was intervened by distance of 20 minutes walk from the locality, where the deceased had his own house. PW-2 is not a person having his blood relation with the deceased victim. The facts and circumstances, as gathered here together with the attending circumstances discussed herein above, would not demonstrate the requisite intention necessary to reveal the attending circumstances, supportive of commission of suicide, far to speak off a case based on run over, caused purposefully and carelessly."

29. On the contrary, with regard to the aforesaid proposition that in case of decapitation of body, it cannot be said that a person has died due to falling from a train, learned counsel for respondent has relied upon the Division Bench Judgment of this Court in the case of ***Tara Chand Mathur vs. Union of India*** in ***First Appeal From Order Defective No.763 of 2011*** in which following another judgment it has been held that in case the body of deceased was cut into two pieces, we cannot draw inference that the accident has occurred as a result of falling down of the deceased from the train.

30. Upon applicability of the aforesaid judgment, it is apparent that the Division Bench has clearly held that the fact whether the person has died due to accident occurred as a result of falling down from the train or has committed suicide is to be seen from the prevailing factors which in that case was that the deceased had failed in examination, the result of which had been declared on the same day due to which he was under depression and jumped before the train. It is quite evident that facts of the said case are completely different from the present case since no such depression has been indicated pertaining to the deceased.

31. Learned counsel has also relied upon another Division Bench of this Court in the case of ***Smt. Meena & Another vs. Union of India (First Appeal From Order No.229 of 2018)*** decided vide judgment and order dated 09.04.2018. In the said judgment, the Division Bench has not found any error with the finding recorded by the trial court that it is not possible that passenger would fall off the train and his body would be found lying in the centre of the tracks that too without extensive injuries and lacerated marks. The aforesaid judgment also in the considered opinion of this Court is not applicable in the present situation where although the body was found lying on the tracks without extensive injuries and without any laceration marks with the body cut into two pieces but the witness in that case was held to be chance witness without any explanation about his presence since he was not travelling in the train. Furthermore, 9 trains has passed without any major injury or further amputation of body.

32. As has been held in the judgment indicated herein above by the Delhi High Court and Calcutta, the Division Benches of this Court have not recorded any specific finding or have laid down a specific law that death cannot be caused by decapitation of a person upon falling from train. The fact that death cannot be caused upon falling from a train once body has been cut into two parts has not been conclusively established either in law or on expert medical opinion. Such a finding has been recorded only on the basis of an assumption that it is not probable for the body to be cut into two parts upon falling from train. However this Court is in respectful agreement with the judgment rendered by the High Court of Delhi and Calcutta to the effect that no such hard and fast Rule can be established without any pertinent medical advise or opinion.

33. The circumstances indicated in the judgment of ***Prempal Singh & Another*** (supra) are quite probable that there is no divine camera which can indicate the actual manner of the fatality but that all factors lead to an inexorable conclusion that a bona fide passenger has died in an untoward train accident.

34. Learned counsel has also relied upon the Division Bench judgment of this Court in the case of ***Dinesh Kumar Singh Maurya vs. Union of India*** in ***F.A.F.O. No.1023 of 2010***, the Single Judge Judgment in the case of ***Smt. Sumitra Mishra and Others vs. Union of India*** in ***F.A.F.O No.583 of 2013*** and the judgment of High Court of Delhi in the case of ***Smt. Dharambiri Devi & Others*** vs. ***The Ministry of Railway and Another promoted No.149(2008)DLT 434.***

35. However in the aforesaid judgments, no hard and fast rule has been stated that a dead body which is cut into two parts and is found in the middle of the track cannot be occasioned upon falling from a train. The findings recorded in the said case laws are merely on the basis of probability rather on the hard and fast medical advice or any law on that point. As indicated herein above, upon applicability of the reasoning indicated in judgments rendered by the High Courts of Delhi and Calcutta, the same is merely an assumption which has to be corroborated from the facts and surrounding circumstances of each and every case. As such, in the view of this Court, the aforesaid factor cannot be a relevant factor for discarding an eye witness account.

36. The judgments cited by the learned counsel for respondent would have applicability probably in a case where there is no eye witness account and there is no corroborative evidence with regard to death having occurred as untoward incident due to falling of a passenger. However in the present case, there is a clear eye witness account not only corroborating but substantiating the incident as claimed in the claim petition. No cogent reason has been indicated in the impugned award for discarding the eye witness account.

37. It is also a relevant factor upon reading of the Panchnama that none of the signatories to the Panchanama recognized the dead body. Even if theory of suicide as set up by the railways is to be believed, naturally the deceased should have been a person living in the vicinity of the accident. It is improbable that a person living in Etawah, would travel all the way to Jaswant Nagar to commit suicide on the railway tracks which could have done in his place of residence itself. Even if theory of suicide is to be believed with the natural consequence of deceased belonging to vicinity of the accident, it would have been but natural for the signatories to the Panchnama to have recognized the dead body. The failure of local persons to recognize the deceased itself indicates that the deceased was not a native and therefore it could not have been a case of suicide. The said aspect of the matter has been completely lost sight of by the tribunal although details of Panchnama have been indicated in the impugned award.

38. As as a result of the aforesaid discussion, it is held that the deceased a was bona fide passenger and his death had occasioned due to an accident which can be termed as an 'untoward incident' as defined under Section 123 of the Act and would therefore not be covered by the proviso of Section 124 (A) of the aforesaid Act of 1989.

39. In view of the fact that the deceased has been found to be a bona fide passenger and that his death had occurred due to an untoward incident, compensation for the same is to be decided in terms of the Railway Accident (Compensation) Rules, 1990 which has been notified in terms of Section 129 of the Railway Act 1989.

40. The parties are in agreement on the point that the alleged incident has taken place on 06.10.2000 while the impugned judgment and award has been rendered on 16.12.2002. The Railway Accident (Compensation) Rules, 1990 have been amended with effect from 01.11.1997 whereby the amount of compensation under Rule 3 has been enhanced to Rs. 4,00,000/- including of death under part I. It has been submitted by learned counsel for parties that prior to amendment, the amount of compensation as indicated was Rs.2,00,000/- and subsequently the rules were amended in 2017 as has been noticed in the case of **Smt. Rina Devi** (supra) whereunder, it has been held that awarding of compensation in terms of Section 124-A is based on no fault theory and as such negligence on the part of any person or principles of contributory negligence cannot be invoked particularly when fixed compensation has been provided in the Rules of 1990.

41. In the present case since accident has taken place on 06.10.2000, the amendment notified on 25.10.1997 with effect from 01.11.1997 would came into effect whereunder a fixed amount of compensation of Rs.4,00,000/- has been indicated in Part I of the Schedule to Rule 3. As such, it is held that the claimant would be entitled to amount of Rs.4,00,000/-. With regard to the rate of interest, it has already been held in the case of **Smt.Rina Devi** (supra) that the rate of interest should be 6% per annum from the date of application till the date of award and 9% thereafter in case the payment is not made within specified time period.

42. Applying the aforesaid dictum of Hon'ble the Supreme Court it is held that the claimants would be entitled to interest @ 6% simple interest per annum from the date of claim till the date of award and @ 9% thereafter till the date of actual payment.

43. At this stage learned counsel for respondent submits that in view of the statutory provision, the principal compensation with interest cannot exceed the sum of Rs.8,00,000/-.

44. The aforesaid aspect of the matter has already been considered by Hon'ble the Supreme Court in the case of ***Union of India vs. Radha Yadav*** reported in ***(2019) 3 Supreme Court Cases 410*** in the following manner:

"11. The issue raised in the matter does not really require any elaboration as in our view, the judgment of this Court in Rina Devi [Union of India v. Rina Devi, (2019) 3 SCC 572] is very clear. What this Court has laid down is that the amount of compensation payable on the date of accident with reasonable rate of interest shall first be calculated. If the amount so calculated is less than the amount prescribed as on the date of the award, the claimant would be entitled to higher of these two amounts. Therefore, if the liability had arisen before the amendment was brought in, the basic figure would be as per the Schedule as was in existence before the amendment and on such basic figure reasonable rate of interest would be calculated. If there be any difference between the amount so calculated and the amount prescribed in the Schedule as on the date of the award, the higher of two figures would be the measure of compensation. For instance, in case of a death in an accident which occurred before amendment, the basic figure would be Rs 4,00,000. If, after applying reasonable rate of interest, the final figure were to be less than Rs 8,00,000, which was

brought in by way of amendment, the claimant would be entitled to Rs 8,00,000. If, however, the amount of original compensation with rate of interest were to exceed the sum of Rs 8,00,000 the compensation would be in terms of figure in excess of Rs 8,00,000. The idea is to afford the benefit of the amendment, to the extent possible. Thus, according to us, the matter is crystal clear. The issue does not need any further clarification or elaboration."

45. In view of aforesaid judgment, the submission of learned counsel for respondent does not have any merit.

46. In terms of aforesaid, judgment and award dated 16.12.2002 passed by Railway Claims Tribunal, Lucknow in Claim Case No.0A0100204 (Smt. Manju Yadav & others Vs. Union of India) is set aside. Consequently, the appeal succeeds and is **allowed.** Parties shall bear their own costs. Office is directed to remit the lower court record to the tribunal.

(2021)09ILR A370
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.07.2021 & 03.09.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE SUBHASH CHAND, J.

FAFO Defective No. 355 of 2018

Smt. Chandrakala & Ors. ...Appellants
Versus
Imtiyaz & Ors. ...Respondents

Counsel for the Appellants:
Sri Anubhav Sinha

Counsel for the Respondents:
Sri Pradeep Kumar Rai, Sri Brijesh Chandra Naik

Motor accident claim -compensation challenged-deceased was not a permanent employee-Tribunal did not grant any amount under the head of future loss of income-income proved to be Rs.8000/- per month but thentoo Tribunal considered it 4500/- per month-erroneous-income is fixed as Rs 8000/- per month and Rs 1000 is deductible as other allowance-job permanent of private-future aspect has to be added-order modified.

Appeal partly allowed. (E-9)

List of Cases cited:

1. National Insurance Co. Ltd. Vs Smt. Vidyawati Devi & 2 ors. decided on 27.07.2016 in First Appeal From Order No. 2389 of 2016

2. First Appeal From Order No. 1818 of 2012 (Bajaj Allianz General Insurance Co.Ltd. Vs Smt. Renu Singh & ors.)

3. Archit Saini Vs Oriental Insurance Co. Ltd. & ors. 2018 0 AIR (SC) 1143

4. Rajendra Singh Vs National Insurance Co. (2020) 7 SCC 256

5.United India Insurance Co. Ltd. Vs Sarita Rani Dhaka & ors. ACJ 895,

6. Ranu Bala Paul Vs Bani Chakraborty & ors. 1999 (1) TAC 151,

7.N.K.Vs Brothers (Pvt.) Ltd. Vs M. Karumai Ammal & ors. AIR 1980 SC 1354,

8. Usha Rajkhowa & ors. Vs Paramount Industries & anr. 2 (2009) ACC 281 (SC)

9. St. of Har. & ors. Vs Jasveer Kaur & ors., 2003 (3) TAC 569 (SC)

10. Smt. Sarla Verma & ors. Vs Delhi Transport Corporation & ors. 2009 ACJ 1298

11. Reshma Kumar & ors. Vs Madan Mohan & ors. Civil Appeal No. 4646 and 4647 of 2009 decided on 02.04.2013

12. United India Insurance Co. Ltd. Vs Sarita Rani 1995 ACJ 895

13. Mohammed Siddique & anr. Vs National Insurance Co. Ltd. & ors. (2020) 3 Supreme Court Cases 57

14. National Insurance 6 of 10 Co. Ltd. Vs Pranay Sethi & ors., 2017 0 Supreme (SC) 1050.

15. St. of Har. & ors. Vs Jasveer Kaur & ors. 2003 (3) TAC 569 (SC)

16. Reshma Kumari & anr. Vs Madan Mohan & anr. passed in Civil Appeal No. 4646 and 4647 of 2009 decided on 02.04.2013

17. Sarla Verma & anr. Vs Delhi Transport Corp. & anr. 2009 ACJ 1298

18. National Insurance Co. Ltd. Vs Mannat Johal & ors., 2019 (2) T.A.C. 705 (S.C.)

19. A.Vs Padma Vs Venugopal reported in 2012 (1) GLH (SC) 442,

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

1. We are taking up this defective appeal for final disposal and directing the office to give regular number, as we have condoned the delay today.

2. Heard Sri Anubhav Sinha, learned counsel for the appellants and Sri Brijesh Chandra Naik, learned counsel for the respondent no.3 (Insurance Company). None appears for owner and driver.

3. This appeal, at the behest of the claimants, challenges the judgment and award dated 30.03.2017 passed by Motor Accident Claims Tribunal/Additional District Judge II, Gautam Budh Nagar (hereinafter referred to as 'Tribunal') in M.A.C.P. Case No.24 of 2014 awarding a sum of Rs.9,31,625/- as compensation.

4. This appeal is of the year 2018 and both the counsels have agreed with our suggestion for getting the matter finally disposed of without record so that the liability to pay interest is lessened as the only issue to be decided is quantum assessed.

5. It is submitted by learned counsel for the appellants that the deceased was 26 years of age at the time of accident. He was in job, but he was not a permanent employee, therefore, the Tribunal did not grant any amount under the head of future loss of income, as the job was only for seven months. The Tribunal has considered his income to be Rs.4500/- per month. It is submitted by learned counsel for the appellants that the income of the deceased should have been considered to be between Rs.7,000/- to Rs. 8,000/- per month as it was proved by leading evidence to which, the deceased being 26 years, 40% of the income should be added and as he was survived by his widow and two minor sons and parents. 1/4th of the amount should be deducted towards personal expenses of the deceased. As far as multiplier is concerned, there is no dispute between the parties. It is also submitted that the interest should be granted at the rate higher than 7% and Rs.70,000/- with increase by 10% for three years should granted under the head of non-pecuniary damages.

6. Sri Naik, learned Advocate appearing for the respondent-Insurance Company has contended that in the absence of any proof of income of Rs.7000/- per month cannot be considered to be income of the deceased and the Tribunal has rightly considered the income of the deceased to

be Rs.4500/-. It is further submitted by Sri Naik that in view of the fact that an appeal is continuation of proceedings though the Insurance Company has not challenged the findings, as far as negligence of the driver is concerned, he can raise the same as held by this High Court in case of **National Insurance Company Ltd. Vs. Smt. Vidyawati Devi and two others decided on 27.07.2016** in First Appeal From Order No. 2389 of 2016. We permit Sri Naik to raise the said issue of negligence. It is submitted by Sri Naik that it a case of head on collusion and therefore, the deceased should also be held negligent and is requested to this Court to up turn the finding on the issue of negligence by holding that the deceased to be negligent and dismiss the claim petition.

7. Sri Naik, learned counsel for the Insurance Company in oral reply to the submissions of learned counsel for the appellants on negligence contends that this being a case of head on collision, the deceased should also be held negligent and requested this Court to upturn the finding on issue of negligence.

8. As far as issue of negligence is concerned, it is vehemently submitted by learned counsel for the appellants, that the deceased was held not at all negligent. According to him, the accident was between two vehicles of unequal magnitude and, therefore, the deceased cannot be said to have contributed to the accident having taken place.

9. 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.

10. 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.

11. 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*

12. At the very outset from the award impugned, it is culled out that two vehicles involved in the accident were of unequal magnitude, namely, the motor cycle driven by the deceased Anil Kumar Yadav and the Dhumpher insured by the respondent-Insurance Company. Issue no.1 has been decided by the Tribunal whereby the deceased has been considered to be riding motorcycle namely a two wheeler whereas the other vehicle was Dumpher namely the big vehicle and collusion was between the vehicles of two unequal magnitude. The Tribunal decided the issue of negligence in favour of the claimants though orally it was submitted by Sri Naik that there was head collision and the deceased was also negligent. The Tribunal has relied on several authoritative pronouncements for arriving at the finding. The driver of the Dumpher, who was the best witness has not stepped in the witness box. The evidence of PW-2, who was eye witness clinches the issue. The evidence he was riding his motorcycle and was driving vehicle along with the deceased, he has been believed to be an eye witness by the Tribunal. He has opined in his oral testimony that when the deceased came to Mahamaya fly over, the Dumpher driven in rash and negligent manner came and dashed with the motorcyclist causing his death. Except the written statement, Insurance Company did not lead any evidence. The decision cited by the learned judge holding against the Insurance company will come in the way of oral submission of Sri Naik. The reason being site plan shows that the deceased was on his correct side. The FIR was lodged by Sonu Yadav and the charge-sheet was laid against respondent no.2, namely driver of the Dumpher and therefore, it is very clear that PW-2, who is eye witness has opined that the Dumpher came on the wrong side and dashed with the vehicle driven by the deceased, namely Anil Kumar Yadav. This evidence corroborated by the documentary evidence is produced before the court below and it is very clear that the evidence produced before the Tribunal was pointing out its finger toward the negligence of the driver of the Dumpher. The instantaneous death of the motorcyclist goes to show that the motorcyclist was not negligent. The decision of the Apex Court in case of **Archit Saini Vs. Oriental Insurance Company Limited and others 2018 0 AIR (SC) 1143** and the reasonings of the Apex Court in the said case is also required to be applied to the facts of this case and therefore, it cannot be said that the driver of the vehicle was in any way negligent. The finding of the court below cannot be upturned and we are convinced that the findings of fact recorded by the Tribunal cannot be disturbed. The recent decision of the Apex Court in case of **Rajendra Singh Vs. National Insurance Company (2020) 7 SCC 256** where the Apex Court has held that issue of negligence has to be decided on the basis of evidence adduced or on the basis of evidence adduced against the respondents driver and, therefore, also we cannot accept the oral objections of learned counsel for the Insurance Company that the deceased should be held to be negligent also. We also take into consideration the decisions on which the Tribunal has placed

reliance namely **United India Insurance Company Limited Vs. Sarita Rani Dhaka and others ACJ 895, Ranu Bala Paul Vs. Bani Chakraborty and others 1999 (1) TAC 151, N.K.V. Brothers (Pvt.) Limited Vs. M. Karumai Ammal and others AIR 1980 SC 1354, Usha Rajkhowa and others Vs. Paramount Industries and anothers 2 (2009) ACC 281 (SC), State of Haryana and others Vs. Jasveer Kaur and othes 2003 (3) TAC 569 (SC), Smt. Sarla Verma and others Vs. Delhi Transport Corporation and others 2009 ACJ 1298, Reshma Kumar and others Vs. Madan Mohan and others Civil Appeal No. 4646 and 4647 of 2009** decided on 02.04.2013. We are fortified our view and the oral submission of Sri Naik is required to be rejected. The factual scenario will also not permit us to up turn the finding of the Tribunal as far the issue of negligence is concerned, therefore, no negligence can be attributed to the deceased. Thus, it cannot be said that the deceased was in any way negligent. The site plan as discussed by the Tribunal will also not permit us to take a different view. Further aspect that requires to be appreciated is that the charge-sheet was laid against the driver of the Dumpher. The fact that the driver of the Dumpher has not stepped in the witness box this fact has also been considered by the learned judge by relying on the decision reported in **United India Insurance Company Limited Vs. Sarita Rani 1995 ACJ 895,** thus the reasonings cannot be found fault with. The other oral submission that the driver and owner of the other vehicle has not been joined as party is not required to be decided as the driver of the other vehicle has died and his heirs have claimed the compensation hence this submission is also rejected.

13. We are also fortified in our view by the decision of the Apex Court in case of **Mohammed Siddique and another Vs. National Insurance Company Limited and others (2020) 3 Supreme Court Cases 57.**

Compensation:-

14. This takes this Court to the issue of compensation. The income of the deceased in the year of accident and looking to his profession namely that he was having private job can be considered to be Rs.7,000/- per month to which as he was 26 years, 40% as future loss of income requires to be added in view of the decision of the Apex Court in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050.**

15. As far as the income of the deceased is concerned, the deceased was working with The Oura Creation Sri Nagli Enterprises Pvt. Limited and was earning Rs. 8,000/- per month. PW-1 the widow of the deceased has deposed the said fact and also the salary slip was produced as Exhibit 23. PW-3 Sri Vijay Naik, who was H.R. Executive had examined who has deposed that document 19/G/1 and 19G/5 was produced by his company that Anil Kumar Yadav was being paid Rs. 8000/- per month. The tribunal unfortunately has considered his income to be Rs. 7000/- per month for a period of seven months namely for the period during which the deceased had worked and thereafter has considered his income to be Rs. 4500/- on the basis of judgment of the Apex Court in **State of Haryana and others Vs. Jasveer Kaur and others 2003 (3) TAC 569 (SC)**. We fail to understand as to how the tribunal can draw such a distinction during one year and split the income of the deceased. The tribunal according to us has committed an error, which is apparent on the face of the record in considering the income of the

deceased as Rs. 4500/- per month, despite the fact that income was proved as Rs. 8000/- per month. The reliance on the judgment of State of Haryana (supra) is erroneous reason, is once it has been established by way of cogent evidence that income of the deceased was Rs. 8000/-, the tribunal cannot fix it notionally. We fix the income at Rs. 7000/-, as Rs. 1000/- is the other allowances, which are deductible as per the judgment of the Apex Court. Thus, the income is considered to be Rs. 7000/- per month to be recalculated. The learned judge has referred to the judgment of **Reshma Kumari and another Vs. Madan Mohan and another** passed in Civil Appeal No. 4646 and 4647 of 2009 decided on 02.04.2013, but the tribunal thereafter has referred to the judgment of **Sarla Verma and another Vs. Delhi Transport Corporation and another 2009 ACJ 1298** and not granted future loss of income. The Tribunal most unfortunately held that income of deceased should be considered to be notional income of Rs. 4500/- per month for five months and for the other seven months his income should be considered to be Rs. 7000/- per month. Rs. 4500 x 12 and multiplied by 17, on what basis the Tribunal has split this, is not clear. The Tribunal has considered that his basic income was Rs. 7000/-, but is it not clarified that what the deceased was doing prior to that seven months and therefore, the Tribunal has relied on judgment in case of State of Haryana (supra), this is itself arbitrary and against the mandate of Apex Court as well as this High Court. Once the salary slip shown to be that Rs. 8000/- the other items could have been deducted and income should be considered as Rs. 7000/- per month. We, therefore, on the basis of the judgment of Reshma Kumari (supra) subsequently approved by the Apex Court in the Pranay Sethi, recalculate the said amount. Unfortunately, the learned judge has despite the fact that judgment in Reshma Kumari (supra) permitted addition of 30% if the person, who is in the age bracket of 40-50, the learned Tribunal holds that फ्यूचर प्रॉपेक्ट्स (भावी सम्भावनाओ) को वास्तविक वेतन में जोड़ा नहीं जा सकता as it was not proved whether his job was permanent, this again according to us is perverse finding of fact, which requires to be up turned as in the judgment of Sarla Verma (supra), it is not opined as to whether job of the deceased should be permanent or private job for which future prospects would be added, therefore, future prospects of 30% will have to be added. Even on the plain reading of Sarla Verma case, learned judge would not have made this mistake as even if we go by the Rules, namely Uttar Pradesh Motor Vehicles (Eleventh Amendment) Rules, 2011. The deduction of ¼ for personal expenses is not disturbed, hence we recalculate the amount of compensation as per settled legal principles enunciated in Pranay Sethi and Reshma Kumari (supra).

16. 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.7,000/-

ii. Percentage towards future prospects : 50% namely Rs.3500/-

iii. Total income : Rs. 7,000 + 3500 = Rs. 10,500/-

iv. Income after deduction of 1/4th : Rs. 7,375/- (rounded up)

v. Annual income : Rs.7,375 x 12 = Rs. 88,500/-

vi. Multiplier applicable : 17

vii. Loss of dependency: Rs.88,500 x 17 = Rs.15,04,500/-

viii. Amount under non pecuniary heads : Rs.70,000/-

x. Total compensation : 15,74,500/-

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. No other grounds are urged orally when the matter was heard.

19. 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.

20. This Court is thankful to both the counsels for getting this matter disposed of.

21. It is stated by learned counsel for the appellants that they have been granted recovery right. The owner despite service of notice has not appeared for three years, hence the ex-parte judgement is passed and recovery right is maintained as here also no witness or permit is produced.

22. 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 applicants/claimants are neither illiterate nor rustic villagers.

23. The Registrar General is requested to circulate this judgment so that in future the tribunals may not commit this error of taking notional income with the income of the deceased is proved by documentary evidence as well as oral ocular version and tribunal shall in future consider the income of the deceased which is proved.

Ref: Civil Misc. Delay Condonation Application 1 of 2018

1. This is an application seeking condonation of delay in filing the appeal.

2. The delay in filing the appeal is 265 days and vehemently objected by counsel for the respondent.

3. Cause shown for the delay in the affidavit attached to delay condonation application is sufficient, hence, the delay is condoned.

4. This application, accordingly stands allowed.

5. Office to give regular number to the appeal.

(Ref : Civil Misc. Correction No. 4 of 2021)

1. Heard.

2. This is an application seeking correction in the order dated 29.7.2021 passed by this Court.

3. Correction is allowed.

4. In the first line of paragraph No. 21, the word 'appellants' be replaced with the words 'respondent-Insurance Company'.

5. The aforesaid correction be made and the corrected copy of the order dated 21.5.2019 be given to the parties.

(2021)09ILR A378
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.08.2021

BEFORE

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

FAFO Defective No. 432 of 2021

Uday Prakash ...Appellant
Versus
Anand Pandit & Anr. ...Opposite Parties

Counsel for the Appellant:
Sri Shantanu, Ms. Poonam Meena, Sri Mahir Malhotra, Sri Raj Kumar Dhama, Sri Gaurav Bhardwaj

Counsel for the Opposite Parties:
Sri Ankur Tandon, Sri Anubhav Shukla, Sri Rahul Agarwal, Sri Rahul Rathi, Sri Ram Shiromani Shukla, Sri Prafull Shukla, Sri Nishchal Anand, Sri Shashi Nandan (Senior Adv.)

Copyright infringement-application of temporary injunction rejected-appeal-no prima facie plagiarism -impugned order not disturbed.

Appeal disposed. (E-9)

List of Cases cited:

1. Fateh Singh Mehta Vs O.P. Singhal & ors., 1989 SCC OnLine Raj 9

2.Wander Ltd. & anr. Vs Antox India P. Ltd.,1990 (SUPP) SCC 727

3. Gopal Krishnaji Ketkar Vs Mohamed Haji Latif & ors., AIR 1968 SC 1413

4. P.G. Narayanan Vs The U.O.I., rep. by the Secretary, Ministry of Information & Broadcasting, Sastri Bhavan, New Delhi-110 001 & ors., 2005 SCC OnLine Mad 379

5. Super Cassettes Industries Pvt. Ltd. & anr. Vs Nandi Chinni Kumar & ors., 2020 SCC OnLine TS 1282

6. Mansoob Haider Vs Yashraj Films Pvt. Ltd. 2014 SCC OnLine Bom 652

7. Graigola Merthyr Comp. Ltd. Vs Mayor Alderman, [1928] Ch. 235

8. Burjesses of Swansea7 & Zee Entertainment Enterprises Ltd. Vs Sony Pictures Network Pvt. Ltd., 2017 SCC OnLine Bom 409

9. Akashaditya Harishchandra Lama Vs Ashutosh Gowarikar, 2016 SCC OnLine Bom

10.John Hart Jr. & anr.Vs Mukul Deora & ors., 2021 SCC OnLine Del 3499

11. XYZ Films Vs UTV Motion Pictures/ UTV Software Communications Ltd, 2016 (67) PTC81 (Bom)

12. Macmillan & Comp. Ltd. Vs K. & J. Cooper, AIR 1924 Privy Council 75

13. Law Society of Upper Canada Vs CCH Canadian Ltd., 2004 SCC OnLine Can SC 13

14. Greene Vs Bishop, 10 Fed Cas 1128

15. M/s. Mishra Bandhu Karyalaya & ors. Vs Shivratanlal Koshal, 1969 SCC OnLine MP 35

16. K.C. Bokadia & anr. Vs Dinesh Chandra Dubey, 1995 SCC OnLine MP 191

17. n The Daily Calendar Supplying Bureau, Sivakasi Vs The United Concern, 1964 SCC OnLine Mad 29

18.R.G. Anand Vs Delux Films & ors., (1978) 4 SCC 118

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

1. This is a plaintiff's appeal from an order of Mr. Jitendra Kumar Sinha, the learned District Judge, Ghaziabad, rejecting his application for temporary injunction in a suit for infringement of copyright.

2. The suit was instituted, complaining infringement of a copyright owned by the plaintiff relating to a story-screenplay-dialogues for a feature film, registered with the Copyright Office at New Delhi under Registration No. L-28822/2007 dated 16.07.2007. The literary work aforesaid was registered under the name of "Highway-39'. The aforesaid literary work shall hereinafter be referred to as the "copyrighted work'. The suit, wherein the temporary injunction application was made, was instituted some time in the month of December, 2019 and registered on the file of the learned District Judge, Ghaziabad as Suit no.2 of 2019. The following reliefs have been claimed in the suit against the two defendants, who are the respondents here:

"A. pass a decree of Perpetual/Permanent injunction:

i. by restraining the defendants, jointly and severally, by themselves or acting through any agent or any other such person from infringing the registered copyright of the plaintiff in respect of his story and screenplay work titled as 'Highway-39' from converting and adopting the same into a motion picture/feature film in any name whatsoever;

ii. by restraining the Defendants, jointly or severally, by themselves or acting through their agents or any such person from producing, making, promoting, publicizing, releasing, communicating to public about the infringed feature film.

B. pass a decree of Mandatory injunction directing the defendants to jointly or severally:

i. to deliver all versions of the story/ script/ screenplay (literary work), reels and / or the produced work based on the registered copyright work of the plaintiff pertaining to the infringed feature film;

ii. to remove from internet and other similar platforms, including social media pertaining to the defendants and/or of social media account of any of the actors or any other such person involved with the production and making of the infringed feature film, including the removal of any and all promotional material (including posters, trailers and teaser) of the infringed feature film;

C. pass a decree for the rendition of accounts of the advance amount received by the Defendants from the Distribution Companies/ Television Channels/ Internet Television Network by selling the distribution rights/ satellite rights / streaming rights respectively of the feature film made by the defendants by infringing the copyright of the plaintiff in the process of producing the infringed feature film;"

3. It would be apposite to give a more detailed account of the facts giving rise to this appeal. The plaintiff-appellant, Uday Prakash, who shall hereinafter be referred to as the "plaintiff', is claimed to be a Hindi Poet, Scholar, Filmmaker, Journalist and one who has worked as a Professor with Central Universities. The plaintiff also claims to have worked as an Administrator with the Government of India, but which department, is not explicit in the plaint. He also says that he has been an Editor, Researcher and Television Director with the National and Private TV Channels. He writes for major national dailies and periodicals on issues of social and cultural significance. There is an elaborate pleading by the plaintiff, showing his established scholarly status, besides an impressive list of accolades that stand to his credit in the form of prestigious literary awards and literary works of repute.

4. It is the plaintiff's case that he conceived, conceptualized and set about a venture to write a screenplay (film script), that is to say, the copyrighted work, already introduced hereinbefore. The plaintiff says that he completed the copyrighted work and got the same registered with the Film Writers Association, Mumbai. The aforesaid literary work was submitted to the Copyright Office, New Delhi, where it was registered on 16.07.2007 under Registration No. L-28822/2007. The plaintiff says that he discussed the copyrighted work with one of his acquaintances, Mazhar Kamran, who was, at the relevant time, working with the plaintiff as a Cameraman on several audio visual projects that the plaintiff had in hand during the years 2000-2005. Mazhar Kamran is said to have assured the latter that he would show the copyrighted work to a few prominent producers, of whom Anand Pandit was one. Anand Pandit is defendant no.1 to the suit and respondent no.1 to this appeal, who shall hereinafter be referred to as "defendant no.1'. Defendant no.1 is said to be a well-known producer and proprietor of a certain Anand Pandit Motion Pictures, whereas Rumi Jaffery is a well-known Director. Rumi Jaffery of Saraswati Entertainment Pvt. Ltd., Mumbai is the second defendant to the suit and the second respondent to this appeal. He shall hereinafter be referred to as "defendant no.2'. Wherever a joint reference to defendant nos.1 and 2 is necessitated by the context, they shall be called the "defendants'.

5. It is the plaintiff's case that in or about the month of June, 2019, he came to know, from reliable sources in the Film Industry, that defendant no.1 is making a movie under the direction of defendant no.2, which is very similar to the copyrighted work. The plaintiff claims that he was given information that defendant no.1 has scheduled a release of the movie under the name and title of *''Chehre'*. The plaintiff also asserts that he read news and collected information available in the public domain that the movie, last mentioned, went into production somewhere around the month of May, 2019. The movie *''Chehre'* shall hereinafter be called the feature film. The plaintiff asserts that he received reliable information from the Film Industry that the feature film is based exactly on the same "plot and premise' as the plaintiff's copyrighted work. The plaintiff took legal advice and caused a "cease and desist' notice to be issued to the defendants on 14.06.2019. The notice, last mentioned, called upon the defendants to cease and desist from using any portion of the copyrighted work, including his professional, intellectual and creative ideas

that have gone into the story and presentation. The defendants were asked to forthwith cease their production of the feature film based on the copyrighted work as it would infringe the plaintiff's registered copyright.

6. The notice is said to have been answered through a reply of June the 29th, 2019, denying infringement of the copyrighted work. It is said by the plaintiff that the defendants are knowingly indulging in infringement of the plaintiff's copyright. They have signed high profile artists to work in the feature film without taking the plaintiff's permission for the use of the copyrighted work, converting his literary work into a motion picture. It is also said that the plaintiff has not so far assigned or transferred or sold his copyright in the copyrighted work to any third party; he holds it in his name alone. The violation of the plaintiff's copyright has been claimed to cause loss of name and reputation to the plaintiff. It is said the infringement, that would come about in consequence of production and release of the feature film, would cause the plaintiff severe harassment, loss of reputation and a cascading effect on the plaintiff's professional prospects, *vis-a-vis* his reputation as an author in general and the copyrighted work in particular.

7. It is claimed that the wrong done by the defendants not only constitutes infringement of the plaintiff's registered copyright but an act of breach of confidence, besides unlawful trade. It has the effect of depriving the plaintiff of the fruits of his intellectual labour created by investment of colossal time, intellect and effort.

8. Alongside the suit, an application for interim injunction under Order XXXIX Rules 1 and 2 read with Section 151 CPC was also made with a rather curiously worded prayer. The prayer in the temporary injunction application reads:

"In the above mentioned circumstances and in the interest of justice this Hon'ble Court may be pleased grant ad-interim ex-parte injunction in favour of the applicant/ plaintiff and against the defendants, his associates, musclemen, agent, legal heirs, representatives etc, till the pendency of the suit."

9. One would expect the prayer in the application for interim injunction to be somewhat similar in terms of the relief claimed in the plaint, but that is not so. However, it does not appear that the Trial Court has gone much by that technicality. Instead, the Trial Court has substantially read the prayer in the temporary injunction application to be one in aid of the main relief, directed to forbid the defendants, pending suit, from producing and/ or releasing the feature film. Again, the Trial Judge has not expressly said so, but the tenor of his order leaves this Court in no manner of doubt that, that is how he has construed the prayer for interim injunction and decided it by the order impugned.

10. A written statement was filed in opposition to the suit on behalf of defendant no.1. It raises preliminary objections going to the root of the action for infringement of copyright, besides those saying in much detail that no cause of action was disclosed. It was also pleaded that the copyrighted work was devoid of ingenuity and originality as it is an adoption of a banal theme in the public domain. The copyrighted work is said to have been borrowed from a novel titled "A Dangerous Game" written by a Swiss

author, Friedrich Durrenmatt. It was pleaded that the theme and plot of the copyrighted work is drawn substantially from the last mentioned novel and, therefore, lacks originality. It is also said that this work is known by different titles in different parts of the world. It is published under the title "Traps' in the United States and "Die Panne' in Germany. The work of the Swiss author is said to form the basis not only of stage plays, but also films and TV shows. It is said to have been adopted into Hindi and Marathi stage plays, that have been professionally performed in India. It has also been pleaded by defendant no.1 that the feature film is in no manner similar, or connected with the copyrighted work nor does it infringe it in any manner.

11. It was also said by the defendants in the written statement and in opposition to the application for temporary injunction that the film was not scheduled to be released in the month of February, 2020 and the suit was, therefore, no more than a *quia timet* action, that was founded on unreliable sources and erroneous apprehension.

12. Heard Mr. Gaurav Bhardwaj, Mr. Shantanu, Ms. Poonam Meena, Mr. Mahir Malhotra, Mr. Raj Kumar Dhama, learned Counsel for the plaintiff and Mr. Shashi Nandan, learned Senior Advocate assisted by Mr. Ankur Tandon, learned Counsel for respondent no.1 and Mr. Rahul Agarwal, learned Counsel along with Mr. Anubhav Shukla, Mr. Prafull Shukla, Mr. Nishchal Anand, learned Counsel appearing on behalf of respondent no.2.

13. Before this Court, the matter was very elaborately argued on behalf of the plaintiff by Mr. Gaurav Bhardwaj, learned Counsel, very ably assisted by Mr. Shantanu, Ms. Poonam Meena, Mr. Mahir Malhotra, Mr. Raj Kumar Dhama, Advocates. Mr. Bhardwaj was particularly critical of the learned District Judge's order refusing the temporary injunction on parameters completely irrelevant to judge a case for a temporary injunction in a suit for infringement of copyright. He has particularly submitted that the remarks in the impugned order that say that the copyrighted work though registered is an unpublished document are absolutely extraneous to the consideration of a case for grant of a temporary injunction. He has also criticized the learned District Judge's remark to the effect that once the plaintiff pleaded that he had discussed the contents of the copyrighted work with Mazhar Kamran, the plaintiff ought to have impleaded him as a party to the suit.

14. This Court must say that both these remarks in the learned District Judge's order are indeed not relevant to judge a plea for the grant of a temporary injunction in an action for copyright violation. An unpublished copyright, unregistered or registered, is protected intellectual property. It cannot be plagiarized merely because the owner of the copyright has not published it until the time of infringement. The other remark about the failure to implead Kamran as a party to the suit by the plaintiff, is also besides the point. Merely because the plaintiff claims that he had discussed the copyrighted work with Kamran, does not oblige him to implead Kamran as a defendant to the suit. This is so because on the cause of action disclosed in the plaint, the plaintiff does not claim any relief against Kamran. The relief has been claimed against the defendants. The plaintiff's case may require Kamran to be examined as a witness, but there is

absolutely no necessity to implead him as a defendant to the suit. On both these premises, Mr. Bhardwaj is right that the learned District Judge has gone wrong. But, these infirmities are not all that the refusal of temporary injunction is about. There is much more to it.

15. It has next been submitted by Mr. Bhardwaj that there is an error apparent on the face of the record committed by the learned District Judge while writing the impugned order. He submits that this is so because the learned Judge has dealt with the matter as if he were holding a summary trial. The learned Counsel says that this is further so because the learned Judge sought evidence to be led at the stage of consideration of the temporary injunction matter, which is manifestly illegal. This could be urged as a case of manifest illegality, but certainly not an error apparent. This is not to say that this Court accepts the submission of the learned Counsel for the plaintiff that the learned District Judge indeed required evidence to be led like a summary trial, or that his order is illegal on that count. The submission would be considered a little later in this judgment. Learned Counsel for the plaintiff, in support of this submission, has placed reliance upon a decision of the Rajasthan High Court in **Fateh Singh Mehta v. O.P. Singhal & Ors.**1. He has also depended upon a decision of the Supreme Court in **Wander Ltd. & Anr. v. Antox India P. Ltd., 1990**2. These decisions too would be alluded to later.

16. It is next submitted by Mr. Bhargav that the sole substantial defence of the defendants is that there is no comparison pleaded by the plaintiff about the similarity between the feature film and the copyrighted work, which, according the learned Counsel for the plaintiff, is fallacious. He submits that this plea does not lie in the defendants' mouth, inasmuch as the plaintiff had moved an application for discovery of documents under Order IX Rule 12 CPC (along with a notice for production of document under Order XII Rule 8 CPC) seeking a direction from the Court to the defendants to discover the story/ script of his screenplay that was the edifice of the feature film before the Trial Judge; but in answer to the said application, the defendants filed a reply, refusing to discover. He submits that defendant no.1 refused to submit the script before the learned District Judge for his perusal and comparison as it was said that it would jeopardize the commercial viability of the project. It is urged that once the defendants' script, that is the foundation of the feature film, was not accessible to the plaintiff, he could not be expected to plead details of the comparison between the feature film and the copyrighted work. In support of his submission, learned Counsel for the plaintiff has depended on a decision of the Supreme Court in **Gopal Krishnaji Ketkar v. Mohamed Haji Latif & Ors.**3.

17. It is next submitted that there is a vague plea urged on behalf of the defendants that belated approach to this Court against the impugned order dated 08.04.2021, on the eve of release of the movie, disentitles the plaintiff to relief. Mr. Bhardwaj submits that this plea is misplaced because the whole nation had plunged into a deep and devastating crisis about time when the impugned order was delivered, on account of second wave of the Covid-19 pandemic that raged during the months of April, May and June, 2021. It is pointed out that the pandemic is still going on. It is in those circumstances that the plaintiff's timely pursuit of his appeal

has to be viewed. The plaintiff, upon coming to know on 14th August that the defendants had declared that the movie would be released in the theaters on August the 27th, 2021, moved this Court on 19.08.2021, and then urgently mentioned the matter to be taken up.

18. Learned Counsel for the plaintiff next submits that the defendants' case that the suit is a *quia timet* action based on a mere apprehension is now no longer open, nor was it ever open. It is something that has to be seen in the plaintiff's favour. In this connection, reliance has been placed on a decision of the Madras High Court in **P.G. Narayanan v. The Union of India, rep. by the Secretary, Ministry of Information & Broadcasting, Sastri Bhavan, New Delhi-110 001 and others**4.

19. It is also urged by Mr. Bhardwaj that the conduct of the defendants is *mala fide*, unscrupulous and fraudulent, inasmuch as the defendants' project seeks to financially capitalize on the plaintiff's creativity, labour and scholarship. This they seek to do in violation of a registered copyright. In support of this part of his submission, learned Counsel for the plaintiff has placed reliance upon a decision of the Telangana High Court in **Super Cassettes Industries Private Limited & Another v. Nandi Chinni Kumar & Others**5. It is also urged that the learned District Judge has also erred in not securing a copy of the script that is the basis of the feature film and comparing it with the copyrighted work; in the absence of doing this, the learned Judge could not have disposed of the temporary injunction matter. It is in the last submitted that the plea of the defendants not to interdict release of the movie on ground that investment worth hundreds of crores of rupees have gone into its production is abominable. Mr. Bhardwaj says that a submission of this kind leaves an impression that is not seemly in a Court of justice.

20. Mr. Shashi Nandan, learned Senior Advocate assisted by Mr. Ankur Tandon, learned Counsel for respondent no. 1 and Mr. Rahul Agarwal, along with Mr. Anubhav Shukla, Mr. Prafull Shukla and Mr. Nischal Anand, learned Counsel appearing on behalf of respondent no. 2 have submitted in one voice that the plaintiff's claim to have shared the copyrighted work with Mazhar Kamran, whom the plaintiff believes may have passed on the script to the defendants, is founded on sheer conjecture. There is not the slightest proof offered that the plaintiff, in fact, shared this script of the copyrighted work with Mazhar Kamran or the further proof that Mazhar Kamran, in turn, passed on that intellectual property to the defendants. Mr. Shashi Nandan has drawn the Court's attention to the plaint, where it is said that the plaintiff, in the month of June, 2019, had learnt from reliable sources that defendant no. 1 is producing the feature film under the direction of defendant no. 2 and that the story/ plot of the feature film is similar to the copyrighted work. It is emphasized that no detail of "the reliable sources" have been pleaded. The suit, therefore, in Mr. Shashi Nandan's submission, is based on hearsay, conjectures and surmises.

21. It is next submitted by the learned Counsel for the defendants that the plaint reveals that it is bereft of a cause of action, let alone a *prima facie* case. Attention of the Court is drawn to Paragraph no.5 of the plaint, that purports to plead the cause of action. It is submitted by the learned Senior

Counsel and Mr. Agarwal that the plaintiff has failed to disclose facts and documents in support of the cause of action. It is particularly urged that the plaint fails to disclose that :

(a) The copyrighted work is an original literary work;

(b) Defendant no. 1 had access to the copyrighted work; and

(c) The script of the feature film is substantially similar to the copyrighted work.

22. It is next urged on behalf of the defendants that plaintiff has not revealed any material to indicate the defendants' access to the copyrighted work. Reliance has been placed on the decision of the Bombay High Court in **Mansoob Haider v. Yashraj Films Private Ltd.**6. It is also urged that the plaintiff merely rests his case on speculation that is far from one that meets the minimal standard of proof.

23. Learned Senior Counsel for the defendants says that at best, it can be construed as a *quia timet* action, where the burden of proof is much greater on the plaintiff in comparison to an action for injunction, where an actual injury is sustained by the plaintiff contra-distinguished from an apprehended injury. In support of this submission, reliance has been placed on the decisions of the Bombay High Court in **Graigola Merthyr Company Limited v. Mayor Alderman and Burjesses of Swansea**7 **and Zee Entertainment Enterprises Ltd. v. Sony Pictures Network Pvt. Ltd.**8. It is further argued that the reasonable apprehension about an apprehended injury must arise from credible information, the particulars whereof are duly pleaded; that is utterly wanting.

24. It is next submitted that a civil suit cannot be a fishing or roving inquiry, but must be based on established principles of law and accurate pleadings. It is urged that the plaintiff's application for discovery was objected to by the defendants on facts and grounds recognized in law. The Trial Judge never directed the defendants to submit the script for the Court's perusal. It is also said that the application for discovery was never allowed or the defendants permitted to serve the notice that they enclosed with the application. It has been particularly urged before this Court that the defendants' script that is the basis of the feature film and the copyrighted work, both are inspired from a theme of the mock trial contained in the novel titled "A Dangerous Game". About this novel, allusion has already been made earlier in this judgment.

25. It has next been urged that a comparison of the two scripts may show a similarity between the common theme, but the treatment of the subject by each party is completely different. It is urged, therefore, that it cannot be dubbed as an infringement of the plaintiff's copyright. It is urged that the plaintiff's claim does not at all make out a *prima facie* case, as it is founded on utter conjecture. It is an action that is designed to prevent the defendants from commercially exploiting the feature film, which is an upcoming project nearing fruition. There is no unimpeachable evidence of the kind and degree required to make out a *prima facie* case in an action that is essentially *quia timet.* About the balance of convenience here, it is said on behalf of the defendants that the plaintiff has chosen to approach this Court in appeal at the eleventh hour, whereas the order impugned was passed on 8th April, 2021. It is said that this Court is functioning normally since the month of July, 2021 and physical hearing has been

going on for quite some time now. The defendants also say that they are at the threshold of release of the feature film in India, which has already been released in some foreign jurisdictions. The defendants have entered into onerous contracts with Over The Top (OTT) Platforms and film distributors. Any embargo on the release of the film would have a devastating effect on the rights of the third parties. It would lead to irreparable injury to the defendants and many others, who have entered into engagement with them. It is submitted that on the other hand, in the off-chance, if the plaintiff were to succeed in the action at the trial, he can be easily compensated in monetary value as well as by provision of the intellectual credit for the movie. In support of this part of the defendants' submissions and the counts of irreparable loss and balance of convenience, reliance has been placed on a decision of the Bombay High Court in **Akashaditya Harishchandra Lama v. Ashutosh Gowarikar**9 and the decision of the Delhi High Court in **John Hart Jr. and Another v. Mukul Deora and Others**10.

26. This Court has keenly considered the rival submissions advanced on behalf of both sides and perused the record. The submission of the plaintiff that the Trial Judge has manifestly erred in expecting evidence to be produced at the hearing of the temporary injunction application, as if it were a mini trial, is not one of much substance. The reason is not far to seek. The fundamental principles of law governing a motion for temporary injunction pending suit requires the plaintiff to establish his *prima facie* case, the irreparable loss that he would sustain from a refusal of the injunction and the balance of convenience. No doubt that this tripod that holds a plea for a temporary injunction firm is not required to be established by evidence of the kind that is expected to be led at the trial. But, it does require a *prima facie* case to be established and the two other ingredients by some evidence that can be led on affidavits. Temporary injunction matters are reputed to be decided on affidavits, with copies of documents annexed. The first requirement about a *prima facie* case postulates that the case pleaded in the plaint, on the foot of which alone, the case for a temporary injunction stands, should disclose *prima facie* and not after a searching inquiry that must await trial, that a triable case is made out. The decision on this point urged on behalf of the plaintiff is the one in **Wander Ltd.** *(supra)*. In **Wander Ltd.**, it has been held :

"9. Usually, the prayer for grant of an interlocutory injunction is at a stage when the existence of the legal right asserted by the plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. The court, at this stage, acts on certain well settled principles of administration of this form of interlocutory remedy which is both temporary and discretionary. The object of the interlocutory injunction, it is stated

"...is to protect the plaintiff against injury by violation of his rights for which he could not adequately be compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The court must weigh one need against another and

determine where the "balance of convenience' lies."

The interlocutory remedy is intended to preserve in status quo, the rights of parties which may appear on a prima facie case. The court also, in restraining a defendant from exercising what he considers his legal right but what the plaintiff would like to be prevented, puts into the scales, as a relevant consideration whether the defendant has yet to commence his enterprise or whether he has already been doing so in which latter case considerations somewhat different from those that apply to a case where the defendant is yet to commence his enterprise, are attracted."

27. The other decision relied upon by the plaintiff on this point is **Fateh Singh Mehta** *(supra)*, which is not of much relevance on the issue in hand, though it is quite relevant on another point that would soon be dealt with.

28. Now, the question whether a *prima facie* case is made out, is intrinsically connected to the cause of action regarding infringement of the copyright alleged. It is true that in order to establish a *prima facie* case, in an action for infringement of copyright, there have to be pleadings to establish that the literary work, of which the plaintiff claims infringement by the defendants should be shown to be the plaintiff's original literary work, in the sense that the work is at least original rendition of a known theme with the plaintiff producing it, employing his knowledge, labour and skill. In addition, it has also to be established that the defendant had access to the plaintiff's work, and that the offending script is substantially similar to the plaintiff's script. Here, there is no doubt about one fact that the plaintiff holds a copyrighted work. But beyond that, the pleadings are utterly vague. There is an assertion to the effect that the plaintiff discussed the copyrighted work with Mazhar Kamran, but it does not say that he showed the copyrighted work to Kamran or handed it over to him. Therefore, there is a very vague case pleaded about the intermediary who could have possibly palmed off the copyrighted work to the defendants, on coming to know of its contents. A mere discussion of a work involving intellectual intricacies with another is not a case enough to impute that other with knowledge of its contents; and knowledge good enough to share it with a third party. The pleadings, therefore, are woefully vague about the access of the defendants to the copyrighted work.

29. The next assertion in the plaint that the plaintiff was given information about defendant no. 1 producing the feature film, that is essentially similar to the copyrighted work, is also utterly vague. It is set out in Paragraph no.5 of the plaint. The plaintiff does not name the source through which he came to know that the feature film is based on a script that is a plagiarized version of the copyrighted work. The terms employed in the relevant pleadings are "reliable source/sources from the film industry" which can hardly go to make for a *prima facie* case or a triable case for the grant of a temporary injunction in an action for infringement of copyright.

30. There is another issue which is required to be addressed. It is connected to the fundamental issue about whether the plaintiff at all had a cause of action to proceed for infringement with the kind of allegations that find place in the plaint. *Prima facie*, the plaintiff never had occasion to see what the contents of the

script leading to the feature film were, the movie having not been released as yet and certainly not until time the suit was filed. The plaintiff has inferred that it is a copy of his work on the basis of some hearsay, that he has expressed through vague allegations in the plaint, describing them as reliable sources from the film industry. The entire action is, therefore, based on the plaintiff's conjecture. This cannot be the basis of an action for infringement of copyright.

31. In this connection, reference may be made to the decision of the Bombay High Court in **Zee Entertainment Enterprises** *(supra)*. The aforesaid principle is well-established that unless there is the infringing copy in the hands of the plaintiff, an action in the nature of *quia timet* would not lie, and even if it does, a temporary injunction on the basis of mere speculation would not be granted. In **Zee Entertainment Enterprises**, it was held:

"20. Mr. Kadam then relies on the decision of a learned Single Judge of this Court (A.M. Khanwilkar, J as he then was) in Urmi Juvekar Chiang v.Global Broadcast News Ltd to say that what is required is not a hypercritical or meticulous scrutiny but an assessment from the perspective of the average viewer. I understand this to mean that having seen Sony's show, would the average viewer believe that this is in fact a copy of Zee's show. We cannot today adopt that standard, and this of Zee's making, because it chose to make this as a quia timet application. This is not without consequences. Sony's show is scheduled to release only on 8th April 2016. Nobody has seen it yet. What Zee proceeds on is something of speculation or conjecture. Effectively Zee asks me to conclude that Sony's show releasing this Saturday, 8th April 2016 must necessarily be an infringing copy of the Zee's show; and this I am supposed to conclude or am invited to conclude on the basis of paragraphs 8, 9 and 10 of the plaint; although, as we have seen, in those paragraphs the distinct elements (in paragraph 10) have been disclaimed, and the other paragraphs only contain non-specific generalities without any explanation as to the original labour or effort put in by Zee. During the rejoinder, I did ask Mr. Khandekar to consider whether he would prefer to wait till after the show is released on Saturday, on my closing the hearings today, so that the Plaintiffs would have had the opportunity to see the show's first episodes. Mr. Khandekar did take instructions and these were to proceed with the matter today rather than wait for the release. That is certainly something the Plaintiffs are entitled to do and it cannot prejudice the final results. But inevitably what it does mean is that Zee's case is then limited to a matter of speculation without even meeting a minimal standard of proof. This creates enough difficulties in the context of the claim in infringement but it creates even more difficulties in the context of the claim in passing off and to which I will next turn."

32. On general principles governing an action that is in the nature of *quia timet*, it has since long been held that for an injunction to be granted on a threat of injury, the evidence about threat should be through some tangible evidence laid before the Court. An injunction of this kind cannot be sought by a plaintiff on bald assertions based on hypothetical facts. Burden of proof in a *quia timet* action is also much heavier than in a case where the defendant has acted and wronged the plaintiff to his detriment. The principle is classically stated in the decision of the Court of

Appeal in **Graigola Merthyr Company Limited** *(supra)*, where Lord Hanworth M.R. said thus:

"A quia timet action is not based upon hypothetical facts for the decision of an abstract question. When the Court has before it evidence sufficient to establish that an injury will be done if there is no intervention by the Court-it will act at once, and protect the rights of the party who is in fear, and thus supply the need of what has been terms protective justice. It is a very old principle."

33. In **Graigola Merthyr Company Limited** in his separate but concurring opinion, it was held by Lawrence L.J.:

"..... The only difference between the two cases is that in a purely quia timet action the burden of proof resting on the plaintiff is far heavier than in an action where an act has already been done and has already caused actual damage. In both cases, however, the issue is the same-namely, where the act (completed or intended) is an act causing substantial damage to the plaintiff.....…"

34. Here, the submission of the learned Counsel for the plaintiff that the defendants' plea that the suit is a quia timet action based on a mere apprehension, is now no longer open, nor was it ever open, must be dealt with. Learned Counsel for the plaintiff has also said that it is no longer a mere apprehension and is something that ought to be viewed in the plaintiff's favour. Learned Counsel for the plaintiff, in urging this part of his submission, has drawn inspiration from the decision of the Madras High Court in **P.G. Narayanan** *(supra)*, where it has been held:

"26. Learned counsel for the petitioner also submitted that the petitioner is entitled to invoke the jurisdiction of this Court for a *quia timet* action. *Quia timet* is an extraordinary relief granted by Courts to prevent irreparable harm. It gives relief to parties who face imminent threat or danger of a tortious harm for which there is no adequate legal relief available later. They are actually writs of prevention which require three conditions -- (a) no actual present injury, (b) reasonable fear of future harm, and (c) irreparable harm, if relief is not granted. According to the learned counsel for the petitioner, "the violation has already occurred". If so, condition (a) is not satisfied. The petitioner has not made out a case of reasonable future harm. It is not clear how if the license is granted to the sixth respondent, public interest will be injured and hence, condition (b) is not satisfied. Further, it is not as if even if the sixth respondent is granted the license, the harm is irreparable, since it is seen from the guidelines that the license is not a permanent one; it is for a period of ten years and it is terminable at the instance of the licensing authority, which is the Union Government. *Quia timet* action is defined as "One a claimant may bring to obtain an injunction to prevent or restrain some threatened act which, if it is done, would or may cause substantial damage and for which money would not be a sufficient or appropriate remedy". None of these ingredients are satisfied in the present action."

35. From what the Court has been able to make out of this part of the submission by the plaintiff's learned Counsel, is that with the impending release of the feature film, the apprehension has turned into a potent threat staring the plaintiff in his face. It is true that it can now

no longer be said that the defendants are not about releasing the feature film and that part of the cause of action is based on a mere apprehension, that would not support a *quia timet*. The feature film has done its full gestation and would be released by the defendants in the morning hours tomorrow, but it is not the mere release of the feature film, that would afford the plaintiff a cause of action *prima facie* to maintain a *quia timet*. He would have to demonstrate from a case duly pleaded and evidence good enough to support an entitlement to a temporary injunction on basis that the copyrighted work and the script leading to the feature film are *prima facie* so similar in the treatment, may be of a common theme, that it is no more than an offending copy of the plaintiff's copyright. About this part, *prima facie* the plaintiff has not pleaded sufficiently and proved up to the threshold by a comparison of the two scripts a positive case of violation of his copyright. As already said, the allegations about violations of the plaintiff's copyright in the plaint, are based on mere hearsay and no more. The decision in **P.G. Narayanan** is hardly attracted on the facts here.

36. The next submission advanced on behalf of the plaintiff is based on that objection of the defendants that the plaintiff ought to have pleaded accurately the similarities between the copyrighted work and the script underlying the feature film, which was not done. In this regard, learned Counsel for the plaintiff has largely said that considering the vantage at which the parties stand, the plaintiff did not have access to the script leading to the feature film. Therefore, it is impossible to expect of him to have pleaded the similarities with full particulars thereof in the plaint. It has also been said that the application for discovery, though made, was opposed with the result that neither the plaintiff nor the learned Judge, before whom that application was made, could ever have the advantage of comparing the two works. But the question is that whatever be the reason of the failure to plead in the plaint, the offending similarity between the copyrighted work and the script said to be the foundation of the feature film, would it entitle the plaintiff to maintain the action *prima facie*. Learned Counsel for the plaintiff says that where there are no means for the plaintiff to know the contents of the infringing script and despite demand, the defendant does not discover its contents in answer to an application made for the purpose, the burden must be placed on the shoulders of the one who withholds the best evidence which is in his possession, not only from the plaintiff, but also the Court. In support of this contention, learned Counsel for the plaintiff has drawn this Court's attention to the following observations of the Supreme Court in **Gopal Krishnaji Ketkar** *(supra)* :

"5. ..... Lastly, reference should be made to the important circumstance that the appellant has not produced the account of the Dargah income. In the course of his evidence the appellant admitted that he was enjoying the income of Plot No. 134 but he did not produce any accounts to substantiate his contention. He also admitted that "he had got record of the Dargah income and that account was kept separately". But the appellant has not produced either his own accounts or the account of the Dargah to show as to how the income from Plot No. 134 was dealt with. Mr Gokhale, however, argued that it was no part of the appellant's duty to produce the accounts unless he was called upon to do so and the onus was upon the respondents to prove the case and to show

that the Dargah was the owner of Plot No. 134. We are unable to accept this argument as correct. Even if the burden of proof does not lie on a party the Court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts at issue. It is not, in our opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof. In *Murugesam Pillai v. Manickavasaka Pandara* [44 IA 98, at p 103] Lord Shaw observed as follows:

"A practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and failing, accordingly, to furnish to the Courts the best material for its decision. With regard to third parties, this may be right enough -- they have no responsibility for the conduct of the suit; but with regard to the parties to the suit it is, in Their Lordships' opinion, an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition."

This passage was cited with approval by this Court in a recent decision-- *Biltu Ram v. Jainandan Prasad* [Civil Appeal No. 941 of 1965 decided on April 15, 1968***$$$] . In that case, reliance was placed on behalf of the defendants upon the following passage from the decision of the Judicial Committee in *Bilas Kunwar v. Desraj Ranjit Singh* [42 IA 202, at p. 206] :

"But it is open to a litigant to refrain from producing any documents that he considers irrelevant; if the other litigant is dissatisfied it is for him to apply for an affidavit of documents and he can obtain inspection and production of all that appears to him in such affidavit to be relevant and proper. If he fails so to do, neither he nor the Court at his suggestion is entitled to draw any inference as to the contents of any such documents."

But Shah, J., speaking for the Court, stated:

"The observations of the Judicial Committee do not support the proposition that unless a party is called upon expressly to make an affidavit of documents and inspection and production of documents is demanded, the Court cannot raise an adverse inference against a party withholding evidence in his possession. Such a rule is inconsistent with Illustration (g) of Section 114 of the Evidence Act, and also an impressive body of authority."

37. The question in **Gopal Krishnaji Ketkar** arose in the context of an issue, whether the land in dispute in the said case was the property of Peer Haji Malang Dargah or the appellant. It was in the context of the accounts relating to Plot No. 134, which the appellant admitted he was maintaining and did not produce that it was held that even if the burden of proof does not lie on a party, the Court may draw an adverse inference, if that party were to withhold important documents that can throw light on the facts in issue. The proposition involved here is not at all about the burden of proof, but the cause of action itself. What is required to be examined is, as already said, what would be essential to make out a triable cause in an action for infringement of copyright. Those principles are well enunciated in **Mansoob Haider**. It was a temporary injunction application made in a suit for infringement of

copyright. The plaintiff was a professional film script writer. The short facts, giving rise to the action and the temporary injunction matter there, as these figure in the report of the decision in **Mansoob Haider**, are extracted below :

"1. The Plaintiff, a professional film script writer, and whose father wrote scripts and dialogue for notable films, is the author of the film script entitled "ONCE". The entirety of this script is annexed to the plaint at Exhibit "B". The Plaintiff claims that a recently released film, Dhoom 3, infringes the Plaintiff's copyright in his script "ONCE". In the suit, the Plaintiff seeks an order that he be given credit in the titles of the film.

2. The Plaintiff claims that he had delivered this script to 1st Defendant's office. Three years later, the film Dhoom 3 was released.....…"

38. In the aforesaid context, the principles relating to what would be essential for the plaintiff to succeed in an action for infringement and *a fortiori*, on a motion for temporary injunction pending suit, were laid down in **Mansoob Haider** thus :

"38. There are, therefore, three crucial questions or legal tests in cases like this:

(a) Has the plaintiff proved that the defendant had access to his work?

(b) On considering the two works, would an ordinary person inevitably conclude that the defendant had copied the plaintiff's work? (the subjective or intrinsic test); and

(c) Is there a substantial and material overlapping or commonality of the original elements in the plaintiff's work?

39. Even if a plaintiff fails on the first question, he may yet succeed on the second and third questions. But if he fails on the second question also, then I do not see how he can possibly succeed on the third alone. But that may arise in another matter. In this case, in my view, the present Plaintiff fails on all three counts. Indeed, his case is not even based on the second question, but only on the first and his own variation of the third: that Defendants Nos. 1 to 3 had access and that there are common elements, even if these are not shown to be entirely unique and some of which are later given up as being original (the magic trick) or demonstrated to be untrue (being set in a foreign locale). The Plaintiff's variation on the third question is a sort of reductio ad absurdum: a vivisection of individual elements, a false and misleading juxtaposition of these, and, on that basis, to 'round up the usual suspects' and invite a finding of infringement. If these elements, however and wherever placed, are in support of an entirely different premise and story line, there can be no copying, no piracy and no infringement.

G. Conclusions

40. In my view, there is no case whatsoever made out for the grant of interim relief. The Plaintiff has not made out a prima-facie case. I am not convinced that the Plaintiff has even been able to demonstrate that his work was given to, let alone seen, by the 1st Defendant or any of its employees, officers or principal personnel. The two works are entirely different, each original in its own way. The film Dhoom 3 is not and cannot possibly be said to be a copy of the Plaintiff's work Once. The material propositions and premise of the two works are entirely dissimilar. The mere use in both of certain well established and commonly used motifs, themes or elements or even the perhaps co-incidental placing of these in a

certain juxtaposition gives the Plaintiff no rights against the rival work."

39. Therefore, the question that is required to be addressed is not about the burden of proof, or so to speak, the defendants' burden as the plaintiff claims, once they (the defendants) opposed the application for discovery to disclose the contents of the script that is the basis of the feature film, but whether the plaintiff has a triable case pleaded on the parameters of an action for infringement. It has already been held that there is absolutely vague pleading to show that the defendant could have had access to the copyrighted work. The Court in **Mansoob Haider** no doubt, has said that failing on the point of access, the plaintiff can still succeed, upon showing that on a comparison of the two works, an ordinary person would inevitably conclude that defendants had copied the plaintiff's work. There is some doubt whether access has to be necessarily proved, but assuming that it is required to be proved, it would still be necessary for the plaintiff to plead and show that an ordinary person, in comparing the copyrighted work and the feature film, would inevitably come to the conclusion that the latter is a copy of the former.

40. It must be remarked here that before this Court, during the hearing, the Court asked the defendants if they would produce the script, on the foundation of which, the feature film was produced. On instructions sought, the defendants said that they were willing and would produce it. They did so during the hearing on 26.08.2021. At the instance of the plaintiff, the defendants also filed an affidavit to the effect that the final script, on the foot whereof the feature film has been developed and produced, authored by one Ranjeet Kapoor, is the one that is being passed on to the Court. However, the defendants declined to share the script with the plaintiff. The Court, therefore, compared the copyrighted script that was provided by the plaintiff and the script on which the feature film is founded, without sharing it with parties or the advantage of hearing learned Counsel. The Court has nevertheless very carefully compared the two scripts. There is no doubt that they share a common theme. But, it is equally true that the two are distinct and individual treatments of the same subject and theme developed by different individuals in their own way, as a result of their individual intellectual exertions. The two scripts *prima facie* are distinctly different treatments of the same theme. The similarity of the theme consists in the protagonist of the story, wandering off onto a mysterious road - a highway, and landing in distress amidst mysterious characters, who are retired members of the legal profession: a Judge, a prosecutor, a defence counsel and a hangman. The protagonist in both the scripts has some kind of a wrongdoing, a crime to hide, which, in a game, these four men play about a mock court, he reveals when put on trial for the game's fun. In both the themes, ultimately, he dies. This is the theme to be found in the novel "A Dangerous Game", authored by Friedrich Durrenmatt. But, that is not what is relevant. What is to be seen is whether the plaintiff's treatment of the theme in his original way has been plagiarized. The law appears to be that infringement of a copyright is not about the novelty of the work, but about its originality. A very old theme may receive a different and distinctive creative development at the hands of different individuals. Both would be entitled to the copyrights of their originality. The commonality of the theme would not offer any cause of action for infringement.

41. In this connection, reference may be made to the decision of the Bombay High Court in **XYZ Films v. UTV Motion Pictures/ UTV Software Communications Ltd.**11. In the said decision, the test about what would constitute violation of a copyright was laid down thus :

"32. In my view, these quoted portions do not actually assist Dr. Saraf at all. To the contrary, they seem to be against him. The Plaintiffs' copyright does not subsist in any so-called 'central' theme or concept. It subsists only in a particular realization of it; and if that is not copied, and the rival work is wholly different, there is no infringement. I must agree with this view that there is, generally speaking, no copyright in the central idea or theme of a story or a play. It subsists in a combination of situations, events and scenes which, working together, form the realization or expression of that idea or theme. If this combination is totally different and yields a completely different result, the taking of the idea or the theme is not copyright infringement. To my mind this would seem to apply almost exactly to the case at hand. As the Australian Court said another author who materially varies the incidents and character and materially changes the story is not an infringer of copyright."

42. This question about what originality of the impugned work would mean in the context of a copyright violation was considered by the Rajasthan High Court in **Fateh Singh Mehta** *(supra)*, where the principle was laid down:

"7. ..... The originality which is required relates to the expression of the thought but the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work that it should originate from the author (See *University of London Press Limited v. University Tutorial Press Limited* (2). Thus it is well settled that the originality in work relates to the expression of thought. Much depends on the skill, labour knowledge and the capacity to digest and utilies the new materials contributed by the others in imparting to the product the quality and the character which those materials did not possess and which differentiate the product from the materials used. It was stated in the decision reported in AIR 1973 MP 261 that the law of copy right do not protect ideas but they deal with the particular expression of ideas. It is always possible to arrive at the same result from independent sources. The compiler of a work in which absolute originality is of necessity excluded is entitled, without exposing himself to a charge of piracy, to make use of preceeding work upon the subject, where he bestows such mental labour upon what he has taken, and subjects it to such revisial and correction as to produce an original result. The question whether there has been an infringement of copy right depends on whether a colourable limitation has been made."

43. Assuming that the plaintiff has a copyright in the copyrighted work, the law about what would possibly constitute a violation of that copyright has to be further examined for the purpose of this appeal, which after all asserts a right to temporary injunction forbearing release of the feature film pending suit. In the opinion of this Court, it would be apposite to look to guidance in authority also where the point was, whether the plaintiff acquired copyright in a literary work, that he was entitled to protect. This is so because the

criteria for the acquisition of copyright in a literary work would be the same as that in claiming a violation of it. The difference would be only about the vantage of the parties claiming. The substance of the right is originality. In one case, it is about the copyright to be ascertained in the literary work that is claimed, and in the other, assuming that the right exists in the person claiming, whether the infringing work is also original enough so as not to be a violation of the claimed copyright. **Macmillan and Company, Limited v. K. and J. Cooper**12 was a case that arose under the Copyright Act, 1911, where the issue before their Lordships of the Privy Council was whether the plaintiff's work had sufficient originality to entitle it to a copyright. It has been held thus:

"The only other authority on the point of the acquisition of copyright to which it is necessary to refer is the case of *UNIVERSITY OF LONDON PRESS, LTD.*, *v. UNIVERSITY TUTORIAL PRESS, LTD.*, (9) in which Mr. Justice Peterson, dealing with the meaning of the words "original literary work used in Section 1, sub-section 1," of the Act of 1911,at page 608 says:

"The word "original' does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the origin of ideas but with the expression of thought; and in the case of literary work,' with the expression of thought in print or writing. The originality which is required relates to the expression of the thought; but the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work that it should originate from the author."

In their Lordships' view this is the correct construction of the words of S. 1, sub-section 1, and they adopt it.

What is the precise amount of the knowledge, labour, judgment or literary skill or taste which the author of any book or other compilation must bestow upon its composition in order to acquire copyright in it within the meaning of the Copyright Act of 1911 cannot be defined in precise terms. In every case it must depend largely on the special facts of that case, and must in each case be very much a question of degree. .....…"

44. This issue has engaged the attention of the Supreme Court of Canada in a relatively recent decision in **Law Society of Upper Canada v. CCH Canadian Limited**13. The issue before the Supreme Court of Canada relating to violation of copyright arose in the context of provision of custom photocopying services by the Law Society of Upper Canada, a statutory non-profit corporation of some standing. The law society maintained and operated a library equipped with reference and research material said to be the largest collection of legal material in Canada. The library provided a request - based photocopy service for the law society members, judicial and other authorized researchers. Under its custom photocopy service, the desired photocopies of material were delivered in person or by mail to persons eligible to avail this facility of the library. The law society also maintained self-service photocopiers for use by its patrons. Some publishers of law reports, photocopies whereof were permitted by the library to be taken by its patrons, commenced action for infringement of their copyright. This was broadly the contours of the action that ultimately travelled to the Supreme Court of Canada, where, amongst

the several issues decided, one was the contemporary views of Court about "originality' in the copyright law, albeit in the context of the Canadian Statute. The learned Chief Justice speaking for a unanimous Court held:

"(iii) *Recent Jurisprudence*

21. Although many Canadian courts have adopted a rather low standard of originality, i.e., that of industriousness, more recently, some courts have begun to question whether this standard is appropriate. For example, the Federal Court of Appeal in *Tele-Direct*, supra, held, at para. 29, that those cases which had adopted the sweat of the brow approach to originality should not be interpreted as concluding that labour, in and of itself, could ground a finding of originality. As Décary J.A. explained: "If they did, I suggest that their approach was wrong and is irreconcilable with the standards of intellect and creativity that were expressly set out in NAFTA and endorsed in the 1993 amendments to the *Copyright Act* and that were already recognized in Anglo-Canadian law." See also *Édutile Inc. v. Automobile Protection Assn.*, [2000] 4 F.C. 195 (C.A.), at para. 8, adopting this passage.

22. The United States Supreme Court explicitly rejected the "sweat of the brow" approach to originality in *Feist*, supra. In so doing, O'Connor J. explained at p. 353 that, in her view, the "sweat of the brow" approach was not consistent with the underlying tenets of copyright law:

The "sweat of the brow" doctrine had numerous flaws, the most glaring being that it extended copyright protection in a compilation beyond selection and arrangement -- the compiler's original contributions -- to the facts themselves. Under the doctrine, the only defense to infringement was independent creation. A subsequent compiler was "not entitled to take one word of information previously published," but rather had to "independently wor(k) out the matter for himself, so as to arrive at the same result from the same common sources of information." ... "Sweat of the brow" courts thereby eschewed the most fundamental axiom of copyright law -- that no one may copyright facts or ideas.

As this Court recognized in *Compo*, supra, at p. 367, U.S. copyright cases may not be easily transferable to Canada given the key differences in the copyright concepts in Canadian and American copyright legislation. This said, in Canada, as in the United States, copyright protection does not extend to facts or ideas but is limited to the expression of ideas. As such, O'Connor J.'s concerns about the "sweat of the brow" doctrine's improper extension of copyright over facts also resonate in Canada. I would not, however, go as far as O'Connor J. in requiring that a work possess a minimal degree of creativity to be considered original. See *Feist*, supra, at pp. 345 and 358.

(iv) *Purpose of the Copyright Act*

23. As mentioned, in *Théberge*, supra, this Court stated that the purpose of copyright law was to balance the public interest in promoting the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator. When courts adopt a standard of originality requiring only that something be more than a mere copy or that someone simply show industriousness to ground copyright in a work, they tip the scale in favour of the author's or creator's rights, at the loss of society's interest in maintaining a robust public domain that could help foster future creative innovation. See J.

Litman, "The Public Domain" (1990), 39 Emory L.J. 965, at p. 969, and C.J. Craig, "Locke, Labour and Limiting the Author's Right: A Warning against a Lockean Approach to Copyright Law" (2002), 28 Queen's L.J. 1. By way of contrast, when an author must exercise skill and judgment to ground originality in a work, there is a safeguard against the author being overcompensated for his or her work. This helps ensure that there is room for the public domain to flourish as others are able to produce new works by building on the ideas and information contained in the works of others.

(v) *Workable, Yet Fair Standard*

24. Requiring that an original work be the product of an exercise of skill and judgment is a workable yet fair standard. The "sweat of the brow" approach to originality is too low a standard. It shifts the balance of copyright protection too far in favour of the owner's rights, and fails to allow copyright to protect the public's interest in maximizing the production and dissemination of intellectual works. On the other hand, the creativity standard of originality is too high. A creativity standard implies that something must be novel or non-obvious -- concepts more properly associated with patent law than copyright law. By way of contrast, a standard requiring the exercise of skill and judgment in the production of a work avoids these difficulties and provides a workable and appropriate standard for copyright protection that is consistent with the policy objectives of the *Copyright Act.*

(vi) *Conclusion*

25. For these reasons, I conclude that an "original" work under the *Copyright Act* is one that originates from an author and is not copied from another work. That alone, however, is not sufficient to find that something is original. In addition, an original work must be the product of an author's exercise of skill and judgment. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. While creative works will by definition be "original" and covered by copyright, creativity is not required to make a work "original"."

45. The Canadian decision shows that the standard of originality, where the impugned work would not be regarded as infringement, ought to be an exercise of skill and judgment by the author, where the changes that he affects are not so trivial as may be regarded as purely mechanical. This standard would seem to give leeway to an author to write about a theme, that is the subject matter of the work of which infringement is claimed without risk, provided he puts in his intellectual skill, learning and judgment, in his own way, and not merely doing a cosmetic change over. Reference in this context must be made to a very old decision by the Circuit Court, D. Massachusetts in **Greene v. Bishop**14, where the Court, faced with the same issue, held:

"Copying is not confined to literal repetition, but includes, also, the various modes in which the matter of any publication may be adopted, imitated, or transferred, with more or less colorable alterations to disguise the piracy. In all such cases, says Mr. Curtis (Curtis, Copyr. 253), the main question is, whether the author of the work alleged to be a piracy has resorted to the original sources alike open to him and to all waiters, or whether he has adopted and used the plan of the work which it is alleged he has infringed, without resorting to the other sources from which he had a right to borrow. Within

these principles, both the report of the master, and the evidence on which it is founded, show that the respondent has copied what in judgment of law was exclusively secured to the complainant, under and by virtue of his respective copyrights."

46. In India the law relating to copyright in its historical perspective finds reference in the decision of the Madhya Pradesh High Court in **M/s. Mishra Bandhu Karyalaya and others v. Shivratanlal Koshal**15. The brief history of this legislation finds mention in paragraph 11 of the report, which reads:

"11. We are, however, concerned with the state of things prevalent prior to 21st January, 1958, when the Copyright Act, 1957 (Act. No. 14 of 1957), was brought into force. The law then in force was the Imperial Copyright Act, 1911 (1 and 2 Geo. V, Ch. 46) which, with slight modification, was made applicable to this Country by the Indian Copyright Act (Act No. 3 of 1914). The Imperial Copyright Act, 1911, either as operating proprio vigore or as applied by the Indian Copyright Act, 1914, was "a law in force in the territory of India immediately before the commencement of the Constitution", and it, therefore, continued to be in force as the law of the land by virtue of Article 372(1) of the Constitution. We consider the following passage in *Copinger and Skone James on Copyright*, 9th Edn., pp. 428-9, as describing the position correctly.

"The United Kingdom Copyright Act, 1911, extended to India as part of His Majesty's dominions, but certain modifications were introduced by the Indian Copyright Act, 1914 (No. 3 of 1914). The effect of Section 18 of the Indian Independence Act, 1947 (10 & 11 Geo. VI, C. 30) appeared to be that copyright protection both in India and with respect to works originating there remained unchanged."

47. The point under consideration was dealt with by their Lordships of the Division in **M/s. Mishra Bandhu Karyalaya**, thus:

"40. It would thus appear that a "copy' is that which comes so near the original as to suggest the original to the mind of the reader. The dictum of Kekewich, J., in 1908-1 Ch 519 (supra) hag throughout been followed and applied in India. See *Sitanath Basak v. Mohini Mohan Singh*, 34 Cal WN 540 : (AIR 1931 Cal 233), *Mohendra Chandra Nath Ghosh v. Emperor*, AIR 1928 Cal 359, *Kartar Singh v. Ladha Singh*, AIR 1934 Lah 777 and *Gopal Das v. Jagannath Prasad*, ILR (1938) All 370 : (AIR 1938 All 266).

41. Applying these principles to the present case, we are unable to find any material showing that the "Purva Madhyamik Ank Ganeet" published by the defendants, was a copy or a colourful imitation of the "Saral Middle School Ank Ganit' written by the author. Suffice to say, the laws of copyright do not protect ideas, but they deal with the particular expression of ideas. It is always possible to arrive at the same result from independent sources. The rule appears to be settled that the compiler of a work. In which absolute originality is of necessity excluded is entitled, without exposing himself to a charge of piracy, to make use of preceding works upon the subject, where he bestows such mental labour upon what he has taken, and subjects it to such revision and correction as to produce an original result. See, *Spiers v. Brown*, 1858-6 WR 352, *Reade v. Lacy*, (1861) 128 RR 508 and

Hotten v. Arthur, (1863) 136 RR 249, cited by Bamet and Ganga Nath, JJ., in ILR (1938) All 370 : (AIR 1938 All 266) (supra)."

48. The decision of the Division Bench of the Madhya Pradesh High Court in **M/s. Mishra Bandhu Karyalaya** was overruled by a Full Bench of that Court in **K.C. Bokadia and another v. Dinesh Chandra Dubey**16 on a different point without disturbing the exposition of the law, that is under consideration here.

49. The distinction between what would constitute infringement of copyright on account of the statutory changes in the Copyright Act, 1957, varying the earlier provisions of the Imperial Copyright Act, 1911 or the Indian Copyright Act, 1914 fell for consideration of a Division Bench of the Madras High Court in **The Daily Calendar Supplying Bureau, Sivakasi v. The United Concern**17. There, it was held:

"15. ..... Learned Counsel Sri Sankara Ayyar, appearing for the appellant, drew our attention to a difference between the earlier Copyright Act and the Act of 1957. In section 35(1)(c) of the former Act infringing when applied to a copy of a work, in which copyright subsists, has been defined as any copy including any colourable imitation, made, or imported in contravention of the provisions of this Act. It was urged before us that the new Act did not refer to colourable imitation as constituting an infringement. It was contended that any person could now make a colourable imitation of a painting or other artistic work without being held guilty of infringement of the copyright. The earlier Act had already defined what infringement of a copyright meant in section 2(1) but in another place of the same Act in section 35(1) the meaning of the word infringement was again explained. What Act XIV of 1957, did apparently was to bring together the definition of infringement in one place in section 14(1). The English Act of 1956 appears to have also left out the term colourable imitation of an autistics work as constituting an element of infringement. Adverting to this. Copinger observes in his *Law of Copyright* ninth edition at page 147:--

"Section 35(1) of the Act of 1911 in defining "infringing copy' employed the expression "colourable imitation' but this expression does not appear in the Act of 1956 The question therefore appears to turn solely upon the interpretation of the expression "reproduction' and the definition of that word in section 48(1) of the Act of 1956 does not assist, as this definition merely includes certain special forms of reproduction. It is apprehended, however, that the word "reproduction' in the Act of 1956 has the same sense as the word "copy' has acquired in copyright law."

16. After the deletion of the words colourable imitation in the Act of 1957, to find out the meaning of infringement one has therefore, necessarily to interpret the words "reproduce the work in any material form' Section 14(2) of the Act includes also the reproduction of a substantial part of the work, for the purposes of infringement of copyright. The word "reproduce' is a word of ordinary-popular usage. However, the Shorter Oxford English Dictionary refers to the progressive evolution of its meaning

"The action or process of bringing again before the mind in the same form. The action or process of repeating in a copy A copy or counterpart. A copy of a picture or other work of art by means of engraving or some other process and finally a

representation in some form or by some means of the essential features of a thing.'

17. It therefore appears quite likely that when Act XIV of 1957, repealed the earlier enactments and consolidated the law of copyright in India, it adopted the procedure followed in the English Act XIX of 1956, of using the word "reproduction' both of the work itself or a substantial part of it, as a sufficient indication of the scope of infringement and dropped the term "colourable imitation', as superfluous or redundant."

50. There was a wholesome consideration of the issue by the Supreme Court in **R.G. Anand v. Delux Films and others**18, where, what would constitute infringement of a copyright, led to elaborate guidance about it. In **R.G. Anand**, it was held:

"46. Thus, on a careful consideration and elucidation of the various authorities and the case law on the subject discussed above, the following propositions emerge:

1. There can be no copyright in an idea, subject-matter, themes, plots or historical or legendary facts and violation of the copyright in such cases is confined to the form, manner and arrangement and expression of the idea by the author of the copyrighted work.

2. Where the same idea is being developed in a different manner, it is manifest that the source being common, similarities are bound to occur. In such a case the courts should determine whether or not the similarities are on fundamental or substantial aspects of the mode of expression adopted in the copyrighted work. If the defendant's work is nothing but a literal imitation of the copyrighted work with some variations here and there it would amount to violation of the copyright. In other words, in order to be actionable the copy must be a substantial and material one which at once leads to the conclusion that the defendant is guilty of an act of piracy.

3. One of the surest and the safest test to determine whether or not there has been a violation of copyright is to see if the reader, spectator or the viewer after having read or seen both the works is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the original.

4. Where the theme is the same but is presented and treated differently so that the subsequent work becomes a completely new work, no question of violation of copyright arises.

5. Where however apart from the similarities appearing in the two works there are also material and broad dissimilarities which negative the intention to copy the original and the coincidences appearing in the two works are clearly incidental no infringement of the copyright comes into existence.

6. As a violation of copyright amounts to an act of piracy it must be proved by clear and cogent evidence after applying the various tests laid down by the case-law discussed above.

7. Where however the question is of the violation of the copyright of stage play by a film producer or a director the task of the plaintiff becomes more difficult to prove piracy. It is manifest that unlike a stage play a film has a much broader prospective, wider field and a bigger background where the defendants can by introducing a variety of incidents give a colour and complexion different from the manner in which the copyrighted work has expressed the idea. Even so, if the viewer after seeing the film gets atotality of impression that the film is by and large a

copy of the original play, violation of the copyright may be said to be proved."

51. Here, the comparison between the two scripts which the Court has undertaken albeit *prima facie*, shows that after the principle theme that is common to both scripts, are a host of differences in the script leading to the feature film. The protagonist, Mehra, in the script relating to the feature film, suddenly takes a diversion while proceeding to Delhi, when he comes across a road sign, where the diversion that leads to the shortcut indicates a distance to destination of 210 kms., instead of 285 kms. on the main highway. The scene is in a hilly terrain and the car is caught on a road full of snow. It is held up on account of a tree being uprooted and falling onto the road, causing the car to suddenly stop and bump against the snow.

52. By contrast, in the copyrighted version, the theme stands with a welcome to the protagonist in a club along with his newly-wedded wife (his second wife). There is a long course of events involving the protagonist Rohit and his newly-wedded wife Tanya, until time that he leaves to inspect a work site in between a holiday, with his wife. As he reaches the outskirts of the city, he comes across a petrol pump which is mysterious. There, he meets a very scary pump attendant. The highway that he then takes to his work site is mysterious and has no traffic. His car suddenly goes out of order, with steam rushing from somewhere under the bonnet. It does not restart. He walks on foot and finds himself in the midst of a forest. He returns back to the car. After some time, he gets out again, moves into the forest and meets another mysterious man, who ultimately takes him to a mysterious-looking dwarf, who has an equally mysterious-looking wife. The dwarf takes him to the house of a retired High Court Chief Justice, where he comes across four men from the legal profession in similar roles as in the script, giving rise to the feature film. The four men involved behave far more mysteriously than those in the feature film/ script. They act and behave in a much different manner. The manner in which they accuse Rohit of a crime and mock-trial him is quite different and distinctive *prima facie*. Rohit dies ultimately in a car accident at the same place, where his first wife had died.

53. Noticeably, in the script giving rise to the feature film, the four men of the legal profession and Mehra's introduction to them is in a much different fashion. The story leading to the mock trial is developed in its own individual way, much different from the copyrighted version. In the script that is the foundation of the feature film, there is a completely different end, where Mehra is sentenced to death by the Judge in the mock-trial. He was made to believe that he would indeed be hanged. During the course of trial, he goes into great distress and turns violent. During the trial and at the end of it, he utters many things, about which the men from the legal profession tell him that the camera connected to a recorder has captured crimes, to which Mehra has confessed during the mock trial and the incriminating facts that he had uttered. He is threatened with being put on his trial upon charges before a real court. He then tries to break away using his revolver. Mehra ultimately dies while running away falling into a chasm, and cannot be saved despite efforts by the four men who mocked his trial.

54. There is, thus, *prima facie* a materially different and distinctive

development and treatment of the same theme in both the scripts. In the *prima facie* opinion of this Court, there is, apart from the fundamentals of the basic theme that appear to have come from a common source, no such distinctive feature in the copyrighted version that have been *prima facie* plagiarized. It must be remarked here that whatever comparison has been done, is not, in any manner, a final expression of opinion on merits about the distinctive similarities or the dissimilarities. That is something that has to await trial, where wholesome evidence would now be led. All the remarks here are limited to the decision of the temporary injunction matter and nothing more.

55. Now, a still further issue that is required to be examined is what would happen if at the hearing, the plaintiff were to ultimately succeed. Would damages alone be recompense enough? There is relief sought by way of a decree for rendition of accounts of the advance amount received by the defendants from the distribution companies, television channels, OTT platforms, television networks by selling distribution rights/ streaming rights of the feature film, infringing the plaintiff's copyright. The said decree would entitle the plaintiff, if he succeeds, to proportionate proceeds on account, as may be determined that the film earns. But, apart from that, if the copyright is ultimately held to be infringed at the trial, monetary compensation may not be recompense enough. It is, therefore, to be ordered that if the plaintiff succeeds, all further displays of the feature film shall have to carry an acknowledgment, suitably to be displayed that the movie is based on the copyrighted work, which is the plaintiff's authorship. Also, the trial of the suit is to be expedited. Since the learned District Judge is hearing the suit himself, he will proceed with the suit, fixing one date every week and endeavour to conclude the trial within four months.

56. Subject to the above directions, the impugned order does not deserve to be disturbed.

57. The appeal is **disposed of** in terms of the aforesaid orders. Costs in this appeal shall abide the event in the suit.

58. Let this order be communicated to the District Judge, Ghaziabad by the Registrar (Compliance).

(2021)09ILR A402
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.08.2021

BEFORE

THE HON'BLE MANISH MATHUR, J.

FAFO No. 566 of 2000

Smt. Sushma Gupta ...Appellant
Versus
Smt. Siya Peyari & Ors. ...Respondents

Counsel for the Appellant:
N.K. Seth, Ashish Chaturvedi

Counsel for the Respondents:
Ajeet Srivastava, Anil Srivastava, Siddharth Sinha

Motor accidental Compensation claim challenged as to the factum of increase in the future income and enhancement under conventional heads-monthly income considered on notional basis-increase in future prospects of income would be appliable on both income derived on the basis of evidence or notional-amount enhanced.

Appeal partly allowed. (E-9)

List of Cases cited:

1. National Insurance Co. Ltd. Vs Pranay Sethi & ors., (2017) 16 SCC 680

2. Sarla Verma (Smt.) & ors. Vs Delhi Transport Corporation & anr., (2009) 6 SCC 121

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

1. Heard Mr. N. K. Seth, Senior Advocate assisted by Mr. Ashish Chaturvedi, learned counsel for claimant-appellant and Mr. Anil Srivastava, learned counsel appearing on behalf of respondent no.3, the Oriental Insurance Company. The other respondents being clearly proforma in nature have not put in appearance.

2. First Appeal from Order has been filed under Section 110-B of the Motor Vehicles Act, 1939 against the judgment and award dated 07.09.2000 passed in Motor Accident Claim Petition No.83 of 1987 whereby the claim arising out of death of the accident victim has been allowed awarding a sum of Rs.6,89,500/-.

3. From a perusal of the impugned judgment, it is apparent that the claim petition had been filed for awarding a sum of Rs.30,00,000/- along with interest at the rate of 18% per annum as compensation. The accident is said to have occurred on 26.04.1987 at about 1:00 a.m. when the deceased Rakesh Gupta along with others was travelling in an Ambassador car and met with an accident with a petrol tanker coming from the opposite direction resulting in fatal injuries to Rakesh Gupta who subsequently succumbed to the injuries while admitted in the hospital. Initially, a claim petition had been filed by the parents of the deceased but the same was dismissed as not pressed. Subsequently, the present claimants/appellants being the widow and daughter of the deceased have filed the claim petition.

4. Learned counsel appearing on behalf of appellant at the very outset restricts his challenge to the impugned judgment and award only with regard to the factum of increase in the future income and for enhancement under conventional heads. It is submitted that although the claim petition had been filed indicating monthly income of deceased as Rs.25,000/- per month but the Tribunal has held that the aforesaid monthly income could not be proved by the claimants and has thereafter held an income of Rs.5,000/- per month to be established with regard to the deceased. Although it has been submitted that the deceased was a jeweller by profession and had purchased his own shop and had a vehicle of his own, therefore, the income assessed by the Tribunal is towards the lower side but no challenge thereto is being raised. Learned counsel for appellant has submitted that in view of subsequent judgment of Hon'ble the Supreme Court in **National Insurance Company Ltd.** v. **Pranay Sethi and others** reported in (2017) 16 SCC 680, Hon'ble the Supreme Court has held that in case a deceased was self-employed or was on a fixed salary, an addition of 40% of the established income is warranted where the deceased was below the age of 40 years. It is submitted that since in the present case, age of the deceased was 31 years, the addition of 40% to the established income was required. Similarly, basing his claim on the aforesaid judgment, it is submitted that reasonable figures with regard to conventional heads, namely, loss of estate, loss of consortium and funeral expenses with enhancement at

the rate of 10 per cent in every three years was also required to be made.

5. Learned counsel appearing on behalf of respondent-insurance company per contra has submitted that it is evident from a reading of the impugned judgment that the Tribunal has recorded that the parents of the deceased had claimed the income of the deceased as Rs.3,000/- per month and since despite the said claim, the income of the deceased has been assessed at Rs.5,000/- per month, the prospects of future increase in income has already been taken care of by the Tribunal. It has also been submitted that 'just compensation' as indicated in the old Act of 1939 and the new Act of 1988 has to be seen as on the date of accident and not subsequently. In view of aforesaid, it is submitted that the Tribunal has already provided just compensation as was required to be given to the claimants and there is no error whatsoever in the impugned judgment and award on that score. It has also been submitted that as per judgment of Hon'ble the Supreme Court in the case of **Sarla Verma (Smt.) and others v. Delhi Transport Corporation and another** reported in (2009) 6 SCC 121, interest at the rate of 6 per cent per annum has been awarded and even in the Rules framed in terms of the Act of 1988, interest is required to be awarded at the rate of 7 per cent although the Tribunal has awarded interest at the rate of 12 per cent per annum, which is more than the just compensation as required to be made and, therefore, there is no requirement of enhancement on that sore as well.

6. Learned counsel has further more submitted that even as per judgment in the case of **National Insurance Company Ltd. v. Pranay Sethi (supra)**, the increase in future prospects of income is required to be calculated only in case of established income and since in the present case, the income of the deceased was not established but was only arrived at by the Tribunal on notional basis, the future prospects of increase in income was not required to be taken care of.

7. Upon consideration of material on record and submissions advanced by learned counsel for the parties, particularly by learned counsel for answering respondent it is evident that earlier the insurance company had filed First Appeal From Order No.633 of 2005 against the impugned judgment and award which was dismissed vide order dated 23.08.2005 on the ground of limitation. Prior to that, the Insurance Company had also filed Writ Petition No.2930(M/S) of 2000 against the impugned judgment and award in which vide order dated 16.12.2004, the petitioner Insurance Company was required to deposit the entire amount of compensation including interest under the judgment and award. It is submitted that in terms thereof, deposit was made before the Tribunal. It is further submitted that in pursuance to the directions passed by this Court in First Appeal From Order No.633 of 2005, the balance amount was deposed by the Insurance Company and further more an amount of 25,000/- as statutory deposit has also been made at the time of filing of the present appeal.

8. Upon a perusal of impugned judgment and award, it appears that the present claimants being the widow and daughter of the deceased had filed the claim petition indicating the income of the deceased as Rs.25,000/- per month claiming that he was engaged in the profession of a jeweller. However, the

Tribunal has disbelieved the income of the deceased as claimed with specific recording of a finding that the claimants were unable to prove the aforesaid income by any documentary or oral evidence. Learned counsel for appellant submits that he is not challenging the income taken by the Tribunal as Rs.5,000/- per month with regard to the deceased and is pressing the appeal only on the ground of increase in the future income as well as under the head of conventional loss of income.

9. With regard to the submissions pertaining to increase in future prospects of income, learned counsel has placed reliance on the decision in **National Insurance Company Ltd. v. Pranay Sethi**(supra). It is evident from a reading of the aforesaid judgment that the same pertained to an accident that had taken place after the advent of the Motor Vehicles Act, 1988 whereas in the present case, the accident had taken place at the time when the Motor Vehicles Act, 1939 was prevailing.

10. Regarding the two enactments, it is seen that the concept of payment of compensation in the old Act of 1939 was covered under Section 110-B, which is as follows:-

*"**110-B. Award of the Claims Tribunal.** - On receipt of an application for compensation made under section 110-A, the Claims Tribunal shall, after giving the parties an opportunity of being heard, hold an inquiry into the claim and may make an award determining the amount of compensation which appears to it to be just and specifying the person or persons to whom compensation shall be paid; and in making the award the Claims Tribunal shall specify the amount which shall be paid by the insurer or owner or driver of the vehicle involved in the accident or by all or any of them, as the case may be"*

11. With the advent of new Motor Vehicles Act, 1988, the procedure for award of Claims Tribunal and award of compensation has been dealt with under Section 168, which is as follows:-

*"**168 : Award of the Claims Tribunal.** - On receipt of an application for compensation made under section 166, the Claims Tribunal shall, after giving notice of the application to the insurer and after giving the parties (including the insurer) an opportunity of being heard, hold an inquiry into the claim or, as the case may be, each of the claims and, subject to the provisions of section 163 may make an award determining the amount of compensation which appears to it to be just and specifying the person or persons to whom compensation shall be paid and in making the award the Claims Tribunal shall specify the amount which shall be paid by the insurer or owner or driver of the vehicle involved in the accident or by all or any of them, as the case may be:*

"Provided that where such application makes a claim for compensation under section 140 in respect of the death or permanent disablement of any person, such claim and any other claim (whether made in such application or otherwise) for compensation in respect of such death or permanent disablement shall be disposed of in accordance with the provisions of Chapter X."

(2) The Claims Tribunal shall arrange to deliver copies of the award to the parties concerned expeditiously and in any case within a period of fifteen days from the date of the award.

(3) When an award is made under this section, the person who is required to

pay any amount in terms of such award shall, within thirty days of the date of announcing the award by the Claims Tribunal, deposit the entire amount awarded in such manner as the Claims Tribunal may direct. "

The proviso to Section 168(1) of the Act of 1988 has been omitted with effect from 01.09.2019.

12. Upon a comparison of aforesaid two provisions, it is clear that the Claims Tribunal on receipt of an application for compensation is required to make an award after holding an enquiry and determining the amount of compensation which appears to it to be 'just'. Both under Section 110-B of the old Act and Section 168 of the new Act, it is the duty of the Claims Tribunal in case of awarding compensation, to ascertain that the compensation awarded is 'just'. From a comparison of the aforesaid two provisions, it is apparent that the Claims Tribunal while making award of compensation is required to determine the amount which appears to it to be just. As such both the provisions with regard to aforesaid fact appear to be *pari materia.*

13. Hon'ble the Supreme Court in the case of **National Insurance Company Ltd.** v. **Pranay Sethi** (supra) has explained the concept of increase in future prospects of income which is relatable to the concept of the term 'just compensation'. It has been held that to follow the doctrine of annual income at the time of death and not to add any amount with regard to future prospects to the income for the purpose of determination of multiplicand would be unjust and the computation of compensation has to include future prospects so that the method will come within the ambit and sweep of just compensation as postulated under Section 168 of the Act. The relevant portion of the judgment in the case of **National Insurance Company Ltd.** v. **Pranay Sethi** (supra) is as follows:-

"57.Having bestowed our anxious consideration, we are disposed to think when we accept the principle of standardisation, there is really no rationale not to apply the said principle to the self-employed or a person who is on a fixed salary. To follow the doctrine of actual income at the time of death and not to add any amount with regard to future prospects to the income for the purpose of determination of multiplicand would be unjust. The determination of income while computing compensation has to include future prospects so that the method will come within the ambit and sweep of just compensation as postulated under Section 168 of the Act. In case of a deceased who had held a permanent job with inbuilt grant of annual increment, there is an acceptable certainty. But to state that the legal representatives of a deceased who was on a fixed salary would not be entitled to the benefit of future prospects for the purpose of computation of compensation would be inapposite. It is because the criterion of distinction between the two in that event would be certainty on the one hand and staticness on the other. One may perceive that the comparative measure is certainty on the one hand and uncertainty on the other but such a perception is fallacious. It is because the price rise does affect a self-employed person; and that apart there is always an incessant effort to enhance one's income for sustenance. The purchasing capacity of a salaried person on permanent job when increases because of grant of increments and pay revision or for some other change in service conditions, there is always a competing attitude in the private

sector to enhance the salary to get better efficiency from the employees. Similarly, a person who is self-employed is bound to garner his resources and raise his charges/fees so that he can live with same facilities. To have the perception that he is likely to remain static and his income to remain stagnant is contrary to the fundamental concept of human attitude which always intends to live with dynamism and move and change with the time. Though it may seem appropriate that there cannot be certainty in addition of future prospects to the existing income unlike in the case of a person having a permanent job, yet the said perception does not really deserve acceptance. We are inclined to think that there can be some degree of difference as regards the percentage that is meant for or applied to in respect of the legal representatives who claim on behalf of the deceased who had a permanent job than a person who is self-employed or on a fixed salary. But not to apply the principle of standardisation on the foundation of perceived lack of certainty would tantamount to remaining oblivious to the marrows of ground reality. And, therefore, degree-test is imperative. Unless the degree-test is applied and left to the parties to adduce evidence to establish, it would be unfair and inequitable. The degree-test has to have the inbuilt concept of percentage. Taking into consideration the cumulative factors, namely, passage of time, the changing society, escalation of price, the change in price index, the human attitude to follow a particular pattern of life, etc., an addition of 40% of the established income of the deceased towards future prospects and where the deceased was below 40 years an addition of 25% where the deceased was between the age of 40 to 50 years would be reasonable."

14. It is a relevant factor that the judgment in **National Insurance Company Ltd.** v. **Pranay Sethi** (supra) has been rendered in the year 2017 whereas the accident in the present case had taken place in the year 1987 at the time when the old Act of 1939 was prevailing. However, as has already been noticed herein above, the provisions pertaining to award of just compensation as indicated in Section 110-B of the Act of 1939 and Section 168 of the Act of 1988 are *pari materia* and since the judgment in **National Insurance Company Ltd.** v. **Pranay Sethi** (supra) with regard to increase in future prospects of income is based on the concept of just compensation, it is held that the judgment in **National Insurance Company Ltd.** v. **Pranay Sethi** (supra) although passed under the new Act of 1988 in the year 2017, would have retrospective application with regard to accidents having taken place under the old Act of 1939 particularly in view of the term 'just compensation' as indicated in Section 110-B of the Act of 1939. As such, it is held that the judgment rendered by Hon'ble the Supreme Court in **National Insurance Company Ltd.** v. **Pranay Sethi** (supra) would have retrospective application with regard to just compensation and consequences following there from.

15. Learned counsel for answering-respondent has submitted that since the Tribunal has already taken the income of deceased as Rs.5000/- per month instead of Rs.3,000/- per month claimed by the parents of the deceased, it would necessarily imply that increase in future prospects of income has been taken care of by the Tribunal. Regarding the aforesaid submission, it is apparent that it was the parents of the deceased who had claimed an income of Rs.3,000/- per month pertaining

to the deceased but the present claimants had always claimed an income of Rs.25,000/- per month of the deceased who was alleged to be engaged in the profession of a jeweller. The Tribunal has recorded a finding that the claimants were unable to prove income of Rs.25,000/- per month either by any documentary or oral evidence and has thereafter recorded the income of the deceased as Rs.5,000/- per month. In such circumstances, it is evident that the Tribunal has considerably scaled down the income of the deceased from Rs.25,000/- per month to Rs.5,000/- per month and there is in fact no increase in the income of the deceased recorded by the Tribunal. The income claimed by the parents of the deceased would be completely irrelevant in the present circumstances considering the fact that the claim petition filed by the parents of the deceased earlier had already been dismissed as not pressed. The claim petition filed by the claimants herein has to be taken as per the pleadings indicated in the present claim petition and not of any other claim petition. As such, the submission of learned counsel for answering respondent that the Tribunal has increased the income of the deceased over and above that has been claimed, does not appear from the record and the argument therefore is rejected.

16. It has also been submitted by learned counsel appearing on behalf of respondent insurance company that excessive interest has been granted by the Tribunal which, therefore also indicates that just compensation over and above which was required has already been granted. It has been submitted that in **Sarla Verma**(supra), interest has been granted at the rate of 6% per annum while in the present case, interest has been granted at the rate of 12% per annum. It is noticeable that the appeal filed by the answering respondent has already been dismissed vide judgment and order dated 23.08.2005 as noticed herein above and there is no other challenge to the impugned judgment and award. In the absence of any challenge to the impugned judgment and award at present at the instance of the answering respondent insurance company, no exception can be taken to the interest awarded by the Tribunal.

17. Learned counsel for the answering respondent has also submitted that even as per judgment rendered in **National Insurance Company Ltd.** v. **Pranay Sethi**(supra), increase in future prospects of income has been taken only in case of established income and not on the basis of notional income and therefore since in the present case, the income taken by the Tribunal is only notional and not established, there cannot be any increase with regard to future prospects.

18. The aforesaid aspect regarding increase in future prospects of income has been dealt with in paragraph 59.4 of the decision rendered by Hon'ble the Supreme Court in **National Insurance Company Ltd.** v. **Pranay Sethi**(supra), which is as follows:-

"59.4.In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component."

19. From a perusal of the aforesaid judgment, it is evident that addition in the future prospects of income has to be taken in case of established income. It is also noticeable that notional income as per the Act of 1988 has been taken as Rs.3,000/- per month. In the present case, the Tribunal after disbelieving the income indicated by the claimants has taken the income of the deceased as Rs.5,000/- per month. Although there is no evidence indicated by the Tribunal regarding fixing of the aforesaid income of the deceased but the same in any case cannot be taken as notional income. Income determined by the Tribunal with regard to the deceased whether on the basis of evidence or otherwise even on the basis of notional would definitely be held as established income since it is based on a finding recorded by the Tribunal. Even if the Tribunal records income of a deceased person as notional, the same necessarily implies that such an income has been established by the Tribunal and as such it cannot be said that notional income arrived at by the Tribunal would not amount to established income. Consequently, the increase in future prospects of income would definitely be applicable whether the income derived at by the Tribunal is on the basis of evidence or even if taken to be notional. The submission of learned counsel for answering respondent to the contrary is, therefore rejected.

20. Considering the aforesaid aspects of the matter, and as has already been held herein above, the judgment rendered by Hon'ble the Supreme Court in **National Insurance Company Ltd.** v. **Pranay Sethi**(supra) would be applicable even in the present case where the accident had taken place prior to the advent of the Act of 1988. In view thereof, it would be evident that the concept of increase in future prospects of income as indicated in the said judgment would be applicable.

21. It is admitted by the parties and as has been held by the Tribunal that the age of the deceased at the time of the accident was 31 years. Increase in the established income as indicated in the judgment in **National Insurance Company Ltd.** v. **Pranay Sethi**(supra) is 40% in case the age of the deceased was below the age of 40 years. As such, it would be appropriate that the increase in future prospects of income with regard to the deceased is taken as 40% of the income established by the Tribunal pertaining to the deceased.

22. Similarly, in paragraph 59.8 of the decision in **National Insurance Company Ltd.** v. **Pranay Sethi**(supra), reasonable figures regarding conventional heads for loss of estate, loss of consortium and funeral expenses have been taken as Rs.15,000/-, Rs.40,000/- and Rs.15,000/- respectively which would be appropriate to award in the present case.

23. Considering the aforesaid aspect of the matter, the compensation awarded to the applicant would stand revised as hereinafter provided:-

The Tribunal has assessed monthly income of deceased at Rs.5,000/- per month, which is now required to be enhanced by 40%, which would lead to an income of Rs.7,000/- per month. Hence the annual income of deceased would stand at Rs.84,000/-. Considering the deceased would have spent one-third of his annual income towards maintaining himself, the annual income as such would stand reduced to Rs.56,000/- (84,000 ÷ ⅓ = Rs.28,000, 84,000(-)28,000 = Rs.56,000/-). The

Tribunal has taken the multiplier at 17 with which learned counsel for appellant does not have any objection. Hence the compensation would stand at Rs.9,52,000/- (56,000 X 17).

Description	**Awarded by Tribunal**	**Modified/enhanced by this Court**	**Difference**
compensation	Rs.6,89,500/-	9,52,000/-	Rs.2,62,500/-
loss of estate	Rs.2,500/-	Rs.15,000/-	Rs.12,500/-
loss of consortium	Rs.5,000/-	Rs.40,000/-	Rs.35,000/-
funeral expenses	Rs.2,000/-	Rs.15,000/-	Rs.13,000/-
TOTAL			**Rs.3,23,000/-**
rate of interest on the amount awarded by the Tribunal.	12% per annum from effective date as stipulated in the award.	remains the same as awarded by the Tribunal with no modification by this Court.	
rate of interest entitled by claimants on the enhanced amount	Not applicable	6% per annum from the date of institution of appeal before this Court i.e. 18.12.2020 till actual payment to the claimants.	

24. Consequently, the appeal succeeds and is **allowed** modifying the judgment and award dated 07.09.2000 passed in Claim Petition No.83 of 1987 in the aforesaid terms. The parties to bear their own costs.

25. Since it is submitted that the insurance company has already made certain deposits of the compensation awarded some of which apparently has already been withdrawn by the claimants, it is therefore provided that the enhanced compensation would be paid to the claimants after adjusting the amount that have already been paid to them. The claimants would also be entitled to the statutory amount of Rs.25,000/- which has been deposited at the time of filing of the present appeal.

(2021)09ILR A410
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.09.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE SUBHASH CHAND, J.

FAFO No. 724 of 2010

Smt. Rahisa Begum (since deceased) & Anr. ...Appellants
Versus
Shri Susheel Chandra Gupta & Anr. ...Respondents

Counsel for the Appellants:
Sri Mohd. Naushad Siddiqui

Counsel for the Respondents:

Sri Subhash Chandra Srivastava, Sri Dinesh Chandra Srivastava

Motor accident claim-quantum of compensation is challenged-Deceased had permanent job-wife of the deceased also died-son is the sole claimant-major and married-Tribunal held claimant not dependant on deceased-no amount under other heads was granted-only loss of estate-deceased neither author nor co-author of the accident-deduction of 50% from compensation is bad-order modified.

Appeal partly allowed. (E-9)

List of Cases cited:

1. The Oriental Insurance Co. Ltd. Vs Mangey Ram & ors., 2019 0 Supreme (All) 1067

2. New India Assurance Co.Vs Urmila Shukla decided by the Apex Court on 6.8.2021

3. First Appeal From Order No. 1818 of 2012 (Bajaj Allianz General Insurance Co.Ltd. Vs Smt. Renu Singh & ors.) decided on 19.7.2016

4. Khenyei Vs New India Assurance Company Limited & ors., 2015 LawSuit (SC) 469

5. Pramodkumar Rasikbhai Jhaveri Vs Karmasey Kunvargi Tak & ors. decided on 05.08.2002 in Appeal (Civil) No. 5436 of 1994,

6. Raj Rani & ors. Vs Oriental Insurance Co. Ltd. & ors. decided on 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 Co. Ltd. & ors., 2018) AIR (SC) 1143

8. Montford Brothers of St. Gabriel & anr. Vs United India Insurance & anr., 2014 1 ACC 461

9. Gujarat State Road Transport Corporation, Ahmedabad Vs Ramanbhai Prabhatbhai

10. National Insurance Co. Ltd. Vs Birender & ors., 2020 LawSuit (SC) 26

11. Uttar Pradesh State Road Transport Corp. Vs Tara Devi, 1995 LawSuit (All) 13,

12. Padma Devi Vs .P. State Road Transport Corp., 1988 LawSuit (All) 235

13. National Insurance Co. Ltd. Vs Pranay Sethi & ors., 2017 0 Supreme (SC) 1050

14. Satish Chand Sharma (deceased) & 3 ors. Vs Manoj Kumar & anr. F.A.F.O. No. 3160 of 2018 decided on 26.03.2021

15. Oriental InsuranceCo. Vs Kahlon @ Jasmali Singh @ Kahlon, LL 2021 SC 382

16. New India Assurance Co. Ltd. Vs Urmila Shukla & ors., LL 2021SC 359

17. Sarla Verma Vs Delhi Transport Corp., (2009) 6 SCC 12.

18. Smt. Hansagori P. Ladhani Vs The Oriental Insurance Co.Ltd., reported in 2007(2) GLH 291

19. Tej Kumari Sharma Vs Chola Mandlam M.S. General Insurance Co. Ltd

20. A.Vs Padma Vs Venugopal, [2012(1) GLH (SC), 442

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

1. Heard Sri Mohd. Naushad Siddiqui, learned counsel for appellant and Sri Dinesh Chandra Srivastava, learned counsel for insurance company.

2. This appeal, at the behest of the claimants, challenges the judgment and award dated 02.09.2009 passed by Motor Accident Claims Tribunal/Additional District Judge, Court No.16, Kanpur Nagar (hereinafter referred to as 'Tribunal') in M.A.C.P. No. 560 of 2006 awarding a sum of Rs.9,500/- with interest at the rate of 7.5% as compensation, under Section 166 of Motor Vehicles Act, 1988 (hereinafter referred to as M.V. Act).

3. The accident is not in dispute. The issue of negligence decided by the Tribunal is not in dispute. The Insurance Company has not challenged the liability imposed on them. The only issue to be decided is, the quantum of compensation awarded.

4. The facts as they are collated go to show that the deceased was having a permanent job. The Tribunal unfortunately did not compute the income, multiplier, had granted Rs.9,500/-. The Tribunal has held that the wife of the deceased Hasim Ali died and son of the deceased Kasim Ali is the sole claimant, he is major and married person, the learned Tribunal held that Kasim Ali was not dependant on the deceased and has held no amount under other heads could be granted and has misread the judgment and the learned Tribunal has held that the claimant is entitled only for the loss of estate. These findings are assailed on the ground that the provisions of Section 166 of the M.V. Act, 1988 and that the judgment of this Court in **The Oriental Insurance Company Ltd. Vs. Mangey Ram and others, 2019 0 Supreme (All) 1067** and the recent judgment of the Apex Court in **New India Assurance Company Vs. Urmila Shukla** decided by the Apex Court on 6.8.2021 as far as compensation to be paid is concerned has to be applied for grant of compensation. The Apex Court has held that the claimants even if they are major sons their rights would not be diminished. The right in a motor accidents claim case arise on the date the accident occurs, the subsequent happenings will not bring an end to the right of the legal heirs. The widow being the first legal heir would be entitled to receive compensation as per the M.V. Act.

5. It is submitted that the order is perverse and against the well settled principles of law. The learned Tribunal has misread the judgment of the Allahabad High Court in which he has placed reliance. The term dependent has not found place in the Act. For computing compensation legal representative has to be seen whether son is dependent on the father or not has no relevance.

6. The counsel for respondent has stated that no fault can be found as with the decision of Tribunal, the sole surviving claimant is not dependant on the deceased. The case of contributory negligence is rightly decided as the Car was being driven by the deceased, which hit the tanker for which site plan was believed by the Tribunal and finding him negligent does not need interference.

7. Having heard the learned counsel for the parties, issue of negligence be considered from the perspective of the law laid down.

8. 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.

9. The principle of contributory negligence has been discussed time and again. A person who either contributes or author of the accident would be liable for his contribution to the accident having taken place.

10. 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

11. 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."

18. 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 :

(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.

(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.

(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.

(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*

12. The latest decision of the Apex Court in **Khenyei (Supra)** has laid down one further aspect about considering the negligence more particularly composite/contributory negligence. The deceased or the person concerned should be shown to have contributed either to the accident and the impact of accident upon the victim could have been minimised if he had taken care. In this case the deceased was not the author or the co-author of the accident. On facts, the deceased was not plying the vehicle. Hence, the deduction of 50% from the compensation awarded is bad and is set aside.

13. The issue which has been decided by the Tribunal, as far as issue no.1 is concerned, the court below has come to the conclusion that driver of the offending vehicle has not come to the right side. The finding of fact regarding contributory negligence of the driver of the Maruti Car, we are of the considered opinion that the submissions made by the counsel for the claimant-appellant do not satisfy the conscious in this regard and that the findings as far as contributory negligence of the deceased is concerned, it cannot be interfered with. However, the contribution of the deceased in the accident would be 25% and not equal as the vehicles were of unequal magnitude. The deceased was himself driving the vehicle. The tanker dashed the car from the front side. The driver of the Truck had not appeared before the Tribunal. The P.W.2 Shiv Singh, is the eye witness of the accident, hence his evidence is relevant, which is reproduced as under:

"P.W.2-Shiv Singh, who is said to be eye witness of the occurrence, has stated that on 14.04.2006 at 9.45 p.m., near Dixit Market, Kalpi Road, Kanpur, he was standing and then, saw that a Tanker No. UP-78-T-6419 being driven rashly and negligently by it's driver, hit the Maruti Car No. UP-78-AD-1768 coming on wrong side from front side, as a result of which the driver of the alleged Maruti Car was seriously injured and the alleged Maruti Car was also badly damaged. Such accident was occurred due to rash and negligent driving of the Tanker's driver, who at fault. He had got lodged the FIR of this occurrence. The police also recorded his statement regarding the accident in question."

"In this very case, the driver of the offending vehicle i.e. Tanker's driver was the most important witness of the alleged accident but he has not dared to come in the witness box. In the absence of any unexpected development, it was for him to explain as to how the accident took place but no such explanation has been given by him in respect of the alleged accident. Under these circumstances, I have no valid reason to disbelieve the statements of the witnesses, who have examined in the court in respect of the accident in question, particularly, when no oral or documentary evidence has been adduced on behalf of the opp. Parties.

From the perusal of the site-plan paper no.21-C, it reveals that the mark "A' has been shown as the place of occurrence. It is crystal clear that the tanker was being driven by it's driver on wrong side of the road, hit the Maruti Car on front side. There is head on collision between two vehicles involved in the alleged accident.

From the discussions made above, I come to the conclusion that the accident in question was occurred due to contributory negligence on the part of the drivers of both the vehicles involved in the alleged accident, on the alleged date, time and place."

14. The driver of the Tanker did not appear before the Tribunal despite that the learned Tribunal has returned the finding that deceased was also negligent. 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 reason being the Tanker was being driven in rash and negligent when hit the Maruti Car, just because there was head collision of both the vehicles involved, only because of that it cannot be said that drivers of both the vehicles had contributed to the accident having taken place. We are unable to accept the submissions of the counsel for respondents that the deceased was more negligent but we uphold the finding of negligence of the driver of the Maruti Car, but we cannot hold him negligent even to the tune of 10%. From the attending circumstances also and the findings of fact no reasons are given why in last paragraphs the learned Tribunal has returned the finding that drivers are negligent.

15. The Tribunal has held that the deceased too was negligent in driving the vehicle. The reasoning given by the Tribunal to hold the deceased negligent and that he had contributed to 50% of the

accident is perverse, just because there was collision of two vehicles, and that the driver of the car was having valid driving license and the registration of the vehicle was there and just because the the license of the deceased was not produced before the Tribunal, it cannot mean that he was negligent. The ocular version of P.W.3 on the contrary goes to show that the deceased was driving his Maruti Car on his correct side. Thus, the finding on facts is not only bad in law but is perverse, therefore, we hold that the Tribunal has committed an error in holding the deceased to have contributed to the accident having taken place. The vehicle involved in the accident is Car and Tanker. This finding of Tribunal is perverse because the driver of Tanker has not been stepped in witness box. The Tanker was driven on the road on wrong side, despite that without assigning any reason negligence to the tune of 50% is attributed, is perverse. The Tribunal is expected to give reasons for the finding it arises that.

COMPENSATION:-

16. Learned counsel for appellant has relied on the decision of the Apex Court titled as **Montford Brothers of St. Gabriel and another Vs. United India Insurance and another, 2014 1 ACC 461** and on the judgment of **Gujarat State Road Transport Corporation, Ahmedabad Vs. Ramanbhai Prabhatbhai** and the learned counsel for respondent has relied on the decision of Apex Court in **National Insurance Company Ltd. Vs. Birender and others, 2020 LawSuit (SC) 26**, so as to contend that the dependents of the deceased, who has received benefits would not be entitled for the same. The learned counsel for the appellant has also relied on the said judgment.

17. Learned counsel for appellant has further relied on the authoritative pronouncements of this High Court in **Oriental Insurance Company Ltd. Vs. Mangey Ram and others (Supra), Uttar Pradesh State Road Transport Corporation Vs. Tara Devi, 1995 LawSuit (All) 13,** and **Padma Devi Vs. .P. State Road Transport Corporation, 1988 LawSuit (All) 235,** to contend that non grant of compensation except non pecuniary damages is against mandate of this Court.

18. It is submitted that the Tribunal has not granted any amount towards future loss of income to the claimants which is required to be granted in view of the decision in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050.** It is further submitted that the multiplier, amount under non-pecuniary heads are not awarded. The interest awarded by the Tribunal is on the lower side and requires enhancement.

19. Learned counsel for respondent-insurance company has vehemently submitted that the compensation cannot be granted to the appellant and the grant of compensation by the Tribunal is justified as the legal heir or dependant of the deceased, namely, the widow passed away during the pendency of litigation. The sole heir is not the dependant and was not dependant, who is legal heir and therefore, he is not entitled to the benefit other than granted by the Tribunal known as non pecuniary damages and therefore, the order of the Tribunal does not call for any interference or enhancement. The rate of interest granted also does not call for any interference.

20. Recently the Division Bench in which one of us (Hon'ble K.J. Thaker) had

an occasion to deal with the question of the amount which would be admissible to the family members of the deceased where the family members were admittedly **major**. The judgment titled as **Satish Chand Sharma (deceased) and three others Vs. Manoj Kumar and another F.A.F.O. No. 3160 of 2018 decided on 26.03.2021,** therefore, it is submitted by the counsel for appellant that non grant of any amount to the legal heir is bad in the eye of law.

21. The motor accident claim is based on the fact that the right to sue would survive on the legal representative on the date of incident occurred. The original claimant widow would be entitled to the compensation and the right to compensation would accrue on the date of the accident. It would be beneficial for us to reproduce the provisions of Sections 166, 168 and 169 of the M.V. Act, 1988.

"166. Application for compensation.-- (1) An application for compensation arising out of an accident of the nature specified in sub-section (1) of Section 165 may be made--

(a) by the person who has sustained the injury; or

(b) by the owner of the property; or

(c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or

(d) by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be:

Provided that where all the legal representatives of the deceased have not joined in any such application for compensation, the application shall be made on behalf of or for the benefit of all the legal representatives of the deceased and the legal representatives who have not so joined, shall be impleaded as respondents to the application.

(2) Every application under sub-section (1) shall be made, at the option of the claimant, either to the Claims Tribunal having jurisdiction over the area in which the accident occurred, or to the Claims Tribunal within the local limits of whose jurisdiction the claimant resides or carries on business or within the local limits of whose jurisdiction the defendant resides, and shall be in such form and contain such particulars as may be prescribed:

Provided that where no claim for compensation under Section 140 is made in such application, the application shall contain a separate statement to that effect immediately before the signature of the applicant.

(3) * * * *

(4) The Claims Tribunal shall treat any report of accidents forwarded to it under sub-section (6) of Section 158 as an application for compensation under this Act."

"168. Award of the Claims Tribunal.-

(1)

.....

(2)

.....

(3) When an award is made under this section, the person who is required to pay any amount in terms of such award shall, within thirty days of the date of announcing the award by the Claims Tribunal, deposit the entire amount awarded in such manner as the Claims Tribunal may direct."

"Section - 169. Procedures And Powers Of Claim Tribunals.-

(1) In holding any inquiry under section 168, the Claims Tribunal may, subject to any rules that may be made in

this behalf, follow such summary procedure as it thinks fit.

(2) The Claims Tribunal shall have all the powers of a Civil Court for the purpose of taking evidence on oath and of enforcing the attendance of witnesses and of compelling the discovery and production of documents and material objects and for such other purposes as may be prescribed; and the Claims Tribunal shall be deemed to be a Civil Court for all the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

(3) Subject to any rules that may be made in this behalf, the Claims Tribunal may, for the purpose of adjudicating upon any claim for compensation, choose one or more persons possessing special knowledge of and matter relevant to the inquiry to assist it in holding the inquiry.

22. The recent judgment of Apex Court in **Oriental Insurance Company Vs. Kahlon @ Jasmali Singh @ Kahlon, LL 2021 SC 382,** will enure also for benefit of the appellants herein. The compensation in these kind of litigation will accrue on the date of the accident. The legal heir comprised of wife, namely, the widow and the son. The provisions of Section 166 of the Motor Vehicle Act does not provide that claimants should be dependant of deceased. The term dependant is not mentioned in Section 166 of Act, it is legal representatives and therefore, not granting any amount under the head of loss of income for the loss of estate to the widow of the deceased is arbitrary and requires to be set aside and quashed.

23. We will have to deduct what was the tax the deceased was liable and therefore, the submission of counsel for appellant that his income should be considered as Rs.40,000/- per month being a salaried person has to be accepted to which as per the Uttar Pradesh Rules, 1998 and the judgment of **New India Assurance Company Ltd. Vs. Urmila Shukla and others, LL 2021SC 359,** we deem it fit to add the amount of future loss of income as he was below with the age of 50 years, hence 30% will have to be added, which would come to Rs.12,000/- per year. The deceased was survived by his widow and son, therefore, 1/2 will have to be deducted towards the personal expenses of the deceased and multiplier would be 13 as the deceased died in the age bracket of (46-50 years). As far as amount under the head of non-pecuniary damages are concerned, it should be Rs.70,000/- will have to be added in view of the decision of the Apex Court in **Pranay Sethi (Supra)** plus 10% increase for three years and out of which 10% will have to be deducted for negligence of the deceased.

24. In view of the decisions cited before us, it is very clear that in provisions of Section 166 of the Motor Vehicle Act, the word legal representative is the crux of the matter. A widow will fall in Clause (1)(a) of legal representative and therefore, it cannot be said that the widow will not be entitled to any amount under law of compensation. Had the matter been decided immediately after it was filed would Tribunal have not granted the amount, the answer is it would have cause of action arises on the day on which the accident occurs. In this view of the matter, the finding of the Tribunal is contrary to the well settled legal principles. The judgment in **1988 ACJ page 667 (Alld) and 1996 (1) TAC page 614 (Alld)** holding that an adult person having wife and children are not entitled for any compensation and they cannot be deemed to be dependant on his father or mother. This finding in the year

2009 is not sustainable in view of decision in the case of **Padma Devi (Supra).**

25. The decisions cited by the counsel for appellant shall have recent origin and which relate to the definition of legal representative and the fact that term legal representative has been given very wide connotation as has been in the judgment of **Montford brothers (Supra)** because the term legal representative has not been given in the Motor Vehicle Act but Section 2(11) of Civil Procedure Code will have to be taken into consideration.

26. We would alter the principle of deduction for personal expenses. The deceased had a major son, who cannot be said to be dependant on father or mother. The only dependant on him would be his widow and therefore, it can be safely said that he would be spending half of the income on himself being salaried person and therefore, Rs.52,000/- would have to be halved.

27. We do not disturb the rate of interest granted by the Tribunal looking to the fact that appeal has remain pending for no fault of the insurance company, hence we do not deem it fit enhancing the rate of interest.

28. Having heard the counsel for the parties and considered the factual data, this Court found that the accident occurred on 14.4.2006 causing death of Hasim Ali who was 48 years of age and left behind him, his widow and son. The deceased who was working as Senior Operator (Field) in Indian Oil Corporation and was getting salary Rs.43,501/- per month. Out of which permissible deductions under Income Tax would be deducted, we round up the income at Rs.40,000/- per month. The deceased was died at the age of 48 years (46-50 years), hence 30% will have to be added in view of the decision of the **Pranay Sethi (Supra).**

29. We have come to the conclusion that the deceased had also contributed to the accident taking place, reason being though the Tribunal has not given its reasoning for holding him negligent. The impact of the accident would show that there was some contributory negligence on the part of the deceased and therefore, we hold the deceased upto 10% negligent.

30. The deceased being married, the deduction towards personal expenses of the deceased should be 1/3 but here as narrated above it would be on the dependant namely widow, would be 1/2 in view of the decisions relied on by the counsel for appellant. As far as the multiplier is concerned, the deceased being in the age bracket of 46-50 years, it should be 13 in view of the decision of the Apex Court in **Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 12.**

31. Hence, the total compensation payable to the appellants is computed herein below:

i. Income: Rs.40,000/-

ii. Percentage towards future prospects : Rs.12,000/- (30%)

iii. Total income : Rs. 40,000 + 12000 = Rs. 52,000/-

iv. Income after deduction of 1/2: Rs. 26,000/-

v. Annual income : Rs. 26,000 x 12 = Rs.3,12,000/-

vi. Multiplier applicable : 13

vii. Loss of dependency: Rs.3,12,000 x 13 = Rs.40,56,000/-

viii. Amount towards non pecuniary damages : Rs.70,000/-

ix. Total compensation :Rs.41,26,000/-

32. No other grounds are urged orally when the matter was heard.

33. 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% from the date of filing of the claim petition till the date of award and 6% thereafter till the amount is deposited. The amount already deposited be deducted from the amount to be deposited.

DEDUCTIONS OF INCOME TAX FROM THE COMPENSATION AWARDED:

34. 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,** 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 claimants in their proportion 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 exceed Rs.50,000/- in any financial year, the deduction is not permissible, registry of the Tribunal is directed to allow the claimants 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.

DISBURSEMENT BY TRIBUNAL:

35. The sole claimant being major and not an illiterate person the judgment of **A.V. Padma Vs. Venugopal, [2012(1) GLH (SC), 442]** will be followed by Tribunal as 11 years have already elapsed since the time of appeal and amount be granted.

36. We request the Registrar General to forward this judgment to the concerned Tribunal (Sri V.K. Srivastava, HJS.) whenever he is posted with a request to be more careful as he has not considered the judgments of Apex Court.

37. This Court is thankful to both the learned Advocates for getting this matter disposed of during this pandemic.

38. Let record of court below be sent back to the Tribunal concerned.

(2021)09ILR A422
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.08.2021

BEFORE

THE HON'BLE SUNEET KUMAR, J.

FAFO No. 748 of 2021

Shri Ramesh Kumar Agarwal ...Appellant
Versus
Shri Naresh Kumar Agarwal & Anr.
...Respondents

Counsel for the Appellant:
Ms. Aarushi Khare, Sri Vinay Khare (Senior Adv.)

Counsel for the Respondents:
Sri Rishabh Agarwal

Arbitration Act-Once Arbitration proceeding has commencedand arbitral tribnal constituted-interim relief to be sought before the Tribunal as mandated u/s 9(3) -jurisdiction of Court not ousted completely but has been restricted to impress the court of circumtances which may not render the remedy u/s 17 efficacious-failed to prove circumstances exist-Commercial court justified in declining application for interim measures.

Appeal dismissed. (E-9)

List of Cases cited:

1. Benara Bearing & Pistons Ltd. Vs Mahle Engine Components India Pvt. Ltd, 2018 AIR CC 3244

2.Tufan Chatterjee Vs Rangan Dhar, AIR 2016 Cal. 213

3. Martin & Harris Ltd. Vs 6th A.D.J., (1998) 1 SCC 732

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

1. Heard Sri Vinay Khare, learned Senior Advocate, assisted by Ms. Aarushi Khare, learned counsel for the appellant and Sri Rishabh Agarwal, learned counsel for the respondents.

2. This appeal, filed under Section 37(1) of Arbitration and Conciliation Act, 1996,1 is directed against the judgment and order dated 05.03.2021, passed by the Commercial Court, Jhansi, in Misc. Case No. 16 of 2020 (Ramesh Kumar Agarwal Vs. Naresh Kumar Agarwal and another) holding that the Commercial Court would lack jurisdiction under Section 9 of Act, 1996, on the Arbitrator being appointed, accordingly, ordered to return the record under Order 7 Rule 10 of Code of Civil Procedure, 19082.

3. The respondents executed a partnership deed to constitute a firm in the name and style, "M/s Shanti Construction", for the business of stone crushing or any other business as agreed. As per the deed, the profit amongst partners was to be divided at 33.34 per cent to appellant and 33.33 per cent to each respondent. A dispute arose with regard to share of profit, non payment of salary, denial to access books of accounts, stock material and not allowing the appellant to be involved in the day to day working of the firm. The appellant invoked the arbitration clause of the deed. Respondents did not agree to the Arbitrator proposed by the appellant and also failed to propose an Arbitrator. The appellant approached this Court for appointment of an Arbitrator under Section 11 of the Act, 1996, by filing Arbitration Application No. 57 of 2020. During pendency of the application under Section 11, appellant filed a petition under Section 9 before Commercial Court, Jhansi, for interim measure to protect the interest of the appellant. The respondents filed written statement. The Commercial Court adjourned the matter for 05.03.2021. In the meantime, this Court appointed an independent Arbitrator vide order dated 23.02.2021. On the matter being taken up, Commercial Court passed the impugned order holding therein that on appointment of an Arbitrator, Commercial Court would

lack jurisdiction to proceed under Section 9 of Act, 1996, accordingly, ordered return of the record under Order 7 Rule 10 CPC relegating the parties to take remedy before the Arbitrator under Section 17.

4. The order is being assailed, *inter alia*, on the ground that the Commercial Court committed an error in holding that it lacks jurisdiction upon appointment of an Arbitrator; impugned order is illegal and against the provisions of Section 9 of the Act, 1996; an application for interim relief is maintainable before the Commercial Court, before or during the pendency of arbitral proceedings or at any time after the making of the arbitral award till it is enforced; Commercial Court failed to exercise jurisdiction vested in it under Section 9 of Act, 1996.

5. The learned counsel for the appellant has placed reliance on **Benara Bearing and Pistons Ltd. Vs. Mahle Engine Components India Pvt. Ltd.**3

6. Learned counsel appearing for the respondents opposed the appeal and submits that the order is in accordance with the law; once the arbitral tribunal has been constituted, the Court shall not entertain an application for interim measures under Section 9 of Act, 1996; the appellant has not pleaded before the Court below or before this Court that the circumstances existed which may not render the remedy provided under Section 17 efficacious. It is urged that appeal being devoid of merit, is liable to be dismissed at the admission stage itself.

7. Learned counsel for the respondents has placed reliance on **Tufan Chatterjee Vs. Rangan Dhar**4.

8. The short question, that arises for determination in this appeal, is whether Commercial Court was justified in not entertaining the petition under Section 9 filed for interim measure on constitution of the arbitral tribunal.

9. Before examining the rival submissions advanced by learned counsels for the parties, it would be apposite to consider the relevant provisions of Act, 1996.

10. Section 9, provides for "Interim measure, etc. by Court". It reads thus:

"9. Interim measures, etc., by Court.--(1) A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court--

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:--

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which

may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the Court to be just and convenient,

and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.

(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious." *(emphasis added)*

11. Sub-Section (3) came to be inserted by Act No. 3 of 2016, with effect from 23.10.2015. On plain reading of the provision, Section 9 mandates a party to approach the Court before or during arbitral proceeding or at any time after giving of arbitral award but before it is enforced, for interim measure in respect of preservation of the subject matter, interim custody or sale of any goods, appointment of a receiver or other interim measures for protection as may appear to the Court to be just and convenient,

12. Sub-Section (3) of Section 9 provides that upon constitution of arbitral tribunal, Court shall not entertain an application for interim measure under Sub-Section (1) unless the Court finds that the circumstances exist which may not render the remedy provided under Section 17 efficacious.

13. Section 17 provides for "Interim measures ordered by arbitral tribunal". Sub-Section (1) provides that a party may, during the arbitral proceedings, apply to the arbitral tribunal for an interim measure of protection. Sub-Section (2) of Section 17 provides that any order issued by the arbitral tribunal under this Section (Section 17) shall be deemed to be an order of the Court for all purposes and shall be enforceable under the provisions of CPC. Section 17 is extracted:

"17. Interim measures ordered by arbitral tribunal.--*(1) A party may, during the arbitral proceedings, apply to the arbitral tribunal--*

(i) ….

(ii) for an interim measure of protection in respect of any of the following matters, namely:--

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient, and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.

(2) Subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure,1908 (5 of 1908), in the same manner as if it were an order of the Court."

14. Sub-Section (3) of Section-9, inserted by Amendment Act of 2016, mandates that once an arbitral tribunal has been constituted, the Court shall not entertain an application under Sub-Section (1) of Section 9. After amendment, the scope of Section 17 has considerably been widened and the arbitral tribunal has expressly been conferred the same power, as the Court under Section 9. An order of the tribunal under Section 17 is enforceable in the same manner as an order of Court under Section 9, under the provisions of CPC. In other words, the Court and the arbitral tribunal has been conferred same power to grant interim measure of protection and enforcement of the order.

15. Even though an application for interim measure may have been filed in the Court, once arbitration proceedings has commenced and an arbitral tribunal has been constituted, interim relief would have to be sought before the arbitral tribunal, as mandated under Sub-Section (3) of Section 9. The Court would be precluded of its power to grant interim measure unless the Court is satisfied that the circumstances exist which may not render the remedy provided under Section 17 efficacious. In other words, though the jurisdiction of the Court has not been ousted completely on the constitution of arbitral tribunal, but has been considerably restricted. Sub-Section (1) of Section 9 has to be read with Sub-Section (3). The party pressing for interim measure upon constitution of the arbitral tribunal must impress upon the Court that "circumstances' exist which may not render the remedy under Section 17 efficacious. The circumstances could be several which a party has to plead, and, *prima facie*, prove. But where such "circumstances' do not exist then in that event the Court is precluded to entertain the application instituted for interim measure of protection.

16. The introduction of the word "circumstances exist' is intended to restrict the power of the Court under Sub-Section (1) of Section 9 to grant interim measure. And although it is not easy to define what the "circumstances' that may exist rendering Section 17 inefficacious. It would depend upon the particulars and/or surroundings or accompanying act.

17. The expression "entertain' and "institute' are not synonymous. The expression "entertain' means to admit a thing/petition for consideration. In other words, it means entertaining the ground for consideration for the purpose of adjudication on merits and not any stage prior thereto. (Refer: **Martin & Harris Ltd. Vs. 6th Additional District Judge**5. When a suit or proceeding is not thrown out in *limine* but the Court receives it for consideration and disposal according to law, it must be regarded as entertaining the suit or proceeding. The expression/phrase "shall not entertain', in Sub-Section (3)

means not to proceed to consider on merit and/or to receive and take into consideration for adjudication. The word "institute' in respect of legal proceedings means, commenced; to begin an action. On conjoint reading of Sub-Section (1) and (3) of Section 9, it follows that a party to an agreement may file/institute a petition for interim measure but upon appointment of an arbitral tribunal, the Court shall not entertain the petition or proceed to consider on merit until the condition provided therein [Sub-Section (3)] is satisfied.

18. In the facts of the instant appeal, on specific query, learned counsel for the appellant failed to show that circumstances exist that would have persuaded the Court to grant interim relief on the constitution of the arbitral tribunal. The application was filed and notices were issued, respondents put in appearance by filing written statement and the matter was fixed thereafter. In the meantime, arbitral tribunal came to be constituted. The Court, in the circumstances, was justified in declining to entertain the application for interim measure. The parties were rightly relegated to the Arbitrator.

19. The learned counsel for the appellant failed to point out any illegality, infirmity or jurisdictional error.

20. The appeal, being devoid of merit, is, accordingly dismissed.

21. No cost.

(2021)09ILR A427
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.08.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE SUBHASH CHAND, J.

FAFO No. 837 of 1998
with
FAFO No. 846 of 1998
with
FAFO No. 1785 of 2018

Smt. Asha Juneja & Ors. ...Appellants
Versus
M/S Delhi Transport Corporation, I.S.B.T., Kashmiri Gate, Delhi & Ors.
...Respondents

Counsel for the Appellants:
Sri R.B. Singhal, Sri Abu Bakht

Counsel for the Respondents:
Sri B.D. Mandhyan, Sri Sudhir Shanker, Sri Vishesh Kumar Gupta

Motor accident claim-DTC challenges quantum of compensation being higher-the income was calculated without relying upon the Income Tax returns of the year prior to his death-wife earning -loss of income contributed by the deceased has to be considered-order modified-compensation enhanced.

Appeal partly allowed. (E-9)

List of Cases cited:

1. Malarvizhi & ors. Vs United India Insurance Co. Ltd.& anr., 2020 (4) SCC 228

2. United India Insurance Co. Ltd. Vs Indiro Devi & ors., 2018 (7) SCC 715

3. Sarla Verma & ors. Vs Delhi Transport Corp. & anr. , (2009) 6 SCC 121

4. Bajaj Allianz General Insurance Co. Ltd. Vs Smt. Renu Singh & ors. decided on 19.7.2016 , First Appeal From Order No. 1818 of 2012

5. Smt. Kaushnuma Begum & ors. Vs The New India Assurance Co. Ltd. (2001) 2 SCC 9

6. Roshanlal Vs Jarnail Singh reported in 2016 ACJ 736 (P&H),

7. Gian Chand Vs Gurlabh Singh reported in (2016) 16 SCC 590

8. General Manager, Kerala S.R.T.C., Trivandrum Vs Susamma Thomas & ors.,(1994) 2 SCC 176 9. U.P.S.R.T.C. & ors. Vs Trilok Chandra & ors.(1996) 4 SCC 362

9. Sarla Dixit Vs Balwant Yadav AIR 1996 SC 1274

10. Hardeo Kaur Vs Rajasthan State Transport Corporation, 1992 2 SCC 567

11.Puttamma Vs K.L.Narayana Reddy, AIR 2014 SC 706

12. Raman Vs Uttar Haryana Bijli Vitran Nigam Limited, Bijoy Kumar Dugar Vs Bidyadhar Dutta, 2006 (3) SCC 242

13. R.K.Malik Vs Kiran Pal, AIR 2009 SC 2506

14. National Insurance Co. Ltd. Vs Pranay Sethi, AIR 2017 SC 5157

15. Raj Rani Vs Oriental Insurance Co. Ltd., 2009 (13) SCC 654.

16. Ritaben alias Vanitaben Wd/o. Dipakbhai Hariram & anr. Vs Ahmedabad Municipal Transport Service & anr., 1998 (2) G.L.H. 670

17. New India Assurance Co. Ltd. Vs Urmila Shukla & ors., LL 2021 SC 359

(Delivered by Hon'ble Kaushal Jayendra Thaker, J.
&
Hon'ble Subhash Chand, J.)

1. Heard Sri Arun Kumar Shukla, learned Advocate on behalf of Sri Vishesh Kumar Gupta, learned counsel for Delhi Transport Corporation and Sri P.K. Jain, learned Senior Advocate assisted by Sri Abu Bakht, learned Advocate.

2. These are those appeals which are pending adjudication since long. We started hearing the matter but as Sri B.D. Madhyan has absented himself, we waited and adjourned the matter. Sri B.D. Mandhayan who represents the claimants in F.A.F.O. No. 1785 of 2018 absented himself today also. Claimants in the said claim to be heirs and legal representative of deceased as according to them, Master Sikhar Juneja is the legitimate son of Late Chandra Sekhar Juneja and Anuradha Juneja who according to him is legally wedded wife of Late Chandra Sekhar Juneja. The said appeal is dismissed for default.

3. As per the judgment of the apex court in U.P.S.R.T.C. Vs. Km Mamta and Others AIR 2016 SCC 948, all the grounds raised in the appeal are required to be adjudicated and that is how we would decide issue of negligence of driver and quantum and would go ahead with the discussion. All these appeals stem out of the same proceedings.

4. The Delhi Transport Corporation (for short 'DTC') has felt aggrieved as according to them (DTC), the accident occurred because of act of God namely bursting of tyre which was never visioned by the driver or the owner of the vehicle and, therefore, the driver could not have been saddled with the liability or attributed negligence.

5. The next aspect for which the DTC is before us is the quantum of compensation awarded by the Tribunal which according to DTC is on higher side and is not decided as per law applicable in the year of decision or accident.

6. As against this, Sri P.K. Jain, learned Senior Advocate assisted by Sri

Abu Bakht, learned counsel for the claimants-Asha Juneja, Master Udit Juneja and Km. Resham Juneja, has contended that the Tribunal has fallen in error in not considering the income of the deceased as reflected in the Income Tax Returns of the years prior to his death. The learned Tribunal has held that till 1991, the Income Tax Returns have been filed but, thereafter, returns have not been filed. It is stated by Sri Jain that in those days it was not compulsory to file the income tax return within six months of the financial year and, therefore, combined returns were to be filed but, the unfortunate event occurred in the year 1993 namely on 30.7.1993.

7. It is further submitted by Sri Jain that the Tribunal has discussed the oral testimony of witness Asha Juneja widow of the deceased that her husband used to earn Rs. 1 Lakh per month. On what basis the Tribunal assessed the income of the deceased to be Rs.2 Lakh per year is not spelled out , no finding to that effect is recorded by the Tribunal. According the learned counsel for the claimants, there were income tax returns which could have been made the basis for consideration of income of the deceased , may be for period after 1991 that is later part,the income tax returns were not there that cannot be the basis to discard the Income tax returns which were produced . In support of his arguments, Sri Jain has relied on the decisions titled **Malarvizhi & Ors Vs. United India Insurance Company Limited and Another, 2020 (4) SCC 228** and **United India Insurance Co. Ltd. Vs. Indiro Devi & Ors, 2018 (7) SCC 715**. It is submitted by the learned advocate for DTC that the multiplier given by the Tribunal is not in dispute as the learned Tribunal has considered the second column in Second Schedule of the Motor Vehicles Act, 1988 which is lower than the one suggested by Apex Court in **Sarla Verma & Ors. v. Delhi Transport Corporation & Another , (2009) 6 SCC 121.**

8. Learned counsel for the claimants has contended that the deduction towards personal expenses of the deceased should have been 1/4th when there were more than five dependants, this is a gray area which will have to be decided while deciding the appeal preferred by Master Sikhar Juneja and Anuradha Juneja as there is inter se dispute regarding the right of these two and dependency but it should not be one third is the submission of counsel for claimants .It is further submitted that no amount under the head of future loss of income of the deceased has been granted by the Tribunal.

9. Per contra, it is submitted by Sri Shukla, learned Advocate appearing for DTC that in those days, in the State of Uttar Pradesh, the Tribunals were not granting what is known as future loss of income as the Rules did not prescribe and thus the question of addition will not apply. It is also submitted by Sri Shukla that even in the year 1998, the rate of interest was not 12% but it should be as per the repo rate of those days.

10. As against this, Sri Jain has submitted that the repo rate in the year 1998 was 18% and thus grant of 12% does not justify the rate of interest granted by the Tribunal as the matter remained pending. It is further submitted by Sri Jain that the amount granted under the head of non pecuniary damages for minor children and the widow are on lower side and require interference by this Court.

11. Learned counsel for DTC has contended that there was no negligence of

driver of bus hence we propose to decide the issue of negligence :

12. Let us consider what amounts to negligence vis a vis act of God or inevitable accident as contended by learned counsel for DTC.

13. 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.

14. The principle of 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.

15. 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

16. Can it be said that the finding of the Tribunal as far as it relates to negligence is not based on these principles. The aspect which has been highlighted by the Tribunal is that the vehicle did not have any screw fallen and it was not infected by any external material on the highway on which it was plied and, therefore, the Tribunal recorded its finding that bursting of the tyre on the highway was because of two reasons namely (a) either it was not properly managed vehicle or (b) it was being driven in rash and negligent manner. Even if we go by the theory put forth by Sri Shukla, it has come on record that the bus driver has not stopped the bus but drove the same for ten minutes after the bursting of tyre. Ten minutes would mean at least for

some distance. The driver of Car was driving the vehicle on its correct side and, therefore, we cannot take any different view then that taken by the Tribunal.

17. Principle of strict liability as enunciated by the Apex Court in Smt. **Kaushnuma Begum And Ors vs. The New India Assurance Co. Ltd. (2001) 2 SCC 9**, will also have to be invoked. Thus, the issue of negligence raised by learned counsel for the DTC cannot be accepted. **The Apex Court in Kaushnuma Begum (Supra)** held that compensation has to be given even if negligence/rashness of the driver/owner is not proved in the manner to be proved in dispute for tort and the driver/owner can be made liable for damages to the person who suffered on account of such accidents. The principle of strict liability has also been evolved by the Apex Court and applied. Where there is tyre burst, whether driver of the offending vehicle can be held responsible? Principle of res ipsa loquitur can be invoked and reference can be had to findings in paragraph 3 of judgment in **Roshanlal vs Jarnail Singh reported in 2016 ACJ 736 (P&H),** and the Apex court judgment in **Gian Chand Versus Gurlabh Singh reported in (2016) 16 SCC 590** wherein while considering similar plea of act of god, the court observed and held that pleas taken by driver as well as the transport undertaking as regards the accident were totally at variance and there was nothing to doubt the version of claimants and their witnesses that the bus was driven rashly and negligently. The court held that F.I.R. substantiates the plea of the claimants and not of the driver and held that it appeared that bus driver drove the bus rashly and negligently and initially dashed the stationary tractor and then a eucalyptus tree in that process due to application of brakes belt of springs was broken it was a plea taken by transport undertaking that a scooterist was involved in the accident was not believed holding that is totally a false plea and is not supported by its driver. The court held that bus was driven in a rash and negligent manner by its driver and further opined that apart from that merely a mechanical failure is not enough to exonerate the transport undertaking from its liability in the absence of evidence being adduced that the vehicle was maintained properly.

COMPENSATION EVALUTED ;

18. This takes us to the submission of Sri Arun Kumar Shukla, as far as it relates to income and calculation made by the Tribunal. It is submitted that once the Tribunal came to the finding that the income tax returns post 1991 were not filed, it could not have fixed the income figure of Rs.2 Lakhs per annum randomly. We agree with the learned advocates of both the contesting parties who have submitted that the Tribunal could not and should not have considered the income randomly and income and compensation requires reconsideration. The income tax returns of the year 1991 were before Tribunal income of deceased has to be proved by cogent evidence. In the present case, the cogent evidence was oral testimony along with the income tax returns. It is not the case of the D.T.C. nor have they brought on record that the income of the deceased went on decreasing post 1991. Courts should determine what is known as just and fair compensation.

19. 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/."

20. 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 wherefore, the submission of Sri Shukla 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.

21. In **Malarvizhi & Others and Indiro Devi & Others (Supra),** it has been held that Income Tax is the mirror of one's income unless proved otherwise. In our case, the returns as it reflects, proved income of deceased to be Rs. 3,59,150/- per annum. On what basis, the Tribunal has disregarded this income cannot be fathomed as a man's income would increase 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.

22. Hence we now propose to calculate the compensation payable to the legal heirs of the deceased. We can safely now go by the income tax return for the year 1990-1991. The widow, in her oral testimony, has withstood the cross-examination which would negative the submission of Sri Shukla that it was joint property income which has continued. She has categorically mentioned that the rent been taken by her brother-in-law and father-in-law. The amount of insurance which has been received by her cannot be deducted and that aspect is also answered against Sri Shukla. She has categorically denied in her oral testimony that her income was more than that of her husband even if that is so it is the loss of income which her deceased husband was contributing to the family has to be considered and not what the wife was earning.

23. We go by the fact that the income of the deceased has to be considered Rs. 3,59,150/- per annum as reflected in the income tax returns and supported by oral testimony on record which deceased was earning from business to which 40% will have to be added even as per the earlier decisions, 1/4th will have to be deducted as we are convinced that there is an illegitimate son of the deceased who has filed appeal in this Court as marriage of deceased with Anuradha Juneja has not been believed by the Tribunal. The multiplier would be 15 as the deceased was in the age bracket of 36-40 and the 2nd Schedule could not have been applied by the learned Tribunal. Children who have lost love and affection of their father will each get Rs.30,000/- and Rs.40,000/- is granted to the widow.

24. The total compensation payable to the claimants is computed herein below:

i. Annual Income Rs.3,59,150 /-

ii.Percentage towards future prospects : 40% namely Rs.1,43,660/-

iii. Total income : Rs.3,59,150 + 1,43,660 = Rs.5,02,810/-

iv. Income after deduction of 1/4th : Rs.3,77,110/- (rounded up)

v. Multiplier applicable : 15

vi. Loss of dependency: Rs.3,77,110 x 15 = Rs.56,56,650/-

vii. Amount under non-pecuniary head : 30,000 + 30,000 + 40,000 = 1,00,000/-

viii. Total compensation : 57,56,650/-

25. It goes without saying that the interest as per the repo rates in the year 1993 the interest payable would be 6%. We would go by the repo rate and not by Schedule and grant 6% interest as appeals have remained pending for no fault of the advocates. The rate of interest could remain same throughout.

26. In view of the above, the appeal of the DTC is partly allowed on the ground of interest. The appeal preferred by claimants-Asha Juneja and others is also partly allowed. The enhanced amount be deposited within 12 weeks from today.

27. We segregate the matter of Sri B.D. Mandhyan i.e. F.A.F.O. No. 1785 of 2018 and dismisses the same for default with liberty to file restoration application with advance copies to the other parties.

28. As far as disbursement is concerned, office to list the matters after four weeks so that we can pass order even on the matter of Sri B.D. Mandhayan.

29. Record and proceedings be sent back to the Tribunal after two weeks.

30. We are thankful to Sri Shukla and Sri Jain who have ably assisted the Court.

31. On the next date of hearing when we would hear for disbursement, the DTC would place on record the amounts deposited before the Tribunal till date.

(2021)09ILR A435
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.08.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE SUBHASH CHAND, J.

FAFO No. 863 of 2021
(FAFO Defective No. 136 of 2018)

Smt. Satyawati & Ors. ...Appellants
Versus
Vidya Prakash & Ors. ...Respondents

Counsel for the Appellants:
Sri Sushil Kumar Pandey

Counsel for the Respondents:
Sri Pankaj Rai

Motor accident claim-issue involved-compensation awared and negligence of deceased as Tribunal deducted monetary benefits admissible to the climants-deceased was tortfessor—he died for no fault of his own-amount of compensation recalculated.

Appeal partly allowed. (E-9)

List of Cases cited:

1. U.P.S.R.T.C. Vs Km Mamta & ors., AIR 2016 SCC 948

2. Uttar Pradesh Motor Vehicles (Eleventh Amendment) Rules, 2011

3. Sarla Verma Vs Delhi Transport Corp., (2009) 6 SCC 121

4. Sri K.R. Madhusudhan & ors. Vs Administrative Officer & anr., (2011) 4 SCC 689

5. National Insurance Co. Ltd. Vs Pranay Sethi & ors., 2017 0 Supreme (SC) 1050

6. Khenyei Vs New India Assurance Co. Ltd. & ors. (2015) 9 SCC 273

7. Vimal Kanvar & ors. Vs Kishore Dan & ors., AIR 2013 SC3830

8. Bajaj Allianz General Insurance Co.Ltd. Vs Smt. Renu Singh & ors., First Appeal From Order No. 1818 of 2012 decided on 19.7.2016

9. National Insurance Co. Ltd. Vs Mannat Johal & ors., 2019 (2) T.A.C. 705 (S.C.)

10. A.Vs Padma Vs Venugopal, Reported in 2012 (1) GLH (SC), 442

11. Smt. Hansaguti P. Ladhani Vs The Oriental Insurance Co. Ltd., reported in 2007(2) GLH 291

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

1. Heard Sri Sushil Kumar Pandey, learned counsel for the appellant, Sri Pankaj Rai, learned counsel for the respondent- insurance company and perused the judgment and order impugned.

2. This appeal, at the behest of the claimants, challenges the judgment and award dated 13.7.2017 passed by Motor Accident Claims Tribunal/Additional District Judge, Court No.1, Muzaffar Nagar (hereinafter referred to as 'Tribunal') in M.A.C.No.370 of 2014 awarding a sum of Rs.31,99,757/- with interest at the rate of 7% as compensation.

3. The accident is not in dispute. As per the judgment of Apex Court in **U.P.S.R.T.C. Vs. Km Mamta and Others, AIR 2016 SCC 948**, all the grounds raised in the appeal are required to be adjudicated and that is how, we would decide issue of negligence of driver and quantum and would go ahead with the discussion. The issue of negligence decided by the Tribunal has been partly decided in favour of appellants and none of the drivers or insurance companies have challenged the award. The respondents have not challenged the liability imposed on them jointly and severally. The issues to be decided are compensation awarded and whether there was negligence of deceased in the accident taking place for which the Tribunal has deducted the monetary benefit admissible to the claimants.

4. Brief facts as culled out from the record are that on 27.6.2014 the deceased along with his friends was traveling from village Soram to Manali in the car bearing No. HR-26 BV-7516, at about 2:15 a.m. in the morning when they reached Gurdeepazi at Kirtpur Sahab to Bilaspur Road, a Truck bearing No. HP-23 B-5215 came from the front and hit the car. As a result of the negligence of the drivers the accident was caused whereby , deceased Udaiveer Singh and his friend-Rajneesh Kumar who were sitting in the car have died on the spot and Mukul and Prempal who were also travelling in the car have sustained grievous injuries.

5. It is submitted by learned counsel for the appellants that the deceased was 42 years of age at the time of accident. The deceased was a government Assistant Teacher. His income was considered by the Tribunal to be Rs.31,090/- per month. It is further submitted that the Tribunal granted future loss of income of the deceased. The future loss should be granted as per **Uttar Pradesh Motor Vehicles (Eleventh Amendment) Rules, 2011** and also as per decisions of Supreme Court in **Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121 and Sri K.R.**

Madhusudhan and others Vs. Administrative Officer and another, (2011) 4 SCC 689. It is further submitted that the amount granted under non-pecuniary damages is on the lower side and same should be computed and granted as per the decision titled **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050**. It is further submitted that the deduction towards personal expenses of the deceased should be 1/3rd or 1/4th as he was survived by widow, mother and two sons. It is submitted by learned counsel that tax is calculated wrongly and the deduction of income tax by adding future prospect is against legal position of law and is bad.

6. It is further submitted that the deceased was not a tortfessor despite that Tribunal has deducted compensation which could not be done as it is settled law that amount cannot be deducted if the person sustained injuries or death occurred for no fault of his.

7. the counsel for the appellants has submitted that from the factual data, this Court can cull out that that the accident occurred on 27.6.2014 causing death of Udaiveer who was 42 years of age at the time of accident. The Tribunal has assessed income to be Rs.31,090/- per month even if not disturbed by this Court as Rs.580/- is the deduction which includes Rs.500/- as tax. It is submitted that the deceased was in the age bracket of 40-50 and had a permanent job hence addition of 30% of the income may not be be disturbed but is required to be added not only for the purpose of deduction of income taxbut for actual actual calculation of compensation not done by tribunal on erroneous findinds recorded based on whims and not on precedents but against settled legal principles . and added in view of the decision of the Apex Court in**Pranay Sethi (Supra).** The amount under non-pecuniary heads should be at least Rs.1,00,000/- in view of the decision in **Pranay Sethi (Supra)**. The amount rounded is up to Rs.1,00,000/- as 10% of Rs.70,000/- would have to be added every three years and, therefore, we add the same. In view the facts and circumstances of the case, this Court feels no interference is called for as far as deduction of personal expenses is concerned.

8. The vehicle which is involved in the vehicular accident were a jeep/car not driven by deceased Udayveer. The appellant has not challenged the decision on negligence what is challenged is deduction of compensation payable to heirs of non- tort-fessor. The jeep was driven by Rajneesh and not the deceased whose heirs had claimed compensation for his untimely death. The law is well settled that claimant is a non-tort fessor or heirs of deceased. The deceased was a non tort fessor can claim damages/ compensation from any of the tort fessor and for negligence attributed to the driver of the vehicle in which he was traveling. The amount cannot be deducted from awardable compensation.

9. It is submitted by counsel for the appellant that the deduction of compensation for a non tort-fessor is bad and finding are such which cannot stand scrutiny of this Court in view of the judgment of Apex Court in **Khenyei Vs. New India Assurance Company Limited and Others (2015) 9 SCC 273 for composite negligence and Vimal Kanvar and others Vs. Kishore Dan and others, AIR 2013 SC3830 for both negligence and compensation and non grant of future loss as wife had been appointed**

and was working ,and the circulated judgment of this high 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 also for both the issues

Our finding on issue of deduction of compensation on account of negligence :-

10. The Apex Court in **Khenyei Vs. New India Assurance Company Limited & Others, 2015 LawSuit (SC) 469** has held as under for accident caused due to composite negligence :

"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."

18. 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 :

(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.

(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.

(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.

(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."<u>*emphasis added*</u>

11. Thus despite the law being very clear the learned tribunal has fallen in error in deducting the compensation which could not be done.

12. The finding on Compensation and Deduction of income tax while granting compensation :-

13. From the facts collated, we find that the Tribunal has committed manifest error while deciding the compensation to be awarded to the appellants herein. The tribunal seems to have not considered the decision following the supreme court verdict in its over zeal to show innovative interpretation for deducting compensation on various counts unheard of in any authoritative pronouncements (a) calculation of tax (b) deduction for negligence of driver in which deceased was travelling (c) adding future prospect but not granting as wife is given compassionate appointment. This court condemns this perverse approach of the Tribunal. Unfortunate part is that the Tribunal in our view committed an error which can be said to be error apparent on the face of record because the income of the deceased at the time of accident was his actual income. The authorities as narrated above had already deducted tax at source and deducting were also made by employer. The Tribunal committed error which has resulted in perversity as it added future prospects considered yearly income; and then deducted income tax on actual income plus future income multiplied by 12(months). This could never be done .If at all income tax had to be deducted, it had to be deducted on his salary amount not after adding future prospects as is done by the Tribunal. In the year 2014, as is evident as narrated by the learned Tribunal holding that income tax slab for 2,50,000/- was Nil, the Tribunal held that as his income was in the bracket of Rs.2,50,000 to Rs.5,00,000/-, yearly tax was to be deducted. This finding requires modification. Income tax if any has to be deducted on income which was Rs.500/- deducted by employer. Thus deduction of Rs.23,500/- per year was bad and was not even permissible under Income Tax Act. The deceased would be entitled to what is known as standard deductions which would be available to the deceased employee otherwise government would have deducted more amount where he was serving would have deducted more amount towards tax what is known as tax deducted at source. This was not done even if we go by the said standards, it cannot be said that the amount would be taxable as held by the Tribunal. One of the reasons being calculating the slab would therefore have to be recalculated. Income tax deduction has to be from the amount which is known as pay packet of the deceased and not after

addition of the future loss of income which has to be added while calculating the datum figure. This is an error apparent on the face of the record which has been rightly pointed out by the counsel for appellants and it could not be demonstrated by the learned counsel for respondent that this error does not require correction.

14. The second error committed by learned Tribunal is that though the deceased is held to be a non tort-fessor meaning thereby that there is no contribution of negligence, attributable to him despite that there is a deduction of compensation payable to the legal heirs which is against the mandate of the Apex Court in the decision of **Khenyei (supra).** The issue of negligence is concerned, it stands concluded in favour of appellants as there is no cross appeal or rather it has not been pointed out before us that the deceased was a tort feassor hence the decisions cited by the learned Advocate for appellant will apply in full force.

15. The deduction of income tax of Rs.23,000/- per year is rightly pointed out to be fallacious by the counsel. The income.after deductions was Rs.31,090/- per month roughly out of which he would be entitled to deduction and that is the reason why the authority deducted Rs.500/- as tax at source. The amount under non-pecuniary heads should be at least Rs.1,00,000/- in view of the decision in **Pranay Sethi (Supra)**. The amount rounded is up to Rs.1,00,000/- as 10% of Rs.70,000/- would have to be added every three years and, therefore, we add the same. In view of the facts and circumstances of the case, this Court feels that no interference is called for as far as deduction of personal expenses of the deceased is concerned. Learned Tribunal has committed an error apparent on the face of the record.

16. The total compensation is recalculated and payable to the appellants is computed herein below:

i. Annual Income of deceased Rs.3,73,080/- (Rs.31,090 x 12) per annum

ii. Percentage towards future loss of earning prospects : 30% namely Rs.1,11,924/-

iii. Total income : Rs.3,73,080 + Rs.1,11,924 = Rs.4,85,004/-

iv. Income after deduction of 1/3rd towards personal expenses : Rs.3,23,336/-.

v. Multiplier applicable : 14

vi. Loss of dependency: Rs.3,23,336/- x 14 = Rs.45,26,704/-

vii. Amount under non pecuniary heads : Rs.1,00,000/-(addition of 10% every three years hence amount rounded up

viii. Total compensation : Rs.46,26,704/-

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. 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 award and 6% thereafter till the amount is deposited. The amount already deposited be deducted from the amount to be deposited.

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 not blindly apply the judgment of A.V. Padma (supra). The same is to be applied looking to the facts of each case.

22. A copy of this Judgment be circulated by the learned Registrar General to the Tribunals in the State for guidance after seeking approval of Hon'ble the Chief Justice. A copy of this judgment be sent to the learned tribunal whose judgment is under challenge so that in future he may not take such erroneous view which would be unsustainable and against settled legal provisions of law and remain updated with precedents ,

23. This Court is thankful to both the counsels for getting this old matter decided.

(2021)09ILR A442
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.09.2021

BEFORE

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

THE HON'BLE SUBHASH CHAND, J.

Civil Misc. Review Application No. 139896 of 2012
in
FAFO No. 1046 of 2012

Raj Kumar Singh Bhadouria ...Appellant
Versus
Satya Mohan Pandey & Anr....Respondents

Counsel for the Appellant:
Sri Dhruva Narayana, Sri Anandi Krishna Narayana

Counsel for the Respondents:
Sri J.P. Singh, Sri Siddharth

A. Civil Law - Code of Civil Procedure,1908-Section 115-an attempt to re-argue the matter which is not permissible in a Review Application-An application for review cannot be treated to be an opportunity to argue the case on merits afresh-in the garb of a review application reargument on merits of the case cannot be allowed.(Para 3 to 12)

B. Review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 of C.P.C.In review jurisdiction, mere disagreement with the view of the judgment cannot be the ground for invoking the same. review of which is sought, suffers from any error apparent on the face of the order and permitting the order to stand will lead to failure of justice. When the review will be maintainable:-

(i) Discovery of new and important matter or evidence which, after the exercise of due diligence was not within knowledge of the petitioner of could not be produced by him.

(ii) Mistake or error apparent on the face of the record;

(iii) Any other sufficient reason.(Para 4 to 9)

The review application is dismissed. (E-6)

List of Cases cited:

1. Thungabhadra Inds. Ltd. Vs. Govt of A.P. (1964) AIR SC 1372

2. Aribam Tuleshwar Sharma Vs Aribam Pishak Sharma (1979) 4 SCC 389

3. Meera Bhanja Vs Nirmala Kumari Choudhury (1995) AIR SC 455

4. Parsion Devi & ors. Vs Sumitri Devi & ors. (1997) 8 SCC 715

5. Rajendra Kumar Vs Rambai (2003) AIR SC 2095

6. Lily Thomas Vs U.O.I. (2000) AIR SC 1650

7. Inderchand Jain Vs Motilal (2009) 4 SCC 665

8. Kamlesh Verma Vs Mayawati (2013) 8 SCC 320

9. Chhajju Ram Vs Neki (1922) AIR PC 112

10. Moran Mar Basselios Catholicos Vs Most Rev. Mar Poulose Athanasius & ors., AIR 1954 SC 526,

11. UOI Vs Sandur Manganese & Iron Ores Ltd. & ors., (2013) 8 SCC 337

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

(Ref: Civil Misc. Review Application No.139896 of 2012)

1. By way of this Review Application, appellant, Raj Kumar Singh Bhadouria has sought review of the judgment and order dated 13.04.2012 passed by this Court (Coram: Justice Sheo Kumar Singh and Justice Ram Surat Ram (Maurya)) in First Appeal From Order No. 1046 of 2012 (Raj Kumar Singh Bhadouria Vs. Satya Mohan Pandey and another).

2. It is submitted by learned counsel for the review-applicant that the Court has

not properly appreciated the matter and judgment is not correct.

3. Having heard the learned counsel for the petitioner (review) and gone through the grounds taken in the Review Application, we find that virtually there is an attempt to re-argue the matter which is not permissible in a Review Application. An application for review cannot be treated to be an opportunity to argue the case on merits afresh. In the garb of a review application reargument on merits of the case cannot be allowed. We are even fortified in our view by the following authoritative pronouncements.

4. In **Thungabhadra Industries Ltd. Vs. The Government of Andhra Pradesh AIR 1964 SC 1372** the Court said:

"A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error."

5. In **Aribam Tuleshwar Sharma Vs. Aribam Pishak Sharma 1979 (4) SCC 389** the Court said:

"... there is nothing in Article 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every Court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a Court of Appeal. A power of review is not to be confused with appellate powers which may enable an Appellate Court to correct all manner of errors committed by the Subordinate Court."

6. Again, in **Meera Bhanja v. Nirmala Kumari Choudhury AIR 1995 SC 455** while quoting with approval the above passage from **Abhiram Taleshwar Sharma Vs. Abhiram Pishak Shartn (supra)**, the Court once again held that review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 CPC.

7. In **Parsion Devi and others Vs. Sumitri Devi and others 1997 (8) SCC 715** it was held that an error, which is not self evident and has to be detected by process of reasoning, can hardly be said to be error apparent on the face of the record justifying the court to exercise powers of review in exercise of review jurisdiction.

8. In **Rajendra Kumar Vs. Rambai, AIR 2003 SC 2095**, the Apex Court has observed about limited scope of judicial intervention at the time of review of the judgment and said:

"The limitations on exercise of the power of review are well settled. The first and foremost requirement of entertaining a review petition is that the order, review of which is sought, suffers from any error apparent on the face of the order and permitting the order to stand will

lead to failure of justice. In the absence of any such error, finality attached to the judgement/order cannot be disturbed."

9. Thus, Review is not an appeal in disguise. Rehearing of the matter is impermissible in the garb of review. It is an exception to the general rule that once a judgment is signed or pronounced, it should not be altered. In **Lily Thomas Vs. Union of India AIR 2000 SC 1650**, the Court said that power of review can be exercised for correction of a mistake and not to substitute a new. Such powers can be exercised within limits of the statute dealing with the exercise of power. The aforesaid view is reiterated in **Inderchand Jain Vs. Motilal (2009) 4 SCC 665.**

10. In **Kamlesh Verma** Vs. **Mayawati and others 2013 (8) SCC 320**, the Court said:

"19. Review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 of CPC. In review jurisdiction, mere disagreement with the view of the judgment cannot be the ground for invoking the same. As long as the point is already dealt with and answered, the parties are not entitled to challenge the impugned judgment in the guise that an alternative view is possible under the review jurisdiction.

Summary of the Principles:

20. Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute:

20.1. When the review will be maintainable:-

(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;

(ii) Mistake or error apparent on the face of the record;

(iii) Any other sufficient reason.

The words "any other sufficient reason" has been interpreted in ***Chhajju Ram vs. Neki,*** **AIR 1922 PC 112** *and approved by this Court in* ***Moran Mar Basselios Catholicos vs. Most Rev. Mar Poulose Athanasius & Ors., AIR 1954 SC 526****, to mean "a reason sufficient on grounds at least analogous to those specified in the rule". The same principles have been reiterated in* ***Union of India vs. Sandur Manganese & Iron Ores Ltd. & Ors.,*** **2013 (8) SCC 337.**

22.2. When the review will not be maintainable:-

(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.

(ii) Minor mistakes of inconsequential import.

(iii) Review proceedings cannot be equated with the original hearing of the case.

(iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.

(v) A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.

(vi) The mere possibility of two views on the subject cannot be a ground for review.

(vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.

(viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be

permitted to be advanced in the review petition.

(ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived." *(emphasis supplied)*

11. In the case in hand, grounds for review, as above, and the review application do not satisfy the contours of entertaining the review petition, hence, we find no reason to interfere with the well reasoned order of this Court dated 23.8.2016.

12. This review application is, therefore, dismissed.

(2021)09ILR A446
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.08.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE SUBHASH CHAND, J.

FAFO No. 1057 of 2021

Suresh Kumar Gupta ...Appellant
Versus
The Adjudication Authority/A.D.M., Basti & Ors. ...Respondents

Counsel for the Appellant:
Sri Madhup Narain Shukla

Counsel for the Respondents:

A. Civil Law-Food Safety and Standards Act, 2006-Section 68(2) , 76-the designated officer has not put his recommendations before the Commissioner of Food Safety for sanctioning to run the prosecution against the appellant and after delay of 9 months from the receipt of the analysis report he has itself taken decision to run the prosecution against the appellant-the same is in gross violation of the provisions, which is mandatory under the Act,2006-appellant did not receive notice and could not put his defence-However appellant has deposited 50% of the amount of fine-the deposit shall be subject to the result of appeal-appellate authority will decide the matter afresh.(Para 1 to 12)

The appeal is disposed off. (E-6)

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

1. Heard Sri Madhup Narain Shukla , learned counsel for appellant and perused the record.

2. The present appeal has been filed challenging the judgment and order dated 22.06.2019 passed in Case No. 53 of 2017 (State Vs. Suresh Kumar Gupta) under Section 68(2) of Food Safety and Standards Act, 2006.

3. This appeal is under Food Safety and Standards Act, 2006. The appeal requires to be allowed. The provisions of Section 76 of the Food Safety and Standards Act, 2006 reads as under:

"76. Appeal.-

(1) Any person aggrieved by a decision or order of a Special Court may, on payment of such fee as may be prescribed by the Central Government and after depositing the amount, if any, imposed by way of penalty, compensation or damage under this Act, within forty-five days from the date on which the order was

served, prefer an appeal to the High Court: Provided that the High Court may entertain any appeal after the expiry of the said period of forty-five days, if it is satisfied that the appellant was prevented by sufficient cause for filing the appeal within the said period.

(2) An appeal preferred under this section shall be disposed of by the High Court by a bench of not less than two judges."

4. The Designated Officer after scrutiny of the report of Food Analyst shall decide as to whether the contravention is punishable with imprisonment or fine only and in the case of contravention punishable with imprisonment, he shall send his recommendations within fourteen days to the Commissioner of Food Safety for sanctioning prosecution. It means the designated officer after scrutiny of the analyst report and if he found that the contravention is punishable with imprisonment or fine, then he will send his recommendations to the Commissioner of Food Safety for sanctioning to run prosecution within 14 days. But in the present case the designated officer has not put his recommendations before the Commissioner of Food Safety for sanctioning to run prosecution against the appellant and after delay of 9 months from the receipt of the analysis report 02.03.2016, on 05.12.2016 he has itself taken decision to run the prosecution against the appellant, however, the same officer was holding the post Adjudicating Officer. Therefore the same is in gross violation of the provisions, which is mandatory under the Act, 2006.

5. The order of the authority below cannot be sustained for scrutiny before this Hon'ble Court as the same is passed without affording any reasonable opportunity to the appellant though of course notice was issued way back in the year 2017 but as per the appellant it was never served on the appellant. However, while entertaining this appeal we feel that the authority concerned has not mentioned the fact that the notice was received but in fact the appellant has not received the notice and could not put to his defence. The appellant is not a manufacturer and according to the appellant this aspect of the matter has not been looked into.

6. While condoning the delay we have directed the appellant to deposit 50% amount of fine. In compliance of the order dated 17.08.2021 the appellant has deposited 50% of the amount of fine i.e. Rs.20,000/- on 27.08.2021. Receipt of deposit has been brought of on record as Annexure SA-1 to the supplementary affidavit.

7. The ground to set aside the order impugned is on hyper technical grounds as the principles of natural justice has not been followed by the quasi judicial authority while passing the said order. The appeal is allowed and the order impugned dated 22.06.2019 is set aside.

8. The allowing of this appeal is on technical ground that neither Sri S.K. Gupta nor his client was issued any notice. There is disputed question of fact that he was issued notice or yet to be issued. There is also dispute regarding signature of the appellant in the order-sheet.

9. We direct the parties to appear before the Adjudication Authority for adjudication of the case within one week from today as the respondent has raised dispute regarding his presence before the

Adjudication Authority, Basti. Further he was never served with any notice.

10. Secondly, we have tried to balance the respondent by deposit of 50% of the amount under the order impugned. The amount deposited is sought to be substantiated by the Supplementary affidavit. Normally we could not accept the affidavit in Court rather direct to file the same in the registry because the matter is being disposed of finally, hence we accept it and the same be taken on record.

11. The deposit shall be subject to result of the appeal. The appellate authority will decide the matter afresh after providing full opportunity to the parties within a period of twelve weeks from today.

12. We are thankful to the counsel for the parties who have assisted the Court in disposing of this appeal finally.

13. Let the record of court below be sent back to the concerned Adjudication Authority, Basti.

(2021)09ILR A448
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.09.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE SUBHASH CHAND, J.

FAFO No. 1093 of 2021

Satya Prabha Devi & Ors. ...Appellants
Versus
Chola Mandal M S General Insurance Company Ltd. & Ors. ...Respondents

Counsel for the Appellants:
Sri Neerja Singh, Sri Sharve Singh

Counsel for the Respondents:
Sri Pawan Kumar Singh, Sri Pawan Kumar Singh

A. Civil Law - Motor Vehicle Act, 1988-Section 176-challenge to-claim-the tribunal considered the deceased income Rs. 14,124 per month but has not granted future loss of income-Total compensation would be Rs. 29,90,000/- and rate of interest would be 6% -the insurance company shall deposit the amount within period of 12 weeks.(Para 1 to 13)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Sarla Verma Vs Delhi Transp. Corpn. (2009) 6 SCC 121

2. National Ins. Co. Ltd. Vs. Pranay Sethi & ors. (2017) 0 Supreme SC 1050

3. Sunil Sharma & ors. Bachitar Singh & ors. (2011) 3 TAC 629

4. Raghuveer Singh Matolya & ors. Vs Hari Singh Malviya & ors. (2009) IV ACC 933 SC

5. New India Ins. Co. Ltd. Vs Urmila Shukla & ors. in Civil Appeal No. 4634 of 2021

6. Vimal Kanwar & ors. Vs Kishor Dan & ors. (2013) 30 AC 6 SC

7. A.V. Padma Vs Venugopal (2012) 1 GLH SC 442

8. Smt. Hansaguti P. Ladhani Vs The Oriental Ins. Co. Ltd. (2007) 2 GLH 291

9. Smt Sudesna & ors. Vs Hari Singh & anr. FAFO No. 23 of 2001

10. Lakkamma & ors. Vs The Regional Manager M/S United India Ins. Co. Ltd. & anr. (2021) AIR SC 3301

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

&
Hon'ble Subhash Chand, J.)

1. Heard ShriSharve Singh, learned counsel for the appellants; ShriPawan Kumar Singh, learned counsel for the respondents; and perused the record.

2. This appeal, at the behest of the claimants, challenges the judgment dated 07.02.2018 passed by Motor Accident Claims Tribunal/District Judge, Allahabad (hereinafter referred to as 'Tribunal') in Motor Accident Claim Petition No.219 of 2016 awarding a sum of Rs.18,37,870/- with interest at the rate of 7% as compensation.

3. The accident is not in dispute. The issue of negligence decided by the Tribunal is 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.

4. The insurance company has instructed the counsel for the insurance company that the matter be settled as even according to the judgment of the Apex Court as issue was no longer res integra as future prospects should have been granted as per the judgment of **Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121.**

5. Learned counsel for the appellant has requested that the Court may look into the matter from the angle of the two minor children who have lost father at a young age. It is submitted that the Tribunal has not granted amount towards future loss of income of the deceased which is required to be granted in view of the decision in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050** and **The Uttar Pradedsh Motor Vehicles Rules, 1998** though the rules specify misinterpretation in paras 44 and 46 of the tribunal order. It appears that the tribunal has committed gross error despite reproducing the provisions, how only 20% is granted. It is further submitted that amount under non-pecuniary heads granted and the interest awarded by the Tribunal are on the lower side and require enhancement. The learned counsel submitted the salary certificate of the deceased, which is shown the income of the deceased was Rs.17,550/- per month as he was Supervisor in PPAP Tokai India Rubber Pvt. Ltd. It is also submitted that as the deceased was survived by widow, one minor son, one minor daughter and parents and hence the deduction towards personal expenses of the deceased should be 1/4 and not 1/3. The multiplier has to be as per the age of deceased.

6. Learned counsel for the respondents, has vehemently objected the contentions raised by the learned counsel for the appellants and has submitted that the compensation awarded by the Tribunal is just and proper and does not call for any enhancement.

7. Having heard the learned counsel for the parties and considered the factual data, this Court found that the accident occurred on 13.7.2016 causing death of Markanday Misra who was 33 years of age and left behind him, widow, two minor children and parents. The learned Judge has deducted the amount deducting allowance in the judgments of **Sunil Sharma and others Bachitar Singh and others, 2011 (3) TAC 629** and **Raghuveer Singh Matolya and others v. Hari Singh Malviya and others, IV (2009) ACC 933 (SC)**, the learned tribunal has misinterpreted

the said decisions, the reproduction of paras 11, 7 & 8 quoted by learned tribunal but has misread the same. The reliance on Rule 220 but unfortunately he has misread the rule while granting only 20% of the future loss which is error which is apparent on the face of the record and Shri Sharve Singh has rightly placed reliance on the recent Judgment of the Apex Court titled **New India Insurance Company Limited Vs Urmila Shukla and others in Civil Appeal No. 4634 of 2021** decided on 6th August, 2021 so as to contend that this error may be given even if the respondent wants to settle the dispute. The deductions made by the learned tribunal is bad. The Tribunal has assessed the income of the deceased to be Rs.14,124/- per month adding 20% of income. This could not have been done in view of the judgment of **Vimal Kanwar and others v. Kishor Dan and others, 2013 (3) AC 6 (SC) and Rules**. We are unable to accept the submission of Shri Sharve Singh that deduction must 1/4 and not 1/3 for personal expenses. We are considering to be Rs.15,000/- per month which we feel is just and proper. To which as the deceased was age bracket of 31-35 years, 50% of the income will have to be added as future prospects in view of the decision of the Apex Court in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050**. As far as deduction towards personal expenses of the deceased is concerned, it should be 1/3.

8. Hence, the total compensation payable to the legal heirs of the deceased in view of the decision of the Apex Court in Pranay Sethi (Supra) is computed herein below:

i. Income Rs.15,000/- p.m. (Rs.17550-Rs.2500 for all deductions)

ii. Percentage towards future prospects : 50% namely Rs.7500/-

iii. Total income : Rs. 15000 + 7500 = Rs.22500/-

iv. Income after deduction of 1/3 : Rs.15000/-

v. Annual income : Rs.15000 x 12 = Rs.1,80,000/-

vi. Multiplier applicable : 16(as the deceased was in the age bracket of 31-35 years)

vii. Loss of dependency: Rs.1,80,000 x 16 = Rs.28,80,000/-

viii. Amount under non pecuniary heads : Rs.1,10,000/- (Rs.40,000/- to the each minor child for non pecuniary damages and Rs.30,000/- to the widow for other non pecuniary damages)

ix. Total compensation : **Rs.29,90,000/-.**

9. 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.

10. 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.

11. 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.

12. The insurance company has decided to settle the lis. The Apex Court in **AIR 2021 SC 3301, Lakkamma & others. v. The Regional Manager M/S United India Insurance Co. Ltd & another** has accepted the submission of the insurance company that for a period when the appeal is belated. The interest shall not be paid. We will adopt the similar mode from the date of the judgment till the delay is condoned, interest be not granted.

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 along with additional amount within a period of 12 weeks from today with interest at the rate of 6% from the date of filing of the claim petition till the decision in the claim petition from the period when the matter remained pending, there shall be no interest. 6% from the date of the condonation of delay till the amount is deposited, as the insurance company has decided the settle the dispute interest at rate of 6% is granted. The amount already deposited be deducted from the amount to be deposited.

14. This Court is thankful to both the counsels to see that the matter is disposed of.

15. Record and proceedings be sent back to the Tribunal after two weeks.

(2021)09ILR A451
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.09.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE SUBHASH CHAND, J.

FAFO No. 1481 of 2015

Master Pulkit Gupta & Ors. ...Appellants
Versus
Pushpendra Kumar & Ors. ...Respondents

Counsel for the Appellants:
Sri Nigamendra Shukla

Counsel for the Respondents:
Sri Manish Kumar Nigam, Sri Santosh Tripathi, Sri Manviya Tripathi

A. Civil Law - Motor Vehicle Act, 1988- Section 176-challenge to-claim-deceased was working as IT Analyst in Tata Consultancy Co. and the tribunal considered her income Rs. 54,614 per month but has not granted future loss of income-the deceased was survived by four

dependents-Total compensation would be Rs. 80,34,416/- and rate of interest would be 7.5% -the insurance company shall deposit the amount within period of 12 weeks.(Para 1 to 22)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Yerramma & ors. Vs G. Krishnamurthy & anr. (2014) 4 TAC 337 SC

2. Sarla Devi & ors. Vs Divisional Manager,M/s. Royal Sundaram Allance Ins. Co. Ltd. & anr. (2014) 4 TAC 343 SC

3. National Insurance Co, Ltd. Vs Indira Srivastava,(2008) 2 SCC 763 : 2008 910 TAC 424

4. Khenyei Vs New India Assr. Co. Ltd & ors. (2015) LawSuit SC 469

5. T.O. Anthony Vs Karvarnan & ors. (2008) 3 SCC 748

6. G.M., Ker. S.R.T.C., Trivandrum Vs Susamma Thomas & ors., Trilok Chandra & ors. (1994) 2 SCC 176

7. U.P.S.R.T.C. & ors. Vs Trilok Chandra & or..(1996) 4 SCC 362

8. Sarla Dixit Vs Balwant Yadav (1996) AIR SC 1274

9. Hardeo Kaur V/s Raj. St. Transp. Corpn.(1992) 2 SCC 567

10. Puttamma Vs K.L. Narayana Reddy (2014) AIR SC 706 Raman Vs Uttar Haryana Bijll Vitran Nigam Limited

11. Bijoy Kumar Dugar Vs Bidyadhar Dutta (2006) 93 SCC 242 R. K . Malik Vs Kiran Pal (2009) AIR SC 2506

12. National Insurance Rani Vs Oriental Ins. Co. Ltd.(2009) 3 SCC 654

13. Ritaben @ Vanitaben Wd/o . Dipakbhai Hariram & anr. Vs Ahmedabad Municipal Transp. Service & anr. (1998) 2 G.L.H. 670

14. New India Assur. Co. Ltd. Vs Urmilla Shukla & ors. LL (2021) SC 359

15. National Ins. Co. Ltd. Vs Mannat Johal & ors. (2019) 2 T.A.C. 705 SC

16. A.V. Padma V/s Venugopal (2012) 1 GLH SC 442

17. Smt. Hansaguti P. Ladhani Vs The Oriental Ins. Co. Ltd. (2007) 2 GLH 291

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

1. Heard Sri Nigamendra Shukla for the appellants, Sri Manish Kumar Nigam for Insurance Company and Sri Manviya Tripathi for the owner and driver of the Car.

2. This appeal, at the behest of the claimants, challenges the judgment and award dated 25.3.2015 passed by Motor Accident Claims Tribunal/Special Judge (EC Act) Ghaziabad, (hereinafter referred to as 'Tribunal') in Motor Accident Claim Petition No.120 of 2014.

3. Brief facts as culled out from the record are that on 8.1.2014 the deceased along with her husband was travelling by motorcycle, bearing no.UP-16-AH-8708 and when they reached at U-turn near Radission, a Car bearing no.UP-14-BQ-0549 which was being driven rashly and at exorbitant speed dashed the motorcycle from behind due to which both the deceased and her husband suffered multiple injuries. The deceased succumbed to the injuries during treatment on 15.1.2014. The deceased was 32 years of age and was working as IT Analyst in Tata Consultancy Co.

4. The heirs of the deceased instituted a claim petition claiming compensation of

Rs.3,20,50,000/-. The Tribunal has considered her income Rs.54,614/- per annum and awarded a sum of Rs.27,85,314/- with interest at the rate of 6 per cent.

5. Learned counsel for the claimants has contended that the finding of the Tribunal in holding the deceased/her husband to be 50% negligent is bad as the deceased has not contributed to the accident having taken place.

6. It is submitted by learned counsel for the appellant that the deceased was 32 years of age and was working as IT Analyst in Tata Consultancy Co. The Tribunal has considered her income Rs.54,614/- per annum but has not granted future loss of income. It is submitted that the deceased was survived by four dependents and, therefore, the deduction of ½ towards personal expenses is bad and it should be 1/4th.

7. It is submitted by learned counsel for the appellant that the Tribunal has not granted any amount under the head of non-pecuniary damages which requires to be considered and granted. He has further submitted that the interest granted by the Tribunal is on the lower side and requires enhancement. The learned advocate has relied on the decisions in the case of **Yerramma and others v. G.Krishnamurthy and another, 2014 (4) TAC 337 (SC) and Sarla Devi and others Vs. Divisional Manager, M/s. Royal Sundaram Aliance Ins. Co. Ltd. And another, 2014 (4) TAC 343 (SC).** Paragraph no.6 of Yerramma (supra) is quoted herein below:

"6. After thorough consideration of the facts and legal evidence on record in the present case, we are of the view that the collision between the motor vehicles occurred when the respondent-Corporation bus was turning to its right side without showing the turn indicator to enter the bus depot. The driver of the offending vehicle of the respondent-Corporation bus was negligent by not giving the right turn indicator and causing the accident. The driver of the respondent-Corporation bus should have been aware of the fact that he was driving the heavy passenger motor vehicle, and that it was necessary for him to take extra care & caution of the other vehicles on the road while taking the turn to enter the depot. Had the driver of the offending vehicle taken sufficient caution and care, slowed down and allowed reasonable provision for other vehicles on the left side of the road to pass smoothly, the accident could have been averted. Hence, we are of the view that the Tribunal and the High Court have erred in the apportionment of negligence at 25% on the part of the deceased and 75% on the part of the driver of the respondent-Corporation bus without evidence adduced in this regard by the respondent. But on the other hand, legal evidence produced on record by the appellants in this case would show that the accident was caused on account of the negligence on the part of the driver of the offending vehicle of the respondent-Corporation. Therefore, the erroneous finding recorded by the Tribunal & concurring with the same by the High Court on the question of contributory negligence of the deceased is liable to be set aside. Accordingly, we set aside the same as it is not only erroneous but contrary to law laid down by this Court in the case of Juju Kurivila (Supra).

In our considered view, since the deceased at the time of his death was approximately 53 years of age, therefore,

as per law laid down by this Court in the Sarla Verma case (supra), 30% of actual salary for future prospects of the deceased cannot be taken for the purpose of awarding compensation under loss of dependency in favour of the appellants.

Further, with regard to gross annual income of the deceased, to determine the loss of dependency of the appellants, we refer to the case of National Insurance Co. Ltd. v. Indira Srivastava, (2008) 2 SCC 763 : 2008 (1) TAC 424, wherein this Court has held as under:-

"19. The amounts, therefore, which were required to be paid to the deceased by his employer by way of perks, should be included for computation of his monthly income as that would have been added to his monthly income by way of contribution to the family as contradistinguished to the ones which were for his benefit. We may, however, hasten to add that from the said amount of income, the statutory amount of tax payable thereupon must be deducted.

20. The term 'income' in P. Ramanatha Aiyar's Advanced Law Lexicon (3rd Ed.) has been defined as under : "The value of any benefit or perquisite whether convertible into money or not, obtained from a company either by a director or a person who has substantial interest in the company, and any sum paid by such company in respect of any obligation, which but for such payment would have been payable by the director or other person aforesaid, occurring or arising to a person within the State from any profession, trade or calling other than agriculture."

It has also been stated :

'INCOME' signifies 'what comes in' (per Selborne, C., Jones v. Ogle, 42 LJ Ch.336). 'It is as large a word as can be used' to denote a person's receipts '(per Jessel, M.R. Re Huggins, 51 LJ Ch.938.) income is not confined to receipts from business only and means periodical receipts from one's work, lands, investments, etc. AIR 1921 Mad 427 (SB). Ref. 124 IC 511 : 1930 MWN 29 : 31 MLW 438 AIR 1930 Mad 626 : 58 MLJ 337."

8. It is also submitted that the Tribunal has not granted medical expenses though she was hospitalized in Pushpanjali Hospital, Ghaziabad, and Rs. 3,00,000/- was spent for her treatment.

9. As against this, learned counsel for the respondents submits that the compensation awarded by the Tribunal is just and proper. It is also submitted that the deceased being in age bracket of 31-35 at the time of accident, the multiplier of 17 as granted by the Tribunal is bad and it should be 16.

10. 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 claimants must always prove that the other 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" may apply.

11. The principle of 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.

12. In this case, we do not delve into the issue of negligence as concept of contributory negligence and composite negligence operate in different fields. In one there is deduction as one of the parties to accident was claimant was claimant or his heirs whereas in composite negligence both are liable to the third party who is not the driver or tort-fessor. The tort-fessor may be one of the heirs and no amount can be deducted where the tort-fessor claims as legal representative. We, therefore, leave the question open as far as contributory negligence.

13. 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 tkenhe 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."

18. 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 :

(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.

(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.

(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.

(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

14. It is admitted position that the opponents - owner and driver after filing written statement never orally substantiated what they had averred in written statement. The latest decision of the Apex Court in **Khenyei (Supra)** has laid down one further aspect about considering the negligence more particularly composite/contributory negligence. The deceased or the person concerned should be shown to have contributed either to the accident and the impact of accident upon the victim could have been minimised if he had taken care. In this case the deceased was not the author or the co-author of the accident. On facts, the deceased was not plying the vehicle, hence, the deduction of 50% from the compensation awarded is bad and is set aside. The husband, who was plying the motorcyle, is not claiming for his own damages. He is claiming for the death of his wife and, therefore, the principles enunciated in Kheynei (supra) will be applicable. The claimants are heirs of non-tortfessor and hence no deduction is permissible from their claim.

COMPENSATION EVALUATED ;

15. The submission is 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/."

16. Thus even in year 1990 to 2010, 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 by citing decision though of persuasive value of Gujarat High Court referred herein above wherefore, the submission of learned Advocate for 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 when the accident occured.

17. 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.

18. Hence we now propose to calculate the compensation payable to the legal heirs of the deceased.

19. The facts will permit us to rely on the said decisions. The Tribunal has assessed the income of the deceased to be

Rs.54,614 per annum which is undisputed. To which 50% will have to be added as future prospects. The finding that in IT field there will be recession and deceased could have lost the job hence no future could be awarded is absurd and smacks of perversity. Even as per the earlier decisions, 1/2 will have to be deducted as we are convinced that the deceased was survived by dependent namely including one minor son aged 1 year 8 months. Husband cannot be called dependant in absence of proof. The multiplier would be 16 as the deceased was in the age bracket of 31-35. As far as amount under the head of non-pecuniary damages is concerned, we grant Rs.70,000/-. The Tribunal has not granted medical expenses though she was hospitalized hence we grant Rs. 1,00,000/- towards medical expenses as the accident occurred on 8.1.2014 and deceased passed away on 15.1.2014.

20. Hence, the total compensation payable to the claimants is computed herein below:

i. Monthly Income Rs.54,614,/-

ii. Percentage towards future prospects : 50% namely Rs.27,307/-

iii. Total income : Rs.54,614 + 27,307 = Rs.81,921/-

iv. Annual Loss of Dependency : 81,921 x 12 = 9,83, 052/-

iv. Income after deduction of 1/2 : Rs.4,91,526/-

v. Multiplier applicable : 16

vi. Loss of dependency: Rs. 4,91,526 x 16 = Rs.78,64,416/-

vii. Amount under non-pecuniary head : Rs. 70,000/-

viii. Amount for medical expenses: Rs. 1,00,000/-

ix. Total compensation : 80,34,416/-

21. 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."

22. 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 award and 6% thereafter till the amount is deposited. The amount already deposited be deducted from the amount to be deposited.

23. 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.

24. 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.

25. We make it clear that 30% can be recovered by the Insurance Company from the owner, driver and Insurance Company of the motorcycle by the mode suggested by the Apex Court.

26. Fresh Award be drawn accordingly in the above petition by the tribunal as per the modification made herein.

27. This Court is thankful to both the counsels to see that this very old matter is disposed of.

(2021)09ILR A460
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.08.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE SUBHASH CHAND, J.

FAFO No. 1897 of 2018

Smt. Meenaxi Panwanda & Ors. ...Appellants
Versus
Raj Kumar & Ors. ...Respondents

Counsel for the Appellants:
Sri Shreesh Srivastava, Sri Anubhav Sinha

Counsel for the Respondents:
Smt. Archana Singh, Ms. Manjima Singh, Sri Ram Lakhan Deobanshi, Sri Arun Kumar Singh

A. Civil Law -Motor Vehicle Act, 1988- Section 176-challenge to-claim-deceased who was an Assistant Manager in NTPC and his income considered Rs. 63,125 per month-the deceased was survived by his widow and three daughters-Total compensation would be Rs. 68,87,500/- and rate of interest would be 7.5% -the insurance company shall deposit the amount within period of 12 weeks. (Para 1 to 13)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. New India Assur. Co. Ltd. Vs Urmilla Shukla & ors. Civil Appeal No. 4634 of 2021

2. Kirti & anr. Vs Oriental Ins. Co. Ltd. (2021) 2 SCC 166

3. Anita Sharma & ors. Vs The New India Assr. Co. Ltd. & anr. (2021) 1 SCC 171

4. Vimal Kanwar & ors. Vs Kishore Dan & ors. (2013) 7 SCC 476

5. Sunil Sharma & ors. Vs Bachitar Singh & ors. (2011) 11 SCC 425

6. Rajesh & ors. Vs Rajbir Singh & ors. (2013) 3 TAC 697 SC Santosh Devi Vs National Ins. Co. Ltd. and Others (2012) 6 SCC 421

7. Sanobanu Nazirbhai Mirza & ors. Vs Ahmedabad Municipal Transp. Service (2013) 4 TAC 369 SC

8. National Ins. Co. Ltd Vs Pranay Sethi & ors. (2017) 0 Supreme SC 1050

9. National insurace Co. Ltd. Vs Mannat Johal & ors. (2019) 2 T.A.C. 705 SC

10. A.V. Padma Vs Venugopal reported in 2012 (1) GLH (SC) 442,

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

1. Heard Sri Shreesh Srivastava, learned counsel for the appellants, Ms. Manjima Singh, Advocate holding brief of Ms. Archana Singh, learned counsel for the respondent no.2 and Sri Ram Lakhan Deobanshi, learned counsel for the respondent no.3-New India Assurance Company.

2. This appeal, at the behest of the claimants, challenges the judgment and award dated 17.02.2016 passed by Motor Accident Claims Tribunal/Additional District Judge/ Special Judge (S.C. and S.T. Act) Gautam Budh Nagar (hereinafter referred to as 'Tribunal') in M.A.C.T. Case No.324 of 2012 (Meenaxi Panwanda and others Vs. Raj Kumar and others).

3. It is submitted by learned counsel for the appellants that the deceased was 56 years of age. He was an Assistant Manager (H.R.) in NTPC, Haryana. The Tribunal has considered his income to be Rs.63.032/- per month. It is submitted by learned counsel for the appellants that the income of the deceased should have been considered to be Rs.82,337/-. The deceased was survived by his widow and three daughters, the deduction of 1/3rd towards personal expenses of the deceased should not be disturbed. As far as multiplier is concerned, there is no dispute between the parties. It is also submitted that the interest should be granted at the rate of 7.5%.

4. As far as the appeal is concerned, all other aspects except the compensation awarded, has attained finality, as the Insurance Company has not come up in appeal. It is the appeal filed by claimants. The issue of negligence has been decided in favour of the claimants and that issue is not raised in this appeal and the issue that is required to be decided is compensation awarded by the Tribunal, which has not granted any amount under the head of future loss of income despite the law provided for the same. The Tribunal has considered the income to be Rs. 63,032/- per month and granted multiplier of 9 with compensation of Rs. 1,25,000/- under non-pecuniary heads and it is this award, which is under challenge.

5. Learned counsel for the appellants has heavily relied on the judgments in case of **New India Assurance Company Limited Vs. Urmila Shukla and others decided on 06.08.2021 in Civil Appeal No. 4634 of 2021 as well as in case of Kirti and another Vs. Oriental Insurance Company Limited (2021) 2 SCC 166 and Anita Sharma and others Vs. The New India Assurance Company Limited and another 2021 (1) SCC 171** by contending that the deductions as made by the Tribunal are faulty and could not have been made.

The accident occurred in the year 2012 and appeal is of the year 2018, therefore, interest, which is granted 7% will have to be 7.5% from the date of filing of the claim petition till the amount is deposited. As far as deceased is concerned, it is a case of composite negligence as determined by the Tribunal.

6. Learned counsel for the appellants has relied on the judgment of **Vimal Kanwar and others Vs. Kishore Dan and others AIR 2013 SC 3830** and submitted that no deduction should be from the salary of the deceased except income tax but the Tribunal has deducted all the allowances and the loan amount for which installment would be paid. It is submitted by Sri Srivastava that the same could not be done. The case of **New India Assurance Company Limited Vs. Urmila Shukla and others decided on 06.08.2021 in Civil Appeal No. 4634 of 2021** as well as Aneeta Sharma (supra) is not followed.

7. Learned counsel for the appellants has contended that the Tribunal has given reason for deduction. PW-1 Meenakshi Panvanda in her evidence has submitted that Vijay Kumar before his death has incurred huge amount for medical expenses11 lacs, which has been bifurcated that he was admitted in Government hospital, Jhajjar, where he spent Rs. 50,000/- thereafter he was taken to PGI, Rohtak, where he spent Rs. 1,60,000/- and further he was admited to Fortis hospital Noida, where also he has incurred about Rs. 9,00,000/- that is how Rs. 11,10,000/- was incurred. The deceased was working in NTPC Haryana as an Assistant Manager (H.R.) and his salary was Rs. 1,44,779/- per month. The age of the deceased was 56 years. In cross examination, it is admitted as observed by the Tribunal that out of total amount of Rs. 11,10,000/-, Rs. 9,00,000/- for medical charges was paid by NTPC and rest of the amount paid by claimant widow. The Tribunal very strangely did not believe the bills as well as the statement of the appellants and dealt with that this issue as of it is dealing with civil suit for damages. The Tribunal relied on the judgment of Sarla Verma (supra) for deciding the age of the deceased to be 56 years and after reproducing paragraph 21 of the said judgment decided that multiplier of 9 would be admissible. The Tribunal again started calculating income of the deceased and has discussed the evidence of PW-1, who has stated that the income of her husband was 1,44,779/- and she has three daughters out of which two daughters have been married and one is unmarried. PW-3 in his evidence has also stated the same and it is on the basis of the deductions which have been made by employer that the Tribunal has come to the conclusion that the income would be Rs. 63,032/- per month despite the fact that there was clinching evidence. If we consider the deductions then it also would be Rs. 1,44,779, therefore, the Tribunal has held that the income of the deceased was Rs. 99,557/- and has deducted all the deductions and has come to the conclusion that his income was Rs. 63,032/- per month. This finding is assailed on the basis of judgment in case of **Sunil Sharma and others Vs. Bachitar Singh and others 2011 (11) SCC 425** and **Vimal Kanwar and others Vs. Kishore Dan and others 2013 (7) SCC 476**. The Tribunal has gone by the conclusion arrived at the judgment in Sarla Verma (supra) and has calculated the compensation as follows and committed error.

8. Rs. 63,032 multiplied by 12, which comes to Rs. 7,56,384/- and then deducted

1/3 of the income as personal expenses of the deceased and held that no evidence as to what was the dependency and the other damages and thereby calculated Rs. 5,04,256 x 9 by holding that judgment in Sarla Verma (supra) specifies that there should be no addition of the age of the deceased is more than 50 years after judgment of Sarla Verma (supra) before the judgment rendered by the learned judge, the judgment in **Rajesh and others Vs. Rajbir Singh and others 2013 (3) TAC 697 (SC), Santosh Devi Vs. National Insurance Company Limited and others (2012) 6 SCC 421** and **Sanobanu Nazirbhai Mirza and others Vs. Ahmedabad Municipal Transport Service 2013 (4) TAC 369 (SC)** despite considering the fact of rule 220A of the Uttar Pradesh Motor Vehicles (Eleventh Amendment) Rules, 2011 the Tribunal held that no amount for future loss of income can be granted. We would deduct what is known as income tax. The income would be Rs. 82,337 per month + 15% future loss of income and multiplier of 9 and deductions as per judgments. We would have to recalculate the amount as the learned judge has erred in not going through the judgment in case of Sunil Sharma and Vimal Kanwar (supra). If he would have gleaned the same, he would not deduct the amount of Rs. 33,000/- per month from pay of the deceased. The calculation of deductions is given to us by the learned counsel for the appellants.

9. Learned counsels for Insurance Company submitted that the order of the Tribunal is just and proper and allowance could not have been considered as income of the deceased for the purpose calculating compensation. As far as the deceased was concerned, he was in the age bracket of 55-60 years, which is not in dispute and he was survived by his widow and three daughters, which is also not in dispute.

10. This takes this Court to the issue of compensation. The income of the deceased in the year of accident and looking to his profession namely Assistant Manager (H.R.) in N.T.P.C. can be considered to be Rs.82,337/- per month and future loss of income requires to be added in view of the decision of the Apex Court in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050.**

11. 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.82,337/-

ii. Percentage towards future prospects : 15% namely Rs.12,350/-

iii. Total income : Rs. 82,337+12,350 = Rs. 94687/-

iv. Income after deduction of 1/3rd : Rs. 63,125/- (rounded up)

v. Annual income : Rs.63,125 x 12 = Rs. 7,57,500/-

vi. Multiplier applicable : 9

vii. Loss of dependency: Rs.7,57,500 x 9 = Rs.68,17,500/-

viii. Amount under filial consortium and other non pecuniary heads : Rs.70,000/-

x. Total compensation : 68,87,500/-

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."

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 Vs. Venugopal reported in 2012 (1) GLH (SC) 442**, the order of investment is not passed because applicants/claimants are neither illiterate nor rustic villagers.

15. We are thankful to learned counsel for the parties for getting decided the matter.

16. Record, if any, be sent back to the Tribunal.

(2021)09ILR A464
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.09.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE SUBHASH CHAND, J.

FAFO No. 2169 of 2007

Smt. Shamim Begum & Ors. ...Appellants
Versus
Manager, National Insurance Company, Budaun & Ors. ...Respondents

Counsel for the Appellants:
Sri C.B. Ojha, Sri M.P. Sarraf

Counsel for the Respondents:
Sri Nagendra Kumar Srivastava

A. Civil Law - Motor Vehicle Act, 1988-Section 176-challenge to-claim-deceased was an agriculturist and was having vocation of advocacy and the tribunal considered her income Rs. 62000 p.a. but has not granted future loss of income-the deceased was survived by five dependents-Total compensation would be Rs. 10,79,995/- and rate of interest would be 7% -the insurance company shall deposit the amount within period of 12 weeks.(Para 1 to 18)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Bajaj Allianz Gen. Ins. Co. Ltd. Vs Smt. Renu Singh & ors. FAFO NO. 1818 of 2012

2. Khenyei Vs New India Assur. Co. Ltd. & ors. (2015) LawSuit SC 469

3. Malarvizhi & ors. Vs United India Ins. Co. Ltd. & anr. (2020) 4 SCC 228

4. United India Ins.Co. Ltd. Vs Indira Devi & ors. (2018) 7 SCC 715

5. Oriental Ins. Co. Ltd. Vs Mangey Ram & ors. (2019) Supreme (All) 1067

6. New India Assur. Co. Vs Urmila Shukla MANU/SCOR/24098/2021

7. Kirti & ors. Vs Oriental Ins. Co. (2021) 1 TAC

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

1. Heard Sri Ram Singh, learned counsel for the appellant and Ms Anubha Gupta assisting Sri N.K. Srivastava, learned counsel for the respondent-Insurance Company. None has appeared for the owner.

2. This appeal, at the behest of the claimants, challenges the judgment and award dated 09.04.2007 passed by Motor Accident Claims Tribunal/Additional District Judge, Court No.13, Aligarh (hereinafter referred to as 'Tribunal') in M.A.C. No. 415 of 2005.

3. Brief facts as culled out from the record are that on 25.06.2005 at 12:10 p.m in front of Sugar Mill Sheikhpur, Furkan Ahmad was going to Badaun by his C.D. Don Delux motor-cycle by his side then only a bus bearing No. U.P 24/ 4925 coming from Budaun dashed with the motor-cycle of Furkan Ahmad. As a result of which Furkan Ahmad died on the spot.

4. The deceased was 39 years 11 months and 25 days of age at the time of accident. He was an agriculturist and was having vocation of advocacy and was earning Rs.8,000/- from his agricultural land and Rs. 62,000/p.a from his advocacy profession. He was survived by his mother, widow and three minor children aged 9, 6 and 3 years. The Tribunal has considered his income to be Rs. 62,000/-p.a, deducted 1/3rd towards personal expenses of the deceased, granted multiplier of 16, granted Rs.5,000/- towards consortium , granted Rs. 2,000/- towards funeral expenses and ultimately assessed the total compensation to be Rs.7,53,667/-.

5. Learned counsel for the appellant has submitted that the deceased Furkan Ahmad was 39 years 11 months and 25 days was an advocate by profession. His income tax report shows that his annual income was Rs. 62,000/- per annum for which no enhancement is claimed by the learned counsel for the appellant but the learned counsel for the appellant contends that he was below the age of 50 years and as he was himself employed professional even in the year 2005, the tribunal should have added 40% to his income which is erroneous as it has not added any amount. He has further submitted that he was survived by his mother, wife and three minor children aged 9,6 and 3 years and therefore, the deduction as per the judgements of Sarla Verma and Pranay Shetty and even in those days should be 1/4th and not 1/3rd. It is submitted by him that amount of non pecuniary of Rs. 7,000/- requires to be enhanced.

6. As against this, Ms Anubha Gupta, advocate assisting Sri N.K. Srivastava, learned counsel for the respondent-Insurance Company contends that in the year of accident and when the judgement was pronounced this principle of future loss of income was not there and according to the counsel the multiplier adopted of 16, it should be of 15 and that deduction of 1/3rd from personal expenses is just and proper. It is submitted that the appeal was dismissed in the year 2015 and there is a

huge delay of six years in filing restoration application and that should also be considered by this Court while considering quotient of interest as insurance company is not at fault.

7. It is submitted by Ms Anubha Gupta, advocate assisting Sri N.K. Srivastava that the quantum of compensation and the interest awarded by the Tribunal is just and proper and does not call for any interference by this Court.

9. Having heard the learned counsel for the parties, income considered by tribunal is Rs. 70,000/- per annum, his income was Rs. 62,000/- p.a was his professional income as per the documents and the I.T return of 2002, 2003, 2004 and 2005 and his agricultural land. Let us consider the negligence from the perspective of the law laid down.

10. 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.

11. The principle of contributory negligence has been discussed time and again. A person who either contributes or author of the accident would be liable for his contribution to the accident having taken place.

12. 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.

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

13. 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."

18. 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 :

(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.

(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.

(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.

(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

14. The latest decision of the Apex Court in **Khenyei Vs. New India Assurance Company Limited & Others, 2015 Law Suit (SC) 469** has laid down one further aspect about considering the negligence more particularly composite/contributory negligence. The deceased or the person concerned should be shown to have contributed either to the accident and the impact of accident upon the victim could have been minimised if he had taken care. In this case the deceased was not the author or the co-author of the accident. Hence, the oral prayer that deduction of 50% from the compensation be made is rejected.

15. This takes this Court to the issue of compensation. We would place reliance on the Apex court decision in **Malarvizhi & Ors Vs. United India Insurance Company Limited and Another, 2020 (4) SCC 228** and **United India Insurance Co. Ltd. Vs. Indiro0 Devi & Ors, 2018 (7) SCC 715. and in The Oriental Insurance Company Ltd. Vs. Mangey Ram and others, 2019 0 Supreme (All) 1067** and the recent judgment of the Apex Court in **New India Assurance Company Vs.**

Urmila Shukla decided by the Apex Court on 6.8.2021 reported in MANU/SCOR/24098/2021 and Kirti and others vs oriental insurance company ltd reported in 2021(1) TAC 1It could not be culled out from record that on what basis, the Tribunal has deducted the pecuniary benefits from the income cannot be fathomed. The income of the deceased in the year of accident and looking to his profession can be considered to be Rs.70,000/- per annum as the deceased is below 50 years, 40% as future loss of income requires to be added in view of the decision of the Apex Court in **Pranay Sethi (Supra)**. As far as amount under the head of non-pecuniary damages are concerned, it should be Rs.70,000/- + 10% increase as per the decision of the Apex Court in Pranay Sethi (Supra) as three years have elapsed hence, the lump sum amount under this head would be Rs.1,00,000/-. As far as multiplier is concerned, it is 15.

16. Hence, the total compensation payable to the appellants is computed herein below:

i. Income Rs.70,000/-

ii. Percentage towards future prospects : 40% namely Rs.28,000/-

iii. Total income : Rs. 70,000 + 28,000 = Rs.98,000/-

iv. Income after deduction of 1/3rd : Rs. 65,333/- (rounded up)

v. Multiplier applicable : 15

vi. Loss of dependency: Rs.65,334 x 15 = Rs.9,79,995/-

vii. Amount under non-pecuniary head : 1,00,000/-

viii.Total compensation : 10,79,995/-

17. As far as issue of rate of interest is concerned, it should be 7% from the date of filing of the petition till the judgement. From 2015-2021, the insurance company shall not be liable to pay any interest till restoration, thereafter it would be 7%.

18. 1 In view of the above, the appeal is partly allowed. Oral cross are allowed and compensation is recalculated. 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% 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 will deposit the entire amount can have their right to recover the amount from owner and the Insurance Company of the other vehicle. As far as deceased is concerned, it is a case of composite negligence, hence, the amount cannot be deducted from the compensation awarded to the claimants who are the heirs of a non tort-feasor.

19. 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.

20. Record be sent back to tribunal forthwith.

21. This Court is thankful to both the learned Advocates for getting this matter disposed of during this pandemic.

(Ref: Civil Misc. Delay Condonation Application)

1. Heard learned counsel for the appellants and learned counsel for the respondents.

2. This is an application seeking condonation of delay in filing the recall application.

3. Cause shown for the delay in the affidavit attached to delay condonation application is sufficient, hence, the delay is condoned subject to token of cost of Rs. 500/- to be deducted from the compensation awarded.

4. This application, accordingly stands allowed.

(Ref: Civil Misc. Restoration Application)

1. This is an application seeking recall of order dated 17.09.2015 dismissing the appeal for want of prosecution.

2. Cause shown is sufficient and we feel that being appeal of M.V. Act, it requires to be restored.

3. Hence, the order dated 17.09.2015 is hereby recalled to file subject cost of Rs. 500/- as there is huge delay which should be deducted from the compensation to be deposited. The appeal is ordered to be restored to its original number.

4. This application, accordingly, stands allowed.

(2021)09ILR A471
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.08.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE SUBHASH CHAND, J.

FAFO No. 2235 of 2014

Saiyyad Azadar Husain ...Appellant
Versus
Swami Viveka Nand Vidyashram & Anr. ...Respondents

Counsel for the Appellant:
Sri Ram Singh, Sri Mohd. Asim Zulfiquar

Counsel for the Respondents:
Sri Dinesh Kr. Srivastava, Sri Rajeev Ojha, Sri S.R. Verma, Sri R.K. Sharma

Enhancement of quantum of amount awarded as compensation -income of the deceased wrongly calculated-amount enhanced -50% added under head of

future prospect. Amount enhanced- Appeal allowed. (E-9)

List of Cases cited:

1. National Insurance Co. Ltd.Vs Pranay Sethi & ors., 2017 0 Supreme (SC) 1050

2. New India Assurance Co.Ltd. Vs Resha Devi & ors., 2017 (2) AICC 1808

3.Sarla Verma Vs Delhi Transport Corporation, (2009) 6 SCC 121,

4. National Insurance Co. Ltd. Vs Mannat Johal & ors., 2019 (2) T.A.C. 705 (S.C.)

5. A.Vs Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442

6. Smt. Hansaguti P. Ladhani Vs The Oriental Insurance Co. Ltd., reported in 2007(2) GLH 291

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

1. Heard Mohd. Asim Zulfiquar, learned counsel for the appellant and Sri R.K. Sharma, learned Advocate, holding brief of Sri Rajeev Ojha, learned counsel for the Insurance Company.

2. This appeal, at the behest of the claimant, challenges the judgment dated 19.4.2014 passed by Motor Accident Claims Tribunal/Additional District Judge, Court No.12, Allahabad (hereinafter referred to as 'Tribunal') in Motor Accident Claim Petition No.599 of 2011 awarding a sum of Rs.5,96,000/- with interest at the rate of 7% as compensation.

3. Brief facts of the present case are that on 5.2.2011 at about 7.15 am when Saiyyad Najmul Hasan along with his younger brother Saiyyad Sabeeh Hasan, riding on back seat of motor cycle bearing registration no. U.P. 70 AR 3603, was going to Mohanganj Gohari, driver of the bus bearing registration no. UP 70 AT 7188, which was on the way to Sevaith Railway Crossing from the side of Gohari, driving it rashly and negligently came on wrong side and sped away the bus dashing the motor cycle and running over Saiyyad Najmul Hasan and Saiyyad Sabeeh Hasan. In the accident, both sustained severe injuries as a result of which both passed away on the spot at the very moment. Claimants had filed claim petition claiming Rs. 71,07,000/- averring therein that deceased was 39 years and used to work in Kingdom of Saudi Arbia from which he used to earn Rs.25,000 per mensem.

4. Learned counsel for the appellant submitted that the deceased was about 39 years of the age at the time of accident and used to work in Kingdom of Saudi Arbia from where he used to earn Rs.25,000/- per mensem. It is further submitted that the amount granted under non-pecuniary damages are on the lower side and it should be as per the decision in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050.** Hence, the quantum of amount awarded requires to be enhanced.

5. Learned counsel for the respondent, has vehemently objected the contentions raised by the learned counsel for the appellants and has submitted that the compensation awarded by the Tribunal is just and proper and does not call for any enhancement.However it is submitted that the multiplier of 15 would be applicable in the facts of the present case as the deceased was about 39 years of age.

6. We have perused the record as also the supplementary affidavit filed by the appellant which throws light on the income of

the deceased. It throws light on the fact that he has valid Viza. he was earning SR 2000 (Two thousand Saudi Riyal only). Salary certificate attached with the supplementary affidavit shows that he had worked there from 22.8.2009 to 26.12.2010. This was given by Hussain Bin Ali Establishment. It is further submitted that if this Court does not accept the income in Saudi Riyal, he was skilled labourer for which also the minimum wages in the year of accident would be Rs.3290+1708 which is minimum wages for a skilled labourer. The Insurance Company has also relied upon minimum wages in Uttar Pradesh w.e.f. April 1, 2011 to September 30, 2011. The Accident occurred on 5.2.2011. Even if we go by the certificate given by the authority concerned when the accident occurred, whether he was to go back to serve at Saudi or not is not made known. The certificate speaks his working only upto 26.12.2010 meaning thereby he might be on leave and would have to go back for he was already in jobe even during the earlier period as he had got visas earlier also.In that view of the matter, we go by the Judgment of the Apex Court in **New India Assurance Company Ltd. Vs. Resha Devi and others, 2017 (2) AICC 1808.**

7. On the basis of Judgment of Apex Court in **Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121**, we fix his income to be Rs.7,000/- per mensem. As he was aged about 39 years at the time of accident, 50% requires to be added under the head of future prospect. Multiplier of 15 has to be applied. Further 1/3rd amount is required to be deducted as he was survived by his widow and mother. As far as amount under non pecuniary damages are concerned, it should be Rs.70,000/- with 10% increase in every three years which we grant Rs.1,00,000/- lump sum. 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.7,000 p.m.

ii. Percentage towards future prospects : Rs.3,500/-

iii. Total income : Rs.7,000/- +Rs.3,500/- = Rs.10,500/-

iv. Income after deduction of 1/3rd towards personal expenses : Rs.7,000/-

v. Annual income : Rs.7,000/- x 12 = Rs.84,000/-

vi. Multiplier applicable : 15

vii. Loss of dependency: Rs.84,000/- x 15 = Rs.12,60,000/-

viii. Amount under non pecuniary heads : Rs.1,00,000/-

ix. Total compensation : Rs.13,60,000/-

8. 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."

9. 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.

10. 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.

11. 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 award and 6% thereafter till the amount is deposited. The amount already deposited be deducted from the amount to be deposited.

12. 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.

13. Record be sent back to Tribunal.

14. This Court is thankful to both the counsels to see that the matter is disposed of.

(2021)09ILR A474
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.08.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE DINESH PATHAK, J.

FAFO No. 2386 of 2016

Smt Kavita Singh & Ors. ...Appellants
Versus
The H.D.F.C. Ergo General Insurance Company Ltd. & Ors. ...Respondents

Counsel for the Appellants:
Sri Mayank

Counsel for the Respondents:
Sri Sushil Kumar Mehrotra

Motor Vehicle Accident Claim-Quantum of Compensation challenged-income wrongly

assessed by excluding HRA-further 50% to be added towards future loss of income-father cannot be treated as dependant-so deduction for personal expenses would be 1/3 not 1/4-compensation enhanced.

Appeal partly allowed. (E-9)

List of Cases cited:

1.Vimal Kanwar & ors. Vs Kishore Dan & ors., 2013 (3) T.A.C. 6 (S.C.) 2013 (3) T.A.C. 6 (S.C.)

2. National Insurance Co.. Ltd. Vs Pranay Sethi & ors., 2017 0 Supreme (SC) 1050

3. National Insurance Co. Ltd. Vs Mannat Johal & ors., 2019 (2) T.A.C. 705 (S.C.)

4. A.Vs Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442

5. Smt. Hansaguti P. Ladhani Vs The Oriental Insurance Co. Ltd., reported in 2007(2) GLH 291

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

1. Heard Sri Mayank, learned counsel for the appellants, Sri Sushil Kumar Mehrotra, 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 22.4.2016 passed by Motor Accident Claims Tribunal/Additional District Judge,Court No.3, Mathura (hereinafter referred to as 'Tribunal') in M.A.C.No.567 of 2014 awarding a sum of Rs.23,51,000/- with interest at the rate of 7% as compensation.

3. The accident is not in dispute. The issue of negligence decided by the Tribunal is not in dispute. The respondent has not challenged the liability imposed on them. The only issue to be decided is, the quantum of compensation awarded.

4. It is submitted by learned counsel for the appellants that deceased was about 32 years at the time of the accident. Tribunal has wrongly assessed his income as Rs.16260/- by excluding the amount of HRA. It is submitted that in view of the Judgment of Apex Court in **Vimal Kanwar and others Vs. Kishore Dan and others, 2013 (3) T.A.C. 6 (S.C.) 2013 (3) T.A.C. 6 (S.C.)**, the Tribunal could not have deducted HRA and thus, income of the deceased may be considered Rs.18159/-. Further it did not grant any amount under the head of future prospect, which should be granted in view of the decision in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050**. It is further submitted that the amounts granted under non-pecuniary damages are on the lower side and it should be as per the decision in **Pranay Sethi (Supra)**. It is further submitted that the deduction towards personal expenses of the deceased should be 1/3rd. Hence, the award requires enhancement.

5. 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 not granting the future loss of income.

6. We have considered the submissions and considered the factual data. The deceased was fourth class employee in National Federation of Cooperative Federation of Corporative Sugar Factory. We agree with the submission of the learned counsel for the

appellants that HRA cannot be excluded while considering the income of the deceased in view of Judgment in Vimal Kanwar (supra). Thus, we consider income of the deceased to Rs.18159/-. Further as the deceased was below 40 years of age and a salaried person, 50% is to be added towards future loss of income. Main contention of Sri Mehrotra is that deduction of 1/4 is bad as father cannot be said to be dependent and deduction of personal expenses has to be always based on the number of dependents/legal representative of the deceased. We are convinced with the submission of Sri Mehrotra. Thus, deduction towards personal expenses would be 1/3rd and not 1/4th. The amount under the head of non-pecuniary head would be Rs.70,000/-+30,000 as this is appeal of the year 2016 and about four years have elapsed.

7. Hence, total compensation payable is recalculated and is computed herein below:

i. Income Rs.18,159/-

ii. Percentage towards future prospects : 50% namely Rs.9079/- (rounded up)

iii. Total income : Rs.18,159 +9,079 = Rs.27,238/-

iv. Income after deduction of 1/3rd : Rs.18,159/-

v. Annual income : Rs.18159 x 12 = Rs.2,17,908/-

vi. Multiplier applicable : 16

vii. Loss of dependency: Rs.2,17,908 x 16 = Rs.34,86,528/-

viii. Amount under non-pecuniary head : Rs.1,00,000/-

ix. Total compensation : Rs.35,86,528/-

9. 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."

9. No other grounds are urged orally when the matter was heard.

10. 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.

11. 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.

12. 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 award and 6% thereafter till the amount is deposited. The amount already deposited be deducted from the amount to be deposited.

13. 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.

14. Record and proceedings be sent back to the Tribunal.

(2021)09ILR A477
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.08.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE SUBHASH CHAND, J.

FAFO No. 2651 of 2017

Smt. Shashibala & Ors. ...Appellants
Versus
Jogindra Singh & Ors. ...Respondents

Counsel for the Appellants:
Sri J.B. Singh, Sri Sudhanshu Pandey, Sri Vageesh Pandey, Sri S.K. Sharma

Counsel for the Respondents:
Sri Pradeep Kumar Sinha

Motor Vehicle Accident Claim-issue of negligence in dispute-Motorcyclist was on the correct side because the road ws broad-nothing on record that driver of the Car had taken all kind of caution-negligence of deceased quantified at 10% and not 25%.

Appeal partly allowed. (E-9)

List of Cases cited:

1. National Insurance Co. Ltd. Vs Pranay Sethi & ors., 2017 0 Supreme (SC) 1050

2. National Innsurance Co. Ltd. Vs Birender & ors., Civil Appeal Nos. 242-243 of 2020 decided on 13.1.2020

3. Sandeep Khanduja Vs Atul Dande & ors., (2017) 3 SCC (Crl) 178

4. National Insurance Co. Ltd. Vs Pranay Sethi & ors., 2017 0 Supreme (SC) 1050

5.National Insurance Co. Ltd. Vs Luv Kush & anr., FAFO No.199 of 2017

6. Bajaj Allianz General Insurance Co.Ltd. Vs Smt. Renu Singh & ors., First Appeal From Order No. 1818 of 2012 decided on 19.7.2016

7. Khenyei Vs New India Assurance Co. Ltd. & ors., 2015 LawSuit (SC) 469 h

8. Bijoy Kumar Dugar Vs Bidhyadhar Dutta & ors., TAC 2006 (1) 969

9. Rajesh Ji Verma Vs Abhineet Kesharwani, 2008 (2) TAC 40

10. Archit Saini Vs Oriental Insurance Co. Ltd., (2018) 3 SCC 365

11. National Insurance Co. Ltd.Vs Pranay Sethi & ors., 2017 0 Supreme (SC) 1050

12. Sarla Verma Vs Delhi Transport Corporation, (2009) 6 SCC 121

13.Reliance General Insurance Co. Ltd. Vs Shashi Sharma & ors., 2016 (4) TAC 149

14. Vimal Kanwar & ors. Vs Kishore Dan & ors.. 2013 (2) RCR(Civil) 945

15. Syed Basheer Ahmed Vs Mohammed Jameel, 2009 ACJ 690

16. National Insurance Co. Ltd. Vs Mannat Johal & ors., 2019 (2) T.A.C. 705 (S.C.)

17. A.Vs Padma Vs Venugopal, Reported in 2012 (1) GLH (SC), 442

18.Smt. Hansaguti P. Ladhani VsThe Oriental Insurance Co. Ltd., reported in 2007(2) GLH 291

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

1. Heard Shri Sudhanshu Pandey, learned counsel for the appellants and Sri Pradeep Kumar Sinha, learned counsel for the respondent-insurance company.

2. This appeal, at the behest of the claimants, challenges the judgment dated 22.07.2017 passed by M.A.C.T./Additional District Judge/Fast Track Court-I, Gautam Budh Nagar (hereinafter referred to as 'Tribunal') in Claim Petition No.226 of 2013 awarding a sum of Rs.1,25,000/- with interest at the rate of 7% as compensation.

3. The accident is not in dispute. The issue of negligence decided by the Tribunal is in dispute. The respondent concerned has not challenged the liability imposed on them. The issues to be decided are the quantum of compensation awarded and whether deceased was also negligent in causing the accident.

4. The claimants are the legal heirs of the deceased who died in the fateful vehicular accident which occurred on 15.7.2013 when the deceased Ajab Sigh at about 9.30 in the night was going on Motorcycle No. HR 29 Q 2011 and was returning to home (Faridabad), and when he reached near Galgotiya University, a Maruti Alto No. HR 51 AS 6256 being driven rashly and negligently came and dashed with his scooter whereby he suffered injuries and when he was moved to the Hospital, he succumbed to injuries. One Harinder Singh tried to stop the Maruti Caar but the driver fled away. Claimant No.4, Jaipal Singh lodged the complaint. The deceased was a Teacher in Education Department of Haryana and his basic salary was Rs.51,860/- p.m. The respondent Nos. 1 and 2 filed their replies and contended that their vehicle was not involved in the said incident. The vehicle was insured with it is accepted by respond no.3, insurance company but they pleaded that the vehicle with plied in contravention of policy condition. The tribunal framed about 9 issues. We are mainly concerned with the

issue of negligence and dependency/compensation.

5. It is submitted by learned counsel for the appellants that the Tribunal has not granted any amount towards future loss of income which is required to be granted in view of the decision titled **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050**. It is further submitted that amount under non-pecuniary heads which is granted and the interest awarded by the Tribunal are on the lower side and requires enhancement. It is further submitted that as the deceased was survived by his mother, wife, one daughter and two sons, the deduction towards personal expenses of the deceased should be 1/4th and not 1/3rd as deducted by the tribunal. In support of this submission, learned counsel for the appellants cited the judgment of the Supreme Court in **National Innsurance Company Limited v. Birender and others, Civil Appeal Nos. 242-243 of 2020 decided on 13.1.2020.**

6. Learned counsel for the respondents has vehemently objected to the submissions of the learned counsel for the appellants and has submitted that the compensation awarded by the Tribunal is just and proper and does not call for any enhancement. The learned counsel for the respondents has further submitted that in light of the evidence adduced and it is contended that the tribunal has not committed any error as Compassionate Assistance of full pay is given by the Government to the heirs at least for 12 years. It is further submitted that wife would be getting full pension, entire amount which deceased was getting, till the date of retirement and therefore also requires to be deducted.

7. It is submitted by counsel for claimants that the Supreme Court's decision was cited before the tribunal but tribunal has deducted bonus, maintenance allowance, PF and gratuity from commuptable income holding that they are not part of the salary and, therefore, the tribunal held that the same cannot be considered to be part of the income. The tribunal added 40% as future loss of income, which should be 50%. Most unfortunately, the tribunal has considered the judgment of ***Sandeep Khanduja v. Atul Dande*** **and Ors., (2017) 3 SCC (Crl) 178** and held that claimants can't be awarded compensation except non pecuniary damages. The claim petition was not moved under Section 163-A of the Motor Vehicles Act, 1988 (Act) but was moved under Section 166 of Motor Vehicles Act, 1988 and hence, it appears that the learned tribunal has granted multiplier of 18, but held that as the widow would be getting compensation till 2025 no compensation is payable and granted Rs.1,25,000/- and deducted 25% of the amount holding the deceased to be also negligent.

8. It is submitted by learned counsel for claimants that the learned Tribunal should have gone by the judgment in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050** and not by the rules the tribunal ought to have been considered the decision of this Court in **FAFO No.199 of 2017, National Insurance Company Limited v. Luv Kush and another** where in it is held that rules are not to be over strictly followed. It is submitted that compensation has to be as per the judgment of Pranay Sethi's case, appellants are entitled to filial consortium, funeral charges, compensation for love and affection. The judgment in Pranay Sethi

(Supra) though has been considered by the learned tribunal, he has misguided himself by relying on Rule 4 of the U.P. State Motor Vehicle Rules, 2011 which could not be done.

9. Heard the learned counsels for the parties. The issue of negligence has to be decided from the perspective of the law laid down.

10. The term negligence means failure to exercise care towards others which a reasonable and prudent person would in a circumstance. Negligence can be both intentional or accidental which can also be accidental. More particularly, term negligence connotes reckless driving and the injured of claimants 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.

11. 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.

12. 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

13. 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."<u>*emphasis added*</u>

14. The latest decision of the Apex Court in **Khenyei (Supra)** has laid down one further aspect about considering the negligence more particularly composite/contributory negligence. The deceased or the person concerned should be shown to have contributed either to the accident and the impact of accident upon the victim could have been minimised if he had taken care.

15. The findings of fact that the accident occurred due to contribution of both drivers is to be evaluated on aforesaid principles. The tribunal comes to the conclusion that from the evidence educed, it can't be presumed or held that the motorcyclist was on wrong-side. The learned tribunal has come to the conclusion that as it was a head on conclusion and so both the drivers would have contributed in the accident taking place for which the tribunal relied on the decisions titled ***Bijoy Kumar Dugar vs. Bidhyadhar Dutta and others*****, TAC 2006 (1) 969 and Rajesh Ji Verma v. Abhineet Kesharwani, 2008 (2) TAC 40.** The said judgements would not apply as two vehicles of unequal magnitude were involved in the accident in the case on hand. The motorcyclist was on the correct-side just because the road was broad enough, it cannot be said that he did not take any care or caution to avert the accident from taking place. Nothing is brought on record that the driver of the Maruti Caar had taken all kinds of caution. It is proved that the driver of the motorcycle cannot be said to have contributed in accident having taken place. The judgment of Supreme Court in the decision of ***Archit Saini v. Oriental Insurance Company Ltd.*****, (2018) 3 SCC 365**, which has considered the principles of negligence will also come to the aid of the appellants herein. The reason being the detail analyses of facts would go to show that the driver of Maruti Car was at fault. The sight plan filed along with the charge sheet will not support the finding recorded by the Tribunal. It is not in dispute that the owner or driver of the vehicle namely Maruti Caar did not appear before the tribunal. The Negligence of deceased is quantified at 10% and not 25%.

<u>Compensation</u>

16. Having heard the counsels for the parties and considered the factual data, the accident occurred on 15.7.2013 causing death of Ajab Singh who was 41 years of age and left behind him, wife, one daughter, two young sons and mother. The Tribunal has assessed the income of the deceased to be Rs.50,360- per month. The deceased was a government employee. The income according to counsel for appellants has not been properly calculated. It is submitted that the deceased was Government employee even if we consider the income of the deceased in the year 2013 and even if we go by the judgments of the Apex Court wherein it has been held that income as on date of accident would be applicable. It is submitted that income has to be considered to be Rs.51,860/- per month, which we feel is just and proper. To which as the deceased was in the age bracket of 41-45 years, 30% of the income will have to be added as future loss of prospects in view of the decision of the Apex Court in **National Insurance Company Limited Vs. Pranay Sethi and**

Others, 2017 0 Supreme (SC) 1050. As far as deduction towards personal expenses of the deceased is concerned, it should be 1/4th as the deceased was a married. The Tribunal considered the multiplier of 14 which is maintained as per the decision in **Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121** will have to be followed.

17. Tribunal has considered the judgment of Supreme Court in ***Reliance General Insurance Co. Ltd. V. Shashi Sharma and others, 2016 (4) TAC 149*** and held that the family mainly the widow would as per the rules will receive a sum, which will aggregate to upto 2025 Rs. 67,28,256/- for a period of 12 years which will not permit us to disturb the findings as far non entitlement of amount for twelve years. The deceased was in the age group of 41-45 years and hence an additional multiplier of 14. Hence we would grant a multiplier of 2 which is not granted by the tribunal. Income of the deceased was Rs.51,860/- p.m. to which multiplied by 12 and 1/4 would have to be deducted for personal expenses of deceased. The legal representative mainly the wife receiving a sum of Rs.67,28,256/- upto 2025. We grant multiplier of 2 as is rightly pointed out by Shri P. K. Sinha, learned counsel for insurance company that under the compensatory jurisdiction, it cannot be windfall but must be commensurate with the amount which a family has to receive. The tribunal had already granted Rs.1,00,000/- for non pecuniary damages and Rs.25,000/- for funeral charges which also is not disturbed. The tribunal has not taken into consideration the judgment of ***Vimal Kanwar & Ors. Vs. Kishore Dan & Ors. 2013 (2) RCR(Civil) 945*** and ***Syed Basheer Ahmed v. Mohammed Jameel, 2009 ACJ 690.***

18. 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.51,860 /- p.m.

ii. Percentage towards future prospects : 30% namely Rs.15,558/-

iii. Total income : Rs. 51,860 + Rs.15,558 = Rs.67,418/-

iv. Income after deduction of 1/4 : Rs.50564/-

v. Annual income : Rs.50,564 x 2x12 = Rs.12,13,536/-

vi. Multiplier applicable : 14 (as the deceased was in the age bracket of 41-45 years), but as the family is to get compensated for 12 years (only 2 years loss is granted).

vii. Amount under non pecuniary heads : Rs.1,25,000/-

viii. Total compensation : **Rs.13,38,536/-**

19. 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."

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 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.

21. 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 may be.

22. 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, the TDS can't be deducted on amount of compensation. Registry of the Tribunal is directed to allow the claimants 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.

23. 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 direct investment of amount. The same is to be applied looking to the facts of each case.

24. The amount shall be disbursed in equal proposition but amount of minor children if any now be kept in Fixed Deposit upto 2025 and then be released.

25. This Court is thankful to both the counsels to see that the matter is **disposed of.**

26. The record be sent back to the Tribunal.

(2021)09ILR A485
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.08.2021

BEFORE

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

FAFO No. 2832 of 2012

Bhism Singh & Anr. ...Appellants
Versus
Mangal Singh & Anr. ...Respondents

Counsel for the Appellants:
Sri Anurag Sharma

Counsel for the Respondents:
Sri Pawan Kumar, Sri Pawan Kumar Singh

Deceased a 12 year old boy-victim of a motor accident-quantum of compensation challenged-compensation under head of" non pecuniary damages" -Rs. 2, 95,000 granted relying upon Apex Court judgment. Amount enhanced.

Appeal partly allowed. (E-9)

List of Cases cited:

1. Rajendra Singh & ors. Vs National Insurance Co. Ltd. & ors., (2020) 7 SCC 256

2. FAFO No. 3061 of 2007, Smt. Poonam Vs Amit Kumar & anr.

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

1. Childhood is a phase of life that everyone passes through. The greatest of men, lawyers, judges, jurists, scientists, inventors, men of medicine, to name the important few, amongst others, who not only have made changes to the world, but often changed the world itself, for the betterment of humanity, have, at some point of time, been infants, toddlers and children. If men of eminence, who did so much for the humanity in the productive years of their life, had died as children, would it be no loss to the dependents?; or still more, to the humanity? To the dependents, in many a case, it would be irremediable loss, and likewise, to the humanity. In the event an adult were to die in an accident during the productive years of his life, there are standards to assess the loss of dependency. It includes the loss flowing from future prospects. If a child dies, not just the dependents, but the entire humanity does not know what treasure might have been forsaken forever in his/her untimely exit from the world. To think, therefore, that a child's life, snuffed out in a motor accident, has to compensated by the award of a token for the damages or the loss to the child's dependents, is the product of a very pedantic and mediocre understanding. This appeal under Section 173 of the Motor Vehicles Act, 19881 is about the quantum of compensation that a mother and father of a twelve year old boy, the victim of a motor accident would be entitled to.

2. The facts giving rise to this appeal are these :

In the afternoon of December the 30th, 2009 at 2 O' Clock, Aditya, the young son of the two appellants, Bheeshm Singh and his wife Smt. Kavita, was cycling on the Mavana- Falawada Road. A vehicle proceeding on the road from the direction of Falawada was being driven negligently and at a high speed. It bore Registration No. U.P. 15 B 8625. The rash and negligently driven vehicle hit Aditya. He suffered severe injuries in the accident and died on way to the hospital. Aditya was a few months shy of his 12th birthday. He was a student of Class VII and was reading at the Navjeewan Kishan Shikha Kendra. He would help his parents with the family's farming, dairy management and house-hold chores. It is said that he would earn a sum of Rs. 3000/- per month.

3. The appellants instituted a petition before the learned District Judge, Meerut (sitting as the Motor Accident Claims Tribunal) under Section 163-A of the Act of 1988. The petition was registered as M.A.C. No. 119 of 2010 on 02.02.2010. Summonses were issued to the respondents, returnable on 06.03.2010, fixing 17.03.2010 being the scheduled date for the framing of issues. The appellants claimed a

total sum of Rs. 10,01,000/- in compensation under the following heads :

1. Compensation for pecuniary loss Rs. 5,76,000/-
2. Compensation for mental pain and agony Rs. 1,00,000/-
3. Compensation for loss of future prospects Rs. 3,00,000/-
4. Compensation incurred toward performing the deceased's last right Rs. 20,000/-

4. On the total sum of money claimed, interest @ 18% *per annum*, from the date of institution of claim petition, was demanded.

5. A written statement was put in on behalf of the first respondent-opposite party, Mangal Singh, before the Tribunal, who is the owner of the offending vehicle. He did not dispute the fact that he is the owner, but denied his vehicle's involvement. Not much is to be commented about the owner's defence, as the issue here arises between the appellants, who are the claimants and the Insurer, who have been ordered to pay the compensation awarded by the Tribunal. The second respondent, that is to say, the Insurance Company, also put in a written statement and took a wholesome defence, denying the appellants' entitlement to receive any compensation, and in any case, their liability to indemnify the claimaints. The petition came on for determination before the learned Additional District Judge, Court No. 12, Meerut (sitting as the Tribunal) on 20.03.2012. The petition was allowed in part and the Insurance Company, respondent no. 2 were ordered to pay in compensation to the claimant-appellants a sum of Rs. 77,000/- within four weeks of the date of the award. No interest for the period past and *pendente lite* was awarded by the Tribunal, for it was held that the claimant-appellants were guilty of delay in commencing action. It was nevertheless ordered that in the event the sum of compensation awarded remaining unpaid by the second respondent-Insurance Company within the time specified in the award, the Insurance Company would liable to pay interest @ 12% from the date of default till realization.

6. Dissatisfied with the impugned judgment and award passed by the Tribunal, the claimants have brought the present appeal seeking enhancement of the compensation awarded.

7. Heard Mr. Anurag Sharma, learned Counsel for the claimant-appellants and Mr. Pawan Kumar Singh, learned Counsel appearing on behalf of the respondent-Insurance Company.

8. The only issue that has been suited in this appeal between the claimant-appellants and the Insurance Company is about the quantum of compensation payable, besides the date with effect from which the claimant-appellants would be entitled to interest. Mr. Sharma appearing for the claimant-appellants submits that the fact that the victim was a child, who had no income *in presenti*, does not mean that his otherwise priceless life, is just worth the miserably low compensation that the Tribunal have awarded. He has drawn the Court's attention to the findings of the Tribunal, where there are remarks about the not very bright future prospects about Aditya, given his family background. These have been castigated by the learned Counsel as an insensitive approach by the Tribunal. He submits that Aditya could

have blossomed into a young man with a highly productive life that would have been of immense support, assistance and satisfaction to his parents, the claimant-appellants.

9. On the other hand, Mr. Pawan Kumar Singh, learned Counsel appearing for the Insurance company, has supported the impugned award as one that orders a lawful, just and fair compensation to the claimant-appellants, for the loss of life of a child of the age that Aditya was. Learned Counsel particularly emphasizes that there is no proof to show that Aditya was, in fact, earning a sum of Rs. 3000/- per month. He also urges that from the gross uncertainties of what the future held for Aditya, in terms of his productivity, a quantification of the compensation cannot be built on the edifice of a mere fantasy or conjuncture about the victim's imagined productive future. He submits that there is no index objectively to determine how productive the boy, who was just about 12 years old or for the most, 14, would have been. In short, Mr. Pawan Kumar Singh says that this Court should refrain from enhancing the compensation on the basis of a mere optimistic guess work about Aditya's bright productive future, later in life.

10. This Court has keenly considered the submissions advanced and perused the impugned judgment and record. It is true that Aditya was a boy, who, by his school records, was still a few months away from the age of 12 years; going by his parents' assertions, he was 14 years old. In either case, Aditya was not yet in the age group, where an individual generally starts contributing to the nation's economy, exceptions apart. But, it does not mean that the victim of an accident, who is a child not yet in his productive years, is to be written off on account of the vagaries of an uncertain future and career prospects, as a life lost for which no compensation is payable to his heirs and survivors. There is little doubt that every human life is valuable and if the quantum of a child's productive contribution, later in life, lies in the womb of the future, is it good reason to think or presume about it pessimistically?; or, is it a valid objective assessment of the future prospects about a child, to go by the station of his parents in life or their socio-economic background? This Court says so because in our opinion, the Tribunal has precisely done that. This Court is constrained to say that on the quantification of the compensation payable, based on Aditya's expected future, there are some pessimistic, and, rather, as Mr. Sharma says, very insensitive remarks by the Tribunal.

11. The Tribunal has observed that appellant no. 1, Aditya's father, who has testified as PW-1, has acknowledged in his cross-examination that he is a home guard. He has three children, of whom, two survive. There is then almost an abominable remark by the Tribunal, where it said that there is no evidence to show that there was any possibility for Aditya to become an officer. This remark by the Tribunal is absolutely unpalatable. Should it be inferred from this remark that only an officer's son can become an officer; not a home guard's son, or a person placed still lower in the economic strata? This remark is repugnant to the constitutional creed of equality of opportunity to all citizens of the country. Also, the remark is unacceptable because it suggests that it is only officers who are well-off in life, and not others. A person may do well in any walk of life and contribute immensely in the country's economy. To say the least, the remarks of

the Tribunal above referred are entirely misplaced and unsupportable by sound legal reasonsing.

12. At the same time, it has to be acknowledged that the future prospects of a child can lie anywhere in the broad spectrum, from utter failure to abounding success. While everyone envisions a good future for his child, there is no measurable scale by which the future prospects of a child may be judged and on that basis, compensation determined, by a workable and tangible formula. The Court, therefore, has to determine it by sheer estimation under the head of non-pecuniary damages. The compensation, nevertheless, ought to be a figure that is palliative of some kind to the parents and the survivors; and, not just an eyewash.

13. This Court is of opinion that what would be a just, fair and respectable compensation, to be granted under the head of non-pecuniary damages, requires some further consideration in an appropriate case. However, it is not that the issue is one about which there is no guidance. In **Rajendra Singh & Others v. National Insurance Company Limited & Others**2 , their Lordships of the Supreme Court were concerned about the quantification of compensation payable to the father of a school-going daughter, aged about 12 years. In the context of compensation determinable for the untimely loss of a child of that age, it was held in **Rajendra Singh** *(supra):*

12.The second deceased was a school-going child aged about 12 years. She had a whole future to look forward in life with all normal human aspirations. She died prematurely due to the accident at a very tender age for no fault of hers even before she could start to understand the beauty and joys of life with all its ups and downs. The loss of a human life untimely at childhood can never be measured in terms of loss of earning or monetary loss alone. The emotional attachments involved to the loss of the child can have a devastating effect on the family which needs to be visualised and understood. Grant of non-pecuniary damages for the wrong done by awarding compensation for loss of expectation in life is therefore called for.

13. Undoubtedly the injury inflicted by deprivation of the life of the child is very difficult to quantify. The future also abounds with uncertainties. Therefore, the courts have used the expression "just compensation" to get over the difficulties in quantifying the figure to ensure consistency and uniformity in awarding compensation. This determination shall not depend upon financial position of the victim or the claimant but rather on the capacity and ability of the deceased to provide happiness in life to the claimants had she remained alive. The compensation is for loss of prospective happiness which the claimant would have enjoyed had the child not died at the tender age. Since the child was studying in a school and opportunities in life would undoubtedly abound for her as the years would have rolled by, compensation must also be granted with regard to future prospects. It can safely be presumed that education would have only led to her better growth and maturity with better prospects and a bright future for which compensation needs to be granted under non-pecuniary damages.

14. The income of the minor girl child is incapable of precise fixation. We find no reason to interfere with the assessed notional income of the second deceased. In R.K. Malik v. Kiran Pal [R.K. Malik v.

Kiran Pal, (2009) 14 SCC 1 : (2009) 5 SCC (Civ) 265 : (2010) 1 SCC (Cri) 1265] , considering grant of future prospects for the deceased child aged about 10 years it was observed as follows : (SCC p. 14, paras 32-33)

"32. A forceful submission has been made by the learned counsel appearing for the appellant claimants that both the Tribunal as well as the High Court [R.K. Malik v. Kiran Pal, 2006 SCC OnLine Del 611 : ILR (2006) 1 Del 866] failed to consider the claims of the appellants with regard to the future prospects of the children. It has been submitted that the evidence with regard to the same has been ignored by the courts below.

33. On perusal of the evidence on record, we find merit in such submission that the courts below have overlooked that aspect of the matter while granting compensation. It is well-settled legal principle that in addition to awarding compensation for pecuniary losses, compensation must also be granted with regard to the future prospects of the children. It is incumbent upon the courts to consider the said aspect while awarding compensation."

15. In New India Assurance Co. Ltd. v. Satender [New India Assurance Co. Ltd. v. Satender, (2006) 13 SCC 60 : (2008) 1 SCC (Cri) 96] , the deceased victim of the accident was a nine year old school-going child. Considering the claim for loss of future prospects in absence of a regular income, it was observed that the compensation so determined had to be just and proper by a judicious approach and not fixed arbitrarily or whimsically. The uncertainties of a young life were noticed in the following terms : (SCC p. 64, para 12)

"12. In cases of young children of tender age, in view of uncertainties abound, neither their income at the time of death nor the prospects of the future increase in their income nor chances of advancement of their career are capable of proper determination on estimated basis. The reason is that at such an early age, the uncertainties in regard to their academic pursuits, achievements in career and thereafter advancement in life are so many that nothing can be assumed with reasonable certainty. Therefore, neither the income of the deceased child is capable of assessment on estimated basis nor the financial loss suffered by the parents is capable of mathematical computation."

16. The deduction on account of contributory negligence has already been held by us to be unsustainable. The determination of a just and proper compensation to the appellants with regard to the deceased child, in the entirety of the facts and circumstances of the case does not persuade us to enhance the same any further from Rs 2,95,000 by granting any further compensation under the separate head of "future prospects".

14. During hearing of this appeal, the decision in **Rajendra Singh** was relied upon by Mr. Anurag Sharma, and though as a principle the figure of Rs. 2,95,000/- in that case does not appear to be approved by their Lordships as a universal figure for a just compensation to be granted under the head of "non-pecuniary damages" in event of the unfortunate loss of a child, it was refused to be interfered with by assessing further compensation under a separate head of "future prospects".

15. My attention has been drawn to a recent decision by my esteemed brother Hon'ble Vivek Agarwal, J. in **FAFO No. 3061 of 2007, Smt. Poonam v. Amit Kumar & Another**, decided on January

the 21st, 2021, where ,in, the claim that arose out of a motor accident, the deceased was a ten-years old boy and a student of Class V. Compensation in that case was enhanced from Rs. 39,500/- to Rs. 2,95,000/- following the decision of the Supreme Court in **Rajendra Singh**. The facts in **Rajendra Singh**, going by the age of the victim of the accident, are close to the facts here, but it must be said that these are decisions on facts, which do not lay down the law. Nevertheless, the principle in **Rajendra Singh** is clear that damages have be to be awarded in the case of death of a child under the non-pecuniary head.

16. In the totality of the circumstances, this Court is of opinion that ends of justice would be met by modifying the impugned award passed by the Tribunal to the extent that instead of the compensation of Rs. 77,000/- awarded to the claimant-appellants, the same shall stand enhanced to Rs. 2,95,000/-. The compensation payable shall carry Simple Interest @ 7% *per annum* from the date of institution of the claim petition, until realization.

17. This appeal **succeeds** and stands ***allowed in part***, and, there shall be an order modifying the impugned award in the terms indicated *hereinabove.*

18. **Costs easy.**

(2021)09ILR A491
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.09.2021

BEFORE

THE HON'BLE SURESH KUMAR GUPTA, J.

Misc. Single No. 23987 of 2019

Hakimuddin ...Petitioner
Versus
State of U.P. & Ors. ...Respondent

Counsel for the Petitioner:
Mohammad Riyaz

Counsel for the Respondent:
G.A.

A. Criminal Law - U.P. Gangster Act, 1986 - Sections 16, 17& 18 - The Court rejected the bail application on the ground that the Special Judge (Gangster Act) has not arrived at any final conclusion regarding the release of his attached vehicle under Section 17 of the Gangster Act. (para 13)

Writ Petition Disposed of. (E-10)

List of Cases cited:

1. Rajbir Singh Tyagi Vs St of U.P. & ors. Criminal Misc. Writ Petition No. 17245 of 2009 *(distinguished)*

(Delivered by Hon'ble Suresh Kumar Gupta, J.)

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

2. By means of this petition under Article 226 of the Constitution of India, the petitioner has prayed following reliefs:-

"(i) Issue a writ, order or direction in the nature of certiorari to quash the impugned order dated 31.-07.2019 which is passed in Gangster Criminal Misc. Case No. 08/2018 bearing name Hakimuddin Vs. State of U.P. under Section 14 (1) U.P. Gangster Act by Additional District Judge, Court No. 10/Special Judge Gangster Act, District Sultanpur as well as order dated 25.07.2018 which is passed by District Magistrate

District Amethi in Case No.00590/2018, under Section 14 (1) U.P. Gangster Act as contained in Annexure No. 1 and 2 to this writ petition.

(ii) Issue a writ, order or direction in the nature of mandamus commanding the opposite party no. 2 to 4 to release the seized vehicle No. U.P. 44 AA/7287 forthwith in favour of the petitioner."

3. Brief facts of the case are as follows:

4. The S.H.O, Kothwali Amethi in his report dated 15.05.2018 has mentioned that the petitioner being a gang member had acquired several property by means of anti-social activities and acquired the Indica Vista Car No. UP 44 AA 7287 without disclosing the source of income. According to police report, he had no source of income. The above motor vehicle prima facie held to be proceed of crimes under the Act, 1986 and liable to be attachment thus requested to the Superintendent of Police to initiate attachment proceedings under Section 14(1) Gangsters Act, 1986. Consequently, Superintendent of Police Amethi wrote a letter dated 18.05.2018 to District Magistrate, Amethi for initiating a proceeding for attachment of aforesaid motor vehicle under Section 14(1) Gangsters Act, 1986.

5. Learned counsel for petitioner has submitted that the District Magistrate, concerned on receipt of said letter, initiated seizure proceeding of the vehicle of the petitioner vide order dated 26.06.2018. The petitioner on 02.07.2018 filed an objection by way of representation by disclosing the source of income and acquisition of motor vehicle and also requested to release his vehicle. The plea of the petitioner was rejected under Section 14 (1) of the Gangster Act, 1986 on 25.07.2018 on the ground that a petitioner is a history sheeter and four offences shown in Gang-chart against him and no material evidence of purchasing of said vehicle with valid source of income has been produced.

6. Further submission is that the learned District Magistrate concerned declined to release the vehicle vide order dated 25.07.2018 with the order of attachment and referred the matter to Special Judge (Gangsters Act) under Section 16 (1) of U. P. Gangsters Act, 1986. Thereafter the petitioner made a representation before learned Special Judge (Gangsters Act)/Additional Sessions Judge, Sultanpur. The petitioner requested that aforesaid Vehicle was purchased by earnings of his agricultural sources, pension of father, who was posted in Army and his wife is Gram Pradhan, but the all submissions of the petitioner was rejected regarding the purchasing of the vehicle and dismissed the application for releasing vehicle on 31.07.2019 on the ground that the concerned case is at the premature stage and the evidence of witnesses is yet to be recorded to reach the final conclusion. So releasing the aforesaid vehicle at this stage is contrary to provisions enshrine under Section 16 (3) of the Gangster Act.

7. Learned counsel for petitioner has submitted that vehicle no. UP 44 AA 7287 was purchased by the petitioner on 25.10.2013 from Anany Motor Private Limited for a sum of Rs. 7,04,144/- and the said vehicle was financed with Mahindra & Mahindra Finance Service Limited with 23 equal installments of Rs.18,990/- and sale letter is annexed as Annexure No. 3. Further submission is that at the time of purchase, his wife was Gram Pradhan and father was posted in Army Department and

was receiving pension a sum of Rs. 21,300/-, and the petitioner has sufficient agricultural land and his annual earning is Rs.1,00,000/- also. In support of his submission, he filed copy of bank account of his father as Annexure No. 5 and copy of his bank account as Annexure No. 6. Learned counsel for petitioner has further submitted that the petitioner had paid all installments with the help of earning of his family members and finally submitted that at present the vehicle is lying abandoned in police station and the petitioner is ready to give surety and personal bond regarding the vehicle and he will not sell the vehicle during the disposal of the case finally before the court concerned. Thus the petitioner is legally entitled to release the vehicle in his favour. Learned counsel for petitioner has next submitted that the petitioner has no other alternative and efficacious remedy than to invoke jurisdiction of this Court under Article 226 of the Constitution. Learned counsel for petitioner has also relied upon a judgment of this Court in the case of ***Rajbir Singh Tyagi Vs. State of U.P. and others*** passed by this Court in ***Criminal Misc. Writ Petition No. 17245 of 2009*** wherein Ganster Court conducted inquiry under Section 16 in reference to order passed by District Magistrate and after due enquiry learned Gangster Court passed the final order of attachment and the claim of the petitioner was rejected and High Court by means of writ under Article 226 of the Constitution allowed the writ of the petitioner and quashed the order of the learned trial court and released the attached property.

8. Learned A.G.A. for the State has opposed the submissions made by learned counsel for petitioner and submitted that the inquiry is pending before the Gangster Court and the Gangster Court had not arrived at any final conclusion regarding the alleged motor vehicle. He further submitted that the prayer made in the writ petition is prima facie at this stage is liable to be dismissed.

9. Being aggrieved by the aforesaid orders, this writ petition has been filed.

10. To deal with the issue involved in the present writ petition, the discussion of provisions of Act, 1986, Section 14 to 18 is essential and same is reproduced as under:-

14. Attachment of property. - (1) If the District Magistrate has reason to believe that any property, whether moveable 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 subsection (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 subsection (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 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. 5 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 witness 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.

(5) In any proceedings under this section, the burden of proving that the property in 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.

18. Appeal. - The provisions of Chapter XXIX of the Code shall, mutatis mutandis, apply to an appeal against any judgment on order of a Court passed under the provisions of this Act.

11. The aforesaid provision has clearly envisages that on receiving the reference from the District Magistrate under Section 16 (1) of the Act, the Court shall fix date for inquiry and Court shall hear the parties, receive evidence produced by them, take such further evidence as it considers necessary. In the case in hand, Special Judge (Gangsters Act) came to hold that the evidence of concerned parties and interested witnesses is yet to be recorded to reach final conclusion. Even the notice is not served to them at this stage, so releasing the aforesaid property is contrary to the settled provisions under the Act. In view of the matter, proceedings regarding the determination of the claim of the parties is still to be decided by the court concerned after recording evidence of respective parties.

12. Although in support of his submission, learned counsel for petitioner has relied upon a judgment of this Court in the case of ***Rajbir Singh Vs. State of U.P. passed in Criminal Misc. Writ Petition No. 17245 of 2009.*** but the fact of this case is quite different from the facts of the present case. In ***Rajbir Singh's*** case, the trial court finally determined the rights of the petitioner under Section 17 of the Gangster Act. In the present case, no final order has been passed by the competent gangster court and enquiry proceedings is still pending under Section 16 of the Gangster Act.

13. The learned Special Judge (Gangsters Act) has not arrived at any final conclusion regarding release of alleged property under Section 17 of the Gangster Act. Since no final order was passed by the court of Gangster Act, so at this stage, the present writ petition is not maintainable. If any grievance left to the petitioner after arriving any conclusion by Gangster Court under Section 17 of the Act then he may file appeal under Section 18 of the Gangster Act before this court.

14. In view of the aforesaid statutory provisions of law, there is no ground to entertain this petition. Accordingly, the petition is disposed of. However, it is desirable by the learned Special Judge Gangster Act to conclude the inquiry and pass the appropriate orders under Section 17 of the Gangsters Act, 1986 expeditiously preferably within a period of one month, if there is no legal impediment.

(2021)09ILR A495
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.08.2021

BEFORE

THE HON'BLE MUNISHWAR NATH BHANDARI, A.C.J.
THE HON'BLE SUBHASH CHANDRA SHARMA, J.

Special Appeal No. 107 of 2021

The Secretary, CBSE, New Delhi & Ors. ...Appellants

Versus

Kabir Jaiswal & Ors. ...Respondents

Counsel for the Appellants:
Sri Hridai Narain Pandey, Sri Manish Goyal

Counsel for the Respondents:
A.S.G.I., Sri Ajay Singh, Sri Ram Sagar Yadav

A. Education – Certificate issued by CBSE – Change of name, sought for – Proof, to be filed in support thereof – Public document – Declaration by the Court of law, when it is required – Held, the application for change of name can be supported by school record or public document, in absence of it, declaration of the Court of law has been mandated – Declaration of the Court is sought when an application is not supported by school record or public document. (Para 20)

B. Education – CBSE Examination Bye-laws – Change of name – Period of limitation of 10 years – Date, from which it will be counted – Date of result or date of application – Determination – Jigya Yadav's case relied upon – Held, The period of limitation to make an application would apply from the date of declaration of result. (Para 25)

C. Interpretation of Statue – Statute and bye-laws – Overriding effect –Bye-laws provides for declaration by the Court of law and publication but it cannot be read against the statutory provision – Bye-laws is to be read down to make it consistent to the statutory provision – Bye-laws are not statute though made enforceable but cannot be read against the statutory provisions, like the Indian Evidence Act, 1872 – Presumption given under the Act of 1872 cannot be brush aside by the Bye-laws after publication of Notification in Gazette. (Para 20, 21 and 22)

Appeal disposed of. (E-1)

Cases relied on :-

1. Jigya Yadav (minor) through Guardian/Father Hari Singh Vs Central Board of Secondary Education and others reported in 2021 SCC OnLine SC 415

(Delivered by Hon'ble Munishwar Nath Bhandari, A.C.J.
&
Hon'ble Subhash Chandra Sharma, J.)

1. By this appeal, a challenge is made to the judgment dated 02.12.2020 by which the writ petition preferred by the petitioner-non appellant was allowed.

2. The writ petition was filed to seek a direction on the Central Board of Secondary Education (C.B.S.E.) for change of name of the petitioner-non appellant in their record from Rishu Jaiswal to Kabir Jaiswal and issue the certificate. The prayer aforesaid was allowed by the learned Single Judge.

3. It is after taking note of the fact that on the application made by the petitioner-non appellant to a competent authority, the name was changed from Rishu Jaiswal to Kabir Jaiswal with publication of Notification in the Gazette of India, bearing No. 44 New Delhi, Saturday, November 2-November 8, 2019. Based on the Gazette Notification, a prayer was made to the C.B.S.E. to change the name of the non-appellant in their record and issue the certificate.

4. The prayer aforesaid was not exceeded to rather it was rejected vide order dated 27.05.2020. It was mainly on the ground that school records does not support change of name, as sought by the non-appellant. That was the only ground to deny change of name in the record. The learned Single Judge after relying on the judgments of the High Court so as the Apex Court and referring to the relevant clauses of C.B.S.E. Bye-laws, found no

reason to deny change of name and accordingly order impugned was set aside with a direction to undertake exercise, as directed therein within a period of two months.

5. Learned Additional Advocate General Sri Manish Goyal submits that the impugned order has been passed holding C.B.S.E. Bye-laws to be non statutory and thereby ignoring the period within which change of name can be sought, directions have been given. It is also submitted that in a recent judgment of the Apex Court in the case of ***Jigya Yadav (minor) through Guardian/Father Hari Singh Vs. Central Board of Secondary Education and others reported in 2021 SCC OnLine SC 415***, the C.B.S.E. Bye-laws were held enforceable. The learned Single Judge held that the Bye-laws are not having flavour of statute, thus, period of three years to seek correction or change in the name as per clause 69 of the Bye-laws could not have been affected the prayer. It is also submitted that period of three years has been given to seek correction or change in the name while applicant is a student of C.B.S.E. and not after passing of the examination of the C.B.S.E.

6. Referring to the facts of this case, it is stated that non-appellant cleared C.B.S.E. Examination in the year 2013 while application for change in name was given in the year 2019. It was admittedly beyond the period of three years even if a liberal construction of the Bye-laws is taken to allow a student to seek change in the name after passing C.B.S.E. Examination. The application was beyond three years even then.

7. Learned Senior Counsel further submits that in case of change of name by the candidate at his choice, a declaration by the Court of law is required. In the instant case, there was no declaration by the Court of law and thereby the judgment of learned Single Judge is even hit by the judgment of the Apex Court in the case of Jigya Yadav (supra) where it was made ncessary.

8. The prayer is to set aside the judgment of learned Single Judge.

9. The appeal has been contested by the learned counsel for non-appellant. He submits that judgment in the case of Jigya Yadav (supra) is not adverse to the non-appellant rather it supports him. In the case of Jigya Yadav (supra), the Apex Court has referred to the period for seeking correction or change of the name but therein also, the appeal was not dismissed by the Apex Court on the ground of expiry of period rather a favourable direction has been given.

10. Accordingly, the judgment aforesaid favours the non-appellant.

11. It is even in reference to the request for change of name. In case of change of name on choice of the candidate, the certificate can be issued by the C.B.S.E. when the application is supported by the school record or the public document. In absence of it only, there was a need to seek declaration from the civil Court.

12. Learned A.A.G. has misconstrued the direction of the Apex Court to urge that in case of change of name, the declaration from the Court of law is necessary in all eventualities. This is going against the judgment of the Apex Court in the case of Jigya Yadav (supra). The prayer is accordingly to dismiss the appeal more so when the learned Single Judge has given

reference of the catena of judgments of the Apex court holding C.B.S.E. Bye-laws to be non-statutory and in a case even if the matter is driven by the judgment of the Apex Court in the case of Jigya Yadav (supra), the finding recorded therein with the direction are favourable to the non-appellant.

13. The application was otherwise within the period given under the Bye-laws for the reason that the non-appellant passed out C.B.S.E. Examination in the year 2013 while change of name was much subsequent to it. A Notification in the Gazette was published in the year 2019 to notify the changed name and that was the occasion for the non-appellant to seek change in the name in the year 2019. The application aforesaid was made immediately after issuance of the Gazette Notification, thus, there was no delay on part of the non-appellant to seek change in the name. As per Bye-laws, it was of ten years at the relevant time.

14. We have considered the submission advanced by the parties and perused the record.

15. The ground raised by the appellant to assail the judgment of the learned Single Judge is mainly in reference to the judgment of the Apex Court in the case of Jigya Yadav (supra).

16. The first argument is as to whether change in the name can be sought after passing C.B.S.E. Examination. The learned Single Judge has referred to clause 69.1 of the Bye-laws. The issue aforesaid would be discussed later but there is an admission of the learned Senior Counsel for the appellants that even the Apex Court in the case of Jigya Yadav (supra) has allowed correction or change in the name of a student after passing out the C.B.S.E. course. The first issue for our consideration remains in reference to para 171 of the judgment of the Apex Court in the case of Jigya Yadav (supra). The said para is quoted herein-:

*"171. As regards request for "**change**" of particulars in the certificate issued by the CBSE, it presupposes that the particulars intended to be recorded in the CBSE certificate are not consistent with the school records. Such a request could be made in two different situations. The first is on the basis of public documents like Birth Certificate, Aadhaar Card/Election Card, etc. and to incorporate change in the CBSE certificate consistent therewith. The second possibility is when the request for change is due to the acquired name by choice at a later point of time. That change need not be backed by public documents pertaining to the candidate.*

*(a) Reverting to the **first category**, as noted earlier, there is a legal presumption in relation to the public documents as envisaged in the 1872 Act. Such public documents, therefore, cannot be ignored by the CBSE. Taking note of those documents, the CBSE may entertain the request for recording change in the certificate issued by it. This, however, need not be unconditional, but subject to certain reasonable conditions to be fulfilled by the applicant as may be prescribed by the CBSE, such as, of furnishing sworn affidavit containing declaration and to indemnify the CBSE and upon payment of prescribed fees in lieu of administrative expenses. The CBSE may also insist for issuing Public Notice and publication in the Official Gazette before recording the change in the fresh certificate to be issued by it upon surrender/return of the original*

certificate (or duplicate original certificate, as the case may be) by the applicant. The fresh certificate may contain disclaimer and caption/annotation against the original entry (except in respect of change of name effected in exercise of right to be forgotten) indicating the date on which change has been recorded and the basis thereof. In other words, the fresh certificate may retain original particulars while recording the change along with caption/annotation referred to above (except in respect of change of name effected in exercise of right to be forgotten).

(b)However, in the ***latter situation*** *where the change is to be effected on the basis of new acquired name without any supporting school record or public document, that request may be entertained upon insisting for prior permission/declaration by a Court of law in that regard and publication in the Official Gazette including surrender/return of original certificate (or duplicate original certificate, as the case may be) issued by CBSE and upon payment of prescribed fees. The fresh certificate as in other situations referred to above, retain the original entry (except in respect of change of name effected in exercise of right to be forgotten) and to insert caption/annotation indicating the date on which it has been recorded and other details including disclaimer of CBSE. This is so because the CBSE is not required to adjudicate nor has the mechanism to verify the correctness of the claim of the applicant."*

17. Learned Senior Counsel has made much emphasis in reference to sub-para (b) of para 171. In the case of change in name by choice, the student is required to seek a declaration from the Court of law. In the instant case, no such declaration was sought, thus, the learned Single Judge could not have directed the appellant to undertake the exercise for issuance of certificate in the changed name.

18. We have carefully gone through para 171 of the judgment in the case of Jigya Yadav (supra) and find that after a detailed discussion on the issue, appropriate directions were given by the Apex Court in para 171. The first direction is when change is sought in the C.B.S.E. certificate inconsistent to the school record. The aforesaid can be sought based on a public document like birth certificate, aadhar card/electoral card, etc. to incorporate change in the C.B.S.E. record consistent therewith.

19. The second contingency is for change of name on acquisition of name by choice. In that case, if the application is not backed by school record or public document, then a declaration of Court of law is necessary.

20. Sub-para (b) deals with the issue in regard to change of name acquired by the candidate by choice. There, the application can be supported by school record or public document, in absence of it, declaration of the Court of law has been mandated. The declaration of the Court is sought when an application is not supported by school record or public document. The Bye-laws provides for declaration by the Court of law and publication but it cannot be read against the statutory provision. Notification in Gazette is not only a public document but stand *in-rem* with presumption under the Evidence Act, 1872.

21. In view of the above, we are not in agreement with the learned Senior Counsel that in all eventualities, a

declaration is required to be sought from the Court of law in case of change of name by choice. The Bye-laws is to be read down to make it consistent to the statutory provision. A public document can be basis to seek change in the name.

22. In the instant case, the non-appellant made an application to the competent authority to seek change in the name from Rishu Jaiswal to Kabir Jaiswal. The prayer was exceeded too and accordingly on completion of the legal formalities, the changed name was published in the Gazette. The learned Single Judge could not dispute that Notification in the Gazette is a public document rather it is to be read *in-rem* against the rest of the word. The change in the name was sought based on the Gazette Notification i.e. a public document, thus, it does not lie in the mouth of the appellant to direct the non-applicant to seek a declaration from the Court of law for change in the name rather based on the public document, the application to seek change in the name should have been considered. The Bye-laws are not statute though made enforceable but cannot be read against the statutory provisions, like the Indian Evidence Act, 1872. The presumption given under the Act of 1872 cannot be brush aside by the Bye-laws after publication of Notification in Gazette.

23. The other issue raised by learned counsel for appellant is the nature of Bye-laws. They are claiming it to be under Article 19 (2) of the Constitution of India, therefore, enforceable in law. Again much is not required to be discussed as it has already been dealt with by the Apex Court in the case of Jigya Yadav (supra). The Apex Court held C.B.S.E. Bye-laws to be enforceable in law.

24. We are now touching the issue of the period by which the application could have been given by the candidate for change of name. The Apex Court in the case of Jigya Yadav (supra) has given summary of development of examination Bye-laws which was tabulated therein and for ready reference, quoted herein-:

CBSE EXAMINATION BYELAWS						
	Correction in candidate's name	**Correction in names of candidate's father/mother**	**Change of candidate's name**	**Change in names of candidate's father/mother**	**Change/correction in candidate's date of birth**	**Time period**
Before 2007 Amendment	Permitted to make it consistent with school record.	Permitted to make it consistent with school record.	Alteration/addition/deletion permitted to make it different from school record upon fulfilment of two	Alteration/addition/deletion permitted to make it different from school record upon fulfilment of two	No change in date of birth permitted. Only corrections permitted to make it consistent with school	**For correction in name** No limitation. **For D.o.B.-** within 2 years of declaration of result.

			condition s- permission by court of law and notification in government gazette.	condition s - permission by court of law and notification in government gazette.	records.	
Post 2007 Amendment	Permitted to make it consistent with school record.	Permitted to make it consistent with school record.	No change in name/surname permitted.	No change in name/surname permitted.	Same as before.	**For name -** within 10 years of declaration of result. **For D.o. B.-** same as before
Post 2011 Ame	Same as before.	Same as before.	Can be considered on writt	Can be considered on writt	Same as before.	**For change of name -** withi

ndment			en request of candidate /father/mother duly forwarded by Head of the Institution.	en request of candidate /father/mother duly forwarded by Head of the Institution.		n 10 years of declaration of result.
Post 2015 Amendment	Permitted to make it consistent with school record but only within one year of result.	Permitted to make it consistent with school record but only within one year of result.	Can be considered upon fulfilment of two prior conditions ***before publication of result of candidate*** -	No change in name of father/mother of candidate permissible.	Same as before. Only time was reduced to one year after declaration of result.	**For correction of name -** within 1 year of declaration of result. **For D.o. B.-** within 1 year of declaration

			permission by court of law and gazette notification.			of result.
Post 2018 Amendment	Same as before. Time limit changed to five years after declaration of result.	Same as before. Time limit changed to five years after declaration of result.	Same as before. Caption made mandatory for showing the changed information in certificate.	Change in name of father/mother permitted with same conditions as applicable in case of change of name of candidate.	No change in date of birth permitted. Two categories of corrections permitted - as per school records and as per court orders.	**For correction of name** - within 5 years of declaration of result. **For D.o.B.**- within 5 years of declaration of result.

25. The table quoted above shows amendment in the Bye-laws from time to time and as the non-appellant/petitioner passed out C.B.S.E. Examination in the year 2013, thus, the provision of Bye-laws, as was existing in the year 2013, is to be applied. The relevant Bye-laws is of the year 2011, then existing in the year 2013. The application was maintainable within 10 years of declaration of result. The declaration of result is in the year 2013 thus period of 10 years was to expire in the year 2023 whereas the application for change of name was made in the year 2019 i.e. within the period of 10 years from the date of declaration of result. The issue as to whether period given under the Bye-laws would apply from the date of declaration of result or the date when application was made has been clarified by the Apex Court in the case of Jigya Yadav (supra). It is with a finding that the period of limitation to make an application would apply from the date of declaration of result. The relevant paras of the judgment are quoted herein for ready reference-:

"123. As noted above, the Byelaws permit change of name only if permission from the Court has been obtained prior to the publication of result. It puts a clear embargo on any change of name *sans* prior permission before the publication. The provision is problematic on certain counts. Firstly, it is not a mere restriction on the right, it is a complete embargo on the right post publication of result of the candidate. It fails to take into account the possibility of need for change of name after the publication of result including the uncertainty of timeline required to obtain such declaration from the Court of law due to law's delay and upon which the candidate has no control whatsoever. Whereas, while amending the Byelaws in 2007, the CBSE itself had noted that children are not of mature age

while passing school examinations and they may not be in a position to decide conclusively on issues concerning their identity. The Byelaws completely overlook this possibility when it ordains seeking declaration from the Court prior to the publication of results of the concerned examination conducted by it.

124. The overriding state interest, as per the Board, to retain this stringency is nothing but efficiency of administration. Administrative efficiency, despite being a crucial concern, has not been and cannot be elevated to a standard that it is used to justify non-performance of essential functions by an instrumentality of the State. To use administrative efficiency to make it practically impossible for a student to alter her identity in the Board certificates, no matter how urgent and important it is, would be highly disproportionate and can in no manner be termed as a reasonable restriction. Reasonableness would demand a proper balance between a student's right to be identified in the official (public) records in manner of her choice and the Board's argument of administrative efficiency. To sustain this balance, it would be open to the Board to limit the number of times such alterations could be permitted including subject to availability of the old records preserved by it as per the extant regulations. But to say that post the publication of examination results and issuance of certificates, there can be no way to alter the record would be a case of total prohibition and not a reasonable restraint.

125. The limitation as regards maximum period upto which changes can be permitted also requires a different approach. Upon receiving the certificates, the student would naturally be put to notice of the particulars of certificates. Due to young age and inadvertence including being casual and indolent, a student may fail to identify the errors or to understand the probable impact of those errors and accordingly, may not apply for rectification immediately. It is also possible that a student may not have to use the certificates immediately after passing out and by the time she uses them, the limitation period for correction may elapse. Therefore, a realistic time for permitting corrections is very important. Indeed, it can be commensurate with the statutory or mandatory period upto which CBSE is obliged to preserve its old record.

126. However, we need not explore upon the question as to whether the exercise of a fundamental right can be foreclosed by prescribing a rigid period of limitation. In case of any ordinary civil rights, it is important that the action for enforcement of such rights is initiated in prescribed time and consistency is maintained, but is it permissible to say the same about fundamental rights? The rights which are recognised as fundamental under the Constitution are "preferred or chosen freedoms" and a very sensitive and realistic approach has to be taken in such matters. We wonder whether after the lapse of prescribed time, let us say 3 years, there could be no reasonable and legitimate circumstances to warrant change of name.

130. One of the primary functions of the Board is to grant certificates to its students. Effective maintenance and regulation of standard of education would include complete accountability of the Board in grant of such certificates and its duty does not get extinguished after publication of examination results and issue of certificates. Rather, it extends to taking care of post-publication concerns of students as and when they emerge, as students seek to use their certificates for purposes of higher education and career

opportunities. A narrow reading of the functions of the Board would leave glaring gaps in the field of school education and may jeopardize the welfare of students with legitimate concerns.

147. The provision for "change" of name is far more stringent and calls for a thorough review to settle the correct position. As per the present law, change of name is permissible upon fulfilment of two prior conditions - prior permission of the Court of law and publication of the proposed change in official gazette. These conditions co-exist with another condition predicating that both prior permission and publication must be done ***before the publication of result***. What it effectively means is that change of name would simply be impermissible after the publication of result of the candidate even if the same is permitted by a Court of law and published in official gazette. In other words, once the examination result of the candidate has been published, the Board would only permit corrections in name mentioned in the certificate. Further, changing the name out of freewill is simply ruled out.

152. The Byelaws provide for a two-tier mechanism for recording change of name or other details (as indicated above). One of them is prior permission or declaration by a Court of law to be obtained. As regards public documents like Birth Certificate, Official Gazette, Aadhaar Card, Election Card, etc., the same enjoy legal presumption of its correctness in terms of explicit provisions contained in Chapter V of the 1872 Act. The 1872 Act extends such presumption in terms of Section 76 read with Sections 79 and 80 of the 1872 Act and as in the case of Official Gazette under Section 81 of the same Act. Even other legislations concerning public documents attach equal importance to the authenticity of such documents including while making changes in their certificates to which we have alluded to in this judgment. Understood thus, there is no reason for the CBSE Board to not take notice of the public documents relied upon by the candidate and to record change on that basis in the certificate issued by it, for being consistent with the relied upon public documents. It matters not if the information furnished in the public documents is not entirely consistent with the school records of the incumbent. The CBSE while accepting those documents as foundational documents for effecting changes consistent therewith may insist for additional conditions and at the same time while retaining the original entry make note in the form of caption/annotation in the fresh certificate to be issued by it while calling upon the incumbent to surrender the original certificate issued by it to avoid any misuse thereof at a later point of time. It would be permissible for the CBSE to insist for a sworn affidavit to be given by the incumbent making necessary declaration and also to indemnify the CBSE. The fresh certificate to be issued by the CBSE may also contain disclaimer of the Board clearly mentioning that change has been effected at the behest of the incumbent in light of the public documents relied upon by him. In addition, the incumbent can be called upon to notify about the change in the Official Gazette and by giving public notice as precondition for recording the change by way of abundant precaution.

158. As noticed in the submissions above, there is a conflict of opinion amongst the High Courts as regards the point of time which would determine the applicability of Byelaws. The frequent amendments carried out by the CBSE had made it imperative for the courts to grapple with this question. The immediate question is whether the date of

declaration of result or the date of application for changes would be determinative of the applicable Byelaws. While addressing this question, the Delhi High Court in ***Kalpana Thakur***61 took the view that the Byelaws existing on the date of application would apply, irrespective of amendment. This view can be discerned from the following paragraphs of the judgment:

"12.2 In my view, the submission of Mr. Bansal that amended Bye-laws 69.1(i) would apply, is untenable, for a simple reason that the amendment to the said bye-law was notified only on 25.06.2015; a date which falls beyond the date on which the application for change of name was preferred in the instant case. The argument advanced in support of this submission by Mr. Bansal that the Office Order was in place prior to the date of the application, in my view, will not sustain, as the Office Order, is an internal document, which could have no legal validity till the position taken therein is put in public realm. The very fact that a notification in respect of the amended Bye-law was issued by respondent no. 1/CBSE, would show, that the decision to amend bye-law 69.1(i) required a public notice.

12.3 Consequently, all applications for change of name which are filed prior to notification dated 25.06.2015, will be governed, in my view, by the unamended Bye-law 69.1(i). Therefore, quite logically, the petitioners, in my opinion, would have to be given the reliefs as sought in the writ petition."

Notably, the question before the Court was slightly different. It was only whether the unamended Byelaws would continue to apply if the application was preferred before the date of amendment. Nevertheless, the Kerala High Court in ***Vyshnav***62 has taken a different view of the matter and observed that the Byelaws existing on the date of passing out would apply. It observed thus:

"5. On an analysis of the said rule and amended provision it is evident that, the first respondent relied on an incorrect provision in order to non-suit the petitioner by rejecting the applications submitted for change of name. Therefore, Exts.P7 and P9 cannot be sustained under law, since the same is violative of the rule provided for the purpose. Petitioner has passed out in the year 2013 and therefore, the law as it stood then has to be taken in to account, since there is no retrospective operation to the amendment. Therefore, I quash Exts.P7 and P9, and direct the first respondent to re-consider the application submitted by the petitioner based on Rule 69(1(i), as it stood before as is specified above."

159. Considered in the context of the Byelaws, the controversy is actually simple in nature. The Byelaws consistently provide that the period of limitation is to be calculated from the date of declaration of the result and issue of certificate. It means that the period of limitation begins to run against the student after declaration of result and publication of certificates as the student is put to notice of the contents of the document, upon its issue. The student can now be said to be in a position to verify the correctness of the certificate(s). The irresistible outcome of this legal position is that the Byelaws existing on the date of such declaration/publication of result and issue of certificate would be relevant for the purpose of effecting changes in the certificates. The express language of the Byelaws would be defeated if we say that the law existing on the date of application for recording change would be relevant. That would negate the very importance of

having a period of limitation for correction of the certificates.

160. If the limitation of applicability of Byelaws was to be reckoned from the date of application for correction/change and not the date of result of the examination conducted by CBSE, we would be leaving things to a state of uncertainty. For, a student who could possibly have surpassed the limitation period under unamended Byelaws would regain the right to change the certificates if the Byelaws existing on the date of application permit so and provide for a longer period. Similarly, a student who had ten years for carrying out changes under the unamended Byelaws would lose her right if Byelaws are amended within the ten-year period so as to provide for a much shorter, say two years, limitation period. Certainty, consistency and predictability are the hallmarks of any legal relationship and it is in the interest of public policy that legal interpretation preserves and protects these hallmarks. This determination, however, is only to state the legal position and may not have any immediate bearing on the cases before us."

26. In the light of the finding recorded by the Apex Court in the paras quoted above, it is a case where the application for change of name was given within the time frame provided under the Bye-laws.

27. In view of the above, we are unable to accept the argument of learned counsel for the appellant that application for change of name was submitted after the period of limitation.

28. At this stage, we may also clarify that the Bye-laws existing in the year 2013 was permitting an application for change of name within 10 years of declaration of result, thus, the argument that an application for change of name or correction of the certificate could have been given only by the candidate while pursuing the C.B.S.E. studies is not acceptable. When Bye-laws permits, an application for change of name within 10 years from the date of declaration of result then it would be applicable even for a candidate passed out the C.B.S.E. Examination. If there exists contradiction in the Bye-laws, beneficial provision is to be applied for the student.

29. In totality, we do not find any reason to cause interference in the judgment of learned Single Judge. The issue has now been decided by the Apex Court in the case of Jigya Yadav (supra) and we have recorded finding not only in reference to the Bye-laws but judgment of the Apex Court in the case of Jigya Yadav (supra), thus find no reason to cause interference to the directions given by the learned Single Judge. The writ petition would now be governed by this judgment.

30. With the aforesaid finding, the appeal is **disposed of.**

(2021)09ILR A506
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.08.2021

BEFORE

THE HON'BLE MUNISHWAR NATH BHANDARI, A.C.J.
THE HON'BLE SURESH KUMAR GUPTA, J.

Special Appeal No. 200 of 2020

State of U.P. & Ors. ...Appellants
Versus
Om Prakash Soni ...Respondent

Counsel for the Appellants:
C.S.C.

Counsel for the Respondent:
Mohd. Ali

A. Service Law – Constitution of India – Article 311(2), Proviso – UP Government Servant (Discipline and Appeal) Rules, 1999 – Dismissal – Conviction u/s 376, 511 IPC for the offence of attempt to rape and sentenced to seven years imprisonment with fine – Its effect – Conduct of the petitioner was the basis for the order of dismissal from service – Disciplinary proceeding – Requirement – Rules makes an exception of disciplinary inquiry. An order of punishment can be passed based on the conduct led to conviction – Held, Disciplinary inquiry is not required in such cases in view of the provisions of the Constitution of India so as the Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999 – Learned Single Judge ignored the ratio propounded by the Apex court in Tulsi Ram Patel's case. (Para 9, 10, 11 and 15)

Appeal allowed. (E-1)

Cases relied on :-

1. K. Venkateshwarlu Vs St. of A.P., (2012) 8 SCC 73

2. R.P. Kapur Vs U.O.I. & anr., AIR 1964 SC 787

3. Sada Nand Mishra Vs St. of U.P. & anr., 2000 (18) LCD 88

4. U.O.I. Vs Tulsi Ram Patel, (1985) 3 SCC 398

(Delivered by Hon'ble Munishwar Nath Bhandari, A.C.J.
&
Hon'ble Suresh Kumar Gupta, J.)

1. By this appeal, a challenge is made to the judgment dated 27.09.2019 whereby writ petition preferred by non-appellant/petitioner was allowed. The writ petition was filed to challenge the order of punishment of dismissal from service.

2. The brief facts of the case show that while the non-appellant/petitioner was working on the post of Collection Amin in Tehsil Nawabganj, Gonda, was sentenced to seven years imprisonment for the offence under Sections 376, 511 Indian Penal Code. The order of dismissal from service was passed considering the conduct of the petitioner led to his conviction. It was by invoking Rule 7 of the Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999 and the Government Order dated 06.09.2000.

3. The order of dismissal from service was challenged by the non-appellant/petitioner by maintaining a writ petition. The order of dismissal from service has been set aside by learned Single Judge finding that no disciplinary proceeding was taken before passing the order of punishment. It was by relying the judgment of the Apex Court in the case of ***K. Venkateshwarlu vs. State of Andhra Pradesh, (2012) 8 SCC 73.***

4. Learned counsel for the appellants submits that impugned judgment has been passed in ignorance of Article 311 of the Constitution of India so as the Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999. In case of conviction of an employee, disciplinary proceedings are not required rather considering the conduct of the employee led to conviction, the appropriate punishment can be imposed. In the instant case, the employee was convicted for the offence under Sections 376, 511, 506 Indian Penal Code and sentenced to seven years imprisonment with fine. The conduct of the petitioner led to conviction was the

basis of the punishment of dismissal from service. He was convicted for attempt to rape and looking to the aforesaid conduct, the order was passed dismissing him from service.

5. Article 311 of the Constitution of India and even Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999. Article 311(2) of the Constitution of India exempts disciplinary proceedings in case of conduct of an employee led to conviction. Learned Single Judge has not referred to the provisions of Constitution of India so as Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999 rather erroneously relied on the judgment in the case of ***K. Venkateshwarlu (supra).*** The aforesaid judgment does not propound a ratio on the issue rather it was a judgment on a criminal appeal against the order of conviction and not to challenge the order of punishment.

6. It is also stated that even the judgment in the case of ***R.P. Kapur vs. Union of India and another, AIR 1964 SC 787*** is not an authority on the issue. There also, the order of punishment was not challenged rather it was an order of suspension. Learned Single Judge casually relied the judgment supra to quash the order of dismissal, thus prayer is to set aside the judgment of learned Single Judge.

7. Learned counsel for the non-appellant has vehemently contested the appeal and submits that the judgment under challenge is covered by the judgments of the Supreme Court in the cases of ***R.P. Kapur (supra)*** and ***K. Venkateshwarlu (supra).*** It is a case of conviction, the authority needs to initiate the disciplinary proceeding, as envisaged under Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999. Learned counsel for the appellants has even made a reference of judgment of this Court in the case of ***Sada Nand Mishra vs. State of U.P. and another, 2000 (18) LCD 88.*** Therein relying on the judgment of ***Union of India vs. Tulsi Ram Patel, (1985) 3 SCC 398***, the order of punishment was interfered. The prayer is accordingly to maintain the judgment of learned Single Judge.

8. We have considered the rival submissions of learned counsel for the parties and perused the record.

9. It is not in dispute that the non-appellant was convicted for the offence under Sections 376, 511 Indian Penal Code and sentenced to seven years imprisonment with fine of Rs. 2000/-. The conduct led to conviction was the basis for dismissal from service. The question for our consideration is as to whether the disciplinary proceeding was required before passing the order of dismissal from service. We would first refer to Article 311 of the Constitution of India and for ready reference, it is quoted hereunder:-

"311. Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State.- *(1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.*

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against

him and given a reasonable opportunity of being heard in respect of those charges :

Provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed:

Provided further 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; or

(b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or

(c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry.

(3) If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final."

10. Second proviso to Article 311(2) of the Constitution of India provides exception to the main provision. Article 311(2) mandates an inquiry if a person is dismissed or removed or reduced in rank. The second proviso carves out an exception to the main provision where an employee can be dismissed or removed or reduced in rank on the ground of conduct led to conviction on a criminal charge. The order of dismissal from service in this case was considering the conduct of the petitioner led to his conviction. Learned Single Judge has not referred to the constitutional provision while setting aside the order of dismissal. It is also without referring to the relevant service rules which again carved out an exception to the disciplinary inquiry before the order of punishment. The relevant Rule is also quoted hereunder for ready reference :-

*"**7. Procedure for imposing major penalties.** - Before imposing any major penalty on a Government servant, an inquiry shall be held in the following manner :*

(i) The disciplinary authority may himself inquire into the charges or appoint an authority subordinate to him as Inquiry Officer to inquire into the charges.

(ii) The facts constituting the misconduct on which it is proposed to take action shall be reduced in the form of definite charge or charges to be called charge-sheet. The charge-sheet shall be approved by the disciplinary authority :

Provided that where the appointing authority is Governor, the charge-sheet may be approved by the Principal Secretary or the Secretary; as the case may be, of the concerned department.

(iii) The charges framed shall be so precise and clear as to give sufficient indication to the charged Government servant of the facts and circumstances against him. The proposed documentary evidence and the name of the witnesses proposed to prove the same alongwith oral evidence, if any, shall be mentioned in the charge-sheet.

(iv) The charged Government servant shall be required to put in a written statement of his defence in person on a

specified date which shall not be less than 15 days from the date of issue of charge-sheet and to state whether he desires to cross-examine any witness mentioned in the charge-sheet and whether desires to give or produce evidence in his defence. He shall also be informed that in case he does not appear or file the written statement on the specified date, it will be presumed that he has none to furnish and Inquiry Officer shall proceed to complete the inquiry ex parte.

(v) The charge-sheet, alongwith the copy of the documentary evidences mentioned therein and list of witnesses and their statements, if any shall be served on the charged Government servant personally or by registered post at the address mentioned in the official records. In case the charge-sheet could not be served in aforesaid manner, the charge-sheet shall be served by publication in a daily newspaper having wide circulation :

Provided that where the documentary evidence is voluminous, instead of furnishing its copy with charge-sheet, the charged Government servant shall be permitted to inspect the same before the Inquiry Officer.

(vi) Where the charged Government servant appears and admits the charges, the Inquiry Officer shall submit his report to the disciplinary authority on the basis of such admission.

(vii) Where the charged Government servant denies the charges, the Inquiry Officer shall proceed to call the witnesses proposed in the charge-sheet and record their oral evidence in presence of the charged Government servant who shall be given opportunity to cross-examine such witnesses. After recording the aforesaid evidence, the Inquiry Officer shall call and record the oral evidence which the charged Government servant desired in his written statement to be produced in his defence :

Provided that the Inquiry Officer may for reasons to be recorded in writing refuse to call a witness.

(viii) The Inquiry Officer may summon any witness to give evidence or require any person to produce documents before him in accordance with the provisions of the Uttar Pradesh Departmental Inquiries (Enforcement of Attendance of Witnesses and Production of Documents) Act, 1976.

(ix) The Inquiry Officer may ask any question he pleases, at any time of any witness or from person charged with a view to discover the truth or to obtain proper proof of facts relevant to charges.

(x) Where the charged Government servant does not appear on the date fixed in the inquiry or at any stage of the proceeding inspite of the service of the notice on him or having knowledge of the date, the Inquiry Officer shall proceed with the inquiry ex parte. In such a case the Inquiry Officer shall record the statement of witnesses mentioned in the charge-sheet in absence of the charged Government servant.

(xi) The disciplinary authority, if it considers it necessary to do so, may, by an order appoint a Government servant or a legal practitioner, to be known as "Presenting Officer" to present on its behalf the case in support of the charge.

(xii) The Government servant may take the assistance of any other Government servant to present the case on his behalf but not engage a legal practitioner for the purpose unless the Presenting Officer appointed by the disciplinary authority is a legal practitioner of the disciplinary authority having regard to the circumstances of the case so permits :

Provided that this rule shall not apply in following cases :

(i) ***Where any major penalty is imposed on a person on the ground of conduct which has led to his conviction on a criminal charge;*** *or*

(ii) Where the disciplinary authority is satisfied that for reason to be recorded by it in writing, that it is not reasonably practicable to hold an inquiry in the manner provided in these rules; or

(iii) Where the Governor is satisfied that, in the interest of the security of the State, it is not expedient to hold an inquiry in the manner provided in these rules."

11. The Rule quoted above also makes an exception of disciplinary inquiry. An order of punishment can be passed based on the conduct led to conviction. In the instant case, petitioner was convicted for the offence of attempt to rape and sentenced to seven years imprisonment with fine. The conduct of the petitioner was the basis for the order of dismissal from service. The disciplinary inquiry is not required in such cases in view of the provisions of the Constitution of India so as the Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999.

12. Learned Single Judge, however, relied on the judgment of the Apex Court in the case of ***K. Venkateshwarlu (supra).*** It is without realizing that judgment aforesaid is not authority on the subject and does not propound a ratio on the issue. It was a case where appeal was preferred against the order of conviction. It has relied the judgment in the case of ***R.P. Kapur (supra)*** which again was not involving the issue rather it was a case where an order of suspension was challenged. Both the judgments could not have been applied in conflict with statutory provisions so as the provisions of Constitution of India.

13. In the case of ***R.P. Kapur (supra),*** the challenge was made to the order of suspension dated 16.02.1962 and it was mainly in reference to Article 314 of the Constitution of India. In para 9 of the said judgment, arguments of counsel for the appellant were considered but it does not propound a ratio on the issue. If one is convicted in a criminal case yet a disciplinary inquiry in regard to the same charges is to be conducted before passing order of punishment then it would not only hit the constitutional provision under Article 311 of the Constitution of India but the Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999 also.

14. The judgment in the case of ***Tulsi Ram Patel (supra)*** propounds a ratio. An order of punishment can be passed based on the conviction though while doing it, conduct of the employee led to conviction should be looked into.

15. In view of the above, judgment of the Apex Court in the case of ***Tulsi Ram Patel (supra)*** permits an order of punishment based on the conduct led to conviction. The only rider is that punishment should not be imposed simply based on conviction but considering the conduct led to his conviction. Learned Single Judge ignored the ratio propounded by the Apex Court in the said case.

16. Considering the arguments of learned counsel for the parties, we find reasons to cause interference in the judgment dated 27.09.2019 passed by learned Single Judge.

17. Accordingly, the appeal is allowed and the judgment dated 27.09.2019 passed by learned Single Judge is set aside.

(2021)09ILR A512
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.08.2021

BEFORE

THE HON'BLE MUNISHWAR NATH BHANDARI, A.C.J.
THE HON'BLE MANISH KUMAR, J.

Special Appeal Defective No. 233 of 2021
&
Special Appeal Defective No. 234 of 2021

State of U.P. & Anr. ...Appellants
Versus
Mohit Kumar & Ors. ...Respondents

Counsel for the Appellants:
C.S.C.

Counsel for the Respondents:
Gaurav Mehrotra, Badrish Kumar Tripathi

A. Service Law – UP Ganna Paryaveshak (Group III) Service Rules, 2015 – Rule 9 – Post of Cane Supervisor – Appointment – Qualification – CCC Certificate issued by DOEACC Society – As per Rule 9, one should be in possession of Bachelor's degree in Agriculture Science apart from CCC Certificate of DOEACC Society – Petitioner is not in possession of CCC Certificate in computer operation – It's effect – Held, the petitioner is not eligible for appointment on the post of Cane Supervisor – Qualification is to be determined by the employer for any post and it is not for the Courts to consider and assess the possession of qualification – Learned Single Judge placed reliance on the administrative orders ignoring the statutory provisions. (Para 11, 20 and 24)

B. Interpretation of Statute – Statute and Administrative order – Conflict – Overriding effect – An administrative order can supplement the statutory provisions but cannot supplanted it – It was not in the domain of the administration to issue order dehors the statutory provisions. (Para 17)

Appeal allowed. (E-1)

Cases relied on :-

1. Dhananjay Malik & ors. Vs St. of Uttaranchal & ors., (2008) 4 SCC 171

2. U.O.I. Vs K.P. Joseph & ors., (1973) 1 SCC 194

3. U.O.I. & anr. Vs Ashok Aggarwal; (2013) 16 SCC 147

4. Govt. of A.P. & ors. Vs P. Laxmi Devi; (2008) 4 SCC 720

5. Zahoor Ahmad Rather & ors.Vs Sheikh Imtiyaz & ors., (2019) 2

SCC 404

6. Maharashtra Public Service Commission Vs Sandeep Shriram Warade; (2019) 6 SCC 362

7. P.N.B. Vs Amit Kumar Das; 2020 SCC Online SC 897

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

1. The aforesaid two appeals are against the common judgment dated 10.03.2021, which is impugned in both the appeals, thus, the appeals are being decided by a common judgment.

2. There is a delay in filing of the present special appeals.

Reasons mentioned in the affidavit filed along with application for condonation of delay are found to be satisfactory, hence, the delay in filing the special appeals is condoned and the appeal are heard on merit.

3. The private respondents in the present appeals had preferred writ petitions for non consideration of their candidature

in the interview for appointment on the post of Cane Supervisor in pursuance of the advertisement dated 06.10.2016 for the reason that they were not in possession of certificate of Course on Computer Concepts (hereinafter referred to as, the Certificate of CCC) issued by the DOEACC Society.

4. The learned counsel for the private respondents/petitioners in the present appeals has submitted that they were in possession of degrees in which, computer course was one of the subjects, thus, they were eligible for the appointment on the post of Cane Supervisor in view of the Government Order dated 06.05.2016 and 23.09.2016, as clarified subsequently by the order dated 05.07.2018.

5. In supoort of the submissions that these Government orders or the Executive orders are applicable upon the private respondents/petitioners, they relied upon the judgment of the Hon'ble Apex Court in the case of Dhananjay Malik and others Vs. State of Uttaranchal and others reported in (2008) 4 SCC 171 and in the case of Union of India Vs. K.P. Joseph and others reported in 1973 1 SCC 194.

6. The aforesaid judgments of the Hon'ble Supreme Court are on the issue of filling up the gaps. In this case, there is no gap in Rule 9 (ii) of Rules, 2015 which is required to be filled up by any government order or instructions, thus, the judgment relied are not applicable in this case.

7. The learned Single Judge allowed the writ petitions in reference to the Government Orders, which have relaxed the qualifications otherwise provided under the Statutory provisions taking into consideration that the intention of the legislature/employer in providing requirement of the certificate of CCC for the said post is to recruit the candidates suitable to work efficiently in the changing work environment of office. In the judgment impugned, it has been specifically been mentioned that the private respondents did not possess the certificate of CCC but they were in possession of equivalent qualification issued by other recognized institutions which makes them suitable to fulfill the requirement of employer for the post in question.

8. On the other hand, the learned counsel appearing for the State-appellant has submitted that as per the Rule 9 of the Uttar Pradesh Ganna Paryaveshak (Group III) Service Rules, 2015 (Second Amendment) (hereinafter referred to as the Rules, 2015), the certificate of CCC awarded by the DOEACC Society is the academic qualification for the purpose of consideration for appointment on the post of Cane Supervisor. For convenience, the Rule 9 of the Rules of 2015 is being quoted hereunder:-

" Substitution of Rule 9.

	COLUMN-1 ***Existing Rules***		***COLUMN-2*** ***Rule as hereby substituted***
Academic Qualification	*9. A candidate for direct recruitment to a post in the service*	***Academic Qualification***	*9. A candidate for direct recruitment to a post in the service must possess the following qualification*

	(i) must have passed the Intermediate (Agriculture) Examination from the Board of High School and Intermediate Education, Uttar pradesh or an examination recognized by the Government as equivalent thereto, *OR* *(ii) (a) must have passed the High School Examination from the Board of High School and Intermediate Education, Uttar Pradesh or an examination recognized by the Government as equivalent thereto;* *(b) must possess two years diploma in Agriculture from a recognized institution.*		*:* *(i) Bachelor's degree in Agriculture Science from a University established by law in India or a qualification recognized by the Government as equivalent thereto.* *(ii) CCC Certificate in Computer operation awarded by the DOEACC Society.*				

9. As per the substituted qualification, one was required to be in possession of Bachelor's degree in Agriculture Science apart from CCC Certificate in computer operation of DOEACC Society. The petitioners/ private respondents were not in possession of CCC Certificate. The prayer

is accordingly to set aside the judgement of learned Single Judge.

10. Learned counsel for the private respondents submits that petitioners/private respondents were in possession of the Bachelor's degree in Agricultural Science, where the Computer was one of the subject. Thus as per Government Order, they were eligible for appointment on the post of Cane Supervisor. The prayer is accordingly to upheld the judgement of learned Single Judge.

11. We have considered the rival submissions of the parties and perused the records.

12. It is not in dispute that the post in question is governed by the Uttar Pradesh Ganna Paryaveshak (Group III) Service Rules, 2015 (Second Amendment). The qualification provided therein is as under :

9. *A candidate for direct recruitment to a post in the service must possess the following qualification:*

(i) Bachelor's degree in Agriculture Science from a University established by law in India or a qualification recognized by the Government as equivalent thereto.

(ii) CCC Certificate in Computer operation awarded by the DOEACC Society.

As per Rule 9, one should be in possession of Bachelor's degree in Agriculture Science apart from CCC Certificate of DOEACC Society. It has not been disputed that petitioner is not in possession of CCC Certificate in computer operation. Thus as per the statutory provisions, he is not eligible for appointment on the post of Cane Supervisor. The Government issued letter dated 6.5.2016 to relax the qualification of CCC Certificate. The part of the letter dated 6.3.2016 is also quoted hereunder for ready reference:

''कनिष्ठ सहायक एवं आशुलिपिक के पदो पर चयन हेतु डी.ओ.ई.ए.सी.सी. (डोयक) सोसाईटी द्वारा प्रदत्त सी.सी.सी. प्रमाण–पत्र की समकक्षता के सम्बन्ध में शासन द्वारा निम्नवत् निर्णय लिया गया है:–

(1) माध्यमिक शिक्षा परिषद, उत्तर प्रदेश के साथ–साथ केन्द्र अथवा किसी राज्य सरकार द्वारा स्थापित किसी संस्था/शिक्षा, बोर्ड/परिषद द्वारा संचालित हाईस्कूल अथवा इंटरमीडिएट परीक्षा मे पृथक विषय के रूप मे कम्प्यूटर साइन्स विषय को लिया गया हो।

(2) यदि किसी अभ्यर्थी द्वारा कम्प्यूटर सान्इस मे डिप्लोमा अथवा डिग्री प्राप्त की गई हो तो वह भी कनिष्ठ सहायक/आशुलिपिक के पदों पर भर्ती हेतु पात्र होगा।"

12. The another letter was issued on 23.9.2016 and relevant part of it, is also quoted herein below:

''उपरोक्त विषयक समसंख्यक शासनादेश दिनांक 03/06 मई 2016 का कृपया संदर्भ ग्रहण करे, जिसके माध्यम से कनिष्ठ सहायक एवं आशुलिपिक के पदो पर चयन हेतु डी.ओ.ई.ए. सी.सी. (डोयक) सोसाईटी द्वारा प्रदत्त सी.सी.सी. प्रमाण–पत्र की समकक्षता के संदर्भ मे शासन द्वारा निम्नवत् निर्णय लिया गया था

(1) माध्यमिक शिक्षा परिषद उत्तर प्रदेश के साथ–साथ केन्द्र अथवा किसी राज्य सरकार द्वारा स्थापित किसी संस्था/शिक्षा, बोर्ड/परिषद द्वारा संचालित हाई स्कूल अथवा इंटरमीडिएट परीक्षा मे पृथक विषय के रूप मे कम्प्यूटर साइन्स विषय को लिया गया हो।

(2) यदि किसी अभ्यर्थी द्वारा कम्प्यूटर सान्इस मे डिप्लोमा अथवा डिग्री प्राप्त की गई हो तो वह भी कनिष्ठ सहायक/आशुलिपिक के पदों पर भर्ती हेतु पात्र होगा। ''

13. The Government Order dated 05.07.2018 is also quoted hereunder:

विषय– डी.ओ.ई.ए.सी.सी.(डोयक) सोसाइटी द्वारा प्रदत्त सी.सी.सी. प्रमाण–पत्र की समकक्षता के सम्बन्ध में।

महोदय,

कनिउ सहायक, आणुलिपिक एवं ऐसी समस्त राज्याधीन लोक सेवाओं और पदों जिन पर चयन हेतु डी.ओ.ई.ए.सी.सी.(डोयक) सोसाईटी (परिवर्तित नाम NIELIT-National Institute of Electronics And Information Technology) द्वारा प्रदत्त सी.सी.सी. प्रमाण–पत्र अपेक्षित है, की समकक्षता के सम्बन्ध में समसंख्यक शासनादेश दिनांक 03/06 मई, 2016 एवं 23 सितम्बर, 2016 निर्गत किये गये हैं।

2. समकक्षता के सम्बन्ध में हो रही व्यावहारिक कठिनाईयों के दृष्टिगत सी.सी.सी. प्रमाण पत्र एवं उसकी समकेक्ष अर्हता को और स्पष्ट करने हेतु सम्यक् विचारोपरान्त शासन द्वारा यह निर्णय लिया गया है कि कम्प्यूटर में उच्च योग्यता धारी यथा–कम्प्यूटर में डिप्लोमा, डिग्री, पी.जी.डी.सी.ए., बी.सी.ए., एम.सी.ए. तथा ग्रेजुऐशन अथवा उच्च डिग्री (बी.ए., बी.एस.सी., बी.टेक. एम.एस.सी, एम.बी.ए.) में कम्प्यूटर एवं विषय के रूप अथवा एक सेमेस्टर में कम्प्यूटर कोर्स धारित करने वाले अभ्यर्थियों को भी प्रश्नगत पदों के चयन हेतु अर्ह माना जायेगा।

3. इस सम्बन्ध में मुझे यह कहने का निदेश हुआ है कि शासन द्वारा लिए गए उक्त निर्णय का अनुपालन सुनिश्चित किया जाय।

14. At this stage it is necessary to observe that the administrative order referred to above i.e. 3/6.5.2016, 23.9.2016 and 05.07.2018 cannot be read in conflict to the Rule 9 (ii) of Rules, 2015. The Rule , 2015, as amended require CCC Certificate of computer science. It could not have been nullified by an administrative order, unles so provided in the Rules itself as in the case of Rule 9 (i) of Rules, 2015.

15. The Hon'ble Supreme Court in catena of judgments has held that the statutory provisions cannot be supplanted by issuance of Administrative Orders, Office Memorandums etc. The relevant extract of the judgment of the Hon'ble Supreme Court in the case of ***Union of India and Another Vs. Ashok Aggarwal reported in (2013) 16 SCC 147*** is being quoted hereunder:-

" 59. The law laid down above has consistently been followed and it is a settled proposition of law that an authority cannot issue orders/office memorandum/executive instructions in contravention of the statutory rules. However, instructions can be issued only to supplement the statutory rules but not to supplant it. Such instructions should be subservient to the statutory provisions. (Vide Union of India Vs. Majji Jangamayya, P.D. Aggarwal V. State of UP, Paluru Ramkrishnaiah v. Union of India, C. Rangaswamaiah v. Karnataka Lokayukta and Joint Action Committee of Air Line Pilots' Assn. of India V. D.G. of Civil Aviation.)

60. Similarly, a Constitution Bench of this Court in Naga People's Movement of Human rights V. Union of India, held that the executive instructions have binding force provided the same have been issued to fill up the gap between the statutory provisions and are not inconsistent with the said provisions."

16. The Hon'ble Supreme Court in the case of ***Government of Andhra Pradesh and others Vs. P. Laxmi Devi reported in (2008) 4 SCC 720*** has held as under:- .

" 34. In India the grundnorm is the Indian Constitution, and the hierarchy is as follows:-

i) The Constitution of India;

ii) Statutory law, which may be either law made by Parliament or by the State Legislature;

iii) Delegated legislation, which may be in the form of rules made under the statute, regulations made under the statute, etc;

iv) Purely executive orders not made under any statute.

35. If a law (norm) in a higher layer in the above hierarchy clashes with a law in a lower layer, the former will prevail. Hence a constitutional provision will prevail over all other laws, whether in a statute or in delegated legislation or in an executive order. The Constitution is the highest law of the land, and no law which is in conflict with it can survive. Since the law made by the legislature is in the second layer of the hierarchy, obviously it will be invalid if it is in conflict with a provision in the Constitution (except the directive principles which, by Article 37, have been expressly made non-enforceable. "

17. It is settled law that an administrative order can supplement the statutory provisions but cannot supplanted it. The administrative order referred to above and quoted has supplanted the statutory provisions. It was not in the domain of the administration to issue order dehors the statutory provisions. Thus even the administrative order could not have been read to the benefit of candidate going dehors the Rules.

18. A similar controversy has been decided by this Court in Special Appeal Defective No. 440 of 2021 by the judgment dated 07.07.2021 and held that the statutory provisions cannot be superseded by the administrative orders.

19. The learned counsel for the private respondents-petitioners failed to dispute that a similar controversy has already been attained finality by the judgment dated 07.07.2021 passed in Special Appeal (Defective) No. 440 of 2021.

20. The qualification is to be determined by the employer for any post and it is not for the Courts to consider and assess the possession of qualification.

21. The Hon'ble Supreme Court in the case of ***Zahoor Ahmad Rather and others Vs. Sheikh Imtiyaz and others reported in (2019) 2 SCC 404*** has held as under:-

".....the prescription of qualifications for a post is a matter of recruitment policy. The State as the employer is entitled to prescribe the qualifications as a condition of eligibility. It is no part of the role or function of judicial review to expand upon the ambit of the prescribed qualifications. Similarly, equivalence of a qualification is not a matter which can be determined in exercise of the power of judicial review. Whether a particular qualification should or should not be regarded as equivalent is a matter for the State, as the recruiting authority, to determine. 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 Rattler, 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 other IPA (SW) No. 135 of 2017, decided on 12-10-2017 (J&K)] of the Division Bench.

22. A similar note of restraint was entered in ***Maharashtra Public Service Commission v. Sandeep Shriram Warade [2019 6 SCC 362].*** The para no. 9 is being reproduced hereunder of the said judgment:-

"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."

23. Recently, the Hon'ble Supreme Court in the case of ***Punjab National Bank Vs. Amit Kumar Das reported in 2020 SCC Online SC 897*** observed as under:-

" 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 prescribed 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….."

24. Learned Single Judge, however, placed reliance on the administrative orders ignoring the statutory provisions. The petitioners / private respondents were not having CCC Crtificate from DoEACC Society as provided under Rule 9 (ii) of Rules, 2015 without any exception or reservation. It does not suffice the condition given even in the administrative order and otherwise it could not have been read in conflict with the statutory provisions. Accordingly, we find substance in the appeal and accordingly the judgement of learned Single Judge dated 10.03.2021, is set aside.

25. Accordingly, the appeals are ***allowed.***

The judgment is being pronounced under Chapter VII 1 (2) of the Allahabad High Court Rules, 1952.

(2021)09ILR A519
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.08.2021

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE AJAI KUMAR SRIVASTAVA-I, J.

Service Bench No. 1704 of 2020

Navneet Kumar ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Apoorva Tewari, Aditya Tewari

Counsel for the Respondents:
A.S.G., Neerav Chitravanshi, Raj Kumar Singh

A. Service Law – Administrative Tribunal Act – Sections 6(3) &8(2) – Administrative Tribunals (Procedure for Appointment of Members), Rules 2011 – R. 11 – Central Administrative Tribunal – Post of Judicial member – Retirement – Extension of term – Selection Committee recommended for extension of term of appointment of the petitioner with the concurrence of the Chief Justice of India – However, Department of Personnel and training (DoPT) refused extension, which was approved by the Appointments Committee of the Cabinet (ACC) relying upon letter dated 12.04.2017, though this letter has already been quashed by the High Court vide order dated 08.05.2019 – Validity – Held, once the decision contained in the letter/order dated 12.04.2017 was quashed by this Court, the plea based on the decision of the Selection Committee for carrying forward the vacancies to the year 2017 is not available to the respondents – High court found the Office Memorandum dated 23.08.2019 contrary to the Rules and Judgment dated 08.05.2019. (Para 25 and 32)

Writ petition allowed. (E-1)

Cases relied on :-

1. R. S. Mittal Vs U.O.I. [1995 Supp (2) SCC 230]

2. U.O.I. & ors.Vs Kali Dass Batish; [2006 (1) SCC 779]

3. St. of Bihar Vs Dr. Braj Kumar Mishra & ors. 1999 (9) SCC 546

4. Comptroller &Auditor General of India, Gian Prakash, New Delhi & anr. Vs K. S. Jagannathan & anr.; 1986 (2) SCC 679

5. Badri Nath Vs St. of T.N. & ors. (2000) 8 SCC 395

6. Major General H. M. Singh, VS U.O.I. & anr. (2014) 3 SCC 670

7. Bahadursinh Lakhubhai Gohil Vs Jagdishbhai M. Kamalia & ors. (2004) 2 SCC 65

8. Mohinder Singh Gill & anr. Vs The Chief Election Commissioner & ors. (1978) 1 SCC 405

(Delivered by Hon'ble Devendra Kumar Upadhyaya, J.
&
Hon'ble Ajai Kumar Srivastava-I, J.)

1. These proceedings under Article 226 of the constitution of India have been instituted assailing the decision of the Competent Authority of the Central Government, whereby the proposal of Department of Personnel and Training (hereinafter referred to as "DoPT") for denial of extension of term of appointment of the petitioner as Judicial Member in Central Administrative Tribunal (hereinafter referred to as "CAT") has been approved. This decision has been taken in purported compliance of the judgment and order dated 08.05.2019 passed by this Court in Writ Petition No.6640 (S/B) of 2017.

2. Challenge herein has also been made to the communication dated

24.10.2019 made by the DoPT whereby it has been informed that the matter relating to extension of term of appointment of the petitioner was placed before Appointments Committee of the Cabinet (herein after referred to as "ACC") and the ACC has approved the denial of extension of the term of the petitioner for another term as Judicial Member of CAT.

3. Heard Shri Anil Kumar Tiwari, learned Senior Advocate, assisted by Shri Aditya Tewari for the petitioner and Shri S. B. Pandey, learned Assistant Solicitor General of India along with Shri Raj Kumar Singh, for the respondents. We have also perused the original records, which have been produced before us by the learned counsel representing the respondents.

4. Learned Senior Advocate has argued that the impugned decision and the resultant communication are completely illegal and erroneous for the reason that in the present case it is revealed that the ACC did not take independent decision in the matter and as a matter of fact, the decision taken by the ACC was vitiated for the reason that it was based on the recommendation of the DoPT which procedure is not available in the rules governing the extension of term of appointment of a member of CAT. It has further been argued that since the rules governing the extension of term of a member of CAT do not envisage any recommendation to be made by the DoPT as such the procedure adopted in this case for arriving at the impugned decision is not only alien to the scheme of the rules but this recommendation is a material which is extraneous and thus could not have been considered. Further, learned Senior Advocate has stated that, in fact, as per the scheme of the rules governing the extension of term of a member of CAT, it is only the recommendation of the Selection Committee to be headed by none other than a sitting Judge of the Supreme Court and the views of the Hon'ble Chief Justice of India along with any other material which may have some bearing and reflection on the candidature of the person concerned, can be taken into account and since in this case it is the recommendation/proposal submitted by the DoPT for denying the extension of term of appointment of the petitioner which has been approved as such the decision making process adopted by the ACC to arrive at the impugned decision is erroneous and against the provisions contained in the rules.

5. Shri Tiwari, learned Senior Advocate has also submitted that the exercise undertaken by the Secretariat of the ACC by inviting the proposal/recommendation from the DoPT is even against the mandate of the judgment and order dated 08.05.2019 passed by this Court in the earlier Writ Petition filed by the petitioner, namely, writ petition No.6640 (S/B) of 2017. He has further submitted that the reasons which can be culled out for denying the extension of term of the appointment of the petitioner in this case are in fact non-existent, in asmuchas the proposal submitted by the DoPT to the ACC for denying the extension of term of the appointment of the petitioner only makes mention of three additional complaints which were already examined by this Court in its judgment dated 08.05.2019 and were found not to be adverse to the petitioner's candidature. In this view the submission is that even the proposal submitted by the DoPT on which the approval by the ACC is said to have been accorded, is based on non-existent

material which can reflect upon the candidature of the petitioner adversely or is in any manner not befitting to the nature of the office for which extension of term was considered. Lastly, it has been argued by the learned Senior Advocate that in case this Court comes to the conclusion that this petition deserves to be allowed, instead of remitting the matter to the Competent Authority i.e. the ACC, appropriate direction for extension of term of the appointment of the petitioner may be issued by this Court itself.

6. It has been stated that since in the present case Selection Committee had recommended for extension of term of appointment of the petitioner which was concurred by the then Hon'ble Chief Justice of India, as such in view of the law laid down by Hon'ble Supreme Court in the case of **R. S. Mittal vs. Union of India,** reported in **[1995 Supp (2) SCC 230],** such recommendation ought to have been approved unless there was some justifiable reason to decline the same. Reliance has also been placed on behalf of the petitioner on the judgment of the Apex Court in the case of **Union of India and others vs. Kali Dass Batish,** reported in **[2006 (1) SCC 779]** to bring home the ground that if the legislature has reposed faith in the Chief Justice of India as the *pater familias* of the Judicial hierarchy, it would normally not be open to contend for any one that the Chief Justice of India might have given his concurrence without application of mind or without calling for necessary inputs.

7. In support of the submission that this Court is fully competent and well within its jurisdiction to pass appropriate orders and to give appropriate direction in the facts and circumstances of the case, instead of remitting the matter to the Competent Authority, reliance has been placed by the learned counsel appearing for the petitioner on the judgments in the case of (i) **State of Bihar vs. Dr. Braj Kumar Mishra and others,** reported in **[1999 (9) SCC 546], (ii) Comptroller and Auditor General of India, Gian Prakash, New Delhi and another vs. K. S. Jagannathan and another,** reported in **[1986 (2) SCC 679], and (iii) Badri Nath Vs. State of Tamil Nadu and others,** reported in **[(2000) 8 SCC 395].** Reliance has also been placed on the judgment of Hon'ble Supreme Court in the case of **Major General H. M. Singh, VSM vs. Union of India and another,** reported in **[(2014) 3 SCC 670)** to emphasize the argument that respondents cannot be said to be justified in taking the impugned decision as the same is not justifiable by the reasons in support thereof. It has also been argued that if any statutory authority takes a decision on the suggestion or at the behest of an extraneous authority, the same would be vitiated. In support of this submission reliance has been placed on the judgment in the case of **Bahadursinh Lakhubhai Gohil vs. Jagdishbhai M. Kamalia and others,** reported in **[(2004) 2 SCC 65], Mohinder Singh Gill and another vs. The Chief Election Commissioner and others,** reported in **[(1978) 1 SCC 405.**

8. Shri S. B. Pandey, learned Assistant Solicitor General of India, who has ably been assisted by Shri Raj Kumar Singh has countered the submissions made by the learned counsel appearing for the petitioner and has submitted that the decision of the ACC which is under challenge herein, has been taken strictly in accordance with law and that there is no deviation therefrom. He has further submitted that the ACC was well within its competence to have called for inputs

available with the DoPT for the purposes of arriving at a correct conclusion in respect of the candidature of the petitioner who was seeking extension of his term of appointment and if the recommendation/proposal of the DoPT is viewed in this perspective, the impugned decision whereby the ACC has accorded its approval cannot be faulted with. He has further stated that earlier, recommendation made by the Selection Committee was returned back and thereafter the entire matter was placed before the Selection Committee which took a decision to carry forward the vacancy against which petitioner's term for extension of appointment was being considered to the vacancies pertaining to the year 2017 and this decision of the Selection Committee was also concurred by the Chief Justice of India on 06.04.2017, as such the matter at that point of time itself became final and stood closed. His further submission is that the proposal made by the DoPT which has been approved by the ACC, thus, cannot be termed to be a recommendation or material extraneous to the procedure prescribed in the Rules; it should rather be treated to be only an input provided by the DoPT to aid the ACC to take a decision as per the requirement of Rule 9(4) of Administrative Tribunals (Procedure for Appointment of Members), Rules 2011 as amended in the year 2014 vide notification dated 21.03.2014. In his submission, the learned counsel representing the respondents has stated that the writ petition is highly misconceived which deserves to be dismissed.

9. We have given our anxious consideration to the rival submissions made by the learned counsel appearing for the respective parties and have, as observed above, also perused the original record as produced by Shri Raj Kumar Singh, learned counsel representing the Union of India.

10. Before adverting to the submissions made by the learned counsel representing the parties, we may note certain facts which are not in dispute. The DoPT, Government of India, vide communication dated 19.05.2011 informed the petitioner that his name was approved by the Competent Authority for appointment to the post of Judicial Member in the CAT and accordingly by the said communication, offer of appointment against the vacancy pertaining to second half year of 2010 was conveyed to the petitioner. The petitioner accepted the offer and accordingly he was appointed as Judicial Member of CAT vide order dated 30/31.05.2011 and was posted at Calcutta Bench of the Tribunal. Subsequently he was, however, transferred to Lucknow Bench of the Tribunal. As per the appointment order dated 30/31.05.2011 the petitioner was appointed for a period of five years from the date of his assumption of charge or till the age of 65 years, whichever was earlier. The petitioner in terms of the said order dated 30/31.05.2011 was to complete the term of appointment of five years in the month of May, 2016. However, in terms of the provisions contained in the Rules governing the extension of term of appointment of the Members of CAT, the Chairman of CAT made a recommendation to the Selection Committee for extension of the term of the petitioner. The said recommendation was considered by the Selection Committee constituted in terms of the relevant rules which made a recommendation in favour of the petitioner for extension of his term. The said recommendation of the Selection Committee was sent for orders of the Competent Authority together with the

views of the Hon'ble Chief Justice of India. The record produced before us as also the counter affidavit filed by the respondents reveal that the Selection Committee had made recommendation in favour of extending the term of the petitioner as Member of CAT and the views of Hon'ble the Chief Justice of India were also expressed in favour of extension of his term.

11. It appears that since no decision on the recommendation made by the selection committee together with the views of the Chief Justice of India was communicated to the petitioner, he instituted a writ petition before this Court, namely, Writ Petition No.6640 (S/B) of 2017 wherein initially a prayer was made to issue necessary order for extension of his term in furtherance of the recommendations of the Selection Committee. When the counter affidavit in the said writ petition was filed and it was intimated through counter affidavit to the petitioner that vide Office Memorandum dated 06.03.2017 the Competent Authority in the ACC has returned the proposal for extension of his term, the petitioner moved an amendment application in the writ petition seeking quashing of the said Office Memorandum. By the counter affidavit filed in the earlier writ petition, a communication dated 12.04.2017 from DoPT was also brought to the notice of the petitioner whereby it was informed that the Competent Authority had returned the proposal of extension of term of appointment of the petitioner and that the same was placed before the Selection Committee for consideration whereupon the selection committee recommended to carry forward the vacancy against which the extension of the term of appointment of the petitioner was sought, to vacancies of the year 2017. The said decision for carrying forward the vacancy to the year 2017 contained in the communication dated 12.04.2017 was also challenged by the petitioner by amending the Writ Petition No.6640 (S/B) of 2017. At this juncture itself we may notice that the decision/recommendation of the Selection Committee for carrying forward the vacancies to the year 2017, was concurred by Hon'ble the Chief Justice of India on 06.04.2017.

12. Writ Petition No.6640 (S/B) of 2017 was decided by a Division Bench of this Court vide judgment and order dated 08.05.2019. The said judgment was furnished to the DoPT by the petitioner for compliance which, according to the averments made in the counter affidavit filed by the respondents, was sent to the ACC Secretariat on 04.06.2019 for taking further necessary action in the matter. The counter affidavit further states that the ACC Secretariat vide Office Memorandum dated 14.06.2019 desired the DoPT to convey its specific recommendation/views on the proposal for extension of term of the appointment of petitioner before the ACC for consideration. Pursuant to the said Office Memorandum dated 14.06.2019 issued by the ACC Secretariat, the DoPT sent the proposal to the ACC Secretariat on 23.08.2019 for orders of the Competent Authority purportedly under Rule 9(4) of Administrative Tribunals (Procedure for Appointment of Members), Rules 2011 as amended in the year 2014. It is this approval accorded by the ACC to the proposal of the DoPT for denying the extension of the term of the petitioner which is under challenge in this writ petition.

13. For proper adjudication of the issues involved in this writ petition, it would be

appropriate to make a mention of certain provisions contained in the Administrative Tribunals Act and the relevant Rules. Sub section 3 of section 6 of the Act provides that the Chairman and every other Member of the Central Administrative Tribunal shall be appointed after consultation with the Chief Justice of India, by the President. Section 8(2) of the said Act provides that a Member of the Tribunal shall hold office for a term of five years from the date he enters upon his office and such term is extendable by one more term of five years. It further provides that no Member shall hold office after he has attained the age of 65 years. Thus, section 8(2) of the said Act permits extension of term of appointment of a Member of the CAT subject to the condition that such extension would not be permissible after the Member concerned attains the age of 65 years. Section 6(3) and Section 8(2) of the Administrative Tribunal Act, 1985 are extracted herein below:

"Section 6(3):- The Chairman and every other Member of the Central Administrative Tribunal shall be appointed after consultation with the Chief Justice of India by the President.

Section 8(2): A Member shall hold office as such for a term of five years from the date on which he enters upon his office extendable by one more term of five years."

Provided that no Member shall hold office as such after he has attained the age of 65 years.

14. The Central Government in exercise of its power vested in it by section 36 of the Administrative Tribunals Act, 1985 has framed rules which govern the procedure for appointment of Members of the Tribunal. The Rules also govern extension of term of appointment of a Member of CAT. These rules are known as Administrative Tribunals (Procedure for Appointment of Members), Rules 2011. The said Rules, 2011 were amended by the Central Government vide notification dated 21.03.2014 and the amending Rules are called as the Administrative Tribunal (Procedure for Appointment of Members) Amendments Rules, 2014 (hereinafter referred to as "the Amendment Rules 2014"). The Rules notified on 30.12.2011 are extracted herein below:

"MINISTRY OF PERSONNEL, PUBLIC GRIEVANCES AND PENSIONS
(Department of Personnel and Training)
NOTIFICATION
New Delhi, the 30th December , 2011

G.S.R.923(E).--In exercise of powers conferred by clause (c) of Section 36 of the Administrative Tribunals Act, I985 (13 of 1985) and in supersession of the Administrative Tribunals (Procedure for appointment of Vice-Chairmen and Members) Rules, 2006, except as respects thing done or omitted to be done before such supersession. The Central Government hereby makes the following rules, namely:-

1. Short title and commencement.-(1) These rules may be called the Administrative Tribunals (Procedure for appointment of Members) Rules, 2011.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. Definition.- In these rules, unless the context otherwise requires,-

(a). "Act"means the Administrative Tribunals Act, 1985 (13 of1985) ;

(b) "Section' means a section of the Act;

(c) "Tribunal" means the Central Administrative Tribunal in relation to the Central and the State Administrative Tribunal in relation to a State.

3. Composition of the Selection Committee.

(1) For Selection of Members of the Central Administrative Tribunal. There shall be a Selection Committee for the purpose of selection of the Members of the Central Administrative Tribunal consisting of the following namely,

(i) A sitting Judge of the Supreme Court nominated by the Chief Justice of India-Chairman:

(ii) Chairman, Central Administrative Tribunal-Member:

(iii) Secretary to the Government of India, Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training)-Member:

(iv) Secretary to the Government of India, Ministry of Law and Justice (Department of Legal Affairs)-Member:

(2) For selection of Members of the State Administrative Tribunals-There shall be a Selection Committee of the concerned State Government for the purpose of selection of Members of the concerned State Administrative Tribunal consisting of the following, namely,

(i) Chief Justice of the High Court of the concerned State-Chairman:

(ii) Chief Secretary of the concerned State Government-Member:

(iii) Chairman of the State Administrative Tribunal of the concerned State-Member:

(iv) Chairman of Public Service Commission of the concerned State-Member:

4. Vacancies.- The anticipated vacancies of Members that is those arising between January to December of the each calendar year shall be placed before the Selection Committee and the Chairman of the Administrative Tribunal concerned shall indicate the number of vacancies of Members to be filled from the judicial stream and the administrative stream respectively whereupon the procedure to fill up the vacancies accordingly, shall be initiated by the Department of Personnel and Training of the Central Government or the Department concerned of' the State Government, as the case may be.

5. Procedure for inviting applications and processing of candidates: (1) Central Administrative Tribunal.

(i) The Selection Committee referred to in sub rule (l) of Rule 3 shall devise its own procedure or lay down the guidelines for inviting applications and for the selection of Members of the Central Administrative Tribunal.

(ii) The Selection Committee shall recommend persons for appointment as Members from amongst the persons on the list of candidates prepared by the Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training after writing to the various cadres controlling authorities.

(iii) The Central Government, shall after taking into consideration the recommendations of the Selection Committee, and in consultation with the Chief Justice of India in accordance with the provisions contained in sub-section (3) of section 6, make a final list of persons for appointment as Members of the Central Administrative Tribunal.

(2) State Administrative Tribunal:-

(i) The Selection Committee referred to in sub rule (2) of Rule 3 the concerned Stat Government shall devise its own procedure or lay down guidelines for inviting applications and for the

selections of the Members of Administrative Tribunal of the State concerned.

(ii) The Selection Committee shall recommend persons for appointment as Members from amongst the persons on the list the candidates prepared by the Chief Secretary or Secretary, General Administration Department or Personnel Department of the State Government after writing to the various cadre controlling authorities of the State.

(iii) The State Government shall after taking into consideration the recommendations of the Selection Committee make a list of persons selected and send the same with its recommendations to the Central Government who shall in consultation with the Chief Justice India and in accordance with the provisions contained in sub section (4) of Section 6, appoint Members of the Administrative Tribunal of the State concerned.

(6) Meetings of the Selection Committee.- (1) The Selection Committee shall normally hold its meeting at New Delhi in the case of the Central Administrative Tribunal and at the State capital of the State concerned in the case of the State Administrative Tribunal or at such other place as may be decided by the Chairman of the concerned Selection Committee by recording the reasons for the change of the venue the Committee.

(2) The notice or Agenda as the case may be, for meeting of the Selection Committee shall be issued in advance.

3. The date and venue for the meeting shall be fixed in consultation with the Chairman of the Committee.

4. The quorum for the meeting at a Selection Committee shall be the Chairman and at least one other Member.

7. Consultation with the Chief Justice of India.- (1) For selection of a Member of the Central Administrative Tribunal the Chief Justice of India shall be consulted in accordance with the provisions of sub-section (3) of Section 6 and the recommendation of the Selection Committee referred to in sub-rule (1) of rule 3 shall accordingly be placed before him for his views.

(2) The recommendations of the Selection Committee, together with the views of the Chief Justice of India shall be submitted to the Competent Authority for orders:

8. Consultation with the Governor.- (1) For selection of a Member of State Administrative Tribunal the Governor of the concerned State shall be consulted by the State Government and for this purpose the recommendations of the Selection Committee referred to in sub rule (2) of rule 3 shall be placed before him.

(2) After consulting the concerned Governor under sub rule (1) the recommendations of the Selection Committee together with the views of the Governor shall be forwarded to the Central Government and that Government shall seek the orders of the competent authorities."

15. The Amendment Rules 2014 are also extracted herein below:

"MINISTRY OF PERSONNEL, PUBLIC GRIEVANCES AND PENSIONS
(Department of Personnel and Training)
NOTIFICATION
New Delhi, the 21st March, 2014

G.S.R. 205 (E).--In exercise of the powers conferred by clause (c) of section 36 of the Administrative Tribunals Act, 1985 (13 of 1985), the Central Government hereby makes the following rules further to amend the Administrative Tribunals (Procedure for Appointment of Members) Rules, 2011, namely:-

1. (1) These rules may be called the Administrative Tribunals (Procedure for appointment of Members) Amendment Rules, 2014.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. In the Administrative Tribunals (Procedure for appointment of Members) Rules, 2011 (hereinafter referred to as the said rules), in rule 7 after sub-rule (1), the following sub-rule shall be inserted, namely:--

"(1A) For selection of a Member of the State Administrative Tribunal, the Chief Justice of India shall be consulted in accordance with the provisions of sub-section (4) of section 6 and the recommendations of the Selection Committee referred to in sub-rule (2) of rule 3 shall accordingly be placed before him for his views".

3. In the said rules, after rule 8, the following rules shall be inserted, namely:--

"9. Extension of term of appointment of Member of the Central Administrative Tribunal.--(1) The Chairman of the Central Administrative Tribunal may recommend the names of the Members with justification for extension of their term of appointment to the Central Government in accordance with the provisions of sub-section (2) of section 8.

(2) The proposal of the Chairman of the Tribunal shall be placed before the Selection Committee referred to in sub-rule (1) of rule 3 and the Selection Committee may make recommendations for extension of term of appointment of such Members to the Central Government.

(3) The Chief Justice of India shall be consulted in accordance with the provisions of sub-section (3) of section 6 and the recommendation of the Selection Committee referred to in sub rule (1) of rule 3 shall accordingly be placed before him for his views.

(4) The recommendations of the Selection Committee, together with the views of the Chief Justice of India shall be submitted to the Competent Authority for orders.

10. Extension of term of appointment of Member of the State Administrative Tribunal.--(1) The Chairman of the State Administrative Tribunal may recommend the names of the Members with justification for extension of their term of appointment to the concerned State Government in accordance with the provisions of sub-section (2) of section 8.

(2) The proposal of the Chairman of the Tribunal shall be placed before the Selection Committee referred to in sub-rule (2) of rule 3 and the Selection Committee may make recommendations for extension of term of appointment of such Members to the State Government concerned.

(3) The Governor of the concerned State shall be consulted by the State Government and for this purpose the recommendation of the Selection Committee referred to in sub-rule (2) of rule 3 shall be placed before him.

(4) After consulting the concerned Governor under sub-rule (3), the recommendations of the Selection Committee together with the views of the

Governor shall be forwarded to the Central Government and that Government after consulting the Chief Justice of India shall seek the orders of the competent authorities."

16. By introducing 2014 Amendment Rules, Rule 9 in 2011 Rules was added which provides for procedure for extension of term of appointment of Members of Tribunal. Rule 9 contains the entire scheme of consideration of extension of term of appointment of Members, according to which the process is initiated by the Chairman of the Tribunal. Rule 9(1) provides that the Chairman of the CAT may recommend the names of the Members with justification for extension of their term of appointment to the Central Government in accordance with the provisions of Section 8(2). As per sub rule 2 of rule 9, the proposal of the Chairman of the Tribunal is to be placed before the Selection Committee constituted under Rule 3(1) whereupon the Selection Committee is to make recommendation for extension of term of appointment to the Central Government. Once such recommendation by the Selection Committee is made for extension of term of appointment of a Member, under Rule 9(3) the Chief Justice of India is to be consulted in accordance with the provisions of section 6 (3) of the Act. The recommendations made by the Selection Committee are to be placed before the Chief Justice of India for his views. Sub rule 4 of rule 9 provides that the recommendation of the Selection Committee along with the views of the Chief Justice of India are to be submitted to the Competent Authority for orders. At this very juncture, we may point out that the Competent Authority in such matters as per the Government of India (Transaction of Business) Rules, framed under Article 77(3) of the Constitution of India, is the Appointments Committee of the Cabinet (ACC). We may also notice the composition of the Selection Committee in terms of Rule 3(1) of the Rules 2011, according to which such Selection Committee is to comprise of a sitting Judge of Supreme Court of India to be nominated by the Chief Justice of India, who is its Chairman. The Selection Committee also comprises of the Chairman, CAT, who is its Member, Secretary to the Government of India in the Ministry of Personnel and Public Grievances (Department of Personnel and Training), who is its second Member and Secretary to the Government of India in the Ministry of Law and Justice, Department of Legal Affairs, who is also a Member of the Selection Committee.

17. The composition of the Selection Committee as prescribed in Rule 3(1) of the Rules, 2011 thus makes it clear that it comprises of persons holding high offices in the Government as also holding constitutional office of the Judge of the Supreme Court of India. The sanctity and significance attached to such selection is highlighted by the composition of the Selection Committee as also the provision which requires consultation by the Chief Justice of India. The recommendation, thus, made by such high powered Selection Committee on account of the very nature of its composition itself are, thus, to be kept and treated at a very pedestal and thus we have no hesitation to observe that such recommendation by any such high powered Selection Committee along with views of the Hon'ble the Chief Justice of India cannot be negated in absence of any justifiable reason by any authority.

18. As observed above, the very composition of the Selection Committee itself attaches sanctity and purity to its recommendations. In this case, the fact that the Selection Committee had already

recommended for extension of term of appointment of the petitioner with the concurrence of the Chief Justice of India has not been denied.

19. Thus, for the reasons aforesaid, unless we find some justifiable reason for not accepting such recommendation by the Competent Authority, the decision denying petitioner's extension of term of his appointment, in our considered opinion, would be illegal and vitiated.

20. While examining the reasons which form the proposal submitted by the DoPT denying the extension of the petitioner which was approved by the Competent Authority (ACC) we need to refer to the averments made in paragaraph 15 of the counter affidavit filed by the respondents. Para 15 of the said counter affidavit is extracted herein below:

"15.That it is pertinent to state that the proposal of DoPT for seeking the approval of ACC (Competent Authority) with regard to denial of extension of tenure of the petitioner was based on the fact that the Search cum Selection Committee, on placing before it the decision dated 06.03.2017 of the ACC regarding returning the proposal, recommended for carrying forward of those two vacancies to the next vacancy year and the same was also concurred by the Hon'ble CJI. Besides this, three more complaints were received against Shri Navneet Kumar. Although those complaints could not be verified due to non coming forward of the complainants but it is well accepted that the Judicial Authority not only should be fair but should look to be fair and unblemished also in his conduct and must uphold the highest standards of integrity to keep trust of public."

21. For culling out the reason, if any, which can be said to be available to the respondents for denying the extension of term of appointment of the petitioner, we may also refer to the Office Memorandum dated 14.06.2019, issued from the Secretariat of ACC, whereby the DoPT was required to convey its recommendation/proposal. In the said Office Memorandum dated 14.06.2019 what we find recited is that, *"the Departments have not provided their specific recommendation/views on the order dated 08.05.2019 of the High Court of Allahabad, Lucknow Bench, Lucknow in Writ Petition No.6640 (S/B) of 2017: Navneet Kumar vs. Union Of India Through Secy. Personnel & Training & Anr"*. The said Office Memorandum further recites that, *"the Departments are accordingly requested to convey their specific recommendations/views on the proposal along with approval of the Minister Incharge for placing the same before ACC for consideration".*

22. We may also examine at this juncture itself the proposal submitted by the DoPT vide Office Memorandum dated 23.08.2019 pursuant to the Office Memorandum dated 14.06.2019. The said Office Memorandum, as is available on record placed before us by the learned counsel representing the Union of India, only recites the order of this Court dated 09.05.2019 and thereafter reproduces sub rule 4 of rule 9 of Rules 2011 as amended in 2014 and then it states that *"three complaints were received from different quarters in DoPT against Shri Navneet Kumar. While the proposal for extension of tenure for his second term along with the status of those three complaints was still under consideration of ACC, three more complaints were received by the DoPT"*. This proposal further recites that, *" although those complaints could not be*

verified due to non coming forward of the complainants, but it is a fact that these three complaints were received by the Government thereby casting a shadow on the working of the Hon'ble Member". The proposal also recites that, *"it is well accepted that the Judicial Authority should not only be fair but should look to be fair also in his conduct and must uphold the highest standards of integrity to keep trust of public."* Accordingly the proposal states that *"keeping all in this view the Competent Authority decided not to recommend the officer for the said extension".* The said Office Memorandum dated 23.08.2019 records its proposal as *" issue of order conveying the decision of the ACC with regard to denial of extension of tenure in respect of Shri Navneet Kumar in compliance of the direction dated 09.05.2019 of Hon'ble High Court of Allahabad (Lucknow Bench)".*

23. What we thus find from the above recorded facts is that once the order passed by this Court was submitted before the ACC, its Secretariat directed the DoPT to furnish its recommendation in respect of extension of term of appointment of the petitioner vide Office Memorandum dated 14.06.2019 whereupon vide Office Memorandum dated 23.08.2019 DoPT submitted its recommendation/proposal which is negatively worded and is based upon only one reason that is the complaints said to have been received against the petitioner. What we also notice from a perusal of the averments made in paragraph 15 of the counter affidavit is that basis of proposal made by the DoPT vide Office Memorandum dated 23.08.2019 was the complaints as mentioned in the said Office Memorandum as also the decision of the Selection Committee dated 06.03.2017 whereby the vacancy against which the petitioner's extension of term of appointment was being considered, was carried forward to the vacancies of the year 2017 which was concurred by the Chief Justice of India.

24. We thus, now proceed to examine the reasons indicated in the proposal/recommendation of the DoPT on the basis of which the impugned decision by approving the said proposal has been taken by the ACC.

25. As regards the plea taken by the respondents based on the decision of the Selection Committee for carrying forward the vacancies to the year 2017, we may observe that it is noticeable that the said decision has been expressed in the letter/order dated 12.04.2017 which was challenged by the petitioner by way of seeking amendment in the earlier writ petition, namely, Writ Petition No.6640 (S/B) of 2017. The Court while deciding the aforesaid writ petition vide its judgment and order dated 08.05.2019 allowed the writ petition while quashing the orders challenged in the writ petition. Opening sentence of the decision dated 08.05.2019 passed by this Court makes a mention as to what was challenged in said writ petition and the challenge included challenge to the letter/order dated 12.04.2017. Thus, once the said decision contained in the letter/order dated 12.04.2017 was quashed by this Court vide its judgment and order dated 08.05.2019, the plea based on the decision of the Selection Committee for carrying forward the vacancies to the year 2017, in our considered opinion, is not available to the respondents. As a matter of fact the said decision could not be taken aid of by the respondents in view of the judgment dated 08.05.2019 passed by this Court, for denying the extension of term of

the appointment of the petitioner as member of the Tribunal. Further, at this juncture itself it would be appropriate to note that in the earlier writ petition, namely, the Writ Petition No.6640 (S/B) of 2017 the decision of the Competent Authority which is contained in the Office Memorandum dated 06.03.2017 whereby the proposal for extension of term of appointment of the petitioner was returned back, has also been quashed by this Court while the said writ petition was allowed.

26. Now coming to the second reason as pleaded by the respondents relating to availability of certain complaints which finds mentioned in the proposal dated 23.08.2019 submitted by the DoPT on the basis of which the Competent Authority has taken a decision, what we notice is that it is apparent that the proposal dated 23.08.2019 contains a summary of all those complaints. The last three complaints are dated 16.06.2016, 04.07.2016 and 22.07.2016. In respect of all these complaints, the proposal dated 28.08.2017 itself observes that *" although those complaints could not be verified due to non coming forward of the complaints".* Thus, clearly the proposal dated 23.08.2019 had taken into account the complaints which were not verified. The remarks contained in respect of all six complaints, as are available in the proposal dated 23.08.2019, are summarized herein below:

Complaint No.1: *"Complaint was forwarded to CAT and CAT informed that main grievance of the complainant was against the judicial proceeding of CAT in the case filed by him. In terms of section 32 of AT Act no suit, prosecution etc. was possible."*

Complaint No.2: *"Complaints were forwarded to CAT. CAT replied that they verified that the person who was statedly sending complaints was not there. As such these were pseudonymous."*

Complaint No.3: *"Complaint was forwarded to CAT. CAT replied that the applicant was praying for hearing of his case by Chairman, CAT instead of Shri Navneet Kumar, However, Chairman, CAT authorized other member to hear his case. Even then he was not satisfied."*

Complaint No.4: *"Complainant was asked to verify but no reply came."*

Complaint No.5: *"Complainant was asked to verify but no reply came."*

Complaint No.6: *"The complainant was asked to verify but no reply came."*

27. Having extracted the remarks of DoPT on all six complaints against the petitioner, we may notice now that this Court while deciding the earlier writ petition, namely, Writ Petition No.6640(S/B) of 2017 had perused the original record which were produced at the time of hearing of the said matter and in its judgment dated 08.05.2019 the Court had observed that **"even reference of certain complaints have been given but no finding on it adverse to the petitioner has been recorded".** Accordingly, having regard to the nature of complaints available on record and also keeping in view the observations made by this Court in its order dated 08.05.2019 to the effect that nothing adverse to the petitioner was found in the complaints, in our considered opinion, the reliance placed by the respondents for arriving at the decision which is under challenge herein is not worth being accepted.

28. In the light of these facts stated in the foregoing paragraphs, what we conclude is that the DoPT while preparing

the proposal on the basis of which the impugned decision has been taken by the Competent Authority, has not given due regard to the judgment and order dated 08.05.2019 passed by this Court.

29. At the cost of repetition we may state that regarding complaints the observation was also made by this Court in the judgment dated 08.05.2019 that despite giving reference to certain complaints no findings on the same adverse to the petitioner was recorded. Similarly, it is also to be noticed that the decision of the Selection Committee for carrying forward the vacancy to the year 2017 also stood set aside by the order dated 08.05.2019 passed by this Court, inasmuch as the said decision contained in the letter/order dated 12.04.2017 was challenged by the petitioner which was quashed by the Court. Thus, we have no hesitation to hold that the proposal dated 23.08.2018 submitted by the DoPT pursuant to the Office Memorandum issued by the Secretariat of the ACC, dated 14.06.2019 furnished certain material/information which were not relevant at all for consideration of the case of the petitioner for grant of extension of term of his appointment as Judicial Member of the CAT.

30. Having observed as above, it is now to be noted that the Rules 2011 as amended vide notification dated 21.03.2014 only require the Competent Authority to consider the recommendation of the Selection Committee together with the views of the Chief Justice of India for the reason that sub rule 4 of rule 9 clearly states that the recommendation of the Selection Committee along with the views of the Chief Justice of India shall be submitted to the Competent Authority for orders. While we say that it is only the recommendation of the Selection Committee and the views of the Hon'ble the Chief Justice of India which should be placed or submitted to the Competent Authority for orders, we do not mean that the Administrative Department (which in this case is the DoPT) is precluded from bringing to the notice of the Competent Authority any relevant material such as complaints or reports or any other material reflecting upon the functioning of the Judicial Member of the CAT in respect of whom extension of term of appointment is being considered. However, while we say that it is well within the competence of the DoPT to furnish all relevant information and material before the Competent Authority i.e. ACC, for orders, we also observe that the rules do not envisage any "recommendation" to be furnished by the Administrative Department (DoPT). Furnishing recommendation by the DoPT, in fact, appears to be alien to the rules. We need to differentiate between furnishing of recommendations and submission of relevant material. The relevant material is placed before any authority or body for its consideration without any comment by the authority or person furnishing the same, however, recommendation would necessarily involve some views about the merit of candidature of the candidate concerned. Thus, in this view, any such recommendation, which is not envisaged under the rules, has the potential of affecting the mind of the Competent Authority whereas material in the form of complaints etc. if furnished, are to be considered without any recommendation of the Administrative Department. The Rules thus do not rightly envisage any recommendation to be furnished to the Competent Authority by the Administrative Department.

31. In this case, as is apparent from a bare reading of the proposal dated 23.08.2014, the DoPT has made the proposal

which is couched in negative language. The proposal, in fact, suggests that the order conveying the decision of ACC with regard to the denial of extension of the term of the petitioner be issued in compliance of the directions dated 09.05.2019 passed by this Court. The opinion of the ACC, in our considered view, is to be formed by application of independent mind by its members for the reason that rule 9(4) of the Rules mandates the Competent Authority to pass orders or to take decision on the basis of the recommendations of the Selection Committee and the views of the Chief Justice of India. The Administrative Department in such matters, keeping in view the position of the rules as discussed above, is thus required only to furnish the recommendation of the Selection Committee, views of the Chief Justice of India and also any inputs which the department may be in possession of, for its consideration by the Competent Authority sans any recommendation.

32. In view of what we have stated above, it is abundantly clear that the proposal/recommendation submitted by the DoPT vide Office Memorandum dated 23.08.2019 is not only against the rules but it also contains certain material regarding which this Court in its judgment and order dated 08.05.2019 had made observations and had found that there did not exist anything adverse to the candidature of the petitioner. We are, thus, convinced that the decision making process as also the impugned decision whereby the proposal submitted by the DoPT to the Competent Authority for denial of extension of the term of appointment of the petitioner as Judicial Member of CAT has been approved, are vitiated.

33. In respect of submission made by the learned Senior Advocate appearing for the petitioner that having regard to the facts and circumstances of the case as also the manner in which the impugned decision has been taken, this Court itself is competent to issue appropriate direction granting extension of term of appointment of the petitioner, it is observed that so far as the proposition propounded in the judgments cited by the learned counsel for the petitioner is concerned, there cannot be any quarrel. However, we do not find it a case where findings recorded by the Competent Authority empowered under the rules can be substituted by us. It is ultimately the satisfaction of the Competent Authority under the rules which has to be given precedence and finality. As a word of caution at this juncture itself, we may, however, observe that this does not mean that the Competent Authority under the rules can easily ignore the recommendations of the Selection Committee which comprises of a sitting Judge of Hon'ble Supreme Court of India, the apex court of the country and officers of very higher rank in the Government of India. Such recommendation along with the views of Chief Justice of India cannot be brushed aside without there being any justifiable reason. As observed by Hon'ble Supreme Court in the case of **R. S. Mittal (supra)** when a recommendation is made by the Selection Committee comprising of such high ranking officials and even constitutional functionary, there has to be a very strong and justifiable reason to decline such recommendation. Hon'ble Supreme Court in the case of **Union of India and others vs. Kali Dass Batish (supra)** has observed that if the legislature has reposed faith in the Chief Justice of India as the *pater familias* of the Judicial hierarchy in the country, it is not open to contend that the Chief Justice of India might have given his concurrence without application of

mind or without calling for necessary inputs.

34. As noticed above, the recommendations, made by such statutory Selection Committee comprising of the persons, as elaborated above, by dint of the very nature of composition of the Committee, are to be placed at a higher pedestal. But the fact remains that all such recommendations and views are subject to the orders to be passed or decision to be taken by the Competent Authority in terms of Rule 9(4) of the Rules 2011 as amended in the year 2014. Therefore we do not find ourselves in agreement with this submission made by the learned counsel for the petitioner.

35. For the discussion made and the reasons given above, the writ petition is **allowed.**

36. The order dated 11.10.2019 as is available at page 53 of the writ petition and the communication dated 24.10.2019 as is available at page 52 of the writ petition are hereby quashed.

37. The Competent Authority under Rule 9(4) of Administrative Tribunals (Procedure for Appointment of Members), Rules 2011 as amended in the year 2014 vide notification dated 21.03.2014 will thus take decision afresh in the matter for grant of extension of term of appointment of the petitioner as Judicial Member of the CAT as early as possible, say within a period of ten weeks from the date a certified copy of this order is produced before the authority concerned.

38. In the facts of the case, there will be no order as to costs.

(2021)09ILR A534
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.08.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Single No. 2306 of 2004
connected with
Service Single No. 4953 of 2006

Ram Dular & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Dr. L.P. Misra, Shobh Nath Pandey

Counsel for the Respondents:
C.S.C., Niraj Chaurasiya, V.K. Bajpai

A. Service Law – Constitution of India – Article 14 – Pay-scale revision vide GO dated 20.07.2001 – Extension of benefit thereof w.e.f. 01.01.1996 – However, restriction imposed limiting its benefit to the employee who have retired on or after 01.07.2001 – Validity of GO challenged – Held, there is no rational basis extending the benefit of revision of pay-scale only to those employees who have retired on or after 01.07.2001 and restricting for those employees have retired on or before 01.07.2001 – There is patently no rational nexus with the object sought to be achieved by the impugned Government Orders – It tried to create class within the class, which is not permissible in the eyes of law. (Para 21 and 22)

Writ Petition allowed. (E-1)

Cases relied on :-

1. D.S. Nakara & ors. Vs U.O.I. (1983) 1 SCC 305

2. All Manipur Pensioners Association by its Secretary Vs St. of Manipur; AIR 2019 SC 3338

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri O.P. Srivastava, learned Senior Advocate assisted by Sri Shobh Nath Pandey and Sri Kaushlendra Yadav, Advocates for the petitioners and Sri Vivek Kumar Shukla, learned Additional Chief Standing Counsel for the State-respondents. Useful assistance was provided by Law Trainee/ Clerk (Ms. Shama Parveen) of this Court

2. By means of first writ petition i.e. Writ Petition No.2306 (S/S) of 2004, the petitioners have prayed for the following reliefs:-

"(a) to issue a writ, order or direction in the nature of certiorari to quash the Government Orders dated 20.07.2001, 08.08.2001 and 03.09.2001, contained in Annexure Nos.1, 2 and 3 to the writ petition, to the extent they provide cut off date as 01.07.2001 for the grant of the benefit of the amended pay-scale of Rs.5500-9000, by declaring it arbitrary and unconstitutional

(b) to issue a writ, order or direction in the nature of mandamus thereby commanding the opposite parties to extend the benefit of the amended pay-scale of Rs.5500-9000 with effect from 01.01.1996 in accordance with the earlier Government Order dated 10th July, 1998, contained in Annexure No.4 to the writ petition and to fix the pension of the petitioner accordingly at their respective basic pay."

3. By means of second writ petition i.e. Writ Petition No.4953 (S/S) of 2006, the petitioners have prayed for the following reliefs:-

"(i) to issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 20.09.2005, contained in Annexure No.1 to the writ petition.

(ii) to issue a writ, order or direction in the nature of certiorari quashing the impugned government order dated 03.09.2001, contained in Annexure No.2 to the writ petition, to the extent the petitioners have been deprived from getting the benefit of revision of the pay-scale in Vth Pay Commission Report (Central) w.e.f. 01.01.1996 and thereafter the pensionery benefits accordingly.

(iii) to issue a writ, order or direction in the nature of mandamus directing and commanding the opposite parties to allow the benefit of Vth Pay Commission Report (Central) to the petitioners and thereby the pay of the petitioners be accordingly fixed in the revised scale on 01.01.1996 and thereafter the pensionery benefits of the petitioners be computed accordingly and the arrears of the pensionery benefits be also given to them within some reasonable time which may be 2 weeks."

4. In both the writ petitions, the question of law to be considered is the same and, therefore, with the consent of learned counsel for the parties both the writ petitions are being decided by a common judgment and order.

5. The question to be considered is that as to whether the benefit of pay-scale revision which has been extended with effect from 01.01.1996 can be restricted with effect from 01.07.2001 without having any rational nexus with the object sought to be achieved.

6. Ignoring the unnecessary facts of both the cases the relevant facts to adjudicate the controversy in question are being considered.

7. In both the writ petitions, the petitioners have retired after 01.01.1996 and before 01.07.2001. However, by mans of Government Order dated 20.07.2001 and subsequent Government Orders the benefit of pay-scale revision has been restricted with effect from 01.07.2001 saying that the benefit of pay-scale revision would be extended with effect from 01.01.1996 to those employees who have retired on or after 01.07.2001. All those Government Orders have been assailed on the ground that those Government Orders are violative of Article 14 of the Constitution of India for creating class within the class for no cogent reason.

8. In the first writ petition, all the relevant Government Orders dated 20.07.2001, 08.08.2001 and 03.09.2001 have been assailed, whereas in the second writ petition only one Government Order dated 03.09.2001 has been assailed and the order dated 22.09.2005 has been assailed whereby the benefit, so prayed by the petitioners, has been rejected by the Joint Director of Education, VIth Region, Lucknow.

9. Since the very fact that all the petitioners of both the writ petitions have been retired on or after 01.01.1996 while serving on the post of Assistant Teacher in various Educational Institutions except petitioner No.1 in the second writ petition who retired from the post of Principal (Junior High School), Sohan Lal Inter College, Lucknow, therefore, there would be no use to go into the details of the relevant facts relating to the petitioners inasmuch as regarding their services as Assistant Teacher and Principal has not been disputed by the opposite parties and the only ground to not providing the benefit of the pay-scale revision to the petitioners is that they had been retired from service on or before 01.07.2001, therefore, they are not entitled for the benefit of the pay-scale revision in view of the Government Orders dated 20.07.2001 and 08.08.2001.

10. Sri O.P. Srivastava, learned Senior Advocate for the petitioners has drawn attention of this Court towards the Government Order dated 10.07.1998, which is contained as Annexure No.3 to the second writ petition, whereby on the basis of recommendations of the Pay Commission, U.P., 1998 the decision has been taken to provide the benefit of the pay-scale revision to the teaching and non-teaching staff of the Educational Institutions with effect from 01.01.1996.

11. On the basis of the aforesaid Government Order dated 10.07.1998, another Government Order dated 20.07.2001 (Annexure No.4 of the second writ petition) has been issued providing the benefit of the pay-scale revision to the teachers of the Primary and Secondary Educational Institutions with effect from 01.01.1996 providing further that the pay-scale shall be revised with effect from 01.07.2001.

12. By means of subsequent Government Order dated 08.08.2001 (Annexure No.5 of the second writ petition), it has been provided that the benefit of the pay-scale revision shall be given with effect from 01.01.1996 and employees concerned would submit their option as to whether they want to opt the benefit of such pay-scale revision or they

do not want to opt such revision provided vide Government Order.

13. As a matter of fact, the Government Order dated 08.08.2001 provides the modalities providing the benefit of revised pay-scale revision. The Government Order dated 08.08.2001 has been modified vide Government Order dated 03.09.2001 (Annexure No.2 of the second writ petition), wherein it has been indicated that the benefit of the revised pay-scale revision shall be provided to those teachers who were in the employment on or after 01.07.2001. It has been further clarified in this Government Order dated 03.09.2001 that the benefit of pay-scale revision with effect from 01.01.1996 to 30.06.2001 shall be given on notional basis as no arrears shall be paid to any of the employees.

14. Sri O.P. Srivastava, learned Senior Advocate has submitted that he has instructions to say that none of the petitioners are claiming any arrears of benefit of revision of pay-scale with effect from 01.01.1996 to 30.01.2001. He has also submitted that the petitioners are claiming the benefit of pay-scale revision with effect from 01.01.1996 notionally for the reason that after 01.01.1996 the pay-scale was revised by the State Government and whatever the pay-scale was fixed after the said revision, the petitioners be provided such pay-scale and on the basis of the said pay-scale the petitioners be provided the consequential service benefits except the arrears of salary.

15. Sri O.P. Srivastava, learned Senior Advocate for the petitioners has submitted with vehemence that there may be no rational nexus with the object sought to be achieved by the impugned Government Orders, pursuant to which the rider has been imposed that those employees who have retired on or before 01.07.2001 would not be entitled for the benefit of the pay-scale revision. He has further submitted that the Government Order dated 01.07.1998 (supra) clearly indicates that the benefit of pay-scale revision would be paid to the employees with effect from 01.01.1996 without imposing any rider. Therefore, by means of the subsequent Government Orders whereby the aforesaid riders has been imposed, is not only illegal, discriminatory, unwarranted and uncalled for but the same is violative of Article 14 of the Constitution of India inasmuch as the aforesaid rider creates class within the class which is not permissible.

16. Sri O.P. Srivastava has further submitted that if the authorities impose the rider that the benefit of the pay-scale revision would not be paid to those employees who have retired on or before 01.01.1996, the date when the said benefit is extended to the employees, the said rider would have been justified but the rider so imposed by the Government Order 03.09.2001 for providing the benefit of pay-scale revision to the employees retired on or after 01.07.2001 is absolutely unwarranted. There is no dispute that the petitioners were very much in service when the benefit of pay-scale revision was extended to the employees i.e. 01.01.1996, therefore, such discrimination may not be permitted in the eyes of law.

17. On the other hand, Sri Vivek Kumar Shukla, learned Additional Chief Standing Counsel has submitted that for providing the benefit of Government Order dated 10.07.1998, the Government Order dated 20.07.2001 has been issued revising

the pay-scale with effect from 01.07.2001 extending the benefit of pay-scale revision with effect from 01.01.1996 fixing the cut off date as 01.07.2001. He has further submitted that as per the subsequent Government Order dated 08.08.2001 the options were to be sought from the employees for extending the benefit of pay-scale revision with effect from 01.07.2001, therefore, such options would have been submitted by those employees who were working at that point of time. Since the petitioners have already retired from service on or before 01.07.2001, so no options could have been sought from them and, therefore, the benefit of revision of pay-scale could have not been extended.

18. On being confronted learned Additional Chief Standing Counsel on the Government Order dated 10.07.1998 (Annexure No.3 of the second writ petition), by means of which the benefit of revision of pay-scale has been given with effect from 01.01.1996 asking as to why this benefit can be denied to the petitioners who were very much in service on or before 01.01.1996, Sri Shukla has submitted that since this is a policy decision, therefore, such benefit could have not been provided to the petitioners immediately after 10.07.1998 and such benefit has been made available to the employees pursuant to the Government Order dated 03.09.2001.

19. On that, Sri O.P. Srivastava, learned Senior Advocate for the petitioners has submitted that if any policy decision is taken, which is patently violative of Article 14 of the Constitution of India creating class within the class, this Court after judicial scrutiny may set aside the same. He has again reiterated that there may not be absolutely any rational imposing the bar for not providing the benefit of revision of pay-scale to the employees who have retired on or after 01.01.1996. Sri Srivastava has referred the dictum of the Constitutional Bench of Hon'ble Apex Court in re:***D.S. Nakara and others vs. Union of India*** reported in ***(1983) 1 SCC 305*** referring paras 42, 46 & 65, which read as under:-

"42. If it appears to be undisputable, as it does to us that the pensioners for the purpose of pension benefits form a class, would its upward revision permit a homogeneous class to be divided by arbitrarily fixing an eligibility criteria unrelated to purpose of revision, and would such classification be founded on some rationalprinciple ? The classification has to be based, as is well settled, on some rational principle and the rational principle must have nexus to the objects sought to be achieved. We have set out the objects underlying the payment of pension. If the State considered it necessary to liberalise the pension scheme, we find no rational principle behind it for granting these benefits only to those who retired subsequent to that date simultaneously denying the same to those who retired prior to that date. If the liberalisation was considered necessary for augmenting social security in old age to government servants then those who retired earlier cannot be worst off than those who retire later. Therefore, this division which classified pensioners into two classes is not based on any rational principle and if the rational principle is the one of dividing pensioners with a view to giving something more to persons otherwise equally placed, it would be discriminatory. To illustrate, take two persons, one retired just a day prior and another a day just succeeding the specified date. Both were in the same pay bracket, the average emolument was the

same and both had put in equal number of years of service. How does a fortuitous circumstance of retiring a day earlier or a day later will permit totally unequal treatment in the matter of pension ? One retiring a day earlier will have to be subject to ceiling of Rs. 8,100 p a. and average emolument to be worked out on 36 months' salary while the other will have a ceiling of Rs. 12,000 p.a. and average emolument will be computed on the basis of last ten months average. The artificial division stares into face and is unrelated to any principle and whatever principle, if there be any, has absolutely no nexus to the objects sought to be achieved by liberalising the pension scheme. In fact this arbitrary division has not only no nexus to the liberalised pension scheme but it is counter productive and runs counter to the whole gamut of pension scheme. The equal treatment guaranteed in Art.14 is wholly violated inasmuch as the pension rules being statutory in character, since the specified date, the rules accord differential and discriminatory treatment to equals in the matter of commutation of pension. A 48 hours difference in matter of retirement would have a traumatic effect. Division is thus both arbitrary and unprincipled. Therefore the classification does not stand the test of Art.14.

46. By our approach, are we making the scheme retroactive ? The answer is emphatically in the negative. Take a government servant who retired on April 1, 1979. He would be governed by the liberalised pension scheme. By that time he had put in qualifying service of 35 years. His length of service is arelevant factor for computation of pension. Has the Government made it retroactive, 35 years backward compared to the case of a Government servant who retired on 30th March, 1979 ? Concept of qualifying service takes note of length of service, and pension quantum is correlated to qualifying service. Is it retroactive for 35 years for one and not retroactive for a person who retired two days earlier? It must be remembered that pension is relatable to qualifying service. It has correlation to the average emoluments and the length of service. Any liberalisation would pro tanto be retroactive in the narrow sense of the term. Otherwise it is always prospective. A statute is not properly called a retroactive statute because a part of the requisites for its action is drawn from a time antecedent to its passing. (see Craies on Statute Law, sixth edition, p. 387). Assuming the Government had not prescribed the specified date and thereby provided that those retiring pre and post the specified date would all be governed by the liberalised pension scheme, undoubtedly, it would be both prospective and retroactive. Only the pension will have to be recomputed in the light of the formula enacted in the liberalised pension scheme and effective from the date the revised scheme comes into force. And beware that it is not a new scheme, it is only a revision of existing scheme. It is not a new retiral benefit. It is an upward revision of an existing benefit. If it was a wholly new concept, a new retiral benefit, one could have appreciated an argument that those who had already retired could not expect it. It could have been urged that it is an incentive to attract the fresh recruits. Pension is a reward for past service. It is undoubtedly a condition of service but not an incentive to attract new entrants because if it was to be available to new entrants only, it would be prospective at such distance of thirty-five years since its introduction. But it covers all those in service who entered thirty-five years back. Pension is thus not an incentive but a

reward for past service. And a revision of an existing benefit stands on a different footing than a new retiral benefit. And even in case of new retiral benefit of gratuity under the Payment of Gratuity Act, 1972 past service was taken into consideration. Recall at this stage the method adopted when pay-scales are revised. Revised pay-scales are introduced from a certain date. All existing employees are brought on to the revised scales by adopting a theory of fitments and increments for past service. In other words, benefit of revised scale is not limited to those who enter service subsequent to the date fixed for introducing revised scales but the benefit is extended to all those in service prior to that date. This is just and fair. Nowif pension as we view it, is some kind of retirement wages for past service, can it be denied to those who retired earlier, revised retirement benefits being available to future retirees only ? Therefore, there is no substance in the contention that the court by its approach would be making the scheme retroactive, because it is implicit in theory of wages.

65. That is the end of the journey. With the expanding horizons of socio-economic justice, the socialist Republic and welfare State which we endeavour to set up and largely influenced by the fact that the old men who retired when emoluments were comparatively low and are exposed to vagaries of continuously rising prices, the falling value of the rupee consequent upon inflationary inputs, we are satisfied that by introducing an arbitrary eligibility criteria: 'being in service and retiring subsequent to the specified date' for being eligible for the liberalised pension scheme and thereby dividing a homogeneous class, the classification being not based on any discernible rational principle and having been found wholly unrelated to the objects sought to be achieved by grant of liberalised pension and the eligibility criteria devised being thoroughly arbitrary, we are of the view that the eligibility for liberalised pension scheme of being in service on the specified date and retiring subsequent to that date' in impugned memoranda, Exhibits P-I and P-2, violates Art. 14and is unconstitutional and is struck down. Both the memoranda shall be enforced and implemented as read down as under: In other words, in Exhibit P-1, the words:

"that in respect of the Government servants who were in service on the 31st March, 1979 and retiring from service on or after that date"

and in Exhibit P-2, the words:

"the new rates of pension are effective from 1st April 1979 and will be applicable to all service officers who became/become non-effective on or after that date."

are unconstitutional and are struck down with this specification that the date mentioned therein will be relevant as being one from which the liberalised pension scheme becomes operative to all pensioners governed by 1972 Rules irrespective of the date of retirement. Omitting the unconstitutional part it is declared that all pensioners governed by the 1972 Rules and Army Pension Regulations shall be entitled to pension as computed under the liberalised pension scheme from the specified date, irrespective of the date of retirement. Arrears of pension prior to the specified date as per fresh computation is not admissible. Let a writ to that effect be issued. But in the circumstances of the case, there will be no order as to costs."

20. Sri O.P. Srivastava, learned Senior Advocate for the petitioners has also referred para-8 of the dictum of Hon'ble

Apex Court in re: ***All Manipur Pensioners Association by its Secretary vs. State of Manipur*** reported in ***AIR 2019 SC 3338***, which reads as under:-

"8. Even otherwise on merits also, we are of the firm opinion that there is no valid justification to create two classes, viz., one who retired pre1996 and another who retired post1996, for the purpose of grant of revised pension, In our view, such a classification has no nexus with the object and purpose of grant of benefit of revised pension. All the pensioners form a one class who are entitled to pension as per the pension rules.Article 14 of the Constitution of India ensures to all equality before law and equal protection of laws. At this juncture it is also necessary to examine the concept of valid classification. A valid classification is truly a valid discrimination. It is true thatArticle 16 of the Constitution of India permits a valid classification. However, a very classification must be based on a just objective. The result to be achieved by the just objective presupposes the choice of some for differential consideration/treatment over others.

A classification to be valid must necessarily satisfy two tests. Firstly, the distinguishing rationale has to be based on a just objective and secondly, the choice of differentiating one set of persons from another, must have a reasonable nexus to the objective sought to be achieved. The test for a valid classification may be summarised as a distinction based on a classification founded on an intelligible differentia, which has a rational relationship with the object sought to be achieved. Therefore, whenever a cutoff date (as in the present controversy) is fixed to categorise one set of pensioners for favourable consideration over others, the twin test for valid classification or valid discriminationtherefore must necessarily be satisfied. In the present case, the classification in question has no reasonable nexus to the objective sought to be achieved while revising the pension. As observed hereinabove, the object and purpose for revising the pension is due to the increase in the cost of living. All the pensioners form a single class and therefore such a classification for the purpose of grant of revised pension is unreasonable, arbitrary, discriminatory and violative of Article 14 of the Constitution of India. The State cannot arbitrarily pick and choose from amongst similarly situated persons, a cutoff date for extension of benefits especially pensionery benefits. There has to be a classification founded on some rational principle when similarly situated class is differentiated for grant of any benefit.

8.1 As observed hereinabove, and even it is not in dispute that as such a decision has been taken by the State Government to revise the pension keeping in mind the increase in the cost of living. Increase in the cost of living would affect all the pensioners irrespective of whether they have retired pre1996 or post1996. As observed hereinabove, all the pensioners belong to one class. Therefore, by such a classification/cutoff date the equals are treated as unequals and therefore such a classificationwhich has no nexus with the object and purpose of revision of pension is unreasonable, discriminatory and arbitrary and therefore the said classification was rightly set aside by the learned Single Judge of the High Court. At this stage, it is required to be observed that whenever a new benefit is granted and/or new scheme is introduced, it might be possible for the State to provide a cutoff date taking into consideration its financial resources. But the same shall not be applicable with

respect to one and single class of persons, the benefit to be given to the one class of persons, who are already otherwise getting the benefits and the question is with respect to revision."

21. Having heard learned counsel for the parties and having perused the material available on record and also the dictum of Hon'ble Apex Court in re: ***D.S. Nakara (supra) and All Manipur Pensioners Association (supra),*** I am of the considered opinion that there is no rational basis extending the benefit of revision of pay-scale only to those employees who have retired on or after 01.07.2001 and restricting for those employees have retired on or before 01.07.2001 and there is patently no rational nexus with the object sought to be achieved by the impugned Government Orders.

22. By means of the impugned Government Orders and the impugned order, the State Government/ Authorities tried to create class within the class, which is not permissible in the eyes of law. I am afraid as to how the authorities are treating those employees/ teachers who retired on or after 01.01.1996 and on or before 01.07.2001 as one class and the employees / teachers who retired on or after 01.01.2001 as another class for providing the benefit of revision of pay-scale which has admittedly been extended to the employees with effect from 01.01.1996. As a matter of fact, both the set of employees, as aforesaid, are one class and by means of any Government order or Government Policy those employees cannot be discriminated. Had the authorities imposed rider of extending the benefit of revision of pay-scale to the employees who have retired on or before 01.01.1996, such rider would have been sustained for the reason that on the date when the benefit of revision of pay-scale was provided those employees were not in service. However, in the present case, admittedly all the petitioners were very much in service when the benefit of revision of pay-scale was extended i.e. from 01.01.1996.

23. In view of the above, both the writ petitions succeed and are ***allowed***.

24. The order dated 22.09.2005 passed by the Joint Director of Education, VIth Region, Lucknow, which is contained as Annexure No.1 to the second writ petition, is hereby set aside/ quashed.

25. The rider so imposed in the Government Order dated 03.09.2001 to the effect that the benefit of revision of pay-scale would be given to those employees who have retired on or after 01.07.2001 is hereby declared as non est and the same may not be read against the petitioners.

26. A writ in the nature of mandamus is issued commanding the opposite parties to take appropriate decision in the issue of the petitioners in the light of the Government Order dated 10.07.1998 (Annexure No.3 of the second writ petition) providing them the benefit of revision of pay-scale with effect from 01.01.1996 notionally ignoring the such rider imposed in the Government Order dated 03.09.2001 for the petitioners only.

27. Such appropriate order shall be passed with expedition preferably within a period of two months from the date of presentation of a certified/ computerized copy of this order.

28. No order as to costs.

(2021)09ILR A543
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.09.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Single No. 4132 of 2021

Mrityunjai Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Mahendra Pratap Singh, Abhishek Dwivedi

Counsel for the Respondents:
C.S.C.

A. Service Law – Promotion on the post of Superintending Engineer – Pendency of Departmental enquiry – Departmental Promotion Committee (DPC) decision – Adverse entry was not in existence on the date of meeting of DPC – It's effect – Held, DPC can consider only such material which was available before it on or before the date of DPC – No adverse material of any kind whatsoever can be considered which came into the notice before the competent authority or before the DPC after the meeting of DPC. (Para 10)

B. Pleading – No specific denial of recital of writ petition – It's effect – Held, the law is trite that the specific recital of the petition should be denied specifically citing reasons and legal position, if any, and simple denial is no denial in the eyes of law. (Para 9)

Writ Petition allowed. (E-1)

Cases relied on :-

1. Delhi Jal Board Vs Mahinder Singh; (2000) 7 SCC 210

2. Brij Nath Pandey Vs St. of U.P.; (2001) 9 SCC 398

3. Gyan Prakash Pandey Vs St. of U.P. & ors. [2018 (6) ADJ 670 (DB) (LB)]

4. State of U.P. through Principal Secretary, Irrigation & Water Resource Vs Suresh Pandey; 2019 Legal Eagle (ALD) 926

5. St. of U.P. & anr. Vs Nand Kumar Singh, Special Appeal No. 478 of 2010

6. R. K. Singh Vs State of U.P. & ors.1991 Supp (2) SCC 126

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Mahendra Pratap Singh, learned counsel for the petitioner and Sri Vinod Kumar Shukla, learned Standing Counsel for the State-respondents.

2. Rejoinder affidavit sent by the Registry is taken on record.

3. By means of this petition, the petitioner has prayed following reliefs:-

"i. issue a writ, order or direction in the nature of Certiorari to quash the impugned orders dated 04-01-2021 and 05-06-2020 passed by the opposite party no.1 contained as annexure no.1 & 2 to this writ petition.

ii. issue a writ, order or direction in the nature of Mandamus commanding the respondents to open seal cover and promote the petitioner on the post of Superintendent Engineer in view of recommendation of Departmental Promotion Committee convened on 19-07-2018 from the date other incumbents were considered and promoted in pursuance to recommendation of Departmental Promotion Committee held on 19-07-2018, with all consequential benefits.

iii. issue a writ, order or direction in the nature of Mandamus commanding

respondents not to make any promotion on the post of Chief Engineer until the petitioner is promoted on the post of Superintendent Engineer in view of recommendation of Departmental Promotion Committee convened on 19-07-2018."

4. The precise contention of learned counsel for the petitioner is that for making promotion of the petitioner on the post of Superintending Engineer his issue was kept under sealed cover by the Departmental Promotion Committee (hereinafter referred to as "DPC") dated 19.7.2018. However, no decision was taken by the date of review DPC i.e. 11.7.2019. The reason to keep the promotion of the petitioner under sealed cover was that the petitioner was awarded adverse entry vide order dated 12.12.2018, however, the said punishment was not prescribed under the Service Rules. Therefore, the petitioner challenged the order dated 12.12.2018 before this Court by filing Writ Petition 34856 (S/S) of 2019; Mrityunjai Kumar Vs. State of U.P. and others, placing reliance upon the dictum of the Hon'ble Apex Court in re; Vijay Singh Vs. State of U.P. and others, (2012) 5 SCC 242, wherein the Apex Court has held that the employee may not be awarded any punishment which is not prescribed under the Rules. On the basis of aforesaid dictum of the Hon'ble Apex Court, this Court vide judgment and order dated 7.1.2020 set aside the order dated 12.12.2018 directing the opposite parties to make promotion of the petitioner on the post of Superintending Engineer in the Minor Irrigation Department ignoring such punishment order dated 12.12.2018.

5. On 9.1.2020, the Government has passed an order expunging such special adverse entry from the service record of the petitioner awarding him "Utkrishth" entry for the period in question. However, the petitioner was not given promotion pursuant to the order dated 7.1.2020. Vide order dated 5.6.2020, claim of the petitioner for promotion on the post of Superintending Engineer has been turned down on the basis of pending departmental enquiry initiated on 24.1.2020.

6. Learned counsel for the petitioner has submitted that since the aforesaid departmental enquiry may not be treated as bar promoting the petitioner on the post of Superintending Engineer inasmuch as as per trite law, only such material can be considered which was existing at the time of DPC and admittedly, when the DPC in question has met on 19.7.2018, no such material was available with the Department. Therefore, the petitioner filed another writ petition bearing Service Single No.8490 of 2020; Mrityunjai Kumar Vs. State of U.P., and the said writ petition was decided finally vide judgment and order dated 10.6.2020 directing the opposite parties to take fresh decision in the issue of the petitioner. Operative portion of the judgment and order dated 10.6.2020 is being reproduced herein below:-

"Be that as it may the fact of the matter is that the earlier proceedings have come to an end. Therefore the least that is require to be done by the competent authority is to take a decision as to whether the sealed cover is required to be opened or not, if not, the reasons therefore in the light of the aforesaid Government Order dated 28.05.1997 and such other government orders or rules as may be applicable as also the law on the subject. The matter cannot be kept in limbo indefinitely. In fact when a recommendation is kept in sealed cover as

and when the next DPC meets, it is necessarily to be opened and if the proceedings are still pending it is again to be kept in sealed cover otherwise they are to be acted upon unless there is some legal impediment in this regard. But all these are issues which are to be considered by the State Government. Let a decision be taken on an representation being filed by the petitioner in this regard, as aforesaid, within one month of such representation being submitted. The representation itself be submitted within 10 days.

It is made clear that this Court has not decided the merits of the claim of the petitioner. All points are open for consideration at the competent level in accordance with rules/law.

With these observations, this petition is disposed of."

7. In compliance of the aforesaid order, the impugned order dated 4.1.2021 has been passed by opposite party no.1 rejecting the claim of the petitioner for promotion on the post of Superintending Engineer on the basis of pending departmental enquiry since 24.1.2020. Learned counsel for the petitioner has taken specific plea to that effect in para-43 of the writ petition, which reads as under:-

"43. That name of the petitioner was considered by the Departmental Promotion Committee convened on 19-07-2018, but recommendation pertaining to the petitioner were kept in seal cover in consideration of the fact that departmental enquiry proceedings were pending on the date, when Departmental Promotion Committee was convened i.e. on 19-07-2018. Now the Departmental Enquiry Proceedings having been concluded vide order dated 12-12-2018 and the order dated 12-12-2018 having been quashed by the Hon'ble court vide order dated 07-01-2020, the petitioner is fully entitled for promotion in pursuance to recommendation of the Departmental Promotion Committee convened on 19-07-2018."

8. Replying to the aforesaid contention, no specific explanation has been given by the State in the counter affidavit vide para-15, which reads as under:-

"15. That the contents of paragraphs 43 and 44 of the writ petition are not admitted as stated hence denied and in reply thereto it is stated that the necessary proceeding with respect to the determination of the process of closing envelope proceedings, etc. in the elections for promotions of government employees of the State was initiated as per the arrangement given in Chapter-11 of Office Memorandum No. 13/21/89-ka-1997 dated 28.5.1997."

9. The law is trite that the specific recital of the petition should be denied specifically citing reasons and legal position, if any, and simple denial is no denial in the eyes of law. In para-15 of the counter affidavit, I am unable to comprehend as to what has been indicated by the State referring Chapter-11 of the Government order dated 28.5.1997. This is not Chapter-11 but it is para-11 of the Government Order dated 28.5.1997. However, para-11 of the aforesaid Government Order simply provides that at the time of meeting of DPC, if any adverse material comes into the notice of the Committee, the issue of the employee may be kept under sealed cover. In the present case, admittedly, the DPC had met on 19.7.2018 for promoting the petitioner on

the post of Superintending Engineer and on account of adverse entry awarded to the petitioner on 12.12.2018, his promotion was kept under sealed cover pursuant to para-11 of the Government Order dated 28.5.1997. Further, on account of impugned order dated 12.12.2018, the petitioner could not get promotion vide review DPC dated 11.7.2019, however, as soon as the order dated 12.12.2018 has been set aside by this Court on 7.1.2020 and such adverse remark has been expunged by the Government on 9.1.2020, the sealed cover of the petitioner should have been opened and he should have been promoted on the post of Superintending Engineer.

10. Having heard learned counsel for the parties and having perused the material available on record, I am of the considered opinion that the DPC can consider only such material which was available before it on or before the date of DPC. No adverse material of any kind whatsoever can be considered which came into the notice before the competent authority or before the DPC after the meeting of DPC. In the present case, the foundation and basis of the impugned order dated 4.1.2021 is that one departmental enquiry was pending against the petitioner w.e.f. 24.1.2020 under Rule 7 of Rules, 1999, therefore, in view of para-11 of the Government Order dated 28.5.1997, the issue of the petitioner should be kept under sealed cover until such departmental enquiry concludes.

11. The aforesaid reason is patently illegal, arbitrary, discriminatory and unwarranted on the face of it inasmuch as the case of the petitioner is not to be considered afresh vide DPC dated 20.3.2020 but the case of the petitioner would be considered pursuant to the DPC dated 19.7.2018 when his promotion was kept under sealed cover. There is no dispute that the reason for which the promotion of the petitioner was kept under sealed cover on 19.7.2018 is not in existence since 7.1.2020 when the very reason i.e. order dated 12.12.2018 has been set aside by this Court in Service Single No.34856 of 2019. Therefore, para-11 of the Government Order dated 28.5.1997 has been wrongly invoked vide impugned order dated 4.1.2021. Since the order dated 7.1.2020 passed by this Court in Service Single No.34856 of 2019 has attained finality, therefore, in compliance of the aforesaid order the sealed cover of the petitioner should be opened and he should be promoted on the post of Superintending Engineer in the Minor Irrigation Department pursuant to the recommendation of the DPC dated 19.7.2018. The Hon'ble Apex Court in re; **Delhi Jal Board Vs. Mahinder Singh, (2000) 7 SCC 210**, has observed as under:-

"5. The right to be considered by the Departmental Promotion Committee is a fundamental right guaranteed under Article 16 of the Constitution of India, provided a person is eligible and is in the zone of consideration. The sealed cover procedure permits the question of his promotion to be kept in abeyance till the result of any pending disciplinary inquiry. But the findings of the disciplinary inquiry exonerating the officer would have to be given effect to as they obviously relate back to the date on which the charges are framed. If the disciplinary inquiry ended in his favour, it is as if the officer had not been subjected to any disciplinary inquiry. The sealed cover procedure was envisaged under the rules to give benefit of any assessment made by the Departmental Promotion Committee in favour of such an

officer, if he had been found fit for promotion and if he was later exonerated in the disciplinary inquiry which was pending at the time when DPC met. The mere fact that by the time the disciplinary proceedings in the first inquiry ended in his favour and by the time the sealed cover was opened to give effect to it, another departmental enquiry was started by the Department, would not, in our view, come in the way of giving him the benefit of the assessment by the first Departmental Promotion Committee in his favour in the anterior selection. There is, therefore, no question of referring the matter to a larger Bench."

12. The Hon'ble Apex Court in re; **Brij Nath Pandey Vs. State of U.P., (2001) 9 SCC 398**, vide para-2 has observed as under:-

"2. Heard counsel on both sides. The appellant was denied promotion in the selection which took place in 1995 when, according to him, his junior was promoted. According to the appellant the adverse entries in his annual confidential reports of 1985-86 and 1986-87 could not have been taken into consideration in view of the fact that the appellant was subsequently allowed to cross the efficiency bar since 1-1-1992 vide an order dated 20-5-1992. In our view this contention of the appellant is correct and the adverse entries in 1985-86 and 1986-87 cannot come in the way of the appellant for further promotion once he was allowed to cross the efficiency bar on 20-5-1992. So far as the adverse remarks of 1993-94 are concerned at the time of the selection in 1995 the said adverse remarks were there on record but they were subsequently deleted on 6-7-1996. Therefore, the appellant is entitled to a fresh consideration for his promotion in 1995. The respondents are therefore directed to consider the case of the appellant afresh with reference to the selection of 1995 when his junior was promoted."

13. The Division Bench of this Court in re; **Gyan Prakash Pandey Vs. State of U.P. and Others, [2018 (6) ADJ 670 (DB) (LB)], State of U.P. through Principal Secretary, Irrigation & Water Resource Vs. Suresh Pandey, 2019 Legal Eagle (ALD) 926,** has clearly held that only those material can be considered by the DPC which are available before the DPC.

14. The Division Bench of this Court in re; **State of U.P. & Another Vs. Nand Kumar Singh, Special Appeal No.478 of 2010**, vide para-7 has interpreted para-11 of the Government Order dated 28.5.1997 as under:-

"7. In our opinion, once three cases are manifest under which the sealed cover procedure has to be followed, Paragraph 11 will have to be considered in that context, otherwise this would result in adding another case. The only way to harmonize the rules, considering paragraphs 2 and 11, is to hold that if on the date of D.P.C. there was a charge-sheet and this was not within the knowledge of the Selection Committee even at the stage of issuing the letter of appointment, the sealed cover procedure can be followed. In our opinion, this would be a proper and harmonious construction of the two rules."

15. Not only the above, the Hon'ble Apex Court in re; **R.K. Singh Vs. State of U.P. & Others, 1991 Supp (2) SCC 126**, has held that after expungtion of adverse

material, the employee would be entitled for the benefits w.e.f. the date when it was due to him.

16. Admittedly, in the present case, the issue of the petitioner was kept under sealed cover on 19.7.2018 for the reason he was awarded adverse entry vide order dated 12.12.2018 and after setting aside the order dated 12.12.2018, which was adverse material before the DPC held on 19.7.2018, the petitioner was legally entitled for the promotion as per recommendation of DPC dated 19.7.2018.

17. Therefore, in view of the above, the writ petition is **allowed**.

A writ in the nature of certiorari is issued quashing the orders dated 4.1.2021 and 5.6.2020 passed by opposite party no.1, which are contained in Annexure Nos.1 & 2 to the writ petition. A writ in the nature of mandamus is issued commanding the opposite parties to open the sealed cover of the petitioner and promote him on the post of Superintending Engineer in view of the recommendation of Departmental Promotion Committee convened on 19.7.2018 from the date the other incumbents were considered for promotion pursuant to such recommendation.

18. The petitioner shall be entitled for all consequential service benefits.

19. No order as to costs.

(2021)09ILR A548

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 27.08.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Single No. 11867 of 2020
&
Service Single No. 12047 of 2021

Atma Singh ...Petitioner

Versus

U.P. State Bridge Corporation Ltd. & Anr. ...Respondents

Counsel for the Petitioner:
Ashok Shukla

Counsel for the Respondents:
Shishir Jain, Ram Ratan

A. Service Law – Departmental enquiry – Limitation of time fixed by the High Court – Non compliance thereof – No leave of High Court sought – It's effect – Held, where there is a stipulation of time by the Court, it will not be open to the employer to disregard that stipulation unless the time is extended by the Court itself on the application of the department – Punishment of censure entry was held illegal, arbitrary, unwarranted and in violation of the decision of Full Bench of this Court in *Abhishek Prabhakar Awasthi's case*. –. (Para 23 and 26)

Writ Petition allowed. (E-1)

Cases relied on :-

1. Abhishek Prabhakar Awasthi Vs New India Assurance Company Ltd. & ors. 2014 (6) ADJ 641.

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Ashok Shukla, learned counsel for the petitioner and Sri Ram Ratan, learned counsel for the respondents.

2. By means of first writ petition i.e. Service Single No. 11867 of 2020, the petitioner has prayed following reliefs:-

"(i) issue a writ, order or direction in the nature of mandamus commanding the Uttar Pradesh Uttar Pradesh State Bridge Corporation, the Respondent No. 1 and its Managing Director, the Respondent No.2 to grant the promotion, with all consequential benefits, to the Petitioner with effect from 08.03.2019, the date on which the promotion was granted to his juniors on the post of Assistant Engineer (Civil).

(ii) issue a writ, order or direction in the nature of mandamus commanding the Uttar Pradesh State Bridge Corporation, the Respondent No. l and its Managing Director, the respondent no.2 to allow the benefit of 1st and 2nd ACP w.e.f. 2008 and 2014 respectively and consequently re-fix the pay of the petitioner and arrears of salary accrued as such be also paid with interest @ 18% per annum thereupon from due upto the date of actual payment.

(iii) issue a writ, order or direction in the nature of certiorari quashing the Enquiry Report dated 27.02.2020, show-cause notice dated 13.03.2020 and Charge-sheet dated 09.10.2015 contained as Annexure Nos. 1, 2 and 3 respectively to the writ petition.

(iv) issue a writ, order or direction in the nature of mandamus commanding the Managing Director, the respondent no.2 not to proceed against the petitioner on the basis of Enquiry Report dated 27.02.2020, show-cause notice dated 13.03.2020 and Charge-sheet dated 09.10.2015."

3. By means of second writ petition i.e. Service Single No. 12047 of 2021, the following prayers have been made:-

"(i) issue an order, direction or writ in the nature of certiorari quashing the impugned punishment order dated 02.06.2021 as contained in Annexure No.1 to the writ petition with all consequential benefits.

(ii) issue an order, direction or writ in the nature of mandamus commanding the opposite parties not to implement the impugned punishment order dated 02.06.2021 as contained in Annexure No.1 to the writ petition."

4. Since both the writ petitions are of the same petitioner and issues are interrelated, therefore, with the consent of respective parties I hereby dispose of both the writ petitions by this common judgment.

5. The questions to be considered in both the writ petitions are that as to whether the departmental enquiry can be conducted and concluded beyond the period so stipulated by the Court without taking leave in view of the decision of Full Bench of this Court in re:- ***Abhishek Prabhakar Awasthi vs. New India Assurance Company Limited and Others*** *[reported in 2014 (6) ADJ 641]*. Secondly, as to whether if any punishment order is awarded pursuant to the departmental enquiry so conducted and concluded beyond the period so stipulated by the Court without taking leave can be sustained in the eyes of law.

6. The brief facts of the case are that the petitioner was appointed on the post of Junior Engineer (Civil) in the U.P. State Bridge Corporation Ltd.

7. The disciplinary proceedings for the alleged shortcoming in the Central Store (Civil) at Bridge Construction Unit, Saidpur was instituted against the petitioner and a charge-sheet dated 09.10.2015 was

issued and served upon the petitioner to which he has submitted reply on 31.10.2015 denying the charges levelled against him annexing therewith documentary evidence.

8. On 20.03.2016, the Presenting Officer has submitted the departmental comments on the reply of the petitioner dated 31.10.2015 to the Enquiry Officer. Thereafter, the Enquiry Officer has fixed a date for personal hearing on 23.04.2016 and submitted enquiry report on 09.11.2016.

9. Thereafter, on 30.11.2016 the disciplinary authority-respondent no.2 has issued show-cause notice to the petitioner annexing therewith the copy of the enquiry report dated 09.11.2016 reply thereof has been submitted by the petitioner on 13.12.2016.

10. During the pendency of the aforesaid enquiry, a notice dated 03.03.2017 was issued to the petitioner by the General Manager calling upon him to show cause as to why recovery of a sum of Rs.14,93,546/- may not be made from him for the same issue for which enquiry was pending reply thereof has been submitted by the petitioner on 23.03.2017.

11. When the petitioner came to know about the promotion of certain Junior Engineers on the post of Assistant Engineers who are junior to the petitioner, he moved an application to the respondent no.2 with a request to take decision in respect of promotion of the petitioner on the post of Assistant Engineer.

12. The disciplinary authority instead of taking any decision in the pending enquiry issued a show-cause notice (second) dated 25.06.2019 to the petitioner annexing therewith the copy of enquiry report dated 04.06.2019 to which the petitioner has submitted his reply on 10.07.2019 (Annexure No.16). Moreover, he had specifically mentioned in the reply that he had never been informed about the enquiry giving rise to enquiry report dated 04.06.2019.

13. The petitioner feeling aggrieved from the enquiry report dated 04.06.2019, show-cause notice dated 25.06.2019 as well as notice of recovery dated 03.03.2017 had preferred the Writ Petition No. 22962 (S/S) of 2019, impugning the same before this Court. The Court vide judgment and order dated 13.11.2019 disposed of the aforesaid writ petition setting aside the show-cause notice dated 25.06.2019, the enquiry report dated 04.06.2019 as well as the notice of recovery dated 03.03.2019 (it should be 03.03.2017). However, it was left open to the respondents to continue with departmental proceedings against the petitioner and taking the same to its logical end. Moreover, the Court had also commanded that as the departmental enquiry is pending against the petitioner since 2015, therefore, departmental enquiry shall be concluded and final order would be passed within a period of four months from the date of receipt of a certified copy of the judgment. The operative portion of the judgment and order dated 13.11.2019 is being reproduced hereinbelow:-

"The writ petition is accordingly disposed of after setting-aside the order dated 25.06.2019 and inquiry report dated 04.06.2019 as well as notice dated 03.03.2019 leaving it open for the respondents to continue with departmental proceedings against the petitioner and taking the same to their logical end. It is

also provided as the departmental inquiry is pending against the petitioner since 2015, the said proceedings shall be concluded and final order would be passed within a period of four months from the date of receipt of a certified copy of this order. Needless to mention that the petitioner would cooperate in the inquiry."

14. On 19.11.2019, the certified copy of the judgment and order dated 13.11.2019 was sent by counsel for the petitioner through Speed Post to the Managing Director. A letter dated 23.12.2019 was issued by the Chief Project Manager (Complaint) addressing to the Chief Project Manager, (Ayodhya)/Enquiry Officer to complete the enquiry pending against the petitioner in the light of judgment and order dated 13.11.2019.

15. The Chief Project Manager (Ayodhya) vide letter dated 15.01.2020 intimated the petitioner that 24.01.2020 is the date fixed for the enquiry but the enquiry proceedings were not held on that date as the Enquiry Officer was busy in some other work. On 31.01.2020, the petitioner again appeared before the Enquiry Officer and the Enquiry Officer had submitted the enquiry report on 27.02.2020 to the Chief Project Manager. (Complaint).

16. Thereafter, on 13.03.2020 the disciplinary authority issued a show-cause notice to the petitioner annexing therewith the enquiry report dated 27.02.2020 and the reply thereof has been submitted by the petitioner on 30.03.2020 wherein he had specifically mentioned that no enquiry, whatsoever, has been conducted as per law and rules even after the judgment and order dated 13.11.2019. On the contrary the enquiry report dated 27.02.2020 itself reveals that the same is reproduction of the earlier enquiry report dated 04.06.2019 (which was set-aside vide judgment and order dated 13.11.2019).

17. Vide letter dated 6.6.2020, the General Manager (Complaint) asked the petitioner to submit his reply to the show-cause notice dated 13.03.2020 as he has not submitted the reply and the matter is being delayed. Thereafter, the petitioner in his letter dated 12.06.2020 informed the General Manager (Complaint) that he had already submitted his reply on 30.03.2020 to the show-cause notice dated 13.03.2020 through e-mail on 31.03.2020 to the office of the Managing Director.

18. In spite of lapse of time fixed by the Court vide judgment and order dated 13.11.2019, the respondents again kept the disciplinary proceedings pending and that too the detriment of the petitioner.

19. The petitioner, feeling aggrieved, by the illegal action of the respondents had again approached this Court through Writ Petition No. 11867 (S/S) of 2020. The Court vide order dated 29.7.2020 directed the counsel for the respondents to satisfy the Court as to why further time should be granted in a proceeding which is pending since 2012 i.e. for the past eight years keeping in mind the law laid down by the Full Bench of this Court. The Hon'ble Court further directed to produce the record of disciplinary proceedings or file an affidavit.

20. In view of the aforesaid facts and circumstances of the case, there is no dispute that the certified copy of the judgment and order dated 13.11.2019 was provided to the competent authority through registered post dated 19.11.2019

and the competent authority took cognizance of the said judgment and order vide letter dated 23.12.2019 (Annexure No.20 of the second writ petition). Therefore, the enquiry in question must have been concluded and final order must have been passed on or before 23.04.2020, the period of four months as stipulated vide judgment and order dated 13.11.2019. However, the certified copy of the judgment and order dated 13.11.2019 has been sent to the Managing Director through registered post on 19.11.2019 and if the five days period is counted for the service in that case the departmental enquiry must have been concluded and final order must have been passed on or before 24.03.2020 i.e. four months' period.

21. To be more precise, the maximum period of four months was provided to the disciplinary authority to pass final order taking the cognizance of the enquiry report but no final order was passed within a maximum period of four months as stipulated by this Court vide judgment and order dated 13.11.2019.

22. On being confronted the learned counsel for the opposite parties as to why the final order has not been passed within time stipulated by this Court vide judgment and order dated 13.11.2019, he could not explain the appropriate reason to this effect. On being further confronted learned counsel for the respondent as to why the Managing Director has not given reference of the judgment and order dated 13.11.2019 whereby the rider of four months have been imposed for passing final order, in the impugned order dated 02.06.2021, again the learned counsel for the respondents could not justify the inaction of the Managing Director. On a pinpoint query as to whether any leave was granted by the Court extending the time for passing final order, the learned counsel for the respondent has submitted that no such leave was granted. Then another pinpoint query was made from him seeking explanation that despite about fourteen months delay which has been caused in passing final order on 02.06.2021, the impugned order which is contained as Annexure no.1 to the second writ petition, neither any reason of such delay has been explained nor any plausible explanation has been given by the learned counsel for the respondents. Lastly, he has been asked as to why the enquiry of the year 2012 has been concluded after about nine years when the final order is passed on 02.06.2021, there was no cogent explanation with learned counsel for the respondent.

23. Having heard learned counsel for the parties and having perused the material available on record, I am of the considered opinion that the impugned Office Memo dated 02.06.2021 passed by the Managing Director which is contained as Annexure no.1 to the second writ petition whereby the direction for making recovery of Rs.13,84,290/- with punishment of censure entry is apparently illegal, arbitrary, unwarranted and in violation of the decision of Full Bench of this Court in re:- ***Abhishek Prabhakar Awasthi (supra).***

24. Before the Full Bench in re:- ***Abhishek Prabhakar Awasthi (supra)*** two questions were referred for adjudication which have been indicated in para 2 of the judgment as under:-

"2. The following questions have been referred in the order of the learned Single Judge for determination by the Full Bench:-

"(a) Whether if an inquiry proceeding is not concluded within a time frame fixed by a court and concluded thereafter, without seeking extension from the Court then on the said ground the entire inquiry proceeding as well as punishment order passed, is vitiated in view of the judgment in the case of P.N. Srivastava; and

(b) Whether the law as laid down by a Division Bench of this Court in the case of P.N. Srivastava that if an inquiry proceeding is not concluded within a time frame as fixed by a Court, it stands vitiated is still a good law in view of the judgment rendered by the Supreme Court in the case of Suresh Chandra as well as a judgment dated 27.07.2009 of a Division Bench of this Court in Writ Petition No. 1056 (SB) of 2009 (Union of India and others Vs. Satendra Kumar Sahai and another)."

25. The Full Bench in Para 19 was pleased to answer those questions as under:-

"19. In view of the above discussion, we now proceed to answer the questions which have been referred to the Full Bench.

(A) Question No. (a): We hold that if an enquiry is not concluded within the time which has been fixed by the Court, it is open to the employer to seek an extension of time by making an appropriate application to the court setting out the reasons for the delay in the conclusion of the enquiry. In such an event, it is for the court to consider whether time should be extended, based on the facts and circumstances of the case. However, where there is a stipulation of time by the Court, it will not be open to the employer to disregard that stipulation and an extension of time must be sought;

(B) Question No. (b): The judgment of the Supreme Court in the case of Suresh Chandra (supra) as well as the judgment of the Division Bench of this Court in the case of Satyendra Kumar Sahai (supra) clearly indicate that a mere delay on the part of the employer in concluding a disciplinary enquiry will not ipso facto nullify the entire proceedings in every case. The court which has fixed a stipulation of time has jurisdiction to extend the time and it is open to the court, while exercising that jurisdiction, to consider whether the delay has been satisfactorily explained. The court can suitably extend time for conclusion of the enquiry either in a proceeding instituted by the employee challenging the enquiry on the ground that it was not completed within the stipulated period or even upon an independent application moved by the employer. The court has the inherent jurisdiction to grant an extension of time, the original stipulation of time having been fixed by the court itself. Such an extension of time has to be considered in the interests of justice balancing both the need for expeditious conclusion of the enquiry in the interests of fairness and an honest administration. In an appropriate case, it would be open to the Court to extend time suo motu in order to ensure that a serious charge of misconduct does not go unpunished leading to a serious detriment to the public interest. The court has sufficient powers to grant an extension of time both before and after the period stipulated by the court has come to an end."

26. The crux of the decision of Full Bench of this Court is that where there is a stipulation of time by the Court, it will not be open to the employer to disregard that stipulation unless the time is extended by

the Court itself on the application of the department. In the present case, admittedly, no such application for extension of time has been moved by the department and despite taking cognizance of the fact that this Court vide judgment and order dated 13.11.2019 has stipulated maximum period of four months to pass final order considering the enquiry report and such period of four months was being expired on 23.04.2020, if the letter of the Chief Project Manager is taken into account (Annexure no.20 to the second writ petition) or on 24.03.2020 if the date of registered post dated 19.11.2019 intimating the order dated 13.11.2019 is taken into account giving advantage of five days of service of the registered post. In any case, the final order must have been passed on or before 23.04.2020 after conclusion of the departmental enquiry but the final order has been passed on 02.06.2021 (Annexure No.1) awarding punishment of recovery and censure entry to the petitioner.

27. In view of what has been considered above, the impugned order dated 02.06.2021 passed by the Managing Director which is contained as Annexure No.1 to the writ petition is not sustainable in the eyes of law being illegal, arbitrary and unwarranted viz a viz violative of the direction being issued by the Full Bench of this Court in re:- ***Abhishek Prabhakar Awasthi (supra)***.

28. Accordingly, the second writ petition is hereby ***allowed***.

29. Since the orders impugned in the first writ petition have been merged in the final order dated 02.06.2021 impugned in the second writ petition and the second writ petition has been allowed, therefore, the first writ petition shall be deemed to have been allowed in view of the aforesaid terms, accordingly, the first writ petition is ***allowed***.

30. The writ in the nature of certiorari is issued quashing the Office Memo dated 02.06.2021 passed by the Managing Director, U.P. State Bridge Corporation Ltd., Lucknow which is contained as Annexure No.01 to the writ petition.

31. The writ of mandamus is issued commanding the opposite parties not to implement the punishment order dated 02.06.2021 against the petitioner as the same has been quashed thereby providing all consequential service benefit to the petitioner.

32. No order as to costs.

(2021)09ILR A554
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.08.2021

BEFORE

THE HON'BLE SUNEET KUMAR, J.

Writ A No. 13760 of 2020

Manjul Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Pravin Kumar, Sri Karma Singh Yadav, Sri Rahul Sharma

Counsel for the Respondents:
C.S.C.

A. Service Law – Appointment on the post of Assistant Teacher – Use of forged and manufactured documents of TET certificate – No rebuttal of to the

document filed in counter affidavit – Held, Petitioner would have no right to continue on the post and receive salary. The very foundation on which the appointment rests is non-est--void abinitio – Nothing further has to be done by the authorities but to discontinue the appointment – In permitting the petitioner to continue in service and pay salary would perpetuate fraud and misrepresentation that would be negation of rule of law – High Court imposed Cost of Rs. 1 Lakhs. (Para 10, 14 and 15)

Writ petition dismissed. (E-1)

Cases relied on :-

1. Chairman and Managing Director, Food Corporation of India & ors. Vs Jagdish Balaram Bahira & ors. 2017 (8) SCC 670

2. Nidhi Kaim Vs St. of M.P.; (2017) 4 SCC 1)

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

1. Case called out. No one has put in appearance on behalf of the petitioner to press the petition despite notice.

2. Heard Shri Shailendra Singh, learned counsel appearing for first, second, third and fifth respondent and learned standing counsel.

3. Pursuant to order dated 26 March 2021, the second and third respondents are present.

4. By the instant writ petition, petitioner seeks a direction to the second respondent-Assistant Director Basic, Gorakhpur Mandal Basti, with regard to payment of salary.

5. The facts briefly stated is that the petitioner came to be appointed Assistant Teacher in Pt. Dindayal Purva Madhyamik Vidyalaya, Bitia, Belhar, District Sant Kabir Nagar, on 15 March 2016. The institution is in the grant-in-aid of the State. On 7 April 2017, salary of the petitioner was stopped on an allegation that the petitioner had obtained appointment on the strength of forged documents.

6. The third respondent-Finance and Accounts Officer (Basic Education), Sant Kabir Nagar, has filed affidavit, wherein, it has been stated that petitioner applied pursuant to an advertisement issued by the fourth respondent-Committee of Management of the Institution inviting applications for the post of Assistant Teacher. Petitioner came to be appointed on the approval granted by the fifth respondent-Basic Education Officer, Sant Kabir Nagar.

7. It is urged that petitioner joined the post on 17 March 2016. On complaint being received that the petitioner has obtained appointment on forged documents, the second respondent vide communication dated 7 April 2017, directed the fifth respondent to enquire into the matter and pending enquiry the salary of the petitioner was stopped. In the meantime, a complaint being Case Crime No. 273 of 2018 under Sections 419, 420, 467, 468 and 471 IPC, came to be lodged against petitioner, his father, the then Basic Shiksha Adhikari-Shri Mahendra Pratap Singh and the Manager of the Institution on 5 June 2018. The Investigating Officer verified the roll number of B.Sc.-III marksheet of the petitioner from the Mahatma Gandhi P.S. College, Gorakhpur. It was informed that the roll number noted on the marksheet submitted by the petitioner was allotted to one Tufail Ahmad, son of, Rahmat Ali. In other words, petitioner had submitted the mark-sheet (B.Sc.-III) of the same roll number.

Further, the intermediate mark-sheet submitted by the petitioner against roll number 1132323 was also found to be a forged document.

8. It is alleged that father of the petitioner, a clerk, in the office of Basic Shiksha Adhikari had managed the forged documents to obtain appointment of the son. It is urged that father of the petitioner and the then Basic Shiksha Adhikari in connivance with the petitioner obtained forged documents pertaining to the educational qualification of the petitioner i.e. Intermediate and B.Sc.-III year, as well as, Teacher Eligibility Test (TET) certificate. All documents relied upon by the petitioner and the copies of the original marksheets/certificates have been placed on record.

9. The T.E.T. certificate for the year 2011 submitted by the petitioner bears Roll No. 10040855 issued to a candidate belonging to backward category (OBC), wheres, the authorities have submitted copy of the original document, wherein, the said roll number was allotted to Kalpana Tripathi, belonging to general category, and she failed to qualify the T.E.T. examination. The T.E.T. certificate submitted by the petitioner bears the same roll number. In other words the document is a forged and manufactured document.

10. The petitioner has not filed any rebuttal to the aforementioned documents placed on record by the respondents.

11. Supreme Court in **Chairman and Managing Director, Food Corporation of India and others vs. Jagdish Balaram Bahira and others, 2017 (8) SCC 670,** held that:

"Thus, where a benefit is secured by an individual - such as an appointment to a post or admission to an educational institution - on the basis that the candidate belongs to a reserved category for which the benefit is reserved, the invalidation of the caste or tribe claim upon verification would result in the appointment or, as the case may be, the admission being rendered void or non est."

12. It follows that when a candidate is found to have put forth a false claim on the strength of forged and manufactured documents and obtained appointment, it would be a negation of the rule of law to exercise jurisdiction under Article 226 to protect that individual. Societal good lies in ensuring probity. That is the only manner in which the sanctity of the system can be preserved. The legal system cannot be seen as an avenue to support those who make untrue claims based on forged educational documents.

13. The nation cannot live on a lie. Courts play a vital institutional role in preserving the rule of law. The judicial process should not be allowed to be utilized to protect the unscrupulous and to preserve the benefits which have accrued to an imposter on the specious plea of equity. (Refer: Nidhi Kaim vs. State of M.P. (2017) 4 SCC 1)

14. It is not disputed by the petitioner that the documents were duly verified by the competent authorities and the authorities conferring the certificates have certified that the documents relied upon by the petitioner are forged and manufactured

documents. Petitioner in the circumstances would have no right to continue on the post and receive salary. The very foundation on which the appointment rests is non-est -- void abinitio. Nothing further has to be done by the authorities but to discontinue the appointment. In permitting the petitioner to continue in service and pay salary would perpetuate fraud and misrepresentation that would be negation of rule of law. Petitioner, his father (clerk) and the then Basic Education Officer were throughout aware that petitioner had obtained the appointment by fraud.

15. In view thereof, the writ petition is dismissed with cost of Rs. 1 lakh to be deposited by the petitioner with the fifth respondent within one month from date, failing which, the same shall be recovered as arrears of land revenue by the District Collector, Sant Kabir Nagar. The State respondents shall initiate disciplinary proceedings against the then Basic Education Officer forthwith.

(2021)09ILR A557
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.08.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Single No. 14287 of 2021

Dr. Sushil Chandra Tiwari ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Amol Kumar, Alok Kumar Singh

Counsel for the Respondents:
C.S.C.

A. Service Law – Civil Service Regulations – Reg. 370 – Pension, Right to get it – Requirement of ten years qualifying service – Non completion – Adhoc Service, its relevancy in counting the service – Pension released in compliance of Judgment and order dated 22.07.2014 passed in petitioner's writ petition and contempt proceeding – No objection of non-completion of ten years qualifying service was raised – Stopping pension after lapse of six years – No opportunity of hearing – No explanation sought – Validity – Held, petitioner has rendered qualifying pensionery service with effect from the date of his initial joining in the department in question, so the same shall be treated as service qualifying for pension and pensioner benefits – High Court quashed impugned order. (Para 36 and 42)

Writ petition allowed. (E-1)

Cases relied on :-

1. Deokinandan Prasad Vs St. of Bihar; 1971 (2) SCC 305

2. Civil Appeal No. 6798 of 2019; Prem Singh Vs St. of U.P. & ors.

3. Secretary, St. of Karn. & ors. Vs Uma Devi; 2006 (4) SCC 1

4. Writ Petition No. 1573 (S/B) of 2012; Dr. Sushil Chandra Tiwari & ors. Vs St. of U.P. & ors.

5. Civil Appeal No. 2898 of 2021; Rashi Mani Mishra & ors. Vs St. of U.P. & ors.

6. Secretary, Minor Irrigation Department Vs Narendra Kumar Tripathi; (2015) 11 SCC 80

7. Santosh Kumar & ors. Vs G.R. Chawla & ors. (2003) 10 SCC 513

8. St. of Urrarakhand Vs Archana Shukla; (2011) 15 SCC 194

9. Direct Recruit Class-II Engineering Officers' Association; (1990) 2 SCC 715

10. Dr. Chandra Prakash & ors.Vs St. of U.P.; (2002) 10 SCC 710

11. D.T.C. Vs Balwan Singh; AIR 2017 SC 396

12. Frome United Breweries Company Ltd. & anr. Vs Keepers of the Peace and Justice for Country Borough to Bath; 1926 AC 586

13. St. of Orissa Vs Dr. (Miss) Binapani Dei & ors. AIR 1967 SC 1269

14. Writ A No. 52358 of 2017; Dr. Atul Darbari Vs St. of U.P. & anr.

15. Writ Petition No. 1744 (S/B) of 2015; Dr. Khalid Ali Khan & anr. Vs St. of U.P. & ors.

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Amol Kumar, learned counsel for the petitioner and Sri Raghvendra Kumar Singh, learned Advocate General of U.P. assisted by Sri Manjive Shukla, learned Additional Chief Standing Counsel for the State-respondents.

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

"(I) to issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 31.03.2021, having reference No.1054/A.N.C./PENSION/M.I-15731 passed by the Joint Director Pension, Kanpur Mandal, Kanpur, by means of which, the pension to the petitioners was stopped with immediate effect as well as the order dated 15.02.2021 having reference No.3625/2021/4217 issued by the Director, Employees State Insurance Scheme, Labour and Medical Services, Uttar Pradesh passed by the opposite part No.3, contained as Annexure Nos.1, 2 & 3.

(II) to issue a writ, order or direction in the nature of mandamus commanding the opposite parties to release the pension to the petitioner, without any delay or interruption."

3. The brief facts, as per learned counsel for the petitioner, are that pursuant to the advertisement in the Newspaper on 30.01.1986 for making appointment on adhoc vacancy of Medical Officers in the Employees State Insurance Scheme, Labour and Medical Services, Uttar Pradesh (here-in-after referred to as the "department in question"), the petitioner was appointment as Medical Officer on adhoc basis in the department in question on 17.03.1989.

4. Initially, the medical services rendered by the department in question was looked after by the Department of Medical & Health Services, U.P., however, vide Government Order dated 10.06.1985 a separate wing was created with regard to medical and paramedical staff. The option was also given to the doctors of the medical & health to opt for services of the department in question as the separate directorate and separate cadre for the department was proposed with the separate service rules, on the same emoluments and perks which are paid to the doctors of Medical & Health Department. Such Government Order has been annexed as Annexure No.5 to the writ petition. Admittedly, the aforesaid Government Order has been issued after getting prior approval from the Finance Department and Medical & Health Department of U.P. and also with the order and approval of the Governor.

5. Since pursuant to the Government Order dated 10.06.1985 no service rules were promulgated governing the service condition of the petitioner, therefore, the initial appointment of the petitioner was made on 17.03.1989 by the Competent Authority following the due procedure required for making appointment on adhoc

basis. However, the rules were later on promulgated in the name of U.P. Employees State Insurance Scheme, Labour Medical Services Rules, 1993 (here-in-after referred to as the "Rules, 1993").

6. The services of the petitioner were regularized with effect from 24.07.2009 on the basic pay-scale of Rs.8000-13500 pursuant to the order dated 22.12.2011 (Annexure No.6).

7. Learned counsel for the petitioner has submitted with vehemence that the department was created vide Government Order dated 10.06.1985 with due approval by the Finance Department and the Medical & Health Department and also by the order and approval of the Governor creating 345 posts of employees including one Additional Director. The separate directorate and separate cadre was also proposed to be created and separate service rules to be created. Therefore, it cannot be said that pursuant to the advertisement dated 30.01.1986 the appointment of certain employees was not made as per law. Besides, the petitioner has continuously and permanently discharged his duties of Medical Officer till 31.05.2015, i.e. the date of his superannuation.

8. Sri Amol Kumar, learned counsel for the petitioner has further submitted that adhoc services of the petitioner are to be counted for grant of pension as per Regulation 370 of Civil Service Regulations (here-in-after referred to as the "C.S.R."), which clearly states that continuous temporary or officiating service of the government servant followed by the confirmation in the same or any other post shall qualify for pension.

9. Learned counsel for the petitioner has further submitted that the Regulation 350 of the C.S.R. provides that all establishments whether temporary or permanent shall be deemed to be pensionable establishments.

10. Therefore, learned counsel for the petitioner has submitted that despite the fact that the petitioner has continuously discharged his services with effect from 17.03.1989 till his retirement on 31.05.2015, therefore, after completing more than 26 years of continuous service, pentionary benefits cannot be denied by means of impugned order dated 31.03.2021 which has been issued after about six years from the retirement of the petitioner holding that the petitioner has not discharged qualify service of ten years for making pension and pensionery benefits withholding of his pension and pensionery benefits, is patently illegal, arbitrary, discriminatory and unwarranted. Besides, the impugned order dated 31.03.2021 has been wrongly issued under Regulation 351-A of C.S.R. inasmuch as there is a bar of four years from the event or reason having taken place.

11. Learned counsel for the petitioner has given instances of as many as 22 employees who are identically placed with the present petitioner, vide para-19 of the writ petition who have been paid pension and all retiral benefits as has been paid to the petitioner.

12. Learned counsel for the petitioner has submitted that as per the trite law the pension is treated as "Property" as per Article 300-A of the Constitution of India, therefore, the same cannot be stopped or curtailed or withheld without following due procedure of law. The impugned order dated 31.03.2021 has not only been passed in an illegal and unwarranted manner but

also without affording an opportunity of hearing to that effect.

13. Learned counsel for the petitioner has further submitted that the law is trite on the point that if any order involves the civil consequences which affects the person monitorily, such order cannot be passed without affording of any opportunity of hearing.

14. Learned counsel for the petitioner has referred the dictum of the Constitutional Bench of Hon'ble Apex Court in re: ***Deokinandan Prasad vs. State of Bihar*** reported in ***1971 (2) SCC 305***, whereby the Hon'ble Apex Court has held that the pension is a right and the payment thereto does not depend upon the discretion of the government. The Hon'ble Apex Court in re: Dr. ***Hira Lal vs. State of Bihar, Civil Appeal No.1677-1678*** has held that the executive instructions of the State cannot stop the pension of an employee unless and until any order is passing by the government exercising power under Article 309 of the Constitution of India.

15. Sri Amol Kumar, learned counsel for the petitioner, has further submitted that not only for the reason that more than four years have passed, to be more precise more than six years, since the retirement of the petitioner provisions under Regulation 351-A of C.S.R. may not be invoked but for another legal reason that neither any departmental enquiry nor judicial proceeding were pending against the petitioner at the time of his retirement, therefore, such exercise under Regulation 351-A of C.S.R. may not be invoked.

16. Sri Amol Kumar, learned counsel for the petitioner, has placed reliance upon the dictum of Hon'ble Apex Court rendered in re: ***Prem Singh vs. State of U.P. & others*** rendered in ***Civil Appeal No.6798 of 2019*** referring paras-32, 33, 34 & 35 to strengthen his submission that after rendering about 26 years of service, the services rendered by the petitioner on adhoc basis may not be ignored for the purposes of making payment of pension and retiral dues. Further, if on technical ground such services of an employee are ignored that may cause serious prejudice to the employee concerned. The Hon'ble Apex Court in the case of **Secretary, State of Karnataka & Ors v. Uma Devi, 2006 (4) SCC 1** had directed that if some employees have rendered their ten years continuous service be regularized and they be paid all pensionery benefits counting their entire length of services. For convenience, paras-32, 33, 34 & 35 of **Prem Singh** (Supra) are being reproduced here-in-below:-

"32. The question arises whether the imposition of rider that suchservice to be counted has to be rendered in-between two spells of temporary or temporary and permanent service is legal and proper. We find that once regularization had been made on vacant posts, though the employee had not served prior to that on temporary basis, considering the nature of appointment, though it was not a regular appointment it was made on monthly salary and thereafter in the pay scale of work-charged establishment the efficiency bar was permitted to be crossed. It would be highly discriminatory and irrational because of the rider contained in Note to Rule 3(8) of 1961 Rules, not to count such service particularly, when it can be counted, in case such service is sandwiched between two temporary or in-between temporary and permanent services. There is no rhyme or reason not to count the service of work-charged period in case it

has been rendered before regularisation. In our opinion, an impermissible classification has been made under Rule 3(8). It would be highly unjust, impermissible and irrational to deprive such employees benefit of the qualifying service. Service of work-charged period remains the same for all the employees, once it is to be counted for one class, it has to be counted for all to prevent discrimination. The classification cannot be done on the irrational basis and when respondents are themselves counting period spent in such service, it would be highly discriminatory not to count the service on the basis of flimsy classification. The rider put on thatwork-charged service should have preceded by temporary capacity is discriminatory and irrational and creates an impermissible classification.

33. As it would be unjust, illegal and impermissible to make aforesaid classification to make the Rule 3(8) valid and non discriminatory, we have to read down the provisions of Rule 3(8) and hold that services rendered even prior to regularisation in the capacity of work-charged employees, contingency paid fund employees or non-pensionable establishment shall also be counted towards the qualifying service even if such service is not preceded by temporary or regular appointment in a pensionable establishment.

34. In view of the note appended to Rule 3(8), which we have read down, the provision contained in Regulation 370 of the Civil Services Regulations has to be struck down as also the instructions contained in Para 669 of the Financial Handbook.

35. There are some of the employees who have not been regularized in spite of having rendered the services for 30-40 or more years whereas they have been superannuated. As they have worked in the work-charged establishment, not against any particular project, their services ought to have been regularized under the Government instructions and even as per the decision of this Court inSecretary, State of Karnataka & Ors v. Uma Devi, 2006 (4) SCC 1. This Court in the said decision has laid down that in case services have been rendered for more than ten years without the cover of the Court's order, as one time measure, the services be regularized of such employees. In the facts of the case, those employees who have worked for ten years or more should have been regularized. It would not be proper to regulate them for consideration of regularisation as others have been regularised, we direct that their services be treated as a regular one. However, it is made clear that they shall not be entitled to claiming any dues of difference in wages had they been continued in service regularly before attaining the age of superannuation. They shall be entitled to receive the pension as if they have retired from the regular establishment and the services rendered by them right from the day they entered the work-charged establishment shall be counted as qualifying service for purpose of pension."

17. Per contra, Sri Raghvendra Kumar Singh, learned Advocate General of U.P. has submitted that the petitioner is not entitled for pension as initially he was appointed on adhoc Medical Officer on 17.03.1989 and later on his services were regularized on 22.12.2011, w.e.f. 24.07.2009 and finally he was retired from service on 31.05.2015. Since the petitioner has not rendered ten years of service with effect from his regularization, therefore, he could have not been paid pension and retiral benefits for not completing ten years qualified service.

18. Sri Raghvendra Kumar Singh, learned Advocate General has further submitted that since the petitioner was Incharge Medical Officer when he retired from Kanpur, therefore, taking advantage of his position he himself forwarded his pension papers to the Chief Medical Officer, E.S.I Labour Medical Services, Kanpur without indicating the fact that initially he was adhoc appointee and subsequently regularized on 22.12.2011 w.e.f. 24.07.2009.

19. Sri Raghvendra Kumar Singh, learned Advocate General has submitted that as per the Government Order dated 22.06.1987 a government employee for being entitled for grant of pension must have put at least ten years or more regular satisfactory service, but the petitioner has not completed such qualified service.

20. Sri Singh has drawn attention of this Court towards Annexure No.SCA-6, which is the judgment and order dated 22.07.2014 passed in the case of the petitioner by the Division Bench of this Court in Writ Petition No.***1573 (S/B) of 2012; Dr. Sushil Chandra Tiwari and others vs. State of U.P. & others,*** whereby the Division Bench has interpreted the meaning and purport of the term "substantive appointment" and while applying the nature of substantive appointment in the case of the petitioner, it has been held in para-15 that the initial appointment of the petitioner may not be treated as substantive appointment.

21. Sri Singh has further submitted that the petitioner has not assailed the judgment and order dated 22.07.2014 before the Hon'ble Apex Court, therefore, that judgment has attained finality and in that way the petitioner cannot say that his initial appointment was a substantive appointment. If the same was not a substantive appointment, he cannot claim the benefit of those services rendered on adhoc basis whereas, the pensionery benefits accrued with effect from the date the employee has rendered ten years regular services.

22. However, on being confronted the learned Advocate General as to whether the State has assailed the judgment and order dated 22.07.2014 inasmuch as in the operative paragraph i.e. para-17 , the Division Bench has categorically observed that the petitioner cannot be discriminated with the similarly placed employees getting protection of Article 14 of the Constitution of India, directing the opposite parties for giving all service benefits including continuity of service to the petitioner so given to the similarly placed employees, learned Advocate General has fairly submitted that the State has also not assailed that order. Therefore, to me, that order of Division Bench has attained finality for both the parties.. For convenience, operative portion of para-17 is being reproduced here-in-below:-

"17. In our considered opinion if this is the position on facts, then the petitioners cannot be discriminated as that would violate Article 14 of the Constitution of India. Consequently, the State Government is required to delve into this factual aspect and in the event it is established that the petitioners belong to the same category of employees prior to the enforcement of the Rules, and if other employees have been extended the service benefits in a similar fashion, then there is apparently no reason to discriminate the petitioners for extension of such benefits.

Consequently, we dispose of this writ petition with the aforesaid

observations and a direction is issued to the State Government to consider the claim of the petitioners in the light of observations made herein above and pass appropriate orders within three months from the date of production of a certified copy before the competent authority."

23. On being further confronted as to whether any opportunity of hearing has been provided to the petitioner before passing the impugned order dated 31.03.2021, learned Advocate General has submitted that in view of the facts and circumstances of the present case, it would have been a futile exercise to provide an opportunity of hearing inasmuch as the petitioner could have not been able to demonstrate any material protecting his claim for making payment of pension and pensionery benefits for not rendering qualifying service of ten years.

24. Sri Singh has drawn attention of this Court towards Annexure Nos.SCA-9 to SCA-11 of the short counter affidavit whereby the orders have been passed against those doctors who have been paid pension and pensionery benefits after their retirement in the same manner as has been paid to the petitioner. Sri Singh has also drawn attention of this Court towards Annexure No.SCA-12 of the short counter affidavit which is the ordinance known as Uttar Pradesh Qualifying Service for Pension and Validation Ordinance, 2020, which has been converted into the Act in the name of Uttar Pradesh Qualifying Service for Pension and Validation Act, 2021 (here-in-after referred to as the "Validation Act, 2021") drawing attention towards Section 2 of the Validation Act, 2021 which explains "Qualifying Service" for pension.

25. Sri Singh has further submitted that the aforesaid Validation Act, 2021 has got retrospective affect with effect from 01.04.1961. As per Section 2, the qualifying service means a services rendered by an officers appointed on temporary or permanent post in accordance with the provisions of service rules prescribed by the government for the post.

26. Since the petitioner has rendered his services with effect from 17.03.1989 till 24.07.2009, cut off date of Regularisation ordeer as on adhoc basis, therefore, such period of service cannot be treated as temporary or permanent. After regularization on 22.12.2011 w.e.f. 24.07.2009 the petitioner has rendered less than ten years of service, to be more precise about six years service, therefore, he could have not been paid pension and pensionery benefits.

27. Sri Raghvendra Kumar Singh, learned Advocate General has drawn attention of this Court towards a recent judgment of Hon'ble Apex Curt dated 28.07.2021 (reportable) rendered in ***Rashi Mani Mishra & others vs. State of U.P. & others in Civil Appeal No.2898 of 2021*** and other connected civil appeals by submitting that the Hon'ble Apex Court has categorically held that adhoc appointee cannot be deemed to be appointed as substantive appointees, therefore, such adhoc appointees shall be placed below the substantive appointees/ direct recruits. In the aforesaid judgment, the Hon'ble Apex Court has considered all the relevant judgments of the issue e.g. ***(i) Secretary, Minor Irrigation Department vs. Narendra Kumar Tripathi*** reported in ***(2015) 11 SCC 80, (ii) Santosh Kumar and others vs. G.R. Chawla and others*** reported in ***(2003) 10 SCC 513, (iii) State***

of Urrarakhand vs. Archana Shukla reported in ***(2011) 15 SCC 194, (iv) Direct Recruit Class-II Engineering Officers' Association*** reported in ***(1990) 2 SCC 715 and (v) Dr. Chandra Prakash & others vs. State of U.P.*** reported in ***(2002) 10 SCC 710 etc.*** The relevant paras-9 and 10 of the judgment of ***Rashi Mani Mishra (supra)*** are being reproduced here-in-below:-

9. Now so far as the reliance placed upon the decision of this Court in the case of Direct Recruit Class II Engg. Officers' Assn. (supra), relied upon by the learned Senior Advocate appearing on behalf of the ad hoc appointees is concerned, it is required to be noted that even in the said decision also, it is observed and held that where initial appointment was made only ad hoc as a stop gap arrangement and not according to the rules, the officiation in such post cannot be taken into account for considering the seniority. In the case before this Court, the appointments were made to a post according to rule but as ad hoc and subsequently they were confirmed and to that this Court observed and held that where appointments made in accordance with the rules, seniority is to be counted from the date of such appointment and not from the date of confirmation. In the present case, it is not the case of confirmation of the service of ad hoc appointees in the year 1989. In the year 1989, their services are regularised after following due procedure as required under the 1979 Rules and after their names were recommended by the Selection Committee constituted under the 1979, Rules. As observed here-in-above, the appointments in the year 1989 after their names were recommended by the Selection Committee constituted as per the 1979 Rules can be said to be the "substantive appointments". Therefore, even on facts also, the decision in the case of Direct Recruit Class II Engg. Officers' Assn.(supra) shall not be applicable to the facts of the case on hand. At the cost of repetition, it is observed that the decision of this Court in the case of Direct Recruit Class II Engg. Officers' Assn. (supra) was considered by this Court in the case of Santosh Kumar (supra) when this Court interpreted the very 1979 Rules.

10. Similarly, the decision of this Court in the case of Rudra Kumar Sain (supra), relied upon by the learned counsel appearing on behalf of the ad hoc appointees also shall not be applicable to the facts of the case on hand. In the case before this Court, the promotees appointed on ad hoc were continued for fairly long periods and their appointments were made after due consultation with, or approval of Service Commission, and therefore their appointments were held not to be ad hoc or fortuitous or stopgap. It is to be noted that in the present case when the ad hoc appointees were appointed in the year 1985, there was no consultation with the UPSC and as such there was no recommendation by the UPSC. Their services came to be regularised as per the 1979 Rules and after they were selected by the Selection Committee constituted under the 1979 Rules, which specifically provides that for the purpose of regularisation of ad hoc appointments, the appointing authority shall constitute a Selection Committee and consultation with the Commission shall not be necessary. It is also to be noted that when the ad hoc appointees were appointed in the year 1985, they were appointed on the basis of the recommendations of the Selection Committee constituted for ad hoc appointments and when subsequently their services were regularised and they were appointed in the year 1989, they were appointed by the order of Governor. This is

one additional ground to hold that their substantive appointments can be said to be only from the date of their regularisation/appointment made in the year 1989 after their names were recommended by the Selection Committee constituted under the 1979 Rules and their services were regularised as per the 1979 Rules after following the procedure as required under the 1979 Rules, i.e., in the year 1989. Therefore, their seniority is to be counted only from 23.02.1989, the date of their regularisation and the services rendered by the ad hoc appointees prior thereto, i.e., from the date of their initial appointments in the year 1985 is not to be counted for the purpose of seniority, vis-à-vis, the direct recruits appointed prior to 1989."

28. Therefore, Sri Singh has submitted that the Hon'ble Apex Court in re: Rashi Mani Mishra (supra) has clarified the position that the length of service of adhoc appointees shall be counted with effect from the date of their regularization for the purposes of pension, so the adhoc service rendered by the present petitioner may not be counted for the purpose of making pension and the pensionery benefits. Accordingly, the writ petition is devoid of merits and is liable to be dismissed.

29. I have heard learned counsel for the respective parties and perused the material available on record.

30. At the outset, I shall deal the arguments of learned counsel for the petitioner regarding violation of principles of natural justice while passing the impugned order dated 31.03.2021 (Annexure No.1).

31. Admittedly, no opportunity of hearing has been provided to the petitioner before passing the impugned order dated 31.03.2021 whereby the pension and pensionery benefits of the petitioner have been withheld for the reason that the petitioner has not rendered ten years qualified service. The Hon'ble Apex Court in re: ***D.T.C. vs. Balwan Singh*** reported in ***AIR 2017 SC 396*** in para-5 has observed as under:-

*"5. Prima facie, we are of the view that no adverse effect can be permitted upon the right of the employee to receive pension unless he was given notice by appropriate entry in the service book or through other notice that his absence will be treated as unauthorised absence and will not be counted towards qualifying service for pension. In absence of such notice, after the respondent-employee has taken voluntary retirement under VRS and that too on the ground that he has completed ten years of service, it may be unjust and very harsh to inflict him with such adverse consequences. No doubt in sub-rule (2) of Rule 28 of the Pension Rules which relates to condonation of interruption of service, an opportunity of representation is required to be given to the employee before making entry in service book regarding forfeiture of past service only, but there appears to be some substance in the submission that Rules of Natural Justice may be attracted even in other similar situation where the entry is regarding unauthorised absence, if it is to have the effect of break in service adversely affecting the length of qualifying service for pension."**[Emphasis Supplied]***

32. Further, admittedly, the petitioner was being paid pension and pensionery benefits since his retirement i.e. 31.05.2015 i.e. after lapse of about six years the impugned order has been passed without

seeking any explanation from the petitioner despite the fact that such impugned order involves civil consequences, therefore, it would be causing serious prejudice to the petitioner and on the basis of principles of fairness good conscience the principles of natural justice should be followed. This law is trite from the very beginning as observed by the House of Lords in re: ***Frome United Breweries Company Ltd. and another vs. Keepers of the Peace and Justice for Country Borough to Bath*** reported in ***1926 AC 586."***

*"... It is true that the order is administrative in character, but even an administrative order which involves civil consequences, as already stated, must be made consistently with the rules of natural justice after informing the first respondent of the case of the State, the evidence in support thereof and after giving an opportunity to the first respondent of being heard and meeting or explaining the evidence. No such steps were admittedly taken, the High Court was, in our judgment, right in setting aside the order of the State."****[Emphasis Supplied]***

The Hon'ble Apex Court in re: ***State of Orissa vs. Dr. (Miss) Binapani Dei and others*** reported in ***AIR 1967 SC 1269*** has followed the aforesaid dictum of House of Lords in re; ***Frome United Breweries Company Ltd.*** *(Supra).*

33. I have noted that the impugned order dated 31.03.2021 has been passed taking recourse of Regulation 351-A of C.S.R., therefore, had the petitioner been issued a show cause notice before passing the order dated 31.03.2021 the petitioner would have apprised the authorities that no such impugned order could be passed taking recourse of Regulation 351-A of C.S.R. on account of bar of four years under such provisions of law. The petitioner could have also apprised the Competent Authority by submitting his explanation that for the purposes of seniority or promotion his services rendered as an adhoc basis could have not been counted but for making payment of pension and pensionery benefits such order could have not been passed. Since no such opportunity has been extended to the petitioner, therefore, the impugned order dated 31.03.2021 is violative of principles of natural justice and may not sustain in the eyes of law on this point alone.

34. The Government Order dated 10.06.1985 (Annexure No.5) whereby a conscious decision has been taken by the Competent Authority that separate cadre of the doctors of the department in question shall be created. A separate Directorate shall be established. Service rules governing the conditions of service shall be formulated. The doctors and paramedical staff appointed in the department in question shall be paid the same salary and allowances which is being paid to the doctors and paramedical staff of Medical & Health Services. Such Government Order has been passed after getting prior approval from the Finance and Medical Department and by the order and approval of the Governor of the State. Later on such service rules were formulated in the year 1993.

35. Not only the above, the Annexure No.RA-2 of the rejoinder affidavit is the Government Order dated 08.02.1989 which provides the vacant posts of Medical Officer are pending consideration in the State Government and option was asked from the Medical Officers to give three options with regard to their posting, if they

were found suitable for adhoc appointment, then the appointment letter would be issued to them. However, in case, there is no vacant post in accordance with option, the Medical Officer would be posted nearest to home district where the vacancies are available. Therefore, the aforesaid Government Order clearly provides that such appointment would be made on a clear vacancy through proper channel. Thereafter the petitioner was appointed on the post of Medical Officer in the department in question on 13.07.1989 and admittedly he discharged his continuous and uninterrupted services till his retirement on 31.05.2015.

36. I have also seen Annexure No.8 of the writ petition, which is an affidavit of service being filed by the Principal Secretary of the Department before the Contempt Court bearing *Criminal Misc. Case No.1317 (S) of 2015; Dr. Sushil Chandra Tiwari vs. Arun Kumr Sinha and others* indicating in para-6 that the petitioner has been paid his all retiral benefits including the pension. Such affidavit of compliance has been filed on 07.08.2015 i.e. after the retirement of the petitioner. Therefore, if there was any anomaly on the part of the petitioner for not apprising the department correctly about his status at the time of his retirement, such fact could have been brought into the notice of the Contempt Court or any review application could have been filed Before the Division Bench which granted the similar benefit to the petitioner, but admittedly, the judgment and order dated 22.07.20214 passed by the Division Bench of this Court has not been assailed by the State Government nor any review application has been filed nor any action has been taken for about six years from the retirement of the petitioner.. Therefore, for all practical purposes, the judgment and order dated 22.07.2014 has attained finality and the compliance of order dated 22.07.2014 has been made by the department by filing affidavit of compliance on 07.08.2015, so in these circumstance the impugned order dated 31.03.2021 would be nullity in the yes of law.

37. Not only the above, the learned Advocate General has himself stated that the judgment and order dated 22.07.2014 has attained finality, therefore, the initial appointment of the petitioner may not be treated as substantive appointment but at the same time the judgment and order dated 22.07.2014 has been accepted by the State Government by making compliance thereof providing all the post retiral benefits which have been paid to the similarly placed employees, therefore, the aforesaid compliance decision may not be reversed by the State Government after about six years and such action be barred from the principles of estoppel.

38. I have noticed Annexure No.10 of the writ petition, which is the judgment and order dated 11.12.2019 passed by this Court in ***Writ-A No.52358 of 2017; Dr. Atul Darbari vs. State of U.P. & another,*** which is an identical case with the present petitioner and that writ petition has been allowed considering the decision of this Court in re: *Dr. Amrendra Narain Srivastava vs. State of U.P. & others passed in Writ-A No.61974 of 2011 and Dr. Prem Chandra Pathak and another vs. State of U.P. & others passed in Writ-A No.27579 of 2014*, wherein this Court has held that the entire period of adhoc services rendered by the employee shall be taking into account and counted for the purposes of grant of pensionery benefits. In the

judgment of ***Dr. Atul Darbari (supra),*** this Court has followed the dictum of Hon'ble Apex Court rendered in re: Prem Singh vs. State of U.P. in Civil Appeal No.6798 of 2019 whereby even the services rendered in work charged establishment shall be treated as qualifying service. Therefore, this Court in re: Dr. Atul Darbari (supra) as directed the concerning authorities to make payment of retiral dues to the petitioner of that writ petition. Some more identical orders have been annexed with the writ petition wherein the similar benefits have been given. Further, there is one judgment and order dated 17.07.2019 passed by this Court in ***Dr. Khalid Ali Khan & another vs. State of U.P. & others; Writ Petition No.1744 (S/B) of 2015,*** which has been annexed as Annexure No.17 to the writ petition, is to be referred for the reason that the judgment and order dated 17.07.2019 passed by this Court in an identical matters has been upheld by the Apex Court when the State challenged the judgment and order dated 17.07.2019 before the Hon'ble Supreme Court by filing Special Leave Petition (Civil) Diary No.5396 of 2020 (Annexure No.18), the Hon'ble Supreme Court has dismissed the Special Leave Petition vide order dated 05.06.2020.

39. It is also necessary to mention here that the latest dictum of Hon'ble Apex Court rendered in re: ***Rashi Mani Mishra (supra),*** it has been held that for the purposes of seniority or promotion the services rendered on adhoc basis shall not be counted but the said judgment does not debar the employees who have retired from service and their adhoc services have been counted for the purpose of pension and pensionery benefits.

40. At this stage, I would like to consider the U.P. Retirement Benefit Rules, 1961 (here-in-after referred to as the "Rules, 1961"). The qualifying service defines in Rule 3 (8) of the Rules, 1961 means service which qualifies for pension in accordance with the provisions of Article 368 of C.S.R. Rule 3 (8) of the Rules, 1961 is quoted as under:-

"Rule 3 (8)- "Qualifying service" means service which qualifies for pension in accordance with the provisions of Article 368 of the Civil Services Regulations:

Provided that continuous temporary or officiating service under the Government of Uttar Pradesh followed without interruption by confirmation in the same or any other post except-

(i) periods of temporary or officiating service in a non-pensionable establishment.

(ii) periods of service in a work-charged establishment, and

(iii) periods of service in a post, paid from contingencies, shall also count as qualifying service.

Note- *If service rendered in a non-pensionable establishment, work-charged establishment or in a post paid form contingencies falls between two periods of temporary service in a pensionable establishment or between a period of temporary service and permanent service in a pensionble establishment, it will not constitute an interruption of service."*

41. Regulation 368 of the Civil Services Regulations, provides that service does not qualify, unless the officer holds a substantive office in a permanent establishment. Regulations 368 and 369 provides as follows:-

"368. Service does not qualify unless the officer holds a substantive office on a permanent establishment.

369. An establishment, the duties of which are not continuous but are limited to certain fixed periods in each year, is not a temporary establishment. Service in such an establishment, including the period during which the establishment is not employed qualifies but the concession of counting as service the period during while the establishment is not employed does not apply to an officer who was not on actual duty when the establishment was discharged, after completion of its work, or to an officer who was not on actual duty on the first day on which the establishment was again re-employed."

Therefore, the qualifying service, as defined in sub-rule (8) of Rule 3, includes the service, which qualifies for pension in accordance with the provisions of Section 368 of Civil Services Regulation. The petitioner does not fall in any of the exceptions inasmuch as the period of his temporary service was not in a non-pensionable establishment after he was regularized in the State Government.

42. In the light of the aforesaid provisions of law, it is clear that the petitioner has rendered qualifying pensionery service with effect from the date of his initial joining in the department in question, so the same shall be treated as service qualifying for pension and pensionery benefits.

43. In view of what has been considered above, the writ petition succeeds and is hereby ***allowed.***

44. A writ in the nature of certiorari is issued quashing the orders dated 31.03.2021 passed by the Joint Director Pension, Kanpur Mandal Kanpur, the order dated 15.02.2021 issued by the Special Secretary U.P. and the order dated 05.03.2021 issued by the Director, Employees State Insurance Scheme, Labour and Medical Services, Uttar Pradesh, which are contained as Annexure Nos.1, 2 & 3 respectively to the writ petition. A writ in the nature of mandamus is also issued commanding the opposite parties to release the pension of the petitioner forthwith, preferably within a period of one month from the date of production of a certified/ computerized copy of this order, failing which, the petitioner shall be entitled for interest at the rate of 6% per annum.

45. No order as to costs.

(2021)09ILR A569
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.09.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Single No. 15848 of 2020

Ravi Shanker Sharma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Shreesh Kumar Mishra Atal, Sharad Pathak, Surendra Prasad Gupta

Counsel for the Respondents:
C.S.C., Pankaj Patel

A. Service Law – UP Government (Discipline and Appeal) Rules, 1999 – Punishment – Dismissal from service – Departmental enquiry – Opportunity of hearing – Non-speaking order – Past conduct of the delinquent employee of habitual absentism, unauthorized leave, indisciplined behaviour with superior

officers, its relevancy – Ground of disproportionate punishment taken – Held, before passing the impugned order of dismissal the inquiry officer must have conducted the departmental inquiry strictly in accordance of law and the disciplinary authority must have passed the order of dismissal after affording sufficient opportunity of hearing to the petitioner – Further held, the impugned order cannot be said as non-speaking order if the reply so given by the petitioner has been considered properly. Considering the past conduct of the petitioner by the inquiry officer may not be said to be any illegality – High Court did not found punishment order of dismissal disproportionate. (Para 25 and 29)

B. Service Jurisprudence – Quantum of Punishment – Wednesbury test – Meaning and Scope – Point is to be seen as to whether the decision was illegal or suffered from procedural improprieties or was one which no sensible decision maker could, on material before him and with framework of law have arrived at ...whether the decision was absurd or perverse. The Court would not, however, go into the gravity of choice made by the authority nor could the Court substitute its decision – As a matter of fact the Court can only test the decision making process whether adopted correctly or not but not the decision – Held, the severe most punishment of the service jurisprudence i.e. dismissal which was awarded to the petitioner does not shock the conscience of the Court. (Para 27 and 29)

Writ Petition dismissed. (E-1)

Cases relied on :-

1. Om Prakash Vs St. of Pun. & ors. (2011) 14 SCC 682

2. St. of M.P. Vs Harihar Gopal; 1969 SLR 274 (SC)

3. Maan Singh Vs U.O.I. (2003) 3 SCC 464

4. Sri Bhagwan Lal Arya Vs Commissioner of Police, Delhi & ors. (2004) 4 SCC 560

5. Ram Kishan Vs U.O.I. & ors. (1995) 6 SCC 157

6. Rama Kant Misra Vs St. of U.P. & ors. (1982) 3 SCC 346

7. Collector Singh Vs L.M.L. Ltd. Kanpur; (2015) 2 SCC 410

8. S.K. Giri Vs Home Secretary, Ministry of Home; 1995 Supp (3) SCC 519

9. Ved Prakash Gupta Vs Delton Cable India (P) Ltd.; (1984) 2 SCC 569

10. Surendra Prasad Shukla Vs St. of Jharkhand & ors. (2011) 8 SCC 536

11. Girish Bhushan Goyal Vs B.H.E.L. & anr. (2014) 1 SCC 82

12. State of Uttar Pradesh & ors.Vs Saroj Kumar Sinha; (2010) 2 SCC 772

13. S.N. Mukherjee Vs U.O.I. (1990) 4 SCC 594

14. State of Mysore Vs K. Manche Gowda; (1964) 4 SCR 540

15. B.C. Chaturvedi Vs U.O.I. (1995) 6 SCC 749

16. U.O.I.Vs G. Ganayutham; (1997) 7 SCC 463

17. U.O.I. Vs Mohd. Ibrahim; (2004) 10 SCC 87

18. St. of U.P. Vs Sheo Shanker Lal Srivastava; (2006) 3 SCC 276

19. North-Eastern Karnatak Roadways Corporation Vs Ashappa; (2006) 5 SCC 137

20. Man Singh Vs St. of Har. (2008) 12 SCC 331

21. Wednesbury Test [(1948) 1 KB 223

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Sharad Pathak, learned counsel for the petitioner, the learned Standing Counsel for the State-respondents and Sri Pankaj Patel, learned counsel for the opposite party no. 2 to 5.

By means of this petition the petitioner has prayed following relief:

i) Issue a writ, order or direction in the nature of certiorari quashing the

impugned dismissal order dated 29.07.2020, passed by opposite party number 3, contained as Annexure No. I to the writ petition; and pay the petitioner arrears of salary with interest and also pay other consequential dues.

2. The order under challenge is order dated 29.7.2020 passed by the opposite party no. 3 i.e. The Chief Executive Officer which is contained as Annexure no. 1 to the writ petition whereby the petitioner (since deceased) has been dismissed from service.

It is to be noted here that the main petitioner died on 1.4.2021, during the pendency of this writ petition, therefore, his legal heirs filed substitution application which was allowed by this Court, accordingly the family members of the petitioner i.e. Lata Sharma, wife, Bhavna Sharma, daughter, Ashawani Sharma, Son, Aakash Sharma, son of Late Ravi Shankar Sharma have been substituted as petitioner nos. 1 to 4.

3. The sole contention of the learned counsel for the petitioner is that the punishment order of dismissal has been passed without conducting proper inquiry, the impugned order is non-speaking and did not record reasons upon the reply given by the petitioner, past conduct of the petitioner has been taken into consideration while passing the impugned order and the impugned punishment order is disproportionate punishment which does not commensurate with the gravity of the misconduct.

4. Therefore, the question for consideration before this Court is that if the employee does not cooperate with the departmental proceedings despite ample opportunities having been provided as to whether the punishment order could have been passed conducting departmental enquiry as per law or not. While considering this question this has to be seen as to whether the past conduct of the delinquent employee may be taken into consideration that he had committed same type of misconduct on earlier occasions. Besides, the quantum of the punishment can be evaluated by the High Court.

5. Brief facts of the case, as per learned counsel for the parties, are that the petitioner was placed under suspension in contemplation of departmental inquiry by the Chief Executive Officer / Appointing Authority vide order dated 20.9.2018 (Annexure no. 2 to the writ petition). One Deputy Chief Executive Officer, Gorakhpur, Circle Gorakhpur was appointed inquiry officer in the matter.

6. After due approval of the charge-sheet dated 1.01.2019 the same has been served upon the petitioner along with relied upon documents for seeking his defense reply. The petitioner submitted his defense reply on 14.1.2019.

7. Thereafter, in conformity of U.P. Government (Discipline and Appeal) Rules, 1999, the inquiry officer issued a letter dated 16.3.2019 fixing the matter for 18.3.2019 asking the petitioner to appear on the said date and place his defense, if any. The inquiry officer has also afforded an opportunity of personal hearing to the petitioner fixing date time and place to conclude the inquiry but the petitioner after appearing before the inquiry officer has submitted that he has already filed his defense reply so he has nothing to say more.

8. The inquiry officer has recorded the findings in the inquiry report that the

charges of unauthorized absence, undisciplined attitude, violation of the employees conduct rules and negligent behaviour have been found proved. The inquiry officer has also noted that on earlier occasions the petitioner remained absent unauthorizedly and his attitude and behaviour with the superiors was absolutely unbecoming of a government servant.

9. As per the learned counsel for the petitioner only one date i.e. 18.3.2019 was fixed for personal hearing / oral inquiry, however, no oral inquiry took place in terms of the relevant Rules, 1999 and the inquiry was concluded only taking into account the defense reply of the petitioner. The learned counsel has not disputed one fact that on 18.3.2019 the petitioner had submitted his detailed representation without requesting that he wished to file any defense or witness or material or wished to cross-examine any person or material. To the contrary he had given impression to the inquiry officer on 18.3.2019 that except his defense reply dated 14.1.2019 to the charge-sheet dated 1.11.2019 he has nothing to say.

10. The inquiry officer submitted the inquriy report dated 19.3.2019 before the disciplinary authority enclosing therewith the relevant evidences / material considered by the inquiry officer.

11. The Chief Executive Officer / Appointing Authority issued a show cause notice to the petitioner on 22.5.2019 (Annexure no. 11 to the writ petition) enclosing the inquiry report seeking reply from the petitioner on or before 30.5.2019.

12. The petitioner has not submitted his explanation on or before 30.5.2019 but submitted on 12.6.2019 (Annexure no. 12 to the writ petition). Thereafter, the disciplinary authority has fixed the date on 16.7.2019 for personal hearing of the petitioner so that the petitioner could submit his defense, if any.

13. Again a letter was issued to the petitioner on 27.8.2019 seeking explanation and in compliance of the aforesaid letter dated 27.8.2019 the petitioner filed a representation dated 16.9.2019 pleading his bona fide but the disciplinary authority did not find such representation satisfactory, therefore, the disciplinary authority issued another letter dated 16.10.2019 to the petitioner fixing the next date for personal hearing on 22.10.2019. The petitioner again submitted his explanation on 22.10.2019 but the same was not found satisfactory as the substantial pleadings of bona fide of the petitioner were missing.

14. As an abundant precaution and in conformity with the rules of natural justice the disciplinary authority again issued a letter dated 26.11.2019 fixing another date i.e. 4.12.2019 for personal hearing hearing of the petitioner. Again on 3.3.2020 the explanation of the petitioner has been sought apprising him that in case of not submitting proper reply / explanation, the major penalty may likely to be imposed against the petitioner. Considering the pandemic situation of Covid-19 the authority has issued another notice dated 6.5.2020 (Annexure no. 16) calling upon the explanation along with evidences, if any which the petitioner wishes to produce. The petitioner submitted his reply on 27.5.2020 in a sheer mechanical manner without providing any relevant material corroborating his bona fide.

15. Lastly, on 2.7.2020 a letter was issued by the disciplinary officer to the

petitioner fixing the final date for personal hearing on 6.7.2020 and the said date was extended on 7.7.2020. However, on 8.7.2020 the petitioner submitted a written reply but like his earlier explanations he could not provide any material or evidence enabling him not guilty. However, as a matter of fact the material / evidence available with the department the petitioner was guilty of the charges. Therefore, considering the entire material on record and after providing opportunity of personal hearing as maintained above the impugned order dated 29.7.2020 has been passed dismissing the petitioner from service.

16. As per learned counsel for the petitioner no proper departmental inquiry was conducted against the petitioner and no cogent reasons have been recorded by the disciplinary authority while awarding the punishment of dismissal. The past conduct of the petitioner has been taken into consideration whereas the past conduct should have not been considered and the impugned punishment is disproportionate inasmuch as even if on the charge of habitual, unauthorized and deliberate absence the most severe punishment of service jurisprudence i.e. dismissal should not have been provided to the petitioner.

17. On the other hand Sri Pankaj Patel, learned counsel for the opposite parties no. 2 to 5 has submitted that in the charge-sheet there was specific charge against the petitioner that he was habitual absentee and on earlier occasions he proceeded on unauthorized leave. Not only the above after having been confronted on such misconduct he behaved with the superior authorities in gross in-disciplined manner and his misconduct as such is misdemeanor / misdeed, delinquency, the improper behaviour and dereliction from duty, therefore, the punishment of dismissal has been rightly awarded. Hence, the present writ petition is liable to be dismissed.

18. Sri Pankaj Patel has drawn attention of this Court towards the dictum of Hon'ble Apex Court in re: ***Om Prakash vs. State of Punjab and others reported in (2011) 14 Supreme Court Cases 682*** by submitting that the Hon'ble Apex Court has held that charge of repeated absentism or habitual absentism without leave would be sufficient to provide major punishment of dismissal to the employee. The delinquent was himself fully conscious and aware of his absence from the duty and the said charge was mentioned in the charge-sheet, therefore, the said employee does not deserve any sympathy. In re: Om Prakash (supra) the Apex Court has considered the earlier dictum of Apex Court i.e. ***State of M.P. vs. Harihar Gopal, 1969 SLR 274 (SC) and Maan Singh vs. Union of India, (2003) 3 SCC 464*** holding that the habitual absentee without leave does not deserve any sympathy from the Court.

19. Sri Patel, learned counsel has also submitted that in view of the facts and circumstances and misconduct of the petitioner no other punishment except the punishment of dismissal could have been provided, therefore, the quantum of punishment may not be tested or examined in the present case.

20. However, Sri Sharad Pathak, learned counsel for the petitioner while pressing his ground regarding proportionality of the punishment and defective departmental enquiry has cited various dictums of the Apex Court i.e. ***Sri Bhagwan Lal Arya vs. Commissioner of Police, Delhi & Ors. (2004) 4 SCC 560,***

Ram Kishan vs. Union of India & Ors. (1995) 6 SCC 157, Rama Kant Misra vs. State of U.P. and others (1982) 3 SCC 346, Collector Singh vs. L.M.L. Ltd. Kanpur (2015) 2 SCC 410, S.K. Giri vs. Home Secretary, Ministry of Home 1995 Supp (3) SCC 519, Ved Prakash Gupta vs. Delton Cable India (P) Ltd. (1984) 2 SCC 569, Surendra Prasad Shukla vs. State of Jharkhand & Ors. (2011) 8 SCC 536, Girish Bhushan Goyal vs. B.H.E.L. & Anr. (2014) 1 SCC 82, State of Uttar Pradesh and others vs. Saroj Kumar Sinha (2010) 2 SCC 772, S.N. Mukherjee vs. Union of India (1990) 4 SCC 594 and State of Mysore vs. K. Manche Gowda (1964) 4 SCR 540.

21. In all the aforesaid judgments the Hon'ble Apex Court has held that on account of the charge of unauthorized absence the incumbent should have not been provided the major punishment i.e. dismissal.

22. So as to press his another ground that the impugned punishment order has been issued without conducting the proper disciplinary inquiry Sri Pathak has placed reliance on the judgment of ***State of U.P. & Ors. vs. Saroj Kumar Sinha (supra).***

23. Pressing his another ground that the explanation of the petitioner was not considered properly, Sri Pathak has placed reliance in re: ***S.N. Mukherjee vs. Union of India (supra).***

24. Lastly pressing his ground that the past conduct of an employee should not be taken into account Sri Pathak has referred the dictum of Apex Court in re: ***State of Mysore vs. K. Manche Gowda (supra).***

25. Having heard learned counsel for the parties and having perused the material available on record, I am of the considered opinion that before passing the impugned order of dismissal the inquiry officer must have conducted the departmental inquiry strictly in accordance of law and the disciplinay authority must have passed the order of dismissal after affording sufficient opportunity of hearing to the petitioner. The impugned order cannot be said as non-speaking order if the reply so given by the petitioner has been considered properly. Not only the above since the charge regarding past conduct was indicated in the charge-sheet and departmental inquiry was conducted on that charge also, therefore, considering the past conduct of the petitioner by the inquiry officer may not be said to be any illegality. Lastly, considering the findings of inquiry officer and order of punishment being issued by the disciplinary authority, I do not find that the punishment order of dismissal was disproportionate.

26. The Apex Court in re: ***B.C. Chaturvedi vs. Union of India (1995) 6 SCC 749, Union of India vs. G. Ganayutham (1997) 7 SCC 463, Union of India vs. Mohd. Ibrahim (2004) 10 SCC 87, State of U.P. vs. Sheo Shanker Lal Srivastava (2006) 3 SCC 276, North-Eastern Karnatak Roadways Corporation vs. Ashappa (2006) 5 SCC 137 and Man Singh vs. State of Haryana (2008) 12 SCC 331*** has consistently held that the High Court should be very slow in interfering with the quantum of punishment unless it is found to be shocking to one's conscience.

27. The Apex Court has followed the ***'Wednesbury Test[(1948) 1 KB 223*** in adjudicating the issue engaging attention as to whether the Court should interfere in the quantum of punishment. As per aforesaid test the point is to be seen as to whether the decison was illegal or suffered from

procedural improprieties or was one which no sensible decision maker could, on material before him and with framework of law have arrived at ...Whether the decision was absurd or perverse. The Court would not, however, go into the gravity of choice made by the authority nor could the Court substitute its decision. As a matter of fact the Court can only test the decision making process whether adopted correctly or not but not the decision.

28. In the present case the inquiry officer has not only considered the defense reply of the petitioner but has afforded an opportunity of personal hearing on 18.3.2019 for conducting oral inquiry but the petitioner has categorically submitted that except his defense reply he has nothing to say nor does he want to examine any material / witness. Thereafter the inquiry officer has examined all relevant material relating to the charges leveled against the petitioner and arrived on the conclusion that all the charges leveled against the petitioner are found to be proved. Not only the above the appointing authority issued couple of letters / notices to the petitioner after receiving the findings of inquiry report dated 19.3.2019, as considered above, for affording sufficient number of hearing to the petitioner seeking any material or evidence which could establish that the petitioner was not guilty, but the petitioner could not produce any material or evidence showing his bonafide, however, he has preferred couple of explanations before the disciplinary authority. In these circumstances the disciplinary authority has passed the impugned order dated 29.7.2020 dismissing the petitioner from service. I do not find any infirmity or illegality in the inquiry report dated 19.3.2019 and in the impugned order of punishment dated 29.7.2020. Since the past conduct of the petitioner was absolutely unbecoming of a government employee, therefore, the specific charge to that effect was framed in the charge-sheet and after departmental inquiry the said charge was found to be proved, therefore, considering the past conduct of the petitioner by the inquiry officer would not vitiate the inquiry proceedings. So far as the argument of the learned counsel for the petitioner that the gravity of misconduct does not commensurate with quantum of punishment, I am of the considered opinion that after considering the entirety of the facts and circumstances of the issue in question, perusing the findings of inquiry officer and material available on record viz. a viz. explanations of the petitioner given at the stage of inquiry proceedings the disciplinary authority has properly awarded the punishment of dismissal against the petitioner. As per impugned order itself it has been indicated that the petitioner was placed under suspension on 22.1.2000 and after conclusion of the inquiry the lenient view was adopted against the petitioner awarding him serious warning with censure entry. On that point of time more or less similar charges were leveled against the petitioner i.e. unauthorized absence, mis-behaviour with the officials / officers etc. As per impugned order the petitioner was not able to type even half of page within three days whereas he was discharging his duties of clerk / typist. The petitioner was again suspended on 14.8.2003 more or less on the same charges i.e. careless and irresponsible behaviour, indisciplined behaviour, habitual absentee, mis-behaviour with superior officers and not following the direction of superior authorities. After conclusion of second inquiry two increments of the salary of the petitioner has been withheld with adverse entry. Some letters of the department were

also considered by the disciplinary authority which indicates that immediate superior of the petitioner has indicated that the petitioner did not take any interest in discharging his official duties and had got a lot of work pending. Again, the petitioner was placed under suspension on 24.9.2018 more or less on the same charges and after conclusion of the departmental inquiry the inquiry officer submitted his findings before the disciplinary authority on 19.3.2019 recommending for major penalty. Since the disciplinary authority was conscious about the fact that before passing the order of major punishment the petitioner must have been afforded sufficient number of hearing, therefore, the disciplinary authority has admittedly issued so many letters / notices / show cause notices seeking explanation from the petitioner asking for production of relevant material / evidence which could show the bonafide of the petitioner but no such material / document has been produced before the disciplinary authority, therefore, the disciplinary authority has passed the order of dismissal which is contained as Annexure no. 1 to the writ petition.

29. Considering the entirety of the facts and circumstances in issue, I do not find that the impugned order of punishment is excessive or does not commensurate with the gravity of mis-conduct inasmuch as the petitioner was in a habit of habitual absentism, unauthorized leave, indisciplined behaviour with superior officers / officials and not discharging the duties as per parameters befitting for the government employees, therefore, on earlier occasions he was awarded censure entry for the year 1997-98, 1998-99 vide order dated 20.7.2000 with serious warning. Again vide order dated 31.5.2004 he was awarded adverse entry and his two increments of salary has been withheld. Despite the serious warning having been given to the petitioner time and again by the authorities concerned from the very beginning but instead of improving his behaviour he indulged in mis-behaviour and indiscipline with the superior officers / officials and continued habitual absentism and proceeded on unauthorized leave without caring the directions of officers. Therefore, the severe most punishment of the service jurisprudence i.e. dismissal which was awarded to the petitioner does not shock the conscience of the Court. So far as the decision making process awarding major punishment to the petitioner is concerned, I do not find any flaw or infirmity in such process and I do not find that such decision was absurd or perverse. Therefore, I do not incline to interfere the punishment awarded to the petitioner.

30. Accordingly, the writ petition is ***dismissed being misconceived.***

31. No order as to costs.

32. Before parting with, I put a note of appreciation for Ms. Shama Parveen, Law Clerk, for making thorough research on the case laws.

(2021)09ILR A576
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.08.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Single No. 18755 of 2021

Vipin Sharma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sharad Pathak, Shreesh Kumar Mishra Atal

Counsel for the Respondents:
C.S.C., Ran Vijay Singh, Shivam Sharma

A. Service Law – GO dated 05.03.2021 – Appointment – Cancellation – Incorrect information given in application form – Correction sought – Plea of bonafide mistake, how far permissible – Held, in view of Clause 17 of the notification of selection in question wherein it has been categorically indicated that if any wrong information has been provided by the candidate, the same may not be permitted to correct later on and such condition has not been assailed by the petitioner – In view of the decision of Division Bench of this Court in re; *Doli (Supra)* the petitioner may not be permitted to correct the wrong information – If the candidates are permitted to correct their mistake done while filling up the application form in question whether it is bonafide or not, the authority concerned would not be able to conclude the selection process to its logical end. (Para 15)

Writ Petition dismissed. (E-1)

Cases relied on :-

1. Special Appeal Defective No. 226 of 2021; Doli Vs St. of U.P. & ors. decided on 08.04.2021

2. Amarjeet Singh & ors. Vs Devi Ratan & ors.; (2010) 1 SCC 417

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Sharad Pathak, learned counsel for the petitioner, Sri Ran Vijay Singh, learned counsel for the opposite party nos.1, 2, 3 & 5 and Sri Shivam Sharma, learned counsel for the opposite party no.4.

2. By means of the writ petition, the petitioner has assailed the order dated 19.06.2021 passed by opposite party no.4 by means of which the petitioner's appointment on the post of Assistant Teacher in 69,000 Primary Teacher has been cancelled. The petitioner has also assailed the decision dated 19.06.2021 passed by opposite party no.5 by means of which the District Selection Committee has taken decision of cancelling the appointment of the petitioner.

3. The precise submission of learned counsel for the petitioner is that while filling up the application form, he indicated his marks for Intermediate education passed in the year 2009 as 352 out of 500 in place of 332 out of 500 marks. As soon as the petitioner came to know about such bonafide mistake, he has requested the authority concerned to permit the petitioner to make such correction saying that he may provide original certificate/marksheet of the interim examination.

4. Learned counsel for the petitioner has further submitted that had the petitioner been filled up the correct marks of Intermediate as 332 out of 500, he would have been selected for the post of Assistant Teacher. Further, filling up more marks than he has obtained in the Intermediate was not extended any undue advantage to the petitioner, therefore, his candidature should have not been rejected on the basis of Government Order dated 05.03.2021 (Annexure No.26).

5. Learned counsel for the petitioner has also submitted that the appointment of any Assistant Teacher can be cancelled on the basis of Government Order dated 05.03.2021, if any marks have been filled up by the candidate without having any documentary evidence to that effect and that information provides any undue

advantage to such candidate but in the present case the petitioner is having his original mark sheet and certificate of the Intermediate Examination and the marks so filled up by the petitioner is not extending any undue advantage, in as much as he would have been selected if he had filled up the correct marks. Therefore, learned counsel for the petitioner submitted that in the interest of justice petitioner could have been permitted to correct the bonafide mistake, thereby permitting the petitioner to discharge the functions for which selection letter was issued to him.

6. Learned counsel for the petitioner lastly submitted that when the petitioner has been selected on the post of Assistant Teacher and has been permitted to submit his joining on such post then his appointment could not have been cancelled on the basis of principle of estopple and the bonafide mistake of the petitioner might be permitted to be condoned.

7. Per contra, Sri Ran Vijay Singh and Sri Shivam Sharma as learned counsel for the opposite parties have cited the judgment of Apex Court in the case of (***Rahul Kumar Vs. State of U.P. & Ors.***) referring para-4 thereof, whereby the Hon'ble Apex Court has considered the Government Order dated 05.03.2021 and vide para-7, the said Government Order has been upheld which reads as under:-

"4. Subsequently, the State issued Government Circular dated 05.03.2021 ("the Circular', for short) which further elaborated paragraph 1 of Point No.2 as stated above. The relevant portion of the Circular was to the following effect:

"2. In continuation of the recommendations dated 13-12-2020 of the Committee which were brought to your notice vide the letter dated 15-01-2021, the opinion of the legal and personnel department were sought. On the basis of the recommendations of the legal and personnel department, the following have been decided to be acted upon:-

(1) In context of Recommendations of the Committee at Point-1 in reference to more marks mentioned:-

The candidates who has submitted the application form on the basis of certificate/marksheet available with them and had mentioned more marks but the marks were subsequently changed after scrutiny/re-evaluation/back-paper by the university/issuing authority on its own, those candidates cannot be held to be responsible for changing or wrongfully mentioning marks in the application form as they did not have any option but to fill the marks mentioned in the certificate/marksheet available with them at the relevant time of filing-up of the application form. Such candidate, if they have obtained more quality points than the last candidate selected in the category in the district, then he/shall be given the appointment letter in that district. If any such candidate has lesser quality points than the last candidate selected in a particular district but more than the quality point than the last selected candidate in that category in the state list then the details of such candidate shall be provided to the administration by the Director, Basic Education. Further actions will be taken in that regard by the administration.

Where a candidate, without any documentary basis, has mentioned more marks than what he has obtained or has mentioned less maximum marks than what the actual was, his/her selection/candidature shall be cancelled."

a) According to the Circular, wherever more marks were claimed as a result of subsequent changes after scrutiny/

re-evaluation/back-paper by the university/issuing authority "on its own", the candidate could not be held responsible for discrepancy or wrongful mentioning of the marks and a benefit was therefore sought to be conferred upon the candidate which was not contemplated by the G.O.

b) The last part of the quoted portion of the Circular emphasized that where a candidate had mentioned "more marks" than what he had actually obtained or had mentioned "lesser maximum marks" than what the total marks for the examination in question were allocated, the selection/candidature of the candidate would stand cancelled.

c) The underlying principle, therefore, is quite evident that by quoting more marks than what the candidate had actually obtained or by specifying lesser total marks for the examination than those allocated for the examination, the candidate would essentially be claiming an advantage to which he was not entitled, in case the discrepancy were to go unnoticed.

7. We need not consider individual fact situation as the reading of the G.O. and the Circular as stated above is quite clear that wherever a candidate had put himself in a disadvantaged position as stated above, his candidature shall not be cancelled but will be reckoned with such disadvantage as projected; but if the candidate had projected an advantaged position which was beyond his rightful due or entitlement, his candidature will stand cancelled. The rigour of the G.O. and the Circular is clear that wherever undue advantage can enure to the candidate if the discrepancy were to go unnoticed, regardless whether the percentage of advantage was greater or lesser, the candidature of such candidate must stand cancelled. However, wherever the candidate was not claiming any advantage and as a matter of fact, had put himself in a disadvantaged position, his candidature will not stand cancelled but the candidate will have to remain satisfied with what was quoted or projected in the application form."

8. They referred another judgment of Hon'ble Apex Court in ***(Jyoti Yadav & Anr. Vs. State of U.P. & Ors.)*** referring para-13 to 15, whereby the Government Order dated 05.03.2021 have been clarified:-

"13. The stand of the State is that every candidate was obliged to fill up the relevant entries in the application form correctly and specially those pertaining to the marks obtained by the candidates in various examinations with due care and caution. The information given in the application form would reflect in quality points of the candidates and have a direct bearing on the merit list. That would in turn, not only determine the inter se merit but afford guidance to cater to the choices indicated by the candidates. The declaration which was spelt out in the Guidelines and repeated in the Advertisement, had clearly put every candidate to notice that if there be any mistake in the application form, the candidate could not claim any right to have those mistakes rectified.

14. Wherever the mistakes committed by the candidates purportedly gave additional marks or weightage greater than what they actually deserved, according to the communication dated 05.03.2021, their candidature would stand rejected. However, wherever mistakes committed by the candidates actually put them at a disadvantage as against their original entitlement or the variation could be one attributable to the University or

issuing authority, an exception was made by said communication. The reason for treating these two categories of candidates differently cannot thus be called irrational.

In the first case, going by the marks or information given in the application form the candidate would secure undue advantage whereas in the latter category of cases the candidate would actually be at a disadvantage or where the variation could be attributed to them. The candidates in the latter category have been given a respite from the rigor of the declaration. The classification is clear and precise. Those who could possibly walk away with the undue advantage will continue to be governed by the terms of the declaration, while the other category would be given some relief.

15. Having considered all the rival submissions, in our view, the Communication dated 05.03.2021 made a rational distinction and was designed to achieve a purpose of securing fairness while maintaining the integrity of the entire process. If, at every juncture, any mistakes by the candidates were to be addressed and considered at individual level, the entire process of selection may stand delayed and put to prejudice. In order to have definiteness in the matter, certain norms had to be prescribed and presciption of such stipulations cannot be termed to be arbitrary or irrational. Every candidate was put to notice twice over, by the Guidelines and the Advertisement."

9. Both the learned counsel for the opposite parties have submitted that vide Clause 17 of the notification pursuant to which the selection in question has been completed, it has been categorically indicated that if any candidate provides any wrong information, he/she may not be permitted to correct the same, so such candidate must verify the information carefully before finalizing the same. Therefore, the wrong information so given by the petitioner would definitely cause prejudice to him in view of Clause 17 of the notification in question.

10. So as to strengthen the aforesaid contention Sri Ran Vijay Singh, learned counsel for the opposite party has placed reliance on the judgment and order dated 08.04.2021 passed by the Division Bench in this Court in ***Special Appeal Defective No.226 of 2021 (Doli Vs. State of U.P. & Ors.)*** referring para-8 thereof, whereby the Division Bench has held that after submitting the form such correction may not be permitted in Clause-17 of the notification. For the convenience, Para-8 is being reproduced hereinunder:-

"8. Having noticed the two Division Bench decisions of this Court, the issue which arises for our consideration is whether a candidate who is put to notice that before uploading the data she must cross check the data with her testimonials and obtain a print-out thereof before uploading and, once it is uploaded, she would not be allowed to correct a mistake, could seek a writ of mandamus upon the authorities to allow her to correct the mistake. The answer to it would depend upon existence of enabling provisions found in a statute or rule or executive instructions. No statutory provision or rule or instruction has been shown to us which may allow such correction despite clear instructions to the contrary in the notification. It has also not been shown to us that the authorities have allowed such corrections to other candidates. It is well settled that a mandamus is ordinarily to be issued upon a public authority to perform its duty or obligation cast upon it by law. A

person seeking a writ of mandamus must therefore demonstrate that a right inheres in him that casts a corresponding duty / obligation upon the public authority or State or its instrumentality to perform, or desist from performing, such act for which a writ of mandamus is sought. That right may be derived, inter alia, from the Constitution of India, a statute or a rule or an executive instruction. The petitioner has failed to demonstrate that any such right inheres in her under a Statute or rule or executive instructions. Whether such right inheres in her under the Constitution of India needs to be examined. Interestingly, the petitioner has not challenged the instructions contained in clause 17 of the notification as violative of Part III of the Constitution of India or any statutory provision or rule. Otherwise also, in matters relating to public examinations, such strict instructions as are found in clause 17 of the notification are desirable to prevent foul play and to ensure expeditious conclusion of the recruitment process, inasmuch as if candidates are allowed to correct/alter data their merit position would alter accordingly, resulting in utter confusion. Therefore, ex facie, such instructions do not appear arbitrary. In these circumstances, we are of the considered view, the appellant has failed to make out a case for issuance of a writ in the nature of mandamus commanding the respondents to rectify the mistake made by her in her online submission."

11. Lastly, both the learned counsels for the opposite parties have cited dictum in ***(Amarjeet Singh & Ors. Vs. Devi Ratan & Ors.)*** reported in ***(2010) 1 SCC 417*** submitting that since the petitioner has not assailed the Government Order dated 05.03.2021 which is the foundation of cancellation of the appointment of the petitioner, therefore, the consequential order may not be quashed unless the main order is not assailed.

12. Learned counsel for the opposite parties drew attention towards the Annexure No.3 of the petition wherein undertaking of the petitioner has been enclosed showing that petitioner has given undertaking that in case if any wrong information is provided, his selection can be cancelled.

13. Shri Shivam Sharma, learned counsel for the opposite party has also drew attention towards Annexure No.35 of the writ petition which is an order dated 01.07.2021 passed by this Court submitting that learned counsel for the petitioner is taking contrary stand in the present case to the stand taken in the case of ***(Sri Chandra Shekar Vs. State of U.P. & Ors.)*** passed by this Court on 27.07.2021.

14. I have heard learned counsel for the parties, perused the material available on record and the decisions so cited.

15. Since the appointment of the petitioner has been cancelled on the basis of Government Order dated 5.3.2021 which has been confirmed by the Apex Court in re; ***Rahul Kumar (Supra)*** clarified in re; ***Jyoti Yadav (Supra)***, therefore, no interference may be required in the cancellation order. Besides, in view of Clause 17 of the notification of selection in question wherein it has been categorically indicated that if any wrong information has been provided by the candidate, the same may not be permitted to correct later on and such condition has not been assailed by the petitioner. Not only the above, the petitioner has himself given undertaking which is contained in Annexure No.3 with

the writ petition, therefore, in view of the decision of Division Bench of this Court in re; ***Doli (Supra)*** the petitioner may not be permitted to correct the wrong information. To me, if the candidates are permitted to correct their mistake done while filling up the application form in question whether it is bonafide or not, the authority concerned would not be able to conclude the selection process to its logical end, therefore, the Clause-17 in the notification has been incorporated. So far as the argument of learned counsel for the petitioner regarding the principle of estoppel having been imposed against the cancellation of appointment of the petitioner vide order dated 19.06.2021 after permitting him to serve on the post in question is concerned, I am of the considered opinion that to meet out such eventuality the Government Order dated 5.3.2021 has been issued. Admittedly, neither the Government Order dated 5.3.2021 has been assailed nor Clause-17 of the notification has been assailed by the petitioner, therefore, the competent authority may not be restrained to issue order of cancellation of appointment of the petitioner on the basis of principle of estoppel.

16. Having heard learned counsel for the parties and having perused the material available on record and the case laws so cited by learned counsel for the parties, I do not find any infirmity or illegality in the orders impugned dated 19.06.2021 passed by the authorities, therefore, the writ petition is ***dismissed***.

17. No order as to cost.

18. However, it is provided that since the petitioner has admittedly discharged his duties on the post of Assistant Teacher, therefore, no recovery shall be made from him for the period he has discharged his duties.

(2021)09ILR A582
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.09.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Single No. 21142 of 2021

Rajeev Kumar Saxena ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Jayshanker Shukla

Counsel for the Respondents:
C.S.C.

A. Service Law – Transfer – Nature and Scope of interference – Joining submitted in pursuance of transfer – Cancellation of transfer order – No opportunity of hearing – Validity challenged – Transfer is an incidence of service – Courts do not normally interfere such orders unless such order has been passed in a violation of rules or is an outcome of malice in law – Held, both these grounds are missing in this case – Transfer policy is only a guideline and such guideline may not be executed through writ court unless there is any statutory violation, therefore, the plea of the petitioner that suspending the transfer order dated 12.7.2021 would be violative of transfer policy is misconceived. (Para 6)

Writ Petition dismissed. (E-1)

Cases relied on :-

1. Service Single No. 21036 of 2021; Avnesh Kumar Vs St. of U.P. & ors. decided on 20.9.2021

2. Civil Misc. Writ Petition No. 52249 of 2000; Krishna Chandra Dubey Vs U.O.I.& ors.

3. Special Leave to Appeal (C) No(s). 36717/2017; Namrata Verma Vs The St. of U.P. & ors.

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Jay Shanker Shukla, learned counsel for the petitioner and Ms. Jyoti Sikka, learned Addl. Advocate General, assisted by Sri Shailendra Kumar Singh, learned Chief Standing Counsel-III for the State-respondents.

2. At the very outset, Sri Shailendra Kumar Singh, learned Chief Standing Counsel-III has drawn attention of this Court towards the order dated 20.9.2021 passed by this Court in **Service Single No.21036 of 2021, Avnesh Kumar Vs. State of U.P. & Ors,** by submitting that the case of the present petitioner is identical with the case of **Avnesh Kumar** (supra) inasmuch as the place of posting of the present petitioner is unchanged in the same manner as the place of posting of **Avnesh Kumar** (supra) was unchanged, therefore, the present writ petition may be decided in terms of order dated 20.9.2021. For the convenience, the order dated 20.9.2021 passed in re; **Avnesh Kumar** (supra) is being reproduced herein below:-

"1. Heard Sri Jay Shanker Shukla, learned counsel for the petitioner and Ms. Jyoti Sikka, learned Additional Advocate General of U.P. for the State-respondents.

2. By means of this petition, the petitioner has assailed the order dated 27.7.2021 passed by the Special Secretary, Finance (Services) Anubhag-1, Government of U.P. addressing to the Director, Internal Accounts and Audit Examination, Lucknow suspending the operation of all transfer orders of the employees made for the session 2021-22 until further orders. The petitioner has also assailed the office order dated 28.7.2021 passed by the Director, Internal Accounts and Audit Examination, U.P., Lucknow in compliance of the order dated 27.7.2021 staying the transfer orders issued from 22.6.2021 to 15.7.2021.

3. Contention of learned counsel for the petitioner is that the petitioner, who is serving on the post of Accountant in the office of Superintendent, Central Jail, Fatehgarh, Farrukhabad, has been transferred vide order dated 15.7.2021 (Annexure No.8) in the public interest to the office of Finance Controller (Vittiya Paramarshdata), Zila Panchayat, Farrukhabad. Learned counsel for the petitioner has contended that as soon as the transfer order dated 15.7.2021 was passed, the petitioner submitted his joining at the transferred place, therefore, after submitting his joining at the transferred place, his transfer order may not be suspended by means of impugned order dated 27.7.2021. Further, the consequential order dated 28.7.2021 passed by the Director concerned staying all transfer orders is illegal.

4. Learned counsel for the petitioner has further submitted that some identical writ petitions are pending and in some of identical writ petitions, interim orders have been granted. Learned counsel for the petitioner has drawn attention of this Court towards an order dated 17.9.2021 passed by the Division Bench of this Court in Special Appeal No.339 of 2021 whereby the Division Bench of this Court has stayed the order dated 27/28.7.2021 on the basis of principles of parity observing that since the interim

order has been passed in favour of some employees, therefore, the appellant before the Division Bench is also entitled for the same benefit in view of the dictum of the Hon'ble Apex Court in re; Vishnu Traders vs. State of Haryana and others, reported in 1995 Supp. (1) SCC 461. For the convenience, the order dated 17.9.2021 passed by the Division Bench in Special Appeal No.339 of 2021 is being reproduced herein below:-

"This intra-court appeal has been filed against the judgment and order dated 07.09.2021 passed by learned Single Judge in Writ Petition No.19887 (SS) of 2021 in re: Satya Narayan Gautam vs. State of U.P. and others, whereby the writ petition preferred by the petitioner/appellant has been dismissed.

Heard.

Admit.

Issue notice.

Since the respondents are represented by learned Standing Counsel no steps are required to be taken for issuance of notice.

Learned counsel for the appellant submits that vide order dated 15.07.2021 several persons were transferred on their own request. The petitioner/appellant was also transferred on his request on the post of Accountant. The said transfer order was subsequently suspended by the State Government vide order dated 27.07.2021 after joining of the transferred persons including the appellant on the transferred place. The competent authority through his order dated 28.07.2021 directed to join back at the earlier place of posting. The aforesaid orders were challenged by several persons by filing separate writ petitions namely Writ Petition No.17278 (SS) of 2021 in re: Akansha Tripathi vs. State of U.P. and others, Writ Petition No.9907 (SS) of 2021 in re: Munish Kumar Srivastava vs. State of U.P. and others, Writ Petition No.18115 (SS) of 2021 in re: Gyanendra Kumar vs. State of U.P. and others, and Writ Petition No.19103 (SS) of 2021 in re: Shankar Lal Agrawal vs. State of U.P. and others, wherein the Court had granted indulgence and stayed the impugned order dated 27/28.07.2021. The submission of learned counsel for the appellant is that the appellant/petitioner is also entitled to get parity of the aforesaid orders as he is similarly situated like the others. However, learned Single Judge dismissed the writ petition on the first day itself. In support of his submission, learned counsel for the appellant/petitioner has relief on the case of Vishnu Traders vs. State of Haryana and others reported in 1995 Supp. (1) SCC 461, to emphasize that there should be parity in grant of the interim orders.

We have considered the submissions of learned counsel for the parties and gone through the records.

Once the interim order has been passed in the cases of similarly situated persons, the appellant/petitioner was entitled to get parity. As such, we stay the operation of the impugned judgment and order dated 07.09.2021 as well as the order dated 27/28.07.2021 till further orders of this Court.

However, it would be open for the respondents to pass fresh orders."

5. I have also granted interim order in favour of the employee, who had sought transfer at particular district apprising his grievance and said transfer order was passed on his request and thereafter, such employee submitted his joining at the transferred place, therefore, I was of the opinion that when any transfer order is passed considering the request of an employee and such employee has submitted his joining at the transferred

place, such transfer order should not be suspended by way of general order staying all transfer orders.

6. However, I had also an occasion to decide an identical writ petition bearing Writ Petition No.19965 (S/S) of 2021, whereby the transfer of such employee was made in public interest and he submitted his joining pursuant to the earlier transfer order. When his transfer order was suspended by a general orders dated 27.7.2021 and 28.7.2021, he assailed such order placing same analogy that once an employee has submitted his joining at the transferred place, his/ her transfer order may not be suspended or withdrawn. Dismissing that writ petition considering the fact that place of said petitioner was unchanged, therefore, no legal prejudice is being caused to him and even his place of posting is unchanged, no interference was made in that transfer order in terms of order dated 6.9.2021 passed by the Hon'ble Apex Court in re; Namrata Verma v. The State of Uttar Pradesh & Ors., Special Leave to Appeal (C) No(s).36717/2017. For the convenience, the order dated 6.9.2021 reads herein below:-

"Heard Mr. Parvez Bashista, learned counsel appearing for the petitioner and Mr. Sanjay Kumar Tyagi, learned counsel appearing for the respondent-State of U.P.

It is not for the employee to insist to transfer him/her and/or not to transfer him/her at a particular place. It is for the employer to transfer an employee considering the requirement.

The Special Leave Petition is dismissed.

Pending applications stand disposed of."

7. Ms. Jyoti Sikka, learned Additional Advocate General has submitted that the decision of the Hon'ble Apex Court in re; Namrata Verma (supra) might have not been placed for consideration before the Division Bench of this Court and difference of the facts being considered by this Court might have not been apprised properly, therefore, the order dated 17.9.2021 would have been passed. However, she has submitted that the State is willing to file counter affidavit in the said special appeal apprising each facts and circumstances in detail including the order of the Hon'ble Apex Court in re; Namrata Verma (supra).

8. By means of impugned order dated 27.7.2021 (Annexure No.1), all the transfer orders issued for the transfer session 2021-22 have been suspended until further orders and as per Ms. Sikka, the fact finding enquiry is going on and as soon as the report of fact finding enquiry is received to the competent authority, appropriate orders would be passed. In case the competent authority finds that the earlier transfer orders issued in favour of the petitioner and other employees are appropriate orders, such employees would be permitted to discharge their respective duties at the transferred place and if it is found that such transfer orders were not passed strictly as per policy or law, those transfer orders would be cancelled and the employees would have to submit their joining at the earlier places. In any case, since no final decision has yet been taken, therefore, grievance of the petitioner that by means of impugned order dated 27.7.2021 and 28.7.2021 (Annexure Nos.1 & 2), the earlier transfer orders of the petitioner have been cancelled is misconceived. The said transfer order has been suspended for the time being till any appropriate order is passed by the competent authority.

9. Besides, if the transfer order of the petitioner is permitted to be existed, in

that case he shall remain be posted at Farrukhabad and in case his transfer order is cancelled, even in that case he shall remain be posted at Farrukhabad. The present petitioner shall remain be posted at Farrukhabad in any eventuality. Therefore, I wonder as to why the present transfer order has been challenged by the petitioner when his place of posting is unchanged in any circumstance. The Hon'ble Apex Court has time and again and also in re; Namrata Verma (supra) has categorically observed that the employee may not insist for particular place of posting.

10. In view of the above, I do not find any infirmity or illegality in the impugned orders dated 27.7.2021 passed by opposite party no.2 and 28.7.2021 passed by opposite party no.3 (Annexure Nos.1 & 2).

11. Therefore, the writ petition is dismissed being misconceived."

3. Sri Shukla, learned counsel for the petitioner has submitted that even if the place of posting of the petitioner is unchanged, even then the transfer order earlier passed in favour of the petitioner pursuant to which the petitioner has submitted his joining may not be suspended by means of impugned orders dated 27.7.2021 and 28.7.2021 (Annexure Nos.1 & 2) passed by the Special Secretary and Director respectively. Since the earlier transfer order dated 12.7.2021 was passed strictly in terms of transfer policy of the State Government, which provides that after three years of service, the place of posting of an employee should be changed and following such guideline, the place of posting o the petitioner was changed from the office of Block Development Officer, Kadarchauk, Badaun to the office of Finance Advisor (Vittiya Paramarshdata), Zila Panchayat, Badaun in public interest on the vacant post. Therefore, if the transfer order dated 12.7.2021 pursuant to which the petitioner has submitted his joining in the office of Vittiya Paramarshdata, Zila Panchayat, Badaun is suspended, at least an opportunity of hearing to the petitioner should be afforded. Sri Shukla has submitted that the law is trite to the effect that if any person submits his joining pursuant to the transfer order, the same may not be suspended, withdrawn or cancelled.

4. Sri Sri Shailendra Kumar Singh, learned Chief Standing Counsel-III, has informed on the basis of instructions that the Director, who had made transfer of the employees for the session 2021-22, has been placed under suspension pursuant to the fact finding enquiry for the reason that while transferring the employees for the session 2021-22, the relevant guidelines and mandate of policy have not been considered properly, however, final decision is pending consideration before the Government regarding those transfer orders, which have been suspended until further orders.

5. On being confronted the learned counsel for the petitioner as to what legal right of the petitioner has been flouted or violated by means of impugned orders dated 27.7.2021 and 28.7.2021 when the place of posting shall remain unchanged in case the earlier transfer order is cancelled or survived, learned counsel for the petitioner has submitted that when any order has been passed without following the due procedure of law, that may not be permitted to sustain any longer.

6. Be that as it may, the transfer is an incidence of service, therefore, the courts do not normally interfere such orders

unless such order has been passed in a violation of rules or is an outcome of malice in law. Both the aforesaid grounds are missing in this case. The law is trite in re; **Krishna Chandra Dubey Vs. Union of India (UOI) and Ors. (Civil Misc. Writ Petition No.52249 of 2000)**, that it is very well within the domain of the competent authority to modify the transfer order or to cancel the transfer order even if the same has been executed. Recently, the Hon'ble Apex Court in re; **Namrata Verma v. The State of Uttar Pradesh & Ors., Special Leave to Appeal (C) No(s).36717/2017**, has held that the employee may not request his/ her posting at any particular place. In the present case, if the transfer order dated 12.7.2021 (Annexure No.6) is cancelled, the petitioner shall remain be posted at Badaun and if such transfer order survives, in that case the petitioner shall remain be posted at Badaun. Further, the transfer policy is only a guideline and such guideline may not be executed through writ court unless there is any statutory violation, therefore, the plea of the petitioner that suspending the transfer order dated 12.7.2021 would be violative of transfer policy is misconceived. It is made clear that the facts of the case wherein the interim order has been granted are different inasmuch as such employee had placed his grievance before the competent authority seeking transfer and considering his bonafide grievance, he was transferred at particular place. Further, such transfer is permissible but his transfer order was also suspended by means of impugned orders dated 27.7.2021 and 28.7.2021 even after submitting his joining, therefore, the interim order was granted in favour of such employee seeking counter affidavit from the State Government. In other cases where the place of posting is unchanged, no interim order has been granted by this Court as informed by the learned Chief Standing Counsel.

7. In view of the above, I do not find any infirmity or illegality in the impugned orders dated 27.7.2021 passed by opposite party no.2 and 28.7.2021 passed by opposite party no.3 (Annexure Nos.1 & 2).

8. Therefore, the writ petition is **dismissed** being misconceived.

(2021)09ILR A587
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.09.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Single No. 29369 of 2016
connected with
Service Single No. 2397 of 2020

Mohd. Nijamuddin & Ors. ...Petitioners
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioners:
A.P. Singh, Amarendra Pratap Singh

Counsel for the Respondents:
C.S.C., Amit Bose

A. UP Police Radio Subordinate Service Rules, 1982 – Promotion on the post of Workshop Hand – Qualification of having ITI certificate – Requirement – Rules of 2015 make the qualification of having ITI Certificate mandatory, but Rules of 2016 make it optional – Eight vacancies of promotion was notified on 16.05.2016 – Rules, 2015 will be applied or Rules, 2016 – Held, in view of the qualification being prescribed under the Amended Rules, 2016 the candidates, who were qualified as per unamended Rules i.e. Rules, 2015, have not been ousted from zone of

consideration. Therefore, case of the petitioners may not be said to have been prejudiced on account of Amended Rules, 2016, so their claim that they be considered for promotion strictly in terms of unamended Rules, 2015 is absolutely misconceived – Direction issued to promote all suitable candidates from Class IV post to the post of Workshop Hand strictly in accordance with Rules, 2016. (Para 14, 30 and 34)

Writ Petition disposed of. (E-1)

Cases relied on :-

1. Md. Raisul Islam & ors. Vs Gokul Mohan Hazarika & ors. JT 2010 (6) SC 632

2. Santosh Kumar Singh Vs St. of U.P. & ors. [2015 (7) ADJ 179 (FB)]

3. Gaurav Pradhan & ors. Vs St. of Raj. & ors. JT 2017 (9) SC 501

4. Assam Public Service Commission Vs Pranjal Kumar Sarma (2019) 17 SCALE 542

5. Ramjit Singh Kardam Vs Sanjeev Kumar; AIR 2020 SC 2060

6. Rashmi Ranjan Nayak Vs Union of India & others; 2015 SCC OnLine Ori 300

7. U.O.I. & ors. Vs Krishna Kumar; (2019) 4 SCC 319

8. Deepak Agarwal & anr. Vs St. of U.P. & ors. (2011) 6 SCC 725

9. Y. V. Rangaiah & ors. Vs J. Sreenivasa Rao & ors. (1983) 3

SCC 284

10. St. of Tripura & ors. Vs Nikhil Ranjan Chakraborty & ors. (2017) 3 SCC 646

11. U.O.I. & ors. Vs Krishna Kumar & ors. (2019) 4 SCC 319

12. St. of Orissa & anr. Vs Dhirendra Sundar Das & ors. (2019) 6 SCC 270

13. Zile Singh Vs St. of Har. & ors. (2004) 8 SCC 1

14. Gottumukkala Venkata Krishamraju Vs U.O.I. 2018 SCC OnLine SC 1386

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri A.P. Singh, learned Senior Advocate, assisted by Sri Amrendra Pratap Singh, learned counsel for the petitioners in leading writ petition as well as Sri I.M. Pandey, learned counsel for the petitioners in Service Single No.2397 of 2020, Sri Sharad, learned Standing Counsel for the State, Sri Amit Bose, learned Senior Advocate, assisted by Sri Abhishek Bose, learned counsel for the intervenor.

2. By means of first writ petition, only one prayer has been made, which is as under:-

"(a) issue a writ, order or direction in the nature of mandamus commanding the Opposite parties to fill up the vacancies in the cadre of Workshop hand occurring prior to promulgation of Uttar Pradesh Police Radio Subordinate Service (IInd amendment) Rules, 2016 in accordance with the provisions of Uttar Pradesh Police Radio Subordinate Service Rules, 2015."

3. By means of second writ petition, following prayers have been made:-

"1. Issue a writ, order or direction in the nature of ceriorari to quash order bearing no.W-43/2019 dated 22.11.2019 passed by the opposite party no.2 whereby the representation of the petitioners for promotion on the post of Workshop Hand under the 25% promotion quota as prescribed under Rule - 5(1)(a) read with rule 17 of U.P. Police Radio Subordinate Service Rules - 2015 as amended by U.P. Police Radio Subordinate Service (Ilnd Amendment) Rules 2016, has been rejected in wholly unlawful and

arbitrary manner refusing to hold selection for promotion to the post of Work Shop Hand until final disposal of the Writ Petition No.29369(S/S) of 2016 or vacation of interim order dated 16.12.2016 and 25.5.2018 passed therein as contained in annexure no.1 to the writ petition.

2. Issue a writ, order or direction in the nature of Mandamus commanding the Opposite Parties to consider the Petitioners for promotion on the post of Workshop Hand under Rule - 5(1)(a) read with rule 17 of U.P. Police Radio Subordinate Service Rules - 2015 as amended by U.P. Police Radio Subordinate Service (Ilnd Amendment) Rules 2016, against the existing vacancies as shown in the chart of vacancies of the various posts of department as on 31.08.2019 contained in annexure no. 5 to the writ petition excluding the vacancies which had been ascertained prior to U.P. Police Radio Subordinate Service (Ilnd Amendment) Rules 2016 i.e. 19.10.2016 (the date of notification no.18/2016/2792/6-Pu-01-16-1300 (7)/ 1994 whereby the U.P. Police Radio Subordinate Service (IInd Amendment) Rules 2016 were notified) within a short reasonable period to be prescribed by this Hon'ble Court in the interest of Justice."

4. In both the writ petitions since the question of law to be adjudicated is one and same, therefore, with the consent of learned counsel for the parties I hereby dispose of both the writ petition by means of common order.

5. The question to be adjudicated in both the writ petitions is that as to whether the promotion on the post of Workshop Hand in Uttar Pradesh Police Radio Branch Headquarters, Lucknow (hereinafter referred to as "department in question") for the vacancies occurring prior to the year 2016 can be made on the basis of Uttar Pradesh Police Radio Subordinate Service (Second Amendment) Rules, 2016 or in view of the provisions of Uttar Pradesh Police Radio Subordinate Service Rules, 2015.

6. Ignoring the detailed facts of the issue in question, only those facts are being considered which are necessary to adjudicate the issue in question.

7. In both the writ petitions, the petitioners were initially appointed on the post of Messenger Peon/ Group 'D' post from the year 1989 to 1993. Later on, all the petitioners were confirmed on such post and have been allowed all service benefits admissible as per law e.g. selection grade, promotional pay scale, benefit of A.C.P. etc.

8. Notably, for the U.P. Police Radio Branch of the Police Force, the Governor of U.P. in exercise of powers vested in him under Section 15 of the U.P. Pradeshik Armed Constabulary Act, 1948 (hereinafter referred to as "the Act, 1948") promulgated the U.P. Police Radio Subordinate Service Rules, 1982 regulating the appointment and other conditions of service of the posts in the U.P. Police Radio Subordinate Service. According to Rule 4 of the aforesaid Rules, the cadre of the U.P. Police Radio Subordinate Service would comprise of the posts of Workshop Hand, Assistant Operator, Head Operator, Radio Station Officer, Radio Maintenance Officer and Radio Inspector in that hierarchy.

9. At the time when the aforesaid Rules were promulgated, according to the then existing provisions of Rule 5 (1) of the aforesaid Rules, the posts of Workshop

Hands were to be filled up entirely by direct recruitment. Further, as per Rule 5 (2) of aforesaid Rules, the posts of Assistant Operators were to be filled upto the extent of 90% by direct recruitment and 10% by promotion from amongst such permanent Workshop Hands, who had qualified Grade-III Operators Course.

10. Subsequently, by means of notification dated 14.2.1998, the Governor of U.P. promulgated the U.P. Police Radio Subordinate Service (First Amendment) Rules, 1997 (hereinafter referred to as "Rules, 1997"), whereby Rule 5 (1) of the aforesaid Rules was substituted by a new rule which provides that the post of Workshop Hand would be filled up to the extent of 75% by direct recruitment and 25% by promotion from amongst such Group 'D' employees working in the U.P. Police Radio Branch, who had qualified the High School Examination conducted by the U.P. Board of High School and Intermediate or who had qualified the training course in the trade from a Government recognized Industrial Training Institute which would be useful for the work as a Workshop Hand in the department or any other course recognized as equivalent thereto and had put in five years of service as Group 'D' employee.

11. From the aforesaid Rules, as amended in the year 1997, it is apparent that as far as Group 'D' employees of the Radio Branch are concerned, for the first time in the year 1997 an avenue for promotion to the post of Workshop Hand was provided to the extent of 25% of the posts and the Group 'D' employees, who were eligible for promotion to the Workshop Hand were those who had qualified the High School Examination or those who had obtained Industrial Training Institute Certificate from any Government recognized Industrial Training Institute (hereinafter referred to as "I.T.I.") in a trade which would be useful for the work of Workshop Hand in the U.P. Police Radio Branch.

12. As far as direct recruitment to the posts of Workshop Hand was concerned, the educational qualification required was the same as that required for promotion, i.e., qualifying High School Examination or obtaining an I.T.I. certificate. Thus, it is apparent that for the post of Workshop Hand, an I.T.I. certificate in any trade was not an essential qualification for either direct recruitment or promotion.

13. On 28.9.2015, the Governor of U.P. in exercise of his power vested under the Act, 1948 promulgated the U.P. Police Radio Subordinate Service Rules, 2015 (hereinafter referred to as "Rules, 2015") superseding all the existing Rules thereby the qualification of I.T.I. or equivalent was made compulsory considering the nature and duties to be performed by the Workshop Hands as they deal with the technical equipments like wireless set etc.

14. On 19.10.2016, the Uttar Pradesh Police Radio Subordinate Service (Second Amendment) Rules, 2016 (hereinafter referred to as "Rules, 2016") were notified whereby and whereunder vide Rule 2 (a) (ii), high school passed group 'D' employees have been brought into the field of eligibility for promotion in the cadre of Workshop Hand or who had qualified the I.T.I. course. As a matter of fact, by means of Second Amendment in the Rules made in the year 2016, such qualification was revived which was there as per Rules 1982. The difference between Rules, 2015 and Rules, 2016 is that vide Rules, 2015, the

qualification of having I.T.I. was mandatory with High School examination but by means of Rules, 2016, such qualification was one of the qualifications. In other words, vide Rules, 2015, the employee must have qualified High School Examination/ Intermediate Examination and must have possessed the I.T.I. course but vide Rules, 2016, the employee having qualified High School/ Intermediate Examination or the employee having qualified I.T.I. course is eligible.

15. In the first writ petition the impression was given to the Court to the effect that the Rules, 2016 were difference from Rules, 2015 but this fact has not been apprised that the Rules, 2016 are the same as of the Rules, 1982. Further, the candidate, who was eligible as per Rules, 2015, was also eligible as per Rules, 2016 inasmuch as in both the Rules one qualification, i.e. having qualified High School/ Intermediate Examination is common. So as to understand minutely the conditions of Rules, 2015 and Rules, 2016, a thin line difference is that Rules, 2015 used the term 'and' between two qualifications i.e. High School qualification and I.I.T. certificate whereas Rules, 2016 provide the term 'or' i.e. High School Examination or I.T.I. certificate. The candidates who were qualified as per Rules, 2015 may not be disqualified for the Rules, 2016, therefore, the grievance of such employees, the petitioners, is misconceived whereby they are saying that the conditions of Rules, 2016 are making prejudice to them.

16. On 28.11.2015, the department finalized inter-se seniority list of group 'D' for the purposes of promotion in the cadre of Workshop Hand from amongst permanent group 'D' employees.

17. On 2.5.2016, the department sent a requisition to the Uttar Pradesh Police Services Recruitment and Promotion Board, Lucknow (hereinafter referred to as "the Board") for filling up the vacancies in the cadre of Workshop Hand occurring in the department. On 16.5.2016, eight vacancies for promotion has been notified apprising to the Board for taking appropriate steps.

18. However, Sri Amit Bose, learned counsel for the intervener has submitted that by Rule 2 of the Rules, 2016, Rule 5 (a) (ii) of the Rules, 2015 has been substituted by the amending provisions. The effect of substitution of the earlier rule by the subsequent rule is that the old rule is replaced and the new rule is enacted with the result that it has to be treated that the substituted rule was always in existence as against the old rule, which is obliterated from the statute book.

19. Sri Bose has further submitted that in view of the aforesaid principle of law, once Rule 5 (a) (ii) of the Rules, 2015 was substituted by new Rule, it has to be treated that new law was in force right from the inception. In view of the above, the entire argument of the learned counsel for the petitioners that the vacancies of the post of Workshop Hand said to have occurred while the original Rule 5 (a) (ii) of the Rules, 2015 was in force have to be filled up as per said rule and not on the basis of substituted rule as inserted under the Rules, 2016 losses all significance and does not deserve any consideration.

20. However, Sri A.P. Singh, learned Senior Advocate, has submitted that since the vacancies in question were prior to the year 2016, therefore, such vacancies should be filled up through old rules i.e. Rules,

2015 inasmuch as the rule of game cannot be changed during the stage of selection process.

21. Sri A.P. Singh has placed reliance upon the judgment of the Hon'ble Apex Court in re; **Md. Raisul Islam & Ors. v. Gokul Mohan Hazarika & Ors., JT 2010 (6) SC 632**, by submitting that the Hon'ble Apex Court has been pleased to hold that once the process of selection had started under the prevalent Rules, it cannot take a stand that the said selection could be completed in terms of Amended Rules.

22. Sri Singh has also cited the dictum of the Full Bench of this Court in re; **Santosh Kumar Singh v. State of U.P. and others, [2015 (7) ADJ 179 (FB)]**, by submitting that the vacancies in question should be filled up pursuant to the advertisement and the prevalent Rules at that point of time. In support of his aforesaid submission, he has also cited some more dictums of the Hon'ble Apex Court in re; **Gaurav Pradhan & Ors. v. State of Rajasthan & Ors, JT 2017 (9) SC 501, Assam Public Service Commission v. Pranjal Kumar Sarma, (2019) 17 SCALE 542, Ramjit Singh Kardam v. Sanjeev Kumar, AIR 2020 SC 2060, Rashmi Ranjan Nayak v. Union of India & others, 2015 SCC OnLine Ori 300,** and **Union of India & Others v. Krishna Kumar, (2019) 4 SCC 319.**

23. Sri Amit Bose, learned Senior Advocate, as well as learned Standing Counsel has reiterated that after the amendment in Rules, 2016 regarding the qualification for the post of Workshop Hand, such qualifications indicated under the Rules, 2015 have lost its efficacy and significance, therefore, the promotion in question should not be made on the basis of Rules, 2015.

24. Sri Bose has submitted that it is a settled principle of law that a candidate has a right to be considered for promotion on the basis of rules existing on the date of consideration and it is not an absolute proposition of law that old vacancies have to be filled up on the basis of old Rules (Unamended Rules). The principle of old vacancies to be filled up on the basis of old rules can only apply in case the candidates, who were eligible under the old Rules, were ousted for consideration as a result of the Amended Rules. In the instant case, the position is otherwise as under Rule 5 (a)(ii) of Rules, 2015 the candidate possessing only High School Examination without possessing I.T.I. certificate were totally ousted by use of the word 'and' between both the qualifications. On the other hand, as a result of substituted Rule 5 (a) (ii) of the Rules, 2016, Class-IV employees having qualification of High School and I.T.I. certificate would not be ousted from consideration zone but they continue to be eligible for said promotion. Therefore, Sri Bose has submitted that the dictum of the Hon'ble Apex Court in re; **Deepak Agarwal and Another v. State of Uttar Pradesh and Others, (2011) 6 SCC 725** and **Y. V. Rangaiah and Others v. J. Sreenivasa Rao and Others, (1983) 3 SCC 284**, which categorically provide that old vacancies should be filled up as per old rules are distinguishable and would not apply in the present case inasmuch as the protection of the dictum of the Hon'ble Apex Court in re; **Deepak Agarwal** (supra) and **Y. V. Rangaiah** (supra) would be available to those candidates, who are being ousted on account of Amended Rules i.e. Rules, 2016.

25. Having heard learned counsel for the parties and having perused the material available on record, I am of the considered opinion that any selection process initiated

pursuant to the advertisement shall be finalized in terms of the existing rules to fill up the vacancies of direct recruitment but the same analogy would not be applied in case of promotion inasmuch as at the time of making promotion, it has to be seen as to what are the mandatory qualifications for the candidates. However, one relevant aspect has to be taken into consideration that as to whether such amendment in the qualification by amending the rules is precluding the candidates/employees, who were possessing the requisite qualification as per unamended rules or not. If the amended qualification is precluding those candidates, who were otherwise eligible as per unamended rules, may not be made sufferer.

26. The Hon'ble Apex Court in re; **Y. V. Rangaiah** (supra) has held that the vacancies in the promotional post occurring prior to the amendment have to be filled up in accordance with the unamended rules.

27. Thereafter, the Hon'ble Apex Court in re; **Deepak Agarwal** (supra) has held that it is the rules which are prevalent at the time when the consideration took place for promotion, which would be applicable. A candidate has the right to be considered in the light of existing rules, which implies 'rule in force' on the date the consideration took place. There is no rule of universal or absolute application that vacancies are to be filled invariably by the law existing on the date when the vacancy arises.

28. The Hon'ble Apex Court in re; **State of Tripura and others Vs. Nikhil Ranjan Chakraborty and others, (2017) 3 SCC 646**, has held that a candidate only has right to be considered in the light of existing rules, namely, rules in force on the date on which consideration for promotion takes place and there is no rule of absolute application that vacancies must invariably be filled by law existing on the date when they arose. Paragraphs 8 & 9 of the aforesaid judgment are being reproduced herein below:-

"8. In Deepak Agarwal [Deepak Agarwal v. State of U.P., (2011) 6 SCC 725 : (2011) 2 SCC (L&S) 175] the appellants were Technical Officers who along with Assistant Excise Commissioners were eligible to be considered for promotion to the post of Deputy Excise Commissioner. Two days before the DPC was scheduled to meet to consider the cases of all eligible officers for promotion, the Rules concerned were amended and Technical Officers stood excluded as the feeder post for the next promotional post of Deputy Excise Commissioner. The challenge to such exclusion having been negated [Deepak Agarwal v. State of U.P., 2002 SCC OnLine All 1279 : 2002 All LJ 1701] by the High Court, the matter reached this Court and the relevant paragraphs of the decision were: (Deepak Agarwal case [Deepak Agarwal v. State of U.P., (2011) 6 SCC 725 : (2011) 2 SCC (L&S) 175] , SCC pp. 728 & 734-35, paras 2 & 23-26)

"2. The old vacancies have to be filled under the old rules is the mantra sought to be invoked by the appellants in support of their claim that the vacancies arising prior to 17-5-1999, ought to be filled under the 1983 Rules as they existed prior to the amendment dated 17-5-1999. The claim is based on the principle enunciated by this Court inY.V. Rangaiah v. J. Sreenivasa Rao [Y.V. Rangaiah v. J. Sreenivasa Rao, (1983) 3 SCC 284 : 1983 SCC (L&S) 382] .

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23. Could the right of the appellants, to be considered under the

unamended 1983 Rules be taken away? The promotions to the 12 vacancies have been made on 26-5-1999 under the amended Rules. The High Court rejected [Deepak Agarwal v. State of U.P., 2002 SCC OnLine All 1279 : 2002 All LJ 1701] the submissions of the appellants that the controversy herein is squarely covered by the judgment of this Court in Y.V. Rangaiah [Y.V. Rangaiah v. J. Sreenivasa Rao, (1983) 3 SCC 284 : 1983 SCC (L&S) 382] . The High Court has relied on the judgment of this Court in K. Ramulu v. S. Suryaprakash Rao [K. Ramulu v. S. Suryaprakash Rao, (1997) 3 SCC 59 : 1997 SCC (L&S) 625] .

24. We are of the considered opinion that the judgment in Y.V. Rangaiah case [Y.V. Rangaiah v. J. Sreenivasa Rao, (1983) 3 SCC 284 : 1983 SCC (L&S) 382] would not be applicable in the facts and circumstances of this case. The aforesaid judgment was rendered on the interpretation of Rule 4(a)(1)(i) of the Andhra Pradesh Registration and Subordinate Service Rules, 1976. The aforesaid Rule provided for preparation of a panel for the eligible candidates every year in the month of September. This was a statutory duty cast upon the State. The exercise was required to be conducted each year. Thereafter, only promotion orders were to be issued. However, no panel had been prepared for the year 1976. Subsequently, the Rule was amended, which rendered the petitioners therein ineligible to be considered for promotion. In these circumstances, it was observed by this Court that the amendment would not be applicable to the vacancies which had arisen prior to the amendment. The vacancies which occurred prior to the amended Rules would be governed by the old Rules and not the amended Rules.

25. In the present case, there is no statutory duty cast upon the respondents to either prepare a yearwise panel of the eligible candidates or of the selected candidates for promotion. In fact, the proviso to Rule 2 enables the State to keep any post unfilled. Therefore, clearly there is no statutory duty which the State could be mandated to perform under the applicable Rules. The requirement to identify the vacancies in a year or to take a decision as to how many posts are to be filled under Rule 7 cannot be equated with not issuing promotion orders to the candidates duly selected for promotion. In our opinion, the appellants had not acquired any right to be considered for promotion. Therefore, it is difficult to accept the submissions of Dr Rajeev Dhavan that the vacancies, which had arisen before 17-5-1999 had to be filled under the unamended Rules.

26. It is by now a settled proposition of law that a candidate has the right to be considered in the light of the existing rules, which implies the "rule in force" on the date the consideration took place. There is no rule of universal or absolute application that vacancies are to be filled invariably by the law existing on the date when the vacancy arises. The requirement of filling up old vacancies under the old rules is interlinked with the candidate having acquired a right to be considered for promotion. The right to be considered for promotion accrues on the date of consideration of the eligible candidates. Unless, of course, the applicable rule, as in Y.V. Rangaiah case [Y.V. Rangaiah v.J. Sreenivasa Rao, (1983) 3 SCC 284 : 1983 SCC (L&S) 382] lays down any particular time-frame, within which the selection process is to be completed. In the present case, consideration for promotion took place after the amendment came into operation. Thus, it cannot be accepted that any

accrued or vested right of the appellants has been taken away by the amendment."

9. The law is thus clear that a candidate has the right to be considered in the light of the existing rules, namely, "rules in force on the date" the consideration takes place and that there is no rule of absolute application that vacancies must invariably be filled by the law existing on the date when they arose. As against the case of total exclusion and absolute deprivation of a chance to be considered as in Deepak Agarwal [Deepak Agarwal v. State of U.P., (2011) 6 SCC 725 : (2011) 2 SCC (L&S) 175] in the instant case certain additional posts have been included in the feeder cadre, thereby expanding the zone of consideration. It is not as if the writ petitioners or similarly situated candidates were totally excluded. At best, they now had to compete with some more candidates. In any case, since there was no accrued right nor was there any mandate that vacancies must be filled invariably by the law existing on the date when the vacancy arose, the State was well within its rights to stipulate that the vacancies be filled in accordance with the Rules as amended. Secondly, the process to amend the Rules had also begun well before the Notification dated 24-11-2011."

29. Recently, the Apex Court in two cases in re; **Union of India and Others v. Krishna Kumar and Others, (2019) 4 SCC 319** and **State of Orissa and Another v. Dhirendra Sundar Das and Others, (2019) 6 SCC 270**, has held that the rights to be considered for promotion in accordance with the rules as they exist when the exercise is carried out for promotion. In both the aforesaid judgments, all relevant case laws on the subject have been considered.

30. I have also considered the relevant facts of the present case that in view of the qualification being prescribed under the Amended Rules, 2016 the candidates, who were qualified as per unamended Rules i.e. Rules, 2015, have not been ousted from zone of consideration. Therefore, case of the petitioners may not be said to have been prejudiced on account of Amended Rules, 2016, so their claim that they be considered for promotion strictly in terms of unamended Rules, 2015 is absolutely misconceived.

31. When the petitioners are not being ousted on account of Amended Rules, 2016 so far as it prescribes qualification to be promoted on the post of Workshop Hand, then for all other purposes making promotion from Class-IV to Workshop Hand, the provisions of Rules, 2016 shall be taken into account inasmuch as after the amendment in the Rules, 2015 regarding qualification by means of Rules, 2016, such prescription by unamended Rules shall loose all significance and does not deserve any consideration.

32. The Hon'ble Apex Court in re; **Zile Singh v. State of Haryana and Others, (2004) 8 SCC 1**, has held in para-25 as under:-

"25. Substitution of a provision results in repeal of the earlier provision and its replacement by the new provision (see Principles of Statutory Interpretation, ibid., p. 565). If any authority is needed in support of the proposition, it is to be found in West U.P. Sugar Mills Assn.v.State of U.P.[(2002) 2 SCC 645], State of Rajasthan v. Mangilal Pindwal [(1996) 5 SCC 60] , Koteswar Vittal Kamath v. K. Rangappa Baliga and Co. [(1969) 1 SCC 255] and A.L.V.R.S.T. Veerappa Chettiar v.

S. Michael [AIR 1963 SC 933] . In West U.P. Sugar Mills Assn. case [(2002) 2 SCC 645] a three-Judge Bench of this Court held that the State Government by substituting the new rule in place of the old one never intended to keep alive the old rule. Having regard to the totality of the circumstances centring around the issue the Court held that the substitution had the effect of just deleting the old rule and making the new rule operative. In Mangilal Pindwal case [(1996) 5 SCC 60] this Court upheld the legislative practice of an amendment by substitution being incorporated in the text of a statute which had ceased to exist and held that the substitution would have the effect of amending the operation of law during the period in which it was in force. In Koteswar case [(1969) 1 SCC 255] a three-Judge Bench of this Court emphasised the distinction between "supersession" of a rule and "substitution" of a rule and held that the process of substitution consists of two steps: first, the old rule is made to cease to exist and, next, the new rule is brought into existence in its place"

33. Therefore, in view of the above, the effect of substitution of rule by another is that the old rule is repealed and the new rule is re-enacted with the result that it has to be treated that the substituted rule was always in existence from the very inception. The Hon'ble Apex Court in re; **Gottumukkala Venkata Krishamraju v. Union of India, 2018 SCC OnLine SC 1386**, vide paras-15 & 16 has observed as under:-

"15. Ordinarily wherever the word "substitute" or "substitution" is used by the legislature, it has the effect of deleting the old provision and make the new provision operative. The process of substitution consists of two steps : first, the old rule is made to cease to exist and, next, the new rule is brought into existence in its place. The rule is that when a subsequent Act amends an earlier one in such a way as to incorporate itself, or a part of itself, into the earlier, then the earlier Act must thereafter be read and construed as if the altered words had been written into the earlier Act with pen and ink and the old words scored out so that thereafter there is no need to refer to the amending Act at all. No doubt, in certain situations, the Court having regard to the purport and object sought to be achieved by the legislature may construe the word "substitution" as an "amendment" having a prospective effect. Therefore, we do not think that it is a universal rule that the word "substitution" necessarily or always connotes two severable steps, that is to say, one of repeal and another of a fresh enactment even if it implies two steps. However, the aforesaid general meaning is to be given effect to, unless it is found that the legislature intended otherwise. Insofar as present case is concerned, as discussed hereinafter, the legislative intent was also to give effect to the amended provision even in respect of those incumbents who were in service as on September 01, 2016.

16. The effect, thus, would be to replace Section 6 as amended with the intention as if this is the only provision which exist from the date of introduction and the earlier provision was not there at all. The effect of this would be that all those incumbents who are holding the post of Presiding Officer on September 01, 2016 would be governed by this provision."

34. Therefore, in view of the facts, circumstances and case laws so cited by the learned counsel for the parties, I do not find any good ground to direct the opposite

parties to fill up the vacancies in the cadre of Workshop Hand occurring prior to the promulgation of Rules, 2016 in accordance with the provisions of Rules, 2015. Since the qualifications so prescribed under the Amended Rules, 2016 are the same as were prescribed under the very first Rules i.e. Rules, 1982 and the qualification so inserted by means of Rules, 2015 on 28.9.2015 remained in force till 19.10.2016, however, vide Amended Rules, 2016 the qualifications indicated under such Rules i.e. Rules, 2016 are not ousting the petitioners from the consideration zone of promotion on the post of Workshop Hand and such Rules, 2016 are governing the field for all practical purposes, therefore, the opposite parties are directed to make promotion on the post of Workshop Hand identifying entire existing vacancies in the promotional quota completing such exercise with expedition, preferably within a period of three months thereby promoting all suitable candidates from Class-IV post to the post of Workshop Hand strictly in accordance with Rules, 2016. The interim orders, if any, in these writ petitions would be treated to have been merged in this order.

35. So far as the prayer in both the writ petitions that vacancies occurring prior to the year 2016 should be filled up on the basis of unamended Rules, 2015 is hereby rejected. However, all the vacancies of Workshop Hand lying vacant in the Department as on today shall be filled up strictly as per the directions made herein above within time so stipulated.

36. In the aforesaid terms, both the writ petitions are **disposed of.**

(2021)09ILR A597
APPELLATE JURISDICTION

CRIMINAL SIDE
DATED: ALLAHABAD 09.09.2021

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.
THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Criminal Appeal No. 84 of 1983

Deo Narain Yadav ...Appellant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri S.K. Singh, Sri A.K. Srivastava, Sri Apul Misra, Sri H.K. Yadav, Sri M.N. Tiwari, Sri P.C. Srivastava, Sri P.N. Misra, Sri Rahul Misra, Sri S.kumar, Sri V.M. Zaidi

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

(A) Criminal Law - appeal against conviction - Indian Penal Code, 1860 - Section 302 - The Code of criminal procedure, 1973 - Section 313 - Indian Evidence Act, 1872 - section 8 - oral testimony of a witness cannot be discarded simply on the ground that he is interested witness or inimical or chance witness - What is required is cautious approach in scrutiny and appreciation of his testimony - where eye-witness account is produced motive looses its significance.(Para -9,16)

Agricultural plots of deceased and (accused/appellant) are adjacent - enmity between them regarding dismantling of boundary (mend) - co - villager (PW-2) asked accused not to quarrel - accused advanced ahead, PW-2 caught hold of him but accused jerked him, and PW-2 fell down - accused fired gun shot at deceased - hit his head and skull blown off - fell down and died on the spot - son of deceased also Informant (PW-1) - lodged F.I.R. - trial court convicting the appellant (accused) under section 302 and sentencing him to life imprisonment - hence appeal.

HELD:-Two witnesses(PW-1 & PW-2) examined by the prosecution as eye-witness are not reliable, their presence on the spot at the time of occurrence and their seeing of occurrence is highly doubtful. Time of the occurrence is also doubtful and the possibility cannot be ruled out that occurrence may have taken place after the sunset in the darkness. Two prosecution witnesses being interested and inimical and also chance witnesses lack, the credibility and cannot be relied. Shadows of doubts on the prosecution evidence and from the appreciation of evidence and entire material on record, it is clear that case of the prosecution is not stand proved beyond reasonable doubt. So it will be just and proper to give the benefit of doubt to the accused.(Para - 19)

Criminal Appeal allowed. (E-7)

(Delivered by Hon'ble Syed Aftab Husain Rizvi, J.)

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

2. This criminal appeal arises out of judgment and order dated 25.11.1982 passed by the Vth Additional & Sessions Judge, Allahabad in Special Case No.166 of 1982, Case Crime No.12 of 1982, under Section 302 I.P.C., Police Station- Nawabganj, District- Allahabad, convicting the appellant (accused) under Section 302 I.P.C. and sentencing him to life imprisonment.

3. The prosecution case is that complainant Rajendra Prasad Yadav gave an application dated 27.01.1982 at Police Station-Nawabganj, District- Allahabad alleging therein that he is resident of village Rajapur Mazara Awanikapura. The agricultural plot of applicant and Deo Narain Yadav resident of Rajapur Chaubara Mazara Awanikapura are adjacent and there is enmity between them regarding dismantling of boundary (mend). On 26.01.1982 at about 04 p.m. his father Rameshwar @ Bachai went to the house of Paras Nath to take money. After some time he (Rajendra Prasad) went to call his father where he saw that Deo Narain Yadav armed with his licensed gun was abusing his father and saying that you will not simply settle the dispute of dismantling the boundary (mend) and today you have met me on opportune moment, you will be killed and not spared. On this, my father forbidden him to abuse which further enraged Deo Narain Yadav. Meanwhile, co-villager Kishori Lal asked Deo Narain Yadav not to quarrel. Deo Narain Yadav advanced ahead, Kishori Lal caught hold of him but Deo Narain Yadav jerked him, and Kishori Lal fell down. Then, Deo Narain Yadav due to aforesaid enmity with intention to kill his father fired a gun shot at Rameshwar Prasad on his head, some portion of skull of my father's blow off and brain material came out and my father died on the spot. On hearing noises witness Kallu from southern side and many other co-villagers making exhortation reached the spot. Accused Deo Narain Yadav threatening all of them with death ran away towards East. Due to extreme cold, rain, darkness and due to fear, I have come to the police station today morning with co-villagers for giving information written by Doodhnath. The dead body of my father on the spot is being guarded by village Chowkidar Mahrani Din.

4. On the aforesaid written information Case Crime No.12 of 1982 under Section 302 I.P.C. was registered at Police Station- Nawabganj, District Allahabad on 27.01.1982 at 08:40 a.m. and the investigation commenced. The investigating officer, S.I. Nasiruddin

reached at the spot prepared inquest report and sent the body for post-mortem examination, interrogated the witnesses, inspected the place of occurrence, prepared the site plan, took sample of blood-stained soil and plain soil and sealed it in separate containers and prepared its memo, interrogated other witnesses including eye-witness and after completion of investigation submitted the charge-sheet against the accused Deo Narain Yadav under Section 302 I.P.C.

5. The learned trial Court framed charge against the accused Deo Narain Yadav under Section 302 I.P.C. The accused denied it and claimed for trial. Prosecution examined five witnesses. Statement of accused Deo Narain Yadav was recorded under Section 313 Cr.P.C. in which, he alleged that he has been falsely implicated at the instance of Paras Nath, Kishori Lal, Kedar Nath. Paras Nath is of the party of Kishori Lal. He has also stated that he appeared as a witness against Kishori Lal. Rajendra Prasad (complainant PW-1) is under the influence of Kishori Lal. He has further stated that he had no enmity with Rameshwar Prasad (deceased). Paras Nath and Data Deen have filed a case in respect of Plot No.73 against Ram Swaroop (father of the accused) under Section 115 C which he lost from the Court of Tehsildar as well as from the Court of Commissioner and even from the Civil Court. He has further stated that on 26.06.1979, Paras Nath, Shambhoo Nath and Gopi Nath sons of Nanhku and Ram Saran son of Raghunandan (uncle of Paras Nath) assaulted him for which he lodged a report. He filed a copy of chitthi mazroobi of that incident. He further stated that on 14.10.1977 Kedhar Nath son of Shukru and Chhedi Lal son of Sher Ali resident of Rampur Chaubara murdered his brother Sampat who was a guard in R.P.F. and he lodged a report with the police, a carbon copy thereof he has filed. He has further stated that at the time of incident, he was not present at his house and no such quarrel as alleged has taken place.

No oral evidence in defence produced by the accused. The learned trial Court after hearing the arguments by impugned judgment has convicted the accused (Appellant) for charge under Section 302 I.P.C. and sentenced him for life imprisonment.

6. The post-mortem of the deceased was conducted on 28.01.1982 at 02.40 p.m. by Doctor P.L. Nigam PW-4 and according to which on external examination, the rigor mortis has passed off from the upper portion of the body but was present in the lower limbs. Mud was found sticking on both the legs and on the left thigh, blood was accumulated on the left side of the face and chin. Following ante-mortem injuries were found on the body.

One gun shot wound 7.5"x6" x brain cavity deep starting from the right side of the tip of nose going upwards and laterally crossing whole of the body of nose, left side of the forehead going upwards upto the middle of the vault of scalp. The posterior end of the wound was placed 3" above pinna of left ear. The scalp bones were broken into innumerable pieces of varying sizes. Whole of the brain matter including meningia were missing from the cavity except both the lobes of cerebelum and a part of the base of brain. One piece of flattened fire-arm pellet, irregular in shape was recovered from the posterior part of the brain cavity. The margins of the wound of nose were inverted and it appeared to be woud of entry and the posterior part over

the vault of the scalp, the margins of the wounds are everted. It shows that the wound of entry is on the anterior part of the wound and the wound of exit at its posterior part.

On internal examination Dr. Nigam found that the skull bone was broken into pieces and the membrane of the brain were lacerated and the brain was missing as mentioned in injury no.1

In the opinion of the Dr. P.L. Nigam (PW-4) the cause of death was shock and hemorrhage on account of ante-mortem injury and duration of death was two days from time of post-mortem. The pellet recovered from the body was sealed in an envelop and sent to the police. Dr. P.L. Nigam PW-4 in his examination-in-chief has also stated that the death of Rameshwar Prasad could have been caused on 26.01.1982 at about 04 p.m. and injury no.1 in the ordinary course was sufficient to cause his death and the injury could have been caused with the gun shot.

7. Learned counsel for the appellant contended that the injury of the deceased could not be caused by a 12 bore gun. The dimension of the wound is 7.5"x6" and it has blown the skull. The wound is blast wound and greater probability is that it has been caused with a high velocity weapon like rifle. Its impact is great and consequent damage is much, hence medical evidence does not corroborate the oral testimony. Learned A.G.A., on the other hand, contended that injury depends on the cartridge used in the weapon, if a single ball cartridge is used the injury of such a nature can be caused and there is no contradiction between the medical evidence and ocular testimony. The post-mortem report indicates that a shot has been fired from the front which has hit the upper portion of the face from nose to the skull on the left side and due to this skull bone was broken into pieces and the brain matter was missing from the cavity. One piece of flattened firearm pellet irregular in shape was recovered from the posterior part of the brain cavity. The margins of the wound of the nose were inverted and it appeared to be a wound of entry and posterior part over the vault of the scalp the margins of the wound are everted. It shows that the wound of entry is on the interior part of the wound and the wound of exit at its posterior part. A bullet fired by a rifle due to its velocity passes out of the body making an aperture of entry and exit. In the instance case, the position is not the same but it is a single wound suggesting that the shot must have been fired from a close range but more than 3 feet. In such a situation the injury of such a nature can be caused from 12 bore gun. So it cannot be said that the injury received may not have been caused by a 12 bore gun.

8. The prosecution case is based on direct evidence and two eye-witnesses. PW-1 Rajendra Prasad and PW-2 Kishori Lal have been produced by the prosecution. Rajendra Prasad is son of the deceased and also the informant. In his examination-in-chief this witness has said that deceased Rameshwar @ Bachai was his father and accused Deo Narain Yadav is the resident of his own village. The agricultural plots of Rameshwar Prasad (deceased) and accused Deo Narain Yadav are adjacent. Sometimes his father used to plough a portion of the field of the accused and some times the accused used to plough some area of his plot dismantling the boundary (mend) and on account of that Deo Narain Yadav used to bear grudge against the deceased Rameshwar Prasad. The house of Deo

Narain Yadav is 200 paces away in the south of his house. He further stated that his father was murdered about 9 months ago at 4 p.m. His father has gone to the house of Paras Nath to take money, when there was delay in his return he went to call him. He further stated that his father was standing between baithaka of Paras Nath and Deo Narain Yadav's fodder cutting machine. Deo Narain Yadav was standing near his house armed with a gun. Deo Narain Yadav was asking his father to settle the dispute of the boundary (mend) soon otherwise he will be killed as he has met him on opportune moment. Meanwhile, Kishori Lal arrived there and asked Deo Narain Yadav not to quarrel. Deo Narain Yadav advanced ahead then Kishori Lal caught hold of him but Deo Narain Yadav pushed him and Deo Narain Yadav after advancing ahead fired a gun shot at Rameshwar Prasad which hit his head and his skull blown off and he fell down and died on the spot. Rajendra Prasad and Kishori Lal made a noise then Kallu came there. Deo Narain Yadav extending threats that if anybody would try to advance, will be killed, escaped from there. Soon after the incident his mother came there. The witness has further stated that in the evening and in the night he could not go to the police station to lodge a report as it was raining and cold and also due to fear. In the night he kept on watching the dead body and on the next morning he got the report scribed by Doodh Nath a teacher and accompanied with Paras Nath and Ram Kailash went to police station to lodge the report. On spot the blood which oozed out from the injury of Rameshwar Prasad was fallen on the ground.

Kishori Lal PW-2 is an eye-witness. In his examination-in-chief he has stated that Rameshwar Prasad was murdered 9 months earlier. At abut 4 p.m. he was at home when he heard hue and cry of the quarrel he reached at the place of occurrence the house of Paras Nath and fodder cutter machine of Deo Narain Yadav there he saw Rameshwar and his son Rajendra Prasad and Deo Narain Yadav there. Deo Narain Yadav was armed with a licensed gun. Some altercation was going on between Deo Narain Yadav and Rameshwar Prasad. He tried to pacify and also tried to caught hold Deo Narain Yadav but he pushed him and fired a gun shot at Rameshwar Prasad which hit the head of the Rameshwar Prasad and his skull blown off. Rameshwar fell down and died. On this, Kishori Lal PW-2 and son of Rameshwar Prasad made a noise then Kallu came there. Thereafter, accused Deo Narain Yadav escaped towards east extending threats.

9. Learned counsel for the appellant contended that Rajendra Prasad PW-1 is the son of deceased and interested witness while Kishori Lal PW-2 is inimical witness and both the witnesses are chance witnesses, their presence on the spot is highly doubtful and their testimony cannot be relied on. It is settled principle of law that oral testimony of a witness cannot be discarded simply on the ground that he is interested witness or inimical or chance witness. What is required is cautious approach in scrutiny and appreciation of his testimony.

10. It is clear from the evidence that the distance between the house of the complainant and the place of occurrence is near about 200 paces and according to prosecution case the complainant reached at the place of occurrence to look his father who has gone to take money from house of Paras Nath and there was delay in his

return. It is not the prosecution version that the complainant was accompanying his father when he went to the house of Paras Nath. Rajendra Prasad PW-1 has stated in his cross examination that Paras Nath was not present in his house at the time of murder. As Rameshwar (deceased) has gone to the house of Paras Nath to take money and Paras Nath was not present in his house at that time so there was no occasion for delay in return of Rameshwar which is the reason assigned for presence of Rajendra Prasad PW-1 at the place of occurrence at the time of incident. Regarding presence of Kishori Lal PW-2 at the place of occurrence, it is in the evidence that Kishori Lal reached there on hearing the noises of quarrel. It is admitted by Kishori Lal PW-2 that he was at his home and when he heard the noises of quarrel he reached on the spot. The evidence on record also establishes that house of Kishori Lal is in the north-east of pond, 50-60 paces away from the place of occurrence and there are houses of several other persons near his house. Kishori Lal PW-2 in his cross examination has said that dead body was lying 5-6 paces from the house of Deo Narain Yadav in which there is a boring machine. The houses of Jeet Lal, Bindeshwari, Jawahar and Suraj Deen are 50-60 paces from the dead body. He has further stated that his house is in the east of Suraj Deen and in the north of the house of Jeet Lal. So there are several other houses near the house of Kishori Lal which are nearer to the place of occurrence than that of Kishori Lal. Rajendar Prasad PW-1 has also said in his cross examination that there are houses of Jeet Lal, Suraj Deen, Bindeshwari, Raja and others near the pond and none of them is the witness of the incident, only Kishori Lal has been named as witness.

It is also in the statement of Rajendra Prasad PW-1 that there are 2-3 houses in the south of Paras Nath and an Abadi Pasiyana in the west of the house of Ram Saran Yadav. So it is also established that there are houses and Abadi in north-east as well as north-west and west directions of the place of occurrence but none of resident of these houses are alleged to have come at the place of occurrence hearing the noises of quarrel. It is in the statement of Rajendra Prasad PW-1 that when he reached to the spot Deo Narain Yadav was saying to his father to settle the dispute of the boundary (mend) soon otherwise he will be killed as he has met on opportune moment. Thereafter Kishori Lal tried to pacify but Deo Narain Yadav shot the gun fire. This indicates that whole incident has occurred in a very short span of time. It does not show that the altercation was so loud that it may attract persons residing 50-60 paces away from the place of occurrence. In these circumstances, the presence of witness Kishori Lal at the time and place of occurrence becomes doubtful. The absence of any other witness of the vicinity or nearby locality further confirms this. Apart from Kishori Lal another witness named in the F.I.R. is Kallu and from the evidence, it is also established that Kallu was an accused in a criminal case in which Kishori Lal was a witness and Kishori Lal filed affidavit in favour of Kallu. So Kallu and Kishori Lal are friendly and all of them are in league with one another. It also indicates that intentionally and after giving a thoughtful consideration, the choice of witnesses have been made and only two persons who are favourable to the complainant have been named in the F.I.R. as witness. It is also in the statement of Kishori Lal PW-2 that at the time of incident it was raining and neither he nor Rameshwar nor Rajendra Prasad was holding any umbrella. This is also unnatural.

11. Although, Kishori Lal has tried to conceal the facts about enmity and matters related to it and have given evasive replies to the questions asked in cross examination on these points and have shown ignorance about certain facts which are supposed to be his knowledge but from his cross examination it is fully established that he was an accused in a case under Sections 107 and 117 Cr.P.C. in which the accused was second party and he has said that in that case he was falsely implicated by accused Deo Narain Yadav. He has also admitted that Sampat (brother of the accused) was murdered and he was excommunicated and still his community members have no relations with him. Considering all the aforesaid facts and in the absence of no other independent and nereby resident named in the F.I.R. as witness the presence of witness Rajendra Prasad PW-1 and Kishori Lal PW-2 who are interested, inimical and chance witness becomes doubtful.

12. There are some other contradictions and discrepancies in the statements of the witnesses. Rajendra Prasad PW-1 in his cross-examination has said that when his father was shot he was 4-5 paces East from his father. He has further said that he has indicated this place to the Investigating Officer when he was preparing the site plan but in the site plan, the position of complainant Rajendra Prasad has been shown in the Northwest direction from his father. He has further said that Kishori Lal witness was 1-2 paces east from Deo Narain and he has shown this place to the investigating officer but in the site plan, the place where Kishori Lal was present is shown to the west from the deceased. Kishori Lal PW-2 has also said that there is one hand-pump in the North of the house of Bachai and when shot was fired he was 2 paces to this hand-pump and Rajendra the son of Rameshwar was 3 paces in the north, this statement is also against the site plan because in the site plan the hand-pump has been shown in the extreme north of the house of Paras Nath much away from the place of occurrence while the presence of accused, deceased, and the witnesses has been shown in the south-east direction of the House of Paras Nath. Rajendra Prasad PW-1 has told the presence of only Kishori Lal and Kallu on the spot during the occurrence and soon thereafter. While Kishori Lal PW-2 in his cross examination has said that on hearing the noises and sound of fire Kallu and many others came to the spot making exhortations. He has further said that other persons came after 10 minutes after the arrival of Kallu and 5 minutes thereafter Deo Narain Yadav ran away. Many persons exhorted then Deo Narain Yadav ran away. The persons who came included men, women and children of the village. There is no such description in the statement of Rajendra Prasad PW-1 and he has not said anything about the presence of any other person except Kishori Lal and Kallu, Rajendra Prasad PW-1 has also said that the whole night the only source of light was of the lantern. The lantern was kept there in open near the dead body whole night. While from the evidence on record it appears that it was raining at the time of occurrence and also the whole night. So, this statement also cannot be believed. Rajendra Prasad PW-1 in his cross examination has also said that witnesses Kishori Lal or Kallu did not stay there on the spot in the night. They went to their homes after seeing the incident and did not come back to the spot. This is unnatural conduct. Further on this point, Kishori Lal has said that he remained at the spot till 8 p.m. and when the Chowkidar came there

then he returned to his home. The aforesaid discrepancies and contradictions are major and affects the reliability of the witnesses.

13. There is a specific allegation in the F.I.R. that Deo Narain Yadav was armed with his licensed gun and he used this weapon in the crime. Although, it was a licensed gun it has not been recovered and sent for Forensic examination. The Investigating Officer has not made any effort for the recovery of the weapon used in the offence while it may be a good piece of evidence to support the prosecution and this will certainly go against the prosecution.

14. The learned counsel for the appellant further contended that according to the prosecution version the occurrence has taken place at 26.01.1982 at 4 p.m. and the F.I.R. was lodged on 27.01.1982 while in the normal course the F.I.R. could have been lodged within 2-3 hours and it appears that occurrence might have taken place sometime in the night and that is why the report was lodged in the morning of the next day. The learned A.G.A. contended that the reason for the delay in lodging the F.I.R. has been reasonably explained. Rajendra Prasad PW-1 has stated that he did not go to the Police Station to lodge the report in the evening or in the night because it was raining and the weather was really cold and also due to fear. The explanation given by the prosecution appears to be plausible but the material on record indicates that it creates serious doubt about timing of the occurrence. The incident is of the last week of the January in which sunset occurs after 5 p.m. and the incident is said to have occurred at 4 p.m. so there was more than an hour before it became dark. But the statement of the witnesses show that lodging of the F.I.R. was not considered at all just after the occurrence in the evening. Kishori Lal PW-2 has said that till he was at the place of occurrence there was no mention of the lodging of the F.I.R. and at another place, he has said that he remained at the place of the occurrence till 8 p.m.. Rajendra Prasad PW-1 has also said that at 6:30 a.m. next morning writing of the report was started and it was then decided to lodge the F.I.R.. In the evening, when Ram Kailash came neither report was written nor it was considered to go to the police station to lodge the F.I.R.. However, it is normal human behaviour to inform the police to lodge the F.I.R. soon after such type of occurrence but it appears that neither any effort was made nor it was considered to lodge the F.I.R. soon after the incident. From the statement of the witnesses, it is also established that village Chowkidar and other persons have come to the spot after darkness. Rajendra Prasad PW-1 in his cross examination has said that "village Chowkidar came to the the spot after 2-3 hours when called. Chowkidar lives in Pasiyana. I have gone to call him. He has further stated that I have seen Paras Nath on the spot after arrival of Chowkidar." On another place in his cross examination, he has said that he saw Ram Kailash in the evening at his house when he went to call Chowkidar. When he saw Ram Kailash the sun was already set and lantern were lit. While Kishori Lal PW-2 has said that he remained on the spot till 8:00 p.m. and when Chowkidar came on the spot then he went to his house. It is clear from the material on record that the place of occurrence is inside the village Abadi and there are several houses nearby and village Chowkidar lives in Abadi called Pasiyana. The arrival of village Chowkidar and other person at place of occurrence after the darkness clearly indicates that the

occurrence as alleged by the prosecution is not of 4:00 p.m. but after the sunset and that may be the reason that F.I.R. could not be lodged same day. Rajendra Prasad PW-1 has said in his cross examination that "I have said to Chowkidar to lodge the F.I.R. at the police station as soon as he came to the spot but there is no explanation why Chowkidar not lodged the F.I.R. or what reply he gave to the complainant." It is also in the statement that Parasnath is intermediate and at the time of occurrence he was in class 8th and that when Chowkidar came to the spot till then Ex-Ka-1 was not written. This also indicates that because of sunset, darkness has prevailed due to which no one tried to report the incident at the police station. Not lodging the F.I.R. in the evening and even no effort made to inform the police creates serious doubt about the time of occurrence and the possibility that occurrence has taken place after the sunset, cannot be ruled out. So in this case delay in lodging, the F.I.R. seriously doubts the time of the incident and adversely affects the prosecution case and also the reliability of eye-witnesses.

15. Learned counsel for the appellant contended that the place of occurrence is also doubtful as no pellets, Tikli, or any other sign of firing has been found on the spot. He further contended that according to the prosecution version the skull of the deceased was broken and the part of the brain came out lying on the ground but the same has not been taken into possession by the investigating officer and sent for post-mortem examination with the dead body. Learned A.G.A. contended that the deceased has died instant death due to head injury. The investigating officer has taken blood-stained and unstained soil from the spot and its chemical examination report confirms human blood in it. The statement of the witnesses are consistent on this point and there is no ground to make any doubt about the place of occurrence. It is true that the part of the brain which was lying beside the dead body has not been sent for post-mortem examination but in the inquest report, it is mentioned that part of the brain is lying beside the dead body, so not sending brain material with dead body for post-mortem is nothing but latches on the part of investigating officer. From the oral evidence and other material on the record, the place of occurrence is fully established there is no doubt about this.

16. Learned counsel for the appellant further contended that the motive attributed is very weak and remote. There is no immediate motive of the incident. Rajendra Prasad PW-1 himself has said that sometime his father used to plough a portion of the field of the accused and some times the accused used to plough the some area of his plot. There is no evidence on record to indicate that any such incident has taken place on the day of occurrence or soon before it, hence, no motive is established from the material on record. The motive as alleged in the F.I.R. is that there was previous enmity between deceased and the accused in respect of the intervening boundary (mend) and Rajendra Prasad PW-1 has corroborated the allegations of the F.I.R. and it is not disputed that agricultural field of the accused and the deceased are adjacent. As the prosecution case is based on the direct evidence, the motive is not so important. It is settled principle of law that where eye-witness account is produced motive looses its significance.

17. The learned A.G.A. contended that after the occurrence the accused

absconded, he was not found at his house, so under section 8 of the Evidence Act, adverse inference will be drawn against him that he is guilty. The learned counsel for the appellants on the other hand contended that the accused was not preset at his home at the time of occurrence and this fact has been stated by him in his statement under Section 313 Cr.P.C. The arguments of learned A.G.A. cannot be accepted. The evidence on record indicates that the place of occurrence is near the house of the accused and accused was not found at his house when the Investigating Officer came after lodging of F.I.R. in the noon of 27.01.1982. So it should have come in the knowledge of the accused that he has been named in the F.I.R., it was natural on his part to leave his residence and no adverse inference under Section 8 of Evidence Act can be drawn for this conduct of the accused.

18. The learned A.G.A. further contended that the oral testimony of PW-1 is consistent throughout except on one point when he has misread the direction of west to east. Kishori Lal PW-2 has also corroborated the oral testimony of PW-1 and there is no major discrepancy or contradiction. Medical evidence also supports the ocular version. The oral statement of PW-2 cannot be discarded because he has some dispute with the accused party. Learned counsel for the appellant submitted that witnesses are interested and inimical and both the witnesses are chance witnesses. No other witness of the vicinity has been named in the F.I.R. nor produced in the Court. Their presence on the spot is doubtful and they are not reliable. The sanctity of F.I.R. is also doubtful, there is no plausible explanation for the delay in lodging the F.I.R.. Time of occurrence is also doubtful and the motive attributed is weak and remote. The licensed gun has not been recorded.

19. From the appreciation of the evidence on record, it is clear that the two witnesses examined by the prosecution as eye-witness are not reliable, their presence on the spot at the time of occurrence and their seeing of occurrence is highly doubtful. The time of the occurrence is also doubtful and the possibility cannot be ruled out that occurrence may have taken place after the sunset in the darkness. The two prosecution witnesses being interested and inimical and also chance witnesses lack, the credibility and cannot be relied. There are shadows of doubts on the prosecution evidence and from the appreciation of evidence and entire material on record, it is clear that case of the prosecution is not stand proved beyond reasonable doubt. So it will be just and proper to give the benefit of doubt to the accused.

20. The learned Trial Court has failed to appreciate the evidence in right perspective and finding of conviction recorded by it is not just and liable to be set aside.

21. Consequently, this Criminal Appeal is **allowed** and the judgment and order of conviction dated 25.11.1982 passed by the Vth Additional & Sessions Judge, Allahabad is hereby set aside. Accused Deo Narain Yadav is acquitted of the charge under Section 302 I.P.C. The applicant is on bail. His personal bonds and sureties bonds stand cancelled, sureties stand discharged. He need not surrender.

22. Lower court record along with copy of the judgment be transmitted immediately to the trial Court.

(2021)09ILR A607
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.09.2021

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.
THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Criminal Appeal No.319 of 1985

Aidal Singh ...Appellant(In Jail)
Versus
The State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Pt. Mohan Chandra, Sri Rajesh Singh, Sri Yogendra Misra, Sri Yogesh Kumar Srivastava

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

(A) Criminal Law - Indian Penal Code, 1860 - Section Sections 147, 148, 149 & 302 - The Code of criminal procedure, 1973 - Section 161,313- appeal against conviction

(P.W.-3) wife of complainant (PW-2) & daughter of deceased - living in her Mayaka at the time of murder of her father - Appellant no. 1(uncle of PW-3) forbid, his brother to keep his daughter and son-in-law in his house and wanted to eliminate him - in the night at 12:00 p.m. - father of PW-3 sleeping under the Chhappar of the house - (P.W.-3) sleeping inside the house - appellant no. 2 fired a gun shot on deceased with a country made pistol - hit his left chest - fell down on the ground and died - witnesses saw and identified the accused in the light of Dibbi (kerosene lamp) - (P.W.-3) came outside, her father was lying dead - Trial court convicted accused appellant no. 1(died) and appellant no. 2 for charge under section 302 only - Hence appeal.

HELD:-Incident has occurred in the night while all were asleep and a single shot was fired by someone who made good his escape from the spot before anyone can notice the incident. Sole testimony of complainant (P.W.-2) is not reliable and there is no other witness to corroborate his oral version. Trial court failed to appreciate the evidence properly and the finding of conviction recorded by it is not sustainable. Conviction of the appellant no. 2 under Section 302 IPC and consequent sentence of rigorous imprisonment is set aside.(Para - 16,17,18)

Criminal Appeal allowed.(E-7)

(Delivered by Hon'ble Syed Aftab Husain Rizvi, J.)

1. Heard Sri Y.K. Srivastava, learned counsel for the appellants and Sri Devendra Kumar Singh, learned AGA.

2. This criminal appeal has been filed against the judgment and order dated 30.1.1985 passed by Vth Additional Sessions Judge, Agra in Sessions Trial No. 348 of 1983 (State of U.P. Vs. Aidal Singh & others), Case Crime No. 67, Police Station - Tundla, District - Agra convicting and sentencing the appellants Aidal Singh and Ram Charan under Sections 302 IPC for life imprisonment.

3. During pendency of this appeal, the appellant no. 1, Aidal Singh has died. Therefore, the appeal stands abated against the appellant no. 1, Aidal Singh.

4. The prosecution case is that on 8.3.1983 at 9:15 a.m., complainant - Nathi Lal son of Chiranji Lal gave an oral information at police station - Tundla, district - Agra that he is resident of village - Garhi, police station - Tundla,. His sasural is in the house of Jagjit son of Chetram, resident of village Nagla Asha. Jagjit has no other issue except his wife Bohri and due to this, he along with his wife and children are living with his father-in-law in

his house since seven to eight years and doing agriculture. The real brother of his father-in-law Aidal Singh do no like this and on many occasions there was an altercation between them. Aidal Singh and others were afraid that Jagjit, his father-in-law will transfer the land about 20-25 Bighas to him and his wife. Aidal Singh forbid, his father-in-law Jagjit to keep his daughter and son-in-law in his house and wanted to eliminate him. The previous night at about 11:00 p.m., cousins of his wife, Naimichand, Gyaniram, his wife Bohri and his father-in-law Jagjit were siting in his house under a Chhappar and were talking. Dibbi (Kerosene lamp) was burning, meanwhile, Aidal Singh, Bhagwan Singh holding Lathi in their hands and Ram Jit Lal holding Ballam, Pratap Singh, Dariyav Singh and Ram Charan armed with country made pistols came there and Aidal said that today Jagjit will be taught a lesson for keeping his daughter and son-in-law with him and all of them surrounded us. Ram Charan fired a gun shot upon my father-in-law with a country made pistol which hit his left chest and he fell down on the ground and died. We all made a noise, Aidal Singh and others ran away towards ravine (Beehad) in the South. The witnesses saw and identified the accused in the light of Dibbi (kerosene lamp). In the night, he could not come to the police station due to fear and after sunrise have come at police station leaving family and villagers near the dead body.

5. On the aforesaid oral information Case Crime No. 67 under Sections 147, 148, 149 and 302 IPC was registered against all the six accused named in the FIR. Investigation commenced, investigating officer visited the place of occurrence and took blood stained and plain soil from the place of occurrence, sealed it in separate containers, also took in possession Dibbi (kerosene lamp) and prepared memo thereof and also prepared site plan. Panchayatnama and post-mortem of the deceased was conducted. Investigating officer recorded the statements of complainant and other witnesses and after completion of investigation submitted the charge sheet against all the six accused persons under Sections 147, 148, 149 and 302/34 IPC.

6. Learned trial court framed charges against Aidal Singh, Bhagwan Singh, Ram Ji Lal, Pratap Singh and Darab Singh under Section 302 read with Section 149 IPC against the accused, Aidal Singh and Bhagwan Singh under Section 147 IPC, against the accused Ramji Lal, Pratap Singh, Darab Singh and Ram Charan under Section 148 IPC and against the accused - Ram Charan under Section 302 IPC. Accused denied the charges and claimed for trial. Four witnesses were produced by the prosecution and ten prosecution papers have been Exhibited. Statements of accused were recorded, under Section 313 Cr.PC. Accused denied the prosecution case and stated that they are innocent and have been falsely implicated due to enmity. One defence witness, Gyani Singh - D.W.-1 has also been examined by the accused.

7. Learned trial court by the impugned judgment acquitted accused - Bhagwan Singh, Ramji Lal, Pratap Singh and Darab Singh from all the charges and convicted accused - Aidal Singh and Ram Charan for charge under Section 302 IPC only and sentenced them for life imprisonment.

8. Post-mortem of the Jagjit was conducted by Dr. Keshaw Singh on 9.3.1983 at 1:00 p.m.. According to the

post-mortem report, Exhibit Ka-1 rigor mortis present, eyes half open, the following anti-mortem injuries were found on the body (i) gun shot wound of entry 4 cm x 4 cm cavity deep on the left side of the chest and 3 cm below and lateral to the nipple. Blackening and tattooing present. Margins inverted.

In internal examination, left lung and pericardium were lacerated, heart was punctured and empty, clotted blood was present in chest cavity, stomach was empty, semi digested food material present in small intestine, faecal matter present in large intestine, liver was lacerated. Duration of death is about one and a half day and cause of death was due to shock and haemorrhage as a result of anti-mortem injury. The post-mortem report has been proved as Exhibit Ka-1 by Dr. Keshaw Singh P.W.-1.

9. The prosecution case is based on direct evidence and there are two eye witnesses, namely Nathi Lal and Bohri. According to the prosecution, Nathi Lal (P.W.-2) is the complainant. In his examination-in-chief, he has narrated the version of the first information report and has supported it and has also proved the FIR as Exhibit-Ka-2. He has also said that police station is 5 to 6 kms away from his village. He being alone could not go the police station in the night.

10. Bohri (P.W.-3) is the wife of the complainant and the daughter of the deceased. In her examination-in-chief, she has said that she was living in his Mayaka (village - Nagla Asha) at the time of murder of her father. Her father's name is Jagjit and Aidal Singh is her uncle. Near one year and nine months ago at 12:00 p.m. in the night her father Jagjit was sleeping under the Chhappar of the house. She was sleeping inside the house. The house is built at thar. When she came outside, her father was lying dead. She has not seen anyone. She knows all the six accused, namely Bhagwan Singh, Ram Charan, Pratap Singh, Ramji Lal, Aidal Singh and Daryav Singh. They are present in the court. She has not seen them at the spot. This witness has not supported the prosecution case and on request of the prosecution, the witness was declared hostile and cross examined by the prosecution. In her cross-examination, the witness has denied her statement under Section 161 Cr.PC. She has further said that she was sleeping and no Dibbi (kerosene lamp) was burning. She woke up after hearing the sound of gun shot. She has also contradicted the suggestion given by the prosecution that she has entered into a compromise with her uncle and due to this she is not giving correct statement. On further examination by the defence, she again reiterated that she was sleeping inside the house and her husband was sleeping at the door. She and Naimichand and Gyaniram came outside after hearing the sound of gun shot and till then no one told the name of the person who fired the gun shot. It was dark night.

11. Constable - Nahar Singh, P.W.-4 is a formal witness who has proved the other prosecution papers, like Chik FIR, copy of the G.D., Panchayatnama and related papers, the site plan and charge sheet by secondary evidence.

12. Out of the two eye witnesses examined by the prosecution, one witness, P.W.-3 Bohri has become hostile and has not supported the prosecution case and now the prosecution case rests on the sole testimony of eye witness - Nathi Lal (P.W.-

2). Although, he has supported the allegations of the FIR, but his oral testimony is not inspiring. The prosecution case is that deceased along with his son-in-law, Nathi Lal (P.W.-2) and his wife and Nemichand and Gyan Chand were sitting under the Chhappar which is outside the house and were talking. It does not seem natural and probable because the village people believes in the principle of early to bed and early to rise. They take their dinner just after sun set and go to bed early. It is also pertinent to mention that incident is of first week of March, the winter season. It has also come in evidence that the house of deceased, Jagjit is one furlong away from the village and after some distance the ravines begin. So sitting and talking under Chhappar outside the house at 11:00 p.m. does not appear to be probable. It is also the prosecution case that the accused persons armed with lathi, ballam and country made pistols came there while deceased, her two brothers, son-in-law and daughter were sitting under the Chhappar. Accused, Ramcharan fired a single shot which hit the deceased and all accused ran away. None of the persons present on the spot even tried to pacify or intervene or save the deceased. No scuffle has taken place. No other person has received any kind of injury and all accused made good there escape just thereafter without causing any harm to the complainant or his wife. This story also not seem probable. There are other contradictions also in the oral statement of Nathi Lal (P.W.-2). In his cross examination, he has said that Dibbi (kerosene lamp) was kept in tidwall of the northern wall while in the site plan (Exihibit Ka-7), it is shown in the eastern wall and not in the northern wall as stated by Nathi Lal (P.W.-2). The witness has further stated in his cross examination that there was no other cot in the south of Jagjit's cot but in the site plan (Exibit Ka-7) three cots have been shown in the south of cot where dead body of the deceased was lying.

13. Gyan Singh named as Gyani in the FIR has been produced by the accused in defence as D.W.-1 and who is the cousin of the deceased. He has said that Jagjit was murdered two years ago in midnight in the fields. He also went there. Nemi, Nathi, Bohri and brothers of Jagjit also reached there. We all reached there after the murder. No one has seen the occurrence. Nathi went to lodge a report in the morning and till then name of the culprits were not known. In cross examination, this witness has contradicted his statement recorded by the investigating officer under Section 161 Cr.P.C. and has also denied the suggestion that he is giving false evidence due to compromise.

14. P.W.-3, Bohri is the daughter of the deceased and the wife of the complainant Nathi Lal although she has not supported the prosecution case and has become hostile but her oral statement cannot be ignored on this ground. She has said that when her father was murdered, she was living in her Mayaka. She has further said that it was 12:00 p.m. in the night her father was sleeping under the Chhappar at the door of the house and she was inside the house. In her cross examination, she has said that on hearing the sound of fire, she came out. She has also said that she was sleeping and no Dibbi (kerosene lamp) was burning, she woke up on hearing the sound of fire. She has further said that her husband was also sleeping at the door. So the statement of this witness appears to be natural and probable and from the evidence on record it appears that the incident has occurred in the

dead of night in darkness when all were asleep. It is a hit and run case and no one had opportunity to see and identify the assailant. The statement of defence witness gets support from the oral statements of P.W.-3, Bohri and statements of these witnesses contradict and belie the oral testimony of P.W.-2, Nathi Lal. There are major contradictions and discrepancies in the statement of Nathi Lal. His oral testimony is not reliable. Learned trial court has erred in placing reliance on sole testimony of Nathi Lal (P.W.-2).

15. Learned AGA contended that oral evidence of Nathi Lal(P.W.-2), complainant and eye witness is consistent and is also supported with medical evidence. Bohri (P.W.-3) has become hostile and has not supported the prosecution case due to fear so it will not adversely affect the prosecution case and reliability of Nathi Lal (P.W.-2). These arguments are not convincing. As discussed above, the oral testimony of Nathi Lal (P.W.-2) is not inspiring and reliable. Bohri is the wife of Nathi Lal (P.W.-2), who has lodged the FIR and has named accused persons and also deposed against them in Court. Hence, it cannot be considered that wife of Nathi Lal out of fear has become hostile and has not supported the prosecution case. Contrary to it, from material on record, it appears that her statement is more natural and probable and it also gets support from defence witness - Gyan Singh who is named as eye witness in the FIR.

16. From appreciation of evidence on record, it appears that incident has occurred in the night while all were asleep and a single shot was fired by someone who made good his escape from the spot before anyone can notice the incident.

17. From the aforesaid discussion, it is clear that the sole testimony of Nathi Lal (P.W.-2) is not reliable and there is no other witness to corroborate his oral version. The learned trial court has failed to appreciate the evidence properly and the finding of conviction recorded by it is not sustainable. The appeal is liable to be allowed.

18. The criminal appeal is **allowed.** The conviction of the appellant no. 2, Ramcharan under Section 302 IPC and consequent sentence of rigorous imprisonment is set aside. Appellant no. 2 / accused, Ramcharan is acquitted from charge under Section 302 IPC. Appellant / accused is in jail. Appellant / accused be released forthwith if not wanted any other case.

19. Lower court record along with copy of the judgment be transmitted to the learned trial court immediately.

(2021)09ILR A611
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.09.2021

BEFORE

THE HON'BLE SUBASH CHANDRA SHARMA, J.

Criminal Appeal No. 1362 of 1983

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

Counsel for the Appellant:
Sri N.K. Shukla, Sri Mohammad Waseem, Sri B.D. Sharma

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

(A) Criminal Law - appeal against conviction under Section 307 - Indian Penal Code, 1860 - Section 307 , 323 - The Code of criminal procedure, 1973 - Section 313 - motive loses all its

importance in a case where direct evidence of eye witnesses is available because even if there is a very strong motive for the accused person to commit a particular crime, they cannot be convicted if the evidence of eye witnesses is not convincing.(Para - 23)

(B) Criminal Law - Indian Penal Code, 1860 - Section 307 - ingredients - act attempted should be of such nature that if not prevented or intercepted it would lead to the death of victim - intention or mens rea to kill is needed to be proved clearly without doubt for this purpose the prosecution can make use of the circumstances like attack by dangerous weapon on fatal part of body, however, the intention to kill cannot be gauged simply by seriousness of the injury caused - intention and knowledge of the result of the act being done is the main thing that is needed to be proved for conviction under Section 307 I.P.C.- assault on the head with lathi - always a question of fact - whether there was intention to cause death or other injury - circumstances, manner of assault, nature and number of injuries will all have to be considered cumulatively. (Para - 36,41)

On 05.02.1980 at about 8:00 P.M. in the night - appellant in company of his other friend - caused simple injuries with lathi to Informant on his head and arms - while taking heat beside the fire in the field - where engine was placed - Finding recorded by the learned trial court to this extent - holding guilty to appellant - convicted appellant - hence appeal.

HELD:- Injuries caused by lathi in the opinion of doctor were simple, therefore, it is apparent that accused did not want to use lathi with the intention of causing death of informant. Present case does not fulfill the ingredients of Section 307 I.P.C. but it comes within the ambit of Section 323 I.P.C. Hence conviction of the appellant under Section 307 I.P.C. cannot be sustained. No any purpose will be served by sending the appellant (aged about 81 years) in jail after elapse of 41 years from the incident. Period of sentence is reduced to the period already undergone by him. (Para - 43,48)

Criminal Appeal partly allowed. (E-7)

List of Cases cited:-

1. Gopi Ram Vs St. Of U.P. , 2006 (55) ACC 673 SC

2. St. of U.P. Vs Nawab Singh, 2005 SCC (Criminal) 33

3. ShiVs raj Bapuray JadhaVs Vs St. of Karnataka, (2003) 6 SCC 392

4. R.R. Reddy Vs St. of AP, AIR 2006 SC 1656

5. Sucha Singh Vs St. of Punj., AIR 2003 SC 1471

6. St. of Rajasthan Vs Arjun Singh, AIR 2011 SC 3380

7. Varun Chaudhry Vs St. of Raj., AIR 2011 SC 72

8. St. of U.P. Vs s. Naresh & ors. , (2011) 4 SCC 324

9. Mamo Dutt Vs s. St. of U.P., (2012) 4 SCC 79

10. Balwan Singh & ors. Vs s. St. Of Haryana, (2014) 13 SCC 560

11. St. Of Maharashtra Vs s Balram Bama Patil, AIR 1983 SC 305

12. Jage Ram Vs s. St. of Haryana, (2015) 11 SCC 366

13. St. of M.P. Vs s. Kanha @ Om Prakash, CrlA. No. 1589 of 2018

14. Neelam Bahal & anr. Vs s. St. of Uttarakhand, 2010 (2) SCC 229

(Delivered by Hon'ble Subash Chandra Sharma, J.)

1. This criminal appeal has been preferred against the judgment and order dated 28.04.1983 passed by 4th Additional Sessions Judge, Budaun in Sessions Trial

No.242 of 1981 arising out of Case Crime No.45 of 1980, Police Station Dataganj, District Budaun by which appellant has been convicted under Section 307 I.P.C. and sentenced to undergo rigorous imprisonment for a term of 3 years.

2. The prosecution story in brief is that two months prior to the present incident appellant and Rajbhar abongwith his other companions committed dacoity in the house of Shyam Pal (brother of informant). They were identified and named in the F.I.R. Atiraj brother of informant was witness in that case. That was the reason appellant was annoyed with him. On 05.02.1980 at about 8:00 P.M. in the night when informant with Shivlal was sitting at the tube well in his field, appellant alongwith some unknown person equipped with lathi came there and asked about Atiraj. At this informant-Jhandu Singh told him that Atiraj was at his home. Meanwhile Chhotey started assaulting informant with lathi and caused injuries. The appellant was identified in the light of torch and other unknown person could not be identified. An F.I.R. was lodged at Police Station Dataganj on 06.02.1980 at about 9:15 A.M. Jhandu Singh was sent to PHC Dataganj for medical examination from where he was referred to District Hospital, Budaun where he was examined on 06.02.1980 at about 12:30 P.M.

3. Injuries found on the person of Jhandu Singh are as here under :-

(I) Lacerated wound 3cm x 1cm bone deep on left side of the forehead.

(II) Incised wound 4cm x 1.5cm bone deep on right frontal region of head.

(III) Lacerated wound 1cm x 0.5cm, 10 cm above left ear on temporal region.

(IV) Lacerated wound 2cm x 0.5cm scalp deep, 1cm behind injury no.3.

(V) Lacerated wound 3cm x 0.5cm scalp deep on left occipital region of head.

(VI) Lacerated wound 4cm x 1cm scalp deep, 9cm behind injury no.5.

(VII) Lacerated wound 4.5cm x 0.5cm scalp deep on right parietal region, 11cm above right ear.

(VIII) Lacerated wound 1cm x 0.5cm muscle deep outer side of left eye.

(IX) Contusion 10cm x 5cm on left side face with swelling. Advised X-ray.

(X) Abraded contusion 16cm x 10cm lower part of left fore-arm and hand. Advised X-ray.

(XI) Lacerated wound 10cm x 0.5 cm below nose at top.

(XII) Contusion 4cm x 2cm top of left shoulder.

Duration about half day (12 hours). All except no.2 by blunt object, no.2 by sharp edged cutting object. All simple except no.1 & 2 Advised x-ray skull.

4. Investigation of the case was handed over to S.I. Babu Ram who after completing investigation submitted charge-sheet against Chotey under Section 307 I.P.C.

5. The court concerned took cognizance and afforded essential prosecution papers to the appellant and committed the case to the court of Session for trial.

6. The trial court framed charge under Section 307 I.P.C. against the appellant which was read over and explained to him. He did not plead guilty but denied the charge and claimed for trial.

7. Prosecution examined PW-1 Dr. S.C. Naugriya, PW-2 H.C. Ramveer Singh, PW-3 Jhandu Singh, PW-4 Shivlal and PW-5 Babu Ram the Investigating Officer.

8. After prosecution evidence statement of appellant under Section 313 Cr.P.C. was recorded in which he stated the prosecution story to be false. He had also stated that the statements made by the witnesses were false. He had been implicated in the case owing to an enmity about a field. He further stated that in wrestling he defeated Atiraj, so for damaging his good health he had been implicated falsely.

9. Opportunity for defence evidence was given to appellant but no evidence was adduced on his part.

10. After hearing the arguments for accused/appellant as well as the State, learned trial court passed the impugned judgment dated 28.04.1983 while convicting and sentencing the appellant as aforesaid.

11. Being aggrieved with this judgment and order this appeal has been preferred.

12. Heard Mr. Mohammad Waseem, learned counsel for the appellant and Sri Arun Kumar Singh, learned A.G.A. for the State and perused the record.

13. Learned counsel for the appellant argued that in this case the identity of appellant is not certain because the occurrence took place in the night. There was no source of light. Lathi has been said to be used in causing injuries to informant Jhandu Singh but one incised wound was found on his person which is not probable with lathi. No blood stains were found on the place of occurrence. Atiraj brother of Jhandu Singh was defeated by appellant on account of that enmity he has falsely been implicated in this case. Now the appellant is near about 81 years old and he has been in jail for a period of more than one year. He further argued that the nature of injuries found on the person of informant have been said to be caused with lathi which is hard and blunt object. All injuries are simple in nature. Anyhow injuries were not fatal to the life of the injured. The nature of injuries brings the case within the purview of Section 323 I.P.C. in place of Section 307 I.P.C. Learned trial court has not considered all these facts while passing the judgment but convicted and sentenced the appellant arbitrarily which is illegal and not based on the evidence on record, therefore, it is liable to be set aside and appeal be allowed.

14. Learned A.G.A. opposed the contentions raised by learned counsel for the appellant and argued that Jhandu Singh was injured in this case who supported the prosecution version. Shivlal and Rajpal were eye-witnesses who have also supported the prosecution version. Medical report also corroborates the prosecution case. There was source of torch light which was taken there by Rajpal, as a result there was no suspicion in identifying the appellant by the informant. Blood stained soil was taken from the place of occurrence by Investigating Officer. There is no

ground to reverse the findings recorded by the learned trial court and the impugned judgment and order convicting and sentencing the appellant is sound and based on legal principles. The appeal is devoid of merit and is liable to be dismissed.

15. Before proceeding to deal with the contentions raised by learned counsel for the appellant, it will be convenient to take note of the evidence as adduced by the prosecution.

16. PW-3 Jhandu Singh is informant who had stated that it was at about 8 P.M. he was at the well where engine was placed and Shivlal was also with him at that time and they were taking heat with fire. Meanwhile appellant Chotey and one other person came there and Chotey asked about Atiraj. Jhandu Singh replied that Atiraj was at home then Chotey uttered "isi ko le lo" and started beating him with intention to kill. He identified them in the light of torch but he did not know the name of other person. On making hue and cry Rajpal also came there with a torch. He sustained injuries on his head and arms. Accused persons went away in the direction of North West after causing injuries. Prior to the said incident appellant Chotey committed dacoity at the house of Shyamlal who is his nephew. In that case his brother Atiraj Singh is witness and as a result the companion of appellant Chhotey was imprisoned. Case against the appellant was still pending. After the accused persons went away his brother Atiraj Singh also came there at about 9-10 P.M. They arrived at home in the morning and went to police station with his brother. He got tehrir written by Rajpal in the village and affixed his thumb impression. On the basis of which case was registered at the police station. He proved tehrir as Exibit Ka-4.

17. PW-4 Shivlal deposed that it was time about 8 P.M. engine was placed at Sarman Singh's tube well, it belonged to Jhandu Singh who was present there. Both of them were taking heat with fire. Shivlal was one fourth partner in the land of Jhandu Singh. Appellant Chhotey and one other person came there, both of them were equipped with lathi and Chhotey asked about Atiraj. Jhandu Singh lighted his torch and told him that Atiraj Singh was at his home. Chhotey uttered "isi ko dekhenge" and both of them started beating Jhandu Singh. He began to cry after going on some distance and Jhandu Singh also made hue and cry. Rajpal also came there and made noise then other people from the village also came there. Atiraj Singh also came there but both of the accused persons fled away.

18. PW-1 is Dr. S.C. Naugriya who examined injured Jhandu Singh and prepared injury report dated 06.02.1980 at about 12:30 P.M. He proved the injury report as prepared by him in his handwriting and signature as Exibit Ka-1. Giving detail of injuries, he opined that except injury no.2 all injuries were possible with some blunt object like lathi and all the injuries were about half day old. Injury no.2 was possible with some incised weapon. All injuries except injury nos.1, 2, 9 & 10 were simple. Injury nos.1, 2, 9 & 10 kept under observation and advised for x-ray. All injuries were possible to be caused on 05.02.1980 at about 8-9:00 P.M.

19. PW-2 Head Constable Ramveer Singh has stated that he prepared F.I.R. in his hand writing which he proved as Exibit Ka-2 and also stated that he entered the contents of F.I.R. into G.D at report no.14 which he proved as Exibit Ka-3.

20. PW-5 S.I. Babu Ram was the Investigating Officer of this case and he proved the investigation and the site plan as Exibit Ka-5, fard of taking torch into his possession as Exibit Ka- 6 to 8. He also collected blood stained soil and plain soil from the place of occurrence and prepared fard as Exibit Ka-10. Thereafter, he concluded the investigation and submitted charge-sheet as Exibit Ka-10.

21. Occurrence took place on 05.02.1980 at about 8:00 P.M. and F.I.R. was lodged at the police station on 06.02.1980 at 9:15 P.M. There is delay in lodging the F.I.R. but informant lived in a village which was five miles away from the police station, therefore, it could not be possible to go to the police station in the night for lodging F.I.R. In the morning he reached at police station and lodged F.I.R. without making any delay. In this way, the delay in lodging the F.I.R. cannot be said to be material in the circumstances of the present case.

22. So far as motive is concerned, there is no need to prove motive in cases of direct evidence.

23. It is settled law that the motive loses all its importance in a case where direct evidence of eye witnesses is available because even if there is a very strong motive for the accused person to commit a particular crime, they cannot be convicted if the evidence of eye witnesses is not convincing.

24. We find that the Supreme Court has clearly opined in various decisions, such as Gopi Ram v St. Of UP, 2006 (55) ACC 673 SC, State of UP v Nawab Singh; 2005 SCC (Criminal) 33, Shivraj Bapuray Jadhav v State of Karnataka; (2003) 6 SCC 392, R.R. Reddy v State of AP, AIR 2006 SC 1656, Sucha Singh v State of Punjab; AIR 2003 SC 1471, State of Rajasthan v Arjun Singh AIR 2011 SC 3380, Varun Chaudhry v State of Rajasthan AIR 2011 SC 72 that the prosecution case could not be denied on the ground of alleged absence or insufficiency of motive. Motive is insignificant in cases of direct evidence of eyewitnesses. Failure to prove motive or absence of evidence on the point of motive would not be fatal to the prosecution case when the other reliable, truthful and acceptable evidence is available on record sufficient to establish the guilt of accused persons.

25. PW-3 Jhandu Singh is informant and injured witness. PW-4 Shivlal was present on the spot at the time of occurrence and was taking heat with the fire in company of informant Jhandu Singh.

26. PW-3 Jhandu Singh is injured witness. His presence on the spot cannot be denied. The reliability of injured witness has well been explained by the Hon'ble Apex Court in the case of ***State of U.P. vs. Naresh & others (2011) 4 SCC 324*** from which a relevant para is reproduced hereinunder for ready reference :-

".....The evidence of an injured witness must be given due weightage being a stamped witness, thus, his presence cannot be doubted. His statement is generally considered to be very reliable and it is unlikely that he has spared the actual assailant in order to falsely implicate someone else. The testimony of an injured witness has its own relevancy and efficacy as he has sustained injuries at the time and place of occurrence and this lends support to his testimony that he was present during the occurrence.

Thus, the testimony of an injured witness is accorded a special status in law. The witness would not like or want to let his actual assailant go unpunished merely to implicate a third person falsely for the commission of the offence.

Thus, the evidence of the injured witness should be relied upon unless there are grounds for the rejection of his evidence on the basis of major contradictions and discrepancies therein. [Vide: Jarnail Singh v. State of Punjab, (2009) 9 SCC 719; Balraje @ Trimbak v. State of Maharashtra, (2010) 6 SCC 673; and Abdul Sayad v. State of Madhya Pradesh, (2010) 10 SCC 259]. "

27. In another decision in the case of ***Mamo Dutt vs. State of U.P. (2012) 4 SCC 79,*** Hon'ble the Apex Court again reiterated the evidentiary value required to be attached to the evidence of an injured witness by observing thus:-

"Normally, an injured witness would enjoy greater credibility because he is the sufferer himself and thus, there will be no occasion for such a person to state an incorrect version of the occurrence, or to involve anybody falsely and in the bargain protect the real culprit.".....

28. Again in the case of ***Balwan Singh & others vs. State Of Haryana (2014) 13 SCC 560*** Hon'ble the Apex Court observed thus:

"It is trite law that the evidence of injured witness, being a stamped witness, is accorded a special status in law. This is as a consequence of the fact that injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness would not want to let actual assailant go unpunished."

29. PW-3 Jhandu Singh got injuries on his person in the incident. He was examined by Dr. S.C. Naugriya on 06.02.1980 at about 12:30 P.M. and injuries on his person were recorded by the doctor. Those injuries have been said to be caused on 05.02.1980 at about 8-9:00 P.M. in the night as stated by the doctor. Jhandu Singh has also stated about the incident to have taken place at about 8'o clock in the night. He also stated that injuries were caused on his head and arms. This gets support with the medical report Exibit Ka-1 and also with the statement given by PW-1 Dr. S.C. Naugriya.

30. PW-3 Jhandu Singh has told in his statement that accused/appellant was having lathi and caused injuries with it on his head and arms. PW-1 Dr. S.C. Naugriya has also mentioned in Exibit Ka-1 that except injury no.2 all injuries were possible to be caused with blunt object like lathi and injury no.2 was likely to be caused with some sharp object. He has further explained that injury no.2 could be caused with lathi having some sharp edged blade. In this way, it stands proved that injuries to PW-3 Jhandu Singh were caused with lathi at about 8:00 P.M. in the night of 05.02.1980.

31. Incident took place in the field where engine was placed on the well, which has clearly been stated by Jhandu Singh PW-3 and Shivlal PW-4. PW-5 S.I. Babu Ram had also explained in his statement about the place of occurrence which also gets support from site plan Exibit Ka-5. During cross-examination also informant Jhandu Singh had explained the place of occurrence to be on the well in the field where engine was placed and he had

also explained the directions and about the fields situated around the site. Blood stained and plain soil was also taken from the place of occurrence by Investigating Officer during inspection of spot and fard was prepared which he proved as Exibit Ka-9. All these support the statement of informant Jhandu Singh about the place of occurrence being in the field at well where engine was placed.

32. So far as the fact of enmity between the informant and accused/appellant is concerned, appellant has stated in his statement recorded under Section 313 Cr.P.C. that he was a wrestler and defeated Atiraj Singh brother of the informant in wrestling that was the reason he was implicated falsely and also on account of enmity related to field. In this regard nothing has been stated by informant Jhandu Singh during his cross-examination and no any other evidence has been brought on record by the appellant. On the other hand, it has been stated by the informant that appellant committed dacoity in the house of his nephew Shyam Pal in which his brother Atiraj Singh was witness. Co-accused was convicted and case was pending against him on account of which appellant was annoyed with Atiraj brother of informant. Further it has also been explained by the informant during cross-examination that there was no any field of appellant situated in the area. No other proof has been given by appellant which could show that his field was also situated near the field of informant and that caused enmity between them. So the argument relating to the fact of enmity due to wrestling and land dispute is not tenable.

33. It has further been submitted that in this case occurrence took place in the night at about 8:00 P.M. there was no source of light, so appellant could not have been identified by the informant but only on account of enmity he named him falsely. PW-3 Jhandu Singh had clearly stated during his examination-in-chief that he identified appellant in the light of torch. During cross-examination also he has reiterated the fact of torch. PW-4 Shivlal had also stated that he identified the appellant in the light of torch. This also gets supports with the statement of PW-6 S.I. Baburam who took the torch in his possession and prepared fard Exibit Ka-6 & 7. Argument in this regard has no force.

34. From testimony of injured informant PW-3 Jhandu Singh and eye-witness PW-4 Shivlal, it is proved beyond reasonable doubt that on 05.02.1980 at about 8:00 P.M. in the night appellant Chhotey in company of his other friend caused simple injuries with lathi to Jhandu Singh on his head and arms while taking heat beside the fire in the field where engine was placed. Finding recorded by the learned trial court to this extent, holding guilty to appellant, is correct and it requires no interference.

35. Now the argument by learned counsel for the appellant is that the offence does not come within the ambit of Section 307 I.P.C. because there was no intention to cause death of informant but it squarely falls within the purview of Section 323 I.P.C.

36. So far as, conviction of the appellant under Section 307 I.P.C. is concerned, it is expedient to examine the main ingredients of Section 307 I.P.C. which are (I) the act attempted should be of such nature that if not prevented or intercepted it would lead to the death of victim, (ii) the intention or mens rea to kill

is needed to be proved clearly without doubt for this purpose the prosecution can make use of the circumstances like attack by dangerous weapon on fatal part of body, however, the intention to kill cannot be gauged simply by seriousness of the injury caused, (iii) the intention and knowledge of the result of the act being done is the main thing that is needed to be proved for conviction under Section 307 I.P.C.

37. In this regard, in the case of ***State Of Maharashtra vs Balram Bama Patil AIR 1983 SC 305***, Hon'ble the Apex Court held in para 9:

"To justify a conviction under this section it is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds. The section makes a distinction between an act of the accused and its result, if any. Such an act may not be attended by any result so far as the person assaulted is concerned, but still there may be cases in which the culprit would be liable under this section. It is not necessary that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. What the Court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in this section. An attempt in order to be criminal need not be the penultimate act. It is sufficient in law, if there is present an intent coupled with some overt act in execution thereof."

38. Hon'ble the Apex Court has held in the case of ***Jage Ram vs. State of Haryana (2015) 11 SCC 366*** that :-

"12. For the purpose of conviction under Section 307 IPC, prosecution has to establish (i) the intention to commit murder and (ii) the act done by the accused. The burden is on the prosecution that accused had attempted to commit the murder of the prosecution witness. Whether the accused person intended to commit murder of another person would depend upon the facts and circumstances of each case. To justify a conviction under Section 307 IPC, it is not essential that fatal injury capable of causing death should have been caused. Although the nature of injury actually caused may be of assistance in coming to a finding as to the intention of the accused, such intention may also be adduced from other circumstances. The intention of the accused is to be gathered from the circumstances like the nature of the weapon used, words used by the accused at the time of the incident, motive of the accused, parts of the body where the injury was caused and the nature of injury and severity of the blows given etc."

39. Again it was reiterated in the Case of ***State of Madhya Pradesh Vs. Kanha @ Om Prakash, CrlA. No. 1589 of 2018.***

40. For the conviction under this section more importance is to be given to mens rea or intention than the actus reus or the actual acts itself. The attempt should arise out of a specific intention or desire to murder the victim. The nature of weapon used, the manner in which it is used, motive for the crime, severity of the blow, the part of the body where the injuries

inflicted is all taken into consideration to determine the intention.

41. In a case of an assault on the head with lathi, it is always a question of fact whether there was intention to cause death or other injury. The circumstances, manner of assault, nature and number of injuries will all have to be considered cumulatively.

42. In the F.I.R., it has been mentioned that appellant asked informant about his brother Atiraj Singh and when he told that Atiraj Singh was at home, appellant alongwith his friend assaulted with lathi with the intention of causing death but it has not been mentioned anywhere that appellant was uttering such words while causing injuries on his person. Even during his examination before the court he has not stated that appellant was uttering such words expressing his intention to kill him. PW-4 Shivlal has also not stated any word in this regard that appellant was uttering words expressing his intention to kill Jhandu Singh. It reveals that appellant might be furious on Atiraj because he was witness in the case of dacoity which was committed at the house of Shyampal nephew of informant but not against the informant Jhandu Singh. When Jhandu Singh told him that Atiraj Singh was at home appellant assaulted him with lathi while saying "isi ko le lo". This expression does not at all infer the intention of appellant to kill Jhandu Singh. No any other enmity with the appellant has been disclosed in the testimony of informant during examination before the Court, therefore, it cannot be concluded that there was any intention or motive in the mind of appellant to kill Jhandu Singh. The nature of injuries caused to Jhandu Singh also shows that all injuries are simple though some of them are on the head and others are on his arms but no any injury is of such nature as can be said to be grievous. In the opinion of the doctor PW-1 all injuries are simple and caused with lathi. He has nowhere stated that the injuries are fatal to the life of injured Jhandu Singh. Though lathi can be used to cause grievous injuries but it depends on force used. The nature of injuries shows that no much force was used while making assault with lathi otherwise it might have caused grievous injuries on the head and on the other parts of the body. In this way, it transpires from material on record that appellant had no intention to cause death of informant Jhandu Singh but he only intended to cause voluntarily simple hurt to him which cannot come within the purview of offence as defined under Section 307 I.P.C. and the manner committing the offence itself brings the case within the limits of Section 323 I.P.C.

43. Moreover, in the present case injuries were caused by lathi. The injuries in the opinion of doctor were simple, therefore, it is apparent that accused did not want to use lathi with the intention of causing death of informant. From this aspect also the present case does not fulfill the ingredients of Section 307 I.P.C. but it comes within the ambit of Section 323 I.P.C. Hence conviction of the appellant under Section 307 I.P.C. cannot be sustained.

44. In these circumstances of the case, this court is of the view that conviction of the appellant under Section 307 IPC cannot be sustained but appellant is liable to be convicted for the offence under Section 323 I.P.C.

45. In the case of ***Neelam Bahal and another vs. State of Uttarakhand 2010 (2) SCC 229*** where conviction and sentence of

appellant under Section 307 I.P.C. was converted into Section 326 I.P.C. simplicitor. Incident took place in the year 1987 and appellant was about 25 years old. Considering the facts and circumstances of the case, Hon'ble the Apex Court, reduced the sentence to the period already undergone by him.

46. In the present case, it is noteworthy that the incident took place in the year 1980 i.e. 41 years ago and it is said that now appellant is above 81 years old person. Record does not show that the appellant has any criminal antecedent and learned counsel for appellant has also submitted the same which could not be rebutted by learned counsel for the State.

47. Record shows that appellant has remained in jail from 10.03.1980 to 28.06.1980 and from 28.04.1983 to 21.03.1984 i.e. more than one year.

48. To sum up, the conviction & sentence imposed on the appellant under Section 307 I.P.C. is set aside instead he is convicted under Section 323 I.P.C. No any purpose will be served by sending the appellant (aged about 81 years) in jail after elapse of 41 years from the incident. The period of sentence is reduced to the period already undergone by him.

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

(2021)09ILR A621
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.09.2021

BEFORE

THE HON'BLE ANIL KUMAR OJHA, J.

Criminal Appeal No. 2327 of 1982

Natthu Singh & Ors. ...Appellants(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Pt. Mohan Chandra, Sri Anurag Shukla, Sri Imranullah, Sri Nazrul Islam Jafri, Sri A.B.L. Gaur (Senior Adv.)

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

(A) Criminal Law - appeal against conviction - Indian Penal Code, 1860 - 304 read with Section 34 - The Code of criminal procedure, 1973 - Section 161,313 - law on the point of cross case - non explanation of injuries by prosecution will not affect the prosecution case where injuries sustained by the accused are minor and superficial in nature.(Para - 25)

(B) Indian Evidence Act, 1872 - non-examination of *eye-witness* cannot be pressed into service like a ritualistic formula for discarding the prosecution case with a stroke of pen - Court can convict an accused on statement of sole witness even if he is relative of the deceased and non examination of *independent witness* would not be fatal to the case of prosecution - evidence of *related witnesses* is required to be carefully scrutinized and appreciated before any conclusion is made to rest upon it - if the testimony of an eye witness is otherwise found trustworthy and reliable, the same cannot be disbelieved merely on certain insignificant normal or natural contradiction have appeared in his testimony.(Para -18)

(B) Criminal Law - Indian Penal Code, 1860 - Section 300 (Exception 2) - culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds power given to him by law and causes the death of the person

against whom he is exercising such right of private defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence - suffice to say - appellant has not been convicted and sentenced for the offence of murder - convicted only under Section 304 read with Section 34 of I.P.C. - not entitled to benefit of doubt.(Para - 28)

Deceased uprooted some pea plants - appellant along with co-accused persons assaulted the deceased by lathi and farsa - Hearing the cry, witness reached on the spot - other witnesses PW-2, PW-3 also reached there and saw the incident - witness has said that incident took place at 06:00AM in the morning - at that time his brother deceased has gone to attend the nature's call - Case registered by PW-1, complainant (brother of deceased) - against the appellants - appellants convicted - hence appeal.

HELD:- Prosecution established its case beyond reasonable doubt against the sole surviving appellant no. 3 (Jaibir). Appellant has been convicted under Section 304 read with Section 34 of I.P.C.. Impugned judgment and order passed by lower court is within four corners of law. No illegality in the impugned order, therefore impugned order passed with regard to conviction and sentence of the appellant under Section 304 I.P.C., is hereby confirmed. (Para - 30,31,32,33)

Criminal Appeal dismissed. (E-7)

List of Cases cited:-

1. Mukesh & anr. Vs St. of NCT of Delhi & ors. , AIR 2017 SC 2161

2. Dahari & ors. Vs. St. of U.P., AIR (2012) 10 SCC 256

3. Bhagwan Jagannath Markad Vs. St. of Mah., (2016) 10 SCC 537

4. Ashok Kumar Chaudhary Vs St. of Bihar, 2008 (61) ACC 972 (SC)

5. Sucha Singh Vs St. of Punj., 2003 (47) ACC 555

6. Bhola Yadav Vs St. of U.P., 2002 (1) JIC 1010 (Allahabad)

7. Bheru Lal Vs St. of Raj., 2009 (66) ACC 997 (SC)

8. Bhagwan Jagannath Markad Vs St. of Mah., (2016) 10 SCC 537

9. Shaikh Majid Vs St. of Mah., 2008 (62) ACC 844 (SC) &

10. Sukumar Roy Vs St. of W.B., AIR 2006 SC 3406

11. Lakshmi Singh Vs St. of Bihar, 1976 LawSuit(SC) 325

12. Thaman Kumar Vs. St. of Union Territory of Chandigarh, 2003 (3) SCR 1190

(Delivered by Hon'ble Anil Kumar Ojha, J.)

This appeal relates to year 1982 and the same is nearly 39 years old.

2. Appeal of appellant no. 1 Nathu Singh has already been abated vide order dated 01.08.2016. Office has submitted report dated 02.08.2021 that appellant no. 2 Kali Charan has passed away therefore, appeal of appellant no. 2 Kali Charan stands abated. Now, the case of appellant no. 3 Jaibir Singh only is to be examined.

3. Heard learned counsel for the appellant no. 3 Jaibir, learned A.G.A. for the State and perused the records.

4. Challenge in this criminal appeal is the judgment and order dated 19.08.1982 passed by Vth Additional Sessions Judge, Aligarh in S.T. No. 40 of 1980 (State v. Nathu Singh and others), under Section 304 I.P.C., P.S. Gangiri, District Aligarh whereby the learned Vth Additional Sessions Judge, Aligarh has convicted and sentenced the appellants under Section 304

read with Section 34 of I.P.C. to undergo seven years of rigorous imprisonment.

5. Shorn of unnecessary details, the prosecution case is that the complainant Jauhari lodged an F.I.R. on 25.02.1979 at 17:00 hours in the evening at P.S. Gangiri, District Aligarh stating therein that on 25.02.1979 at about 06:00 hours in the morning the deceased Govind went to answer the nature's call in the field, there, he extirpated peas from the Nathu's field. Nathu, his son Kali Charan and Jaibir were guarding that field. Kali Charan was armed with farsa, Nathu and Jaibir were armed with lathi. They caught hold Govind and started assaulting by lathi and farsa. After hearing scream of Govind, complainant Jauhari, Kamta Singh, Khubaram and Sarnam who belong to his village rushed to the spot, when complainant and witnesses reached there, Kali Charan exhorted and said that in case they will come forward, they will be killed. They left the injured Govind lying on the field there. Thereafter, complainant was taking the injured to hospital in bullock-cart and in the way to the hospital injured Govind died near Bilona. The complainant and witnesses have seen the accused persons assaulting the deceased by lathi and farsa.

6. On written report submitted by complainant Jauhari, a case was registered against the appellants Nathu, Kali Charan and Jaibir in Case Crime No. 30 of 1979, under Section 304 I.P.C., P.S. Gangiri, District Aligarh.

7. The investigation of case was entrusted to PW4 Banwari Lal Gautam who recorded statements of witnesses under Section 161 Cr.P.C., visited the spot and prepared site plan. After completion of investigation, investigating officer submitted charge sheet against the appellants Nathu, Kali Charan and Jaibir Singh in Case Crime No. 30 of 1979, under Section 304 I.P.C., P.S. Gangiri, District Aligarh.

8. The then Additional Judicial Magistrate, Aligarh, on 22.10.1980 committed the case of appellants to the Sessions Court for trial. The then Additional Sessions Judge, Aligarh on 23.04.1981 framed charges against the appellants Nathu, Kali Charan and Jaibir under Sections 304 read with Section 34 of I.P.C. and in alternative Section 302 read with Section 34 of I.P.C. Appellants denied the charges and claimed trial.

9. Prosecution was called upon to adduce evidence to substantiate the prosecution case. Evidence of PW1 Jauhari, PW2 Sarnam Singh, PW3 Kamta Prasad were recorded to prove the prosecution case. All the three witnesses have supported the prosecution case.

10. PW4 Banwarli Lal Gautam is the investigating officer of the case and proved the documents such as panchayatnama Ex. K-2, F.I.R. Ex. K-3, Chik Report Ex. K-5, Site plan Ex. K-7 and charge sheet Ex. K-8.

11. PW5 Dr. K. K. Agarwal conducted the post mortem examination of the deceased Govind on 28.02.1979 and found following ante mortem injuries on his person:

(1) Incised wound 1-1/2" x 1/2" x muscle deep on the right upper lip.

(2) Incised wound 1"x 1/4" muscle deep 2" above the left eyebrow on the left side of forehead.

(3) Lacerated wound 3/4" x 3/10" x muscle deep on the back of right elbow joint.

(4) Lacerated wound 2 1" x 4/10" x muscle deep on upper part of right forearm on the back.

(5) Lacerated wound 1/2" x 1/4" x muscle deep on the back of right elbow joint.

(6) Contusion on 3" x 2" on the back of right palm.

(7) Lacerated wound 1/2" x 1/4" x muscle deep on the front of right leg in it upper 1/3rd.

(8) Lacerated wound 3" x 1" x bone deep on the front of right leg below injury no. 7. Bone fracture & protended out.

(9) Lacerated wound 1-1/4" x 1/2" x muscle deep on the outer side of right leg on its middle 1/3rd part.

(10) Lacerated wound 3-1/2" x 2" x bone deep on the front of right leg on its middle of lower 1/3rd part. Tibia on preclaimed and protended out.

(11) Lacerated wound 4" x 1" x bone deep on the shine of left leg 2" below the knee joint.

(12) Lacerated wound 4" x 1/2" x bone deep 1" below the injury No. 11.

(13) Abraded contusion 4" x 2" on the back of left fore arm on the middle 1/3rd.

(14) Contusion 2" x 2" on the outer side of Rt. Buttock.

(15) Contusion 8" x 3" on the front of left side of chest 6" below the coller bone.

12. After completion of evidence, statement of appellants under Section 313 Cr.P.C. was recorded. Appellant Jaibir denied the evidence and said that he does not know how and when the deceased Govind died. Police has colluded with complainant Jauhari. He has been falsely implicated owing to enmity. All the witnesses are relatives of the deceased Govind.

13. Defence also produced DW1 S. N. Sharma as defence witness.

14. After hearing learned counsel for the prosecution and defence, the then Vth Additional Sessions Judge, Aligarh convicted and sentenced the appellant as above.

15. Aggrieved by the aforesaid order appellant preferred this appeal before this Court.

16. Learned counsel for the appellant no. 3 Jaibir submitted that there is unexplained delay of eleven hours in lodging the F.I.R. Witnesses have not seen the occurrence. All the witnesses are interested witnesses. There is cross version of the present case. Prosecution case is doubtful. Appellant Jaibir is entitled to benefit of doubt and deserves acquittal. Appeal should be allowed and appellant Jaibir should be acquitted.

17. Per contra, learned A.G.A. opposed the above submissions put forward by learned counsel for the appellant and contended that prosecution cannot take the defence of cross case. The evidence of witnesses is reliable and trustworthy. Further submitted that delay in lodging the F.I.R. is not fatal for the prosecution case as informant/complainant Jauhari is of the

village background. Prosecution has established its case beyond reasonable doubt against the appellants including Jaibir. There is no contradiction between oral and medical evidence rather medical evidence corroborates the prosecution case. Appeal has no legs to stand, hence, it should be dismissed.

18. Learned counsel for the appellant Jaibir submitted that PW1 is brother of deceased Govind. PW2 Sarnam Singh is also related with the informant and deceased. PW3 Kamta Prasad is also related witness, so relying on the testimony of the related witnesses, it would not be safe to record conviction against the appellant. Prosecution has not produced any independent witness. He further submitted that there are material contradictions in the statement of witnesses so on account of material contradictions, the evidence of PW1, PW2 and PW3 is unworthy of credence.

In ***Mukesh and another v. State of NCT of Delhi and others AIR 2017 SC 2161,*** Hon'ble Apex Court has held that the if a witness examined in the court is otherwise found reliable and trustworthy, the fact sought to be proved by the witness need not be further proved through other witnesses though there may be other witnesses available who could have been examined but were not examined. Non-examination of material witnesses is not a mathematical formula for discarding the weight of the testimony available on record however natural, trustworthy and convincing it may be. It is settled law that non-examination of eye-witness cannot be pressed into service like a ritualistic formula for discarding the prosecution case with a stroke of pen. Court can convict an accused on statement of sole witness even if he is relative of the deceased and non examination of independent witness would not be fatal to the case of prosecution.

In ***Dahari and others Vs. State of U.P. AIR (2012) 10 SCC 256,*** the Hon. Apex Court has held as follows:

"It is settled legal proposition that the evidence of closely related witnesses is required to be carefully scrutinised and appreciated before any conclusion is made to rest upon it, regarding the convict/accused in a given case. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon."

In ***Bhagwan Jagannath Markad Vs. State of Maharashtra, (2016) 10 SCC 537,*** the Hon. Apex Court has held as follows:

"We may also refer to the judgment of this Court in Masalti versus State of U.P. [26] to the effect that the evidence of interested partisan witnesses though required to be carefully weighed, the same could not be discredited mechanically. When a crowd of unlawful assembly commits an offence, it is often not possible to accurately describe the part played by each of the assailants. Though the appreciation of evidence in such cases may be a difficult task, the court has to perform its duty of sifting the evidence carefully."

In ***Ashok Kumar Chaudhary v. State of Bihar 2008 (61) ACC 972 (SC),*** the Hon'ble Apex Court has held that if the testimony of an eye witness is otherwise found trustworthy and reliable, the same cannot be disbelieved and rejected merely because certain insignificant, normal or

natural contradictions have appeared into his testimony. If the consistencies, contradictions, exaggerations, embellishments and discrepancies in the testimony are only normal and not material in nature, then the testimony of an eye witness has to be accepted and acted upon. Distinctions between normal discrepancies and material discrepancies are that while normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so."

Thus, it is settled legal position that evidence of related witnesses is required to be carefully scrutinized and appreciated before any conclusion is made to rest upon it. It is also settled law that if the testimony of an eye witness is otherwise found trustworthy and reliable, the same cannot be disbelieved merely on certain insignificant normal or natural contradiction have appeared in his testimony.

In the light of above settled legal position the evidence of eye witnesses PW1, PW2 and PW3 is being analyzed and evaluated. Evidence of PW-1, PW-2 & PW-3 cannot be discarded merely on the ground that they are related to each other and interested witnesses.

19. PW1 Jauhari has deposed in the court that on the day of alleged incident, deceased Govind uprooted some pea plants then appellant Jaibir along with co-accused persons assaulted the deceased Govind by lathi and farsa. This witness has further deposed that the appellant Jairam was armed with lathi. Hearing the cry, this witness reached on the spot, other witnesses Sarnam, Kamta Prasad also reached there and saw the incident. This witness has said that incident took place at 06:00AM in the morning, at that time his brother deceased Govind has gone to attend the nature's call. He also has gone for the same purpose. Defence extensively cross-examined this witness but no major contradiction is there in his evidence. This incident occurred in the year 1979, nearly 42 year ago, court can take judicial notice of the fact that at that time in the villages there was scarcity of toilets in U.P. and going to attend nature's call, in the field at 6 O'clock, in the morning was a natural phenomena in the villages in 1979. Evidence of PW1 is natural, probable and reliable.

20. PW2 Sarnam Singh has supported the prosecution version. He has stated in his examination-in-chief that the incident has taken place at about 05:30 or 06:00AM and at that time he was at this home. After hearing the commotion of Govind, Nathu Singh, Jaibir and Kali Charan, he rushed to the occurrence place and stopped before 20-25 steps from Nathu's field and saw that the appellants Nathu, Jaibir and Kali Charan were assaulting the deceased Govind. He further deposed that Kali Charan was having farsa and two other appellants namely Jaibir and Nathu were armed with lathies. Govind's brother Jauhari also reached there. When this witness asked to the appellants not to do so then the appellants threatened this witness to kill. Defence extensively cross-examined this witness but there is no major contradiction in the evidence of this witness. The evidence of PW2 is also probable and credible.

21. PW3 Kamta Prasad has also supported the prosecution version. He has stated in his examination-in-chief that the incident took place at about 06:00AM and at that time he was going to attend nature's

call. He heard the noise of appellants Nathu Singh, Jaibir and Kali Charan, who were assaulting the deceased Govind. He further deposed that Kali Charan was having farsa and two other appellants namely Jaibir and Nathu were armed with lathies. Along with him Sarnam and Khoob Singh also reached on the spot. This incident occurred in the year 1979, nearly 42 year ago, court can take judicial notice of the fact that at that time in the villages there was scarcity of toilets in U.P. and going to attend nature's call, in the field at 6 O'clock, in the morning was a natural phenomena in the villages in 1979. Defence extensively cross-examined this witness but there is no major contradiction in the evidence of this witness. The evidence of PW3 is also probable, credible and reliable.

22. Learned counsel for the appellant Jaibir submitted that there is cross version of the present case. There was injury on the person of accused Kali Charan, which was not explained by the prosecution, so prosecution case is doubtful.

23. In S***ucha Singh v. State of Punjab, 2003 (47) ACC 555*** Hon'ble Apex Court has held that there is no invariable rule that injuries sustained by the accused in the same transaction should be explained by prosecution. When major portion of evidence deficient but residue sufficient to prove the guilt of the accused, conviction can be recorded.

24. In ***Bhola Yadav v. State of U.P., 2002 (1) JIC 1010 (Allahabad)***, it has been held that in a criminal trial under Section 302/34 I.P.C. non-disclosure of superficial injuries sustained by the accused would not be fatal to prosecution, if injuries are self explained and consistent with the prosecution case and circumstances themselves explain such injuries. Prosecution case will not be affected adversely.

25. In ***Bheru Lal v. State of Rajasthan, 2009 (66) ACC 997 (SC)*** Hon'ble Apex Court has held that non explanation of injuries by prosecution will not affect the prosecution case where injuries sustained by accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy that it outweighs the effect of the omission on the part of prosecution to explain the injuries.

Bhagwan Jagannath Markad v. State of Maharashtra, (2016) 10 SCC 537; Shaikh Majid v. State of Maharashtra, 2008 (62) ACC 844 (SC) and Sukumar Roy v. State of W.B., AIR 2006 SC 3406, may also be cited on the above point.

Thus settled law on the point of cross case is that non explanation of injuries by prosecution will not affect the prosecution case where injuries sustained by the accused are minor and superficial in nature.

26. So far as the facts of the present case are concerned, DW-1 S. L. Sharma, pharmacist has proved Ex. Kha-2. This witness has deposed in the court in his cross-examination at page no. 32 of the paper book that injured himself came there. There was no police personnel with him and there was no police report. If anyone comes as a private case, then doctor can examine him after taking fees. Perusal of the Ex. Kha-2 reveals that Kali Charan s/o Nathu, R/o Muria Khera Gangiri, Aligarh was examined on 25.02.1979 at 01:00PM. Dr. K. S. Yadav found following injuries

on his person: Scratch abrasion linear 4 cm x 1/8 cm. on left side of abdomen lower. Simple by friction with pointed. Duration recent.

Thus, from the above injury of appellant Kali Charan, it can be said that same was simple and superficial in nature and the appellant cannot get the benefit of cross version.

27. Learned counsel for the appellant relied upon the law laid down by the Hon'ble Apex Court in ***Lakshmi Singh v. State of Bihar, 1976 LawSuit(SC) 325*** and submitted that if there is a defence version which explains the injuries on the person of accused. It is rendered probable so as to throw doubt on the prosecution case. The omission on the part of prosecution to explain injuries on the person of accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which completes in probability with that of prosecution one.

The authority relied upon by the learned counsel for the appellant is not applicable to the facts of the present case because the injury sustained by the appellant Kali Charan is simple and superficial in nature.

28. Learned counsel for the appellant submitted that there is contradiction between medical and oral evidence. So appellant is entitled to benefit of doubt. I do not agree with the above contention of learned counsel for the appellant.

In ***Thaman Kumar Vs. State of Union Territory of Chandigarh 2003 (3) SCR 1190,*** the Hon. Apex Court has held as follows:

"*The conflict between oral testimony and medical evidence can be of varied dimensions and shapes. There may be a case where there is total absence of injuries which are normally caused by a particular person. There is another category where though the injuries found on the victim are of the type which are possible by the weapon of assault, but the size and dimension of the injuries do not exactly tally with the size and dimension of the weapon. The third category can be where the injuries found on the victim are such which are normally caused by the weapon of assault but they are not found on that portion of the body where they are deposed to have been caused by the eye-witnesses. The same kind of inference cannot be drawn in the three categories of apparent conflict in oral and medical evidence enumerated above. In the first category it may legitimately be inferred that the oral evidence regarding assault having been made from a particular weapon is not truthful. However,* in the second and third category no such inference can straightway be drawn.

The manner and method of assault, the position of the victim, the resistance offered by him, the opportunity available to the witnesses to see the occurrence like their distance, presence of light and many other similar factors will have to be taken into consideration in judging the reliability of ocular testimony."

So far as facts of the present case are concerned, there is no contradiction between oral and medical evidence because Dr. K. K. Agarwal P.W.-5 who has conducted the post mortem examination of the deceased Govind found 15 ante mortem injuries on the person of the deceased. He has opined that the injuries on the person of

the deceased Govind could be of 25.02.1979 at 06:00 hours in the morning. The lacerated wounds and contusions can be caused by blunt object like lathi and incised wound can be caused by sharp edged weapon like farsa. It is pertinent to note here that PW1 Jauhari, PW2 Sarnam Singh and PW3 Kamta Prasad have given consistent evidence that Kali Charan was armed with farsa and appellant Jaibir and Nathu Singh were armed with lathies. There were injuries of lathi and farsa both on the person of the deceased Govind. Thus, there is no contradiction or inconsistency between medical and oral evidence rather medical evidence corroborates the oral evidence of PW-1 Jauhari, PW-2 Sarnam Singh and PW-3 Kamta Prasad.

29. Learned counsel for the appellant next submitted that there is delay of eleven hours in lodging the F.I.R. and no plausible reason has been given for the same and on this basis the prosecution case should be thrown out. I do not agree with the above contention of the learned counsel for the appellant because the complainant belongs to village background. It is pertinent to note here that the injured Govind was being taken to hospital by bullock-cart which can travel one or two kilometers per hour. It is also notable that on the way to hospital the injured Govind succumbed to injuries. Therefore, it can be held that under the circumstances of the present case eleven hours delay in lodging the F.I.R. would not create doubt in the prosecution case.

30. Learned counsel for the appellant lastly submitted that in any case, when deceased Govind uprooted the pea plants, it is in the right of private defence, appellants beaten him. It can be a case of only exceeding the right of private defence.

In Section 300 I.P.C., Exception 2, there is provision that culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds power given to him by law and causes the death of the person against whom he is exercising such right of private defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence. On this point it would be suffice to say that appellant Jaibir has not been convicted and sentenced for the offence of murder, he has been convicted only under Section 304 read with Section 34 of I.P.C. with seven years of rigorous imprisonment, so appellant Jaibir cannot get the benefit on the aforesaid argument.

31. The upshot of the above discussion is that the prosecution has established its case beyond reasonable doubt against the sole surviving appellant Jaibir.

32. From the perusal of the impugned judgment passed by the court below, it is evident that that appellant has been convicted under Section 304 read with Section 34 of I.P.C. to undergo seven years of rigorous imprisonment.

33. The impugned judgment and order passed by lower court is within four corners of law. There is no illegality in the impugned order, therefore impugned order dated 19.08.1982 passed by Vth Additional Sessions Judge, Aligarh with regard to conviction and sentence of the appellant in S.T. No. 40 of 1980 (State v. Nathu Singh and others), under Section 304 I.P.C., P.S. Gangiri, District Aligarh is hereby confirmed. Appeal lacks merit and is liable to be dismissed.

34. Accordingly, this appeal is **dismissed.**

35. Appellant Jaibir is on bail, he be taken into custody to serve out the remaining sentence. His bonds are cancelled and sureties are discharged.

36. Copy of this judgment be certified to the court below for compliance. Lower court record be transmitted to the District Court, concerned forthwith.

(2021)09ILR A630
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 09.09.2021

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Criminal Revision No. 540 of 2021

Shivam Pandey @ Shiva & Anr.
...Revisionists
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionists:
Rajiva Dubey

Counsel for the Opposite Parties:
Mr. Alok Tiwari (Addl. Govt. Advocate)

A. Criminal Law - Code of Criminal Procedure,1973-Section 397/401, 319 - Indian Penal Code,1860-Section 364, 392, 419, 420-quashing of summoning order passed u/s 319 Cr.P.C.-statement of PW2 ,PW3, PW4 depicts clear motive of the revisionists-they threatened the abductee prior to the abduction-abductee had an illicit relationship with the sister of revisionist-Three witnesses given last scene evidence against the revisionists-strong and cogent evidence available against the revisionist is more than enough to summon the accused persons-Trial court committed no illegality in passing the order.(Para 1 to 29)

B. If the evidence tendered in the course of any enquiry or trial shows that any person not being the accused has committed any offence for which he could be tried together with the accused, he can be summoned to face trial even though he may not have been charge-sheeted by the investigating agency or may have been discharged at an earlier stage.(Para 17 to 20)

The revision is dismissed. (E-6)

List of Cases cited:

1. Hardeep Singh & ors. Vs St of Punj. & ors. (2014) AIR SCW 667

2. Brijendra Singh & ors. Vs St. of Raj. (2017) AIR SC 2839

3. Rajendra Singh Vs St. of U.P. & anr. (2007) 7 SCC 387

4. Gaurav @ Nilwa Vs St. of U.K. & anr. (2020) 112 ACC 186

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

1. Heard learned counsel for petitioners as well as Shri Alok Tiwari, learned Additional Government Advocate for State.

2. The present 482 Cr.P.C. application has been filed to quash the impugned order dated 19.8.2021, passed by Addl. Sessions Judge/FTC (New), Lakhimpur Kheri vide S.T. No.707 of 2018, Crime No.894 of 2018 under sections 364, 392, 419, 420 I.P.C., P.S. Kotwali Sadar, district Lakhimpur Kheri, whereby the application moved by the prosecution under Section 319 CrPC has been allowed and the revisionsits have been summoned to face trial.

3. Learned counsel for the revisionists submitted that the trial Court has illegally summoned the revisionists. In the statement under section 161 CrPC none of the prosecution witnesses has taken the name of the revisionists. It is submitted that relying on the evidence of P.W.1, P.W.2, P.W.3 and P.W.4, learned trial court has, though summoned the revisionists under section 319 CrPC, however, has failed to record any satisfaction as mandated by the Supreme Court in the case of **Hardeep Singh and others** versus **State of Punjab and others 2014 AIR (SCW) 667**.

4. The next ground raised by the revisionists' counsel is that the statement of the prosecution witnesses under section 161 CrPC and the material collected during investigation by the investigating officer have not been taken into account while summoning the revisionists.

5. Per contra, learned A.G.A. has submitted that the prosecution witnesses P.W.1, P.W.2, P.W.3 and P.W.4 in their statement before the court have assigned the motive of committing the crime to the revisionists. P.W.2, P.W.3 and P.W.4 have given the last seen evidence against the revisionists. P.W.2, P.W.3 and P.W.4 have also stated that the threat was extended by the revisionists to the deceased few days back and the trial court after considering the evidence of all four prosecution witnesses and after finding more than a prima facie case has rightly summoned the revisionists. There is no illegality in the order impugned.

6. A perusal of the evidence of P.W.1 Manoj Kumar Mathur shows that he came to know that the abductee Mobin has developed illicit relationship with the sister of revisionist No.1 Shivam Pandey. Mobin was working as driver with the witness and that is why, after coming to know the illicit relationship, he has terminated his service.

7. P.W.2 Razia wife of the abductee Mobin has stated that the revisionists 1 and 2 went with her husband Mobin. They were seen by another prosecution witness Salim. She has also corroborated and reiterated the illicit relationship of Mobin with the sister of revisionist No.1. 3 to 10 days prior, her husband Mobin was threatened by revisionists that either he leaves Lakhimpur Kheri and forget their sister or his family members will not be able to trace his body. She has further stated that on 8.8.2018 at 6.30p.m., her husband was taken by the revisionists. She has also stated that she had moved an application to the Superintendent of Police, Kheri and has told him that the revisionists in collusion with Abhishek Verma and Naman Verma, co-accused have abducted her husband.

8. P.W.3 Salim has stated that he has seen the revisionists 1 and 2 with the abductee Mobin on 8.8.2018 at around 6-7 p.m..

9. P.W.4 Baheed in his examination in chief has also stated that the abductee Mobin developed relationship with the sister of revisionist No.1. When it came to the knowledge of revisionists 1 and 2, they went to the house of Mobin at around 6.00p.m. and threatened Mobin to leave Lakhmpur Kheri, or else his family members will not be able to trace his dead body.

10. The trial Court on due appreciation of evidence of the prosecution witnesses P.W.2, P.W.3 and P.W.4 has found that all the three prosecution witnesses have taken the name of both the

revisionists and have supported the story of committing the crime by them, hence has summoned the revisionists.

11. Learned counsel for the revisionists has relied on the judgment in Hardeep Singh's case (supra) and submitted that the trial court should have recorded its satisfaction that the evidence which has been adduced by the prosecution is sufficient and if it goes unrebutted, it will lead to conviction. Relevant para 99 of the judgment in Hardeep Singh's case (supra) is reproduced as below :

?99. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court not necessarily tested on the anvil of Cross-Examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 Cr.P.C. In Section 319 CrPC the purpose of providing if ?it appears from the evidence that any person not being the accused has committed any offence? is clear from the words ?for which such person could be tried together with the accused.? The words used are not ?for which such person could be convicted?. There is, therefore, no scope for the Court acting under Section 319 Cr.P.C. to form any opinion as to the guilt of the accused.?

12. A perusal of the aforesaid judgment (relevant para 99) shows that the test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction.

13. In the present case, I find that the trial court was satisfied that on the basis of the evidence of P.W.2, P.W.3 and P.W.4 , prima facie case against the revisionist is made out. There is no requirement for the court while issuing summons to the persons summoned under section 319 CrPC to form any opinion regarding guilt of the accused.

14. The learned counsel has further relied on Brijendra Singh and others versus State of Rajasthan 2017 AIR (SC) 2839. Relevant para 13 is extracted below :

?13. In order to answer the question, some of the principles enunciated in Hardeep Singh?s case may be recapitulated:

Power under Section 319 Cr.P.C. can be exercised by the trial court at any stage during the trial, i.e., before the conclusion of trial, to summon any person as an accused and face the trial in the ongoing case, once the trial court finds that there is some ?evidence? against such a person on the basis of which evidence it can be gathered that he appears to be guilty of offence. The ?evidence? herein means the material that is brought before the Court during trial. Insofar as the material/evidence collected by the IO at the stage of inquiry is concerned, it can be utilised for corroboration and to support the evidence recorded by the Court to invoke the power under Section 319Cr.P.C. No doubt, such evidence that has surfaced in examination-in-chief, without cross-examination of witnesses, can also be taken into consideration. However, since it is a

discretionary power given to the Court under Section 319Cr.P.C. and is also an extraordinary one, same has to be exercised sparingly and only in those cases where the circumstances of the case so warrants. The degree of satisfaction is more than the degree which is warranted at the time of framing of the charges against others in respect of whom chargesheet was filed. Only where strong and cogent evidence occurs against a person from the evidence led before the Court that such power should be exercised. It is not to be exercised in a casual or a cavalier manner. The prima facie opinion which is to be formed requires stronger evidence than mere probability of his complicity.?

15. In the case of Brijendra Singh (supra), it has been held by Supreme Court that prima facie opinion which is to be formed requires stronger evidence than mere probability of his complicity of the accused and the degree of satisfaction should be more than the degree which is warranted at the time of framing of charges. It is further held that even such evidence which has surfaced in the examination in chief without cross examination can be taken into consideration.

16. In the present case, the evidence of P.W.2, P.W.3 and P.W.4 makes it more than prima facie evidence and strong and cogent evidence has been given against the revisionists.

17. Learned A.G.A. on the other hand has relied on judgment in **Rajendra Singh** versus **State of U.P. and another (2007)7 SCC 378**. It has been held that if the evidence tendered in the course of any enquiry or trial shows that any person not being the accused has committed any offence for which he could be tried together with the accused, he can be summoned to face trial even though he may not have been charge-sheeted by the investigating agency or may have been discharged at an earlier stage. .

18. In **Gaurav @ Nilwa** versus **State of Uttarakhand and another** [2020(112)ACC 186, the High Court of Uttarakhand while summing up law laid down in Hardeep Singh's case (supra) held as under (relevant para 10) :

?10. From the law laid down by Honble Apex Court in Hardeep Singhs case (supra), it emerges that- (i) the Court can exercise power under Section 319 Cr.P.C. even on the basis of the statement made in examination-in-chief of witnesses concerned; and (ii) Court need not wait till the cross examination of such a witness and the Court need not wait for the evidence against accused proposed to be summoned to be tested by cross examination and to a person not named in the FIR or a person so named in the FIR, but, to have not been charge-sheeted or a person who has been discharged can be summoned under Section 319 Cr.P.C., provided from the evidence it appears that such person can be tried along with accused already facing trial.?

19. In regard to the arguments of the revisionists' counsel that the material collected by the investigating officer has to be taken into account, he has relied on para 110 of the judgment in Hardeep Singh's case (supra), which is extracted hereinunder :

?110. We accordingly sum up our conclusions as follows:

Question Nos.1 & III Q.1 What is the stage at which power under Section 319 Cr.P.C. can be exercised?

AND Q.III Whether the word "evidence" used in Section 319 (1) Cr.P.C. has been used in a comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial?

A. In Dharam Pal's case, the Constitution Bench has already held that after committal, cognizance of an offence can be taken against a person not named as an accused but against whom materials are available from the papers filed by the police after completion of investigation. Such cognizance can be taken underSection 193 Cr.P.C. and the Sessions Judge need not wait till 'evidence' underSection 319Cr.P.C. becomes available for summoning an additional accused.

Section 319 Cr.P.C., significantly, uses two expressions that have to be taken note of i.e. (1) Inquiry (2) Trial. As a trial commences after framing of charge, an inquiry can only be understood to be a pre-trial inquiry. Inquiries under Sections 200, 201, 202 Cr.P.C.; and under Section 398 Cr.P.C. are species of the inquiry contemplated bySection 319 Cr.P.C. Materials coming before the Court in course of such enquiries can be used for corroboration of the evidence recorded in the court after the trial commences, for the exercise of power under Section 319Cr.P.C., and also to add an accused whose name has been shown in Column 2 of the chargesheet.

In view of the above position the word 'evidence' in Section 319 Cr.P.C. has to be broadly understood and not literally i.e. as evidence brought during a trial.

Question No. II Q.II Whether the word "evidence" used in Section 319(1) Cr.P.C. could only mean evidence tested by cross-examination or the court can exercise the power under the said provision even on the basis of the statement made in the examination-in-chief of the witness concerned?

A. Considering the fact that under Section 319Cr.P.C. a person against whom material is disclosed is only summoned to face the trial and in such an event underSection 319(4)Cr.P.C. the proceeding against such person is to commence from the stage of taking of cognizance, the Court need not wait for the evidence against the accused proposed to be summoned to be tested by cross-examination.

Question No. IV Q.IV What is the nature of the satisfaction required to invoke the power under Section 319 Cr.P.C. to arraign an accused? Whether the power under Section 319(1) CrPC can be exercised only if the court is satisfied that the accused summoned will in all likelihood be convicted?

A. Though underSection 319(4) (4)(b) Cr.P.C. the accused subsequently impleaded is to be treated as if he had been an accused when the Court initially took cognizance of the offence, the degree of satisfaction that will be required for summoning a person under Section 319 Cr.P.C. would be the same as for ?framing a charge. The difference in the degree of satisfaction for summoning the original accused and a subsequent accused is on account of the fact that the trial may have already commenced against the original accused and it is in the course of such trial that materials are disclosed against the newly summoned accused. Fresh summoning of an accused will result in delay of the trial - therefore the degree of

satisfaction for summoning the accused (original and subsequent) has to be different.

Question No.V Q.V Does the power under Section 319Cr.P.C. extend to persons not named in the FIR or named in the FIR but not chargesheeted or who have been discharged?

A. A person not named in the FIR or a person though named in the FIR but has not been chargesheeted or a person who has been discharged can be summoned under Section 319Cr.P.C. provided from the evidence it appears that such person can be tried along with the accused already facing trial. However, in so far as an accused who has been discharged is concerned the requirement of Sections 300 and 398 Cr.P.C. has to be complied with before he can be summoned afresh.

The matters be placed before the appropriate Bench for final disposal in accordance with law explained hereinabove.?

20. A perusal of the law laid down in the aforesaid case shows that enquiries under sections 200, 201, 202 CrPC and under section 396 CrPC are species of the inquiry contemplated by section 319 CrPC. However, it is no where held that if for the first time statement has been given before the court which was not given before the investigating officer, the trial court shall be precluded from summoning the accused; rather on the contrary in view of the aforesaid judgment, it is quite clear that if the evidence has been given by the prosecution witness regarding commission of the crime by a person and makes out more than a prima facie case greater than the degree of satisfaction at the stage of framing of charges, such persons can be summoned by the trial court. Therefore, the law in this respect can be summarised that if during enquiry or trial an evidence has come that a person who is not charge-sheeted and not an accused has committed a crime and that evidence is more than prima facie evidence and also shows more than probability, rather it is a strong or cogent evidence, the trial Court shall be within its right to summon that accused to face trial along with other co-accused persons. The satisfaction that requires should be lower than that on which the accused can be convicted, however, it has to be greater than mere a prima facie case or mere a probable case.

21. In the present case, P.W. 2 and P.W.4 have given clear cogent evidence regarding commission of crime by the present revisionists. They have assigned motive against the revisionists. They have also given the last seen evidence against the revisionists that they were seen with Mobin who has been abducted. P.W.2, P.W.3 and P.W.4 have also stated that the revisionists have threatened the abductee Mobin to kill. Thus, a cumulative reading of statements of these three witnesses depicts that the revisionists had a clear motive. They have extended threat 8-10 days prior to the abduction of Mobin and on the date of occurrence, these three witnesses have given last seen evidence against the revisionists and in view of the aforesaid law laid down by Supreme Court, it is more than enough to summon the accused persons.

22. At this stage, learned counsel for the revisionists submits that although discretion under section 319 CrPC is discretionary, however, while summoning the accused, the trial court should not act in

a casual manner and such discretion should be exercised sparingly.

23. I find that the trail court has been very careful and has gone through the evidence of the prosecution witnesses in detail and only then has summoned the revisionists to face trial. There is no illegality in the impugned order.

24. The revision, being devoid of merit, is dismissed.

(2021)09ILR A636
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.09.2021

BEFORE

THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Criminal Revision No. 1407 of 2021

Yogesh ...Revisionist (In Jail)
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Suresh Chandra Pandey, Sri Saurabh Pandey.

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

A. Criminal Law - Code of Criminal Procedure, 1973-Section 397/401 & Indian Penal Code, 1860-Section 147, 148, 149, 323, 342, 302/34 & Juvenile Justice (Care and Protection of Children) Act, 2015-Section 101, 102- application-bail rejected u/s 12 JJ Act-appeal preferred u/s 101 of the Act, turned down-age of the accused/revisionist determined as 16 years 6 months and 16 days on the date of incident-failure to grant a fair hearing would be equally a cause of prejudice to the accused as to the victim-victim/complainant would be entitled to a reasonable opportunity of being heard in a revision-right to be heard in revision would not stand excluded only for the reason that a person who claims such a right was not entitled to be heard at the stage of passing of the original order or at the appellate stage. (Para 1 to 82)

B. In a situation where substantial right would be effected or a prejudice is likely to result, an opportunity of hearing can legitimately be claimed as a matter of right when the order is assailed at the higher forum, irrespective of the right of hearing having been given at the stage when original order was passed. (Para 75 to 81)

C. The principle of audi alteram partem is a fundamental rule of natural justice and 'fair play in action' is its essence, which demands that before any order prejudicial to the interests of a person is passed, he must be given an opportunity to be heard.(Para 76)

The revision is allowed. (E-6)

List of Cases cited:

1. X S/o Laxman Vs St. Thru Pp & anr. CRLR No. 494 of 2021

2. Sandeep Kumar Bafna Vs St. of Mah. & ors. (2014) 16 SCC 623

3. Manharibhai Muljibhai Kakadia & anr. Vs Shailesbhai Mohanbhai Patel & ors. (2012) 10 SCC 517

4. Mohit @ Sonu & anr. Vs St. of U. P. & anr. (2013) 7 SCC 789

5. Babloo Pasi Vs St. of Jharkhand anr. (2008) 13 SCC 133

6. Jagannath Verma Vs St. of U.P.(2014) 8 ADJ 439

7. Mallikarjun Kodagali (dead) thru LRs Vs St. of Karn. & ors.

8. Amir Hamza Shaikh & ors. Vs St. of Mah. & anr. (2019) 8 SCC 387

9. J.K. International Vs St. (Govt of NCT of Delhi) & ors. (2001) 3 SCC 462

10. Ali M.K. & ors. Vs St. of Ker. & ors. (2003) 11 SCC 632

11. Mullins Vs Treasurer of Surrey (1880) 5 QBD 170

12. Shah Bhojraj Kuverji Oil Mills & Ginning Factory Vs Subhash Chandra Yograj Sinha (1961) AIR SC 1596

13. Calcutta Tramways Co. Ltd. Vs Corp. of Calcutta (1965) AIR SC 1728

14. West Derby Union Vs Metropolitan Life Assurance Co.(1897) AC 647

15. A.N. Sehgal Vs Raje Ram Sheoran (1991) AIR SC 1406

16. Tribhovandas Haribhai Tamboli Vs Gujarat Revenue Tribunal (1991) AIR SC 1538

17. Kerala State Housing Board Vs Ramapriya Hotels (P) Ltd.(1994) 5 SCC 672

18. R. Vs Taunton, St James (1829) 9 B&C 831 & Lord Esher in Barker, Re (1890) 25 QBD 285

19. Hardeep Singh & ors. Vs St. of Punj. & ors. (2014) 3 SCC 92

20. Patel Chunibhai Dajibha etc. Vs Narayanrao Khanderao Jambekar (1965) AIR SC 1457

21. The Martin Burn Ltd. Vs The Corpn of Calcutta (1966) AIR SC 529

22. M. V. Elisabeth Vs Harwan Investment & Trading Pvt. Ltd. (1993) AIR SC 1014

23. Sultana Begum Vs Prem Chand Jain (1997) 6 SCC 373

24. St. of Bih. Vs Bih. Distillery Ltd. (1997) AIR SC 1511

25. Institute of Chartered Accountants of India Vs M/s Price Waterhouse (1997) 6 SCC 312

26. South Central Railway Employees Co-operative Credit Society Central Railway Employees Co-operative Credit Society Employees Union Vs Registrar of Co-operative Societies (1998) 2 SCC 580

27. Shilpa Mittal Vs St. (NCT of Delhi) & anr. (2020) 2 SCC 787

28. U.O.I. Vs Hansoli Devi & ors. (2002) 7 SCC 273

29. Aswini Kumar Ghose Vs Arabinda Bose, Quebec Railway, Light Heat and Power Co. Vs Vandray (1953) SCR 1

(Delivered by Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. The seminal question which is before the Court at this stage of the proceedings is as to whether in a revision under Section 102 of the Juvenile Justice (Care and Protection of Children) Act, 20151, in a matter relating to consideration of bail to a 'child in conflict with law', the complainant/victim is to be afforded an opportunity of being heard.

2. The present criminal revision has been filed against the order dated 24.06.2021 passed by the Additional Sessions Judge/Special Judge POCSO Act, Mathura in Juvenile Criminal Appeal No. 39 of 2021 (Yogesh V. State of U.P. and Ors.) under Section 101 of the JJ Act, arising out of order dated 24.05.2021 passed by Incharge Principal Magistrate, Juvenile Justice Board in Case No. 77 of 2020, arising out of Crime No. 568 of 2020, under Sections 147, 148, 149, 323, 342, 302/34 of the India Penal Code2 at Police Station -Vrindavan, District-Mathura.

3. Heard Shri Saurabh Pandey, appearing along with Shri Suresh Chandra Pandey, learned counsel for the revisionist and Shri Vinod Kant, learned Additional Advocate General assisted by Shri Pankaj Saxena, learned Additional Government Advocate-I for the State-Opposite party.

4. The facts of the case, as reflected from the averments in the affidavit accompanying the memo of revision, indicate that the proceedings were initiated pursuant to an FIR dated 22.09.2020 registered as Case Crime no. 568 of 2020, under Sections 147, 148, 149, 323, 342, 302/34 of the Penal Code at Police Station-Vrindavan, District-Mathura. As per the FIR allegations the revisionist along with other co-accused had tied up the victim on to a chaff cutter and had beaten him with sticks till he died, and thereafter, they had fled away from the scene of crime. The postmortem report showed cause of death as shock due to ante-mortem head injury. The statement of the witnesses were recorded during the course of investigation and thereafter the police filed charge sheet under Sections 147, 148, 149, 323, 342, 302/34 of the Penal Code.

5. The age of the revisionist was determined by the Juvenile Justice Board3 vide order dated 22.03.2021, as 16 years 6 months and 16 days on the date of the incident. The District Probation Officer submitted its report before the Board on 10.02.2021 and thereafter, the bail application was rejected by the Board by order dated 24.05.2021 after recording that there was lack of family control over the accused and that his involvement in the heinous offence was due to his association with persons of criminal nature and for the reason of lack of moral values and family control there was possibility of his influencing and destroying the prosecution evidence. It was observed that there was a possibility of the accused being exposed to moral, physical and psychological danger and that his release would defeat the ends of justice. Accordingly, the bail application was rejected. Aggrieved against the aforesaid order, the revisionist preferred an appeal under Section 101 which was also rejected by the Additional Sessions Judge/Special Judge POCSO Act, Mathura upon due consideration of the facts and circumstances of the case and the material on record, reiterating the findings recorded by the Board.

6. The principal contention which is sought to be put forward by the counsel for the revisionist is that in a revision which arises out of an order passed by the Board under Section 12 of the JJ Act, rejecting the bail application, which has subsequently been affirmed in an appeal under Section 101, the complainant/victim cannot be said to be a necessary party entitled to an opportunity of hearing.

7. Learned counsel for the revisionist has submitted that an application for bail on behalf of the child in conflict with law is firstly required to be filed before the Board under Section 12 of the JJ Act, and as per the statutory provisions there is no requirement to provide any opportunity of hearing to the complainant/victim while deciding the bail application. Against the order of the Board rejecting the bail application, there is a provision of appeal under Section 101 which also does not stipulate providing of a hearing to the complainant/victim. It is submitted that in a case where the application for bail of the child in conflict with law has been rejected under Section 12 of the JJ Act, and the appeal preferred there against under

Section 101 has also been turned down, the remedy there-against is by filing a revision before the High Court under Section 102 of the JJ Act.

8. Learned counsel has strenuously urged that looking to the scheme of the Act, which is in the nature of beneficial legislation there being no clear provision with regard to grant of any opportunity to the complainant/victim at the stage of hearing of the bail application under Section 12 or at the stage of appeal under Section 101, there is no reason as to why a notice to the complainant/victim should be held necessary at the stage of revision under Section 102. It is submitted that looking to the legislative intent of the enactment there is no such indication which may require providing of opportunity of hearing to the complainant before proceeding to consider the prayer for bail at the stage of revision.

9. It was further submitted that an order of bail to a child in conflict with law cannot be held to cause any prejudice to the complainant/victim so as to require grant of opportunity of hearing in a revision under Section 102.

10. Attention has been drawn to Section 15A of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 18894 to contend that in terms of Section 15A thereof, there is a clear mandate for notice to the victim or his dependent and in case legislature had intended to grant the right of hearing to the complainant in proceedings relating to bail under the JJ Act, a similar provision could have been provided herein also. In the absence of any such specific provision, the requirement of granting an opportunity of hearing to the complainant/victim could not be read into the statute as a condition precedent for hearing of the revision.

11. Learned counsel has sought to contend that the practice of impleading the parties in a revision relating to a bail matter under Section 102 of the JJ Act has the effect of causing unwarranted delay in the hearing of the bail application relating to a juvenile. To support his submissions, learned counsel for the revisionist has placed reliance upon the order in **X S/o Laxman vs. State, Through Pp and Another5.**

12. Responding to the aforesaid contention learned Additional Advocate General has submitted that as per terms of the proviso to Section 102, there being a clear mandate that the High Court shall not pass any order under this section prejudicial to any person without giving him a reasonable opportunity of being heard, the complainant/victim would necessarily be required to be heard in a revision filed by the child in conflict with law in a bail matter. It is pointed out that in terms of the proviso to Section 102, any order to be passed on a revision filed by the accused, may have the effect of being prejudicial to the interest of the complainant/victim and therefore, a reasonable opportunity of being heard ought to be accorded to the complainant. He submits that any other interpretation would render the proviso to the section redundant.

13. Learned Additional Advocate General has further submitted that the JJ Act, 2015 has been promulgated as a beneficial enactment with the purpose of reform and rehabilitate the child in conflict with law and as such no analogy can be drawn with that of an adult offender facing

trial before a regular criminal court. He has submitted that in terms of the scheme of the Act, in a case when the bail of the juvenile is rejected, he is not sent to a jail but only to an observation home with the object of providing him avenues for reform. It is pointed out that the proviso to Section 12 indicates that the bail application can be rejected 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 and psychological danger or the person's release would defeat the ends of justice.

14. It is also submitted that one of the grounds on which the bail may be refused would be a situation where the person's release would defeat the ends of justice. It is contended that this would bring into fore the rights of the victim/complainant and in a particular set of facts, one of the grounds to refuse grant of bail to the juvenile would be whether his release would defeat the ends of justice. It is submitted that the proviso to Section 12(1) would indicate that the victim/complainant's interest may also be a ground for denial of bail. Referring to Section 102 of the JJ Act, 2015 which provides the forum of revision, it is pointed out that in terms of the proviso, the High Court is not to pass an order under the section prejudicial to any person without giving him a reasonable opportunity of being heard. Submission is that a conjoint reading of the proviso to Section 12(1) which enumerates the grounds for denial of bail together with the proviso to Section 102 would indicate the clear intention of the legislature to grant an opportunity to the victim/complainant to be heard at the stage of revision.

15. Rival contentions with regard to the requirement of a notice to the complainant/victim in a revision filed under Section 102 of the JJ Act in a matter relating to consideration of bail to a child in conflict with law, now fall for consideration.

16. The JJ Act, 2015 was enacted to consolidate and amend the law relating to children alleged and found to be in conflict with law and children in need of care and protection by catering to their basic needs through proper care, protection, development, treatment, social reintegration, by adopting a child friendly approach in the adjudication and disposal of matters in the best interest of children and for their rehabilitation.

17. The enactment was made in furtherance of the powers and duties conferred under various provisions of the Constitution, in particular, clause (3) of article 15, clauses (e) and (f) of article 39, article 45 and article 47, wherein the State is to ensure that all the needs of children are met and that their basic human rights are fully protected. The enactment also takes into consideration the standards prescribed by various international conventions to which the Government of India is a party.

18. The provisions under the JJ Act, 2015, which are relevant for the purposes of the controversy at hand and would be required to be referred, are as follows:-

"2. Definitions.--In this Act, unless the context otherwise requires,--

.....

(12) "child" means a person who has not completed eighteen years of age;

(13) "child in conflict with law" means a child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence;

(14) "child in need of care and protection" means a child--

(i) who is found without any home or settled place of abode and without any ostensible means of subsistence; or

(ii) who is found working in contravention of labour laws for the time being in force or is found begging, or living on the street; or

(iii) who resides with a person (whether a guardian of the child or not) and such person--

(a) has injured, exploited, abused or neglected the child or has violated any other law for the time being in force meant for the protection of child; or

(b) has threatened to kill, injure, exploit or abuse the child and there is a reasonable likelihood of the threat being carried out; or

(c) has killed, abused, neglected or exploited some other child or children and there is a reasonable likelihood of the child in question being killed, abused, exploited or neglected by that person; or

(iv) who is mentally ill or mentally or physically challenged or suffering from terminal or incurable disease, having no one to support or look after or having parents or guardians unfit to take care, if found so by the Board or the Committee; or

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

(vi) who does not have parents and no one is willing to take care of, or whose parents have abandoned or surrendered him; or

(vii) who is missing or run away child, or whose parents cannot be found after making reasonable inquiry in such manner as may be prescribed; or

(viii) who has been or is being or is likely to be abused, tortured or exploited for the purpose of sexual abuse or illegal acts; or

(ix) who is found vulnerable and is likely to be inducted into drug abuse or trafficking; or

(x) who is being or is likely to be abused for unconscionable gains; or

(xi) who is victim of or affected by any armed conflict, civil unrest or natural calamity; or

(xii) who is at imminent risk of marriage before attaining the age of marriage and whose parents, family members, guardian and any other persons are likely to be responsible for solemnisation of such marriage;

(20) "Children's Court" means a court established under the Commissions

for Protection of Child Rights Act, 2005 (4 of 2006) or a Special Court under the Protection of Children from Sexual Offences Act, 2012 (32 of 2012), wherever existing and where such courts have not been designated, the Court of Sessions having jurisdiction to try offences under the Act;

(33) "heinous offences" includes the offences for which the minimum punishment under the Indian Penal Code (45 of 1860) or any other law for the time being in force is imprisonment for seven years or more;

(35) "juvenile" means a child below the age of eighteen years;

(40) "observation home" means an observation home established and maintained in every district or group of districts by a State Government, either by itself, or through a voluntary or non-governmental organisation, and is registered as such, for the purposes specified in sub-section (1) of section 47;

(45) "petty offences" includes the offences for which the maximum punishment under the Indian Penal Code (45 of 1860) or any other law for the time being in force is imprisonment up to three years;

(54) "serious offences" includes the offences for which the punishment under the Indian Penal Code (45 of 1860) or any other law for the time being in force, is imprisonment between three to seven years;

10. Apprehension of child alleged to be in conflict with law.--(1) As soon as a child alleged to be in conflict with law is apprehended by the police, such child shall be placed under the charge of the special juvenile police unit or the designated Child Welfare Police Officer, who shall produce the child before the Board without any loss of time but within a period of twenty-four hours of apprehending the child excluding the time necessary for the journey, from the place where such child was apprehended:

Provided that in no case, a child alleged to be in conflict with law shall be placed in a police lockup or lodged in a jail.

(2) The State Government shall make rules consistent with this Act,--

(i) to provide for persons through whom (including registered voluntary or non-governmental organisations) any child alleged to be in conflict with law may be produced before the Board;

(ii) to provide for the manner in which the child alleged to be in conflict with law may be sent to an observation home or place of safety, as the case may be.

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 be 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 fulfil 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.

14. Inquiry by Board regarding child in conflict with law.--(1) Where a child alleged to be in conflict with law is produced before Board, the Board shall hold an inquiry in accordance with the provisions of this Act and may pass such orders in relation to such child as it deems fit under sections 17 and 18 of this Act.

(2) The inquiry under this section shall be completed within a period of four months from the date of first production of the child before the Board, unless the period is extended, for a maximum period of two more months by the Board, having regard to the circumstances of the case and after recording the reasons in writing for such extension.

(3) A preliminary assessment in case of heinous offences under section 15 shall be disposed of by the Board within a period of three months from the date of first production of the child before the Board.

(4) If inquiry by the Board under sub-section (2) for petty offences remains inconclusive even after the extended period, the proceedings shall stand terminated:

Provided that for serious or heinous offences, in case the Board requires further extension of time for completion of inquiry, the same shall be granted by the Chief Judicial Magistrate or, as the case may be, the Chief Metropolitan Magistrate, for reasons to be recorded in writing.

(5) The Board shall take the following steps to ensure fair and speedy inquiry, namely:--

(a) at the time of initiating the inquiry, the Board shall satisfy itself that the child in conflict with law has not been subjected to any ill-treatment by the police or by any other person, including a lawyer or probation officer and take corrective steps in case of such ill-treatment;

(b) in all cases under the Act, the proceedings shall be conducted in simple manner as possible and care shall be taken to ensure that the child, against whom the

proceedings have been instituted, is given child-friendly atmosphere during the proceedings;

(c) every child brought before the Board shall be given the opportunity of being heard and participate in the inquiry;

(d) cases of petty offences, shall be disposed of by the Board through summary proceedings, as per the procedure prescribed under the Code of Criminal Procedure, 1973 (2 of 1974);

(e) inquiry of serious offences shall be disposed of by the Board, by following the procedure, for trial in summons cases under the Code of Criminal Procedure, 1973 (2 of 1974);

(f) inquiry of heinous offences,--

(i) for child below the age of sixteen years as on the date of commission of an offence shall be disposed of by the Board under clause (e);

(ii) for child above the age of sixteen years as on the date of commission of an offence shall be dealt with in the manner prescribed under section 15.

16. Review of pendency of inquiry.-- (1) The Chief Judicial Magistrate or the Chief Metropolitan Magistrate shall review the pendency of cases of the Board once in every three months, and shall direct the Board to increase the frequency of its sittings or may recommend the constitution of additional Boards.

(2) The number of cases pending before the Board, duration of such pendency, nature of pendency and reasons thereof shall be reviewed in every six months by a high level committee consisting of the Executive Chairperson of the State Legal Services Authority, who shall be the Chairperson, the Home Secretary, the Secretary responsible for the implementation of this Act in the State and a representative from a voluntary or non-governmental organisation to be nominated by the Chairperson.

(3) The information of such pendency shall also be furnished by the Board to the Chief Judicial Magistrate or the Chief Metropolitan Magistrate and the District Magistrate on quarterly basis in such form as may be prescribed by the State Government.

17. Orders regarding a child not found to be in confilct with law.-- (1) Where a Board is satisfied on inquiry that the child brought before it has not committed any offence, then notwithstanding anything contrary contained in any other law for the time being in force, the Board shall pass order to that effect.

(2) In case it appears to the Board that the child referred to in sub-section (1) is in need of care and protection, it may refer the child to the Committee with appropriate directions.

18. Orders regrding 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, 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 childs 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 childs 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 childs 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.

19. Powers of Children's Court.-- (1) After the receipt of preliminary assessment from the Board under section 15, the Childrens Court may decide that--

(i) there is a need for trial of the child as an adult as per the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) and pass appropriate orders after trial subject to the provisions of this section and section 21, considering the special needs of the child, the tenets of fair trial and maintaining a child friendly atmosphere;

(ii) there is no need for trial of the child as an adult and may conduct an inquiry as a Board and pass appropriate orders in accordance with the provisions of section 18.

(2) The Children's Court shall ensure that the final order, with regard to a child in conflict with law, shall include an individual care plan for the rehabilitation of child, including follow-up by the probation officer or the District Child Protection Unit or a social worker.

(3) The Childrens Court shall ensure that the child who is found to be in conflict with law is sent to a place of safety till he attains the age of twenty-one years and thereafter, the person shall be transferred to a jail:

Provided that the reformative services including educational services, skill development, alternative therapy such as counselling, behaviour modification therapy, and psychiatric support shall be provided to the child during the period of his stay in the place of safety.

(4) The Children's Court shall ensure that there is a periodic follow-up report every year by the probation officer or the District Child Protection Unit or a social worker, as required, to evaluate the progress of the child in the place of safety and to ensure that there is no ill-treatment to the child in any form.

(5) The reports under sub-section (4) shall be forwarded to the Children's Court for record and follow-up, as may be required.

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.

101. Appeals.--(1) Subject to the provisions of this Act, any person aggrieved by an order made by the Committee or the Board under this Act may, within thirty days from the date of such order, prefer an appeal to the Children's Court, except for decisions by the Committee related to Foster Care and Sponsorship After Care for which the appeal shall lie with the District Magistrate:

Provided that the Court of Sessions, or the District Magistrate, as the case may be, may entertain the appeal after the expiry of the said period of thirty days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time and such appeal shall be decided within a period of thirty days.

(2) An appeal shall lie against an order of the Board passed after making the preliminary assessment into a heinous offence under section 15 of the Act, before the Court of Sessions and the Court may, while deciding the appeal, take the assistance of experienced psychologists and

medical specialists other than those whose assistance has been obtained by the Board in passing the order under the said section.

(3) No appeal shall lie from,--

(a) any order of acquittal made by the Board in respect of a child alleged to have committed an offence other than the heinous offence by a child who has completed or is above the age of sixteen years; or

(b) any order made by a Committee in respect of finding that a person is not a child in need of care and protection.

(4) No second appeal shall lie from any order of the Court of Session, passed in appeal under this section.

(5) Any person aggrieved by an order of the Children's Court may file an appeal before the High Court in accordance with the procedure specified in the Code of Criminal Procedure, 1973 (2 of 1974).

102. Revision.--The High Court may, at any time, either on its own motion or on an application received in this behalf, call for the record of any proceeding in which any Committee or Board or Children's Court, or Court has passed an order, for the purpose of satisfying itself as to the legality or propriety of any such order and may pass such order in relation thereto as it thinks fit:

Provided that the High Court shall not pass an order under this section prejudicial to any person without giving him a reasonable opportunity of being heard.

103. Procedure in inquiries, appeals and revision proceedings.--(1) Save as otherwise expressly provided by this Act, a Committee or a Board while holding any inquiry under any of the provisions of this Act, shall follow such procedure as may be prescribed and subject thereto, shall follow, as far as may be, the procedure laid down in the Code of Criminal Procedure, 1973 (2 of 1974) for trial of summons cases.

(2) Save as otherwise expressly provided by or under this Act, the procedure to be followed in hearing appeals or revision proceedings under this Act shall be, as far as practicable, in accordance with the provisions of the Code of Criminal Procedure, 1973 (2 of 1974)."

19. The procedure to be followed in relation to children in conflict with law has been provided under Chapter IV of the JJ Act. Section 10 relates to apprehension of child alleged to be in conflict with law. In terms thereof, as soon as such a child is apprehended by the police, he/she shall be placed under the charge of the special juvenile police unit or the designated Child Welfare Police Officer, who shall produce the child before the Board without any loss of time but within a period of twenty-four hours and it is provided that in no case, a child alleged to be in conflict with law shall be placed in a police lock-up or lodged in jail. In terms of sub-section (2), the State Government is to make rules to provide for the manner in which the child alleged to be in conflict with law may be sent to an observation home or place of safety.

20. The provision with regard to grant of bail to a child in conflict with law is provided for under Section 12 of the JJ Act. Sub-section (1) thereof provides that 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, 19736 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. The rule under Section 12(1) is therefore for grant of bail to a child in conflict with law; the question with regard to the merits of the case including the role or complicity of a child in conflict with law or the gravity of the offence notwithstanding. This is however subject to the conditions under the proviso to sub-section (1) whereunder bail can be denied.

21. T he grounds on which bail can be denied to a juvenile as per terms of the proviso to Section 12(1), are as follows: (i) if there appears to be reasonable grounds for believing that the release is likely to bring that person in association with any known criminal; or (ii) expose the said person to moral, physical and psychological danger; or (iii) the person's release would defeat the ends of justice.

22. The Board, while denying bail, is required to record the reasons and the circumstances that led to such a decision. It is therefore seen that the case for bail under Section 12(1) has to be tested on three parameters specified under the proviso and in terms thereof bail is to be granted to the juvenile/child in conflict with law except where the case falls under any of the three disentitling categories contemplated by the proviso.

23. It is also to be noticed that in a situation where the juvenile is not released on bail under Section 12 (1), he is to be kept only in an observation home, as per sub-section (2), in a manner, as may be prescribed, until he can be brought before the Board. Further sub-section (3) provides that 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, regarding the person, as may be specified in the order.

24. The procedure of inquiry referred to under sub-section (3) of Section 12 is provided under Section 14 and in terms thereof, the inquiry is to be completed within a period of four months, unless the period is extended, for a maximum period of two more months by the Board, having regard to the circumstances of the case and after recording reasons in writing for such extension.

25. Section 15 provides for a preliminary assessment in case of a heinous offence alleged to have been committed by a child, who has completed or is above the age of 16 years, and in terms of sub-section (3) of Section 14, such preliminary assessment is to be disposed of by the Board within a period of three months from the date of first production of the child before the Board. This is subject to further extension of time, in case the Board so requires, which is to be granted by the Chief Judicial Magistrate/Chief Metropolitan Magistrate, as the case may be, for reasons to be recorded in writing. Sub-section (5) of Section 14 enjoins upon the Board to take steps to ensure fair and speedy inquiry. Section 16 provides for a periodic review of pendency of cases relating to inquiry before the Board.

26. Section 17 empowers the Board to pass orders regarding a child not found to

be in conflict with law and in terms of Section 18, the Board is empowered to pass orders regarding child found to be in conflict with law. Amongst the various orders which may be passed by the Board under Section 18, it is provided, as per terms of clause (g) of sub-section (1), that the Board may direct the child to be sent to a special home, for such period, not exceeding three years, for providing reformative services. As per sub-section (3) where the Board after preliminary assessment under Section 15 passes an order that there is a need for trial of the child as an adult, then the Board may transfer the trial of the child to the Children's Court having jurisdiction to try such offences.

27. Section 19 relates to powers of Children's Court and in terms of sub-section (1) thereof upon receipt of preliminary assessment from the Board under Section 15, the Children's Court may decide that-- (i) there is a need for trial of the child as an adult as per the provisions of the Code; (ii) there is no need for trial of the child as an adult and may conduct an inquiry as a Board and pass appropriate orders in accordance with the provisions of Section 18. Sub-section (2) of Section 19 provides that the Children's Court shall ensure that final order, with regard to a child in conflict with law, shall include an individual care plan for the rehabilitation of the child. As per sub-section (3) the Children's Court is to ensure that the child found to be in conflict with law is sent to a place of safety till he attains the age of twenty one years and thereafter, the person shall be transferred to a jail. It is further provided that the reformative services including educational services, skill development, alternative therapy such as counseling, behaviour modification therapy and psychiatric support shall be provided during the period of stay of the child in the place of safety.

28. Section 21 mandates that 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 the JJ Act or under the Penal Code or any other law for the time being in force.

29. The aforementioned discussion delineates the scheme of the JJ Act and the measures provided thereunder for furtherance of the objective of the Act, which is in the nature of a beneficent legislation, and also a remedial one with detailed provisions for providing avenues for reforms and rehabilitation of a juvenile/child in conflict with law.

30. The orders made by the Child Welfare Committee or the Board, under the JJ Act, have been made subject to appeal.

31. Section 101 provides for a statutory appeal to any person aggrieved by an order made by the Committee or the Board. As per Section 102 the High Court may, at any time, either on its motion or an application received on this behalf, call for the record of any proceeding in which any Committee or Board or Children's Court, or Court has passed an order for the purpose of satisfying itself as to the legality or propriety of any such order. In terms of the proviso to Section 102, the High Court shall not pass an order under the section prejudicial to any person without giving him a reasonable opportunity of being heard. The procedure to be followed in inquiries, appeals and revision proceedings is provided under Section 103 and in terms of sub-section (2) thereof, the procedure to

be followed in revision proceedings under the Act shall be, as far as practicable, in accordance with the provisions of the Code.

32. The term "prejudice" occurring in the proviso to Section 102 would be significant for understanding its true scope, ambit and width:

(i) Black's Law Dictionary7 explains "prejudice" to mean damage or detriment to one's legal rights or claims.

(ii) Concise Oxford English Dictionary8 defines "prejudice" as under :

"Prejudice.--n (1). Preconceived opinion that is not based on reason or actual experience. » unjust behaviour formed on such a basis. chiefly Law (2). harm or injury that results or may result from some action or judgment. » v.(1) give rise to prejudice in (someone); make biased. (2). cause harm to (a state of affairs)".

(ii) Webster Comprehensive Dictionary9 explains "prejudice" to mean (i) a judgment or opinion, favourable or unfavourable, formed beforehand or without due examination ... detriment arising from a hasty and unfair judgment; injury; harm.

(iii) ***P. Ramanatha Aiyar; the Law Lexicon10*** explains "prejudice" to mean injurious effect, injury to or impairment of a right, claim, statement etc.

The term "Prejudice" is, therefore, generally defined as meaning "to the harm, to the injury, to the disadvantage of someone". It also means injury or loss.

33. The question as to whether the complainant/informant or aggrieved party can claim any vested right of being heard at the stage of an application for grant of bail was considered in ***Sandeep Kumar Bafna vs. State of Maharastra and Others 11***and it was observed that though no such vested right can be claimed to conduct a prosecution, however the complainant or informant or aggrieved party may be heard at a crucial and critical juncture of the trial, so that his interests in the prosecution are not prejudiced or jeopardized.

34. It may be relevant to take note of the fact that sub-section (2) of Section 103 mandates that the procedure to be followed in hearing appeals or revision proceedings under the Act shall be, as far as practicable, in accordance with the provisions of the Code.

35. Under the Code, Section 401 contains the High Court's powers of revision and in terms of sub-section (2) thereof, no order under the 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.

36. The right to be heard provided under sub-section (2) of Section 401 of the Code, which is somewhat analogous to the right of hearing as per the proviso to Section 102 of the JJ Act, was subject matter of consideration in **Manharibhai Muljibhai Kakadia and Another vs. Shaileshbhai Mohanbhai Patel and Others12.** A similar ground, as has been raised in the present case, was taken to contend that since the "accused" or "other person" had no role to play in the earlier stage of the proceedings and as the revision had been filed against the dismissal of a complaint at the pre-cognizance stage, the

"accused" or "other person" would not have any right of hearing at the stage of revision under Section 401(2) of the Code. Repelling the aforesaid contention and holding that opportunity of hearing to accused/other person is necessary in a revision filed by the complainant against dismissal of the complaint under Section 203, the following observations were made:-

"46. The legal position is fairly well-settled that in the proceedings under Section 202 of the Code the accused/suspect is not entitled to be heard on the question whether the process should be issued against him or not. As a matter of law, upto the stage of issuance of process, the accused cannot claim any right of hearing. Section 202 contemplates postponement of issue of process where the Magistrate is of an opinion that further inquiry into the complaint either by himself is required and he proceeds with the further inquiry or directs an investigation to be made by a Police Officer or by such other person as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding. If the Magistrate finds that there is no sufficient ground for proceeding with the complaint and dismisses the complaint under Section 203 of the Code, the question is whether a person accused of crime in the complaint can claim right of hearing in a revision application preferred by the complainant against the order of the dismissal of the complaint. Parliament being alive to the legal position that the accused/suspects are not entitled to be heard at any stage of the proceedings until issuance of process under Section 204, yet in Section 401(2) of the Code provided that no order in exercise of the power of the revision shall be made by the Sessions Judge or the High Court, as the case may be, to the prejudice of the accused or the other person unless he had an opportunity of being heard either personally or by pleader in his own defence.

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48. In a case where the complaint has been dismissed by the Magistrate under Section 203 of the Code either at the stage of Section 200 itself or on completion of inquiry by the Magistrate under Section 202 or on receipt of the report from the police or from any person to whom the direction was issued by the Magistrate to investigate into the allegations in the complaint, the effect of such dismissal is termination of complaint proceedings. On a plain reading of sub-section (2) of Section 401, it cannot be said that the person against whom the allegations of having committed the offence have been made in the complaint and the complaint has been dismissed by the Magistrate under Section 203, has no right to be heard because no process has been issued. The dismissal of complaint by the Magistrate under Section 203 - although it is at preliminary stage - nevertheless results in termination of proceedings in a complaint against the persons who are alleged to have committed the crime. Once a challenge is laid to such order at the instance of the complainant in a revision petition before the High Court or Sessions Judge, by virtue of Section 401(2) of the Code, the suspects get right of hearing before revisional court although such order was passed without their participation. The right given to "accused" or "the other person" under Section 401(2) of being heard before the revisional court to defend an order which operates in his favour should not be confused with the proceedings before a Magistrate under

Sections 200, 202, 203 and 204. In the revision petition before the High Court or the Sessions Judge at the instance of complainant challenging the order of dismissal of complaint, one of the things that could happen is reversal of the order of the Magistrate and revival of the complaint. It is in this view of the matter that the accused or other person cannot be deprived of hearing on the face of express provision contained in Section 401(2) of the Code. The stage is not important whether it is pre-process stage or post process stage."

37. The aforementioned decision in the case of **Manharibhai Muljibhai Kakadia** (supra) lays down the proposition that where a complaint is dismissed under Section 203 of the Code, the accused/suspect is entitled to a hearing before the revisional court as per the requirement under Section 401(2), and that no order under sub-section (1) shall be made to the prejudice of the accused or other person unless he as had an opportunity of being heard in his own defence. It was held that once a challenge is made to an order of dismissal of a complaint under Section 203, at the instance of the complainant, the accused/suspect gets a right of hearing before the revisional court, although such order was passed without their participation- the right to be heard emanating from Section 401(2). It was made clear that the right given to the "accused" or other person under Section 401(2) of being heard before the revisional court ought not to be confused with the proceedings before the Magistrate under Sections 200, 202, 203 and 204 of the Code. It was also observed that in a revision petition at the instance of the complainant challenging the order of dismissal of the complaint, one of the things that could happen is reversal of the order of the Magistrate and revival of the complaint and in that situation, the persons who were alleged in the complaint to have committed the crime would have no right to participate in the proceedings before the Magistrate. The fact that the accused/suspect were not heard when the original order of dismissal has been passed under Section 203 and would not be heard upon restoration of the proceedings upon the revision being allowed, was held not to affect their right to be heard in the revision proceedings.

38. The requirement of an opportunity of hearing under Section 401(2) of the Code and its extension to cases under Section 482 of the Code in the context of a challenge to an order refusing to issue summons under Section 319 was reiterated in the decision in **Mohit alias Sonu and another vs. State of Uttar Pradesh and another13**, and it was held that it was required to give notice and opportunity of hearing to a person in whose favour some right had accrued by virtue of an order refusing to issue summons.

39. The complainant's right to be heard in the revision under Section 53 of the Juvenile Justice (Care and Protection of Children) Act, 2000, i.e. the old Act was subject matter of consideration in **Babloo Pasi vs. State of Jharkhand and Another14** and in the context of Section 53 and its proviso, which are pari materia, the provisions contained under Section 102 and its proviso under the JJ Act, 2015, it was held that the High Court while exercising its revisional jurisdiction could not pass an order prejudicial to any person without affording him an opportunity of hearing; hence complainant is to be accorded an opportunity of hearing. Referring to the

principle of audi alteram partem, it was observed as follows:-

"12. Section 52 of the Act provides that any person aggrieved by an order made by a competent authority under the Act may prefer an appeal to the Court of Sessions. Section 53 of the Act confers on the High Court the revisional jurisdiction to satisfy itself as to the legality or propriety of any order passed by the competent authority or Court of Sessions. The Section reads as under:

"53.Revision.- The High Court may, at any time, either of its own motion or on an application received in this behalf, call for the record of any proceeding in which any competent authority or Court of Session has passed an order for the purpose of satisfying itself as to the legality or propriety of any such order and may pass such order in relation thereto as it thinks fit:

Provided that the High Court shall not pass an order under this section prejudicial to any person without giving him a reasonable opportunity of being heard."

From a bare reading of proviso to the Section, it is plain that in exercise of its revisional jurisdiction the High Court cannot pass an order, prejudicial to any person without affording him a reasonable opportunity of being heard.

13. At this juncture, it would be profitable to note that Section 54 of the Act also prescribes the procedure to be followed while dealing with inquiries, appeals and revisions under the Act. Sub-section (2) thereof stipulates that save as otherwise expressly provided under the Act, the procedure to be followed in hearing revisions under the Act, shall be as far as practicable in accordance with the provisions of the Code of Criminal Procedure, 1973 (for short `the Code'). Sub- section (2) of Section 401 of the Code contemplates that no order under the said 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.

14. Furthermore, by now it is well settled that save in certain exceptional situations, the principle of audi alteram partem mandates that no one shall be condemned unheard. It is a part of rules of natural justice and the soul of natural justice is `fair play in action', which demands that before any prejudicial or adverse order is passed or action is taken against a person, he must be given an opportunity to be heard.

15. The question for consideration is that when the statutory provisions mandate and principles of natural justice demand a pre-decisional hearing, whether or not the High Court was justified in not granting an opportunity of hearing to the appellant/complainant? In our opinion, having regard to the nature of controversy before the High Court and the scheme of the relevant statutory provisions whereunder the High Court was exercising its jurisdiction, the "fairness in action" did demand that the complainant was given an opportunity of hearing in the revision petition preferred by the accused. Moreover, he was impleaded as a party-respondent and was obviously prejudiced by the order passed by the High Court when the accused was declared to be a juvenile. We have, therefore, no hesitation in holding that the High Court was clearly

in error in reversing the order passed by the Board without giving an opportunity of hearing to the appellant. Accordingly, we uphold the contention of learned counsel for the appellant that the order of the High Court deserves to be set aside on this short question alone."

40. It would be seen that the order in the case of **X S/o Laxman** (supra), sought to be relied upon by revisionist, has been passed without considering the binding precedent-- the decision in the case Babloo Pasi (supra). It may also be noticed that the questions which have been raised in the present case were neither argued nor considered in the aforesaid order made in the case of **X S/o Laxman**, and accordingly, the same cannot be held to be a conclusive authority on the point.

41. The issue as to whether a prospective accused is also a necessary party and is required to be heard in a revision filed against an order rejecting an application under Section 156 (3) of the Code, before a final order is passed, was one of the questions which were taken up upon a reference by a Full Bench of this Court in **Jagannath Verma Vs. State of U.P.15** and the same was answered by holding that the prospective accused or, as the case may be, the person who is suspected of having committed the crime is entitled to an opportunity of being heard before a decision is taken in a criminal revision.

42. The right of "victim" as defined under Section 2 (wa) under the proviso to Section 372 of the Code came up for consideration in **Mallikarjun Kodagali (dead) represented through legal representatives vs. State of Karnataka and Others16** and it was held that the said right available to the "victim" is not a mere matter of procedure but a substantive right. The travails and tribulations of victims of crime and the continuing ordeal faced by them prior to trial and during the trial were taken note of and it was observed as follows:-

"2. The travails and tribulations of victims of crime begin with the trauma of the crime itself and, unfortunately, continue with the difficulties they face in something as simple as the registration of a First Information Report (FIR). The difficulties in registering an FIR have been noticed by a Constitution Bench of this Court in Lalita Kumari v. State of U.P., (2014) 2 SCC 1: 2014 1 SCC (Cri) 524. The ordeal continues, quite frequently, in the investigation that may not necessarily be unbiased, particularly in respect of crimes against women and children. Access to justice in terms of affordability, effective legal aid and advice as well as adequate and equal representation are also problems that the victim has to contend with and which impact on society, the rule of law and justice delivery.

3. What follows in a trial is often secondary victimisation through repeated appearances in Court in a hostile or a semi-hostile environment in the courtroom. Till sometime back, secondary victimisation was in the form of aggressive and intimidating cross-examination, but a more humane interpretation of the provisions of the Indian Evidence Act, 1872 has made the trial a little less uncomfortable for the victim of an offence, particularly the victim of a sexual crime. In this regard, the judiciary has been proactive in ensuring that the rights of victims are addressed, but a lot more needs to be done. Today, the rights of an accused far outweigh the rights

of the victim of an offence in many respects. There needs to be some balancing of the concerns and equalising their rights so that the criminal proceedings are fair to both. .....

4. In *Sakshi v. Union of India, (2004) 5 SCC 518: 2004 SCC (Cri) 1645* this Court passed significant directions for holding in camera proceedings, providing for a screen between the accused and the victim and placed restrictions, in a sense, on the cross examination of witnesses. It is true that these directions have been passed in a case relating to sexual offences but the trend of this Court has been to show concern for the rights of victims of an offence and to address them.

5. Parliament also has been proactive in recognising the rights of victims of an offence. One such recognition is through the provisions of Chapter XXI-A of the Cr.P.C. which deals with plea bargaining. Parliament has recognised the rights of a victim to participate in a mutually satisfactory disposition of the case. This is a great leap forward in the recognition of the right of a victim to participate in the proceedings of a non-compoundable case. Similarly, Parliament has amended Cr.P.C. introducing the right of appeal to the victim of an offence, in certain circumstances. The present appeals deal with this right incorporated in the proviso to Section 372 Cr.P.C.

6. In other words, a considerable amount has been achieved in giving life to the rights of victims of crime, despite the absence of a cohesive policy. But, as mentioned above, a lot more still needs to be done.

7. Among the steps that need to be taken to provide meaningful rights to the victims of an offence, it is necessary to seriously consider giving a hearing to the victim while awarding the sentence to a convict. .....

8. The rights of victims, and indeed victimology, is an evolving jurisprudence and it is more than appropriate to move forward in a positive direction, rather than stand still or worse, take a step backward. A voice has been given to victims of crime by Parliament and the judiciary and that voice needs to be heard, and if not already heard, it needs to be raised to a higher decibel so that it is clearly heard.

9. With this background, we need to consider the questions that arise before us consequent to the introduction of the proviso to Section 372 of the Cr.P.C. with effect from 31st December, 2009. The questions are somewhat limited: Whether a "victim' as defined in Cr.P.C. has a right of appeal in view of the proviso to Section 372 Cr.P.C. against an order of acquittal in a case where the alleged offence took place prior to 31st December, 2009 but the order of acquittal was passed by the Trial Court after 31st December, 2009? Our answer to this question is in the affirmative. The next question is: Whether the "victim" must apply for leave to appeal against the order of acquittal? Our answer to this question is in the negative."

43. The rights of the victims of crime in the context of remedies available to them were considered in the light of certain recent reports of the Law Commission and it was observed as follows:-

"14. In recent times, four Reports have dealt with the rights of victims of crime and the remedies available to them. The first Report in this sequence is the 154th Report of the Law Commission of India of August 1996. While this Report did not specifically deal with the right of a victim of crime to file an appeal, it did discuss issues of victims of crime, compensation to be paid to the victim and rehabilitation of the victim including the establishment of a Victim Assistance Fund.

15. The second important Report is the March 2003 Report of the Committee on Reforms of Criminal Justice System, commonly known as the Report of the Justice Malimath Committee. In the Chapter on Adversarial Rights, it is recommended under the sub-heading of Victims Right to Appeal as follows:

"2.21. The victim or his representative who is a party to the trial should have a right to prefer an appeal against any adverse order passed by the trial court. In such an appeal he could challenge the acquittal, or conviction for a lesser offence or inadequacy of sentence, or in regard to compensation payable to the victim. The appellate court should have the same powers as the trial court in regard to assessment of evidence and awarding of sentence."

16. Thereafter, in the substantive Chapter on Justice to Victims, it is noted that victims of crime, in many jurisdictions, have the right to participate in the proceedings and to receive compensation for injury suffered. It was noted as follows:

"6.3. Basically two types of rights are recognized in many jurisdictions particularly in continental countries in respect of victims of crime. They are, firstly, the victim's right to participate in criminal proceedings (right to be impleaded, right to know, right to be heard and right to assist the court in the pursuit of truth) and secondly, the right to seek and receive compensation from the criminal court itself for injuries suffered as well as appropriate interim reliefs in the course of proceedings."

17. Following up on this, and extending the rights of victims of crime, it was observed in paragraph 6.5 that:

"6.5. The right of the victim should extend to prefer an appeal against any adverse order passed by the trial court. The appellate court should have the same powers to hear appeals against acquittal as it now has to entertain appeal against conviction. There is no credible and fair reason why appeals against acquittals should lie only to the High Court."

18. On this basis, the Justice Malimath Committee made the following recommendation enabling the victim of a crime to prefer an appeal. The recommendation (made in the Chapter having the same heading) reads as follows:

"6. (14) (v) The victim shall have a right to prefer an appeal against any adverse order passed by the court acquitting the accused, convicting for a lesser offence, imposing inadequate sentence, or granting inadequate compensation. Such appeal shall lie to the court to which an appeal ordinarily lies against the order of conviction of such court."

19. The third Report worth considering is the July 2007 Report of the

Committee on the Draft National Policy on Criminal Justice also known as the Professor Madhava Menon Committee. While this Committee does not specifically deal with providing a right of appeal to the victim of a crime, it does refer to victim orientation to criminal justice and providing for a balance between the constitutional rights of an accused person and a victim of crime. One of the suggestions given by the Committee is to permit the impleadment of a victim in the trial proceedings. Obliquely, therefore, it follows that if a victim is impleaded as a party to the trial proceedings, the victim would certainly have a right to file an appeal against an adverse order, particularly an order of acquittal.

20. The fourth Report that deserves a mention is the 221 st Report of the Law Commission of India, April 2009. In this Report, the recommendation of the Law Commission of India was to the effect that as the law stands, an aggrieved person cannot file an appeal against an order of acquittal. However, a revision petition can be filed. The powers of a revisional court are limited and the process involved is cumbersome and it also involves a wastage of money and time. It was, therefore, recommended by the Law Commission that against an order of acquittal passed by a Magistrate, a victim should be entitled to file an appeal before the revisional court. It was also recommended that in complaint cases also an appeal should be provided in the Sessions Court instead of the High Court. In all such cases, the aggrieved person or complainant should have the right to prefer an appeal, though with the leave of the Appellate Court. The view of the Law Commission was expressed in the following words:

"2.9 All appeals against orders of acquittal passed by Magistrates were being filed in High Court prior to amendment of section 378 by Act 25 of 2005. Now, with effect from 23.06.2006, appeals against orders of acquittal passed by Magistrates in respect of cognizable and non-bailable offences in cases filed on police report are being filed in the Sessions Court, vide clause (a) of sub-section (1) of the said section. But, appeal against order of acquittal passed in any case instituted upon complaint continues to be filed in the High Court, if special leave is granted by it on an application made to it by the complainant, vide sub-section (4) of the said section.

2.10. Section 378 needs change with a view to enable filing of appeals in complaint cases also in the Sessions Court, of course, subject to the grant of special leave by it.

2.11 Further, at present, against orders of acquittal passed by Magistrates (where the offence is cognizable and non-bailable) or by Sessions Courts, appeal in cases filed on police reports can be filed only at the instance of the District Magistrate or the State Government, as the case may be, vide sub-section (1) of section 378. In such matters, the aggrieved person or the informant cannot himself file an appeal. However, he can prefer a revision. If the revisional Court finds that the accused has been wrongly acquitted, it cannot convict him in view of sub-section (3) of section 401, but it has to remand the case. It is a cumbersome process and involves wastage of money and time. This provision also needs a change and in such matters also, where the District Magistrate or the State does not direct the Public Prosecutor to prefer appeal against an order of acquittal, the aggrieved person or the informant should have the right to prefer appeal, though with the leave of the

Appellate Court. This will also give an opportunity to the aggrieved person to challenge the findings of fact recorded by lower court. Also, this will introduce more transparency and accountability in the lower judiciary, as at present, the percentage of acquittal is quite high."

21. It is, apparently, on the basis of all these Reports and other material that Section 372 Cr.P.C. was amended on 30th December, 2009 with effect from 31st December, 2009. Section 372 Cr.P.C., as it stands today, reads as follows:

"372. No appeal to lie unless otherwise provided. - No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force:

Provided that the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court."

44. The '**Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power17',** adopted by the General Assembly of the United Nations in the 96th Plenary Session on 29.11.1985, referred to as the Magna Carta of the rights of victims, was also considered and one of the declarations made thereunder in relation to access to justice for the victim of an offence through justice delivery mechanisms, both formal and informal, was extracted. It was stated thus:-

"73. In our opinion, the proviso to Section 372 of the Cr.P.C. must also be given a meaning that is realistic, liberal, progressive and beneficial to the victim of an offence. There is a historical reason for this, beginning with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly of the United Nations in the 96th Plenary Session on 29.11.1985. The Declaration is sometimes referred to as the Magna Carta of the rights of victims. One of the significant declarations made was in relation to access to justice for the victim of an offence through the justice delivery mechanisms, both formal and informal. In the Declaration it was stated as follows:

"4. Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.

5. Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.

6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:

(a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are

involved and where they have requested such information;

(b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;

(c) Providing proper assistance to victims throughout the legal process;

(d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;

(e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.

7. Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims."

74. Putting the Declaration to practice, it is quite obvious that the victim of an offence is entitled to a variety of rights. Access to mechanisms of justice and redress through formal procedures as provided for in national legislation, must include the right to file an appeal against an order of acquittal in a case such as the one that we are presently concerned with. Considered in this light, there is no doubt that the proviso to Section 372 of the Cr.P.C. must be given life, to benefit the victim of an offence.

75. Under the circumstances, on the basis of the plain language of the law and also as interpreted by several High Courts and in addition the resolution of the General Assembly of the United Nations, it is quite clear to us that a victim as defined in Section 2(wa) of the Cr.P.C. would be entitled to file an appeal before the Court to which an appeal ordinarily lies against the order of conviction. It must follow from this that the appeal filed by Kodagali before the High Court was maintainable and ought to have been considered on its own merits.

76. As far as the question of the grant of special leave is concerned, once again, we need not be overwhelmed by submissions made at the Bar. The language of the proviso to Section 372 of the Cr.P.C. is quite clear, particularly when it is contrasted with the language of Section 378(4) Cr.P.C. The text of this provision is quite clear and it is confined to an order of acquittal passed in a case instituted upon a complaint. The word "complaint" has been defined in Section 2(d) of the Cr.P.C. and refers to any allegation made orally or in writing to a Magistrate. This has nothing to do with the lodging or the registration of an FIR, and therefore it is not at all necessary to consider the effect of a victim being the complainant as far as the proviso to Section 372 of the Cr.P.C. is concerned."

45. It would be apposite to refer to **The Crime Victims' Rights Act (CVRA)18,** which is a part of the **United States Justice for All Act.** The CVRA enumerates the rights afforded to victims in the following manner:-

"The Crime Victims' have following rights:-

(a) The right to be reasonably protected from the accused.

The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.

(b) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

(c) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

(d) The reasonable right to confer with the attorney for the Government in the case.

(e)The right to full and timely restitution as provided in law.

(f) The right to proceedings free from unreasonable delay.

(g) The right to be treated with fairness and with respect for the victim's dignity and privacy."

46. The question with regard to consideration of grant of permission under Section 302 of the Code to a complainant or victim to conduct prosecution fell for consideration in **Amir Hamza Shaikh and Others vs. State of Maharashtra and Another19** and it was held that though the Magistrate is not bound to grant permission at the mere asking but the victim has a right to assist the court in a trial before Magistrate. The observation made in the earlier judgment in J.**K. International v. State (Government of NCT of Delhi) and Others20** with regard to the complainant's continued participation in criminal proceedings initiated by him were referred to and it was stated as follows:-

"8. In a three Judge Bench of this Court in J.K. International v. State (Govt. of NCT of Delhi) (2001) 3 SCC 462: 2001 SCC (Cri) 547, where offences under Sections 420, 406 and 120-B IPC were investigated and charge-sheet filed on the basis of complaint of the appellant, the accused filed a petition for quashing of the charges in which the complainant wanted to be heard. The Public Prosecutor filed an application before the Magistrate for amending the charge for incorporating two more offences which were exclusively triable by the Court of Sessions. The Magistrate dismissed the application but the said order was not challenged by the prosecution. It was held that the scheme in the Code indicates that the person who is aggrieved by the offence committed is not altogether wiped out from the scene of the trial merely because the investigation was taken over by the police.

9. This Court while considering the provisions of sub-section (2) of Section 301 and Section 302 CrPC, held as under:

"9. The scheme envisaged in the Code of Criminal Procedure indicates that a person who is aggrieved by the offence committed, is not altogether wiped out from the scenario of the trial merely because the investigation was taken over by the police and the charge-sheet was laid by them. Even the fact that the court had taken cognizance of the offence is not sufficient

to debar him from reaching the court for ventilating his grievance. Even in the Sessions Court, where the Public Prosecutor is the only authority empowered to conduct the prosecution as per Section 225 of the Code, a private person who is aggrieved by the offence involved in the case is not altogether debarred from participating in the trial. This can be discerned from Section 301(2) of the Code which reads thus:

"301. (2) If in any such case any private person instructs a pleader to prosecute any person in any court, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution, and the pleader so instructed shall act therein under the directions of the Public Prosecutor or Assistant Public Prosecutor, and may, with the permission of the court, submit written arguments after the evidence is closed in the case."

47. The settled principles governing the grant of bail and the relevant considerations while considering an application for bail may be enumerated as follows:-

(i) whether there is any prima facie or reasonable ground to believe that accused had committed the offence;

(ii) nature and gravity of charge;

(iii) severity of punishment in the event of conviction;

(iv) danger of accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of accused;

(vi) likelihood of offence being repeated;

(vii) reasonable apprehension of witnesses being tampered with; and

(viii) danger of justice being thwarted by grant of bail.

Vague allegation that the accused may tamper with evidence or witnesses may not be a ground to refuse bail; however, if the accused is of such character that his mere presence at large would intimidate witnesses or if there is material to show that he will use his liberty to subvert justice or tamper with evidence, then bail would be refused.

48. The plea of bail of an adult in a non-bailable offence, would substantially be governed by the provisions of Section 439 of the Code, wherein a wide discretion is conferred on the High Court or the Court of Sessions, and in terms thereof for an adult offender, bail in a non-bailable offence is not a matter of right. The right to bail in such cases is dependent upon the discretion of the High Court or the Court of Sessions, and which is to be exercised along settled lines in relation to different offences. In case of a juvenile offender, sub-section (1) of Section 12 of the JJ Act provides for bail as a matter of right, notwithstanding anything contained in the Code or in any other law for the time being in force. This is however, subject to the three distinct exceptions carved out in terms of the proviso to the sub-section.

49. The right to be granted bail in case of a juvenile, therefore cannot be held to be indefeasible or unqualified, and the same is to be considered as per terms of the settled principles and in context of sub-

section (1) of Section 12 of the JJ Act and the proviso to the said sub-section.

50. In order to examine the question with regard to the right of the complainant/victim to be granted a reasonable opportunity of being heard at the stage of a revision under Section 102, which seeks to assail an order refusing bail under the provisions of the Act, the proviso to Section 102 would be required to be considered in the light of the statutory scheme of the Act.

51. The normal function of a proviso as has been consistently held, is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment.

52. The law relating to the statutory construction of a proviso was considered in **Ali M.K. And Others v. State of Kerala and Others21,** and it was reiterated that the proviso qualifies or carves out an exception to the main provision, and referring to earlier judgments in **Mullins v. Treasurer of Surrey22, Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subhash Chandra Yograj Sinha23, Calcutta Tramways Co. Ltd. v. Corporation of Calcutta24, West Derby Union v. Metropolitan Life Assurance Co.25, A.N. Sehgal v. Raje Ram Sheoran26, Tribhovandas Haribhai Tamboli v. Gujarat Revenue Tribunal27, Kerala State Housing Board v. Ramapriya Hotels (P) Ltd.28, R. v. Taunton, St James29 and Lord Esher in Barker, Re30,** the law on the point was summarized as follows:-

"10. The normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. As was stated in Mullins v. Treasurer of Surrey16, (referred to in Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subhash Chandra Yograj Sinha17 and Calcutta Tramways Co. Ltd. v. Corporation of Calcutta18, when one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject matter of the proviso. The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined to that case. It is a qualification of the preceding enactment which is expressed in terms too general to be quite accurate. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment and ordinarily, a proviso is not interpreted as stating a general rule. "If the language of the enacting part of the statute does not contain the provisions which are said to occur in it you cannot derive these provisions by implication from a proviso. ..." said Lord Watson in West Derby Union v. Metropolitan Life Assurance Co.19 . Normally, a proviso does not travel beyond the provision to which it is a proviso. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other. (See A.N. Sehgal and Ors. v. Raje Ram Sheoran20, Tribhovandas Haribhai Tamboli v. Gujarat Revenue Tribunal21 and Kerala State Housing Board and Ors. v. Ramapriya Hotels (P)Ltd.22).

"This word (proviso) hath divers operations. Sometime it worketh a qualification or limitation; sometime a condition; and sometime a covenant." (Coke upon Littleton 18th Edn., p. 146.)

"If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant, and the earlier clause prevails....But if the later clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as a whole" [Per Lord Wrenbury in Forbes v. Git (1922) 1 AC 256].

11. A statutory proviso "is something engrafted on a preceding enactment" (R. v. Taunton, St James23).

"The ordinary and proper function of a proviso coming after a general enactment is to limit that general enactment in certain instances." [Per Lord Esher in Barker, Re24].

12. A proviso to a section cannot be used to import into the enacting part something which is not there, but where the enacting part is susceptible to several possible meanings it may be controlled by the proviso [See Jennings v. Kelly, (1940) AC 206].

53. In "**Construction and Interpretation of the Laws" by Henry Campbell Black31** it has been stated as a rule of construction that a proviso when added to a section thereof introduces a condition or limitation upon the operation of the enactment, or makes special provision for cases excepted from the general provisions of the law, or qualifies or restrains its generality, or excludes some possible ground of misinterpretation of its extent. The legal proposition has been stated as follows:-

"107. A proviso is a clause added to a statute, or to a section or part thereof, which introduces a condition or limitation upon the operation of the enactment, or makes special provision for cases excepted from the general provisions of the law, or qualifies or restrains its generality, or excludes some possible ground of misinterpretation of its extent."

54. A proviso, added to a section or a part thereof, has therefore been held to qualify the enactment by introducing a condition or limitation upon its operation. A statutory proviso coming after the general enactment is something engrafted on a preceding enactment and is to be construed in a manner, so as to limit the operation of the enactment in certain instances.

55. The revisional powers under Section 102 of the JJ Act is subject to the proviso engrafted in the section which mandates that the High Court shall not pass an order under the section prejudicial to any person without giving a reasonable opportunity of being heard. The word "shall" is usually used to indicate the mandatory nature of the provision and the word "not" is used in a sense of creating a prohibition. The proviso to Section 102 uses the words "shall" and "not" in conjunction which is a clear indication of the intent of the Parliament to convey the mandatory nature of the proviso containing a condition providing in absolute terms that the High Court shall not pass an order exercising powers of revision under the section prejudicial to any person without giving him a reasonable opportunity of being heard.

56. In statutory construction the intention of legislature is primarily

gathered from the language used which means that attention has to be given to what has been stated. A construction, which would render a part of the statute as being devoid of any meaning or application has to be avoided.

57. The basic rules of interpretation of statutes came up for consideration in Constitution Bench decision, **Hardeep Singh and Others vs. State of Punjab and Others32**, in the context of examining the scope of exercise of powers under Section 319 Cr.P.C., and it was stated that when language of the statute is plain and unambiguous, the court should give effect to the same and should not go behind the express language so as to add or subtract any word. Referring to the doctrine A Verbis Legis Non Est Recedendum it was stated that legislature is presumed to have used words deliberately and consciously for carrying out the purpose of the statute. The observations made in this judgment in this regard are as follows:-

"42. To say that powers under Section 319 Cr.P.C. can be exercised only during trial would be reducing the impact of the word "inquiry" by the court. It is a settled principle of law that an interpretation which leads to the conclusion that a word used by the legislature is redundant, should be avoided as the presumption is that the legislature has deliberately and consciously used the words for carrying out the purpose of the Act. The legal maxim A Verbis Legis Non Est Recedendum which means, "from the words of law, there must be no departure" has to be kept in mind.

43. The court cannot proceed with an assumption that the legislature enacting the statute has committed a mistake and where the language of the statute is plain and unambiguous, the court cannot go behind the language of the statute so as to add or subtract a word playing the role of a political reformer or of a wise counsel to the legislature. The court has to proceed on the footing that the legislature intended what it has said and even if there is some defect in the phraseology, etc., it is for others than the court to remedy that defect. The statute requires to be interpreted without doing any violence to the language used therein. The court cannot rewrite, recast or reframe the legislation for the reason that it has no power to legislate."

58. The earlier decisions in **Patel Chunibhai Dajibha etc. v. Narayanrao Khanderao Jambekar33, The Martin Burn Ltd. v. The Corporation of Calcutta34, M.V. Elisabeth v. Harwan Investment & Trading Pvt. Ltd.35, Sultana Begum v. Prem Chand Jain36, State of Bihar v. Bihar Distillery Ltd.37, Institute of Chartered Accountants of India v. M/s. Price Waterhouse38, South Central Railway Employees Co-operative Credit Society Employees Union v. Registrar of Co-operative Societies39**, were referred to emphasize the presumption against redundancy or surplusage by observing that no word in a statute should be treated as redundant or surplusage.

"44. No word in a statute has to be construed as surplusage. No word can be rendered ineffective or purposeless. Courts are required to carry out the legislative intent fully and completely. While construing a provision, full effect is to be given to the language used therein, giving reference to the context and other provisions of the Statute. By construction, a

provision should not be reduced to a "dead letter" or "useless lumber". An interpretation which renders a provision an otiose should be avoided otherwise it would mean that in enacting such a provision, the legislature was involved in "an exercise in futility" and the product came as a "purposeless piece" of legislation and that the provision had been enacted without any purpose and the entire exercise to enact such a provision was "most unwarranted besides being uncharitable." (Vide Patel Chunibhai Dajibha etc. v. Narayanrao Khanderao Jambekar27, The Martin Burn Ltd. v. The Corporation of Calcutta28, M.V. Elisabeth v. Harwan Investment & Trading Pvt. Ltd.29, Sultana Begum v. Prem Chand Jain30, State of Bihar v. Bihar Distillery Ltd.31, Institute of Chartered Accountants of India v. M/s. Price Waterhouse32, South Central Railway Employees Co-operative Credit Society Employees Union v. Registrar of Co-operative Societies33.

45. This Court in Rohitash Kumar v. Om Prakash Sharma, (2013) 11 SCC 451, after placing reliance on various earlier judgments of this Court held: (SCC pp. 460-61, paras 27-29)

"27.The Court has to keep in mind the fact that, while interpreting the provisions of a Statute, it can neither add, nor subtract even a single word... A section is to be interpreted by reading all of its parts together, and it is not permissible, to omit any part thereof. The Court cannot proceed with the assumption that the legislature, while enacting the Statute has committed a mistake; it must proceed on the footing that the legislature intended what it has said; even if there is some defect in the phraseology used by it in framing the statute, and it is not open to the court to add and amend, or by construction, make up for the deficiencies, which have been left in the Act. ...

28. The Statute is not to be construed in light of certain notions that the legislature might have had in mind, or what the legislature is expected to have said, or what the legislature might have done, or what the duty of the legislature to have said or done was. The Courts have to administer the law as they find it, and it is not permissible for the Court to twist the clear language of the enactment, in order to avoid any real, or imaginary hardship which such literal interpretation may cause. ...

29... under the garb of interpreting the provision, the Court does not have the power to add or subtract even a single word, as it would not amount to interpretation, but legislation." (emphasis in original)

46. Thus, by no means can it be said that provisions of Section 319 Cr.P.C. cannot be pressed into service during the course of "inquiry". The word "inquiry" is not surplusage in the said provision."

59. The presumption against redundancy or surplusage was reiterated in a subsequent judgment in the context of the provisions of the JJ Act in **Shilpa Mittal vs. State (NCT of Delhi) and Another40** and it was held that where language of the provision is explicit and clear the court cannot remove any word treating it as surplusage.

60. It is a cardinal principal of construction that the language of a statute should be read as it is and any construction which results in rejection of words as

meaningless or treating them as surplusage has to be avoided.

61. In the Constitution Bench decision **Union Of India vs Hansoli Devi & Ors41,** after referring to the observations made by **Tindal CJ in the Sussex Peerage Case42** and also the observations made in the decisions in **Aswini Kumar Ghose v. Arabinda Bose43, Quebec Railway, Light Heat and Power Co. v. Vandray44,** it was held that where the language of the statute is plain and unambiguous, the court must give effect to the words used in the statute and it would not be a sound principle of construction to brush aside words in a statute as being inapposite surplusage. It was stated thus:-

"9. Before we embark upon an inquiry as to what would be the correct interpretation of Section 28-A, we think it appropriate to bear in mind certain basic principles of interpretation of statute. The rule stated by Tindal, C.J. in Sussex Peerage case, (1844) 11 Cl & Fin 85: 8 ER 1034, still holds the field. The aforesaid rule is to the effect: (ER p. 1057)

"If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intent of the lawgiver."

It is a cardinal principle of construction of statute that when language of the statute is plain and unambiguous, then the court must give effect to the words used in the statute and it would not be open to the courts to adopt a hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act. In Kirkness v. John Hudson & Co. Ltd, (1955) 2 All ER 345, Lord Reid pointed out as to what is the meaning of "ambiguous' and held that: (All ER p. 366 C-D)

"A provision is not ambiguous merely because it contains a word which in different context is capable of different meanings. It would be hard to find anywhere a sentence of any length which does not contain such a word. A provision is, in my judgment, ambiguous only if it contains a word or phrase which in that particular context is capable of having more than one meaning."

It is no doubt true that if on going through the plain meaning of the language of statutes, it leads to anomalies, injustices and absurdities, then the court may look into the purpose for which the statute has been brought and would try to give a meaning, which would adhere to the purpose of the statute. Patanjali Sastri, C.J. in the case of Aswini Kumar Ghose v. Arabinda Bose, [1953] SCR 1, had held that it is not a sound principle of construction to brush aside words in a statute as being inapposite surplusage, if they can have appropriate application in circumstances conceivably within the contemplation of the statute. In Quebec Railway, Light Heat and Power Co. v. Vandray, AIR (1920) PC 181, it had been observed that the Legislature is deemed not to waste its words or to say anything in vain and a construction which attributes redundancy to the legislature will not be accepted except for compelling reasons. ..."

62. The treatise "**Construction and Interpretation of the Laws" by Henry Campbell Black45** may be referred to again, wherein the rule against surplusage has been stated in the following manner:-

"In giving construction to a statute, the courts are bound, if it be possible, to give effect to all its several parts. No sentence, clause, or word should be construed as unmeaning and surplusage, if a construction can be legitimately found which will give force to and preserve all the words of the statute."

63. The rule against surplusage is a principle of statutory construction based on semantics. The principle requires the courts to give each word and clause of a statute operative effect. The courts should not interpret any statutory provision in a way that would render it or another part of the statute inoperative or redundant or devoid of any meaning or application.

64. In interpretation of statutes, the courts would always presume that legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect. It is for this reason that it has been held that legislature is deemed not to waste its words or to say anything in vain and a construction which attributes redundancy to the legislature would not be accepted except for compelling reasons; the rule being that a meaning should, if possible, be given to every word in the statute, unless there are good reasons to the contrary.

65. In the context of the JJ Act, an order granting bail to a juvenile by the Board would be subject to an appeal under Section 101 by any aggrieved person, including the victim/complainant, and thereafter a revision under Section 102. The aggrieved person, including the victim/complainant, would therefore, have a remedy against an order granting bail under Section 12 or at the stage of appeal under Section 101. It would therefore be of no avail to raise an argument, as is sought in the present case, that the victim/complainant having not been given any right to oppose the bail at the stage of Section 12 or Section 101, no such right can be claimed at the stage of revision under Section 102.

66. This would be more so for the reason, as noticed above, that the victim/complainant would have a right to raise a challenge to an order granting bail passed under Section 12 or any such order passed at the stage of appeal under Section 101; however, in the event the victim/complainant is denied an opportunity to oppose the bail at the stage of revision under Section 102, which is the final stage under the statute, he would be left remedy-less. It is in this view of the matter that the victim/complaint cannot be deprived of an opportunity of hearing on the face of the express provision contained under the proviso to Section 102 of the JJ Act.

67. The JJ Act is a beneficial legislation aimed to provide for protection of rights of "child in conflict with law", and also a "child in need of care and protection". There may be a situation, as in the present case, where the person in conflict with law is a child so also is the victim/complainant. The protection granted to a juvenile under the provisions of the JJ Act, cannot be held to be absolute but it would be circumscribed by the provisions of the Act and would apply strictly upon fulfillment of the conditions precedent therefor. The Act provides for beneficent consequences, and thus, it is required to be construed liberally; however, the beneficent legislation is not to be construed so liberally in favour of the "child in conflict with law" so as to deny the basic right of an

opportunity of hearing to the victim who, in many cases, may also be a child -- "a child in need of care and protection".

68. It is also relevant to note that the JJ Act apart from being a beneficent legislation, is also a remedial one. The rule under Section 12(1) is for grant of bail to a "child in conflict with law" irrespective of questions regarding his role and complicity or the gravity of the offence. The reasons for which bail can be denied as spelt out under the proviso to Section 12(1), namely, that the release is likely to bring that person into association with any known criminal or expose the person to moral, physical and psychological danger or the persons release would defeat the ends of justice, go to show that these are all reasons which are indicative of the legislative intent of giving primacy to the interest of the "child in conflict with law".

69. It may also be noticed that as per terms of sub-section (2) of Section 12 where the juvenile is not released on bail under sub-section (1), the statute enjoins that he is to be kept only in an observation home, in such manner, as may be prescribed, until he can be brought before a Board. Further, sub-section (3) provides that 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, regarding the person, as may be specified in the order. The procedure of inquiry referred to under sub-section (3) of Section 12 is provided under Section 14 and in terms thereof, the inquiry is to be completed within a period of four months, unless the period is extended, for a maximum period of two more months by the Board having regard to the circumstances of the case and after recording reasons in writing for such extension.

70. Section 15 provides for a preliminary assessment in case of a heinous offence alleged to have been committed by a child who has completed, or is above the age of 16 years and in terms of sub-section (3) of Section 14, such preliminary assessment is to be disposed of by the Board within a period of three months from the date of first production of the child before the Board. This is subject to further extension of time, in case the Board so requires, which is to be granted by the Chief Judicial Magistrate/Chief Metropolitan Magistrate, as the case may be, for reasons to be recorded in writing. Sub-section (5) of Section 14 enjoins upon the Board to take steps to ensure fair and speedy inquiry.

71. Section 16 provides for a periodic review of pendency of cases relating to inquiry before the Board. Section 17 empowers the Board to pass orders regarding a child not found to be in conflict with law and in terms of Section 18, the Board is empowered to pass orders regarding child found to be in conflict with law. Amongst the various orders which may be passed by the Board under Section 18, it is provided, as per terms of clause (g) of sub-section (1), that the Board may 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. As per sub-section (3) where the Board after preliminary assessment under Section 15 passes an order that there is a need for trial of the 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.

72. Section 19 relates to powers of Children's Court and in terms of sub-section (1) thereof after receipt of preliminary assessment from the Board

under Section 15, the Children's Court may decide that- (i) there is a need for trial of the child as an adult as per the provisions of the Code and pass appropriate orders after trial subject to the provisions of the section and Section 21, considering the special needs of the child, the tenets of fair trial and maintaining a child friendly atmosphere; (ii) there is no need for trial of the child as an adult and may conduct an inquiry as a Board and pass appropriate orders in accordance with the provisions of Section 18. Sub-section (2) of Section 19 provides that the Children's Court shall ensure that the final order, with regard to a child in conflict with law, shall include an individual care plan for the rehabilitation of the child, including follow-up action by the probation officer or the District Child Protection Unit or a social worker. As per sub-section (3) the Children's Court shall ensure that the child who is found to be in conflict with law is sent to a place of safety till he attains the age of twenty one years and thereafter, the person shall be transferred to a jail. It is further provided that the reformative services including educational services, skill development, alternative therapy such as counselling, behaviour modification therapy, and psychiatric support shall be provided during the period of stay of the child in the place of safety.

73. Section 21 mandates that 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 the JJ Act or under the provisions of the Penal Code or any other law for the time being in force.

74. The aforementioned statutory provisions underline the scheme of the JJ Act which shows that irrespective of the fact that in a situation a juvenile may have been denied bail for the reasons spelt out under the proviso to Section 12(1), the beneficial and the remedial provisions of the legislation with avenues for reform and rehabilitation would continue to be available.

75. The test as to whether a person would be entitled to an opportunity of being heard in a challenge to an order passed in an original proceeding, or an appeal thereon, by another cannot be held to be dependent necessarily on whether such a person had a right to be heard in the original proceeding or at the stage of appeal. A person who is entitled to be heard in an original proceeding may legitimately assert a right to be heard when a substantive right created by an order passed in that proceeding is sought to be assailed before a higher forum at the behest of another person but a right to be heard in revision would not stand excluded only for the reason that a person who claims such a right was not entitled to be heard at the stage of passing of the original order or at the appellate stage. The entitlement or the right of hearing at a particular stage would have to be assessed independently, by considering the consequences of the proceeding in which a hearing is sought. In a situation where a substantial right would be effected or a prejudice is likely to result, an opportunity of hearing can legitimately be claimed as a matter of right when the order is assailed at the higher forum, irrespective of the right of hearing having been given at the stage when the original order was passed.

76. Applicability of principles of natural justice as part of our jurisprudence is not merely a matter of statutory entitlement but a recognition of the

constitutional right to fair procedure and fair treatment. The principle of audi alteram partem is a fundamental rule of natural justice and 'fair play in action' is its essence, which demands that before any order prejudicial to the interests of a person is passed, he must be given an opportunity to be heard.

77. The victim/complainant would therefore be entitled to a reasonable opportunity of being heard in a revision where the order refusing bail by the Board under Section 12 and by the appellate authority under Section 101, are sought to be assailed. This would be more so on the face of the express provision under the proviso to Section 102 which mandates that the High Court shall not pass an order under this section prejudicial to any person without giving him a reasonable opportunity of being heard.

78. It would be apt to take note that one of the grounds on which bail may be denied to a juvenile, as per the exception carved out under Section 12 (1), would be a situation where his release would defeat the ends of justice. In a given case, the release of the juvenile may have the consequence of defeating the ends of justice, for reasons which may be multifarious, and may include within its ambit situations, which may be having the effect of causing prejudice to the rights of the victim/complainant.

79. To put it differently, a situation where the juvenile's release would have the effect of defeating the ends of justice, may in a given case, also be a cause of prejudice to the victim/complainant. It would therefore be seen that one of the grounds for denial of bail under Section 12(1) i.e. the person's release defeating the ends of justice, may have a linkage, direct or otherwise, to a cause of prejudice to the victim/complainant.

80. A conjoint reading of the proviso to Section 12 (1) and the proviso to Section 102 would therefore lead to the inference that an order granting bail to a juvenile, in given case, may have the effect of defeating the ends of justice by causing prejudice to the rights of the victim/complainant. There being a likelihood of the rights of the victim/complainant being prejudiced, it would follow, as a logical corollary, that he would be entitled to a reasonable opportunity of being heard at the stage of revision under Section 102 where the order rejecting the bail application is sought to be assailed.

81. Our criminal justice system rests itself on the edifice of a fair trial. The concept of fairness would require to be manifest in an infinite variety of actual situations with the ultimate test being-- whether denial of opportunity has deprived the quality of fairness to a degree where miscarriage of justice has resulted. It may not be wholly correct to say that it is only the accused who is entitled to be fairly dealt with. Taking such a view may result in gross injustice to the victims, their family members, relatives and to the society at large. Denial of opportunity-- a fair opportunity-- is as much injustice to the accused as it is to the victim. Failure to grant a fair hearing would be equally a cause of prejudice to the accused as to the victim. It is for this reason, that the criminal justice system would have to accord primacy to the triangulation of interests of the accused, the victim and the society that acts through the State and its prosecuting agencies.

82. Having regard to the aforestated reasons, this Court is of the view that before passing an order in revision under Section 102 of the JJ Act, in a matter relating to consideration of bail to a 'child in conflict with law', the complainant/victim would be required to be given a reasonable opportunity of being heard before any order prejudicial to his/her interest, is passed. Taking any other view would render the proviso to Section 102 redundant.

83. Let notice be issued to opposite party no.2 returnable within four weeks.

84. List/put up on date fixed.

(2021)09ILR A671
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.09.2021

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE PIYUSH AGRAWAL J.

Crl. Misc. Writ Petition No. 4779 of 2021

Silicon Union & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Santosh Kumar Shukla, Sri Vimal Kumar Misra

Counsel for the Respondents:
A.G.A., Sri Ved Byas Mishra

A. Criminal Law - Constitution of India, 1950-Article 226 & Indian Penal Code,1860-Sections 406, 420, 467, 468, 471-challenge to-First Information Report-petitioners fraudulently taken sum of Rs. 4 Crore apprx., after much persuasion a sum of Rs. 60 to 75 lac have been refunded but Rs. 30 lac still with the petitioners-the said amount was paid by the informant to the petitioners bank account through R.T.G.S.-the police officer in course of investigation can seize or prohibit the operation of the said account as there is direct link between the alleged offence and the bank account-even though section 102 Cr.P.C. has not been mentioned in the impugned notice but the power exercised by the Investigating Officer to freeze the bank account in question is referable to Section 102(3) Cr.P.C.-the only irregularity appears that the Investigating Officer has not reported forthwith the fact of freezing the bank account to the concerned Judicial Magistrate.(Para 1 to 9)

The writ petition is dismissed. (E-6)

List of Cases cited:

St. of Mah. Vs Tapas D. Neogy (1999) 7 SCC 685

(Delivered by Hon'ble Surya Prakash Kesarwani, J.
&
Hon'ble Piyush Agrawal, J.)

1. Heard Sri S.K. Shukla, learned counsel for the petitioners; Sri Patanjali Mishra, learned AGA for State-respondents and Sri Ved Byas Mishra, learned counsel for the informant-respondent-5.

2. This writ petition has been filed praying for the following relief:-

"I. Issue a writ, order or direction in the nature of certiorari quashing the Notice / order dated 31.01.2021 issued by Respondent No. 3 (Annexure No. 6 to the Criminal Misc. Writ Petition) by which directed to the Respondent no. 4 to freeze the account No. 577102000013527 of the petitioner no. 2.

II. Issue a writ, order or direction in the nature of mandamus directing the Branch Manager I.D.B.I. Bank, Regional Officer I.D.B.I. Tower W.T.C. Complex Mumbai, Maharastra to allow the Petitioner No. 2 to operate her account No. 577102000013527."

3. The informant-respondent no. 5 has lodged the F.I.R. No. 047 of 2021, dated 10.1.2021, under Sections 406, 420, 467, 468, 471 IPC, Police Station Phase III, Commissionerate, Gautam Buddha Nagar alleging that the petitioners have fraudulently taken a sum of Rs. 4,58,60,160/- out of which, after much persuasion a sum of Rs. 60 lakh and 75 lakh have been refunded on 9.6.2020 and 10.6.2020 and a sum of Rs. 3,03,19,200/- is still with the petitioners which they have retained fraudulently and the aforesaid amount was paid by the informant to the petitioners in their bank account no. 577102000013527, I.D.B.I. Bank, Thane Branch, Mumbai through R.T.G.S. The Investigating Officer issued the impugned notice dated 31.1.2021 to the Branch Manager I.D.B.I. Bank with reference to the aforesaid bank account and requested to freeze the aforesaid account and by the same notice the Investigating Officer has also requested the Branch Manager to give statement of the account in question from 1.1.2020 till date. The
impugned notice dated 31.1.2021 has been challenged in the present writ petition.

4. Undisputedly, the aforesaid amount in question was paid as advance by the informant-respondent no. 5 to the petitioners through R.T.G.S. in the aforesaid bank account. The allegation in the F.I.R. is that the amount was fraudulently obtained by the petitioners from the informant-respondent. Although the heading on the top of the impugned notice is "नोटिस अंतर्गत धारा 91 सी. आर. पी. सी." but the last portion of the notice to freeze the bank account is referable to Section 102 Cr. P. C.

5. In the case of S**tate of Maharastra Vs. Tapas D. Neogy, (1999) 7 SCC 685** (para 12), Hon'ble the Supreme Court considered the scope of Section 102 Cr P C and held as under:

"12. Having considered the divergent views taken by different High Courts with regard to the power of seizure under Section 102 of the Code of Criminal Procedure, and whether the bank account can be held to be `property' within the meaning of said Section 102 (1), we see no justification to give any narrow interpretation to the provisions of the Criminal Procedure Code. It is well known that corruption in public offices has become so rampant that it has become difficult to cope up with the same. Then again the time consumed by the Courts in concluding the trials is another factor which should be borne in mind in interpreting the provisions of Section 102 of the Criminal Procedure Code and the underlying object engrafted therein, inasmuch as if there can be no order of seizure of the bank account of the accused then the entire money deposited in a bank which is ultimately held in the trial to be the outcome of the illegal gratification, could be withdrawn by the accused and the Courts would be powerless to get the said money which has any direct link with the commission of the offence committed by the accused as a public officer. ***We are, therefore, persuaded to take the view that the bank account of the accused or any of his relation is `property' within the meaning of Section 102 of the Criminal Procedure Code and a police officer in course of investigation can seize or prohibit the operation of the said account if such assets have direct links with the commission of the offence for which the police officer is investigating into.*** *The contrary view expressed by Karnataka,*

Gauhati and Allahabad High Courts, does not represent the correct law. It may also be seen that under the Prevention of Corruption Act, 1988, in the matter of imposition of fine under sub-section (2) of Section 13, the legislatures have provided that the Courts in fixing the amount of fine shall take into consideration the amount or the value of the property, which the accused person has obtained by committing the offence or where the conviction is for an offence referred to in clause (e) of sub- section(1) of Section 13, the pecuniary resources or property for which the accused person is unable to account satisfactorily. The interpretation given by us in respect of the power of seizure under Section 102 of the Criminal Procedure Code is in accordance with the intention of the legislature engrafted in Section 16 of the Prevention of Corruption Act referred to above. In the aforesaid premises, we have no hesitation to come to the conclusion that the High Court of Bombay committed error in holding that the police officer could not have seized the bank account or could not have issued any direction to the bank officer, prohibiting the account of the accused from being operated upon. Though we have laid down the law, but so far as the present case is concerned, the order impugned has already been given effect to and the accused has been operating upon his account, and so, we do not interfere with the same."

6. The petitioners are accused in the above noted F.I.R. The amount in question was transferred by the informant -respondent no. 5 to the petitioners in the aforesaid bank account which has been freezed pursuant to the impugned notice. The bank account of the accused / petitioners is a "property' within the meaning of Section 102 of Cr. P.C. The police officer in course of investigation can seize or prohibit the operation of the said account if such assets have direct links with the commission of the offence for which the police officer is investigating into.

7. Prima facie, there is a direct link between the alleged commission of offence and the aforesaid bank account which is being investigated by the Investigating Officer. Therefore, even though Section 102 Cr. P. C. has not been mentioned in the impugned notice but the power exercised by the Investigating Officer to freeze the bank account in question is referable to Section 102 (3) Cr. P. C. The only irregularity which appears to us is that the Investigating Officer has not reported forthwith the fact of freezing the bank account to the concerned Judicial Magistrate.

8. Therefore, considering the facts and circumstances of the case in its entirety, we do not find any good reason to interfere with the impugned notice. However, we direct that in the event, the fact of freezing the bank account in question has not yet been reported by the Investigating Officer, same shall be reported by the Investigating Officer to the concerned Judicial Magistrate immediately and not later than a week from today.

9. Subject to aforesaid observation, the writ petition is **dismissed.**

(2021)09ILR A673
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.09.2021

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE PIYUSH AGRAWAL, J.

Crl. Misc. Writ Petition No. 5156 of 2021

Umashankar & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:

Sri Shashi Kant Pandey, Sri Shantanu Pandey

Counsel for the Respondents:
G.A., Sri Sunil Kumar Verma

A. Criminal Law - Constitution of India, 1950-Article 226 & Indian Penal Code, 1860-Sections 366, 376-D, 323, 342 & SC/ST Act- Section 3(2)(v)-quashing of FIR-petitioner firstly kidnapped the victim and thereafter under coercion and threat shown marriage with her and also obtained protection by filing Writ-she is used as a shield to escape from the offence or perpetuation of offences under the garb of personal liberty-statement of the victim u/s 164 Cr.P.C. supported the FIR version-prima facie fraud practiced by the Petitioner upon the court.(Para 1 to 9)

The writ petition is dismissed. (E-6)

List of Cases cited:-

1. Gian Devi Vs The Superintedent, Nari Niketan, Delhi & ors. (1976) 3 SCC 234

2. Lata Singh Vs St. of U.P & anr. (2006) 5 SCC 475

3. Bhagwan Dass VS St. (NCT of Delhi) (2011) 6 SCC 396

(Delivered by Hon'ble Surya Prakash Kesarwani, J. &
Hon'ble Piyush Agrawal, J)

1. Heard Shri Shashi Kant Pandey, learned counsel for the petitioners, Shri Sunil Kumar Verma, learned counsel for the informant - resondent no. 3 and Shri Rishi Chaddha, the learned A.G.A. for the State - respondents.

2. This writ petition has been filed praying for the following reliefs:

"I. Issue a writ, order or direction in the nature of certiorari quashing the First Information Report dated 16.06.2021 lodged by the Respondent No. 3 against the petitioners in registered as Case Crime No. 0183 of 2021, under sections 366, 376-D, 323, 342 IPC and section 3(2)(v) S.C./S.T. Act, Police Station - Utraon, District - Prayagraj.

II. Issue a writ, order or direction in the nature of mandamus commanding & directing the respondents not to arrest the petitioners in Case Crime No. 0183 of 2021, under sections 366, 376-D, 323, 342 IPC and section 3(2)(v) S.C./S.T. Act, Police Station - Utraon, District - Prayagraj."

3. T he impugned First Information Report No. 0183 of 2021 dated 16.06.2021, under sections 366, 376-D, 323, 342 IPC and section 3(2)(v) S.C./S.T. Act is reproduced below:

*"नकल तहरीर हिन्दी वादिनी सेवा में, श्रीमान थानाध्यक्ष उतरांव, प्रयागराज। विषय- उमाशंकर, रमाशंकर पुत्रगण रामकरन मौर्य व एक अज्ञात के विरूद्ध अपहरण, बलात्कार मारपीट, अनुसूचित जाति महिला उत्पीड़न करने के सम्बन्ध में महोदय जी, निवेदन है कि मैं काजल कुमारी उम्र 23 वर्ष पुत्री स्व० मौजीलाल पासी ग्राम खमहरिया सीकी थाना उतरांव प्रयागराज की निवासिनी हूँ। मैं अनुसूचित जाति (पासी) हूँ। **घटना दि० फरवरी 2021 को घर से ब्यूटी पार्लर जाते समय दिन में लगभग 11.30 पर मेरा अपहरण उपरोक्त व्यक्तियों द्वारा कर लिया गया था। इन लोगों ने जबरन मेरे साथ मारपीट कर यौन शोषण मेरा किये थे। और अज्ञात जगह पर रखते रहे है। जो नैनी के आगे जारी काटी के पास है।** मेरे भाई ने दिनांक 6.2.21 को गुमशुदी की रिपोर्ट तथा बाद में इन दोनों भाईयों को थाना उतरांव को बताया था। पुलिस से **बचने के लिए इन लोगों ने मेरी***

शादी जबरन उमाशंकर मौर्य से आर्य समाज मन्दिर नैनी में कराया था। और मारपीट कर मुझे अपने जीजा से यह कहने को मजबूर किए थे। कि रमाशंकर को एवं उमाशंकर के साथ कोई कार्यवाही नहीं की जाय। *मेरी सगाई 10 दिसम्बर 20 को अपने समाज के लड़के से तय थी। 24 मई 2021 को शादी होनी थी इन दरिन्दों ने मेरे साथ अत्याचार किया है।* ***मैं किसी तरह इन के चंगुल से छूटकर आई हूँ।*** *तब से अपने को न्याय पाने तथा इन्हें कठोर दंड दिलाने के लिए हर जगह प्रार्थना पत्र दे चुकी हूँ। अभी तक इनके विरूद्ध एफ०आई०आर० नहीं हुआ है। आज दिनांक 16.06.21 को महिला प्रकोष्ठ उ०प्र० लखनऊ द्वारा पुनः उतरांव में प्रार्थना पत्र देकर एफ०आई०आर० दर्ज कराकर उचित धाराओं में कार्यवाही करने की कृपा करें। सदैव आप की आभारी रहूँगी। प्रार्थिनी हस्ताक्षर काजल कुमारी (काजल कुमारी) मो० 7080666578 दिनांक 16.06.21 नोट- मैं कम्प्यूटर आपरेटर ग्रेड (ए) अनुराधा गुप्ता प्रमाणित करता हूँ कि नकल तहरीर मेरे द्वारा कम्प्यूटर पर अक्षरशः अंकित की गयी है।"*

4. Learned counsel for the petitioners submits that petitioner no. 1 had married with the informant/victim/respondent no. 3 and had jointly filed Writ C No. 7852 of 2021 (Kajal Kumari & Another Vs. State of U.P. & 3 Others), which was disposed of vide order dated 12.03.2021; wherein, the learned Single Judge has observed as under:-

"Having regard to the facts and circumstances of the case, I am of the view that the petitioners are at liberty to live together and no person shall be permitted to interfere in their peaceful living. In case any disturbance is caused in the peaceful living of the petitioners, the petitioners shall approach the Senior Superintendent of Police, Prayagraj i.e., respondent no.2, with a computerized copy of this order, who shall provide immediate protection to the petitioners."

5. Perusal of the impugned FIR, prima facie, discloses commission of cognizable offence by the petitioners.

6. Learned counsel for the informant/victim/respondent no. 3 has stated, before us, that on 23.06.2021, the statement of the victim has been recorded under section 164 Cr.P.C., in which she has supported the First Information Report version.

7. Perusal of the impugned FIR, prima facie, indicates fraud practiced by the petitioner no. 1 upon the Court to obtain the aforesaid order dated 12.03.2021 passed in Writ C No. 7852 of 2021 (Kajal Kumari & Another Vs. State of U.P. & 3 Others).

8. The Courts need to be cautious enough to see that under the garb of personal liberty of one, the personal liberty of the victim, is not offended or under allegation of marriage with her, she is not used as a shield to escape from the offences or perpetuation of offences. Facts of the present case, prima facie, disclose that the petitioner no. 1, firstly, kidnapped the informant/respondent/ victim and thereafter, under coercion and threat shown marriage with her and also obtained protection by filing Writ C No. 7852 of 2021 (Kajal Kumari & Another Vs. State of U.P. & 3 Others) relying upon judgements of Supreme Court in ***Gian Devi v. The Superintendent, Nari Niketan, Delhi and others,*** (1976) 3 SCC 234; ***Lata Singh v. State of U.P. and another,*** (2006) 5 SCC 475; and, ***Bhagwan Dass v. State (NCT of Delhi)***, (2011) 6 SCC 396. This is, prima

facie, abuse of process law which needs to be checked.

9. For all the reasons, afore-stated, the writ petition is dismissed.

(2021)09ILR A676
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.08.2021

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Second Appeal No. 176 of 1989

Ramesh Kumar Sharma ...Appellant
Versus
M/S Gool Poput & Ors. ...Respondents

Counsel for the Appellant:
Pradeep Chandra, N.B. Nigam, R.M. Singh, R.M. Singh, R.N. Singh, Raj Mohan Saggi, Rama Nand Gupta

Counsel for the Respondents:
Radhey Shyam, R.Dixit, R. Dwivedi, Shashwat Kishore Chaturvedi

A. Civil Law-Code of Civil Procedure, 1908-Section 100/115-land dispute-applicants instituted a suit praying that defendants-appellants may be restrained from interfering with the possession over the plot shown by letters 'ABCD'-trial court decreed the suit of the applicants for the land shown-appellant preferred an appeal-appellate court confirmed the judgement of the trial court holding that the land 'ABCD' are covered by lease deed, hence they are the owner of the same-the Court found illegality committed by the court below in decreeing the suit without getting the property in dispute identified while deciding the substantial question of law on which the appeal was admitted-the court did not frame any substantial question of law of remand, no grounds has been taken by the applicants in the memo of review petition that no substantial question of law of remand was framed, accordingly, the judgment under review is not sustainable.(Para 1 to 46)

The review application is dismissed. (E-6)

List of Cases cited:

1. Naba Kishore Mohanta Vs.Janardan (2001) 92 R.D. 26 SC

2. Askok Rangnath Nagar Vs Srikant Govind Rao (2015) AIR SCW 6318 SC

3. K.K. Kanan Vs Koolivathukkal (2010) AIR SCW 156 SC

4. Lisamma Vs Karthiyayan (2015) AIR SC 2824

5. Sayeeda Rahimunnisa Vs Malan Bi (2016) SC 4653

6. Municipal Corpn. Vs Surendra Singh (2008) 4 AWC 3414

7. P. Purushottam Vs Pratap Steel (2002) 2 SCC 686

8. Thyang Rajan & ors.. Vs Vinugopal Swami (2004) AIR SC 1913

9. Tamil Nadu Electricity Board & anr. Vs N. Raju Reddiear & anr. (1997) AIR SC 1005

10. Ram Sahu(Dead) thru L.Rs. & ors.. Vs Vinod Kumar Rawat & ors.. (2020) SCC Online SC 896

11. Bhavnagar University Vs . Palitana Sugar Mill Pvt. Ltd. (2003) AIR SC 511

12. Lily Thomoas etc. Vs U.O.I. & ors. (2000) AIR SC 1650

13. St. of Haryana & ors. Vs Mohinder Singh & ors. (2003) 1 AWC 567 SC

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

Order on Civil Misc. Review Petition No.178479 of 2011.

1. Heard Sri Shashi Nandan, learned Senior Counsel assisted by Sri S.K. Chaturvedi, Advocate on behalf of review-applicant, Sri Satish Chandra Mishra, Sri Navin Sinha, and Sri M.C. Chaturvedi

learned Senior Counsel assisted by Sri Kapil Misra, Sri Ramanand Gupta, and Sri Vineet Sankalp learned counsel for the defendant-appellant.

2. The present review petition has been filed by the plaintiffs-respondents (hereinafter referred to as 'applicants') praying for the review of the judgment of this Court dated 25.05.2011 whereby this Court has allowed the appeal and remanded the matter back to decide the same after giving the full opportunity of hearing to the parties and after getting the property in dispute identified.

3. The necessary facts for the present case detailed in the judgment dated 25.05.2011 are as under:-

4. The applicants instituted a suit praying that defendants-appellants (hereinafter referred to as appellants) may be restrained from interfering with the possession over the plot shown by letters 'A, B, C & D' in the map attached with the plaint and boundaries given at the foot of the plaint.

5. The plaint case was that the father of the applicant E.M. Boyce was a permanent lessee of three Bighas, four Biswas equivalent to two acres situated in Civil Lines under a lease deed dated 01.09.1919 executed by Radhabai Zamindaria, widow of one Harlal Bhorey. There was a stipulation in the lease deed that lessees have no right to transfer the aforesaid land without permission of Zamindaria. Subsequently, Smt. Sarjoobai daughter of Radhabai on 05.06.1942 deleted the clause in the lease deed which prohibited the applicants to transfer the lease without permission of Zamindaria. A document to this effect was signed by Sri Rewa Shankar Bhayal as 'Muktar-e-am' of Smt. Sarjoobai. A further case in the plaint was that the leased plot was part and parcel of a big plot whose number was 158 in the settlement of 1865. The said plot was divided into 22 plots in the settlement year of 1297 and the land of three bighas and four Biswas was converted into plot nos.296, 297, and 298 in the settlement of 1346 fasli. The applicants are in possession of the aforesaid plots since 1919. It is further stated in the plaint that the appellant purchased the aforesaid land from defendant no.2 (Rewa Shankar Bhayal), and thereafter, they submitted an application before the S.D.O. concerned for demarcation. The Kanoongo, thereafter, inspected the spot for demarcation of land purchased by appellants, and the same was done on 14.03.1982.

6. The appellants contested the suit by filing a written statement contending interalia that the applicants are neither lessee nor in possession of plots marked by letters A, B, C & D and red lines in the map attached to the plaint. The appellants also denied the right of applicants over the land shown by letters C, G, K & J. The appellants further pleaded that the land shown by letters A, B, C & D in the map attached with the plaint was never leased out under the said lease, and boundaries given in Suit No.441 of 1993 do not tally with the lease dated 01.09.1919. Besides the above averments, the appellants took several other pleas and prayed for the dismissal of the suit.

7. The trial court by judgment and order dated 30.07.1983 decreed the suit of the applicants for the land shown by letters A, B, C, & D, but dismissed the suit for the land shown by letters C, G, K & J. The trial court also held that the land shown by

letters A, B, C & D belongs to the applicants and they are in possession over the same.

8. Feeling aggrieved by the judgment of the trial court, the appellants preferred Civil Appeal before the District Judge, Jhansi. The applicants filed a cross objection against the judgment and order passed by the trial court. The appellate court by judgment and order dated 18.10.1988 confirmed the judgment of the trial court and dismissed the appeal filed by the appellants as well as the cross objection of the applicants. The appellate court held that the land shown by letters A, B, C & D are covered by lease deed dated 01.09.1919, hence, applicants are the owner of the same. The appellate court further held that Rewa Shanker Bhayal had no right to transfer the land shown by letters A, B, C & D to the appellants. Consequently, appellants have no right over the land-based on sale deed executed by Rewa Shanker Bhayal in their favour.

9. Feeling aggrieved by the order of the appellate court dated 18.10.1988, the appellant preferred the present second appeal.

10. The record of the case reveals that the present second appeal was heard on admission on 18.01.1989, on which date this Court while admitting the appeal passed the following order:-

"Admit.

Issue notice.

The substantial question of law is involved in this appeal is question no.4 framed as substantial question of law in the appeal."

11. The substantial question no.4 framed in the memo of appeal reads as under:-

"4. Whether the learned lower appellate court is justified placing reliance of the alleged admission made by Smt. Sarju Bai in the plaint of the suit no.441 of 1933, without the plaint is being proved in accordance with law?"

12. Thus, it is clear from the order dated 18.01.1989 that this Court has admitted the appeal on the substantial question of law no.4 framed in the memo of appeal.

13. The appeal was decided by this Court by judgment and order dated 25.05.2011whereby this court set aside the judgment of appellate court dated 18.10.1988 and judgment and decree dated 30.07.1983 passed by the trial court. The operative portion of the judgment and order dated 25.05.2011 reads as under:-

" In such circumstances, I am of opinion that courts below was not justified in granting injunction in favour of plaintiff-respondent. In case there was no identification of land it was the duty of the courts below to have identification through issuance of commission but admittedly, from the record it appears that courts below have not taken this endevour to get the property identified, therefore, in my opinion, the judgement and order passed by courts below dated 10.10.1988 passed by Additional District and Sessions Judge (Special Judge, E.C. Act) and judgement and decree dated 30.7.1983 passed by Munsif Magistrate, Jhansi are not sustainable in law, therefore, it is hereby quashed. The present appeal is allowed and appeal is remanded back to trial court to decide the same after giving full opportunity to the parties and after getting property in dispute identified. As the matter is very old and the parties are litigating

from 1982, therefore, it will be appropriate that the trial court may decide the suit within a period of six months from the date of production of certified copy of this order.

No order as to costs."

14. Learned Senior Counsel for the applicants has firstly submitted that no substantial question of law was formulated by the Court as required under Section 100(4) of C.P.C. at the time of admission of appeal, hence, there is a palpable error committed by the Court in deciding the second appeal without complying with the requirement of Section 100 (4) of C.P.C.

15. He further submits that according to Section 100 (5) of C.P.C., the jurisdiction of the Court is to hear the appeal on the substantial question of law so formulated at the time of admission of appeal, and the Court is under obligation to permit the respondents, at the time of the hearing, to argue that case does not involve such question. He further submits that though the proviso appended to Section 100 (5) of C.P.C. vests the power in the Court to hear the appeal on any other substantial question of law not formulated by it at the time of admission of appeal, that power can be exercised by the High Court subject to compliance of stipulation contained in the proviso to Section 100 (5) of C.P.C. which means that the Court has to record reasons for formulating another substantial question of law which, in the opinion of the Court, is involved in the case. Accordingly, he submits that the Court in the instant case without recording reasons proceeded to formulate substantial question of law relating to the identity of the land and decided the same. Accordingly, the submission is that the Court did not comply with the requirement of proviso to Section 100 (5) of C.P.C.

16. Further, elaborating the aforesaid submission, he contends that no substantial question of law relating to identifiability of land was involved in the second appeal as no plea has been raised by the applicants in the written statement that property in dispute is not identifiable nor any issue was framed by the trial court in respect of the identity of land in dispute, and hence, there is an error of law on the face of record calling for intervention by this Court in the exercise of its power of review under Order 47 Rule 1 of C.P.C.

17. He further submits that the question of the identity of land is a question of fact and not a substantial question of law, therefore, this Court has erred in interfering with the judgement and order of the trial court as well as appellate court and allowed the appeal.

18. He also contends that the order under review has been passed without hearing the applicants and thus, a ground for review is also made out.

19. On the point of non-framing of the substantial question of law, learned Senior Counsel for the applicants has relied upon the following judgments:-

I. Naba Kishore Mohanta Vs. Janardan 2001 (92) R.D. 26 (SC);

II. Ashok Rangnath Nagar Vs. Srikant Govind Rao 2015 AIR S.C.W. 6318 (SC);

III. K.K. Kanan Vs. Koolivathukkal 2010 AIR S.C.W. 156 (SC).

20. On the issue that question of law relating to the identity of property is the question of fact, learned Senior Counsel for the applicants has placed reliance upon the judgment of this Court in the case of Lisamma Vs. Karthiyayan 2015 AIR SC 2824. On the question that the Court did not frame any question of law for remand, he has placed reliance upon the judgements in the cases of ***Sayeeda Rahimunnisa Vs. Malan Bi 2016 SC 4653, Municipal Corporation Vs. Surendra Singh 2008(4) A.W.C. 3414, P.Purushottam Vs. Pratap Steel 2002 (2) S.C.C. 686 and Thyang Rajan and Others Vs. Vinugopal Swami 2004 AIR S.C. 1913.***

21. Rebutting the aforesaid submission, learned Senior Counsel for the appellant submits that earlier in the case, applicants had engaged Sri Radhey Shyam Dwivedi, Advocate, and Sri Rajesh Dwivedi, Advocate as their counsel. He submits that the judgment of this Court reveals that learned counsel for the applicants (respondents in appeal) was heard by the Court, and therefore, the review petition by another counsel Sri N.B. Nigam is not maintainable. He further submits that now presently, even the counsel, who has filed the review petition, Sri N.B. Nigam is not representing the applicants, and they are being represented by Sri S.K. Chaturvedi, Advocate who has filed Vakaltnama on 27.10.2016. Accordingly, he submits that the practice of changing Advocate while filing the review petition has been deprecated by the Apex Court in the case of ***Tamil Nadu Electricity Board and Another Vs. N. Raju Reddiear and Another AIR 1997 SC 1005*** wherein the Apex Court has held that review petition cannot be entertained at the behest of a counsel or a person, who had not appeared before the Court or was not a party in the main case, therefore, the review petition is liable to be dismissed at the threshold in view of the judgment of Apex Court. He places paragraph 3 on page 8 of the judgment under review to point out that the Court has noted the contention of learned counsel for the respondents, therefore, the review petition could have been filed only by the counsel who was representing the applicants originally, as he is the best person to state as to whether the argument advanced herein by the learned Senior Counsel for the applicants was ever raised by him or not.

22. He further submits that earlier counsel Sri Rajesh Dwivedi has filed an affidavit on record wherein he has stated that he was engaged only to assist Sri Radhey Shyam Dwivedi, Advocate, who had died in January 2008. It is further stated in the affidavit that on the date of hearing of the case, he did not appear before the Court since he was confined to bed due to a fracture in his leg. Paragraphs 1 to 5 of the affidavit are being extracted herein below:-

"1. That, the deponent was engaged in the above mentioned second appeal to assist Sri Radhey Shyam Advocate, on behalf of the respondents.

2. That Sri Radhey Shyam Advocate had died in the month of January, 2008.

3. That thereafter the respondents had taken record of their case from the chamber of late Radhey Shyam, Advocate in end of April, 2011 for engagement of another counsel.

4. That the deponent was not in position to appear in Second Appeal on

25.05.2011 as the applicant was confined to bed due to fracture of his leg and as such the deponent could not inform the court that the deponent had no instructions to act as counsel in appeal.

5. That after the death of Sri Radhey Shyam Advocate, the respondents never contacted to deponent for argument of the case."

23. He submits that Sri Rajesh Dwivedi, Advocate, who was also counsel in the case, is a practicing Advocate, and therefore, in such circumstances, the review petition ought to have been filed by Sri Radhey Shyam Dwivedi, Advocate. He submits that veracity of the affidavit of Sri Radhey Shyam Dwivedi cannot be verified, and a bald averment has been made by Sri Rajesh Dwivedi, Advocate that he did not appear before the court on the day of hearing of case due to a fracture in his leg and no documentary evidence relating to his treatment was filed by Sri Rajesh Dwivedi, Advocate to substantiate said averment. He submits that no reliance can be placed upon the alleged affidavit of Sri Rajesh Dwivedi Advocate in the absence of any investigation enquiring about the veracity of the affidavit or any material on record to prove that the affidavit of Sri Rajesh Dwivedi is genuine. He further contends that the affidavit of Rajesh Dwivedi, Advocate is a device to get away with the objection of non-maintainability of review petition by other counsel.

24. He submits that once the Court has noted in its order that the submission had been advanced by counsel for the applicant, the said recital in the order is to be taken as true unless there is any material contrary to it on record. He further submits that this Court while admitting the appeal has formulated the substantial question of law extracted above which has been noted by the Court on page 4 in the judgment, and thereafter, it proceeded to decide the appeal.

25. He further submits that the Court can exercise its power of review only when it falls within the parameters of Order 47 Rule 1 of C.P.C., and the present case does not meet the requirement of Order 47 Rule 1 of C.P.C., hence, the Court should refrain from exercising its power under Order 47 Rule 1 of C.P.C. He further submits that the submission of learned counsel for the appellants that the Court has not framed any substantial question of law at the time of admission of appeal is incorrect and against the record since the order dated 18.01.1989 reflects that the appeal has been admitted on the substantial question of law no.4 framed in the memo of appeal.

26. He further submits that the Court has noted the substantial question of law framed at the time of admission of appeal in the judgement, and thereafter, it proceeded to decide the appeal on merit, and while deciding the substantial question of law, the Court found that the judgement of both the courts below is erroneous for the reason that the suit could not have been decreed without identification of the property in dispute, and accordingly, it set aside the judgment of both the courts below and remanded the matter back. He further submits that in the case of ***Ram Sahu (Dead) through L.Rs. and Others Vs. Vinod Kumar Rawat and Others 2020 SCC Online SC 896***, the Apex Court held that an order can be reviewed by a Court only on the prescribed ground mentioned in the order under Order 47 Rule 1 of C.P.C. In this respect, he has placed reliance upon paragraph 34 of the judgment which is being extracted hereinbelow:-

"34. To appreciate the scope of review, it would be proper for this Court to

discuss the object and ambit of Section 114 CPC as the same is a substantive provision for review when a person considering himself aggrieved either by a decree or by an order of Court from which appeal is allowed but no appeal is preferred or where there is no provision for appeal against an order and decree, may apply for review of the decree or order as the case may be in the Court, which may order or pass the decree. From the bare reading of Section 114 CPC, it appears that the said substantive power of review under Section 114 CPC has not laid down any condition as the condition precedent in exercise of power of review nor the said Section imposed any prohibition on the Court for exercising its power to review its decision. However, an order can be reviewed by a Court only on the prescribed grounds mentioned in Order 47 Rule 1 CPC, which has been elaborately discussed hereinabove. An application for review is more restricted than that of an appeal and the Court of review has limited jurisdiction as to the definite limit mentioned in Order 47 Rule 1 CPC itself. The powers of review cannot be exercised as an inherent power nor can an appellate power can be exercised in the guise of power of review."

27. He further submits that the fact whether learned counsel for respondents had raised any argument that the question of identification of land is a question of fact and is not a substantial question of law at the time of hearing of appeal could only be certified by counsel who appeared in the case at the time of the hearing, and since the counsel who appeared in the case for the applicants has not filed review petition certifying that he had raised the aforementioned argument at the time of the hearing, therefore, this question cannot be raised by the counsel for the applicants. He submits that the applicants want rehearing of appeal in the garb of review application which is beyond the scope of review since it is settled in law that the power of review can be exercised only if there is an error apparent on the face of the record, and an error which has to be searched and fished out is not an error apparent on the face of the record.

28. Thus, he submits that no ground for review is made out and the review petition deserves to be dismissed.

29. I have considered rival submissions of the parties and perused the record.

30. The fact as emanates from the record reveals that Sri Radhey Shyam Dwivedi and Rajesh Dwivedi were counsels representing the applicants. The Court noted the submission advanced by the learned counsel for the respondents in the judgment, therefore, in view of the judgment of Apex Court in the case of ***(Tamil Nadu Electricity Board and Another) (supra),*** the review petition at the behest of another counsel is not maintainable. Paragraph 1 of the judgment is being extracted hereinbelow:-

"*1. It is a sad spectacle that new practice unbecoming of worthy and conducive to the profession is cropping up. Mr. Mariaputham, Advocate-on-Record had filed vakalatnama for the petitioner-respondent when the special leave petition was filed. After the matter was disposed of, Mr. V. Balachandran, Advocate had filed a petition for review. That was also dismissed by this Court on April, 24, 1996. Yet another advocate, Mr. S.U.K. Sugar, has now been engaged to file the present application styled as "application for*

clarification", on the specious plea that the order is not clear and unambiguous. When an appeal/special leave petition is dismissed, except in rare cases where error of law or fact is apparent on the record, no review can be filed; that too by the advocate on record who neither appeared nor was party in the main case. It is salutary to note that Court spends valuable time in deciding a case. Review petition is not, and should not be, an attempt for hearing the matter again on merits. Unfortunately, it has become, in recent time, a practice to file such review petitions as a routine; that too, with change of counsel, without obtaining consent of the advocate on record at earlier stage. This is not conducive to healthy practice of the Bar which has the responsibility to maintain the salutary practice of profession. In Review Petition No.2670/96 in CA No.1867/92, a Bench of three Judges to which one of us, K. Ramaswamy,J., was a member, had held as under:

"The record of the appeal indicates that Shri Sudarsh Menon was the Advocate-on-Record when the appeal was heard and decided on merits. The Review Petition has been filed by Shri Prabir Chowdhury who was neither an arguing counsel when the appeal was heard nor was he present at the time of arguments. It is unknown on what basis he has written the grounds in the Review Petition as if it is a rehearing of an appeal against our order. He did not confine to the scope of review. It would be not in the interest of the profession to permit such practice. That part, he has not obtained "No Objection Certificate" from the Advocate-on-Record in the appeal, in spite of the fact that Registry had informed him of the requirement for doing so. Filing of the "No Objection Certificate" would be the basis for him to come on record. Otherwise, the Advocate-on-Record is answerable to the Court. The failure to obtain the "No Objection Certificate" from the erstwhile counsel has disentitled him to file the Review Petition. Even otherwise, the Review Petition has no merits. It is an attempt to reargue the matter on merits.

On these grounds, we dismiss the Review Petition".

31. In the present case, it is worth noticing that the facts detailed above reflect that the conduct of the applicants is mischievous and not fair for the reason that the Court has recorded in the judgment the contention advanced by the learned counsel for the applicants and to wriggle out the said fact recorded by the Court, applicants have filed the affidavit of Sri Rajesh Dwivedi, Advocate sworn on 25.04.2013 after about 2 years from the date of filing the review petition stating therein that he was engaged as assisting counsel to Sri Radhey Shyam Dwivedi, Advocate and on the date of hearing, he had fracture in leg without bringing any documentary evidence on record relating to his treatment which can demonstrate that he had fracture in leg. The affidavit of Sri Rajesh Dwivedi, Advocate had been filed after two years from the date of filing of the review petition to meet out the objection that the review petition is not maintainable as it has been filed by some other counsel and not the counsel who was heard at the time of hearing of the appeal. Further, from the averments made in the affidavit of Sri Rajesh Dwivedi, Advocate, it is manifest that Sri Rajesh Dwivedi, Advocate is still a practicing Advocate and he did not dare to come before the Court and state that the affidavit has been sworn by him and the averments made therein are correct,

therefore, in such circumstances, this Court is not inclined to accept the affidavit of Sri Rajesh Dwivedi, Advocate and averments contained therein, more so, when the Court has noted the contentions advanced by the counsel for the applicants in the judgment.

32. At this stage, it would be apt to refer to the judgment of the Apex Court in the case of ***Bhavnagar University Vs. Palitana Sugar Mill Pvt. Ltd. AIR 2003 SC 511*** wherein the apex court observed that statement of facts as to what transpired at the time of hearing recorded in the judgment of the Court are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. In this regard, the relevant extract of paragraph 61 of the judgment of the Apex Court is being reproduced hereinbelow:-

"61...statements of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges, who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error (Per Lord Buckmaster in Madhusudan v. Chandrabati, AIR 1917 PC 30). That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. Of course a party may resile and an Appellate Court may permit him in rare and appropriate cases to resile from a concession on the ground that the concession was made on a wrong appreciation of the law and had led to gross injustice; but, he may not call in question the very fact of making the concession as recorded in the judgment."

33. In the instant case, the matter was argued on behalf of applicants by original counsel, and review was filed by Sri N.B. Nigam, Advocate who was not the original counsel of the applicants, and even after filing the review, the applicants have changed the counsel and engaged a new counsel Sri S.K. Chaturvedi. Therefore, this court is of the view that the review application is not maintainable.

34. Now, coming to the other contention advanced by the learned counsel for the applicants, it would be pertinent to refer to the judgment of Apex Court wherein it has been held that the power of review can be exercised within the parameters provided in Order 47 Rule 1 of C.P.C. In the case of ***Lily Thomas etc. Vs. Union of India and Others AIR 2000 SC 1650,*** the Apex Court has held that the power of review can be exercised within the limits of the statute.

35. In this regard, it would also be relevant to refer to paragraph no. 3 & 5 of the judgment of Apex Court in the case of State of Haryana and Others Vs. Mohinder Singh and Others 2003 (1) AWC 567 SC which is being extracted hereinbelow:-

"3. Learned Additional Solicitor General appearing for the appellant-State strongly contended that the High Court could not have passed the order under challenge in the purported exercise of its powers of review and the order under challenge is liable to be set aside on this ground alone, dehors even the infirmities in

the ultimate decision on merits. Reliance has been placed in support thereof on the decision in Parsion Devi and others v. Sumitra Devi and others, JT 1997 (8) SC 480, wherein it has been observed as follows:-

"9. Under Order XLVII, Rule 1, C.P.C., a judgment may be open to review inter alia, if there is a mistake or an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review under Order XLVII, Rule 1, C.P.C. In exercise of the jurisdiction under Order XLVII, Rule 1, C.P.C., it is not permissible for an erroneous decision to be "reheard and corrected". A review petition, it must be remembered, has a limited purpose and cannot be allowed to be "an appeal in disguise."

10. Considered in the light of this settled position we find that Sharma, J., clearly overstepped the jurisdiction vested in the Court under Order XLVII, Rule 1 C.P.C. The observations of Sharma, J., that "accordingly, the order in question is reviewed and it is held that the decree in question was of composite nature wherein both mandatory and prohibitory injunctions were provided" and as such the case was covered by Article 182 and not Article 181 cannot be said to fall within the scope of Order XLVII, Rule 1 C.P.C. There is a clear distinction between an erroneous decision and an error apparent on the face of the record. While the first can be corrected by the higher forum, the latter only can be corrected by exercise of the review jurisdiction."

.....

5. We have carefully considered the submissions of learned counsel appearing on either side. The Division Bench in the High Court, in our view, completely overstepped the limits of its review jurisdiction and on the face of it appears to have proceeded as though it is a rehearing of the whole petition which had been earlier finally disposed of. It has often been reiterated that the scope available for a litigant invoking the powers of review is not one more chance for rehearing of the matter already finally disposed of. The course adopted in this case by the High Court appears to be really what has been held by this Court to be not permissible. On this ground alone, without expressing any views on the merits of the claim, the order of the High Court dated 14.5.1999 is set aside and the original order dated 14.5.1998 shall stand restored. While noticing some of the submissions made on merits by either side, we consider it appropriate to place on record that even the learned counsel for the appellant could not seriously dispute the position that the respondents would at any rate be entitled to be placed on the 'first higher standard pay scale' and that to this extent atleast, the respondents' claim would deserve consideration. The appeals are allowed in the above terms. No order as to costs."

36. Now, so far as the first contention of learned counsel for the applicant that the Court has not proceeded to frame any question of law at the time of admission of appeal, the said contention on the face of the record is wrong and incorrect. As noted above, this Court has admitted the appeal on the substantial question of law no.4 framed in the appeal, therefore, the judgment relied upon by the learned counsel for the applicants on the point that non-framing of the substantial question of

law by the Court at the time of admission of appeal amounts to an error apparent on the face of the record which calls for intervention by this court in the exercise of the power of Review are not applicable in the facts of the instant case.

37. So far as the second contention advanced by the learned counsel for the applicants that proviso to Section 100(5) of C.P.C. was not adhered to by the Court in deciding the appeal, since the Court has not recorded any reason in framing the question of the identity of the land, and further the question of identification of land is a question of fact, therefore, the Court has committed an error which is apparent on the face of the record, therefore, the present is a case falling within the ambit of Order 47 Rule 1 of C.P.C., the said submission is also not sustainable for the reason that the Court while deciding the appeal has noted the substantial question of law framed at the time of admission of appeal in the 6th line from the top at page 4 of the judgement under review, and thereafter, proceeded to decide the appeal.

38. While deciding the substantial question of law on which the appeal was admitted, the Court found the illegality committed by the court below since the identity of the land in question was not ascertained and accordingly, it formed an opinion that the court below had erred in law in decreeing the suit without getting the property in dispute identified.

39. The perusal of judgment discloses that the Court did not frame any other substantial question of law and had decided the appeal only on the question of law so framed at the time of admission of appeal, and therefore, there does not arise any question of compliance of proviso to Section 100 (5) of C.P.C.

40. The judgment relied upon by the learned counsel for the applicants in the case of ***Lisamma (supra)*** on the point that question of the identity of property is a question of fact is not applicable in the facts of the present case. Since the Court has not framed any substantial question of law regarding the identity of the land, the Court, while deciding the question of law on which appeal was admitted, found illegality committed by the court below in not getting the land identified while decreeing the suit.

41. It is settled in law that Court can exercise its power of review only when there is an error apparent on the face of the record and an error which is to be fished out by a process of reasoning cannot be said to be an error apparent on the face of the record. Hence, it implies that the reviewing court has no power to review the judgment where the error in the judgment is to be searched out by a process of reasoning.

42. This Court is of the opinion that to test the aforesaid contention of learned counsel for the applicants, a process of reasoning has to be applied which is beyond the scope of review as under the power of review, the Court cannot re-hear the appeal.

43. At this stage, it would be relevant to note that the appellants have taken specific plea in paragraphs 17 and 19 of the written statement wherein they have disputed the identification of land, and further, they have filed an application before the appellate court, which is marked as paper no.74, praying for the survey of

the land in question and thus, the submission of learned counsel for the applicants that identity of land was not disputed by the applicants is incorrect on the face of the record.

44. Now, so far as the submission of learned counsel for the applicants that Court did not frame any substantial question of law of remand, it is pertinent to note that no ground has been taken by the applicants in the memo of review petition that no substantial question of law of remand was framed, accordingly, the judgment under review is not sustainable. As no such ground has been taken by the applicants for reviewing the judgment of this Court, therefore, this submission cannot be advanced during the argument.

45. It is worth mentioning that the Court ought to have framed any issue of remand or not can be adjudicated only after hearing the applicants on merit inasmuch as to ascertain this question, the first question that would arise for adjudication is whether the Second Appellate Court on finding that the judgment of the lower court is not sustainable in law is devoid of the power to remand the matter directing the court below to decide the suit afresh without framing the issue of remand. To adjudicate the said question, this Court has to re-hear the appeal which is beyond the scope of the Court in the exercise of the power of review under Order 47 Rule 1 of C.P.C. Thus, the judgments cited on the point that no issue of remand was framed therefore the judgment under review is not sustainable are not applicable in the facts of the present case.

46. The contention of learned counsel for the applicants that no opportunity of hearing was given is also misconceived as the Court in its judgment has noted the submissions advanced by the learned counsel for the applicants, and accordingly, the said submission is also misconceived

47. Thus, for the reasons given above, the review application being misconceived is ***dismissed*** with no order as to cost.

(2021)09ILR A687
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.09.2021

BEFORE

THE HON'BLE SIDDHARTH, J.

First Appeal No. 428 of 2019

Amar Singh ...Appellant
Versus
Ranpal Singh & Ors. ...Respondents

Counsel for the Appellant:
Sri Purnendu Prakash Pandey, Sri Chandra Kumar Rai

Counsel for the Respondents:
Himadari Batra, Sri Kunal Shah, Sri Manoj Kumar Dhuriya, Sri Syed Fahim Ahmed

A. Civil Law -Code of Civil Procedure, 1908-Section 96-land dispute-appellant failed to adduce Allotment Certificate and could not prove the factum of grant of Lease/Allotment in his favour- if the receipt for premium is taken to be the Allotment Certificate itself, in absence of previous approval of the Assistant Collector the same is void ab initio-finally, the document dated 11.05.1974 was not a lease, hence, it never required cancellation or declaration as a void document from revenue court.(Para 1 to 66)

The appeal is dismissed. (E-6)

List of Cases cited:

1. U.O.I .Vs Ibrahim Uddin (2012) 5 AWC 5003 SC

2. Similesh Kumar Vs Gaon Sabha, Uskar, Ghazipur & ors. (1977) AIR All 360

3. H . Siddiqui Vs A. Ramalingam, (2011) AIR SC 1492

4. Munshi Ram Vs Balkar Singh (2016) SCC Online P&H 11166

5. Lal Bhadur Vs Addl. Commr. Writ C No 30114 of 2016

6. Lal Bhadur Vs Additional Commissioner, Writ C No 30114 of 2016

7. Abdul Rauf Khan Vs Abdul Samad, (1999) 2 AWC 939

8. Dhurandar Prasad Singh Vs Jai Prakash University, (2001) AIR SC 2552

9. Prem Singh Vs Birbal Singh (2006) 5 SCC 353

10. Rajasthan State Industrial Development and Investment Corporation Vs Subhash Sindhi Co-operative Housing Society Jaipur (2013) 5 SCC 427

11. In Kalawati Vs Bisheshwar (1968) AIR SC 261

12. St. of Ker. Vs. M.K Kunhikannan Nambiar Manjeri Manikoth , Naduvil(dead) & ors. (1996) AIR SC 906

(Delivered by Hon'ble Siddharth, J.)

1. Heard Sri Chandra Kumar Rai, learned counsel for the appellant and Sri Kunal Shah, learned counsel for the respondents and perused the record of the court below.

2. This first appeal has been preferred by the defendant-appellant against the judgment and decree dated 13.03.2019 passed by Civil Judge (Senior Division), Gautambuddh Nagar in Original Suit No. 1334 of 2010 (Ranpal Singh vs. Amar Singh and Others).

3. Plaintiff/respondent no. 1 instituted an Original Suit No. 1334 of 2020 praying for a decree of partition of 1/5 share in respect of property in dispute shown by letters A, B, C and D being Khasra No. 120, area 525 square yards. The pedigree mentioned in the plaint is as follows:-

- Ranpal (plaintiff/respondent no. 1)

- Amar Singh (defendant no. 1/appellant)

Late Shri Ramphal - - Raghubar (defendant/respondent no. 2)

- Ram Niwas (defendant/respondent no. 3)

- Smt. Rameshari (defendant/respondent no. 4)

It was pleaded in the plaint that plaintiff/respondent no. 1 and defendants, who are five in numbers, are real brothers and sister. Their father died on 29.08.2007 and after his death plaintiff/respondent no. 1 and defendants are entitled to 1/5 share each in the property in dispute which is shown by letter A, B, C and D in the plaint map.

4. Defendant No. 1/appellant filed his written statement denying the plaint case. In the additional pleas the defendant no. 1/appellant stated that suit is liable to be dismissed as 150 square yard area of Khasra No. 120 was given to defendant no. 1/appellant by lease dated 11.05.1974. The same is situated in disputed area shown by

letter A, B, C and D in the plaint map. The remaining area of 525 square yard of Khasra No. 120 belongs to their father Ramphal Singh in which all the five brothers and sister will be entitled to equal share. It has been also stated in the written statement that in the 150 square yard area which belongs to defendant no. 1/appellant residential house was constructed by him from his own funds. The same has no concern with the plaintiff/respondent no. 1 and defendant/respondent nos. 2 to 4.

5. Defendant/respondent nos. 2 and 3 filed their joint written statement admitting the plaint allegations and defendant/ respondent no. 4 filed her separate written statement admitting the plaint allegations.

6. The trial court framed the following six issues in the plaint:-

(1) Whether the plaintiff is owner of 1/5 part of disputed property shown in the plaint map ?

(2) Whether the suit is barred by provisions of Sections 34, 41 and 49 of Specific Relief Act ?

(3) Whether the suit is undervalued ?

(4) Whether the court fees paid by the plaintiff is insufficient ?

(5) Whether the plaintiff is entitled to partition of his share on the basis of pleadings in the plaint ? and

(6) Whether the plaintiff is entitled to any other relief, if yes, then to what effect?

7. On behalf of the plaintiff/ respondent no. 1, Ranpal Singh, was examined as P.W-1 and documentary evidences were also filed in support of his case.

8. On behalf of the defendant no. 1/appellant, Amar Singh, was examined as D.W-1 and in documentary evidence original lease receipt (82 Ga-83 Ga), C.H. Form 45 (84 Ga), C.H. Form 41 (85 Ga), Khatauni, Revenue map, Electricity Bill (86 Ga to 91 Ga) were filed in support of his case.

9. The trial court heard the counsel for the parties in Original Suit No. 1334 of 2010 and perused the evidence on record and decreed the plaintiff/respondent no. 1's Suit No. 1334 of 2010 for 1/5 share in respect of property in dispute by judgment and decree dated 13.03.2019.

10. That the trial court decided issue nos. 1 and 5 together and recorded the finding that the defendant no. 1/appellant failed to prove that he has been allotted the land of 150 square yard in Khasra No. 120 by any lease of land management committee and held that since the parties are brothers and sister, the plaintiff/respondent no. 1 is entitled to his 1/5 shares in his property. Issue nos. 3 and 4 regarding valuation and court fees paid in the suit were decided in favour of plaintiff/respondent no. 1. Issue no. 2 was decided holding that the same was required to be proved by the defendant no. 1/appellant which he has failed to prove and therefore it was decided against defendant no. 1/appellant. Finally, issue no. 6 was decided holding that the suit is liable to be decreed and 1/5 share of the plaintiff/respondent no. 1 was declared in the suit property.

11. Learned counsel for the defendant no.1/appellant has submitted that the trial court has failed to consider the lease executed in favour of the defendant/appellant on 11.05.1974 in accordance with law. Permission of Assistant Collector / Sub-Divisional Officer regarding execution of lease has came into existence on 01.11,1975 while lease in question was executed on 11.05.1974 when there was no such provision in the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950. Hence, impugned judgment and decree dated 13.03.2019 passed by the court below is wholly illegal and manifestly erroneous.

12. Trial court has failed to consider that unless lease in question is cancelled by Revenue Court in accordance with law; the Civil Court cannot ignore it, as such impugned judgment and decree dated 13.03.2019 is illegal and manifestly erroneous.

13. Counsel for the plaintiff/respondent no. 1 has submitted that defendant no. 1/appellant claimed that he is exclusive owner of part of the suit property, area about 150 square yard and therefore as per Section 103 of the Evidence Act he was required to prove the ownership of the aforesaid area of land on the basis of residential lease dated 11.05.1974. He only filed a receipt of premium in evidence and not the lease granted in his favour. The trial court has rightly not accepted the receipt of premium as reliable evidence regarding the claim of defendant no. 1/appellant. At the relevant time the substantive provision for grant of lease was contained in Sections 122-C, 195, 197 and 198 of U.P. Zamindari and Abolition and Land Reforms Act, 1950 and also the procedural aspect of grant of lease by Rule 115-L to Rule 115-T of the U.P. Zamindari Abolition and Land Reforms Rules, 1952 was incorporated on 25.03.1972 by way of 9th amendment. Clause 3 of Rule 115-N of the then existing rules provided that allottee of a housing site shall be given a certificate to allotment in Z.A. Form 49-F in two parts. Main certificate is to be given to the allottee and its counterpart shall remain with land management committee. No such certificate was produced in evidence by the defendant no. 1/appellant.

14. Section 64 of the Evidence Act provides that documents must be proved by primary evidence which as per Section 62 of the Evidence Act means the document itself. No allotment certificate or any such document was produced by the defendant no. 1/appellant.

15. Non-production of original lease / allotment certificate by the defendant no.1/appellant despite objection of the plaintiff/respondent no. 1 would lead to drawing of adverse interference against him. The plaintiff/respondent no. 1 had moved an application dated 25.04.2011, exhibit- 22 Ga 2, before the trial court asking the defendant no. 1/appellant to produce the original copy of the lease / allotment certificate but it was not produced before the Court. He has relied upon the judgment of the Apex Court in the case of *Union of India vs. Ibrahim Uddin, 2012 (5) AWC 5003 SC*, in this regard. During the pendency of suit the plaintiff/respondent no. 1 vide letter dated 26.03.2012 sought information from the office of Assistant Collector, Tehsil Dadri whether any lease / allotment certificate was issued in the name of defendant no. 1/appellant, Amar Singh and by letter dated 03.04.2012 it was informed that no record

with respect to allotment of residential leases for the year 1974 exists in his office. This information was never disputed by the defendant no.1/appellant. In his cross-examination, defendant no. 1/appellant admitted that no possession certificate was issued in his favour.

16. After hearing the rival contentions, this court finds that the following points of determination are involved in this appeal:-

(1) Whether the defendant no. 1 / appellant has proved the disputed area of about 150 square yard in plot no. 120 to be his exclusive property on the basis of residential lease dated 11.05.1974 ?

(2) Whether prior to 01.11.1975 permission of Assistant Collector / Sub-Divisional Officer was required for execution of lease and the trial court has ignored the evidence produced before it by the defendant no. 1/appellant without considering the correct legal position ?

(3) Whether till the lease in question is cancelled by competent revenue court in accordance with law, it is binding on Civil Court and cannot be ignored by it ?

17. All the points of determination are being considered and decided together.

18. The pleadings of the defendant no. 1/appellant is that on the basis of *lease* receipt, paper no. 82-Ga and 83-Ga, he is in possession of 150 square yards of land and he has constructed his house over the same after grant of lease to him on 11.05.1974. He claims that this area of 150 square yard of land is not the part of the property inherited from his father and therefore, after excluding this land 1/5 share of the plaintiff/respondent no. 1 and each of the defendants should be declared. The case of the plaintiff/respondent no. 1 is that the receipt produced by the defendant no. 1/appellant to prove grant of lease by land management committee in his favour is only a receipt of premium and not the copy of lease / allotment certificate itself, therefore, in the absence of the copy of the lease / allotment certificate no rights can accrue to the defendant no. 1/appellant. The submission is that the burden of proving the due allotment and execution of lease of 150 square yards of land in favour of defendant no. 1/appellant was on him and in case he failed to prove the same by way of primary evidence he cannot be granted any rights on its basis.

19. This court finds that the defendant no. 1/appellant in his Written Statement as well as in his examination in chief, had taken only one ground to resist the claim of partition viz., *a portion of suit property, (about 150 square yards)*, which lies on the western side of the suit property as exclusive property which he had acquired by means of a residential lease dated 11.05.1974, and thus the same could not form a part of the subject matter of partition.

20. Section 103 of the Indian Evidence Act, 1872 provides that the burden of proof of any particular fact lies on the party who alleges it and who wishes the Court to believe in its existence. Section 103 of the Evidence Act is reproduced herein below for ready reference of this Hon'ble Court:

103. Burden of proof as to particular fact.--The burden of proof as to any particular fact lies on that person who

wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

21. In *Woodroffe & Amir Ali: Law of Evidence (21st Edition),* the relevant law is stated thus:-

"When, however, the defendant, or either litigant party, instead of denying what is alleged against him, relies on some new matter which if true, is an answer to it, the burden of proof changes sides; and he, in his turn, is bound to show a prima facie case at least and, if he leaves it imperfect, the court will not assist him, Reus excipendo fit actor"

22. Since, the defendant no. 1/appellant had asserted the fact of sole ownership of a portion of suit property on the basis of a lease, Section 103 of the Evidence Act casted an obligation upon the defendant no. 1/appellant to prove the particular fact about grant of lease. The documentary evidence filed by the defendant no. 1/appellant in support of claim of grant of lease, was not the lease/Allotment Certificate itself but a receipt of premium.

23. This court finds that a receipt of premium was produced before the trial Court and the trial Court has not ascribed any value to the receipt of premium, and has returned the finding that the defendant no. 1/appellant has not been able to prove the fact of issuance of grant of lease in his favour. Another important fact of the matter which is based purely on law is that the receipt of premium, which has been filed by the defendant no. 1/appellant is not the same as Lease/Allotment Certificate and on its basis the exclusive rights claimed by defendant no. 1/appellant cannot be sustained and court below has rightly held so.

24. The case of the defendant / appellant that prior to 1.11.1975 permission of Assistant Collector / Sub-Divisional Officer was not required for execution of lease such an amendment came into force on 01.11.1975 when the lease was granted to the defendant/appellant on 11.05.1974. He has relied upon the notification no. 605/ Rajaswa 1-2 (8) - 75 dated 01.11.1975 which shows that Rule 115-N of U.P. Zamindari Abolition and Land Reforms Rules, 1952 was incorporated on 01.11.1975 in the rules. The case of the plaintiff/respondent no. 1 is that the civil court cannot ignore the lease executed in favour of the defendant/appellant since as per Full Bench judgment of the court in the case of ***Similesh Kumar vs. Gaon Sabha, Uskar, Ghazipur and Others, AIR 1977*** All 360, the lease granted by land management committee / gaon sabha can only be cancelled by Revenue Court cannot even consolidation authorities have no jurisdiction to cancel the same. On the contrary, the case of the plaintiff/respondent no. 1 is that the substantive provision for grant of lease is contained in Sections 122-C(2), 195, 197, 198 of U.P. Zamindari Abolition and Land Reforms Act and in the aforesaid provisions there is requirement of previous approval of lease by Assistant Collector much prior in time than 11.05.1974. Section 122-C(2) was inserted in the act aforesaid on 22.07.1971 and it provides for obtaining previous approval of the Assistant Collector before making allotment. The relevant part of the U.P. Land Laws (Amendment) Act, 1971, is being quoted below:-

In pursuance of the provisions of clause (3) of Article 348 of the Constitution of India, the Governor is pleased to order the publication of the following English translation of the Uttar Pradesh Bhoomi-Vidhi (Sanshodhan) Adhiniyam, 1971 (Uttar Pradesh Adhiniyam Sankhya 21 of 1971) as passed by the Uttar Pradesh Legislature and assented to by the President on August 22, 1971.

UTTAR PRADESH LAND LAWS (AMENDMENT) ACT, 1971

(U.P. Act No. 21 of 1971)

(As passed by the Uttar Pradesh Legislature)

An

Act

further to amend the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 and the Uttar Pradesh Urban Areas Zamindari Abolition and Land Reforms Act, 1956.

It is hereby enacted in the Twenty-Second Year of the Republic of India as follows:-

CHAPTER I

Preliminary

1. .....

CHAPTER II

2. .....

3. After section 122-B of the principal Act, the following sections shall be inserted, namely ;

"122-C, (1) The Assistant Collector In-charge of the sub- division, of his own motion or on the resolution of the Land Management Committee, may ear-mark any of the following classes of land for the provision of abadi sites for the members of the Scheduled Castes and the Scheduled Tribes and agricultural labourers allotment of land for housing sites for members of Scheduled Castes, agricultural labourers, etc., and village artisans –

(a) lands referred to in clause (i) of sub-section (I) of section 117 and vested in the Gaon Sabha under that section ;

(b) lands coming into possession of the Land Management Committee under Section 194 or under any other provision of this Act;

(c) any other land which is deemed to be or becomes vacant under section 13, section 14, section 163, section 186 or section 211;

(d) where the land ear-marked for the extension of abadi and reserved as abadi site for Harijans under the U.P. Consolidation of Holdings Act, 1953, is considered by him to be insufficient and land ear-marked for other public purpose under that Act is available, then any part of the land so available.

(2) Notwithstanding anything in sections 122-A, 195, 196, 197 and 198 of this Act, or in Section 4, 15, 16, 28-B and 34 of the United Provinces Panchayat Raj Act, 1947, the Land Management Committee may ***with the previous approval of the Assistant Collector In-charge of the sub-division****, allot, for the purpose of*

building of houses, to persons referred to in sub-section (3) –

(a) any land ear-marked under sub-section (1);

(b) any land ear-marked for the extension of abadi sites for Harijans under the provisions of the U.P. Consolidation of Holdings Act, 1953;

(c) any abadi site referred to in clause (vi) of section (i) of section 117 and vested in the Gaon Sabha;

(d) any land acquired for the said purpose under the Land Acquisition Act, 1894.

25. The defendant no. 1/appellant in Paragraph 20 of his Written Statement had averred that the Lease/Allotment Certificate had been granted to him on 11.05.1974. At the relevant point in time, i.e. on 11.05.1974, the substantive provision for grant of lease was contained in Section 122-C, 195, 197 and 198 of the UP Zamindari Abolition and Land Reforms Act, 1950 (hereinafter referred to as "**U.P.Z.A & L.R Act"). The** aforesaid provisions provided for grant of lease "**with the previous approval of the Assistant Collector".**

26. The procedural aspect of grant of Lease/Allotment Certificate is governed by Rule 115-L to Rule 115-T of the Zamindari Abolition and Land Reform Rules, 1952.

27. Vide ***Uttar Pradesh Zamindari Abolition and Land Reforms (Ninth Amendment) Rules, 1972,*** published in the Official Gazette on 25.03.1972, the previous existing Rules 115-L to Rule 115-R were amended and were substituted by Rule 115-L to Rule 115-T. The aforesaid amendment remained in vogue till 01.11.1975 when further amendment was carried out in the said Rules. As the date of grant of alleged Lease/Allotment Certificate is 11.05.1974, the Rules 115-L to Rule 115-T as introduced by ***Uttar Pradesh Zamindari Abolition and Land Reforms (Ninth Amendment) Rules, 1972,*** is the relevant Rules on the basis of which the validity of the argument of the plaintiff/respondent No. 1 is to be tested.

28. Rule 115 N of the UPZALR Rules as it existed then is reproduced herein below:

115N (1) Whenever the Land Management Committee proceeds to allot housing sites under Rule 115-L or 115-M it shall announce by beat of drum in the village the exact location of the sites to be allotted, the time, the date and venue of allotment.

(2) All documents shall be made by the Land Management Committee in a meeting held for the purpose on the date announced under the preceding sub-rule. Where more than one person belonging to the same order of preference express their desire to be allotted a particular site, the said committee shall draw of lots to determine the person to whom the site should be allotted.

(3) The allottee of the housing site shall be given receipt for the premium, if any, paid by him to the Land Management Committee **and a certificate of allotment. The certificate shall be in Z.A. Form, 49-F which shall be prepared in two parts, the main certificate being given to the allottee and its counter-part remaining with the Land Management Committee for record.**

29. A bare perusal of Clause 3 of Rule 115-N of the then existing Rules reveals that the receipt for premium has no semblance to the Allotment Certificate and is not the same as the Allotment Certificate itself.

30. Moreover, Clause 3 of Rule 15-N of the then existing Rules makes it evident that the allottee of the housing site shall be given a certificate of allotment which shall be in Z.A. Form, 49-F and which shall be prepared in two parts, the main certificate being given to the allottee and its counter-part remaining with the Land Management Committee for record.

31. Thus it becomes evident that the factum of grant of lease can be proved by adducing the allotment certificate which shall be in Z.A. Form 49-F and not by adducing receipt of premium, which at best can prove the payment of some premium to the Land Management Committee but cannot establish the factum of grant of Lease/Allotment Certificate.

32. Further the particulars of Allotment Certificate, Z.A. Form 49-F , clearly reveals that it must apart from the Signature of Chairman of Land Management Committee also bear the signatures of Assistant Collector-in-charge of Sub-Division. However the document that had been filed before the trial court by the defendant no. 1/appellant, cannot by any stretch of imagination be said to be an allotment certificate which is required to be issued in Z.A. Form 49-F.

33. Document filed by the defendant no. 1/ appellant in support of his claim that he has been granted a Lease/Allotment Certificate does not classify as a Allotment Certificate contemplated in Section 122-C of the U.P.Z.A.L.R Act read with Rule 115-N of the Rules in vogue then.

34. Moreover, Section 64 of the Evidence Act provides that documents must be proved by primary evidence, which as per Section 62 of the Evidence Act means the document itself. Thus, for proving the factum of grant of Lease/Allotment Certificate, the statutory requirement as per Section 64 read with Section 62 of the Evidence Act was of adducing of Allotment Certificate and not any other document.

35. Further, as the defendant no. 1/appellant has not laid any foundational basis for proving the factum of grant of Lease / Allotment Certificate by way of secondary evidence, no secondary evidence can be lead to prove the same.

36. It is trite law that secondary evidence is inadmissible until the non production of the original is accounted for so as to bring it within one or other of the cases provided for in Section 65 of the Evidence Act. The Hon'ble Supreme Court in ***H. Siddiqui v. A . Ramalingam, AIR 2011 SC 1492*** held thus:

10. Provisions of Section 65 of the Act 1872 provide for permitting the parties to adduce secondary evidence. However, such a course is subject to a large number of limitations. In a case where original documents are not produced at any time, nor, any factual foundation has been led for giving secondary evidence, it is not permissible for the court to allow a party to adduce secondary evidence. Thus, secondary evidence relating to the contents of a document is inadmissible, until the non production of the original is accounted

for, so as to bring it within one or other of the cases provided for in the section. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. Mere admission of a document in evidence does not amount to its proof. Therefore, the documentary evidence is required to be proved in accordance with law. The court has an obligation to decide the question of admissibility of a document in secondary evidence before making endorsement thereon.

37. As the defendant no. 1/appellant could not adduce the copy of Allotment Certificate, which alone could have proved the fact of grant of lease in his favour, the necessary corollary is that the defendant no. 1/appellant failed to prove his special pleaded fact.

38. The plaintiff/respondent No.1 had moved an Application dated 25.04.2011 before the Trial Court, which is marked as Exhibit 22 Ga 2 and is also available on Trial Court's record, asking the defendant/ appellant to produce the Original Copy of the Lease/Allotment Certificate. However, despite the demand of production of Original Copy of Lease/Allotment Certificate the defendant/appellant did not produce the same, but filed a photo-copy of receipt of premium.

39. The aforesaid action of the defendant no. 1/ appellant warrants drawing an adverse inference against the defendant/appellant as per Clause g of Section 114 of the Evidence Act.

40. Reliance in the aforesaid regard can be placed upon the dictum of the Hon'ble Supreme Court in ***Union of India v. Ibrahim Uddin, 2012 (5) AWC 5003 (SC).*** The relevant extract of the judgment of the Hon'ble Supreme Court in ***Union of India v. Ibrahim Uddin, 2012 (5) AWC 5003 (SC), i***s reproduced herein below,

6. Generally, it is the duty of the party to lead the best evidence in his possession, which could throw light on the issue in controversy and in case such material evidence is withheld, the Court may draw adverse inference under Section 114(g) of the Evidence Act notwithstanding, that the onus of proof did not lie on such party and it was not called upon to produce the said evidence.

.16. Thus, in view of the above, the law on the issue can be summarised to the effect that, issue of drawing adverse inference is required to be decided by the court taking into consideration the pleadings of the parties and by deciding whether any document/evidence, withheld, has any relevance at all or omission of its production would directly establish the case of the other side. The court cannot loose sight of the fact that burden of proof is on the party which makes a factual averment. The court has to consider further as to whether the other side could file interrogatories or apply for inspection and production of the documents etc. as is required under Order XI CPC. Conduct and diligence of the other party is also of paramount importance. Presumption or adverse inference for non-production of evidence is always optional and a relevant factor to be considered in the background of facts involved in the case. Existence of some other circumstances may justify non-production of such documents on some reasonable grounds. **In case one party has asked the court to direct the other side to produce the document and other side**

failed to comply with the court's order, the court may be justified in drawing the adverse inference. All the pros and cons must be examined before the adverse inference is drawn. Such presumption is permissible, if other larger evidence is shown to the contrary.

41. The plaintiff/respondent no. 1 had vide Letter dated 26.03.2012, under the provisions of Right to Information Act, 2005 (hereinafter referred to as "**RTI Act**") sought information from the Office of Assistant Collector, Tehsil Dadri, on the point as to whether any Lease/ Allotment Certificate was issued in the name of some Shri Amar Singh son of Shri Ramphal Singh.

42. Vide letter dated 03.04.2012 the Tehsildar, Dadri, pursuant to the information sought by the plaintiff/respondent No. 1 under the provisions of Right to Information Act, informed the plaintiff/respondent No. 1 that there exists no record in the Office with respect to allotment of residential lease for the year 1974.

43. It is also notable that the response by the Public Information Officer under the provisions of RTI Act is a public document. Reliance in this regard is placed upon Section 74 of the Evidence Act. Section 74 of the Evidence Act is reproduced hereinbelow:

74. Public documents.--The following documents are public documents :--

(1) Documents forming the acts, or records of the acts-- =

(i) of the sovereign authority,

(ii) of official bodies and tribunals, and

(iii) of public officers, legislative, judicial and executive, of any part of India or of the Commonwealth, or of a foreign country;

(2) Public records kept in any State of private documents.

44. Amongst others, Sub-clause (iii) of Sub-Section 1 of Section 74 of the Evidence Act provides that documents forming the acts or records of acts of public officers, legislative, judicial, or executive are considered public documents.

45. The definition of public documents under Section 74 does not specify the form of the document. It merely states that any document which forms ***an act or a record of an act of a ''public officer', whether of the executive,*** legislature, or judiciary, must be considered a public document.

46. It is undeniable that a Public Information Officer is a "public officer' as per Clause 17 of Section 2 of C.P.C. The response letters, moreover, are issued under a statutory duty. The response of a Public Information Officer issued in the course of his duty under, the RTI Act on a bare perusal falls within the ambit of a document forming an act of a public officer and thus is a public document, which could be proved either by adducing the original copy of the same as per Section 64 of the Evidence Act, or by filing a certified copy of the same as per Section 77 of the Evidence Act.

47. The Hon'ble Punjab and Haryana High Court in ***Munshi Ram v. Balkar***

Singh, 2016 SCC Online P&H 11166 held thus:

8. ..... At the Appellate Court, the owner has filed an application under Order 41 Rule 27 CPC that has elicited through RTI a response to say the license number had been wrongly given as 18690/Ag/2003 when it was actually 16690/Ag/2003 and that it had been issued in the name of Balkar Singh. **A response through RTI is of a public officer and it is a public document and would require no further corroboration in the manner contemplated under Section 77 of the Evidence Act. The document must be taken to be true of what its recitals state.**

48. In the Cross-Examination the defendant no. 1/appellant has stated that he has no knowledge about the existence of records in the Office of the Revenue Authorities pertaining to allotment of lease in his favour.

49. The defendant no.1/appellant has very categorically admitted that (i**) a possession certificate has never been issued in his favour** (ii) he never got the lease registered (iii) the receipt of lease does not specify the duration for which the lease has been granted.

50. The defendant/appellant has further stated in his cross examination that he is not aware about the fact as to whether any previous approval of the Assistant Collector was taken or not before grant of lease.

51. The relevant extract of the Cross Examination of the defendant / appellant is reproduced hereinbelow:-

Cross Examination of defendant no. 1/defendant-Witness No. 1

चूंकि मेरे पास इस पट्टे की रसीद है इसलिये मुझे तहसील दादरी तहसील सिकन्दाबाद अथवा राजस्व रिकार्ड बुलन्दशहर, गाजियाबाद अथवा गौतमबुद्ध नगर में यह मालूम करने की आवश्यकता नहीं थी क्योंकि इस पट्टे की आवंटन पत्रावली व संबंधित रिकार्ड आदि उपलब्ध हैया नहीं। [Page 39, 2nd Para of Appellants Paper Book]

यह कहना सही है कि ग्राम सभा इटैंडा द्वारा मुझे कोई कब्जा -प्रमाणपत्र जारी न किया गया हो। [Page 39, 5th Para of Appellants Paper Book]

यह कहना भी सही है कि मैंने इस पट्टे का रजिस्ट्रेशन नहीं कराया है।यह कहना भी सही है कि इस रसीद में यह नहीं लिखा है कि यह पट्टा कितनी अवधि का है। [Page 39, 6th Para of Appellants Paper Book]

ग्राम प्रधान ने मुझे मौखिक बताया था कि यह पट्टा हमेशा के लिये है।मुझे नहीं पता कि असिस्टेन्ट कलक्टर कौन होता है। मुझे नहीं पता कि असिस्टेन्ट कलक्टर का इस पट्टे से पूर्व स्वीकृति ली गयी थी अथवा नहीं।

मुझे नहीं पता कि इस आवंटन का कोई रिकार्ड ग्राम सभा इटैडा केपास है अथवा नहीं। मेरे गवाह रामवीर मेरे सगे साढूं है।

52. Though the defendant no. 1/appellant has in evidence filed a receipt of premium which is not the same as Allotment Certificate but even if, for the sake of argument the receipt of premium, is assumed to be an Allotment Certificate itself, the same bears no endorsement of approval of the Assistant Collector much less previous approval.

53. The defendant no. 1/appellant never asserted that the Assistant Collector had accorded previous approval to his lease, but has rather chosen to assert that at the relevant point in time i.e on 11.05.1974 there was no requirement of seeking prior approval of the Assistant Collector and that the said requirement was brought for the first time on 01.11.1975, when Rule 115-N of the UPZALR Rules was amended and a specific provision in this regard was inserted.

54. Substantive provision for grant of lease is contained in Section 122-C, 195, 197 and 198 of the U.P.Z.A.L.R Act and the aforesaid provisions of the Act contained provision of previous approval of Assistant Collector much prior in time than 11.05.1974.

55. Section 122-C of the U.P.Z.A.L.R Act was inserted for the first time, vide Uttar Pradesh Land (Laws) Amendment Act, 1971 which was published in the Official Gazette on 22.08.1971. Sub-Section 2 of Section 122-C which was inserted vide the aforesaid amendment specifically required obtaining of previous approval of the Assistant Collector before making allotment.

56. Likewise Section 195, 197 and 198 of the UPZALR Act also much prior to 01.11.1975 contained provision requiring previous approval of the Assistant Collector before grant of lease. Section 195, 197 and 198 of the UPZA & SLR Act was amended by Uttar Pradesh Zamindari Abolition and Land Reforms (Amendment) Act, 1968, and by the aforesaid Act and by its Sections 6, 7 and 8, the following words "with the previous approval of the Assistant Collector-in-charge of the sub division" were inserted in Section 195, 197 and 198 of UPZALR Act. A Co-ordinate Bench of this Court in ***Lal Bhadur v. Additional Commissioner, Writ C No. 30114 of 2016,*** was confronted with an identical argument. It was contended, as herein contended, that the procedure for grant of an approval to a resolution of the Land Management Committee by the Assistant Collector was introduced for the first time on 01.11.1975 and thus prior to this date there was no requirement of obtaining previous approval of the Assistant Collector. This Hon'ble Court rejecting the argument observed thus:

Upon receipt of the instructions, a supplementary affidavit has been filed by the petitioner. In Paragraph No. 2 of this affidavit, it has been stated that the procedure, for grant of an approval to a resolution of the Land Management Committee by the S.D.O., was introduced by Notification No. U.O. 605/Rajaswa-1-2(8)-75 dated November 1, 1975.

This Court is not satisfied that the provisions for grant of an approval by the S.D.O., were incorporated from November, 1975 as is the stand of the S.D.M., Phoolpur as also the petitioner. Sections 195, 197 and 198 of the UP ZA & LR Act, 1950 were amended by Presidents Act, 17 of 1968 and the Uttar Pradesh Zamindari Abolition and Land Reforms (Amendment) Act, 1968. By the aforesaid Act and by its Sections 6, 7 and 8, the following words "with the previous approval of the Assistant Collector-in-charge of the sub division" were inserted in each of the aforesaid three sections.

The stand, taken in the letter of the Sub-Divisional Officer, Phoolpur, Allahabad, that the previous approval of the SubDivisional Officer, was required

only after 1974, therefore, cannot be accepted.

Even, the contention, raised on behalf of the petitioner that approval of the Sub-Divisional Officer, was required only after Notification No. U.O. 605/Rajaswa-1-2(8)-75 dated November 1, 1975, is also without substance.

This notification will not over-ride the amendment in the Principal Act itself, especially, Sections 195, 197 and 198 of the Act, wherein the words "with the previous approval of the Assistant Collector-incharge of the sub division" were added much prior in time. It necessarily follows that even in 1974, when the petitioner is alleged to have been allotted the land in question, the previous approval of the Sub-Division Officer was mandatorily required.

57. Thus it becomes evident that the provision requiring previous approval of the Assistant Collector before grant of allotment under Sections 195, 197 and 198 of U.P.Z.A.L.R, was brought into force by the Uttar Pradesh Zamindari Abolition and Land Reforms (Amendment) Act, 1968 and the provision of previous approval of Assistant Collector before grant of allotment under Section 122-C was brought into force by the Uttar Pradesh Land Laws (Amendment) Act, 1971. As the provisions contained in the UPZALR Act prescribed for previous approval of the Assistant Collector before allotment and the same was very much in force prior to 11.05.1974, i.e. the date of grant of alleged lease, the contention of the defendant no. 1/appellant that the same was introduced for the first time on 01.11.1975 by amending Rule 115-N, can be of no help as it is settled law that Rules cannot override or control the provisions contained in the Parent Act.

58. Hence in light of the provisions contained in Section 122-C, Section 195, 197 and 198 of UPZALR Act, as it stood at the relevant point in time as also the dictum of this Hon'ble Court in ***Lal Bhadur v. Additional Commissioner, Writ C No. 30114 of 2016,*** there remains no iota of doubt that the requirement of obtaining previous approval of the Assistant Collector was mandatory.

59. A Co-ordinate Bench of this Court in ***Abdul Rauf Khan v. Abdul Samad, 1999 (2) AWC 939*** held that previous approval of the Assistant Collector is mandatory and any allotment made without his previous approval would be rendered void ab-initio and the Civil Court has sufficient powers to ignore it. The relevant extract of the judgment of this Hon'ble Court in ***Abdul Rauf Khan v. Abdul Samad, 1999 (2) AWC 939*** is reproduced hereinbelow:-

8. A perusal of the aforesaid statutory provisions reveals that without prior approval of the Assistant Collector incharge of the Sub-Division, no allotment of the land could be made by the land management committee**. In the present case, it was pleaded and proved that no approval was ever accorded by the Assistant Collector, incharge of the Sub-Division, what to say of prior approval. Resolution of the Land Management Committee alleged to have been passed in favour of the plaintiff-appellant was thus non-est and void ab initio.**

9. It is well-settled in law that the civil court has got jurisdiction to consider and decide the legality of the allotment, if it

is called upon to decide the same. Reference in this regard may be made to the decision in Chikhuri Bollu Koen v. Santoo Koeri and another 1983 ALJ 687. wherein it was ruled as under :

"What is made final by subsection (7) of Section 122C is the order of the Assistant Collector subject to the provisions of subsection (6), and the provisions of Section 333 of the Act, that is to say the Assistant Collector's order is subject to the order of the Collector under sub-section (6) of Section 122C and the order of the Collector is subject to the order of the Board of Revenue under Section 333, U. P. Zamindari Abolition and Land Reforms Act, and the orders so passed are final. Under sub rule (5) of rule 115P, it is the order of the Collector which is made final. In the present case, no application for cancellation of the allotment was ever made. The result is that there is no order of the Assistant Collector or the Collector or the Board of Revenue. Under the circumstances, these provisions do not operate to bar the Jurisdiction of the civil court to go into the question whether the allotment of land made by the Gaon Sabha was incompetent and, therefore, non est in law. I may here observe that the Schedule II to the Zamindari Abolition and Land Reforms Act read with Section 331 thereof does not exclude the jurisdiction of the civil court in the matter of applications covered by Section 122C or Rule 115P. The civil court could always see whether the land belonged to the plaintiff or not, and if it came to the finding that the land was settled with the plaintiff under Section 9, U. P. Zamindari Abolition and Land Reforms Act, and did not, therefore, belong to the Gaon Sabha and was not open to allotment as an abadi site under Section 122C, it could hold or declare the allotment to be invalid and ineffective in law and ignore it."

60. It is also fairly settled in law that if a transaction is void ab initio, for avoiding the same no declaration or cancellation is required, as law does not take notice of the same and it can be disregarded in collateral proceedings. Reliance in this regard is placed upon the dictum of the Hon'ble Supreme Court in ***Dhurandar Prasad Singh v. Jai Prakash University, AIR 2001 SC 2552,*** wherein it was held that:

21. Thus the expressions void and voidable have been subject matter of consideration on innumerable occasions by courts. The expression void has several facets. One type of void acts, transactions, decrees are those which are wholly without jurisdiction, ab initio void and for avoiding the same no declaration is necessary, law does not take any notice of the same and it can be disregarded in collateral proceeding or otherwise.....

61. Reiterating the aforesaid principle the Hon'ble Supreme Court in ***Prem Singh v. Birbal Singh, (2006) 5 SCC 353*** held thus:

16..... When a document is void ab initio, a decree for setting aside the same would not be necessary as the same is non-est in the eye of law, as it would be a nullity.

62. An echo of the aforesaid principle resonates in the dictum of the Hon'ble Supreme Court rendered in Rajasthan State

Industrial Development and Investment Corporation v. Subhash Sindhi Co-operative Housing Society, Jaipur, (2013) 5 SCC 427, wherein the Hon'ble Supreme Court observed that:

15. In Kalawati v. Bisheshwar, AIR 1968 SC 261, this Court held:

".....Void means non-existent from its very inception....."

16. In State of Kerala v. M.K. Kunhikannan Nambiar Manjeri Manikoth, Naduvil (dead) & Ors., AIR 1996 SC 906, this Court held:

"7.....The word "void" has a relative rather than an absolute meaning. It only conveys the idea that the order is invalid or illegal. It can be avoided. There are degrees of invalidity, depending upon the gravity or the infirmity, as to whether it is, fundamental or otherwise....."

17. The word, "void" has been defined as: ineffectual; nugatory; having no legal force or legal effect; unable in law to support the purpose for which it was intended. (Vide: Black's Law Dictionary). It also means merely a nullity, invalid; null; worthless; sipher; useless and ineffectual and may be ignored even in collateral proceeding as if it never were.

18. The word "void" is used in the sense of incapable of ratification. A thing which is found non-est and not required to be set aside though, it is sometimes convenient to do so. There would be no need for an order to quash it. It would be automatically null and void without more ado. The continuation orders would be nullities too, because no one can continue a nullity.

63. An overview of the aforesaid facts clearly reveal that Firstly, the defendant no. 1/appellant has failed to adduce Allotment Certificate and hence could not prove the factum of grant of Lease /Allotment in his favour. *Secondly*, even if for the sake of arguments, the receipt for premium is taken to be the Allotment Certificate itself, in absence of previous approval of the Assistant Collector the same is void-ab initio and is liable to be ignored for which no separate proceedings are required to be initiated. Finally, the document dated 11.05.1974 was not a lease / allotment certificate. It never required cancellation or declaration as a void document from revenue court.

64. All the points of determination are decided thus, (1) defendant no. 1/appellant has failed to prove that disputed area of 150 square yards in plot no. 120 in dispute was his exclusive property on the basis of residential lease dated 11.05.1974. (2) Even prior to 09.11.1975 permission of Assistant Collector/ Sub-Divisional Officer was required for execution of residential lease. (3) The receipt dated 11.05.1974 was not a lease / allotment letter and not binding on civil court. It required no cancellation / declaration from court as void document and has rightly been ignored by the court below.

65. In view of the above answers to the points of determination, judgment and decree of the trial court deserves to be confirmed.

66. This appeal is accordingly, ***dismissed*** with costs.

(2021)09ILR A703
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.09.2021

BEFORE

THE HON'BLE RAVI NATH TILHARI, J.

Second Appeal No. 518 of 2017

Dularey ...Appellant
Versus
Ram Sewak & Ors. ...Respondent

Counsel for the Appellant:
Lalit Kishore Pandey, Sudhir Pande

Counsel for the Respondent:

A. Civil Law-Code of Civil Procedure, 1908-Section 100/115 & U.P.Z.A. & L.R. Act, 1950-Section 331-the dispute being with respect to agriculture property, suit was not maintainable in the civil court which ought to have been filed in the revenue court. the suit was barred by section 331 of the U.P.Z.A. & L.R. Act-plea regarding bar of suit was not raised in the trial court-the contention which was not canvassed before the Court when the impugned decision was rendered cannot be made the subject-matter of review proceedings-Hence, the review applicant cannot be permitted to raise the new grounds/arguments in review jurisdiction, which was not canvassed in the second appeal.(Para 1 to 22)

The review application is rejected. (E-6)

List of Cases cited:

1. Ram Padarath & ors.. Vs II Addl. Distt. Judge, Sultanpur & ors.. (1989) AWC 290 All

2. Pyarelal Vs Shubhendra Pilania (Minor) (2019) 3 SCC 692

3. National Institute of Technology Vs Niraj Kumar Singh (2007) 2 SCC 481

4. Kiran Singh & ors.. Vs Chaman Paswan & ors.. (1954) AIR SCC 340

5. Kamlesh Verma Vs Mayawati (2013) 8 SCC 320

6. Perry Kansagra Vs Smriti Madan Kansagra (2019) 20 SCC 753

7. B.H Prabhakar & ors.. Vs M.D. Karnataka St. Coop. Apex Bank Ltd. (2000) 9 SCC 482

(Delivered by Hon'ble Ravi Nath Tilhari, J.)

(Review Application No. 28351 of 2018)

1. Heard Sri Sudhir Pande along with Sri Lalit Kishore Pandey, learned counsels for the review-applicant.

2. This review application has been filed by the defendant-appellant in the second appeal.

3. Regular suit no. 465 of 2002 (Mahaveer vs. Gokaran and Ors.) filed by the plaintiff-respondent no. 1, was dismissed by the learned Additional Civil Judge (Junior Division), court no. 3, Sitapur, vide judgment and decree dated 07.04.2015. The regular civil appeal No. 40 of 2015 filed by the plaintiff-respondent was allowed and the suit was decreed by the learned Additional District Judge, court no. 10, Sitapur vide judgment and decree dated 11.10.2017.

4. Challenging the appellate decree, the defendant-appellant filed second appeal No. 518 of 2017, which was dismissed by this Court at the admission stage, vide judgment & decree dated 24.11.2017.

5. In the second appeal, the question for consideration was "whether the lower appellate court has committed any illegality in allowing the appeal and not considering the provisions of Section 331 of the

U.P.Z.A. & L.R. Act while deciding the appeal, which was the sole contention raised before the learned Single Judge.

6. This Court, held that no such objection regarding maintainability on the basis of Section 331 of U.P.Z.A. & L.R. Act was taken by the defendant-appellant and placed reliance on the full Bench decision of this Court in ***Ram Padarath and Ors. vs. Second Addl. District Judge, Sultanpur and Ors. [1989 AWC 290 All.],*** wherein it was held that the defendant-appellant cannot be permitted to raise the issue of maintainability in the second appeal because no such objection was raised before the courts below. In view thereof, the second appeal was dismissed as involving no substantial question of law.

7. Vide order dated 25.08.2021, the defendant-appellant/review applicant, on his prayer, was granted time to file supplementary affidavit to bring on record the written statement, which was filed along with C.M. Application No. 112182/2021

8. Sri Sudhir Pande, learned counsel for the review-applicant, submits that the plea of bar of jurisdiction in the civil court was raised before the trial court. In this respect, he has referred to para 9 of the written statement and consequently submits that the judgment dated 24.11.2017 under review suffers from apparent error of law.

9. Para 9 of the written statement is in reply to para 9 of the plaint. Para 9 of the written statement reads as under:-

"धारा 9 - गलत है I दावा गलत दायर किया गया है I"

10. Para 9 of the plaint reads as under:-

"धारा 9 - यह कि वाद का कारण दिनांक 22.07.02 व 29.07.02 को तथा उसके पश्चात प्रत्येक दिन जब प्रतिवादी सं० 1 मृतक ता 3 द्वारा वादी की अ.ब.स.द. भूमि पर निर्माण कार्य करके कब्ज़ा करने के उद्देश्य से क्रमशः नपाई की गयी तथा नींव खोदने का प्रयास किया गया स्थान ग्राम कंजा शरीफपुर परगना व तहसील लहरपुर जिला सीतापुर न्यायालय की अधिकारिकता में उत्पन्न हुआ I"

11. From perusal of the plaint and the written statement, it is evident that any plea regarding bar of the suit in the civil court being barred by Section 331 of the U.P.Z.A & L.R. Act was not raised.

12. On specific query put to Sri Sudhir Pande, during arguments, if there was any material on the record of the Second Appeal before the learned Single Judge, which evidenced that the plea of bar of jurisdiction in the civil court was raised in the trial court, as provided by Section 331 of the U.P.Z.A & L.R. Act, he fairly submitted that there was no such material.

13. Sri Sudhir Pande has further submitted that the dispute being with respect to agriculture property, suit was not maintainable in the civil court which ought to have been filed in the revenue court. The suit was barred by Section 331 of the U.P.Z.A. & L.R. Act. Consequently, the decree passed by the civil court being without jurisdiction is nullity and the plea of nullity can be raised at any stage, even in execution of proceedings, and as such, such an objection deserved consideration in Second Appeal even if the objection to the jurisdiction of the civil court was not taken in the trial court. He has placed reliance in judgment of Hon'ble Supreme Court in the cases of ***Pyarelal vs. Shubhendra Pilania (Minor) [(2019) 3 SCC 692], National***

Institute of Technology vs. Niraj Kumar Singh [(2007) 2 SCC 481] & Kiran Singh and Ors. vs. Chaman Paswan and Ors. [AIR 1954 SCC 340].

14. Sri Sudhir Pande has further placed reliance on Order 7 Rule II(d) and Order 14 Rule 2(2) of the Civil Procedure Code, 1908 to submit that the question of jurisdiction should have been decided as preliminary issue and the burden of proof was wrongly placed on the appellant, on the point of possession.

15. On specific query made to Sri Sudhir Pande, as to whether any argument, as is being sought to be raised in review application and noted in above paragraphs was advanced before the learned Single Judge, in second appeal, he fairly admitted that those submissions were not made before the learned Single Judge in the second appeal.

16. The basic principles in which review application can be entertained and cannot be entertained have been eloquently laid down by Hon'ble the Apex Court in the case of ***Kamlesh Verma vs. Mayawati [(2013) 8 SCC 320].*** Paragraph 20 under the heading "summary of principles" is being reproduced hereunder:-

20. Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute:

20.1. When the review will be maintainable:

(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;

(ii) Mistake or error apparent on the face of the record;

(iii) Any other sufficient reason.

The words "any other sufficient reason" have been interpreted in Chhajju Ram v. Neki [(1921-22) 49 IA 144 : (1922) 16 LW 37 : AIR 1922 PC 112] and approved by this Court in Moran Mar Basselios Catholicos v. Most Rev. Mar Poulose Athanasius [AIR 1954 SC 526 : (1955) 1 SCR 520] to mean "a reason sufficient on grounds at least analogous to those specified in the rule". The same principles have been reiterated in Union of India v. Sandur Manganese & Iron Ores Ltd. [(2013) 8 SCC 337 : JT (2013) 8 SC 275]

20.2. When the review will not be maintainable:

(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.

(ii) Minor mistakes of inconsequential import.

(iii) Review proceedings cannot be equated with the original hearing of the case.

(iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.

(v) A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.

(vi) The mere possibility of two views on the subject cannot be a ground for review.

(vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.

(viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.

(ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived.

17. In the case of ***Perry Kansagra v. Smriti Madan Kansagra [(2019) 20 SCC 753], t***he Hon'ble Apex Court on the scope and power of review has reiterated the same principles. It is apt to reproduce paragraph nos. 14 to 16, which are as under:-

14. The issues that arise for our consideration can broadly be put under two heads:

14.1. (a) Whether the High Court was justified in exercising review jurisdiction and setting aside the earlier judgment?

14.2. (b) Whether the High Court was correct in holding that the reports of the Mediator and the Counsellor in this case were part of confidential proceedings and no party could be permitted to use the same in any court proceedings or could place any reliance on such reports?

15. As regards the first issue, relying on the decisions of this Court in Inderchand Jain v. Motilal [Inderchand Jain v. Motilal, (2009) 14 SCC 663 : (2009) 5 SCC (Civ) 461] , Ajit Kumar Rath v. State of Orissa [Ajit Kumar Rath v. State of Orissa, (1999) 9 SCC 596 : 2000 SCC (L&S) 192] and Parsion Devi v. Sumitri Devi [Parsion Devi v. Sumitri Devi, (1997) 8 SCC 715], it was submitted by the appellant that the exercise of review jurisdiction was not warranted at all.

15.1. In Inderchand Jain [Inderchand Jain v. Motilal, (2009) 14 SCC 663 : (2009) 5 SCC (Civ) 461] it was observed in paras 10, 11 and 33 as under: (SCC pp. 669 & 675)

"10. It is beyond any doubt or dispute that the review court does not sit in appeal over its own order. A rehearing of the matter is impermissible in law. It constitutes an exception to the general rule that once a judgment is signed or pronounced, it should not be altered. It is also trite that exercise of inherent jurisdiction is not invoked for reviewing any order.

11. Review is not appeal in disguise. In Lily Thomas v. Union of India [Lily Thomas v. Union of India, (2000) 6 SCC 224 : 2000 SCC (Cri) 1056] this Court held: (SCC p. 251, para 56)

'56. It follows, therefore, that the power of review can be exercised for correction of a mistake but not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated like an appeal in disguise.'

33. The High Court had rightly noticed the review jurisdiction of the court, which is as under:

"The law on the subject--exercise of power of review, as propounded by the

Apex Court and various other High Courts may be summarised as hereunder:

(i) Review proceedings are not by way of appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 CPC.

(ii) Power of review may be exercised when some mistake or error apparent on the fact of record is found. But error on the face of record must be such an error which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on the points where there may conceivably be two opinions.

(iii) Power of review may not be exercised on the ground that the decision was erroneous on merits.

(iv) Power of review can also be exercised for any sufficient reason which is wide enough to include a misconception of fact or law by a court or even an advocate.

(v) An application for review may be necessitated by way of invoking the doctrine actus curiae neminem gravabit.'

In our opinion, the principles of law enumerated by it, in the facts of this case, have wrongly been applied."

15.2. In Ajit Kumar Rath [Ajit Kumar Rath v. State of Orissa, (1999) 9 SCC 596 : 2000 SCC (L&S) 192] , it was observed: (SCC p. 608, para 29)

"29. In review proceedings, the Tribunal deviated from the principles laid down above which, we must say, is wholly unjustified and exhibits a tendency to rewrite a judgment by which the controversy had been finally decided. This, we are constrained to say, is not the scope of review under Section 22(3)(f) of the Administrative Tribunals Act, 1985...."

15.3. Similarly, in Parsion Devi [Parsion Devi v. Sumitri Devi, (1997) 8 SCC 715] the principles were summarised as under: (SCC p. 719, para 9)

"9. Under Order 47 Rule 1 CPC a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under Order 47 Rule 1 CPC. In exercise of the jurisdiction under Order 47 Rule 1 C.P.C. it is not permissible for an erroneous decision to be "reheard and corrected". A review petition, it must be remembered has a limited purpose and cannot be allowed to be "an appeal in disguise".

16. On the other hand, reliance was placed by the respondent on the decision in BCCI v. Netaji Cricket Club [BCCI v. Netaji Cricket Club, (2005) 4 SCC 741] to submit that exercise in review would be justified if there be misconception of fact or law. Para 90 of the said decision was to the following effect: (SCC p. 765)

"90. Thus, a mistake on the part of the court which would include a mistake in the nature of the undertaking may also call for a review of the order. An application for review would also be maintainable if there exists sufficient reason therefor. What would constitute sufficient reason would depend on the facts and circumstances of the case. The words

"sufficient reason" in Order 47 Rule 1 of the Code are wide enough to include a misconception of fact or law by a court or even an advocate. An application for review may be necessitated by way of invoking the doctrine actus curiae neminem gravabit."

18. From the aforesaid judgment, it is evident that review proceedings are not by way of appeal. It cannot be treated like an appeal in disguise. A rehearing of the matter is not permissible in law. It is not for an erroneous decision to be "reheard and corrected' in review jurisdiction.

19. In the case of **B.H. Prabhakar and Others vs. M.D. Karnataka State Cooperative Apex Bank Ltd. [(2000) 9 SCC 482]**, Hon'ble Supreme Court has held that the contention which was not canvassed before the Court when the impugned decision was rendered cannot be made the subject-matter of review proceedings. It is relevant to reproduce the said judgment as follows:-

"We have carefully gone through the common judgment sought to be reviewed in these petitions. In our view, no error, much less any patent error, of law could be demonstrated by the review petitioners for supporting these petitions. The resolution of 07th August 1985 was held not to be operative on the facts of the case. In the Review Petitions an attempt is made to show that resolution of 07th August 1985 was the basis of the appointment of the petitioners. That has not been accepted by the Court. ***An attempt to re-argue this aspect does not fall within the scope of the review proceedings.*** *So far as the affidavit of Manager, Legal Cell dated 10th August 1996 is concerned* ***it was never pressed in service before the Court when the impugned judgment was rendered. Hence, non-consideration thereof cannot be treated to be an error apparent on the record as tried to be suggested. Policy adopted by the Respondent-bank alleged to be anti-labor for which reliance is placed on the decision of this Court in the case of Dharwad Distt. P.W.D. Literate Daily Wage Employees Assn. v. State of Karnataka also cannot be made subject-matter of review proceeding as no such contention was canvassed before the Court when the impugned decision was rendered****. On the other hand the petitioners were absorbed as Clerks by the Respondent-bank after their temporary tenure ended on completion of earlier project. That may be the reason why no allegation was made about anti-labor policy of the Respondent-bank when appeals were argued before the Court. For all these reasons, the Review Petitions are dismissed on merits."*

20. In view of the aforesaid, the review applicant cannot be permitted to raise the new grounds/arguments in review jurisdiction, which was not canvassed in the second appeal.

21. The judgment dated 24.11.2017, does not suffer from any apparent error of law or on any other ground legally permissible for exercise of review jurisdiction.

22. For the aforesaid reasons, the review application is devoid of merit and is rejected.

(2021)09ILR A708
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 01.09.2021

BEFORE

THE HON'BLE JASPREET SINGH, J.

Second Appeal No. 554 of 1979

Satish Kumar ...Appellant

Versus

Ram Kishore ...Respondent

Counsel for the Appellant:
R.S. Tripathi, Mohammad Aslam Khan, R.S. Tripathi, Rakesh Srivastava, Randheer Singh, Ravi Nath Tilhari, Sanjay Verma

Counsel for the Respondent:
A,K, Bajpai,J.C. Srivastava

A. Civil Law-Code of Civil Procedure, 1908-Section 100-land dispute-plaintiff instituted a suit seeking joint possession of the property in question-during the pendency of second appeal plaintiff died and substituted by his heirs-the appeal was allowed holding that the plaintiff was not entitled to get possession of the property in suit-thereafter, the defendant preferred an application u/s 144 C.P.C. seeking restituition of possession as well as damages and mesne profit-Trial court allowed the application in favour of defendant-While the only issue remaining was regarding damages/compensation which was not decided by the Trial court in view of absence of evidence-two appeal were preferred, in which the appeal of defendant was allowed and the matter was remanded permitting him to lead evidence regarding his claim for damages while the appeal of plaintiff was dismissed-trial court ought to have taken up the application for impleadment separately and thereafter ought to have decided the application u/s 144 C.P.C. separately-the core question for determination of compensation would require the determination of the date from which date to what date the compensation is to be paid but in absence of evidence,no such finding has been recorded and it requires evidence for both parties to establish their respective case-in absence of any clear finding by the two courts, it would be travesty of justice if some facts is assumed without being proved and even wors.e without providing an opportunity to the parties concerned to lead evidence-The Appellate court ought to have exercised its appellate powers taking note of the aforesaid aspect which has not been done.(Para 1 to 46)

The appeal is allowed. (E-6)

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

1. In order to appreciate the controversy involved in the instant second appeal, the Court will have to travel back in time to trace the genesis of the dispute. The record indicates that Sri Badri Prasad as plaintiff had instituted a suit against Sri Ram Kishor seeking joint possession of the property in question situated in Village Parishar Khas, Tehsil and District Unnao. The said suit seeking joint possession was instituted in the Court of Munsif, North, Unnao registered as Regular Suit No. 7 of 1966. The said suit was decreed by the Court of Munsif, North, Unnao for joint possession over the plots as mentioned in para 1 of the plaint by means of judgment and decree dated 23.05.1968.

2. Sri Ram Kishore, the defendant of Regular Suit No. 7 of 1966 being aggrieved from the judgment and decree dated 23.05.1968 preferred a Regular Civil Appeal under Section 96 C.P.C. which was registered as Regular Civil Appeal No. 75 of 1968. The said appeal was dismissed by the Lower Appellate Court by means of a judgment dated 13.10.1969. Thereafter Sri Ram Kishore escalated the matter and filed a Second Appeal under Section 100 C.P.C. before this Court registered as Second Appeal No. 355 of 1969. During the pendency of the aforesaid Second Appeal Sri Badri Prasad died and he was substituted by his legal heir and widow Smt. Phoolkali. The aforesaid second appeal was allowed by a coordinate Bench of this Court by means of judgment and decree dated 26.04.1973 holding that the plaintiff (Badri Prasad) was not entitled to get possession of the property in suit. The judgment and decree of the two courts was

set aside and the suit was dismissed with cost.

3. It is in this backdrop, that once the suit of Badri Prasad was dismissed, thereafter Ram Kishore preferred an application under Section 144 C.P.C. seeking restitution of possession as well as damages and mesne profit from Smt. Phoolkali (widow of Sri Badri Prasad) as by then Badri Prasad had died. This application was moved before the Court of Munsif North, Unnao and was registered as Misc. Case No. 53 of 1974.

4. The aforesaid application was contested by Smt. Phoolkali by filing her objections. It was contended that all the legal heirs of late Sri Badri Prasad has not been impleaded and for the said reason, the application under Section 144 C.P.C. was not maintainable and consequently was liable to be dismissed. Another objection of Smt. Phoolkali was that she nor her predecessor-in-interest namely Sri Badri Prasad were in possession of the property in question apart from the fact that since the possession was with Ram Kishore as he being a co-tenure-holder, hence, the application was not maintainable.

5. The record would indicate that during the pendency of the aforesaid application, two persons namely Bhagwat Prasad and Ram Narayan had also moved their objections seeking their impleadment on the ground that they are the legal heirs of late Badri Prasad and they are in possession of the property in question, hence, they are necessary and proper parties as their rights are also involved, accordingly, they may be impleaded and be allowed to contest the proceedings.

6. The Court of Munsif, North, Unnao by means of its order dated 27.04.1978 partly allowed the application under Section 144 C.P.C. The Court held that in so far as the relief for possession is concerned, the application was allowed but in absence of any evidence on the issue of damages/compensation/mesne profit, the said relief was refused. The Court also found that the application moved by the third parties namely Bhagwat Prasad and Prem Narayan was not maintainable and the same was also rejected.

7. Being aggrieved against the aforesaid judgment dated 27.04.1978, two appeals under Section 96 C.P.C. came to be filed. One appeal bearing No. 101 of 1978 was filed by Smt. Phoolkali against the judgment dated 27.04.1978 by which the Court had ordered the possession to be restored to Sri Ram Kishore. The other appeal was filed by Sri Ram Kishore registered as Civil Appeal No. 23 of 1978 against the part of the judgment dated 27.04.1978 in so far as it rejected the relief of compensation/mesne profit/damages on the ground that no evidence was led.

8. Significantly, after the order dated 27.04.1978 was passed, in pursuance of order of Munsif, North, Unnao, a warrant of possession was issued and in execution of the said warrant, the possession is said to be delivered to Sri Ram Kishore by the Court Amin.

9. After due contest, the appeal of Smt. Phoolkali bearing No. 101 of 1978 was dismissed while Civil Appeal No. 231 of 1978 filed by Sri Ram Kishore was allowed and the matter was remanded to the Trial Court to permit Sri Ram Kishore to lead evidence in so far as his claim of compensation/mesne profit was concerned. Liberty was also granted to Smt. Phoolkali

to lead her evidence in rebuttal against the claim of Sri Ram Kishore for mesne profit.

10. Being aggrieved against the order of the First Appellate Court dated 12.02.1979, the instant second appeal has been preferred. It will be noted that during the pendency of the instant second appeal, both Smt. Phoolkali and Sri Ram Kishore have expired and they are now represented by their legal heirs who have been substituted in their place. The Court has made a reference to the original parties namely Badri Prasad, Phoolkali and Ram Kishore for ease, however, it shall also include their legal heirs and representatives who are parties before this Court.

11. A coordinate Bench of this Court by means of order dated 31.08.1979 had admitted the aforesaid appeal on the following substantial questions of law which reads as under:-

"Whether the Lower Appellate Court having held that the Trial Court had wrongly recorded that the parties did not want to adduce any oral evidence fell into error of not remanding the case for setting aside the remaining issue as well viz. whether possession had been transferred under the Court's order in the previous litigation."

12. Heard Sri Mohd. Arif Khan, learned Senior Counsel along with Sri Deepankar Kumar for the appellant. None responded on behalf of the respondents despite opportunity having been provided, hence, the appeal was heard in their absence.

13. The submission of learned counsel for the appellant is that the Lower Appellate Court had erred in dismissing the appeal preferred by Smt. Phoolkali especially when it had already arrived at a conclusion that the Trial Court was not justified in recording that the parties did not wish to lead evidence. Once, such a finding was recorded and the appeal of Ram Kishore was remanded permitting him to lead evidence, in the same earnestness, the appeal of Smt. Phoolkali was also liable to be allowed permitting her to lead the evidence as well.

14. He further urged that from the perusal of the order passed by the Trial Court would indicate that there is no mention regarding the fact whether the possession was delivered to Sri Ram Kishore as was contended by Smt. Phoolkali in her objections so also there is no consideration of the other objections raised by Smt. Phoolkali that either the application under Section 144 C.P.C. could be allowed as a whole and not in part. It is also urged that the issue regarding the other legal heirs of Sri Badri Prasad who were not impleaded and were necessary parties but this has also not been considered in the correct earnestness and all these issues were germane to the controversy to be resolved.

15. It is also urged by the learned Senior Counsel that the Lower Appellate Court by remanding the matter has only permitted Sri Ram Kishore to lead evidence on the question of compensation/mesne profit with liberty to the appellant to file the evidence in rebuttal but has erred in dismissing the appeal of Smt. Phoolkali since her objections regarding the fact that Ram Kishore was already in possession would not be permitted to be agitated and she would not be permitted to lead evidence, despite noticing that the Trial Court had erroneously prevented the parties

from leading their respective evidence, thus, the order of remand in so far as the appeal of Ram Kishore is concerned and dismissal of the appeal of Smt. Phoolkali is an erroneous exercise of jurisdiction also resulting in substantial injustice, hence, the appeal deserves to be allowed.

16. The Court has heard the learned Senior Counsel for the appellant and also perused the material available on record.

17. At the outset, it may be noticed that the instant second appeal arises out of a decision rendered on an application under Section 144 C.P.C. It will be necessary to notice the aforesaid provision and Section 144 C.P.C. reads as under:-

*"**Section 144. Application for restitution.***

(1)Where and in so far as a decree 1 [or an order] is 2 [varied or reversed in any appeal, revision or other proceeding or is set aside or modified in any suit instituted for the purpose, the Court which passed the decree or order] shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree 1 [or order] or 3 [such part thereof as has been varied, reversed, set aside or modified]; and for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly 4 [consequential on such variation, reversal, setting aside or modification of the decree or order].

***5[Explanation.**--For the purposes of sub-section (1), the expression "Court which passed the decree or order" shall be deemed to include,*

(a) where the decree or order has been varied or reversed in exercise of appellate or revision jurisdiction, the Court of first instance;

(b) where the decree or order has been set aside by a separate suit, the court of first instance which passed such decree or order.

(c) where the Court of first instance has ceased to exist or has ceased to have jurisdiction to execute, it, the Court which, if the suit wherein the decree or order was passed were instituted at the time of making the application for restitution under this section, would have jurisdiction to try such suit.]

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1)."

18. The aforesaid provision has been amended in the State of U.P. by means of U.P. Amendment Act No. 24 of 1954.

19. It will also be relevant to notice that the provisions of C.P.C. have undergone major amendments in the year 1976 which came into effect from 01.02.1977. Section 2 (2) of the C.P.C. after the amendment reads as under:

"2. (1). ********

(2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the

matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection

*of a plaint and the determination of any question within 2 *** section 144, but shall not include—*

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

Explanation.--A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final;"

20. From the perusal of the aforesaid provisions, Section 2 (2), it would indicate that any determination of a question within Section 144 C.P.C. is deemed to be a decree, consequently, an order passed under Section 144 C.P.C. is appealable as a Regular Civil Appeal under Section 96 C.P.C. and so also the order of the Appellate Court is open to be assailed in a second appeal under Section 100 C.P.C.

21. The expression "restitution' has not been defined in the C.P.C., however, it is a doctrine founded on a Maxim "Actus Curiae Neminem Gravavit'. The maxim explains that the 'Act of the Court shall harm no one'.

22. In a Halsbury's Law of England 4th Edition, it has been stated "Any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, i.e. to prevent a man from retaining the money of, or some benefit derived from, another which is against functions that he should keep. Such remedies in English Law are generally different from remedies in contract and are now recognized to fall within a third category of the common law which has been called quasi contract restitution".

23. The principles underlying the doctrine of restitution is that on a reversal of a decree, the law imposes an obligation on the party to the suit who receives any unjust benefit of the erroneous decree to make restitution to the other party for what he has lost. The obligation arises automatically on the reversal or modification of the decree and necessarily carries with it the right to restitution of all that has been done under the erroneous decree and the Court in making restitution is bound to restore the parties so far as they can be restored to the same position they were in at the time when the Court by its erroneous action had displaced them from.

24. Thus, it would be seen that it is not only the duty of the Court of restoring the things to its proper owner but that also encompasses with it to make such other order including orders for refund of costs or for payment of interests damages and mesne profits which are properly consequential on such variation, reversal, setting aside or modification of the decree or order.

25. It is in this backdrop if the submissions of the learned Senior Counsel for the appellant are tested, it would be discernible from the record that initially Sri Badri Prasad (predecessor-in-interest of Smt. Phoolkali, the predecessors-in-interest

of the present appellants) had instituted a suit for joint possession. The suit was decreed and Sri Ram Kishore, the defendant's appeal was dismissed. In the second appeal preferred before this Court bearing No. 355 of 1969 decided on 26.04.1973, the judgment and decree passed by the two Courts were set aside and the suit of Sri Badri Prasad was dismissed holding that Badri Prasad was not entitled to possession.

26. It is in the aforesaid backdrop that Sri Ram Kishore thereafter had moved an application seeking restitution as well as mesne profit. Apparently, the prayer made by Sri Ram Kishore seeking compensation and mesne profit is within the scope of Section 144 C.P.C. as evidenced and noticed hereinabove first.

27. The record further indicates that the ground of objection raised by Smt. Phoolkali before the Trial Court opposing the application for restitution, she had raised a plea that Badri Prasad was not in possession rather the possession was with Sri Ram Kishore himself. It was also stated that Badri Prasad did not remain in possession throughout and moreover that he was also entitled to a sum of Rs. 1,000/- which he had spent on sowing of the crop. Another objection was to the effect that the other heirs of Badri Prasad were not impleaded. This came to be decided by the Trial Court by means of order dated 27.04.1978.

28 . From the perusal of the said order, it would indicate that primarily the Trial Court had framed two points for determination i.e. (i) Whether the appellant was entitled to the relief as prayed for ; (ii) the other as to whether Sri Bhagwat Prasad and Prem Narayan were entitled to be impleaded as a party in the said litigation.

29. The Trial Court found that the possession was with Badri Prasad who had died during the pendency of the earlier second appeal and was now represented by Smt. Phoolkali, hence, it permitted the prayer of possession in favour of Sri Ram Kishore against Smt. Phoolkali. As far as the other issue regarding the claim of compensation/mesne profit is concerned, the Trial Court noticed that the parties agreed not to lead any evidence, hence, the said issue regarding compensation was decided in the negative in absence of any evidence. It also rejected the application of Sri Bhagwat Prasad and Prem Narayan holding that they were not the parties to be impleaded.

30. Apparently, from the perusal of the order passed by the Trial Court, it would indicate that it has not discussed the issue regarding the possession and whether Ram Kishore was entitled to possession or not. The Trial Court has merely stated that since no evidence has been led by the plaintiff in support of his plea regarding mesne profits, hence, it cannot be ascertained as to how much damage or compensation can be awarded, hence, the said prayer was refused. The Trial Court thereafter concentrated mainly on the issue regarding the application of Prem Narayan and Bhagwat Prasad and abruptly ended by holding that the application of Ram Kishore for restitution of possession is liable to be allowed whereas the application for impleadment by Sri Bhagwat Prasad and Prem Narayan was rejected.

31. The record further indicates that by the same order dated 27.04.1978, the Trial Court had issued a warrant of possession which came to be executed and the same can be verified by means of document bearing Paper No. Ga-89 in the

record of the Trial Court. However, the said document has not been considered by the Trial Court or the First Appellate Court nor there is any mention of the said document in the two impugned orders dated 27.04.1982 and 12.02.1979.

32. As already noticed above, two appeals were preferred and the Lower Appellate Court while considering the appeal of Smt. Phoolkali bearing No. 101 of 1978 has noticed that the learned Trial court did not properly decide the application under Section 144 C.P.C. It also noticed that neither the counsel for Ram Kishore namely Sri C.B. Tiwari, Advocate nor the counsel for Smt. Phoolkali made any such statement that they did not wish to lead evidence and the fact recorded by the Munsif in its order that the parties did not wish to lead evidence was not corroborated from the record and noticing the aforesaid, it found that the Trial Court ought to have taken up the application for impleadment separately and thereafter ought to have decided the application under Section 144 C.P.C. separately. It also noticed that since the possession has been restored to Sri Ram Kishore, hence, the only issue remaining was regarding the damages/compensation and mesne profit which was not decided by the Trial Court in view of absence of evidence and as noticed above that the very fact that neither counsel for the parties made any such submissions that they did not wish to lead evidence, hence, the appeal of Sri Ram Kishore was allowed an the matter was remanded permitting him to lead evidence regarding his claim for damages/compensation/mesne profit and dismissed the appeal of Smt. Phoolkali.

33. The record further indicates that in the memo of appeal preferred by Smt. Phoolkali which is on record bearing paper no. Ka 2/1. The grounds raised were that the application under Section 144 C.P.C. of Ram Kishore ought to have been dismissed in Toto. The other ground was that the Trial Court had erred in not impleading the other heirs of Sri Badri Prasad and the other was that the Lower Appellate Court did not give her an opportunity to lead oral evidence in respect of her case.

34. As already referred in the preceding paragraphs that after the order was passed by the Trial Court on 27.04.1978, a warrant of possession was issued in pursuance whereof Sri Ram Kishore was put in possession and the said paper bearing No. Ka-89/2 is on record. There is no finding recorded upon the aforesaid document. It will also be relevant to notice that if at all the possession was taken in pursuance of the order dated 27.04.1978 then there ought to have been a mention in the order including the date on which the said possession was delivered. The document does not mention any such date.

35. It is not disputed that both the parties were prevented from leading their respective evidence before the Trial Court. This fact has been affirmed by the Lower Appellate Court too. However, it has remanded the matter in so far as the appeal of Ram Kishore is concerned for determination of the mesne profits, if any, but dismissed the appeal of Smt. Phoolkali.

36. The question as to the quantum of compensation/mesne profits also necessarily involves the determination of the date from when such compensation/mesne profit would be payable and up to what date. This would be dependent on the finding from which date the possession of Sri Badri Prasad would be

termed to be unlawful and liable to be restituted and the date on which the said restitution did actually take place.

37. The document bearing Paper No. Ga- 89/2 as referred to hereinabove would indicate that it only states that the possession has been received by Ram Kishore in pursuance of a warrant of possession issued by the Trial Court on 27.04.1978, however, there is no specific date mentioned. Apparently, there is no material on record to indicate that on what date the possession of the property was received by Ram Kishore. It has been stated in paragraph 3 that Sri Badri Prasad had taken the possession on 18.05.1970 and further in paragraph 7 of the said application bearing Paper No. Ga-3/1, it is stated that the appellant namely Ram Kishore is entitled to receive the exclusive possession of the property and has sought mesne profit from 18.05.1970 till the date the possession is to be delivered.

38. Thus, the issue regarding the quantum of compensation as indicated above, is inter-linked with the fact as to when the possession was with Badri Prasad and when it has reverted back to Sri Ram Kishore, this fact needs to be ascertained clearly and for this fact the parties are required to lead evidence. It is admitted that the Trial Court did not permit the parties to lead evidence. The Lower Appellate Court has found that the application under Section 144 C.P.C. has not been properly decided and the parties have been deprived from leading their evidence.

39. Once such a finding was recorded and even if noticing that the possession has been restored to Ram Kishore, the core question for determination of compensation as noticed above would require the determination of the date from which date to what date the compensation is to be paid but in absence of evidence, no such finding has been recorded and it requires evidence for both parties to establish their respective case.

40. The Lower Appellate Court while dismissing the appeal of Smt. Phoolkali as noticed that Smt. Phoolkali shall be given an opportunity to rebut the evidence of Ram Kishore on his claim of damages while the appeal of Ram Kishore has been allowed for the purpose of ascertain the amount of damages, if any, and then decide the application under Section 144 C.P.C. In the operative portion it has been mentioned that the order of Munsif in so far as it relates to restitution of possession is maintained, the Munsif shall give an opportunity to the appellant Ram Kishore to lead evidence on his claim for compensation or damages and Smt. Phoolkali shall be given opportunity to rebut the evidence of Sri Ram Kishore on this point then the Munsif shall ascertain the amount of damages and thereafter decide the application under Section 144 C.P.C. in accordance with law after giving opportunity to the parties to lead evidence.

41. Once such a direction was issued, it would be most unfair that Sri Ram Kishore would be entitled to lead evidence in so far as the quantum of compensation/mesne profit is concerned and Smt. Phoolkali would be entitled only to lead her evidence in rebuttal. As already noticed above, the quantum of mesne profit would be interlinked and dependent on the date and period when Sri Badri Prasad and thereafter Smt. Phoolkali remained in possession. It is not a case where it is admitted to the parties regarding the

aforesaid dates nor the Trial Court or the First Appellate Court have recorded any finding in respect thereto.

42. In absence of any clear finding by the two courts, it would be a travesty of justice if some fact is assumed without being proved and even worse without providing an opportunity to the parties concerned to lead evidence. The Appellate Court ought to have exercised its appellate powers taking note of the aforesaid aspect which has not been done.

43. In this view of the matter, this Court is of the opinion that the order of the Lower Appellate Court dismissing the appeal of the appellant Smt. Phoolkali is erroneous. Merely by permitting her to lead evidence in rebuttal is not going to solve the purpose since the period for which the property remained in possession of Sri Badri Prasad and with Smt. Phoolkali was also required to be determined. This necessarily requires the parties to lead evidence especially when it was a disputed fact and there is no finding given by the two courts and the mention of the fact in the order that possession has been given to Ram Kishore, does not indicate when and what is the basis of such finding has also not been mentioned. Hence, in this view of the matter, this Court holds that the Lower Appellate Court has committed an error in dismissing the appeal of Smt. Phoolkali especially when it found that the parties were prevented from leading their evidence so also for the reason that the Lower Appellate Court found that the application under Section 144 C.P.C. has not been decided properly.

44. For the reasons aforesaid, this second appeal is allowed. The impugned order/judgment and decree passed by the Lower Appellate Court dated 12.02.1979 dismissing the appeal No. 101 of 1978 is erroneous and is set aside and since the appeal of Sri Ram Kishore bearing No. 23 of 1978 has been remanded by the same impugned judgment and order, that part of the order shall be maintained. This Second Appeal No. 554 of 1979shall stand allowed and it the matter of Smt. Phoolkali shall also be remanded to the Trial Court where the application under Section 144 C.P.C. shall be decided afresh by permitting the respective parties to lead their evidence. However, in so far as the issue of compensation/mesne profit is concerned while determining the same, the Court shall also record a finding as to from which date till when the possession remained with Sri Badri Prasad and when it was restored to Sri Ram Kishore strictly in light of the evidence led by the parties.

45. Since the instant appeal remained pending before this Court since 1979 and an application under Section 144 C.P.C. is of the year 1974, hence, the Trial Court is directed that it shall make an earnest endevour to decide the aforesaid application most expeditiously without granting any unnecessary adjournments to either of the parties, however, ensuring full opportunity of hearing as well as permitting the parties to lead their evidence so that the entire proceedings can be decided preferrably within a period of 8 months from the date a copy of this order is placed before the Court concerned.

46. The instant second appeal is allowed in the aforesaid terms. In the facts and circumstances, there shall be no order as to costs. The record of the Court concerned shall be remitted forthwith.

(2021)09ILR A718
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.08.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE SUBASH CHAND, J.

First Appeal No. 627 of 2019

Smt. Shruti Bhatnagar ...Appellant
Versus
Sri Mayank Bhatnagar ...Respondent

Counsel for the Appellant:
Sri Ashok Shankar Bhatnagar, Sri Harsh Bhatnagar

Counsel for the Respondent:

A. Civil Law-Code of Civil Procedure, 1908-Section 96 & Hindu Marriage Act, 1955-Section 13(1)(i-a)-challenge to-dismissal of divorce petition by Family court-wife subjected to cruelty, both physical and mental, under the guise of the demand of cash-respondent remained absent for three years though served-husband has not come forward to contest the appeal nor stepped into the witness box-adverse inference not drawn by the trial court against the respondent/husband caused injury to the appellant/wife-no animus of cohabitation-no endeavour for reconciliation which clearly establish animus deserendi-conduct adopted by husband proved cruelty-it amounted to wilful neglect of wife-decree of divorce granted.(Para 1 to 14)

B. Once the parties have separated and the separation has continued for a sufficient length of time and one of them has presented a petition for divorce, it can well be presumed that the marriage has broken down. The Court, no doubt, should seriously make an endeavour to reconcile the parties, yet, if it is found that the breakdown is irreparable, then divorce should not be withheld. The consequences of preservation in law of the unworkable which has long ceased to be effective are bound to be a source of greater misery for the parties.(Para 9, 10)

The appeal is allowed. (E-6)

List of Cases cited:

1. V.Bhagat Vs D. Bhagat (1994) 1 SCC 337

2. G. Padmini Vs G.Sivananda Babu, (2000) AIR A.P. 176

3. Jitendra Kumar Vs Ankita Sharma @ Thakur

4. Naveen Kohli Vs Neelu Kohli (2006) 3 GLR 2182

5. Geeta Jagdish Mangtani Vs Jagdish Mangtani (2005) AIR SC 3508

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

1. Heard Shri Harsh Bhatnagar, learned counsel holding brief of Shri Ashok Shankar Bhatnagar, learned counsel for the appellant. Though served respondent for three years has absented here as also before the family court

2. This appeal, has been filed by the appellant to set aside the judgment dated 29.07.2019 passed by Principal Judge, Family Court, Ghaziabad in O.S. No. 158 of 2018 and allow the petition of the appellant under Section 13(1)(i-a) of Hindu Marriage Act, 1955.

3. The short brief facts as culled out from the record are that the appellant was married with respondent on 11.02.2012 by

performing all the Hindu rituals. There is no dispute to this fact. Immediately after the wedding, the husband and his family members started harassing the appellant who was at the matrimonial home in Udaipur in the State of Rajasthan. The husband lost his job and therefore, started demanding money from the father of the appellant who showed his inability to pay a sum of Rs. 20 lakhs. After this incident the husband and the family members started abusing and insulting the appellant, however, she tolerated all this so as to save her matrimony, during this period she conceived a child but because of the unhappiness and because her parents was unable to pay Rs. 20 lakhs, she was forced to abort the child and the child aborted. Looking to this unhappy incident, the father of the appellant paid a sum of Rs. 10 lakhs. The husband after procuring the money from the appellant he was in debt and was running here and there. The appellant herein gave birth to a female child which infuriated the respondent more than what he was before the incident. He was indebted to people to the tune of Rs. 40 lakhs, his cruelty day and day out had started physically assaulting her. The appellant's father who lived in a rented house in Ghaziabad and therefore in the year 2017 when she was driven out of the house and when the husband went away and absconded, she was also thrown out of the house with her daughter. All this was tolerated by the wife and much later in the year 2018 she filed the suit for divorce which was conducted ex-parte. The judgement spells out in:

3." प्रतिवादी को दावे की सूचना भेजी गयी। कई बार पंजीकृत डाक से सूचना भेजी गयी। अखबार में प्रकाशन कराया, लेकिन दावे की खबर होने के बावजूद उसने जानबूझकर उपस्थित होकर जवाब दावा नहीं लगाया। प्रतिवादी के द्वारा जानबूझकर न्यायालय में उपस्थित न होने की परिस्थितियों में उनके विरूद्ध दिनांक 21.01.2019 को एकपक्षीय कार्यवाही का आदेश हुआ।

4. याचनी को एकपक्षीय साक्ष्य का अवसर दिया गया, जिस पर याचनी द्वारा साक्ष्य में अपना साक्ष्य शपथ-पत्र दाखिल किया गया है। अन्य किसी साक्षी का साक्ष्य शपथ-पत्र दाखिल नहीं किया गया है। दस्तावेजी साक्ष्य के रूप में शादी की फोटो, शादी का कार्ड, आधार हेतु किये गये आवेदन की फोटोप्रति, एककिता रेंट एग्रीमेंट व शादी व पुत्री के जन्म के समय दिये गये सामान की सूची दाखिल की गयी है।

6. अब देखना यह है कि क्या याचनी अपनी केस एकपक्षीय रूप से साबित करने में सफल रही है? अपने केस के समर्थन में याचनी द्वारा अपना साक्ष्य शपथ-पत्र दाखिल किया गया है। अन्य किसी साक्षी का साक्ष्य शपथ-पत्र दाखिल नहीं किया गया है। प्रतिवादी द्वारा की गयी क्रूरता की बाबत कोई अभिलेख साक्ष्य याचनी द्वारा प्रस्तुत नहीं की गयी है।"

4. Despite this the learned Judge dismissed the application for decree for divorce on the ground that:-

".... प्रस्तुत प्रकरण में याचनी की साक्ष्य से यह कतई स्पष्ट नहीं होता है कि याचनी का प्रतिवादी के साथ रहने की स्थिति में जीवन खतरे में है। अतः केस के तथ्यों एवं परिस्थितयों के आलोक में मयंक भटनागर ने कोई भी क्रूरता याचनी के प्रति की हो ऐसा आरोप याचनी साबित करने में पूरी तरह से असफल रहा है।

याची के द्वारा जनपद गाजियाबाद में निवास के संबंध में केवल नोटेरी किरायानामा दाखिल किया है, परन्तु उक्त किरायानामा को

सम्पत्ति मालिक को न्यायालय में परीक्षित कर सत्यापित नहीं कराया है।...." and has rejected the application. It is this order which has given rise to this appeal.

5. By way of this appeal the appellant who had moved the Family Court for seeking divorce from her husband has moved this Court contending that despite the above mentioned facts the matter was not contested by the respondent-husband. The court on two counts dismissed the Family Court petition for divorce, one of the grounds on which the petition was dismissed that the appellant herein could not prove that she was resident of Ghaziabad. For that the appellant has contended that she had applied for Aadhar Card after been thrown away from the matrimonial home she was moved to Ghaziabad and was residing there when Family Court when the application for divorce was filed, she has filed the application in Ghaziabad. She is daughter of late. Sanjay Bhatnagar and she used to stay in tehsil *" 710C Pinakel Towers Ahinsa Khand, Dwitiya Tehsil, Ghaziabad"* which she has maintained also in 2021, this is the submission of the learned counsel of the appellant and the appellant has not changed the address.

6. The provisions of Section 19 of the Hindu Marriage Act, 1955 relates to jurisdiction. The petition was filed under Section 13 of the Hindu Marriage Act and Section 19 of the Hindu Marriage Act, 1955 reads as follows:-

"19. Court to which petition shall be presented.- Every petition under this Act shall be presented to the district court within the local limits of whose ordinary original civil jurisdiction-

(iiia) in case the wife is the petitioner, where she is residing on the date of presentation of the petition, or..."

7. The facts reveal that at the time of filing of the petition the appellant proved that the residence was falling in territorial jurisdiction of the family court , as per provisions of Act the petition can be filed where the residence of petitioner was disclosed and no rebuttal evidence came on record to contend that the petitioner was not giving correct facts. The another ground to dismiss the petition is that petitioner failed to prove cruelty by cogent evidence that husband had perpetuated mental cruelty though she has condoned the same once the court has lost sight of the fact that cruelty has to be decided on facts it might have been condoned once but that is not conclusive that it was not revisited and was again repeated. The learned counsel for the appellant has taken us to the record and has referred to, page 15 which narrates the genesis of all the events which the learned counsel for the appellant has requested us to go through which would go to show that the chain is complete and the behaviour of the husband has been such which shows that he has not only deserted but before deserting the wife he has forced her to leave Rajasthan and move to Ghaziabad disowning the wife after the birth of a female child is the highest kind of cruelty and therefore in the case on hand the matter will have to be decided based on the facts emerging are (a) desertion (b)as well as cruelty. We are fortified by the judgements in the case of V**. Bhagat Vs. D. Bhagat, (1994) 1 SCC 337, G.Padmini Vs. G.Sivananda Babu, AIR 2000 Andhra Pradesh 176 and Jitendra Kumar Vs. Ankita Sharma @ Thakur**, on which heavy reliance is placed by the learned counsel for the appellant.

8. There is not even a whisper on record to show that ever the husband tried to carry the wife and maintain her. The evidence of the wife clearly shows that on account of subjecting cruelty, both physical and mental, under the guise of the demand of cash, ornament etc.The respondent husband has persistently remained absent for more than 3 years though he have been served with summons of both the courts namely the family court and court of appeal namely in this appeal . The respondent has not appeared before this Court. The evidence reveals three facts: (1) that the husband has no animus of cohabitation; (2)the petitioner has substantiated her say with evidence and even she has in her oral testimony proved the facts alleged . Moreover, the petitioner has proved the facts averred about residential proof . Even if the decree be not granted on the ground of desertion but on the ground of irretrievably breaking down of marriage and on the ground of cruelty a decree was required to be passed in favour of the petitioner appellant as the facts also shows that the respondent and his family members have caused mental cruelty to the petitioner.

9. We would take assistance from a the judgment reported in 2006 (3) GLR 2182 between Naveen Kohli vs. Neelu Kohli, wherein it has been held as follows:

"Irretrievable breakdown of marriage is not a ground for divorce under the Hindu Marriage Act, 1955. Because of the change of circumstances and for covering a large number of cases where the marriages are virtually dead and unless this concept is pressed into service, the divorce cannot be granted. Ultimately, it is for the legislature whether to include irretrievable breakdown of marriage as a ground of divorce or not, but the legislature must consider irretrievable breakdown of marriage as a ground for grant of divorce under the Hindu Marriage Act, 1955.

Once the parties have separated and the separation has continued for a sufficient length of time and one of them has presented a petition for divorce, it can well be presumed that the marriage has broken down. The Court, no doubt, should seriously make an endeavour to reconcile the parties, yet, if it is found that the breakdown is irreparable, then divorce should not be withheld. The consequences of preservation in law of the unworkable marriage which has long ceased to be effective are bound to be a source of greater misery for the parties."

It would be necessary to refer to the provisions of ***Section 13 (1) (i-a) and (iii) of the Hindu Marriage Act, 1955*** *which reads as under:-*

"13 Divorce - (1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party

(i) XXX XXX XXX

(i-a) has after the solemnization of the marriage, treated the petitioner with cruelty; or

(i-b) XXX XXX XXX

(ii) XXX XXX XXX

(iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental

disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

XXX XXX XXX

10. So considering the above provisions of Section 13 (1) of the Hindu Marriage Act, and in light of the facts and in light of the findings that the marriage is not only irretrievably broken, the wife was treated by the husband with mental cruelty without any reason and there was no animus of cohabiting shown by the husband .We find support In decision titled K. Srinivas Rao Vs. D.A. Deepa A.I.R. 2013 SC 2176 where the Court held "cruelty is evident where one spouse has so treated the other and manifested such feelings towards her or him as to cause in her or his mind reasonable apprehension that it will be harmful or injurious to live with the other spouse.Cruelty may be physical or mental. A sustained course of abusive and humiliating treatment calculated to torture, discommode orrender miserable life of the spouse is cruelty. Mental cruelty is a state of mind. The feeling of deep anguish, disappointment,frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty. Accusations of unchastity and indecent familiarity with a neighbour were made in the written statement support the allegation of mental cruelty caused to husband by wife. Humiliation by leveling allegation o fillicit relations of husband with some other ladies that too unproved and unsubstantiated, humiliation of parents of husband, complaint to police authorities against husband for such unfounded allegations collectively do constitute a clear case of mental cruelty justifying divorce under Section 13 of Act,1955."

11. As stated earlier, the respondent-husband has not come forward before this Court to contest this appeal and has chosen to remain absent.The respondent has not cross-examined the petitioner before the trial court and has not stepped into the witness box. The say of the petitioner in her petition as well as in her affidavit, has therefore, remained unchallenged and uncontroverted and stands proved and adverse inference should have been drawn against the respondent but non considering by trial court has caused injury to appellant wife . This Court has also no reason to disbelieve the say of the petitioner/appellant on oath as she has proved her averments by stepping into the witness-box. The petitioner has categorically stated in the way in which she was treated with mental and physical cruelty and was deserted by the respondent.It is an admitted position of fact that there is a desertion of more than two years. Thus it goes without saying that the ingredients of the Section 13 of Hindu Marriage Act 1955 have been proved by the wife. The averments of the plaint and the facts proved by the wife shows that the husband has perpetrated cruelty on the wife. The averments of the wife stated in the petition and this appeal have gone uncontroverted and unchallenged and from the evidence it emerges that the petitioner has been subjected to the cruelty and is deserted, and therefore, this is a clear case of cruelty and desertion for the following reasons:

11. There is no cohabitation by and between the parties. The petitioner's allegations are not refuted or controverted

by the respondent, as he has not stepped into the witness box;

12. The respondent has not made any endeavour of reconciliation and has also not appeared before this Court and has chosen to remain absent though served.

13. The petitioner was subjected to the mental and physical cruelty as alleged in the petition. So, from the above said reasons, the marriage seems to have turned into deadlock as they have no cohabitation with each other since last more than two years. Therefore, the petitioner has been successful in establishing that she was treated with cruelty and has been deserted by the husband and hence the petitioner/appellants entitled to a decree of divorce as prayed for therefore, in view of the above, a decree of divorce requires to be granted to this petitioner/appellant. .It is proved that she was driven out of the matrimonial house and neglected by the husband, which is obviously proved and thus, she is entitled to divorce.We are also fortified in our view by placing relence on the decision in The judgment reported in AIR 2005 SC 3508 in the case of Geeta Jagdish Mangtani v. Jagdish Mangtani,which also helps the petitioner's case as there where thefacts show " the wife left matrimonial home in Mumbai only after about 4 months of marriage and started living with her parents in Gujarat where she gave birth to child and then continued with her teaching job. No attempt was made by her to stay with husband which clearly established animus deserendi. The course of conduct adopted by the respondent proved desertion on her part without reasonable cause. The Hon'ble Supreme Court has held that it amounted to willful neglect of husband and he, is therefore, entitled to divorce decree".

14. The appeal is allowed.

15. The marriage dated 11.02.2012 are ordered to be dissolved. The Marriage Petition No. 518 of 2018 (Smt. Shruti Bhatnagar Vs. Mayank Bhatnagar) under Section 13 (1)(A)of Hindu Marriage Act1955 is allowed .The judgment and decree are reversed. The family court to draw modified decree in consonance with this judgment within eight weeks from today. Record be sent to the concerned Family Court.

16. We are thankful to young counsel who argued the matter and has assisted the Court ably.

(2021)09ILR A723
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.09.2021

BEFORE

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

Second Appeal No. 1169 of 2018

Ishwar Saran (since deceased) & Ors.
...Defendant/Appellants
Versus
Vijai Kumar Kushwaha & Ors.
...Plaintiff/Respondents

Counsel for the Appellants:
Manjari Singh, Sri Ashotosh Guota, Sri Kunal Ravi Singh

Counsel for the Respondents:

A. Civil Law - Code of Civil Procedure,1908-Section 100-plaintiff instituted a suit for partition-the suit was dismissed-this decree was challenged belatedly by an appeal u/s 96 accompanied by an application u/s 5 of the limitation Act, seeking the delay

in preferring the appeal to be condoned-learned trial court rejected the delay condonation application, accompanying appeal, as time barred-the delay was not deliberate but proceeds from the wrong legal advice given by earlier counsel, which they bonafide believed to be true and did not appeal earlier-the appeallants have stated with full particulars as to what advice they received-these assertions have not been rebutted by the defendant on affidavit-What may constitute sufficient cause and what may not, is indeed a substantial question of law-delay occasioned on account of wrong advice they received, is a ground in law 'sufficient' to condone delay-The lower Appellate Court has done a short shrift of the matter to conclude, without assigning any reason that the cause shown is not sufficient. (Para 1 to 16)

The appeal is allowed. (E-6)

List of Cases cited:

1. Allah Tala Vs DDC & ors.,(1993) AWC 155 All

2. Collector,Land Acquisition, Ananantnag & anr. Vs Mst. Katiji & ors. (1987) 2 SCC 107

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

1. This second appeal is directed against an order of the learned Additional District Judge, Court No. 15, Allahabad in Miscellaneous Case No. 475 of 2017, rejecting an application to condone the delay in preferring an appeal from the judgment and decree of the Additional Civil Judge (Junior Division), Court No. 12, Allahabad dated 14.08.2013 passed in O.S. No. 485 of 1989.

2. Looking to the limited issue that is involved in this appeal, an elucidation of facts giving rise to the suit or the merits of the parties' case is not required.

3. The plaintiff-appellants instituted a suit for partition of the suit property, subject matter of O.S. No. 485 of 1989, against the defendant-respondents. The Additional Civil Judge (Junior Division), Court No. 12, Allahabad tried the suit and dismissed it vide her judgment and decree dated 14.08.2013. This decree was challenged belatedly by an appeal under Section 96 C.P.C. preferred to the learned District Judge of Allahabad on 17.05.2017. The appeal was accompanied by an application under Section 5 of the Limitation Act also dated 17.05.2017, seeking the delay in preferring the appeal to be condoned. The application was duly supported by an affidavit. This delay condonation application bearing Paper No. 5-C was registered as Miscellaneous Case No. 453 of 2017 on the file of the learned District Judge, Allahabad. The belated appeal, along with the delay condonation application, was assigned to the learned Additional District Judge, Court No. 15, Allahabad, where it was numbered as Miscellaneous Case No. 475 of 2017. It is this application for condonation of delay that has come to be rejected by the order impugned, and with it, the accompanying appeal, as time barred.

4. It is said in the affidavit filed in support of the delay condonation application that upon dismissal of the appellants' suit by the Trial Court, they sought advice from their Counsel about the steps to be taken against the said decree. It is stated that the learned counsel advised them that since a second appeal was already pending before this Court relating to the same property, no appeal was required to be filed from the Trial Court's decree. It is further stated that from the judgment and decree passed in O.S. No. 128 of 1990, an appeal was carried and

further, a second appeal to this Court, being Second Appeal No. 1765 of 1999, which was said to be pending. It is stated that it was in connection with briefing the learned Counsel in the second appeal that the Counsel in the High Court came across the judgment and decree dated 27.04.2017 passed by the Trial Court, that is in question here. The learned Counsel asked the appellants whether the said decree has been appealed, to which the appellants responded by disclosing that the earlier Counsel had advised them that it was not required. The appellants were thereupon advised to forthwith appeal the judgment and decree passed by the Trial Court under reference.

5. Upon receipt of the said advice, the appellants got an application made for the inspection of records through Mr. Uma Shankar Tiwari, Advocate on 28.04.2017. The inspection was made on 04.05.2017. There was in between a strike called for by the Counsel of the District Court, that led to some delay in presentation of the application for a certified copy of the judgment and decree passed by the Trial Court. The application for a certified copy was made on 09.05.2017. The appeal was presented on 17.05.2017.

6. It has been averred specifically that the delay in preferring the appeal is not deliberate, but proceeds from the wrong legal advice given by Mr. Santosh Kumar Srivastava, Advocate earlier engaged by the appellants, which they bona fide believed to be true and did not appeal earlier. It is stated that as soon as the appellants received advice on 27.04.2020 during briefing on the pending second appeal under reference by the learned Counsel appearing in the High Court, they have acted without delay to prefer the appeal. The defendant-respondents contested the application for condonation of delay and said that the delay has been deliberately made. The defendant-respondents, in answer to the delay condonation application, did not file any objections, or affidavits. They have objected orally. It is recorded by the learned Judge in the order impugned that the defendant-respondents have said that there is no good ground shown in the application under Section 5 of the Limitation Act that may make out a case for the condonation of delay.

7. This appeal was admitted to hearing vide order dated 15.11.2018 with reference to the substantial questions of law nos. 1, 2 and 4 formulated in the memorandum of appeal, but without the Court actually formulating any substantial question of law in the order of that date. Accordingly, when the appeal came up for hearing on 02.09.2021, this Court has proceeded to formulate the following substantial questions of law:

(1) Whether legal advice not to file an appeal bona fide believed to be correct, would constitute 'sufficient cause' to condone the delay as postulated under Section 5 of the Limitation Act?

(2) Whether the Court while considering a plea for condonation of delay ought to lean in favour of hearing on merits, particularly, in the case of a first appeal, rather than shutting out hearing?

8. Since the respondents have not appeared despite service being held good vide order dated 09.08.2021, this appeal has been heard ex parte and judgment was reserved on 02.09.2021.

9. The first substantial question of law noted by the learned counsel for the appellants is about bona fide belief in the

genuineness of a legal advice received to qualify for "sufficient cause" to condone delay, as postulated under Section 5 of the Limitation Act. What may constitute sufficient cause and what may not, is indeed a substantial question of law. In support of the submission that delay occasioned on account of bona fide belief in the soundness of legal advice received, that may be found to be incorrect, is a ground in law 'sufficient' to condone delay, the learned counsel for the appellant Mr. Kunal Ravi Singh relies on a decision of this Court in **Allah Tala vs. Deputy Director of Consolidation and others, 1993 AWC 155 All.** The said decision involved choosing of a wrong forum by the petitioner to file a revision before the Deputy Director of Consolidation, Jalaun at Orai, whereas the jurisdictional Deputy Director was the Deputy Director of Consolidation, Kanpur Dehat. It was in those circumstances that the order of the Deputy Director of Consolidation, who had jurisdiction, declining to condone delay on account of wrong legal advice in preferring the earlier revision before a territorially incompetent Tribunal was held to be a "sufficient cause".

10. It is true that in the last mentioned case, it was not a case of inaction, but steps taken in the wrong forum, based on wrong legal advice that was bona fide believed to be true. Here, this Court finds that there is a previous litigation pending between parties, where the defendants had instituted a suit against the plaintiffs, seeking to recover possession on ground that they were licensees in the suit property. This has figured in the judgment of the Trial Court, whereagainst the appeal has been scuttled on the ground of delay. The appellants have stated with full particulars as to what advice they received, particularly, nominating the learned Counsel from whom they received it and how and under what circumstances, they realized that it was incorrect. These assertions have not been rebutted on behalf of the defendant-respondents on affidavit. Therefore, these remain un-rebutted entirely.

11. The Lower Appellate Court has also not assigned reasons why it has disbelieved the explanation offered by the defendant-appellants. Rather, there is a cryptic remark carried in the impugned judgment with reference to the defendant-appellants' case for condonation to the effect that : "*इसप्रकार प्रार्थी के प्रार्थनापत्र एवं शपथपत्र में वर्णित कथनों के आधार पर विलम्ब को क्षमा किये जाने पर कोई समुचित आधार दर्शित नहीं है।*". There is no reason why the Appellate Court has reached its conclusions to disbelieve the defendant-appellants' explanation. But, that is not the substance of the substantial question of law under consideration. What is of relevance is that whatever explanation for the delay the appellants have furnished in the affidavit filed in aid of the delay condonation application, carries facts and urges a ground to the effect that the delay was occasioned by incorrect legal advice bona fide believed to be true. A wrong legal advice which a party bona fide believes to be true generally constitutes, though not always, sufficient cause to condone delay within the meaning of Section 5 of the Limitation Act. The substantial question of law no. 1 is, therefore, ***answered in the affirmative***.

12. So far as the other substantial question is concerned, it is mooted by Mr. Kunal Ravi Singh that condonation of delay is a matter where the Court should lean in favour of hearing on merits. It is

true for a principle that there is high authority that says that the Court should, as far as may be opt to decide on merits, rather than shutting out parties on the technicality of limitation. Reference is to be made in this connection to the decision of the Supreme Court in ***Collector, Land Acquisition, Ananantnag and Another v. Mst. Katiji and Others, (1987) 2 SCC 107,*** where, it has been held:

"3. The legislature has conferred the power to condone delay by enacting Section 5 of the Indian Limitation Act of 1963 in order to enable the courts to do substantial justice to parties by disposing of matters on 'merits'. The expression "sufficient cause" employed by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which subserves the ends of justice—that being the life-purpose for the existence of the institution of courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that:

1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. "Every day's delay must be explained" does not mean that a pedantice approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fide. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary is respected on on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so."

13. There could be a situation, where the delay is indeed not condonable in the sense that circumstances show gross negligence, or the litigant may be demonstrated to be one who has slept over his rights. Those are cases, where the other side contests the claim, rebuts the facts and disputes what the party seeking condonation asserts or urges. Here, the defendant-respondents have not cared to file a written objection to the delay condonation application, let alone an affidavit rebutting the allegations made on affidavit in support of the delay condonation application.

14. It is also to be remembered that the proceedings where delay is sought to be

condoned, though not in themselves very material, may not be irrelevant altogether. The delay here is sought to be condoned in a first appeal. It is well acknowledged that a First Appeal is about a very valuable right of the litigant, inasmuch as it is an appeal of right, both on facts and law. This is what Section 96 C.P.C. makes it to be. This right of appeal is not subject to any limitation, such as the demonstrable involvement of a substantial question of law or it being subject to discretion of the Court. This being the nature of the appeal envisaged under Section 96 C.P.C., a prayer for condonation of delay must necessarily be viewed in the context of the right that the appellants have at stake. The nature of the jurisdiction, therefore, would all the more require a relatively liberal exercise of the discretion to condone delay, once the explanation comes within what the law understands as "sufficient cause". Here, as remarked elsewhere in this judgment, the Lower Appellate Court has done a short shrift of the matter to conclude, without assigning any reason that the cause shown is not sufficient.

15. This Court is of opinion that the substantial question of law no. 2 should also be **answered in the affirmative**.

16. In the circumstances, this Court is of opinion that this appeal must succeed. The appeal succeeds and is hereby allowed. The impugned judgment dated 31.07.2018 passed by the learned Additional District Judge, Court No. 15, Allahabad in Miscellaneous Case No. 475 of 2017 is hereby **set aside** and **reversed.** The Delay Condonation application stands **allowed**.

17. The Lower Appellate Court shall now proceed to hear the appeal, if there is no other defect, under Order XLI Rule 11 C.P.C.

18. Costs easy.

(2021)09ILR A728
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.08.2021 & 02.09.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE SUBHASH CHAND, J.

F.A.F.O. No. 42 of 2019

Deepak & Anr. ...Appellants
Versus
U.P.S.R.T.C. & Anr. ...Respondents

Counsel for the Appellants:
Sri Pankaj Rai, Neelam Pandey

Counsel for the Respondents:

Motor accident claim-Claimant lost young son studyng in Class VIII-Tribunal relied upon II schedule of the Act and no amount towards future loss of income granted-50% of mainimum wages have to be added under head of future prospects-order modified.

Appeal partly allowed. (E-9)

List of Cases cited:

1. New India Assurance Co. Ltd. Vs Urmila Shukla & ors. passed in Civil Appeal No. 4634 of 2021 decided on 06.08.2021

2. National Insurance Co. Ltd.Vs Pranay Sethi & ors., 2017 0 Supreme (SC) 1050

3.National Insurance Co. Ltd. Vs Mannat Johal & ors., 2019 (2) T.A.C. 705 (S.C.)

4. A.Vs 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 learned counsel for the appellants and perused the judgment and order impugned.

2. There is nobody to oppose the appeal though U.P.S.R.T.C. and the owner have been sent notices and duly served. It is also brought to our notice that U.P.S.R.T.C. had also preferred an appeal.

3. This appeal, at the behest of the claimants, challenges the judgment and award dated 08.11.2017 passed by Motor Accident Claims Tribunal/District Judge, Gautam Budh Nagar (hereinafter referred to as 'Tribunal') in M.A.C.P. No.86 of 2016.

4. As far as the appeal is concerned, all other aspects except the compensation awarded, has attained finality. It is the appeal filed by claimants. The issue of negligence has been decided in favour of the claimants and that issue is not raised in this appeal and the issue that is required to be decided is compensation awarded by the Tribunal, which has not granted any amount under the head of future loss of income despite the law provided for the same.

5. By way of this appeal, the claimants have lost a young son (student) studying in class VIII. The Tribunal has considered his notional income to be Rs. 2400/- per month. The Tribunal relied on the IInd schedule of the Motor Vehicle Act, 1988, did not grant any amount towards future loss of income. It is submitted by Sri Pankaj Rai, learned counsel for the appellants that as per Rules of Uttar Pradesh Motor Vehicles (Eleventh Amendment) Rules, 2011, which is recently interpreted by the Apex Court in case of **New India Assurance Co. Ltd. Vs. Urmila Shukla and others** passed in Civil Appeal No. 4634 of 2021 decided on 06.08.2021 and held that the rules are beneficial and given effect. In our view, the Tribunal has not granted any amount though the rules provides, which reads as follows:-

"220A. Determination of compensation. (1) The multiplier for determination of loss of income payable as compensation in all the claims cases shall be applied as per Second Schedule provided in the Act.

(2((i) The deduction towards personal expenses of a deceased unmarried shall be 50% where the family of a bachelor is large and dependent on the income of the deceased, the deduction shall be 1/3.

(3) The future prospects of a deceased, shall be added in the actual salary or minimum wages of the deceased."

6. For the purpose of future prospects of the deceased it shall be added in actual salary and or the minimum wages of the deceased, as under these rules came into force before deciding the matter, therefore, 50% of the salary and or minimum wages will have to be added, which would mean that the order of the Tribunal requires to be modified. It is further submitted by Sri Rai that the multiplier of 15 granted by the Tribunal has to be 18. It is next submitted that the Tribunal has granted Rs. 9000/- towards funeral purposes whereas no amount under non-pecuniary damages for the parents has granted. It is submitted by Sri Rai that the bus of the U.P.S.R.T.C. was not insured.

7. It is contended that as far as the interest is concerned though the rules specify 7% as rate of interest and less and as far as the amount under non-pecuniary head is concerned, the judgment of Sarla Verma and **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050** would be applicable. **Dictation** The deceased was survived by his parents therefore, 1/2 is ordered to be deducted for personal expenses. The multiplier for the death of boy below the age of 14 is 15 hence, we maintain the same. As far as the compensation for loss of love and affection, loss of future prospects and consortium are concerned, we award Rs. 50,000/- with 10% increase for three years. The rate of interest would be 7.5%.

8. 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.6,000/-

ii. Percentage towards future prospects : 40% namely Rs.2400/-

iii. Total income : Rs. 6,000 + 2400 = Rs. 8400/-

iv. Income after deduction of 1/2 : Rs. 4200/- (rounded up)

v. Annual income : Rs.4200 x 12 = Rs. 50,400/-

vi. Multiplier applicable : 15

vii. Loss of dependency: Rs.50400 x 15 = Rs.7,56,000/-

viii. Amount under filial consortium and other non pecuniary heads : Rs. 85,000/-

x. Total compensation : Rs. 8,41,000/-

9. 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."

10. 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.

11. 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 applicants/claimants are neither illiterate nor rustic villagers.

12. Record, if any be sent back to the Tribunal.

Order on Correction Application

Correction as prayed for be made in paragraph-2 of the judgment by substituting the word 'not' in place of 'also' and further in paragraph-10 of the judgment by substituting the word '**U.P.S.R.T.C**.' in place of '**Insurance Company'.**

The application is allowed, accordingly.

We are thankful to Sri Pankaj Rai, Advocate, for pointing out typographical error under our order dated 11.08.2021.

(2021)09ILR A731
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.09.2021

BEFORE

THE HON'BLE RAVI NATH TILHARI, J.

F.A.F.O. No. 166 of 2021

Akhilesh Kumar Jaiswal & Ors.
...Appellants
Versus
Karunesh Jaiswal & Ors. ...Respondents

Counsel for the Appellants:
Akhilesh Kumar, Dilip Kumar Pandey

Counsel for the Respondents:
Asit Srivastava, Jyotiresh Pandey

Impugned order set aside ad interim temporary injunction-Order of temporary injunction was passed exparte-Defendant-respondents objected stating they have filed caveat-no opportunity of hearing-it is right of caveator of being heard and it is duty of Court to afford the caveator opportunity of hearing-this right recognized by statute-impugned order not illegal-specific direction issued in case of caveat has been lodged.

Appeal dismissed. (E-9)

List of Cases cited:

1.Raj Bahadur & anr. Civil Judge (J.D.) Musafirkhana Sultanpur & 3 ors. in Writ Petition No. 6380 (MS) of 2014 decided on 20.11.2014

2. Maharaja Dharmendra Prasad Singh & anr. Vs Vivek Agarwal & ors. in Civil Misc. Application No. 31058 of 2009 in First Appeal From Order No. 303 of 2009, decided on 06.04.2009 (DB).

3. S.S.Barathokey Vs Chairman U.P.Seed and Tarai Development Corporation Limited & anr. 1993(11) LCD 486

4. Jang Singh Vs Brij Lal, AIR 1966 SC 1631

(Delivered by Hon'ble Ravi Nath Tilhari, J.)

1. Heard Sri Dilip Kumar Pandey, learned counsel for the appellants and Sri Asit Srivastava, learned counsel for the respondents.

2. "Supplementary Reply to the Supplementary Objection filed by the opposite parties' filed by Sri Dilip Kumar Pandey and "Additional Supplementary Affidavit/objection by the respondents/defendants filed by Sri Asit Srivastava are taken on record.

3. This First Appeal From Order under Order 43 Rule 1 of the Code of Civil Procedure, 1976 (C.P.C.) has been filed against the order dated 09.08.2021 passed by the learned Civil Judge (Senior Division), Fast Track Court, Lucknow, in Original Suit No. 1018 of 2021 (Akhilesh

Kumar Jaiswal and others Vs. Karunesh Kumar Jaiswal and others) on the application of the defendant-respondents, under Order 39 Rule 4 C.P.C.. By order dated 09.08.2021, the order dated 30.07.2021 granting ad interim temporary injunction on the appellants' application 6-C, has been set aside.

4. The plaintiff-appellants filed regular Suit No. 1018 of 2021 for permanent injunction in which they filed an application for grant of temporary injunction under Order 39 Rule 1 of C.P.C.. The suit was instituted in the Court of Civil Judge (Junior Divisoin), South, Lucknow on 30.07.2021. As the valuation of the Suit was Rs. 20,00,000/- (Twenty Lacs), beyond the pecuniary jurisdiction of the Civil Judge (Junior Division), South, Lucknow, the Suit was transferred to the Court of Civil Judge (Senior Division), Fast Track, Lucknow on 30.07.2021, itself, where an order of ad interim temporary injunction dated 30.07.2021 was passed ex-parte after hearing the plaintiff-appellant only.

5. On 02.08.2021, the defendant-respondents moved an application before learned District Judge, Lucknow stating that they had filed caveat on 29.07.2021 but without giving notice and affording an opportunity of hearing to them the order dated 30.07.2021 was passed. Upon the said application the learned District Judge, Lucknow by order dated 2.8.2021 called for the comments of both the court concerned.

6. On 2.08.2021 the respondent-defendant filed another application C-10 supported with affidavit C-11 upon which the Court of Civil Judge (Senior Division) Fast Track, Lucknow fixed 3.8.2021 for disposal of temporary injunction application pre-poning the date 06.08.2021 which was earlier fixed vide order dated 30.07.2021. On 03.08.2021, the matter was fixed for 4.08.2021 and then for 06.08.2021 and thereafter for 09.08.2021 on which date the order, under challenge in appeal was passed.

7. This Court, considering the seriousness of the allegations and the counter-allegations as regards filing and reporting of the caveat, in view of the submissions advanced, on 13.09.2021 had passed the following order:-

"1. Heard Sri Dilip Kumar Pandey, learned counsel for the appellants and Sri Asit Srivastava,learned counsel for the respondents.

2. C.M.Application No. 116790 of 2021 along with the appellant's reply to the objection of the respondents is taken on record.

3. Supplementary affidavit/objection filed along with an application dated 13.09.2021 in Court filed by the respondents is also taken on record. The office shall allot number to this application.

4. Learned counsel for the appellants submits that in the Suit for permanent injunction being original Suit No. 1018/2021: Akhilesh Kumar Jaiswal and others Vs. Karunesh Jaiswal and others, filed by the plaintiff-appellants, learned Civil Judge (Senior Division), Fast Track, Lucknow on 30.07.2021, granted ad interim temporary injunction. On 02.08.2021 the defendent-respondents filed an application before the District Judge, Lucknow that they had filed caveat but the copy of the plaint of the suit and the

application for temporary injunction was not served upon them and the ad interim order was granted, upon which learned District Judge, Lucknow asked for comments. The defendant-respondents also filed an application under Order 39 Rule 4 C.P.C. upon which the order dated 30.07.2021 has been set aside on 09.08.2021, on the ground that the copy of plaint etc. was not served on the caveator-defendant-respondents. Against this order dated 09.08.2021 the present appeal has been filed.

5. Learned counsel for the appellants submits that no caveat was filed as it was not registered nor any copy thereof was served to the appellants prior to filing of the suit.

6. Learned counsel for the respondents, however, submits that the caveat was filed on 29.07.2021 in both the courts below i.e. Civil Judge (Junior Division), Lucknow as well as Civil Judge (Senior Division), Fast Track, Lucknow. The suit considering its pecuniary jurisdiction ought to have been filed before Civil Judge (Senior Division) Lucknow, but it was filed before Civil Judge (Junior Division), Lucknow, from where it was sent to the Court of Civil Judge (Senior Division), Fast Track, Lucknow on 30.07.2021 itself. However, at neither place the caveat was reported by the concerned.

7. From the submissions advanced by the learned counsels for the respective parties what transpires is that there is dispute on the point of filing of the caveat, the date of its filing i.e. whether it was filed on 29.07.2021 or on 30.07.2021 as also service of the caveat on the plaintiff-appellants prior to filing of the suit on 30.07.2021.

8. In view of the aforesaid, it is considered necessary to see the copy of the caveat application as also the document C 24/1 mentioned in the order dated 09.08.2021 at internal page No.2 thereof.

9. Learned counsels for the parties pray for and are granted 3 days time to file copy of the aforesaid documents along with affidavit.

10. Learned counsel for the appellants has submitted that the learned District Judge, Lucknow vide order dated 02.08.2021, had called for comments from both the Courts concerned i.e. Civil Judge (Junior Division), Lucknow as well as Civil Judge (Senior Division), Fast Track, Lucknow and directed to put up the matter with comments of the courts concerned.

11. In view of the order dated 02.08.2021 passed by the learned District Judge, Lucknow as also the seriousness of the allegations and the counter-allegations, it is also considered appropriate that the learned District Judge, Lucknow shall submit his report on the aforesaid and in particular the date of filing of caveat; the date of its registration in the records where caveats are lodged; if there are different dates in filing and registering caveat, the reason therefore, with respect to both the caveats filed before the two courts mentioned above. He shall also submit report as to what is the procedure if a case filed in one court is transferred to another court, as in the present case, whether in the transferred court, the caveat is required to be checked.

12. Learned District Judge, Lucknow shall submit the report in a

sealed cover to the Court on the next date through Senior Registrar of this Court.

13. Let a copy of this order be sent through Special messenger to the District Judge, Lucknow, within 24 hours.

14. List on 17.09.2021 as fresh."

8. By means of the order dated 13.09.2021, the learned District Judge, Lucknow was asked to submit the report in a sealed cover and in compliance the District Judge, Lucknow has sent the report dated 15.09.2021 in sealed cover to this Court, which has been opened in the Court.

9. In the report dated 15.09.2021, paragraphs 8 and 9, the learned District Judge, Lucknow has returned the following findings:

"8. From the aforesaid facts and circumstances, it transpires that the caveat was filed in the Court on 29.07.2021 and it was sent to computer center for registration and it got registered on e-portal as caveat No. 83/2021 on 29.07.2021. Thereafter, file got transferred to Civil Judge (S.D.)/F.T.C., Lucknow and due to mistake of clerk concerned i.e. Sri Ram Prasad Gupta, the same could not be enclosed alongwith the Suit. The transferee court having not received caveat, issued ex-parte ad-interim injunction on 30.07.2021. It is noteworthy that when a case is transferred from one Court to another Court, the Transferee Court should check for Munsarim Report where caveat, if filed, is endorsed by Munsarim.

9. The final departmental inquiry was initiated vide No. 15/2021 dated 02.08.2021 was initiated against the concerned clerk Sri Ram Prasad Verma and Sri Yogendra Ram Gupta, learned A.D.J.-3, Lucknow has been nominated as Inquiry Officer and in the said Final Departmental Inquiry, charge has been framed against the delinquent employee."

10. From the above report it is clear that the caveat was filed in Court on 29.07.2021 and it was sent to the Computer Center for registration and it was got registered on e-portal as caveat No. 83/2021 on 29.07.2021. Thereafter, the file was got transferred to the Civil Judge (S.D.)/F.T.C., Lucknow and due to mistake of Clerk concerned the caveat could not be enclosed along with the plaint and the transferee court having not received caveat, issued ex-parte ad-interim injunction on 30.07.2021. The report states that when a case is transferred from one Court to another Court, the transferee Court should check for Munsarim Report, whether caveat if filed is endorsed by Munsarim.

11. Sri Dilip Kumar Pandey submits that on 06.08.2021, due to the lawyers abstaining from judicial work, no one appeared from the side of the respondents and on the next date 09.08.2021, the case was called out in the morning but on the request on behalf of the respondents, it was fixed at 2.30 p.m.. The lawyers were abstaining from judicial work on that date also, but the strike was suddenly called off from noon at 1.00 p.m. on the resolution of the Bar Association of the District Court, and the order dated 09.08.2021 was passed in the afternoon.

12. Sri Dilip Kumar Pandey, submits that the appellants have filed application under Section 24 C.P.C./Order 39 Rule 2A C.P.C. No. 80 of 2021, in this Court, in view of the misuse of power and position

by the certain office bearers/members of the Bar Association of the District Court, for transfer of the suit to nearby district, in which this Court passed the following order on 10.08.2021.

"Heard Sri Virendra Mishra, learned counsel for the petitioners.

This is an application for transfer of the suit proceedings.

It is vehemently argued that the office bearers with the support of members of the bar are not allowing the court to proceed in the matter. The demands made by the members of the bar are no less than an obstruction in the process of law.

This is a sad state of affairs.

It is submitted that the objectionable behaviour of the members of the bar is influenced by the defendants in the suit proceedings who are private parties.

Issue notice.

The District Judge is directed to submit a report for the reason that the grievance raised in the present application filed under Section 24 of the Code of Civil Procedure is exceptional and serious.

List in the week commencing 06.09.2021."

13. Sri Dilip Kumar Pandey further submits that even if caveat was filed on 29.07.2021 but as it was not reported and as copy thereof was not served on the plaitiff/appellants, there was no fault on the part of the plaintiff/appellants in filing Suit without serving copy of the plaint etc and consequently the ex-parte order of ad-interim injunction dated 30.07.2021 could not be set aside on the ground that in spite of caveat the defendent-respondent was not heard. He submits that in terms of the proviso to Order 39 Rule 4 C.P.C. if a party has knowingly made a false or misleading statement in relation to a material particular and consequent thereupon the injunction was granted, without giving notice to the opposite party, then only the Court shall vacate the injunction. He further submits that even in such a case, it is not always mandatory for the Court to vacate the injunction, as, if the Court considers it is not necessary to do so, in the interest of justice, the Court shall not vacate the injunction order for the reasons to be recorded.

14. In support of his submission, Sri Dilip Kumar Pandey placed reliance upon Order 39 Rule 4 C.P.C. which is being reproduced as under:

"4. Order for injunction may be discharged, varied or set aside.-Any order for an *injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order:*

[Provided that if in an application for temporary injunction or in any affidavit supporting such application a party has knowingly made a false or misleading statement in relation to a material particular and the injunction was granted without giving notice to the opposite party, the Court shall vacate the injunction unless, for reasons to be recorded, it considers that it is not necessary so to do in the interests of justice:

Provided further that where an order for injunction has been passed after giving to a party an opportunity of being heard, the order shall not be discharged, varied or set aside on the application of that party except where such discharge, variation or setting aside has been necessitated by a change in the circumstances, or unless Court is satisfied that the order has caused undue hardship to that party.]

(i) after the words "by the Court", insert the words "for reasons to be recorded, either or its own motion, or";

(ii) at the end, insert the following proviso, namely:-

"Provided that if at any stage of the suit it appears to the Court that the party in whose favour the order of injunction exists is delaying the proceedings or is otherwise abusing the process of Courts, it shall set aside the order of injunction."

[Vide Uttar Pradesh Act 57 of 1976, sec. 13 (w.e.f. 1-1-1977).]"

15 . Sri Asit Srivastava relying on Section 148A C.P.C. submits that it provides for filing of caveat and in view of sub-section (3) thereof, where, after a caveat has been lodged if any application is filed in any suit or proceeding, the court shall serve a notice of the application on the caveator. He submits that it is the duty of the Court to serve notice of the application on the caveator and if in spite of filing of the caveat, the same was not endorsed and consequently notice of the plaint etc. was not served to the defendant-respondents, it was the mistake on the part of the Court for which the defendant-respondents cannot be made to suffer. He has placed reliance on the judgments of this Court in the case of **Raj Bahadur and another: Civil Judge (J.D.) Musafirkhana Sultanpur and three others in Writ Petition No. 6380 (MS) of 2014 decided on 20.11.2014 and Maharaja Dharmendra Prasad Singh and another Vs. Vivek Agarwal and others** in Civil Misc. Application No. 31058 of 2009 in First Appeal From Order No. 303 of 2009, decided on 06.04.2009 (DB).

16. I have considered the submissions advanced by the learned counsels for the parties and perused the material on record.

17. So far as the submissions of learned counsel for the appellants, as noted in paragraphs 11 and 12 are concerned, this Court in Application under Section 24 and/or 39 Rule 2 A C.P.C. No. 80 of 2021 is already seized of the matter in which a report has also been called from the District Judge, Lucknow, and as such this Court is not entering into that controversy. But, is expressing its concern for administration of justice in view of the facts that though the caveat was registered on 29.07.2021 it was not reported by the Munsarim of the Court concerned when the suit was filed on 30.07.2021. Again, the suit itself was filed in the Court having no pecuniary jurisdiction. The valuation of the suit as valued by the plaintiff-appellant was Rs. 20,00,000/- (Twenty Lacs). It should have been filed in the Court of Civil Judge (Senior Division), Lucknow, but, the suit was filed in the Court of Civil Judge (Junior Division), (South), Lucknow, from where it was transferred, on the same date i.e. 30.07.2021, and even in the transferee Court the Munsarim of the Court concerned did not notice about the caveat. The exparte

ad interim injunction was passed on 30.07.2021. The report of the learned District Judge, Lucknow, dated 15.09.2021 reproduced above, notes that when the case is transferred from one Court to another Court, the transferee Court should check for Munsarim report where caveat if filed is endorsed by the Munsarim.

18. Without observing anything further, the Court confines itself to the legal issue involved in view of the submissions advanced, with respect to the legality or otherwise of the order dated 09.08.2021 under challenge.

19. It is clear that the caveat was filed on 29.07.2021. The Suit was filed thereafter on 30.07.2021. The notice of the Suit/plaint etc. was not served on the defendant-respondents and the ad-interim injunction was granted ex-parte, without providing any opportunity of hearing to the defendant-respondents.

20. Section 148A of the C.P.C. deals with right of a person to lodge a caveat. It provides as under:

*"**148A. Right to lodge a caveat**.- (1) Where an application is expected to be made, or has been made, in a suit or proceeding instituted, or about to be instituted, in a Court, any person claiming a right to appear before the Court on the hearing of such application may lodge a caveat in respect thereof.*

(2) Where a caveat has been lodged under sub-section (1), the person by whom the caveat has been lodged (hereinafter referred to as the caveator) shall serve a notice of the caveat by registered post, acknowledgment due, on the person by whom the application has been, or is expected to be, made under sub-section (1).

(3) Where, after a caveat has been lodged under sub-section (1), any application is filed in any suit or proceeding, the Court, shall serve a notice of the application on the caveator.

(4) Where a notice of any caveat has been served on the applicant, he shall forthwith furnish the caveator at the caveator's expense, with a copy of the application made by him and also with copies of any paper or document which has been, or may be, filed by him in support of the application.

(5) Where a caveat has been lodged under sub-section (1), such caveat shall not remain in force after the expiry of ninety days from the date on which it was lodged unless the application referred to in sub-section (1) has been made before the expiry of the said period.]"

21. A bare reading of Section 148A C.P.C. shows that any person claiming a right to appear before the Court on the hearing of an application, expected to be made or has been made in a Suit or other proceeding instituted or about to be instituted in a Court may lodge a Caveat for such appearance and hearing of the application before the Court. Sub-Section (3) of Section 148A provides that if any application is filed in any Suit or proceeding, after the caveat has been lodged, the Court shall serve a notice of the application on the caveator.

22. Section 148A, C.P.C. thus provides for an opportunity of hearing to any person claiming such right to defend himself before passing of any order, from

which he might be affected, and to ensure it, where the person files caveat, the Court has to serve a notice of the application on the caveator, which is a duty cast upon the Court.

23. Section 148-A (4) also cast duty on the applicant, who has been served with a notice of caveat, to forthwith furnish copy of the application with complete documents filed in support of the application to the caveator.

24. The duty cast under sub-Section (3) is on the Court where caveat has been lodged and the duty cast under Sub-section (4) is on the applicant, filing application in a Court, who has been served with a notice of caveat. Sub-Section (2) provides for service of notice of caveat on the applicant by the caveator.

25. In **S.S.Barathokey Vs. Chairman U.P.Seed and Tarai Development Corporation Limited and another 1993(11) LCD 486**, where, a caveat was filed but notice of the writ petition was not served upon the caveator's counsel before filing the writ petition and an ex-parte interim order was passed, upon the application for recall of that order on the very ground of no service of notice of the writ petition in spite of caveat, this Court, after considering the provisions of Chapter XXII Rule 1 (4) of the Allahabad High Court Rules, Section 148A of C.P.C. and various authorities on the point, held that the ex-parte interim order without hearing the caveator's counsel deserved to be recalled and the opposite parties were entitled to be given a right of hearing on the application for interim relief.

26. It is appropriate to reproduce paragraphs 7 and 10 to 15 of **S.S.Barathokey (supra)** as under:

"7. A perusal of the above Rule 5 will go to show that where an application is expected to be filed, the person claiming the right to oppose such an application, may file a caveat in the Court. Sub-rule (2) provides that the service of the notice of the caveat shall be made upon the other side by registered post acknowledgment due. Sub-rule (3) provides that after the caveat has been filed and the notice thereof has been served on the applicant's counsel, the applicant shall forthwith furnish to the caveator or his counsel copy of the application as well as any miscellaneous application for interim relief. The date of motion is also necessary to be indicated to the caveator's counsel.

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xxxxx

10. A reference has also been made to Section 148-A of the Code of Civil Procedure. In the case of Chandrajit v. Ganeshiya (AIR 1987 All 360) a Division Bench of this Court has held that the provisions of Section 148-A can be applied to appeals, first, second, execution or any other appeal filed under the Code of Civil Procedure or any other enactment. The caveats would be entitled to be entertained at the time an appeal is submitted for reporting. The Stamp Reporter will make a note, if the caveat has already been filed before him, about the same. In para 8 of this case the intention as to why caveat is filed has been made clear as under:-

"8. A caveat is only an intimation to a Judge or officer notifying that the opposite party be given an opportunity to be heard before any action is taken on the application or proceeding initiated by the other side. It is a request which, if attended

to, will help the court in doing justice in between parties."

11. In the case of ***G. C. Siddalingappa v. G C. Veeranna (AIR 1981 Karnataka 242)*** *after considering the provisions of Section 148-A of the Code of Civil Procedure that Court came to the conclusion that the provision regarding service of notice as contained in sub-section (3) is mandatory and non-compliance with it defeats the very object of introducing Section 148-A. Consequently it follows that the breach of sub-section (3) vitiates the order passed thereof. Once is caveat a filed, it is a condition precedent for passing an interim order to serve a notice of the application on the caveator who is going to be affected by the interim order. Once a caveat is filed it becomes the duty of the Stamp Reporter to report that such and such counsel for the opposite parties or one of the opposite parties has filed a caveat and it becomes the duty of the Court to hear that counsel before an interim order is passed in the case.*

12. This question was also raised for consideration in the case of ***Pashupati Nath Arora v. The Registrar, Cooperative Societies Jaipur and other (AIR 1983 Rajasthan 191****). In that case the provisions of Section 148-A of the Code of Civil Procedure and the Rajasthan High Court Rules, (Rule 159), were interpreted. In that case the High Court held that in order to make the caveat effective, the analogy of provisions 148-A,CPC can be applied to the caveats which are filed before the Court.*

13. A single Judge of this Court in the case of Nainital Bank Limited V. Munsif, Nainital and others (1992(1) LDR 70) has held that an interim order which has been passed in absence of a party who has put in appearance, is to be recalled. In that case also the power had been filed in the Court by the counsel for the opposite parties. The filing of caveat in the court is equivalent to filing of power on behalf of opposite parties and once it is known that a caveat has been filed the office should report this fact.

14. The Hon ble Supreme Court in ***Jang Singh v. Brij Lal (AIR 1966 SC 1631),*** *has observed in para 6 as under :-*

"It is, therefore, quite clear that if there was an error the Court and its officers largely contributed to it. It is no doubt true that a litigant must be vigilant and take care but where a litigant goes to Court and asks for the assistance of the Court so that his obligations under a decree might be ful-filled by him strictly, it is incumbent on the Court, if it does not leave the litigant to his own devices, to ensúre that the correct information is furnished. If the Court in supplying the information makes a mistake the responsibility of the litigant, though it does not altogether cease, is at least shared by the Court. If the litigant acts on the faith of that information the Courts cannot hold him responsible for a mistake which it itself caused. There is no higher principle for the guidance of the Court than the one that no act of Courts should harm a litigant and it is the bounden duty of Courts to see that if a person is harmed by a mistake of the Court he should be restored to the position he would have occupied but for that mistake. This is aptly summed up in the maxim: "Actus curiae neminem gravabit."

15. Thus from the perusal of these cases and the Rules of the Courts and Section 148-A of the Code of Civil

Procedure it becomes quite apparent that in the present case when a caveat had already been filed it was the duty of the Stamp Reporter to make an endorsement to this effect on the writ petition. In the present case it was not the fault of the opposite parties. At the same time it was also the duty of the learned counsel for the petitioner to have served the notice of the writ petition before filing it in the Court because Sri D. P. Singh, Advocate was the Standing Counsel of the U. P. Seeds and Tarai Development Corporation, the opposite party in the present case. As the petitioner did not serve copy of the writ petition on the counsel for the opposite parties the exparte interim order passed in the present case is liable to be recalled and the matter to be heard again. In this case the exparte interim order has been passed by the Court on the fault of the learned counsel for the petitioner for not serving Sri D. P. Singh, learned counsel for the opposite parties who was also their Standing Counsel. The office of the Stamp Reporter is also to be blamed equally for not reporting about the filing of the caveat in the above case. It is a serious matter which requires consideration. The Stamp Reporter should be vigilant while making reports and see whether a caveat has been filed by the other party while reporting on the writ petitions. Dereliction of duty on the part of the Stamp Reporter and his office has resulted in harassment of the parties and wastage of precious time of the Court."

27. In **S.S.Barathokey (supra**) this Court placed reliance on the judgment of the Hon'ble Supreme Court in the Case of **Jang Singh Vs. Brij Lal, AIR 1966 SC 1631, in which it was held that "there is no higher principle for the guidance of the Court than the one that no act of Courts should harm a litigant and it is the bounden duty of Courts to see that if a person is harmed by a mistake of the Court he should be restored to the position he would have occupied but for that mistake. This is aptly summed up in the maxim: "Actus curiae neminem gravabit.".**

28. In the case of **Maharaja Dharmendra Prasad Singh (supra**), the Division Bench of this Court, held that once a caveat is filed, it shall always be incumbent upon the Stamp Reporter to verify the facts with regard to filing of the caveat, go throughout the record not only on the basis of names of the parties but also on the basis of case number of regular suit, the date of order passed by the subordinate Courts/Tribunals and quasi judicial authorities, or other identifying numbers, if any. It also referred that no one should suffer for the fault of the Court as any act of the Court of law shall prejudice no man in the basic concept of administration of justice.

29. In **Maharaja Dharmendra Prasad Singh (supra),** where also there was negligence on the part of the Stamp Reporter, who failed to make an endorsement with regard to filing of the caveat, such slackness or negligence on the part of the Stamp Reporter or Registry of the Court was considered as amounting to negligence on the part of the Court.

30. In the Case of **Raj Bahadur (supra),** this Court held that "the provisions for giving a notice or for providing a copy of the application and document to the caveator are in conformity with the principles of natural justice. Any violation thereof renders any judicial process adopted by any authority, specially by a judicial authority, nugatory. The

relevant part of Raj Bahadur (supra) reads as under:

"The provisions for lodging a caveat are found in Section 148-A of the C.P.C. Sub-Section (3) of Section 148-A specifically provides that where, after a caveat has been lodged under sub-section (1), if any application is filed in any suit or proceeding, the court shall serve a notice of the application on the caveator. Sub-section (4) casts a duty on the applicant to forthwith furnish a copy of the application to the caveator and also copies of any paper or document which has been, or may be, filed by the applicant in support of the application. Sub-sections (3) and (4) of Scction 148-A of the C.P.C. are quoted below:

"(3) Where, after a caveat has been lodged under sub- section (1), any application is filed in any suit or proceeding, the Court shall serve a notice of the application on the caveator.

(4) Where a notice of any caveat has been served on the applicant on the applicant, he shall forthwith furnish the caveator, at the caveator's expense, with a copy of the application made by him and also with copies of any paper or document which has been, or may be, filed by him in support of the application."

Sub-section (3) of Section 148-A, CPC thus makes it mandatory for the Court to serve a notice on the caveator.

Right to lodge caveat under Section 148-A of the C.P.C. has been conferred on a person who apprehends or expects any impending legal action against him. The provisions for giving a notice or for providing a copy of the application and document to the caveator are in conformity with the principle of natural justice. Any violation thereof renders any judicial process adopted by any authority, specially by a judicial authority, nugatory".

31. In view of the above, the order dated 30.7.2021 has rightly been set aside by the learned court below vide order dated 09.08.2021.

32. The submission of Sri Dilip Kumar Pandey that there was no fault on the part of the plaintiff-appellant as neither caveat was reported nor copy thereof was served on the appellants and as such "they had not knowingly made a false and misleading statement in relation to a particular matter' and therefore, the condition under Order 39 Rule 4 C.P.C. for vacating the injunction order dated 30.07.2021 was not fulfilled, cannot be accepted in view of the law laid down in **Maharaja Dharmendra Prasad Singh (supra),** where due to fault on the part of the Stamp Reporter the caveat was not reported. Here also, the Munsarim did not report caveat which had already been registered on 29.07.2021.

33. It is the right of the caveator of being heard if a caveat is filed and it is the duty of the Court to afford him opportunity of hearing and not passing any order without affording opportunity of hearing to the caveator which needs be protected it being a right recognized by the statute, even if there is no fault on the part of the applicant. If due to some negligence, mistake or otherwise of the registry/Munsarim, caveat is not reported and without affording opportunity of hearing order is passed, the order shall be liable to be recalled and the caveator would

be entitled to be restored to the position of hearing of the application afresh, on the principle that an act of Court of law, in administration of justice should prejudice no man.

34. While considering an application for vacation of the order of temporary injunction under order 39 Rule 4 C.P.C. or any other provision, the Courts can not ignore the mandate of Section 148-A (3) C.P.C.

35. Before, concluding, this court deems it appropriate as also a duty in the interest of proper administration of justice to issue following directions as well:

1) **In every Civil Court, Munsarim is the Chief Ministerial Officer.** He is appointed to receive plaints or other papers under the Code and to see that the actual date of presentation is entered upon the plaint, memorandum of appeal, cross-objection **or any other paper** filed and also upon the labels on such papers.

2) It shall be incumbent as also the duty upon the Munsarim of the Court concerned to verify the facts on the basis of case number of regular suit, date of the order passed by the subordinate court, the name of the parties or other identifying numbers, if any with regard to the filing of a caveat;

3) When an application/plaint or/and is filed in Civil Court the Munsarim of that court shall mandatorily make an endorsement on such plaint/application, if any caveat has been filed or not.

4) If caveat has been filed the same shall be reported without any failure;

5) If a plaint/application is filed in one Court but is transferred to another Court, for any reason either at the time of institution or thereafter, the Munsarim of the transferee Court shall also ensure if there is reporting of the caveat or not and in the absence of any such reporting the Munsarim of the transferee Court, shall submit his report to the transferee Court about the caveat and if required, report to that affect shall also be asked from the Munsarim of the Court from where the case has been received on transfer, which report shall be submitted by the Munsarim of the Court from where the file has been received from transfer without any delay so that in cases of urgency, the disposal of the application may not be unnecessarily delayed.

6) Any slackness, negligence or mistake on the part of the Munsarim of the Court concerned for any reason whatsoever would amount to interference in the administration of justice, rendering him liable for appropriate action being taken in addition to the disciplinary proceedings.

7) The above directions are in addition to any other provision or directions etc, if exist, on the above subject.

8) learned District Judges of the District Courts in the State of Uttar Pradesh shall ensure that the caveat lodged is reported and is not missed by any slackness or negligence or mistake or otherwise on the part of the Munsarim and to ensure it necessary order shall be issued as per the above directions.

36. In view of the aforesaid the appeal lacks merit and deserves to dismissed at the admission stage.

37. The appeal is dismissed.

38. The report of the learned District Judge, Lucknow dated 15.09.2021 shall again be kept in the sealed cover in the records of this appeal.

39. The Registrar General of this Court shall send/circulate copy of this judgment to all the District Judges of the State of Uttar Pradesh, for necessary action at their end.

(2021)09ILR A743
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.08.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE SUBHASH CHAND, J.

F.A.F.O. No. 545 of 2021

Smt. Neelam Gupta & Ors. ...Appellants
Versus
United India Insurance Co. Ltd. & Ors. ...Respondents

Counsel for the Appellants:
Sri Ankur Mehrotra

Counsel for the Respondents:
Sri Amit Singh

Motor accident claim-quantum of compensation amount and negligence of deceased is in question-No amount under the head of future loss of income granted-truck came from the right side- as deposed by the eye witness-driver of other vehicle did not sustained any injury-deceased to be held 20% negligent-Income of the deceased wrongly assessed-50% income has to be added as future loss of prospects-amount of compensation modified.

Appeal prtly allowed. (E-9)

List of Cases cited:

1. National Insurance Co. Ltd. Vs Pranay Sethi & ors., 2017 0 Supreme (SC) 1050

2. Vimal Kanwar & ors. Vs Kishore Dan & ors., AIR 2013 SC 3830

3. Sandeep Khanduja Vs Atul Dande & ors., (2017) 3 SCC (Crl) 178

4.National Insurance Co. Ltd.Vs Pranay Sethi & ors., 2017 0 Supreme (SC) 1050

5. FAFO No.199 of 2017, National Insurance Co. Ltd. Vs Luv Kush & anr.

6. Bajaj Allianz General Insurance Co.Ltd. Vs Smt. Renu Singh & ors., First Appeal From Order No. 1818 of 2012 decided on 19.7.2016

7. Raghuvir Singh Matolya & ors.. Vs Hari Singh Malviya & ors., Law 2009 (2) ACCD 1120 SC

8. National Insurance Co. Ltd.Vs Pranay Sethi & ors., 2017 0 Supreme (SC) 1050 & U.P. Rules, 1998

9. Sarla Verma Vs Delhi Transport Corporation, (2009) 6 SCC 121

10. National Insurance Co. Ltd. Vs Mannat Johal & ors., 2019 (2) T.A.C. 705 (S.C.)

11. A.Vs Padma Vs Venugopal, Reported in 2012 (1) GLH (SC), 442

12. Smt. Hansaguti P. Ladhani Vs The Oriental Insurance Co. Ltd., reported in 2007(2) GLH 291

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

1. Heard Shri Ankur Mehrotra, learned counsel for the appellants and Sri Amit Singh, learned counsel for the respondent-insurance company.

2. This appeal, at the behest of the claimants, challenges the judgment dated 03.01.2020 passed by Presiding Officer Motor Accident Claims Tribunal, Ghaziabad (hereinafter referred to as 'Tribunal') in Claim Petition No.464 of 2010 awarding a sum of Rs.27,19,838/- with interest at the rate of 7% as compensation.

3. The accident is not in dispute. The respondents concerned have not challenged the liability imposed on them. The issues to be decided are the quantum of compensation awarded and whether deceased was also negligent in causing the accident. The deceased along with the claimants were going for worshipping at the temple of Kaila Devi on the fateful day i.e. 7.7.2010 when the deceased who was driving the Maruti Wagon R No UP 14 R 5355 was driving the vehicle on its correct side at about 11 hours when the vehicle reached Village Bada Gaon, Vehicle No.RJ 34 G 0950 being driven on wrong-side rashly and negligently dashed with the Maruti Car. The driver due to accidental injuries was in critical condition and no local hospital admitted him, he was shifted to Appolo Hospital Delhi where he succumbed to the injuries. The claimants contended that the accident occurred due to the negligence of driver of the other vehicle. The FIR was lodged against the driver of the offending vehicle. The deceased was an Engineer by profession in LG Electronic India Private Limited and was having a salary of Rs.31,184/- per month. The deceased was a bachelor and was 26 years of age. The deceased left behind him his father, mother and sister. The driver and the owner of the other vehicle involved in the accident did not appear before the tribunal nor they have appeared before this Court.

4. It is submitted by learned counsel for the appellants that the Tribunal has not granted any amount towards future loss of income which is required to be granted in view of the decision in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050** and in view of **U.P. Motor Vehicles Rules, 1998** (hereinafter referred to as the U.P. Rules, 1998). It is further submitted that amount under non-pecuniary heads which is granted and the interest awarded by the Tribunal are on the lower side and requires enhancement. It is submitted that the issue of negligence also requires to be redetermined. The tribunal considered the deceased to be contributor of accident have taken place despite the fact that the driver who is the author of the accident against whom the charge sheet had been laid did not appear nor stopped into witness box. It is further submitted that as the deceased was survived by his parents and sister, the deduction towards personal expenses of the deceased should be 1/3rd as per U.P. Rules, 1998 and not half and other pecuniary benefits should not have been reduced from income of deceased. In support of his submission, learned counsel for the appellants has relied on the judgment of the Supreme Court titled **Vimal Kanwar and others v. Kishore Dan and others, AIR 2013 SC 3830.** It is submitted that the Supreme Court's decision was cited before the tribunal but tribunal has deducted bonus, maintenance allowance, PF and gratuity from commuptable income holding that they are not part of the salary and, therefore, the tribunal held that the same cannot be considered to be part of the income. The tribunal added 40% to the salary, which should be 50%. It is submitted by learned counsel for appellant that most unfortunately, the tribunal has considered the judgment of ***Sandeep***

Khanduja v. Atul Dande and Ors., (2017) 3 SCC (Crl) 178. The claim petition was not filed under Section 163-A of the Motor Vehicles Act, 1988 (referred as the Act) Act but was filed under Section 166 of the Act and hence, it appears that the learned tribunal has granted multiplier of 18. The tribunal deducted 30% holding the deceased to be also negligent.

5. Learned counsel for the respondent submitted that the compensation awarded by the Tribunal is just and proper and does not call for any enhancement rather the multiplier awarded by the Tribunal is on higher side and it is required to be reduced.

6. It is submitted by learned counsel for appellants that the learned Tribunal should have gone by the judgment in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050** and the decision circulated in FAFO No.199 of 2017, **National Insurance Company Limited v. Luv Kush and another.** It is submitted that the tribunal has relied on the Rules whereas the judgment of the Apex Court in Sandeep Khanduza is for petitions under Section 163-A of the Act. The Tribunal has granted multiplier of 18 and therefore the same may be not disturbed. The non pecuniary compensation could not have been granted as per the schedule to the Act which has been found to be faulty by the Apex Court. It has to be as per the judgments of Supreme Court decision in **Pranay Sethi (Supra)** where it is held that parents are entitled to filial consortium, funeral charges and for love and affection. The judgment in Pranay Sethi (Supra) though has been considered by the learned tribunal has misguided itself by relying on Rule 4 of the U.P. State Motor Vehicle Rules, 2011 which could not be done as the tribunal is under an obligation that it should have considered grant of filial consortium and other pecuniary benefits, no doubt the rule if they provide for a better compensation and provide for beneficial and liberal interpretation they can be relied on but if the benefit is less compared to the judicial pronouncement, they will not prevail and, therefore, also the judgment of the tribunal requires modification.

7. Heard the learned counsels for the parties.

8. The issue of negligence has to be decided from the perspective of the law laid down by the Courts.

9. The term negligence means failure to exercise care towards others which a reasonable and prudent person would in a circumstance. Negligence can be both intentional or accidental which can also be accidental. More particularly, term negligence connotes reckless driving and the injured of claimants 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.

10. 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.

11. 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

12. The latest decision of the Apex Court in **Khenyei (Supra)** has laid down one further aspect about considering the negligence more particularly composite/contributory negligence. The deceased or the person concerned should be shown to have contributed either to the accident and the impact of accident upon the victim could have been minimised if he had taken care. In this case the deceased was driver of vehicle. The learned tribunal has lost the sight of one aspect that the truck came on the wrong side which is clear from the deposition of eye witness. The tribunal has considered the sight plan which is not contradictory to the version given by the eye-witness. The tribunal believed the eye witness, the FIR and charge sheet is filed against the driver of the other vehicle. The driver of the other vehicle did not sustain any injury. The statement recorded on 17.7.2010 of one of the claimants is also very clear who has categorically mentioned that accident occurred due to rash and negligent driving of the other vehicle driver.

13. We hold that the driver of the other vehicle came on the wrong side. The site plan shows and has stated that the son was driving his vehicle at normal speed but they also told to drive the vehicle at a moderate speed. We hold the driver namely deceased to be 20% was travelling negligence we modify the findings to the said effect.

Compensation:-

14. Having heard the counsels for the parties and considered the factual data, the accident occurred on 07.07.2010 causing death of Abhishek Gupta who was 26 years of age and left behind him, parents and unmarried sister. The Tribunal has assessed the income of the deceased to be Rs.25,462/- per month. The deceased was Senior Engineer in LG Electronics. PW-1 who is the father of deceased stated that the deceased was working as Senior Engineer in LG Electronics India Private Ltd,

Greater NOIDA at a very young age. PW-2, Panchgopal who is the Assistant Manager Department HR of LG Electronics Private Ltd. stated that deceased was employed on the post of Senior Engineer-11 from 19.9.2007 to 7.7.2010. On 7.7.2010 that is on the faithful day when the accident occurred, the deceased succumbed to the injuries. The deceased was in the pay band of Rs.37,4212/- and he was also entitled for bonus. His income tax was also deducted. At the time of his initial appointment, his basic salary was Rs.10,100/- per month and bonus was depending on performance of his work, HRA was Rs.5,050/- per month. Medical Allowance was Rs.1250/- per month, Maintenance Allowance was Rs.3200/- per month, LTA was Rs.10,000/- per month, PF was Rs.1212/- per month and gratuity deduction was Rs.412/- per month, when the deceased passed away his basic salary was Rs.15,558/- per month. The income according to counsel for appellant has not properly been calculated. The submission that the deceased was Senior Engineer in LG Electronics is not in dispute even if we consider the income of the deceased in the year 2010 and even if we go by the judgments of the Apex Court wherein it has been held that income as on date of accident would be applicable. It is submitted that income be considered to be Rs.30,000/- per month. The tribunal has considered the income to be Rs.25,000/- and has misdirected itself and has misinterpreted the judgment titled **Raghuvir Singh Matolya & Ors. v. Hari Singh Malviya & Ors., Law 2009 (2) ACCD 1120 SC.**

15. The recent judgement of **Vimal Kanwar (Supra) wherein para 19 & 20 of the said judgment the Apex Court has held** as follows:-

"19. The first issue is "whether Provident Fund, Pension and Insurance receivable by claimants come within the periphery of the Motor Vehicles Act to be termed as "Pecuniary Advantage" liable for deduction." The aforesaid issue fell for consideration before this Court in Helen C. Rebello (Mrs) and others vs. Maharashtra State Road Transport Corporation & Anr. reported in (1999) 1 SCC 90. In the said case, this Court held that Provident Fund, Pension, Insurance and similarly any cash, bank balance, shares, fixed deposits, etc. are all a "pecuniary advantage" receivable by the heirs on account of one's death but all these have no correlation with the amount receivable under a statute occasioned only on account of accidental death. Such an amount will not come within the periphery of the Motor Vehicles Act to be termed as "pecuniary advantage" liable for deduction. The following was the observation and finding of this Court:

"35. Broadly, we may examine the receipt of the provident fund which is a deferred payment out of the contribution made by an employee during the tenure of his service. Such employee or his heirs are entitled to receive this amount irrespective of the accidental death. This amount is secured, is certain to be received, while the amount under the Motor Vehicles Act is uncertain and is receivable only on the happening of the event, viz., accident, which may not take place at all. Similarly, family pension is also earned by an employee for the benefit of his family in the form of his contribution in the service in terms of the service conditions receivable by the heirs after his death. The heirs receive family pension even otherwise than the accidental death. No correlation between the two. Similarly, life insurance policy is received either by the insured or

the heirs of the insured on account of the contract with the insurer, for which the insured contributes in the form of premium. It is receivable even by the insured if he lives till maturity after paying all the premiums. In the case of death, the insurer indemnifies to pay the sum to the heirs, again in terms of the contract for the premium paid. Again, this amount is receivable by the claimant not on account of any accidental death but otherwise on the insured's death. Death is only a step or contingency in terms of the contract, to receive the amount. Similarly any cash, bank balance, shares, fixed deposits, etc. though are all a pecuniary advantage receivable by the heirs on account of one's death but all these have no correlation with the amount receivable under a statute occasioned only on account of accidental death. How could such an amount come within the periphery of the Motor Vehicles Act to be termed as "pecuniary advantage" liable for deduction. When we seek the principle of loss and gain, it has to be on a similar and same plane having nexus, inter se, between them and not to which there is no semblance of any correlation. The insured (deceased) contributes his own money for which he receives the amount which has no correlation to the compensation computed as against the tortfeasor for his negligence on account of the accident. As aforesaid, the amount receivable as compensation under the Act is on account of the injury or death without making any contribution towards it, then how can the fruits of an amount received through contributions of the insured be deducted out of the amount receivable under the Motor Vehicles Act. The amount under this Act he receives without any contribution. As we have said, the compensation payable under the Motor Vehicles Act is statutory while the amount receivable under the life insurance policy is contractual."

20. The second issue is "whether the salary receivable by the claimant on compassionate appointment comes within the periphery of the Motor Vehicles Act to be termed as "Pecuniary Advantage" liable for deduction." "Compassionate appointment" can be one of the conditions of service of an employee, if a scheme to that effect is framed by the employer. In case, the employee dies in harness i.e. while in service leaving behind the dependents, one of the dependents may request for compassionate appointment to maintain the family of the deceased employee dies in harness. This cannot be stated to be an advantage receivable by the heirs on account of one's death and have no correlation with the amount receivable under a statute occasioned on account of accidental death. Compassionate appointment may have nexus with the death of an employee while in service but it is not necessary that it should have a correlation with the accidental death. An employee dies in harness even in normal course, due to illness and to maintain the family of the deceased one of the dependents may be entitled for compassionate appointment but that cannot be termed as "Pecuniary Advantage" that comes under the periphery of Motor Vehicles Act and any amount received on such appointment is not liable for deduction for determination of compensation under the Motor Vehicles Act."

16. The judgement of ***Vimal Kanwar (Supra)*** will permit us to upturn the said finding. The amount to be added would be 50% as he was below the age of 40 years and though may not be in government job. The deceased was bachelor as direction of

the Apex Court 50% has been deducted. To which as the deceased was in the age bracket of 26-30 years, 50% of the income will have to be added as future loss of prospects in view of the decision of the Apex Court in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050 and U.P. Rules, 1998**. As far as deduction towards personal expenses of the deceased is concerned, it should be 1/2 as the deceased was a bachelor. The Tribunal considered the multiplier of 18 which is bad as per the decision in **Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121** will have to be followed. The judgment of ***Sandeep Khanduja (supra)*** can't be made applicable, hence multiplier of 17 would be admissible. The amount for non pecuniary damages would be Rs.15,000/- for loss of funeral expenses, Rs.40,000/- for loss of filalial consortium with 10% increase every three years. The rounded figure would be Rs.50,000/- for the mother and father both as per Section 140 of the Motor Vehicles Act.

17. The total compensation payable to the appellants in view of the decision of the Apex Court in **Pranay Sethi (Supra) read with and** U.P. Rules, 1998 is computed herein below:

i. Income Rs.30,000/- p.m.

ii. Percentage towards future prospects : 50% namely Rs.15,000/-

iii. Total income : Rs. 30,000 + Rs.15,000 = Rs.45,000-

iv. Income after deduction of 1/2 : Rs.22,500/-

v. Annual income : Rs.22,500 x 12 = Rs.2,70,000/-

vi. Multiplier applicable : 17 (as the deceased was in the age bracket of 26-30 years)

vii. Loss of dependency: Rs.2,70,000 x 17 = Rs.45,90,000/-

viii. Amount under non pecuniary heads : Rs.50,000/-

ix. Total compensation : **Rs.46,60,000**/-

18. The amount will stand reduced by 20% as we have considered the negligence of the driver of car. Fresh award widhdrawn by the tribunal in the Claim Petition No. 464 of 2010.

19. 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."

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 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.

21. 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.

22. 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.

23. 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 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.

24. 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.

25. This Court is thankful to both the counsels to see that the matter is **disposed of.**

(2021)09ILR A751
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.09.2021

BEFORE

THE HON'BLE RAVI NATH TILHARI, J.

F.A.F.O. No. 724 of 2018

The New India Assurance Company Ltd. ....Appellants

Versus

Smt. Renu & Ors. ...Respondents

Counsel for the Appellants:
Zafar Aziz, Paritosh Sharma

Counsel for the Respondents:
Deshdeepak Bajpai, Ravindra Pratap Singh

Motor accident Claim-challenge to quantum of compensation-loss of love and affection is comprehended in loss of consortium-no justification to award compensation towards loss of love and affection as a separate head-total awarded amount do not deserves to be reduced-Motor Vehicle Act is a beneficial legislation-amount awarded under head of loss of love and affection is held to be also towards "loss of consortium.

Appeal dismissed. (E-9)

List of Cases cited:

1. National Insurance Co. Ltd. Vs Pranay Sethi & ors., reported in 2017 (4) TAC 673 (SC); (2017) 16 SCC 680

2. New India Assurance Co. Ltd. Vs Smt. Somwati & ors. (2020) 9 SCC 644,

3. United India Insurance Co. Ltd.Vs Satinder Kaur @ Satvinder Kaur & ors. (2020) SCC online 410

(Delivered by Hon'ble Ravi Nath Tilhari, J.)

1. Heard Sri Zafar Aziz, learned counsel for the appellant and Sri Ravindra Pratap Singh, learned counsel for claimant-respondent Nos. 1 to 8.

2. As per service report dated 07.05.2019, service upon respondent No. 9 is sufficient, but nobody appears on her behalf.

3. This appeal has been filed by the New India Assurance Company Limited under Section 173 of the Motor Vehicles Act, 1988 (in short "the Act, 1988") challenging the judgment and award dated 31.07.2018 passed by the Motor Accident Claims Tribunal/Additional District Judge, Court No. 05, Barabanki (in short "the Tribunal") in Claim Petition No. 29/2013 in Re Smt. Renu and others Vs. Smt. Meena Dixit.

4. The claimant-respondent Nos. 1 to 8 filed claim petition, claiming compensation against the owner of the offending vehicle/opposite party No. 9 and the Insurance Company-the appellant, on account of death of Ayodhya Prasad Yadav, their predecessor, in the accident dated 05.10.2012 caused on account of rash and negligent driving of the offending vehicle Maruti Car No. U.P.32-CQ-0456.

5. After contest, the Tribunal vide judgment and award dated 31.07.2018 allowed the claim petition and awarded compensation amount of Rs. 42, 05,038/- in total, with interest @ 7 % thereon from the date of filing of the claim petition up to the date of payment.

6. The Tribunal recorded finding that the accident was caused due to rash and negligent driving of the offending vehicle, being driven by its driver. The offending vehicle, at the time of accident had valid and effective documents and was insured with the appellant herein. The driver at the time of accident, was having valid and effective driving licence. Accordingly, the compensation, as mentioned above, was awarded in favour of the claimants.

7. The appeal was filed challenging the award on different grounds, but at the time of arguments Sri Zafar Aziz, learned counsel for the appellant confines the challenge to the quantum of compensation awarded and that too without challenging the findings of the Tribunal on the age and income of the deceased. The multiplier as applied by the Tribunal has also not been challenged.

8. The only submission of Sri Zafar Aziz is that the Tribunal erred in making one- fifth (1/5th) deduction towards the personal and living expenses of the deceased, which should have been one-fourth (1/4th); and the amount of Rs. 15,000/- under the head of "loss of love and affection" could not have been awarded at all, as in view of the judgment of the Hon'ble Supreme Court in the case of **National Insurance Company Limited Vs. Pranay Sethi and others, reported in 2017 (4) TAC 673 (SC); (2017) 16 SCC 680,** any such head, for grant of compensation is not mentioned. The compensation could be awarded under the conventional heads of "loss of consortium", "loss of estate" and "funeral expenses" and the amount under those heads could only be awarded.

9. Sri Ravindra Pratap Singh, learned counsel for the claimant-respondents submits that the deduction of one- fifth (1/5th) towards personal and living expenses of the deceased is perfectly justified, which is as per the law laid down by Hon'ble Supreme Court in the case of **Pranay Sethi (supra),** as there are 8 dependant family members of the deceased.

10. Sri Ravindra Pratap Singh further submits that the amount of Rs. 15,000/- has been rightly awarded, under the head of "loss of love and affection", as the amount of compensation under the head of "loss of consortium" has not been awarded to all the claimants but to only one claimant as the amount under the head of "loss of consortium" is only 40,000/-. The amount of Rs. 15,000/- awarded under the head of "loss of love and affection" is in fact also for "loss of consortium" to the claimants. He submits that all the claimants would be entitled for compensation for loss of consortium @ 40,000/- per head and considering this aspect, the award of Rs. 15,000/- though mentioned under the head of "loss of love and affection" need not be interfered.

11. I have considered the submissions advanced by the learned counsels for the parties and perused the record.

12. The points which arise for consideration are:

i) Whether the deduction of 1/5th made by the Tribunal towards the personal and living expenses of the deceased is legal or it should be one - fourth (1 / 4th) ?

ii) Whether grant of compensation of Rs. 15,000/- under the head of "loss of love and affection" calls for any interference ?

13. So far as the first point is concerned, the Tribunal has made deduction of one - fifth (1 / 5th) in view of the number of dependant family members of the deceased, being eight.

14. In the case of **Pranay Sethi (supra)** the Hon'ble Supreme Court has held as under, in paragraph 37 of SCC report:

"37. Before we proceed to analyse the principle for addition of future prospects , we think it seemly to clear the maze which is vividly reflectible from Sarla Verma , Reshma Kumari , Rajesh and Munna Lal Jain . Three aspects need to be clarified . The first one pertains to deduction towards personal and living expenses . In paragraphs 30 , 31 and 32 , Sarla Verma lays down :

"30. Though in some cases the deduction to be made towards personal and

living expenses is calculated on the basis of units indicated in Trilok Chandra, the general practice is to apply standardised deductions . Having considered several subsequent decisions of this (2003) 3 SLR (R) 601 Court, we are of the view that where the deceased was married , the deduction towards personal and living expenses of the deceased , should be one - third (1 / 3rd) where the number of dependent family members is 2 to 3 , one - fourth (1/ 4th) where the number of dependent family members is 4 to 6, ***and one- fifth (1/5th) where the number of dependent family members exceeds six .***

31. Where the deceased was a bachelor and the claimants are the parents, the deduction follows a different principle. In regard to bachelors, normally, 50% is deducted as personal and living expenses, because it is assumed that a bachelor would tend to spend more on himself. Even otherwise, there is also the possibility of his getting married in a short time, in which event the contribution to the parent(s) and siblings is likely to be cut drastically. Further, subject to evidence to the contrary, the father is likely to have his own income and will not be considered as a dependant and the mother alone will be considered as a dependant. In the absence of evidence to the contrary, brothers and sisters will not be considered as dependants, because they will either be independent and earning, or married, or be dependent on the father.

32. Thus even if the deceased is survived by parents and siblings, only the mother would be considered to be a dependant, and 50% would be treated as the personal and living expenses of the bachelor and 50% as the contribution to the family. However, where the family of the bachelor is large and dependent on the income of the deceased, as in a case where he has a widowed mother and large number of younger non-earning sisters or brothers, his personal and living expenses may be restricted to one-third and contribution to the family will be taken as two-third.".

15. It has thus been clearly laid down in **Pranay Sethi (supra)** that the deduction towards personal and living expenses of the deceased should be one-fifth (1/5th) where the number of dependent family members exceeds six.

16. The number of the dependents being 8, has not been disputed by the learned counsel for the appellant.

17. In view of the aforesaid, I do not find any illegality in the judgment of the Tribunal in making deduction of one - fifth (1 / 5th), towards personal and living expenses of the deceased, which is as per the settled law.

18. Point No. 1 is answered accordingly in terms of paragraph 17.

19. Now I proceed to consider Point No. 2 i.e. whether grant of compensation of Rs. 15,000/- under the head of "loss of love and affection" calls for any interference.

20. The above aspect on the point "loss of consortium" has been considered by Hon'ble Supreme Court, inter alia, in the following cases.

21. In **Pranay Sethi (supra), in paragraph 52, Hon'ble Supreme Court has held as under:-**

"52. As far as the conventional heads are concerned, we find it difficult to

agree with the view expressed in Rajesh Vs. Rajbir Singh (2013) 9 SCC 54. It has granted Rs 25.000 towards. funeral expenses, Rs 1,00,000 towards loss of consortium and Rs 1,00,000 towards loss of care and guidance for minor children. The head relating to loss of care and minor children does not exist. Though Rajesh (supra) refers to Santosh Devi Vs National Insurance Co. Ltd (2012) 6 SCC 421, it does not seem to follow the same. The conventional and traditional heads, needless to say, cannot be determined on percentage basis because that would not be an acceptable criterion. Unlike determination of income, the said heads have to be quantified. Any quantification must have a reasonable foundation. There can be no dispute over the fact that price index, fall in bank interest, escalation of rates in many a field have to be noticed. The court cannot remain oblivious to the same. There has been a thumb rule in this aspect. Otherwise, there will be extreme difficulty in determination of the same and unless the thumb rule is applied, there will be immense variation lacking any kind of consistency as a consequence of which, the orders passed by the tribunals and courts are likely to be unguided. Therefore, we think it seemly to fix reasonable sums. It seems to us that reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs 15,000, Rs 40,000 and Rs 15,000 respectively. The principle of revisiting the said heads is an acceptable principle. But the revisit should not be fact-centric or quantum-centric. We think that it would be condign that the amount that we have quantified should be enhanced on percentage basis in every three years and the enhancement should be at the rate of 10% in a span of three years. We are disposed to hold so because that will bring in consistency in respect of those heads.

22. Paragraph Nos. 59 and 59.8 of Pranay Sethi (supra) are also being reproduced as under :

" 59. In view of the aforesaid analysis, we proceed to record our conclusions:

"59.8 Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000, Rs. 40,000 and Rs. 15,000 respectively. The aforesaid amounts should be enhanced at the rate of 10 % in every three years."

23. In the case of **New India Assurance Company Limited Versus Smt. Somwati and others (2020) 9 SCC 644**, the Hon'ble Supreme Court after considering **Pranay Sethi (supra) and United India Insurance Company Limited Vs. Satinder Kaur alias Satvinder Kaur and others (2020) SCC online 410**, held that "loss of love and affection" is comprehended in "loss of consortium", hence, there is no justification to award compensation towards "loss of love and affection" as a separate head. Paragraph Nos. 32 and 33 of **Smt. Somwati (supra**) are being reproduced as under:

*"32. A three-Judge Bench in **United India Insurance Company Ltd. versus Satinder Kaur alias Satvinder Kaur and others, (2020) SCC Online 410**, had reaffirmed the view of two-Judge Bench in Magma General insurance Company Ltd. Three-Judge Bench from paragraph 53 to 65, dealt with three conventional heads.*

The entire discussion on three conventional heads of three-Judge Bench is as follows: -

*"53. In **Pranay Sethi (supra),** the Constitution Bench held that in death cases, compensation would be awarded only under three conventional heads viz. loss of estate, loss of consortium and funeral expenses.*

54. The Court held that the conventional and traditional heads, cannot be determined on percentage basis, because that would not be an acceptable criterion. Unlike determination of income, the said heads have to be quantified, which has to be based on a reasonable foundation. It was observed that factors such as price index, fall in bank interest, escalation of rates, are aspects which have to be taken into consideration. The Court held that reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The Court was of the view that the amounts to be awarded under these conventional heads should be enhanced by 10% every three years, which will bring consistency in respect of these heads.

a) Loss of Estate - Rs. 15,000 to be awarded

b) Loss of Consortium

55. Loss of Consortium, in legal parlance, was historically given a narrow meaning to be awarded only to the spouse i.e. the right of the spouse to the company, care, help, comfort, guidance, society, solace, affection and sexual relations with his or her mate. The loss of companionship, love, care and protection, etc., the spouse is entitled to get, has to be compensated appropriately. The concept of nonpecuniary damage for loss of consortium is one of the major heads for awarding compensation in various jurisdictions such as the United States of America, Australia, etc. English courts have recognised the right of a spouse to get compensation even during the period of temporary disablement.

*56. In **Magma General Insurance Co. Ltd. V. Nanu Ram and Ors (supra)** this Court interpreted "consortium" to be a compendious term, which encompasses spousal consortium, parental consortium, as well as filial consortium. The right to consortium would include the company, care, help, comfort, guidance, solace and affection of the deceased, which is a loss to his family. With respect to a spouse, it would include sexual relations with the deceased spouse.*

57. Parental consortium is granted to the child upon the premature death of a parent, for loss of parental aid, protection, affection, society, discipline, guidance and training.

58. Filial consortium is the right of the parents to compensation in the case of an accidental death of a child. An accident leading to the death of a child causes great shock and agony to the parents and family of the deceased. The greatest agony for a parent is to lose their child during their lifetime. Children are valued for their love and affection, and their role in the family unit.

59. Modern jurisdictions world-over have recognized that the value of a child's consortium far exceeds the economic value of the compensation awarded in the case of the death of a child.

Most jurisdictions permit parents to be awarded compensation under loss of consortium on the death of a child. The amount awarded to the parents is the compensation for loss of love and affection, care and companionship of the deceased child.

60. The Motor Vehicles Act, 1988 is a beneficial legislation which has been framed with the object of providing relief to the victims, or their families, in cases of genuine claims. In case where a parent has lost their minor child, or unmarried son or daughter, the parents are entitled to be awarded loss of consortium under the head of Filial Consortium.

61. Parental Consortium is awarded to the children who lose the care and protection of their parents in motor vehicle accidents.

62. The amount to be awarded for loss consortium will be as per the amount fixed in ***Pranay Sethi (supra).***

63. At this stage, we consider it necessary to provide uniformity with respect to the grant of consortium, and loss of love and affection. Several Tribunals and High Courts have been awarding compensation for both loss of consortium and loss of love and affection. The Constitution Bench in ***Pranay Sethi (supra), has recognized only three conventional heads under which compensation can be awarded viz. loss of estate, loss of consortium and funeral expenses.***

64. In ***Magma General (supra),*** *this Court gave a comprehensive interpretation to consortium to include spousal consortium, parental consortium, as well as filial consortium. Loss of love and affection is comprehended in loss of consortium.*

65. The Tribunals and High Courts are directed to award compensation for loss of consortium, which is a legitimate conventional head. ***There is no justification to award compensation towards loss of love and affection as a separate head.***

c) Funeral Expenses - Rs. 15,000 to be awarded"

33. The Three-Judge Bench in the above case approved the comprehensive interpretation given to the expression "consortium' to include spousal consortium, parental consortium as well as filial consortium. Three-Judge Bench however further laid down that "loss of love and affection' is comprehended in "loss of consortium', hence, there is no justification to award compensation towards "loss of love and affection' as a separate head."

24. In **Smt. Somwati (supra),** the Hon'ble Supreme Court found the impugned judgments of High Court awarding consortium to each of the claimants in accordance with the law but found no justification for award of compensation under separate head "loss of love and affection". It would be appropriate to refer paragraph Nos. 37, 38 and 39 of Smt. Somwati (supra), which are as under:

"37. Learned counsel for the appellant has submitted that Pranay Sethi has only referred to spousal consortium and no other consortium was referred to in the judgment of Pranay Sethi, hence, there is no justification for allowing the parental consortium and filial consortium. The

Constitution Bench in Pranay Sethi has referred to amount of Rs.40,000/- to the "loss of consortium' but the Constitution Bench had not addressed the issue as to whether consortium of Rs.40,000/- is only payable as spousal consortium. ***The judgment of Pranay Sethi cannot be read to mean that it lays down the proposition that the consortium is payable only to the wife.***

38. The Three-Judge Bench in United India Insurance Company Ltd. (Supra) has categorically laid down that apart from spousal consortium, parental and filial consortium is payable. We feel ourselves bound by the above judgment of Three Judge Bench. ***We, thus, cannot accept the submission of the learned counsel for the appellant that the amount of consortium awarded to each of the claimants is not sustainable.***

39. We, thus, found the impugned judgments of the High Court awarding consortium to each of the claimants in accordance with law which does not warrant any interference in this appeal. We, however, accept the submissions of learned counsel for the appellant that there is no justification for award of compensation under separate head "loss of love and affection'. The appeal filed by the appellant deserves to be allowed insofar as the award of compensation under the head "loss of love and affection'."

25. In view of the aforesaid judgments it is clear that:

i) Reasonable figure on conventional heads, namely, "loss of estate", "loss of consortium", and "funeral expenses" should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively, which amounts should be enhanced at the rate of 10 % in every three years. [para 59.8 of Pranay Sethi (supra)].

(ii) Consortium, in legal parlance is a compendious term which encompasses "spousal consortium", "parental consortium" and "filial consortium". The right to consortium would include the company, care, help, comfort, guidance, solace and affection of the deceased, which is a loss to his family. With respect to a spouse, it would include sexual relations with the deceased spouse. "Parental consortium" is granted to the child upon the premature death of a parent, for loss of parental aid, protection, affection, society, discipline, guidance and training. "Filial consortium" is the right of the parents to compensation in the case of an accidental death of a child which causes great shock and agony to the parents and family of the deceased. **[Satinder Kuar alias Satvinder Kaur (supra)].**

(iii) The judgment of Pranay Sethi (supra) cannot be read to mean that it lays down the proposition that the consortium is payable only to the wife. **[para 37 of Smt. Somwati (supra)]**

(iv) Grant of compensation under the head of "loss of consortium" to all the claimants @ 40,000/- each, was held as according to law. [**Satinder Kuar alias Satvinder Kaur (supra)]**

(v) "loss of love and affection" is comprehended in "loss of consortium" and hence there is no justification to award compensation towards "loss of love and affection" as a separate head.

26. In **Smt. Somwati (supra),** each of the claimants were awarded compensation

under the head of loss of consortium @ 40,000/- each and also compensation under separate head of "love and affection". While maintaining the grant of compensation to each claimant for loss of consortium, the compensation granted under separate head for "loss of love and affection" was set aside.

27. In the present case, each of the claimants has not been awarded compensation under the head "loss of consortium". Grant of Rs. 40,000/- only, under the head "loss of consortium" would be only for one dependent member of the deceased. The compensation for "loss of consortium" to all the claimants has not been awarded. In view of the judgments in Pranay Sethi (supra), Smt. Somwati (supra) and Satinder Kaur @ Satvinder Kaur (supra) if the compensation @ 40,000/- to all the 8 claimants had been awarded, the total amount of compensation would have been on the much higher side than the awarded amount. Although the claimants have not filed any appeal for enhancement of the amount of compensation by grant of compensation to all the claimants under "loss of consortium" but considering the aforesaid fact and also that Motor Vehicles Act is a beneficial legislation, the total awarded amount deserves not be reduced and the amount of Rs. 15,000/- awarded under the head of loss of love and affection is held to be also towards "loss of consortium".

28. If, all the claimants had been awarded compensation under "loss of consortium" and also under separate head of "loss of love and affection" the matter would have been otherwise.

29. On point No.2 it is held that the grant of compensation of Rs. 15,000/- shall also be towards "loss of consortium". The award does not call for interference with respect to that amount of Rs. 15,000/-.

30. The appeal is **dismissed.**

(2021)09ILR A759
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.08.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE SUBHASH CHAND, J.

F.A.F.O. No. 1274 of 2020

Smt. Ajay Kumari & Ors. ...Appellants
Versus
Regional Manager of National Insurance Co. Ltd., Aligarh & Ors. ...Respondents

Counsel for the Appellants:
Sri A.T. Pandey

Counsel for the Respondents:

Income of deceased divided into two part-Rs. 87,216 for 6 months when the sugar mill was operational -Rs. 43, 608 for 6 onths when the mill was closed-and the su of the two parts were divided by two-bad-net income has to be calculated-Rs. 87,216 and Rs. 43, 608 has to be added.

Grant of future loss of income should also be added-Tribunal has deducted income tax-GPF, insurance, gratuity-could not be deducted as net salary of the deceased was non taxable income at the time of accident-amount modified-enhanced.

Appeal partly allowed. (E-9)

Held, *The deceased or the person concerned should be shown to have contributed either to the accident and the impact of accident upon*

*the victim could have been minimised if he had taken care. In this case the deceased was not the author or the co-author of the accident. On facts, the deceased was not plying the vehicle. Hence, the deduction of 50% from the compensation awarded is bad and is set aside.***(para 17)**

List of Cases cited:

1. National Insurance Co. Ltd. Vs Indira Srivastava 2008(2) SCC 763

2. Vimal Kanwar & ors. Vs Kishore Dan & ors., 2013 (3) T.A.C. 6 (S.C.), 2013(3) T.A.C. 6(SC)

3. Bajaj Allianz General Insurance Co.Ltd. Vs Smt. Renu Singh & ors., First Appeal From Order No. 1818 of 2012 decided on 19.7.2016

4.Khenyei Vs New India Assurance Co. Ltd. & ors., 2015 LawSuit (SC) 469

5. National Insurance Co. Ltd. Vs Mannat Johal & ors., 2019 (2) T.A.C. 705 (S.C.)

6.Smt. Hansagori P. Ladhani Vs The Oriental InsuranceCo. Ltd., reported in 2007(2) GLH 291

7. Smt. Sudesna & ors. Vs Hari Singh & anr., Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001

8.Tej Kumari Sharma Vs Chola Mandlam M.S. General Insurance Co. Ltd., First Appeal From Order No.2871 of 2016 decided on 19.3.2021

9. A.Vs Padma Vs Venugopal, [2012(1) GLH (SC), 442]

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

1. Heard Sri A.T. Pandey, learned counsel for the appellant, Sri N.K. Srivastava, learned counsel appearing for National Insurance Company Limited and perused the judgment and order impugned.

2. This appeal, at the behest of the claimants, challenges the judgment and award dated 17.01.2020 passed by Motor Accident Claims Tribunal, Court No.4, Aligarh (hereinafter referred to as 'Tribunal') in M.A.C.P. No.318 of 2016 awarding a sum of Rs.3,20,256/-.

3. The claimants are the widow, mother, daughter and son of the deceased. The Tribunal has considered the annual income of the deceased as Rs.65, 412/-. The income of the deceased was claimed as Rs.1,30,824/- per year but the Tribunal has decided that the income of the deceased would be Rs.87, 216 for six months and Rs.43,608/- for another six months when the sugar mill was closed and hence has held that income would be Rs.65,412/- per year.

4 . It is further submitted that the incident is of the year 2015 and at that time the deceased was in the employment of Sugar Mill, therefore, the Tribunal has erred in assessing the annual income of the deceased and has awarded less compensation to the claimant-appellants.

5. The counsel for respondent has contended that this figure cannot be clubbed together with the income of the deceased as Rs.87,216/- (for a period of six months when the mill was functional) plus Rs.43, 608/- for another six months when the mill remain closed. The average income will have to be considered, which would be Rs.87,216/-.

6. The income of the deceased was Rs.87,216/- for the first six months and for the later six months when Sugar Mill was closed was Rs.43,608/- but the Tribunal has clubbed Rs.87,216/- with Rs.43,608/- and has divided the same by two, which could not have been done, the reason, even the income of the deceased cannot be said to be Rs.65,412/- per year. His income has to be

added. We are adding the amount, namely, Rs.87216/- plus Rs.43,608/- as income as was paid to the deceased. The deceased was having employment and therefore as per judgment of **Pranay Sethi** and the judgment cited by the counsel for the appellant i.e. **National Insurance Co. Ltd. Vs. Indira Srivastava 2008(2) SCC 763** wherein the term income has been defined in paras 18, 19 and 20, which are reproduced as under:

"18. The term 'income' in P. Ramanatha Aiyar's Advanced Law Lexicon (3rd Ed.) has been defined as under :

"The value of any benefit or perquisite whether convertible into money or not, obtained from a company either by a director or a person who has substantial interest in the company, and any sum paid by such company in respect of any obligation, which but for such payment would have been payable by the director or other person aforesaid, occurring or arising to a person within the State from any profession, trade or calling other than agriculture."

It has also been stated :

'INCOME' signifies 'what comes in' (per Selborne, C., Jones v. Ogle, 42 LJ Ch.336). 'It is as large a word as can be used' to denote a person's receipts '(per Jessel, M.R. Re Huggins, 51 LJ Ch.938.) income is not confined to receipts from business only and means periodical receipts from one's work, lands, investments, etc. AIR 1921 Mad 427 (SB). Ref. 124 IC 511 : 1930 MWN 29 : 31 MLW 438 AIR 1930 Mad 626 : 58 MLJ

337."

19. If the dictionary meaning of the word 'income' is taken to its logical conclusion, it should include those benefits, either in terms of money or otherwise, which are taken into consideration for the purpose of payment of income-tax or profession tax although some elements thereof may or may not be taxable or would have been otherwise taxable but for the exemption conferred thereupon under the statute.

20. In N. Sivammal & Ors. v. Managing Director, Pandian Roadways Corporation & Ors. [(1985) 1 SCC 18], this Court took into consideration the pay packet of the deceased."

7. The word net income will have to be considered, therefore, the argument of the respondent that the income of the deceased Rs.1,30,824/- per year cannot be considered to be the income of the deceased cannot be accepted.

8. The appellants had to be granted future loss of income, which has not been granted by the Tribunal without assigning any reason. The Tribunal in its judgment deducted 1/3rd for personal expenses. The deceased was working in the Sugar Mill since 1996. The salary of the deceased was Rs.14,536/- per month. The salary slip was proved by P.W.4. The crushing season of the Sugar Mill was from November to May only. The Mill when it was not working the salary was remained the same but he would be paid half of the amount.

9. The Tribunal deducted 50% of Rs.1,30,824/- as income tax, GPF, insurance, gratuity, which could not have been done as in the year 2015 the income of the deceased was Rs.1,30,824/- per year, which was non taxable income. The Supreme Court in the case of **Vimal Kanwar and others Vs. Kishore Dan and**

others, 2013 (3) T.A.C. 6 (S.C.), 2013(3) T.A.C. 6(SC) held that the certain amounts cannot be deducted, hence we hold that Rs.1,30,824/- was the annual income of the deceased, to which 30% will have to be added as the deceased died at the age of 43 years (age bracket of 41-45 years will apply). He was survived by two minor children, mother and his widow, hence he deduction of 1/4th cannot be granted as requested by learned counsel for the appellant but it would have to be 1/3rd and not 1/4th.

10. The deceased died at the age of 43 years (age bracket of 41-45 years), therefore, the multiplier would be 14.

11. The Tribunal has held that the deceased too negligent also in driving the vehicle. The reasoning given by the Tribunal to hold the deceased negligent and that he had contributed to 50% of the accident is perverse, just because there was collusion of two vehicles, and that the driver of the car was having valid driving license and the registration of the vehicle was there and just because the the license of the deceased was not produced before the Tribunal, it cannot mean that he was negligent. The ocular evidence of P.W.3 on the contrary goes to show that the deceased was driving his motorcycle on his correct side. Thus, the finding on facts is not only bad in law but is perverse, therefore, we hold that the Tribubal has committed an error in holding the deceased to have contributed negligence and due to which accident had taken place. The vehicle involved in the accident is Car and motorcycle. The Tribunal has given its finding just because of the fact that the driving license of the deceased was nor produced and only this fact will not permit us to hold that there was contributory negligence on the part of the deceased.

12. Having heard the learned counsel for the parties, let us consider the negligence from the perspective of the law laid down.

13. 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.

14. The principle of contributory negligence has been discussed time and again. A person who either contributes or author of the accident would be liable for his contribution to the accident having taken place.

15. 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

16. 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."

18. 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 :

(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.

(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.

(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.

(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

17. The latest decision of the Apex Court in **Khenyei (Supra)** has laid down one further aspect about considering the negligence more particularly composite/contributory negligence. The deceased or the person concerned should be shown to have contributed either to the accident and the impact of accident upon the victim could have been minimised if he had taken care. In this case the deceased was not the author or the co-author of the accident. On facts, the deceased was not plying the vehicle. Hence, the deduction of 50% from the compensation awarded is bad and is set aside.

18. This takes this Court to the issue of compensation. The income of the deceased in the year of accident and looking to his profession can be considered to be Rs.130,824/- per year to which as the deceased was in the age bracket of 41 to 45 years, 30% as future loss of income requires to be added in view of the decision of the Apex Court in **Pranay Sethi (Supra**). As far as amount under the head of non-pecuniary damages are concerned, it should be Rs.70,000/- in stead of Rs.15,000/-. As far as multiplier is concerned, it would be 14.

19. Hence, the total compensation payable to the appellants is computed herein below:

i. Income Rs.1,30,824/-

ii. Percentage towards future prospects : 30% namely Rs.39.247/-

iii. Total income : Rs. 130,824 + 39247 = Rs.17,0071x1/3=56690/-

iv. Income after deduction of 1/3rd : Rs. 113381/- (rounded up)

v. Annual income : Rs.113381/-

vi. Multiplier applicable : 14

vii. Loss of dependency: Rs.113381 x 14 = Rs.1587334/-

viii. Amount under non-pecuniary head : 70,000/-

ix. Total compensation : 16,57,334/-

20. 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.) w**herein 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."

21. No other grounds are urged orally when the matter was heard.

22. 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 calculate the compensation and 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.

INCOME TAX DEDUCTION

23. 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**, 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 claimants in their proportion 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 exceed Rs.50,000/- in any financial year, the deduction is not permissible, registry of the Tribunal is directed to allow the claimants 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.

24. As far as disbursement is concerned the Tribunal before passing orders of fix deposit or investment follow the guidelines issued in **A.V. Padma Vs. Venugopal, [2012(1) GLH (SC), 442].**

25. We request the Registrar General to forward this judgment to the concerned Tribunal (Sri Narendra Singh, HJS.) whenever he is posted with a request to be more careful as he has not considered the judgments of Apex Court.

26. This Court is thankful to both the learned Advocates for getting this matter disposed of during this pandemic.

27. Let record of court below be sent back to the Tribunal concerned.

(2021)09ILR A768
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.08.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE SUBHASH CHAND, J.

F.A.F.O. No. 1295 of 2019

United India Insurance Co. Ltd., Allahabad ...Appellant

Versus

Smt. Anita & Ors. ...Respondents

Counsel for the Appellant:
Sri Nagendra Kumar Srivastava

Counsel for the Respondents:
Sri Manish Tandon

Deceased was in age bracket of 35-40-multiplier of 16 will be applied-income tax without considering the deduction is bad-order remodified.

Partly allowed. (E-9)

List of Cases cited:

1. National Insurance Co. Ltd.Vs Pranay Sethi & ors., 2017 0 Supreme (SC) 1050

2.Manasvi Jain Vs Delhi Transport Corp. Ltd.& ors. (2014) 13 SCC 22

3. Vimal Kanwar & ors. Vs Kishore Dan & ors. (2013) 7 SCC 476

4.Smt. Hansagori P. Ladhani Vs The Oriental InsuranceCo. Ltd., reported in 2007 (2) GLH 291

5.A.Vs 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 N.K. Srivastava, learned counsel for the appellant and Sri Manish Tandon, learned counsel for the respondents.

2. This appeal, at the behest of Insurance Company, challenges the judgment and award dated 07.02.2019 passed by Motor Accident Claims Tribunal/12th Additional District Judge, Kanpur Nagar (hereinafter referred to as 'Tribunal') in M.A.C.P. No.461 of 2017 awarding a sum of Rs.78,83,928/- with interest at the rate of 7% as compensation.

3. It is submitted by learned counsel for the appellant that the deceased was in the age bracket of 35-40, therefore, multiplier to be applied would be 16. The fact that the Tribunal has gone by schedule is bad. The schedule has been found faulty and Tribunal ought to have relied on judgment of **National Insurance Company Limited Vs. Pranay Sethi and**

Others, 2017 0 Supreme (SC) 1050, which it has referred but not allowed.

4. It is submitted by learned counsel for the claimants that the claimants can raise objection as far as the question of quantum is concerned, as the appeal is in continuation of the proceedings. He has relied on the provisions of Order 41 rule 33 of the Code of Civil Procedure and has contended that as held by this Court in the case of National Insurance Comnpany Limited Vs. Smt. Vidyawati Devi and others, F.A.F.O. No. 2389 of 2016 the oral cross objection can be raised and it is submitted that the calculations made by the Tribunal are erroneous as the Tribunal has considered the income to be Rs. 37451/- added 50% i.e. Rs. 18726/- and deducted Rs. 9913/-, which was given as personal expenses, income tax and other amounts, which could not be done. It is submitted that the Tribunal has not considered the grant of compensation in its proper perspective.

5. Sri Manish Tandon, learned counsel for the respondents submits that the entire calculation of compensation requires recalculation in view of judgment in case of **Manasvi Jain Vs. Delhi Transport Corporation Limited and others (2014) 13 SCC 22** and **Vimal Kanwar and others Vs. Kishore Dan and others (2013) 7 SCC 476** as well as Pranay Sethi (supra), whereby special allowances could not have been deducted by the Tribunal. As far as income tax is concerned, we are obliged to accept the submissions of Sri Srivastava that deduction of Rs. 7000/- towards income tax from the salary of Rs. 37451/- per month was erroneous and it has to be at least in the slab of 10% which would mean that we would deduct 10% per annum. It is proved that the salary was Rs. 37451/- per month, hence 37451 x 12 and also add 50% of the amount for future loss as per rule 220 A and 220A(i) and decision in Pranay Sethi (supra), we do not disturb the same, but recalculate the same, as the deceased was survived by four people, the deduction of 1/4 is not disturbed. The multiplier of 15 as per judgment of Pranay Sethi is maintained. The rate of interest is maintained. We have perused the salary slip of the deceased as given by Sri Tandon.

6. Learned counsel for the appellant has contended that the Tribunal has deducted only Rs. 7000/- as tax. It is submitted that tax would be in the slab of 20% and not Rs. 7000/- per annum. It is submitted that income has not been properly calculated. The second ground of argument is that there was breach of policy condition as RC book was not valid and, therefore, the Insurance Company should be exonerated. The issue of negligence is not raised by the Insurance Company and it was not pleaded before the Tribunal. However, going by the facts it is clear that the validity of license of the driver is also not under challenge. The Tribunal has perused and returned a findings that the RC book fitness is produced, which was not found to be fabricated or false, therefore, the Tribunal decided the issue nos. 2 and 3 against the Insurance Company. We also concur with the same. The only issue which requires reconsideration is quantum. The deceased was 40 years of age. He has left behind him his widow, two daughters, son and father. The salary record is also produced, which shows that his gross salary was Rs. 37188/- in the month of January and in the month of February it was Rs. 37451/-. He was working in Ircon International Limited, which is Central Government Organization under the Railway Ministry. The deceased has left

over a period of 20 years of job. The Tribunal added 50% for future loss of income and as there were five members in his family, deducted ¼ and that is how the Tribunal came to the figure of Rs. 5,05,596/- per year. The Tribunal deducted Rs. 16913/- and that is how it calculated Rs. 4,88,683/- to be the annual income and multiplied the same by 16 and granted what is known as Rs. 25000/- for funeral expenses and Rs. 40,000 as consortium with 7% interest.

7. As per the submission of Sri Tandon this amount will have to be recalculated as the deductions of Rs. 9000/- is bad. We will have to deduct only Rs. 12000/- per year as income tax as he was in the slab of more than five lac, but he would at the same time entitled what is known as tax deductions.

8. Hence, the judgment and order passed by the Tribunal would stand re-modified and the total compensation payable to the appellants is computed herein below:

i. Income Rs. 36500/- (Rs. 37451/- per month - Rs. 1000/- income tax)

ii. Percentage towards future prospects : 40%, namely Rs. 14,600/-

iii. Total income : 36500+14600 = Rs. 51,100/-

iv. Income after deduction of 1/3rd towards personal expenses : Rs. 17033/-

v. Annual income : (51,100 - 17033 =34,467) 34,467 x 12 = 4,13,604/-

vi. Multiplier applicable : 16

vii. Loss of dependency: Rs.4,13,604 x 16 = Rs. 66,17,664/-

viii. Amount under non pecuniary heads : Rs. 70,000 + Rs. 30,000 (10% per year due to pendency of appeal)

ix. Total compensation : Rs. 67,17,664/-

9. In view of the above, the appeal is partly allowed. The oral cross objection of the Insurance Company is also partly allowed. Judgment 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 as awarded by Tribunal. The amount already deposited be deducted from the amount to be deposited.

10. 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.

11. 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.

12. We are thankful for both the counsels for getting the appeal decided without record and ably assisting the Court.

(2021)09ILR A771
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.08.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE SUBHASH CHAND, J.

F.A.F.O. No. 2938 of 2010

National Insurance Co. Ltd, Allahabad ...Appellant

Versus

Lalita Devi & Ors. ...Respondents

Counsel for the Appellant:
Sri Amit Manohar, Sri Krishna Mohan Rai

Counsel for the Respondents:
Sri Satya Deo Ojha, Sri Sanjay Kumar Shukla

Motor accident claim-deceased was in age bracket of 31-35-25 - income to be calculated as per judgment held in Pranay Sethi-amount under non-pecuniary heads is enhanced-amount of compensation requires to be recalculated-amount enhanced.

Appeal partly allowed. (E-9)

List of Cases cited:

1. The Managing Director, T.N.S.T.C. Vs Sripriya & ors. 2007 (3) T.A.C. 27

2. National Insurance Co. Ltd. Vs Pranay Sethi & ors., 2017 0 Supreme (SC) 1050

3. Sarla Verma Vs Delhi Transport Corp., (2009) 6 SCC 121

4. A.Vs Padma Vs Venugopal, Reported in 2012 (1) GLH (SC), 442

5. Smt. Hansaguti P. Ladhani Vs The Oriental Insurance Co. Ltd., reported in 2007(2) GLH 291

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

1. Heard Sri Amit Manohar, learned counsel for the appellants, Sri S.D.Ojha, learned counsels for the respondent and perused the judgment and order impugned.

2. This appeal has been preferred against the judgment and award dated 21.4.2010 passed by Motor Accident Claims Tribunal/Additional District Judge, Court No.4, Mirzapur (hereinafter referred to as 'Tribunal') in M.A.C.No.52 of 2006 awarding a sum of Rs.6,21,500/- with interest at the rate of 5% as compensation.

3. On the last occasion, we have requested Sri Amit Manohar, learned counsel for appellant to keep the officer present as we are of the opinion that judgment of Jitendra Khimshankar Trivedi and Others Vs. Kasam Daud Kumbhar and others, 2015(1)T.A.C.637 (S.C.) and the judgment in National Insurance Company Limited Vs. Smt. Vidyawati Devi and 2 others decided on 27.7.2016 wherein one of us (Hon'ble Kaushal Jayendra Thaker, J.) was a member of the Bench, may apply to the facts of this case as the Tribunal had

not granted any amount under the head of future loss of income.

4. It is further submitted by learned counsel for appellant Sri Amit Manohar relying on the decision of Apex Court that multiplier of 17 was taken with the help of Second Schedule to the Motor Vehicles Act, 1988 is not sustainable in view of the decision of Supreme Court in **The Managing Director, T.N.S.T.C. Vs. Sripriya and others 2007 (3) T.A.C. 27.**

5. Sri S.D. Ojha, learned counsel for claimants has submitted that he would like to argue for enhancement and Sri Amit Manohar, learned counsel for appellant had contended that he would like to argue for contributory negligence of the driver and also argue that the jeep driver, owner and Insurance company are not joined as parties.

6. We have tried for conciliation in this matter on the basis of decision in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050** and also perused the record. We are thankful to Sri Amit Manohar who has taken assistance of Sri N.K. Srivastava on the panel Advocate of National Insurance Company, Sri S.D. Ojha, learned counsel for respondent and also Sri F.H. Rizvi who has deputed by the Insurance Company is present before this Court today for amicable resolution of the dispute so that insurance company can save interest as the grounds raised are now covered by the judgment in **Pranay Sethi (Supra).**

7. It is submitted by learned counsel for the respondent counsel that the deceased was 34 years of age at the time of accident and was in the profession of selling the fruits. His income was considered by the Tribunal to be Rs.4,500/- which is not just and proper. It is further submitted that the Tribunal has not granted any amount towards future loss of income as the judgment in **Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121** was applicable in those times but now the compensation has to be considered in light of the judgment in Pranay Sethi (Supra). It is submitted that the judgment in **Pranay Sethi (Supra**) was not available in those time and in the alternative it is submitted that even if the judgment of Pranay Sethi (Supra) has not to be applied the compensation be redetermined.

8. The income of the deceased considered at Rs.4500/- per month has been considered by the Tribunal without any proof and is on higher side. The multiplier applicable is also on the higher side. It is further submitted that the deduction towards personal expenses of the deceased should be 1/3rd as he was survived by widow, one minor son, one minor daughter and parents. It is also submitted that interest should be 6% and not 12%. It is further submitted by Sri Amit Manohar that no fitness certificate was produced.

9. As far as the issue of negligence is concerned, we have perused the record. The learned Tribunal has considered this issue threadbare. As far as the deceased was concerned the vehicle- Marshal in which the deceased was travelling has rammed into by Truck No. UP-53 T-2115 and because of this the deceased suffered injury and died on the spot. The driver of the truck fled away from the place of accident. The national insurance company with which the vehicle was insured has filed reply. The Tribunal came to the

definite conclusion with the accident occurred due to sole negligence of the driver of the truck. The evidence of PW-1, PW-2 and PW-3 were also against the driver of truck.

10. The issue of negligence has been decided against the driver of the truck as the truck rammed into stationary marshal jeep and the impact was such that Satish Kumar and Vishnu Kumar sustained injuries. Deceased, Dhanajay Kumar Jaiswal, and Satish Chandra Jaiswal died on the spot. Raj Kumar Gupta was not driving the vehicle. The eye witnesses who had gone for answering in nature call have categorically stated in their oral testimony that Marshal jeep was being driving by Satish Chandra Shamra. The way the truck driver came from the opposite direction, the impact was such the three people in the jeep died on the spot. The FIR, site plan and the charge sheet will not permit us to take a different view than that taken by the Tribunal.

11. The contention is that the truck did not have valid permit, did not have licnece to ply and was covered by the judgment in National Insurance Company Limited Challa Bharatamma and others AIR 2004 SC 4882 . The fact as decided in issue no. 2 and 3 will also not permit us to accept this submission as it was never contested before the Tribunal below and therefore we are unable to grant what is known as recovery rights.

12. This takes us to the submission that the driver did not have a effective driving licence. The issue no. 2 and the driving licence no.9800/1993 was for LMV and HTV (PE) and was valid from 11.11.2005 to 10.11.2008. The accident occurred on 25/26.1.2006. The vehicle was insured on the said date and now to contend that there was no fitness certificate which was not proved before the Court below and therefore the said aspect also cannot be accepted.

13. We are unable to accept the submission of learned counsel for the appellant that the accident occurred due to contributory / composite negligence of the driver of both the vehicles.

14. As the matter is taken for conciliatory disposal, we recalculate the compensation payable to the claimants. Normally the Courts grant 7.5/% or 9% interest considering the year of accident but we were suggested that we should not grant the interest at the rate of 7.5% as the insurance company has agreed for conciliation.

15. Heard the counsels for the parties and considered the factual data, this Court finds that the accident occurred on 25/26.01.2006 causing death of Dhananjay who was 32 years of age at the time of accident. To which as the deceased was in the age bracket of 31-35, 25% of the income will have to be added in view of the decision of the Apex Court in **Pranay Sethi (Supra).** The amount under non-pecuniary heads should be at least Rs.70,000/- in view of the decision in **Pranay Sethi (Supra).** In view the facts and circumstances of the case, this Court feels that the amount of compensation requires to be recalculated and no interference is called for as far as deduction of personal expenses of the deceased is concerned.

16. Hence, the total compensation payable to the appellants is computed herein below:

i. Annual Income Rs.54,000/- (Rs.4500 x 12)

ii. Percentage towards future prospects : 25% namely Rs.13,500/-

iii. Total income : Rs.54000/- + 13,500 = Rs.67,500/-

iv. Income after deduction of 1/3rd towards personal expenses : Rs.22,500/-

v. Multiplier applicable : 16

vi. Loss of dependency: Rs.45000 x 16 = Rs.7,20,000/-

vii. Amount under non pecuniary heads : Rs.70,000/-

viii. Total compensation : Rs.7,90,000/-.

17. It is agreed that the rate of interest even in the year 2009 was not 5% and as the parties have decided to bury their dispute, we enhance interest to 6%.

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 appellant -Insurance Company shall deposit the remaining amount within a period of 12 weeks from today with **interest at the rate of 6%** 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. Record and proceedings be sent back to the Tribunal forthwith.

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 not blindly apply the judgment of A.V. Padma (supra). The same is to be applied looking to the facts of each case.

(2021)09ILR A775
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.09.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE VIVEK VARMA, J.

F.A.F.O. No. 3244 of 2007

Kumari Anju & Ors. ...Appellants
Versus
Suresh Kumar Sachan & Ors. ...Respondents

Counsel for the Appellants:
Sri Deepak Singh, Sri C.K. Parekh, Sri Arpit Agarwal

Counsel for the Respondents:
Sri Amaresh Sinha, Sri Saurabh Srivastava

Motor accident Claim-issue of negligence in dispute-head on collusion-deceased a non tort feasor-deduction of 25 % for negligence is bad-reduced to 10%-compensation enhanced.

Appeal partly allowed. (E-9)

List of Cases cited:

1. Bajaj Allianz General Insurance Co.Ltd. Vs Smt. Renu Singh & ors., First Appeal From Order No. 1818 of 2012, decided on 19.7.2016

2. Khenyei Vs New India Assurance Co. Ltd. & ors., 2015 LawSuit (SC) 469

3. Pramodkumar Rasikbhai Jhaveri Vs Karmasey Kunvargi Tak & ors. decided on 05.08.2002 in Appeal (Civil) No. 5436 of 1994

4. Raj Rani & ors. Vs Oriental Insurance Co. Ltd. & ors. decided on 06.05.2009 in Civil Appeal No. 33-3318 of 2009 (Arising out of SLP (C) Nos. 2792-27793 of 2008

5. Archit Saini Vs Oriental Insurance Co. Ltd. & ors., 2018) AIR (SC) 1143

6. Montford Brothers of St. Gabriel & anr. Vs United India Insurance & anr., 2014 1 ACC 461

7. Gujarat State Road Transport Corporation, Ahmedabad Vs Ramanbhai Prabhatbhai

8. National Insurance Co. Ltd. Vs Birender & ors., 2020 LawSuit (SC) 26

9. Uttar Pradesh State Road Transport Corp. Vs Tara Devi, 1995 LawSuit (All) 13,

10. Padma Devi Vs .P. State Road Transport Corporation, 1988 LawSuit (All) 235

11. Malarvizhi & ors. Vs United India Insurance Co. Ltd. & anr., 2020 (4) SCC 228

12. United India Insurance Co. Ltd. Vs Indiro0 Devi & ors., 2018 (7) SCC 715.

13. The Oriental Insurance Co. Ltd. Vs Mangey Ram & ors., 2019 0 Supreme (All) 1067

14. New India Assurance Co. Vs Urmila Shukla MANU/SCOR/24098/2021

15. Kirti & ors. Vs Oriental Insurance Co. Ltd. reported in 2021(1) TAC 1

16. National Insurance Co. Ltd. Vs Mannat Johal & ors., 2019 (2) T.A.C. 705 (S.C.)

17. A.Vs Padma Vs Venugopal, Reported in 2012 (1) GLH (SC), 442

18. Smt. Hansaguti P. Ladhani VsThe Oriental Insurance Co. Ltd., reported in 2007(2) GLH 291

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

1. Heard Sri Deepak Singh, learned counsel for the appellant, Sri Amaresh Sinha and Sri Saurabh Srivastava, learned counsel for the respondent insurance

companies none for owner or driver of truck. perused the judgment and order impugned.

2. This appeal, at the behest of the claimants, challenges the judgment and award dated 22.8.2007 passed by Motor Accident Claims Tribunal, Varanasi in M.A.C.P. No.151 of 2004 awarding a sum of Rs.14,08,000/- with interest at the rate of 6% as compensation for death of four family members of the claimants who lost their family members in the fateful accident .

3. The accident is not in dispute. The issue of negligence decided by the Tribunal is in dispute. The respondent has not challenged the liability imposed on them. The issues to be decided are, the quantum of compensation awarded and whether the deduction of 25% for negligence of driver of maruti car could be deducted from the compensation awarded to the heirs of non tort feasor. The legal heirs have lost mother and father and appellant no.4 has lost her son and daughter-in-law and, therefore, even if we consider the matter from the angle of negligence of driver to the tune of 25 % for other deceased who have passed away, it would not be a case of contributory negligence but it would be a case of composite negligence and, therefore, no amount could have deducted by the Tribunal from the compensation awarded for the death of non tort feasors, namely, passengers. The fact that the provisions of Section 166 of the Motor Vehicles Act, 1988 (hereinafter referred to as the Act) has been interpreted to take within its sweep the term "legal representative' and not dependent. A person would be legal representative/legal heirs even if he is not dependent on the deceased. A person may be dependent as also legal heir (legal representative). This distinction will have to be decided by us as for the death of one of deceased, the Tribunal has rejected the claim. Unfortunate part of this litigation is that the legal heirs, i.e, aged mother and mother-in-law of the deceased, two minor children and one adolescent sister were advised to file one claim petition for death of four people. These aspects will have to be looked into as though it may appear very simple but there is complexity weaved into this litigation. The question is could the Tribunal dismiss the claim petition if separate claim petitions were filed for four deaths by legal representative whether they were dependent or not. Thus, we have to decide two issues compensation awarded and liability based on negligence.

4. Facts in brevity as per claim petition are that on 13.6.2004 at about 5.30 am Ram Dular Dubey, Pravin @ Pintu Dubey, Vidyawati Devi and Manju Devi boarding in Maruti Van bearing Registration No. UP 65 Y 4968 were going to offer prayers to Vindhyavasini Devi and when they reached near Village Khodhwa, P.S. Mirzamurad, driver of truck bearing Registration No. UP 78 A N 0069 driving rashly and negligently came from the opposite side and dashed with the said maruti van on account of which Ram Dular Dubey and Pravin Kumar Dubey died on the spot while Vidyawati Devi and Manju Devi died during the treatment in Kabir Chaura Hospital. At the time of accident, age of deceased Ram Dular Dubey was about 47 years; age of deceased Smt. Vidyawati was about 45 years; deceased Pravin Dubey and Manju Dubey were aged about 25 years.

5. It is submitted by learned counsel for the appellants that though it was head on collusion it was due to rash and

negligent driving of the driver of the truck in which four persons traveling in maruti van died leaving behind them mother of the deceased namely Ramwanti Devi (old widow lady), Pramod Kumar Dubey, second son of deceased (minor) and another minor son Sandip Kumar Dubey aged about 12 years and unmarried daughter of deceased being Anju Dubey aged about 20 years who were the legal representatives of all the four deceased . The tribunal found driver of the truck to be negligent and fixed liability of 75%. It is submitted that the Tribunal wrongly recorded contributory negligence of the driver of the maruti van to the tune of 25%. In fact no evidence was led in defense to prove contributory negligence.It is further submitted that at the time of accident, deceased Ram Dular Dubey was working on the post of Manager, Kashi Gramin Bank, Branch Lahartara and his income was RS 21,014.60 per mensem. Deceased Vidyawati was a skilled housewife whose income was assessed by the tribunal to be Rs.2,000/- per mensem. Approximate income deceased Pravin Kumar Dubey, who was said to have been selected for B.T.C. was assessed to be earning Rs.7,000/- per mensem. Income of deceased Manju Devi, who was pursuing Ph.D. was assessed to be Rs.12,000/- per mensem. It is submitted that the Tribunal wrongly assessed the income and awarded meagre amount which may be enhanced. It also did not grant any amount under the head of future prospects

6. 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 not granting the future loss of income.It is further submitted that the tribunal has been liberal in considering the negligence as the impact and site plan would show that the van was driven rashly and negligently.

7. The Apex Court in Sudarsan Puhan Vs Jayanta K Mohanty and Another Etc. AIR2018 SC 4662 and U.P.S.R.T.C. Vs. Km Mamta and Others AIR2016 SCC 948, wherein it has been held that that all the issues raised will have to be decided. Having heard the learned counsels for the parties, issue of negligence and compensation will have to be considered from the perspective of the law laid down.

In view of the questions raised by the claimants, issue of negligence would have to be decided.

8. 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.

9. 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.

10. 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

11. 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

12. 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.

13. 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.

14. It is an admitted position of fact that two vehicles involved in accident, i.e., car and truck. Accident occurred at 5.30 a.m. which proved fatal to Ram Dulare and Pravin Kumar Dubey who succumbed to the injuries on the spot while Vidyawati and Manju Devi died during the treatment.

15. Factual data as culled out from the Judgment of the Tribunal goes to show that the Tribunal has given its reasoning on issue nos. 1 and 2. The driver and owner of the truck have not disputed the accident having taken place but they have come out with a new plea that the truck was stationary and Maruti car was being plied and coming from Varanasi at an exorbitant speed. Claimant Anju-PW1 was not an eye witness. The accident occurred at 5.30 a.m is also not in dispute. P.W. 2 Rakesh Kumar Upadhyay has been examined who has opined that he, Ram Dular Dubey, Pravin, Vidyawati and Manju Devi were in the car and were going to worship at the temple. The driver of the truck drove the vehicle rashly and negligently, first dashed one Indica car and then came and dashed maruti car on front side whereby death of Ram Dular and Pravin was caused. He was also injured as he was in the said vehicle and he was admitted in BHU under Dr. Lahri but he has not filed any claim petition. Unfortunately, police has not shown him as a witness. It is an admitted position of fact that the driver of the truck after filing reply did not step into the witness box. The learned Tribunal has held the driver of the truck negligent 75 per cent. Though the witnesses have conveyed that the truck dashed with Indica car after trying to overtake the Indica car. Unfortunately, as the site plan did not show from where Indica car was procured. The learned Judge observed at page 35 as under:-

ष्इन परिस्थितियों में जबकि आमने सामने से सुबह से 5.30 बजे वाहन जा रहे थे तो यदि मारूती कार चालक भी सावधानी बरतता तो ट्रक को जो इण्डिका कार से बड़ी गाड़ी है यदि इण्डिका कार के पीछे जा रही थी तो मारूती कार चालक को दूर से ही दिख सकती थी और वह सावधानी बरतकर कथित दुर्घटना को बचा सकता था''

16. It is nobody's case, hence, we re-evaluate negligence at 10 per cent of the driver. Deceased Pravin was the driver of the car who is the brother of Anju. Pradeep Kumar and Sandeep Kumar, were children of Ram Dular Dubey and Ramvanti Devi aged about 65 years were the mother of Ram Dular Dubey who died in the accident. Therefore, as far as the claim of age of Ram Dular Dubey, the matter would be of a person who can be said to have not contributed the accident having taken place. The heirs of Vidyawati Devi would also be heirs of a non contributor. Vidyawati and Ram Dular Debey were husband and wife. Manju Devi was the widow of Pravin Dubey and appellants are claimants who are sister-in-law, brother-in-law, brother-in-law and grandmother-in-law. It would be a case of non contributor. Pravin if at all he is held liable for the accident, their compensation would stand depleted to that much extent as qua other three. It is a case of composite negligence.

17. The reasoning given by the Tribunal to hold the deceased negligent and that he had contributed to 25% of the accident is perverse, just because there was head on collusion of two vehicles. We hold that the driver of the maruti car was plying his car on the correct side but its impact was such that we hodl that he was negligent to the effect of 10 per cent.

18. The deceased or the person concerned should be shown to have contributed either to the accident and the impact of accident upon the victim could have been minimised if he had taken care. In this case the deceased were not the authors or the co-authors of the accident. On facts, the deceased was not plying the vehicle. Hence, the deduction of 25%from the compensation awarded to heirs of non tortfessors will have to be considerd on the basis of well settled legal principles

governing contributory and composite negligence as both aspects are present in this vehicular accident The driver of the Truck did not appear before the Tribunal despite that the learned Tribunal has returned the finding that driver of van was also negligent.

Computation of compensation for death of four persons:-

19. Learned counsel for appellant has relied on the decision of the Apex Court titled as **Montford Brothers of St. Gabriel and another Vs. United India Insurance and another, 2014 1 ACC 461** and on the judgment of **Gujarat State Road Transport Corporation, Ahmedabad Vs. Ramanbhai Prabhatbhai** to contend that legal representative is considered and not dependent and the learned counsel for respondent has relied on the decision of Apex Court in **National Insurance Company Ltd. Vs. Birender and others, 2020 LawSuit (SC) 26**, so as to contend that the dependents of the deceased, who has received benefits would not be entitled for the same. The learned counsel for the appellant has also relied on the said judgment.

20. Learned counsel for appellant has further relied on the authoritative pronouncements of this High Court in **Oriental Insurance Company Ltd. Vs. Mangey Ram and others (Supra), Uttar Pradesh State Road Transport Corporation Vs. Tara Devi, 1995 LawSuit (All) 13, and Padma Devi Vs. .P. State Road Transport Corporation, 1988 LawSuit (All) 235, to** contend that non grant of compensation except non pecuniary damages is against mandate of this Court.

21. We would place reliance on the decisions in **Malarvizhi & Ors Vs. United India Insurance Company Limited and Another, 2020 (4) SCC 228 and United India Insurance Co. Ltd. Vs. Indiro0 Devi & Ors, 2018 (7) SCC 715. and in The Oriental Insurance Company Ltd. Vs. Mangey Ram and others, 2019 0 Supreme (All) 1067 and the recent judgment of the Apex Court in New India Assurance Company Vs. Urmila Shukla decided by the Apex Court on 6.8.2021 reported in MANU/ SCOR/24098/2021 and Kirti and others vs oriental insurance company ltd reported in 2021(1) TAC 1** for commputing the compensation payable to the heirs legal representative of all four deceased on what basis, the Tribunal has disregarded the income and cannot deduct the amounts as deducted by Tribunal as income would increase unless proved otherwise. The factors to be considered for evaluating 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/deceased .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 in nature .

22. Learned counsel for the appellants submitted with regard to the compensation on account of death of all four deceased and submitted as under:-

(a) As far as the deceased Ram Dular is concerned, the Tribunal considered income of the deceased Ram Dular to be Rs.15,000/-. Unfortunately, the Tribunal did not award any amount under the head of future loss of income. It deducted 1/3rd amount out of Rs.15,000/- which was considered to be his income. His salary certificate of 30.6.2004 and document 71/c go to show that his income was Rs.21,014/-. The Tribunal granted multiplier of only 10 and 6% rate of interest. Learned counsel for the appellant has contended that the income should be considered to be Rs.21,014/- as per the salary certificate paper no. 71C and at the most after all deductions it should be Rs.16,876/-.It is submitted that the deceased left behind him legal heirs four in number, i.e, two juvenile sons, one dauther and mother and, therefore, the personal expenses should be 1/4th and not 1/3rd. Age of the deceased was in the age bracket of 45 to 50 years, hence, multiplier applicable would be 13 and not 10 and even in the year of accident, the pecuniary damages to be awarded would be 1 lakh as both the parents are lost by the minors.

(b) As far as his wife late Vidyavati is concerned, she was a home maker and aged about 45 years at the time of accident. The Tribunal has considered her income to be Rs.15,000/- without granting any future loss of income. It deducted 1/3rd. Under the head of total loss of dependency it granted Rs.1,0000/-; for funeral expenses, it granted Rs.2,000/-

(c) For the death of Pravin Dubey, who has left behind his minor brothers has not considered his income not even notional income though he was expected to earn Rs.7,000 per month as he was selected as BTC teacher as per paper 46C. No amount except Rs.1,000 towards loss of love and affection and Rs.2,000/- for funeral expenses are granted.

(d) As far as late Manju Devi, who has left behind sister-in-law, two brother-in-law and grand mother-in-law, is concerned, the Tribunal has not granted any amount except Rs.2,000/- for funeral expenses holding that they are no dependents and, therefore, no amount under the other head has been granted by the Tribunal. Learned counsel for the appellant submitted that the Judgment of the Tribunal requires modification.

23. We have heard the learned counsels for the parties and considered the factual data far as compensation is concerned. Hence, we now propose to calculate the compensation payable to the legal heirs of the deceased,who were four in number and hence compensation will have to be recalculated in case of all four individually though the claimants could have filed different claim applications as there is no conflict of interest joint claim petition is held maintainable .

We consider the income of the deceased (A) Ram Dular to be Rs.17,000/- per mensem to which as the deceased was aged about 47 years at the time of accident, 30% has to be added under the head of future prospect. 1/4 th have to be deducted towards his personal expenses. Multiplier applicable to him is 13. We grant Rs.1,00,000/- under the head of non-pecuniary damages.

Hence, the total compensation payable to the appellants in view of the

decision of the Apex Court in Pranay Sethi **(Supra)** for death of Ram Dular Dubey is computed herein below:

i. Income Rs.17,000/- p.m.

ii. Percentage towards future prospects : Rs.5,100/-

iii. Total income : Rs.17,000+Rs.5,100= Rs.22,100/-

iv. Income after deduction of 1/4th towards personal expenses : Rs.16,575/-

v. Annual income : Rs.16,575 x 12 = Rs.1,98,900

vi. Multiplier applicable : 13

vii. Loss of dependency: Rs.1,98,900 x 13= Rs.25,85,700/-

viii. Amount under non pecuniary heads : Rs.1,00,000/-

ix. Total compensation: Rs.26,85,700/-

We consider the monthly income of the deceased (B) Vidyavati to be Rs.2,000/- to which as the deceased was aged about 45 years, 25% has to be added under the head of future prospect as she was home maker. 1/3rd is required to be deducted. Multiplier applicable to her is 14. We grant Rs.70,000/- under the head of non-pecuniary damages.

Hence, the total compensation payable to the appellants in view of the decision of the Apex Court in Pranay Sethi (Supra) for death of Vidyawati is computed herein below:

i. Income Rs.2000/- p.m.

ii. Percentage towards future prospects : Rs.500/-

iii. Total income : Rs.2000+Rs.500= Rs.2,500/-

iv. Income after deduction of 1/3rd towards personal expenses : Rs.1,666/- (rounded figure)

v. Annual income : Rs.1,666 x 12 = Rs.19,992

vi. Multiplier applicable : 14

vii. Loss of dependency: Rs.19,992 x 14= Rs.2,79,888/-

viii. Amount under non pecuniary heads : Rs.70,000/-

ix. Total compensation: Rs.3,49,888/-

We consider the monthly notional income of the deceased (C) Pravin Dubey to be Rs.2,000/- to which as the deceased was aged about 25 years, 40% has to be added under the head of future prospect. As he was not a bachelor but had a wife namely Manju Devi, 1/3rd is required to be deducted. Multiplier applicable to her is 18. We grant Rs.70,000/- under the head of non-pecuniary damages.

Hence, the total compensation payable to the appellants in view of the decision of the Apex Court in Pranay Sethi **(Supra)** for death of Pravin Dubey is computed herein below:

i. Income Rs.2000/- p.m.

ii. Percentage towards future prospects : Rs.800/-

iii. Total income : Rs.2000+Rs.800= Rs.2,800/-

iv. Income after deduction of 1/3rd towards personal expenses : Rs.1,866/- (rounded figure)

v. Annual income : Rs.1,866 x 12 = Rs.22,392/-

vi. Multiplier applicable : 18

vii. Loss of dependency: Rs.22,392 x 18= Rs.4,03,056/-

viii. Amount under non pecuniary heads : Rs.70,000/-

ix. Total compensation: Rs.4,73,056/-

We consider the monthly notional income of the deceased (D) Manju Devi to be Rs.2,000/- to which as the deceased was aged about 25 years, 40% has to be added under the head of future prospect. 1/3rd is required to be deducted. Multiplier applicable to her is 18. We grant Rs.70,000/- under the head of non-pecuniary damages.

Hence, the total compensation payable to the appellants in view of the decision of the Apex Court in Pranay Sethi **(Supra)** for death of Manju Devi is computed herein below:

i. Income Rs.2000/- p.m.

ii. Percentage towards future prospects : Rs.800/-

iii. Total income : Rs.2000+Rs.800= Rs.2,800/-

iv. Income after deduction of 1/3rd towards personal expenses : Rs.1,866/- (rounded figure)

v. Annual income : Rs.1,866 x 12 = Rs.22,392/-

vi. Multiplier applicable : 18

vii. Loss of dependency: Rs.22,392 x 18= Rs.4,03,056/-

viii. Amount under non pecuniary heads : Rs.70,000/-

ix. Total compensation: Rs.4,73,056/-

Hence, the total compensation to the claimants for the death of four persons would be Rs.39,81,700/-.

24. 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."

25. No other grounds are urged orally when the matter was heard

26. 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, t**he further order of investment is not passed because applicants /claimants are neither illiterate or rustic villagers and must by now attained majority the tribunal shall follow the directions .

27. 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 each 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 exceed Rs.50,000/- in any financial year, registry of the Tribunal is directed to allow the claimants 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.The insurance company shall follow the said direction and shall not deduct flat TDS without considering the proportionate share of each claimant individually .

28. 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 award and 6% thereafter till the amount is deposited. The amount already deposited be deducted from the amount to be deposited.

29. Fresh Award be drawn accordingly in the above petition by the tribunal as per the modification made herein.

30. It is hoped that 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.

(2021)09ILR A787
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.08.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE SUBHASH CHAND, J.

F.A.F.O. No. 3785 of 2008

Ramesh Chandra Gupta & Anr.
...Appellants
Versus
Jagdish Chandra Samdani & Ors.
...Respondents

Counsel for the Appellants:
Sri Dr. G.S.D. Mishra, Sri Udit Chandra

Counsel for the Respondents:
Sri Sudhanshu Behari Lal Gour

Motor accident claim-quantum of compensation is challenged-no amount granted towards future loss of income-and amount granted under non pecuniary heads are on lower side-deceased was IIT graduate and was Management trainee-income assesed by the Tribunal is bad-future loss of income has to be considered-compensation amount enhanced.

Appeal partly allowed. (E-9)

List of Cases cited:

1. National Insurance Co. Ltd. Vs Pranay Sethi & ors., 2017 0 Supreme (SC) 1050

2. P.S. Somanathan & ors. Vs District Insurance Officer & anr., Civil Appeal No.1891 of 2011, decided on 17.2.2011.

3. Munna Lal Jain & anr. Vs Vipin Kumar Sharma & ors., Civil Appeal No.4497 of 2015, decided on 15.5.2015.

4.Smt. Neeta w/o Kallappa Kadolkar & ors. Vs The DiVs Manager, MSRTC, Kolhapur, Civil Appeal Nos. 348-349 of 2015.

5. Sanobanu Nazirbhai Mirza & ors. Vs Ahmedabad Municipal Transport Service, Civil Appeal No.8251 of 2013, decided on 3.10.2013.

6. Chandan Singh & anr. Vs S.E.W. Construction Co. Ltd & ors., Misc. Appeal No.296 of 2002, decided on 3.1.2003.

7. Smt. Kesh Kumari Verma & anr. Vs Om Narain Shukla & anr., First Appeal From Order No.319 of 2011, decided on 4.3.2014

8. National Insurance Co. Ltd. Vs Brijlata & ors., M.A. Nos.675 and 707 of 2003, decided on 16.1.2008.

9. National Insurance Co. Ltd. Vs Brijlata Insurance Co. Ltd., 2009 ACJ 791

10. Anita Sharma & ors. Vs New India Insurance Co. Ltd. & anr., (2021) 1 SCC 171

11. Kirti Vs Oriental Insurance Co. Ltd, (2021) 2 SCC 166

12. General Manager, Kerala S.R.T.C., Trivandrum Vs Susamma Thomas & ors.,(1994) 2 SCC 176

13. U.P.S.R.T.C. & ors. Vs Trilok Chandra & ors.,(1996) 4 SCC 362

14. Sarla Dixit Vs Balwant Yadav AIR 1996 SC 1274

15. Hardeo Kaur V/s. Rajasthan State Transport Corp., 1992 2 SCC 567

16. Puttamma Vs K.L.Narayana Reddy, AIR 2014 SC 706

17. Raman Vs Uttar Haryana Bijli Vitran Nigam Limited

18. Bijoy Kumar Dugar Vs Bidyadhar Dutta, 2006 (3) SCC 242

19. R.K.Malik Vs Kiran Pal, AIR 2009 SC 2506

20.National Insurance Co. Ltd.Vs Pranay Sethi, AIR 2017 SC 5157

21. Raj Rani Vs Oriental Insurance Co. Ltd., 2009 (13) SCC 654

22. Ritaben @ Vanitaben Wd/o. Dipakbhai Hariram & anr. Vs Ahmedabad Municipal Transport Service & anr., 1998 (2) G.L.H. 670

23.New India Assurance Co. Ltd. Vs Urmila Shukla & ors., LL 2021 SC 359

23. National Insurance Co. Ltd. Vs Mannat Johal & ors., 2019 (2) T.A.C. 705 (S.C.)

24. A.Vs Padma Vs Venugopal, Reported in 2012 (1) GLH (SC), 442

25. Smt. Hansaguti P. Ladhani Vs The Oriental Insurance Co. Ltd., reported in 2007(2) GLH 291

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

1. Heard Shri Udit Chandra, learned counsel for the appellants and Sri Sudhanshu Behari Lal Gour, learned counsel for the respondents.

2. The written submission of learned counsel for appellants is also taken on record.

3. This appeal, at the behest of the claimants, challenges the judgment dated 5.8.2008 passed by Motor Accident Claims Tribunal/Additional District Judge, Pilibhit (hereinafter referred to as 'Tribunal') in Claim Petition No.63 of 2006 awarding a sum of Rs.6,50,000/- with interest at the rate of 6% as compensation.

4. The accident is not in dispute. The issue of negligence decided by the Tribunal is 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.

5. It is submitted by learned counsel for the appellant that the Tribunal has not granted any amount towards future loss of income of the deceased which is required to be granted in view of the decision in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050**. It is further submitted that amount under non-pecuniary heads granted and the interest awarded by the Tribunal are on the lower side and require enhancement. It is also submitted that as the deceased was survived by his parents and hence the deduction towards personal expenses of the deceased should be 1/3 and not 1/2 as by tribunal under challenge. The multiplier has to be as per age of deceased. To which as the deceased was in age bracket of 26-30 years, 50% of the income will have to be added as future prospects in view of the decision of the Apex Court in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050**. Learned counsel for the appellant in his favour he has relied on the following judgments to substantiate his submissions for enhancement.

(i) National insurance Company Limited v. Pranay Sethi and others, Special Leave Petition (Civil) No.25590 of 2014, decided on 31.10.2017.

(ii) P.S. Somanathan and others v. District Insurance Officer and another, Civil Appeal No.1891 of 2011, decided on 17.2.2011.

(iii) Munna Lal Jain and another v. Vipin Kumar Sharma and others, Civil Appeal No.4497 of 2015, decided on 15.5.2015.

(iv) Smt. Neeta w/o Kallappa Kadolkar and others v. The Div. Manager, MSRTC, Kolhapur, Civil Appeal Nos. 348-349 of 2015.

(v) Sanobanu Nazirbhai Mirza and others v. Ahmedabad Municipal Transport Service, Civil Appeal No.8251 of 2013, decided on 3.10.2013.

(vi) Chandan Singh and another v. S.E.W. Construction Co. Ltd and others, Misc. Appeal No.296 of 2002, decided on 3.1.2003.

(vii) Smt. Kesh Kumari Verma and another v. Om Narain Shukla and

another, First Appeal From Order No.319 of 2011, decided on 4.3.2014.

(viii) National Insurance Co. Ltd. v. Brijlata and others, M.A. Nos.675 and 707 of 2003, decided on 16.1.2008.

6. Learned counsel for the respondent, has vehemently submitted that the contentions raised by the learned counsel for the appellants cannot be accepted and has submitted that the compensation awarded by the Tribunal is just and proper and does not call for any enhancement. The deduction can't be 1/3 but has to be 1/2 as deceased was bachelor and survived by parents.

7 . Having heard learned counsels for the parties and considered the factual data. The accident occurred on 28.1.2006 causing death of Anupam Gupta who was 26 years of age and left behind him, parents. The Tribunal has assessed the income of the deceased to be Rs.10,000/- per month, this assessment is wrong. There are three reasons for us to disagree with the learned Tribunal; (i) the post mortem report mentions the address of the deceased to be that of Rajasthan and he had purchased a motorcycle at Rajasthan, but he had not been working there; (ii) As held by the learned Judge, there was no accident having taken place in the Rajasthan which was the place of his service; (iii) The post mortem not only shows his place of service, but also shows that he was residing in the Colony which is maintained by Hindustan Zinc Limited. All these will permit us to interfere with the findings of the tribunal as far as service of deceased is considered. As far as non proving of the job of the petitioner, further the decisions cited by the counsel for the appellants more particularly of the Madhya Pradesh High Court, titled **National Insurance Co. Ltd. v. Brijlata Insurance Co. Ltd., 2009 ACJ 791** would enure from the benefit of the appellants also.

8. The finding of the tribunal on income of deceased are perverse for the following reasons; (i) the deceased was IIT Graduate and he had shifted to Rajasthan, he had purchased the motorcycle in the year 2005. The deceased was Management Trainee in Starliet Industries Subsidiary of Hindustan Zinc Ltd. The judgments of the Apex Court in the case of **Anita Sharma and others versus New India Insurance Company Limited and another, (2021) 1 SCC 171** will not permit us to concur with the learned tribunal contending that as the author of the salary was not examined, it cannot be believed that he was a salaried person. This is a perverse findings of fact. The trappings of civil jurisdiction would and should not be adhered to indicative the compensation, non grant of future prospects is also without any reasons. The Apex Court in **Kirti v. Oriental Insurance Co. Ltd, (2021) 2 SCC 166** will also not permit us to concur with the findings of tribunal. The approach to be adopted by the tribunal. Thus, the approach is irregularities and requires to be interfered and was alleged to be earning Rs.33,360/- per month, which we feel is just and proper. As far as deduction towards personal expenses of the deceased is concerned, it should be 1/2 as the deceased was a bachelor and his mother was dependent.

9. 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/."

10. Thus even in year 1990 to 2005, 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 wherefore, the submission of Sri Shukla 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.

11. In Malarvizhi & Others and Indiro Devi & Others (Supra), 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.

12. 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.33,360/- p.m.

ii. Annual income : Rs.33,360 x 12 = Rs.400320/-

iii. Percentage towards future prospects : 50% namely Rs.200160/-

iv. Total income : Rs. 400320 + 200160 = Rs.600480/-

v. Income after deduction of 1/2 : Rs.300240/-

vi. Multiplier applicable : 17 (as the deceased was in the age bracket of 26-30 years)

vii. Loss of dependency: Rs.300240 x 17 = Rs.51,04,080/-

viii. Amount under non pecuniary heads : Rs.70,000/-

ix. Total compensation : **Rs.51,74,080/-**

13. 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.) w***herein 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."

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 restic 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. 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 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.

17. Record and proceedings be remitted to tribunal.

18. 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.

19. This Court is thankful to both the counsels to see that the matter is **disposed of.**

(2021)09ILR A793
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.08.2021

BEFORE

THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Habeas Corpus Writ Petition No. 315 of 2021

Mohd. Ahmad & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Avinash Pandey

Counsel for the Respondents:
A.G.A.

(A) Habeas Corpus - writ of habeas corpus - prerogative writ - an extraordinary remedy - *festinum remedium* - habeas corpus would be dependent on the jurisdictional fact - It is only where the jurisdictional fact is established that the applicant becomes entitled to the writ as of right - issuance of a writ of habeas corpus at the behest of a husband to regain his wife may not be available as a matter of course and the power in this regard may be

exercised only when a clear case is made out.(Para - 7,8,9,10)

Petitioner no.2, wife of the petitioner no.1 - left her matrimonial home - on account of some serious differences with her husband (petitioner no.1) - an application for restitution of conjugal rights was filed by the petitioner no.1 - pending before Principal Judge, Family Court. (Para - 2)

HELD:-The petitioner no.2 having left her matrimonial home on her own on account of a matrimonial discord, the present petition seeking a writ of habeas corpus at the behest of the petitioner no.1 (husband) would not be entertainable. Proceedings for restitution of conjugal rights being pending between the parties before the Family Court, it is open to the petitioner no.1 to pursue the said remedy. (Para - 12,13)

Habeas corpus petition dismissed. (E-7)

List of Cases cited:-

1. Mohammad Ikram Hussain Vs St. of U.P. & ors. ,1964 AIR 1625

2. Kanu Sanyal Vs D.M. Darjeeling, (1973) 2 SCC 674

3. Soniya & anr. Vs St. of U.P. & ors. , 2021 (145) ALR 773

4. Manjita Devi & anr. Vs St. of U.P. & ors. , 2021 (2) AWC 1055

(Delivered by Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard Sri Avinash Pandey, learned counsel for the petitioners and Ms. Rachna Tiwari, learned Additional Government Advocate appearing for the State-respondents.

2. The undisputed facts as reflected from the pleadings on record are that the petitioner no.2, wife of the petitioner no.1, left her matrimonial home sometime in the month of June, 2019 on account of some serious differences with her husband (petitioner no.1) and an application for restitution of conjugal rights was filed by the petitioner no.1 which was registered as Case No. 772 of 2019 (Mohd. Ahmad vs. Arshi) and the same is stated to be pending before the court of the Principal Judge, Family Court, Saharanpur.

3. Counsel for the petitioners has sought to contend that subsequent thereto sometime in the month of November, 2020 an information was received by him suggesting that petitioner no.2 was being detained at her parental home and in regard to the same certain applications are also stated to have been moved by him before the respondent authorities.

4. Learned Additional Government Advocate submits that once it has been admitted that the petitioner no.2 (wife) left her matrimonial home sometime in the month of June, 2019 on account of serious differences with her husband (petitioner no.1), it is not a case of illegal detention and a writ of habeas corpus would not be entertainable. This would be moreso for the reason that an application seeking restitution of conjugal rights is stated to have been filed by the petitioner no.1 and the same is pending.

5. Learned counsel for the petitioners has not disputed the factual position with regard to the petitioner no.2 having left her matrimonial home in the month of June, 2019 and also that she has not returned back thereafter.

6. There is no material on record to suggest that the petitioner no.2 was forcibly taken away; rather the facts indicate that the petitioner no.2 left her matrimonial home on her own accord on account of some serious differences with her husband (petitioner no.1). The application seeking restitution of conjugal rights, filed by the petitioner no.1-husband, contains a clear narration of facts in this regard.

7. The writ of habeas corpus is a prerogative writ and an extraordinary remedy. It

is 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 v State of U.P. and others1** and **Kanu Sanyal v District Magistrate Darjeeling2**.

8. The writ of habeas corpus has been held as a *festinum remedium* and accordingly the power would be exercisable in a clear case. The remedy of writ of habeas corpus at the instance of a person seeking to obtain possession of someone whom he claims to be his wife would therefore not be available as a matter of course. The observations made in the decision in **Mohammad Ikram Hussain** (supra) in this regard are as follows:-

"13. Exigence of the writ at the instance of a husband is very rare in English Law, and in India the writ of habeas corpus is probably never used by a husband to regain his wife and the alternative remedy under S. 100 of the Code of Criminal Procedure is always used. Then there is the remedy of civil suit for restitution of conjugal rights. Husbands take recourse to the latter when the detention does not amount to an offence and to the former if it does. In both these remedies all the issues of fact can be tried and the writ of habeas corpus is probably not demanded in similar cases if issues of fact have first to be established. This is because the writ of habeas corpus is festinum remedium and the power can only be exercised in a clear case. It is of course singularly inappropriate in cases where the petitioner is himself charged with a criminal offence in respect of the very person for whose custody he demands the writ."

9. The exercise of the extraordinary jurisdiction for issuance of a writ of habeas corpus would 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.

10. In view of the other remedies available for the purpose under criminal and civil law, issuance of a writ of habeas corpus at the behest of a husband to regain his wife may not be available as a matter of course and the power in this regard may be exercised only when a clear case is made out.

11. The aforementioned legal position has been stated in recent decision of this Court in **Soniya and Another vs. State of U.P. and Others3** and subsequently reiterated in **Manjita Devi and another vs. State of U.P. and Others4**.

12. In the facts of the present case, the petitioner no.2 having left her matrimonial home on her own on account of a matrimonial discord, the present petition seeking a writ of habeas corpus at the behest of the petitioner no.1 (husband) would not be entertainable.

13. Proceedings for restitution of conjugal rights being pending between the parties before the Family Court, it is open to the petitioner no.1 to pursue the said remedy.

14. Subject to the aforesaid observation the petition stands dismissed.

(2021)09ILR A795
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.08.2021

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Habeas Corpus Writ Petition No. 529 of 2021

Smt. Netrawati Yadav & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Mahendra Singh

Counsel for the Respondents:
A.G.A., Sri Sarvjeet Sing

(A) Habeas Corpus - Petitioner no.2 wants to defame the image of petitioner no.1 in the society - only with the said intention - present petition filed before this Court - so that he may be able to succeed in his plan to anyhow get the custody of petitioner no.1 - whereas no marriage took place as stated by petitioner no.1 before this Court - Held - action of petitioner no.2 is illegal and against the norms of society in which we are living. **(Para - 8)**

Habeas corpus petition dismissed. (E-7)

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard Sri Mahendra Singh, learned counsel for the petitioners, learned AGA for the State and Sri Sarvajeet Singh, learned counsel for respondent no.4.

2. This habeas corpus writ petition has been filed with the following prayer:

"Issue a writ, order or direction in the nature of habeas corpus directing the respondent no.4 to produce the petitioner no.1 before this Hon'ble Court and set her free from illegal detention of respondent no.4."

3. Learned counsel for respondent no.4 submits that in compliance of the order dated 4.8.2021 passed by this Court, petitioner no.1 Netrawati Yadav is present before this Court along with his father Sri Tejpal respondent no.4, resident of village Saidola, P.S. Faijganj Behta District Budaun. Both of them have been identified by Sri Sarvajeet Singh, Advocate.

4. Petitioner no.1 Netrawati Yadav has been brought before this Court by lady constable 691-Neeraj (PNO 112530626), P.S. Faijganj Behta, District Budaun.

5. On being asked from petitioner no.1 as to whether she has solemnized marriage with petitioner no.2, she has refused the same and states that she has not solemnized marriage with him. She further states that the present writ petition has been filed only with the intention to defame her image in the society. She has already married with one Banti, who has also come with her and is present in the campus of High Court. She has further stated that petitioner no.2 Dharmendra was regularly teasing her in her village because his sister is married in the village of Netrawati Yadav and he used to come there only with the intention to defame her. The father of Netrawati Yadav namely Sri Tejpal has also stated that he solemnized the marriage of his daughter with Banti as per Hindu rites and rituals.

6. On the other hand, learned counsel for the petitioners submits that the marriage of petitioner no.1 Netrawati Yadav took place with petitioner no.2 Dharmendra in Arya Samaj Vivah Trust, Delhi on 12.7.2021. When this Court asked from petitioner no.1 Netrawati Yadav regarding the marriage certificate, she has stated that this marriage certificate is forged and no marriage took place.

7. Learned AGA also supports the contention of learned counsel for respondent no.4 and submits that prima facie the marriage certificate appears to be forged.

8. Considering the arguments advanced by learned counsel for the parties and after perusal of the record, this Court finds that petitioner no.2 wants to defame the image of petitioner no.1 in the society and only with the said intention the present petition has

been filed before this Court so that he may be able to succeed in his plan to anyhow get the custody of petitioner no.1, whereas no marriage took place as stated by petitioner no.1 Netrawati Yadav before this Court. The action of petitioner no.2 is illegal and against the norms of society in which we are living. As per the statement of petitioner no.1 and her father Sri Tejpal, she is married with one Banti who also accompanied her in the High Court campus.

9. Accordingly, the writ petition is dismissed with cost of Rs.50,000/- (rupees fifty thousand) which shall be paid by petitioner no.2 Dharmendra to petitioner no.1 Netrawati Yadav by way of bank draft within one month from today. In case the cost is not paid by petitioner no.2 to petitioner no.1, the same shall be recovered as arrears of land revenue.

10. The copy of the order be sent by the office to the concerned CJM for necessary compliance

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(2021)09ILR A797
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.08.2021

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE PIYUSH AGRAWAL, J.

Habeas Corpus Writ Petition No. 806 of 2020

Kali Prasad @ Pandit Singh ...Petitioner
Versus
Union Of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Raj Kumar Singh, Sri Anil Kumar Yadav, Sri Daya Shankar Mishra, Sri Chandrakesh Mishra

Counsel for the Respondents:
A.S.G.I., Ajay Singh, G.A.

(A) Habeas Corpus - National Security Act, 1980 - Section 3(2),3(3) - Order of detention - "forthwith" - used in Section 3 does not mean instantaneous but without undue delay and within a reasonable time which is to be ascertained from the facts of the case - preventive detention is also described as "jurisdiction of suspicion" - Court must be satisfied that the Officers dealing with the representation were not indifferent to the urgency of the situation of the detenu being in jail. (Para - 18,20)

Petitioner was detained for the grounds/reasons mentioned in the impugned order - passed by the District Magistrate - Petitioner was informed about the grounds of detention and his right to make representation - Petitioner submitted an objection before the concerned respondents. (Para - 3)

HELD:-Both the said respondents well explained the time taken in deciding the representation. The time taken by the respondent no. 1 and the respondent no.2 in deciding the representation of the petitioner/detenu on facts of the present case can not be said to suffer from undue delay or inordinate delay.(Para - 19,23)

Habeas corpus petition dismissed. (E-7)

List of Cases cited:-

1. Rajammal Vs St. of T.N. & anr , AIR 1999 SC 684

2. Hetchin Haokip Vs St. of Manipur, (2018) 9 SCC 562 (Paragraph Nos. 9 to 15)

3. Keshav Tilak Nilkantah Joglekar Vs Commissioner of Police, AIR 1957 SC 28,

4. Vidya dev Verma Vs D.M., Agartala, AIR 1969 SC 323

5. Salim Vs St. of W.B., (1975) 1 SCC 653

6. Kubic Darusz Vs U.O.I., (1990) 1 SCC 568,

7. Ayya Vs St. of U.P., (1989) 1 SCC 374

8. Union of India Vs Yumnam Anand M. (2007) 10 SCC 190

9. Rajindra Vs Commissioner of Police (1994) Suppl. (2) SCC 716

10. Union of India & ors. Vs Laishram Lincola Singh @ Nicolai, (2008) 5 SCC 490

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri Daya Shankar Mishra, learned Senior Advocate, assisted by Sri Chandrakesh Mishra, learned counsel for the petitioner, Sri Rishi Chaddha, learned A.G.A. for the State-respondents and Sri Ajay Singh, learned Central Government Counsel for the respondent no.1.

2. This writ petition has been filed praying for the following relief :

"(i) Issue a writ order or direction in the nature certiorari quashing the impugned order of detention dated 2.11.2020 passed by District Magistrate District Basti/ respondent no.3 in Order no.5176/J.A.(NSA)/2020 by exercising of power U/s 3(3) of National Security Act, 1980.

(ii) Issue a Habeas Corpus writ order or direction in the nature of mandamus directing the respondents to release the petitioner forthwith from detention U/s 3(3) of National Security Act,1980."

3. Briefly stated facts of the present case are that by the impugned order dated 02.11.2020, under Section 3(2) of the National Security Act, 1980 (hereinafter referred to as "the Act 1980"), passed by the District Magistrate, Basti, the petitioner was detained for the grounds/reasons mentioned in the impugned order. The petitioner was informed about the grounds of detention and his right to make representation. The petitioner submitted an objection dated 12.11.2020 before the concerned respondents.

4. As per paragraph No. 4 of the counter affidavit filed on behalf of the respondent no.1 i.e. Union of India, dated 18.01.2021 (filed on 03.02.2021), the representation of the detenu/petitioner was rejected and he was informed about it vide wireless message dated 06.01.2020. In paragraph No. 4 of the supplementary counter affidavit dated 23.07.2021 (filed on 26.07.2021) respondent no.1 has explained the time taken in passing the order, as under :

"That, in continuation of para 4 of the affidavit dated 18.01 2021, it is submitted that the representation dated 12.11.2020 of the detenu along with parawise comments of the detaining authority was forwarded by the Under Secretary, Government of Uttar Pradesh vide letter no. 84/2/77/2020-C.X-5 dated 01.12.2020. The same was received in the section concerned in the Ministry of Home Affairs on 10.12.2020. Despite of unprecedented situation of COVID-19 the representation along with parawise comments of the detaining authority was processed for the consideration of Union Home Secretary on 17.12.2020. The matter was thoroughly examined by Under Secretary with Section Officer and section staff and after satisfying all the facts, the Under Secretary (NSA) with her comments forwarded the file to the Deputy Legal Advisor (DLA) on 23.12.2020. The Deputy Legal Advisor (DLA) forwarded the file to the Joint Secretary (IS-II) on 24.12.2020. Thereafter, there was a

intervening period 25h, 26th, 27th December, 2020 due to Saturday, Sunday and Christmas Eve. On 28th December, 2020, the matter was discussed with Joint Secretary (IS-II) and the Deputy Legal Advisor (DLA). Thereafter, the Joint Secretary (IS-II) with his comments forwarded the file to the Union Home Secretary on 02.01.2021. Thereafter, the Union Home Secretary having carefully gone through the material on record, including the order of detention, the grounds for detention, the representation of the detenu and the comments of the detaining authority thereon concluded that the detenu had failed to put forth any material cause or grounds 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 on 04.01.2021 and sent the file back to the Joint Secretary (Internal Security-II). The file reached the section through the aforesaid levels of officers on 06.01.2021. Accordingly, the detenu and the authorities concerned were informed vide Wireless Message No. II/15028/197/2020-NSA dated 06.01.2020. It is pertinent to mention there were intervening period of 9 days on 12th, 13th, 19th, 20th, 25th, 26th, 27th December, 2020; and 02nd and 03rd January, 2021 due to Saturday, Sunday and Christmas Eve. It is further submitted that the representation was examined with utmost care and caution with promptitude."

5. In paragraph Nos. 3, 4, 5, 6, 7, 10 and 11 of the counter affidavit of the respondent no.2, i.e. the State of U.P., has stated as under :

"3. That, it is submitted that the detention order dated 02-11-2020, grounds for detention and all other connected documents, forwarded by the District Magistrate, Basti vide his letter dated 02.11.2020 were received by the State Government on 05.11.2020. After examining every aspect of the case of petitioner in detail, the State Government approved the order of detention on 11-11-2020. The approval of the detention order was communicated to the petitioner through the district authorities by the State Government radiogram and letter, both dated 12-11-2020, that is within 12 days from the date of the detention order as required under section 3(4) of the Act.

4. That it is further stated a copy of detention order, grounds of detention and all other connected documents, received from the District Magistrate, Basti were also sent to the Central Government by Speed Post on 13-11-2020 within seven days from the date of approval by the State Government as required under section 3(5) of the Act. Hence, the facts mentioned above goes to show that the provisions of section 3(4) and 3(5) of the Act, have been fully complied with.

5. That, it is submitted that the petitioner was detained under the Act on 02-11-2020, i.e. on the date of service of detention order upon the petitioner. The case of the petitioner was referred to the U.P. Advisory Board (Detentions), Lucknow by the State Government by forwarding the detention order, grounds of detention and all other connected papers on 13-11-2020, well within three weeks from the date of his actual detention as required under section 10 of the Act.

6. That it is submitted that a copy of petitioner's representation dated 12.11.2020 alongwith parawise comments was received in the concerned Section of State Government on 01.12.2020 alongwith letter of District Magistrate, Basti dated

27.11.2020. The State Government sent copies of the representation and parawise comments thereon to the Central Government, New Delhi and to the U.P. Advisory Board (Detentions) vide its separate letters both dated 01.12.2020. Thereafter, the concerned section, that is Home (Gopan) Anubhag-5 of the State Government examined the representation on 02.12.2020.

7. That it is further stated the deponent examined the representation on 03.12.2020. The Deputy Secretary examined the representation on 03.12.2020. The Special Secretary examined the representation on 04.12.2020. The Secretary, Government of Uttar Pradesh, Lucknow examined the same on 04.12.2020. The Additional Chief Secretary, Government of Uttar Pradesh, Lucknow, examined the representation on 04.12.2020. Dates 05.12.2020 and 06.12.2020 were holiday Saturday and Sunday. Thereafter the file was submitted to the highter authorities for final orders of the State Government. After due consideration, the said representation was finally rejected by the State Government on 07.12.2020.

10. That it is further stated that on receipt thereof, 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 tentatively from the date of actual detention of the petitioner i.e. since 02.11.2020. Accordingly, orders of confirmation and for keeping the petitioner under preventive detention of 3 months tentatively from the date of his actual detention under the said Act, were issued by the State Government through radiogram and letter, both dated 21.12.2020 (Annexure no.1 of this counter affidavit).

11. That, it is further stated that on the report/recommendation dated 25.01.2021 received from the District Magistrate, Basti and after consideration of the facts and circumstances of the case the State Government satisfied that it is necessary to extend the above detained period 3 months. So the State Government amended the above order and extended it for 6 month from the actual date of detention order that is, since 02.11.2020. Accordingly the above detention order dated 21.12.2020 was amended and the order was issued on date 29.01.2021 tentatively for 6 months from the actual date of detention that is, since 02.11.2020 (Annexure No.2)."

6. The contents of the aforequoted paragraph Nos. 3, 4, 5, 6, 7 have been replied by the petitioner in paragraph No. 4 of the rejoinder affidavit and contents of aforequoted paragraph Nos. 10 & 11 of the counter affidavit have been replied by the petitioners in paragraph No. 6 of the rejoinder affidavit. Paragraph Nos. 4 & 6 of the rejoinder affidavit are reproduced below :

"4. That the contents of paragraphs no.3, 4, 5, 6, 7 of the counter-affidavit are matter of records same can be verify from the records.

6. That the content of paragraphs' no. 10, 11 of the counter affidavit are matter of records same can be verify from the records."

7. Thus, from perusal of the aforequoted paragraph Nos. 3, 4, 5, 6, 7, 10 & 11 of the counter affidavit clearly reveals

sufficient explanation for time taken in passing the order by the respondent No.2, which has not been disputed by the petitioner in paragraphs Nos. 4 & 6 of the rejoinder affidavit. Thus, the only ground of attack of non explanation of time taken in passing the order, by the respondent No.2, has no substance on the admitted facts stated in paragraph Nos.3, 4, 5, 6, 7, 10 & 11 of the counter affidavit of the respondent No.2 and its reply in paragraph Nos. 4 & 6 of the rejoinder affidavit filed on behalf of the petitioner.

8. A detailed counter affidavit by the respondent No.3, i.e. District Magistrate, Basti, and a counter affidavits on behalf of the respondent no.5, i.e. Superintendent of District Jail, Basti, have been filed and the petitioner has filed rejoinder affidavit to the aforesaid counter affidavits which all are on record.

9. The only submission made by learned counsel for the petitioner before this Court, as has also been noted in the order dated 27.07.2021; is that the delay of 57 days in deciding the representation by the respondent no.1 is unexplained and, therefore, further detention of petitioner is wholly illegal and unwarranted and consequently the writ petition should be allowed.

10. In support of his contention learned counsel for the petitioner has relied upon a judgment of Hon'ble Supreme Court in the case of **Rajammal Vs. State of Tamil Nadu and another, AIR 1999 SC 684,** with specific reliance, the relevant portion of which has been quoted in the order dated 27.07.2021, and the same is reproduced below :-

"It is for the authority concerned to explain the delay, if any, in disposing 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. It was further held that delay from 09.02.1998 to 14.02.1998 remains unexplained and such unexplained delay has vitiated the further detention of the detenue. The corollary thereof is that further detention must necessarily be disallowed".

11. There is no quarrel on the aforequoted principle of law stated by Hon'ble Supreme Court in the case of **Rajammal (supra)** that the test is not the duration or range of delay, but how it is explained by the authority concerned.

12. The only thing that needs to be tested in the present writ petition is as to whether the time taken in deciding the representation has been properly explained by the respondent No.1. For this purpose, we have to look at the explanation offered by the respondent no.1. The order of detention dated 02.11.2020, under Section 3(3) of the National Security Act, 1980 was passed by the District Magistrate, Basti, against the petitioner. The petitioner submitted an objection/representation to it dated 12.11.2020. As per paragraph No.6 of the counter affidavit of the respondent no.2, a copy of the representation dated 12.11.2020 alongwith parawise comment was received in the concerned section of the State Government on 01.12.2020 alongwith letter of the District Magistrate dated 27.11.2020 and thereupon the State Government sent copies of the representation and parawise comments to the Central Government i.e. the respondent no.1 and to the U.P. Advisory Board (detention) vide separate letters both dated 01.12.2020.

13. The aforesaid representation of the petitioner sent by the respondent no.2 to

the respondent no.1 was received in the concerned section of the Ministry of Home Affairs on 10.12.2020. Despite **unprecedented situation due to COVID 19**, the representation of the petitioner alongwith parawise comments of the detaining authority was processed for consideration of the Union Home Secretary on 17.12.2020, as has been stated in paragraph no.4 of the supplementary counter affidavit of the respondent No.1 which portion has not been disputed or denied by the petitioner in paragraph no.3 of the rejoinder affidavit.

14. The fact of unprecedented situation due to Pandemic COVID 19 is also reflected from the averments made by the petitioner in paragraph No. 3 of the writ petition sworn on personal knowledge, wherein the counsel for the petitioner has himself declared that due to Pandemic COVID 19, it is impossible for the deponent to come at Allahabad High Court to swear the affidavit, in view of the order dated 11.04.2020, passed by the High Court.

15. The deponent of the affidavit accompanying the writ petition is Krishna Kumar Singh who is elder brother of the petitioner, has stated in paragraph No. 4 of the writ petition that he is filing this habeas corpus writ petition on behalf of the petitioner. In the declaration accompanying the writ petition filed by the Sri Raj Kumar Singh, Advocate (counsel for the petitioner/applicant), it has been stated *that "due to Corona Virus (COVID -19) Pandemic and Nation Wide lock-down and due to close of Photo I.D. center, the deponent unable to swear the Affidavit filed in support of the present Habeas Corpus Writ Petition.*" Thus, the petitioner/deponent of the affidavit accompanying the writ petition as well as the petitioner's counsel have admitted on record the unprecedented situation created due to Pandemic COVID 19. Therefore, the explanation offered with reference to the unprecedented situation created due to Pandemic COVID 19, is well acceptable.

16. The petitioner has also not denied the averments of paragraph No.4 of the supplementary counter affidavit that the matter was thoroughly examined by the under Secretary with Section Officer and Section Staff and after satisfying all the facts, the National Security Advisor (NSA) with her comments forwarded the file to the Deputy Legal Advisor (DLA) on 23.12.2020, who forwarded the file to the Joint Secretary on the very next day i.e. 24.12.2020. The petitioner in his rejoinder affidavit has also not disputed the averments of paragraph No. 4 of the supplementary counter affidavit of the respondent no.1 to the effect that the intervening period 25th , 26th and 27th December 2020 were Saturday, Sunday and Christmas Eve and on 28th December 2020, the matter was discussed with the Joint Secretary (I.S. -II) and the Deputy Legal Advisor (DLA) and immediately thereafter the Joint Secretary (IS-II) with his comment forwarded the file to the Union Home Secretary on 02.01.2021 who rejected the representation of the detenu on 04.01.2021 and sent the file back to the Joint Secretary (Internal Security - II). The file reached to the Section through the aforesaid levels of Officer on 06.01.2021 and accordingly the detenu and the authorities concerned were informed vide wireless message dated 06.01.2021. It has also been stated in paragraph No. 4 of the supplementary counter affidavit by the respondent No.1 that 12th , 13th , 19th , 20th , 25th , 26th and 27th December 2020

and 2nd and 3rd January 2021 of the intervening period were Saturday, Sunday and Christmas Eve. The specific averments as stated in paragraph No. 4 of the supplementary counter affidavit by the respondent no.1 and briefly noted above have not been specifically disputed by the petitioner in paragraph No. 3 of the rejoinder affidavit. Thus, the only submission of learned counsel for the petitioner that there occurred an unexplained delay of 57 days is wholly without substance. The judgment of Hon'ble Supreme Court in the case of **Rajammal (supra)** is of no help to the petitioner on the facts of the present case, inasmuch as in the case of **Rajammal (supra)** Hon'ble Supreme Court has laid down the law that the test is not the **duration or range of delay but how it is explained by the authority concerned.** Therefore, the delay as alleged by the petitioner in paragraph No. 3 of the rejoinder affidavit, is wholly without substance.

17. Thus, the only point argued and pressed before us by the learned counsel for the petitioner to challenge the impugned detention order, has no substance. No other point has been argued before us by learned counsel for the petitioner.

18. In **Hetchin Haokip Vs. State of Manipur, (2018) 9 SCC 562 (Paragraph Nos. 9 to 15)**, Hon'ble Supreme Court explained the meaning of the word "forthwith" used in Section 3(4) of the National Security Act, 1980, in the context of statute providing for preventive detention and after referring to the Constitution Bench judgment in **Keshav Tilak Nilkantah Joglekar Vs. Commissioner of Police, AIR 1957 SC 28, Vidya dev Verma Vs. District Magistrate, Agartala, AIR 1969 SC 323** and the Division Bench judgment in **Salim Vs. State of West Bengal (1975) 1 SCC 653**, held that the **word "forthwith" used in Section 3 does not mean instantaneous but without undue delay and within a reasonable time which is to be ascertained from the facts of the case.**

19. The facts of the present case as briefly discussed above would reveal that the respondent Nos. 1 & 2 have not caused undue delay in deciding the representation of the petitioner. Both the said respondents well explained the time taken in deciding the representation.

20. In case of preventive detention no offence is proved nor any charge is formulated and the justification of such detention is the suspicion or reasonability. There is no criminal conviction in matters of preventive detention which can only be warranted by legal evidence. Therefore, preventive justice requires an action to be taken to prevent apprehended objectionable activity, but at the same time the greatest human freedoms i.e. personal liberty of a person is deprived. Therefore, the law of preventive detention are construed strictly and a meticulous compliance with procedural safeguard, however, technical, is mandatory. Therefore, preventive detention is also described as "jurisdiction of suspicion". These principles have been discussed by Hon'ble Supreme Court in **Kubic Darusz Vs. Union of India (1990) 1 SCC 568, Ayya Vs. State of U.P. (1989) 1 SCC 374 and Union of India Vs. Yumnam Anand M. (2007) 10 SCC 190.**

21. In **Rajindra Vs. Commissioner of Police (1994) Suppl. (2) SCC 716**, Hon'ble Supreme Court held that once a representation is made, the detenu is entitled to the

representation being dealt with expeditiously and if there is some ex facie delay, the obligation is on the State to explain that delay by filing a proper counter affidavit and the Court should insist that each day's delay must be explained. It is obligatory on the part of the Government to show by filing a counter affidavit that it had acted promptly in dealing with the representation. **Thus, what is essential is that the Court must be satisfied that the Officers dealing with the representation were not indifferent to the urgency of the situation of the detenu being in jail**. On the facts of the present case, as discussed above, we find that the Government has acted promptly in the prevailing situation and also looking into the urgency of the situation of the detenu being detained in jail.

22. In **Union of India and others Vs. Laishram Lincola Singh @ Nicolai (2008) 5 SCC 490 (paragraph Nos. 7 & 8)** Hon'ble Supreme Court held as under :-

"7. In Vinod K.Chawla v. Union of India and Ors. (2006)7 SCC 337, it was observed as under:

"13. The contention raised cannot be judged by any straitjacket formula divorced from facts. This has to be examined with reference to the facts of each case having regard to the volume and contents of the grounds of detention, the documents supplied along with the grounds, the inquiry to be made by the officers of different departments, the nature of the inquiry, the time required for examining the various pleas raised, the time required in recording the comments by the authorities of the department concerned, and so on.

14. In L.M.S. Ummu Saleema v. B.B. Gujaral (1981) 3SCC 317 it was held that there can be no doubt that the representation made by the detenu has to be considered by the detaining authority with the utmost expedition but as observed in Frances Coralie Mullin v. W.C. Khambra(1980) 2 SCC 275 (SCC p. 279, para 5, "the time-imperative can never be absolute or obsessive". In Madan Lal Anand v. Union of India(1990) 1 SCC 81 the representation dated 17-1-1989 of the detenu who was detained under COFEPOSA was rejected after more than a month on 20-2-1989. After referring to L.M.S. Ummu Saleema it was held that the detaining authority had explained the delay in disposal of the representation and accordingly the order of detention cannot be faulted on that ground. In Kamarunnissa v. Union of India (1991) 1 SCC 128 the representation made by the detenu on 18-12-1989 was rejected on 30-1-1990 and it was contended that there was inordinate delay in consideration of the representation. In the explanation given in the counter-affidavit filed in reply, it was submitted that considerable period of time was taken by the sponsoring authority in forwarding its comments. It was contended on behalf of the detenu that the views of the sponsoring authority were totally unnecessary and the time taken by that authority could not be taken into consideration. The contention was repelled by this Court and it was observed that consulting the authority which initiated the proposal can never be said to be an unwarranted exercise. It was further emphasised that whether the delay in considering the representation has been properly explained or not would depend upon the facts of each case and cannot be judged in vacuum. Similarly, in Birendra Kumar Rai v. Union of India (1993) 1 SCC 272 the petitioner made a representation against his detention on 22-12-1990 which

was rejected by the Central Government after a month on 25-1-1991. It was observed that the explanation offered for the delay in consideration of the representation was not such from which an inference of inaction or callousness on the part of the authorities could be inferred and accordingly the challenge on the ground of delay was rejected. The subsequent decisions of this Court are also on the same lines and we do not consider it necessary to refer to them as the principle is well settled that there should be no inaction or lethargy in consideration of the representation and where there is a proper explanation for the time taken in disposal of representation, even though it may be long, the continued detention of the detenu would not be rendered illegal in any manner.

15. The grounds of detention in the present case are a long one running into 35 paragraphs which were accompanied by 82 documents running into 447 pages. The representation made by the appellant was also a fairly long one. The representation made by the appellant on 24-3-1998 was received by the Ministry on 27-3-1998. The comments of the sponsoring authority were called on 30-3- 1998 which were received on 17-4-1998. The comments were placed before the Secretary (R) through the ADG on 22-4-1998 (18th and 19th being holidays). The decision of the Central Government was taken and communicated on 29-4-1998 (25th and 26th being holidays). The representation was also considered by the detaining authority in the meantime and was rejected on 21-4-1998. In the additional affidavit filed on behalf of the sponsoring authority before the High Court, it was stated that the representation was received by them on 2-4-1998 and the comments were dispatched on 17-4-1998. During this period, there were holidays on 4th, 5th, 8th to 12th April, and only seven working days were available. Again there were holidays on 18th, 19th, 25th and 26th April. Having regard to the facts and circumstances of the case, we are clearly of the opinion that the entire time taken in consideration and disposal of the representation made by the appellant has been fully explained and it cannot be said by any stretch of imagination that there was any inordinate delay or unexplained delay in considering the representation made by the appellant. The challenge to the detention order made on the ground of delay in consideration of the representation made by the appellant has no substance and deserves to be rejected."

8. The order of the High Court is clearly unsustainable and is set aside. The period of detention fixed by the order of detention being over, it is open to the detaining authority to consider whether there is any need for detaining the respondent as the situation stands now."

23. Thus, for all the reasons stated above the time taken by the respondent no. 1 and the respondent no.2 in deciding the representation of the petitioner/detenu on facts of the present case can not be said to suffer from undue delay or inordinate delay.

24. Thus, for all the reasons aforestated, we do not find any merit in the present writ petition. Therefore, the writ petition is **dismissed**. However, there shall be no order as to costs.

(2021)09ILR A806
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.09.2021

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MRS. SAROJ YADAV, J.

Habeas Corpus No. 23475 of 2020

Mohd. Faiyyaz Mansuri ...Petitioner
Versus
Union Of India & Ors. ...Respondents

Counsel for the Petitioner:
Rajendra Kumar Dwivedi, Harish Pandey, Sushil Kumar Singh

Counsel for the Respondents:
G.A., A.S.G.,Pooja Singh

(A) Habeas Corpus - National Security Act, 1980 - Section 3 (2) - Order of detention , Section 3(4) - Order of approval , Section 8 - Grounds of order of detention to be disclosed to persons affected by the order - Section 10 - Reference to Advisory board , Section 11 - Procedure of Advisory Board , Section 12(1) - Order of confirmation - Indian Penal Code, 1860 - Sections 153A, 292, 505 (2), 506, 509, 295-A - The Information Technology (Amendment) Act, 2008 - Section 67 , Indian Evidence Act, 1872 - Section 65-B - Constitution of India - Article 21,22 - preventive detention is not punitive but preventive - resorted to with a view to prevent a person from committing activities regarded as prejudicial to certain objects that the law of preventive detention seeks to prescribe - Preventive detention is, thus, based on suspicion or anticipation and not on proof - Court not a proper forum to scrutinize the merits of administrative decision to detain a person. (Para -25)

Posting of derogatory message on the Facebook wall by Petitioner/detenue - indecent comment on God and Goddess - hurt sentiments of Hindu Community - tried to increase religious fervor and threatened to kill - disturb the peace in the area - detenue/petitioner arrested - Petition filed by detenue/petitioner through his next friend/brother - challenging the order of detention passed by the District Magistrate , order of approval and confirmation passed by Government of Uttar Pradesh under provision of the N.S.A. - State Government extended detention of the detenue/ petitioner - further period of six months from the date of detention by means of amendment.(Para - 1,9)

HELD:- Activities relied upon by the Detaining Authority to come to the conclusion that in order to prevent the petitioner from acting in any manner prejudicial to the maintenance of public order, it became necessary to pass order for detention of the detenue/petitioner, cannot be said to be mere disturbance of law and order. Plea of the detenue/petitioner that there is delay in forwarding the petitioner's representation on the part of the respondent no.1 (Union of India), has substance and on this count alone, the impugned detention order is liable to be quashed. (Para – 27,34)

Habeas corpus petition allowed.(E-7)

List of Cases cited:-

1. Lahu Shrirang Gatkal Vs St. of Mah. through the Secretary & ors. , (2017) 13 SCC 519

2. Rajammal Vs St. of T.N. & anr. , (1991) 1 SCC 417

3. Mohinuddin @ Moin Master Vs D.M., Beed , AIR 1987 SC 1977

4. Satyapriya Sonkar Vs Superintendent, Central Jail ,2000 Cr.L.J. Allahabad (D.B)

5. Kundanbhai Dulabhai Shaikh Vs D.M., Ahmedabad , 1996 (3) SCC 194

6. K.M. Abdulla Kunhi Vs U.O.I. , (1991) 1 SCC 476

7. Harish Pahwa Vs St. of U.P. & ors. , A.I.R. 1981 SC 1126

8. St. of U.P. Vs Sanjay Pratap Gupta ,2004 (8) SCC 591

9. Ramji Lal Modi Vs St. of U.P., AIR 1957 (SC) 620

10. Gulam Abbas & ors. Vs St. of U.P. & ors. , 1984 (1) SCC 81)

11. Rakesh Singh Vs U.O.I. & 3 ors. , 2021 Law Suit (All 159)

12. Naresh Kumar Goyal Vs U.O.I. & ors. , (2005) 8 SCC 276

13. U.O.I. & anr. Vs Dimple Happy Dhakad, AIR 2019 SC 3428

14. Secretary to Government of Tamil Nadu Public (Law & Ordre) Revenue Department & ors. Vs Kamala & ors. , (2018) 5 SCC 322

15. State of Maharashtra & ors. Vs Balu S/o Waman Patole ,Criminal Appeal No. 1681 of 2019

16. T. Devaki Vs Govt. of T.M. & ors. , 1990 (2) SCC 456

(Delivered by Hon'ble Ramesh Sinha, J.)

(1) The instant writ petition under Article 226 of the Constitution of India has been filed by the detenue/petitioner, **Mohd. Faiyyaz Mansuri**, through his next friend/brother Mohd. Siraj, challenging the order of detention dated 17.09.2020 passed by the District Magistrate, Lakhimpur Kheri under Section 3 (2) of the National Security Act, 1980 (hereinafter referred to as "N.S.A."), the order of approval dated 25.09.2020 passed by the Under Secretary, Home (Confidential) Department, Government of Uttar Pradesh under Section 3(4) of the N.S.A. and the order of confirmation dated 28.10.2020 passed by the Under Secretary, Home (Confidential) Department, Government of Uttar Pradesh under Section 12(1) of the N.S.A.

(2) During pendency of the instant writ petition, the State Government has extended the detention of the detenue/ petitioner for a further period of six months from the date of detention i.e. 17.09.2020, vide order dated 08.12.2020, which is also challenged by the detenue/petitioner by means of amendment.

(3) The prejudicial activities of the petitioner/detenue impelling the third respondent (District Magistrate, Lakhimpur Kheri) to clamp the impugned detention order against him are contained in grounds of detention. Facts relating to the detention of the detenue/petitioner as given in the grounds of detention (Annexure 8) accompanying the impugned detention order 17.09.2020 are that one Sagar Kapoor, s/o Brijesh Kapoor, resident of Bazarganj, Police Station Mohammadi, District Kheri made a written report to the effect that on 05.08.2020, at 8:39 P.M., the detenue/petitioner had posted provocative post with the intention of provoking the sentiments of Hindu society through his Facebook I.D., to which one Samreen Bano made indecent comment on 5.8.2020, which was supported by Mohd. Arif, Mohd. Shadab and other three-four persons by attacking the Hindu religious sentiments and tried to increase religious fervor and threatened to kill and also tried to disturb the peace in the area. On the basis of the said written report, F.I.R. No. 0595 of 2020, under Sections 153A, 292, 505 (2), 506, 509 I.P.C. and 67 of the Information Technology (Amendment) Act, 2008, at Police Station Mohammadi, District Kheri was registered on 06.08.2020 at 12:46 P.M. During the investigation, Sections 292/509 I.P.C. were dropped, however, Section 295-A I.P.C. was added. On 08.08.2021, the detenue/ petitioner was arrested in connection with the aforesaid F.I.R. and

sent to jail. The said incident was published in daily newspaper "Hindustan' and "Amar Ujala'. On account of the act of the detenue/petitioner in posting inflammatory post of offending material through his facebook, various Hindu organizations and local persons were angry and gathered in the area and raised slogans against the inflammatory post of offending material and also blocked the road, because of which, the flow of normal life, peace and discharge were disturbed and the atmosphere of the area was very tense. After deploying the additional police force and after serious efforts, the public order could be restored.

(4) It has also been mentioned in the grounds that the detenue/ petitioner was confined to Jail but his Pairokars were trying for his release on bail and in this regard, a bail application on behalf of the detenue/petitioner was filed before the Additional Chief Judicial Magistrate, Outline Court, Mohammadi, Kheri, which was rejected by the Court on 08.09.2020. Subsequently, again a bail application on behalf of the detenue/petitioner was filed before the Sessions Court, Kheri, on which 18.09.2021 was fixed for hearing. Therefore, there was a possibility that the detenue/petitioner if released on bail, shall again indulge in similar crime, which shall be prejudicial to the maintenance of the public order. Further, there is strong possibility for violence between two communities, which could disturb the public order. It has further been stated that on the basis of the aforesaid incident, the detaining authority felt satisfied that in order to prevent the detenue/petitioner from acting in any manner prejudicial to the maintenance of public order, it became necessary to pass orders for detention of the petitioner. The detenue/petitioner was also informed that he has a right to make a representation under Section 8 of the N.S.A. to the detaining authority and the State Government through the Jail Superintendent. In respect of Sections 9 and 10 of the N.S.A., he was also informed that he may also move a representation to the Chairman, U.P. Advisory Board (Detention) through Jail Superintendent. He was further informed that he may also make a representation to the Central Government through Superintendent of the Jail.

(5) The detention order along with the grounds of detention dated 17.09.2020 was served to the petitioner/detenue on 17.09.2020. The true copy of the detention order and the grounds of detention have been annexed as Annexure no.1 and 8, respectively, to the writ petition. The impugned order of detention was approved by the State Government on 25.09.2020 under Section 3 (4) of the N.S.A. and communicated to the petitioner on 26.09.2020. On 25.09.2020, the order of detention, grounds of detention and all other relevant papers received from the District Magistrate, Lakhimpur Kheri were sent to the Central Government under Section 3 (5) of the N.S.A. by the State Government. On 28.10.2020, the State Government had confirmed the order of detention dated 17.09.2020 under Section 12 (1) of the N.S.A for a period of three months tentatively from the date of his actual detention under N.S.A. i.e. w.e.f. 17.09.2020. On 28.09.2020, the case of the detenue/petitioner was referred to the U.P. Advistory Board (Detention), Lucknow. On 29.09.2020, the detenue/petitioner has submitted his representation to the District Magistrate, Lakhimpur Kheri, Secretary (Home), State of U.P., Lucknow and Secretary, Ministry of Home Affairs, Government of India, New Delhi and the U.P. Advisory Board (Detention), Lucknow, to the Superintendent,

District Jail, Lakhimpur Kheri, who, vide letter dated 29.09.2020 forwarded the petitioner's representation dated 29.09.2020, to the District Magistrate, Lakhimpur Kheri. On 01.10.2020, the District Magistrate, Lakhimpur Kheri had sent the detenue/petitioner's representation dated 29.09.2020 along with para-wise comments to the State Government, which was received by the State Government on 05.10.2020. On 06.10.2020, the State Government has sent the petitioner's representation dated 29.09.2020 along with parawise comments to the Central Government, New Delhi and the U.P. Advisory Board (Detentions), Lucknow vide separate letters dated 06.10.2020, which was received by the Central Government, Ministry of Home Affairs, New Delhi on 12.10.2020. On 08.10.2020, the State Government rejected detenue/ petitioner's representation dated 29.09.2020, which was communicated to the detenue/petitioner on 09.10.2020. On 22.10.2020, the U.P. Advisory Board (Detention), Lucknow examined the matter and also heard the detenue/petitioner in person. Opinion of the U.P. Advisory Board (Detention), Lucknow dated 23.10.2020 was received by the State Government on 26.10.2020. The State Government, thereafter, considered the matter again and confirmed the detention of the detenue/petitioner for a further period of three months tentatively by the order dated 28.10.2020, which was duly communicated to the detenue/petitioner on 28.10.2020. On 13.11.2020, the Central Government, Ministry of Home Affairs, New Delhi rejected the detenue/petitioner's representation dated 29.09.2020, which was communicated to the detenue/ petitioner on 17.11.2020 through wireless message.

(6) Feeling aggrieved by the aforesaid, the detenue/petitioner has filed the instant habeas corpus petition through his next friend/brother Mohd. Siraj, with the prayer, as mentioned in paragraph-1 herein-above.

(7) During pendency of the instant habeas corpus petition, the State Government, vide order dated 08.12.2020, extended the period of detention for a further period of three months, which has been challenged by the detenue/petitioner by means of the amendment in the instant habeas corpus petition. On 12.03.2021, the State Government again extended the period of detention for further three months and then on 03.06.2021 the State Government extended the period of detention for further three months, but it transpires from the record that the extension order dated 12.03.2021 and 03.06.2021 has not been challenged by the detenue/petitioner in the instant habeas corpus petition.

(8) Heard Sri Sushil Kumar Singh, learned Counsel for the detenue/petitioner, Ms. Pooja Singh, learned Counsel for the Union of India/respondent no.1 and Sri S.N. Agnihotri, learned Additional Chief Standing Counsel for the State/respondents no. 2 to 4 and perused the material brought on record.

(9) Challenging the impugned order of detention as well as consequential orders, Mr. Sushil Kumar Singh, learned Counsel for the detenue/petitioner has argued that it has been alleged in the F.I.R. No. 0595 of 2020 registered against the detenue/ petitioner at Police Station Mohammadi, District Kheri that the petitioner/detenue had posted one derogatory message on the Facebook wall through his I.D., on which one Samreen Bano had made indecent comment on God and Goddess of the Hindu community. It has also been alleged in the F.I.R. that

some other people, namely, Mohd. Arif, Mohd. Shadab and 3-4 other persons have also hurt the sentiments of the Hindu Community. The detenue/petitioner was arrested in connection with the aforesaid F.I.R. on 08.08.2020. He argued that the police, while registering the F.I.R. and implicating the detenue/petitioner in the said incident, could not verify and identify the verification report from Facebook Company to ascertain the fact that by which mobile I.M.E.I. number, the offending material was uploaded on Facebook as mandated under Section 65-B of the Indian Evidence Act. He also argued that the police has filed the charge-sheet against the detenue/petitioner in the aforesaid F.I.R without verifying the factum or collected evidence as mandated under Section 65-B of the Indian Evidence Act to connect a person with information technology crime. He also argued that in the F.I.R., four persons were named as accused and the main person, namely, Samreen Bano, who is allegedly said to have made abusive comments, has not been arrested till date and similarly, Mohd. Arif, Mohd. Shadab have also not been arrested by the police, which clearly establishes that it was not a stringent situation inasmuch as there was no reason to invoke the stringent provisions of N.S.A. by the District Magistrate solely against the detenue/petitioner. He argued that subjective satisfaction of the detaining authority is vitiated as the impugned order of detention has been passed on irrelevant facts which have been considered in the impugned order and there was no public order situation but it may be only a normal law and order situation, if any.

(10) Learned Counsel for the detenue /petitioner has further submitted that the extension orders dated 08.12.2020, 12.03.2021, 03.06.2021 were passed on the basis of the beat report of the Constable, who manufactured and created it without any substantive piece of evidence that who were the persons feeling apprehensive about the release of the detenue /petitioner. His submission is that artificial beat report by Station House Officer dated 02.12.2020 has been made the basis for the grant of extension, which is not sustainable in the eyes of law for want of basic material for extension. He pointed out that the first extension order dated 08.12.2020 was not supplied to the detenue/petitioner, hence the valuable right of the detenue /petitioner as guaranteed under Article 22 (5) of the Constitution of India has been infringed rendering the continued detention of the petitioner to be illegal. He submits that when the extension order dated 08.02.2021 has been filed by the District Magistrate, Lakhimpuer Kheri through supplementary counter affidavit, then, the detenue/petitioner has challenged the second extension order by way of amendment application. He further submitted that the petitioner /detenue was detained under N.S.A on 17.12.2020 without being informed about any extension order, however, when the Court intervened in the matter, the order of extension dated 08.12.2020 was supplied to the detenue/petitioner on 19.02.2021 by the Jail Authorities and further the supplementary counter affidavit was filed by annexing the order on 22.02.2021.

(11) Learned Counsel for the detenue/petitioner has argued that the proviso to Section 3 (2) of the N.S.A. provides that no order passed under Section 3 (2), shall, in the first instance, exceed six months and if the State Government is satisfied that the order is required to be passed for a further period, it may extend

the period of detention by such period not exceeding three months at any one time and in no case, the period of detention would exceed the period of 12 months in total. He argued that in the present case, perusal of the impugned order of detention dated 17.09.2020 passed by the detaining authority as well as impugned order of affirmation passed by the State Government dated 25.09.2020 reveals that it does not specify the period for which detention has been ordered and, therefore, in view of the ratio laid down by the Apex Court **in Lahu Shrirang Gatkal Vs. State of Maharashtra through the Secretary and others** : (2017) 13 SCC 519, the impugned detention order and consequential order are illegal and the same are liable to be quashed.

(12) The next submission of the learned Counsel for the detenue/petitioner is that there was undue delay in the disposal of the representation of the detenue/petitioner on the part of the Central Government, Ministry of Home Affairs, New Delhi as the petitioner's representation dated 29.09.2020 was received by the Central Government on 12.10.2020 but it was rejected on 13.11.2020 i.e. after one month and the said order rejection dated 13.11.2020 was communicated to the petitioner through wireless message on 17.11.2020 i.e., after four days from the date of passing the order of rejection. He argued that there is no plausible explanation in deciding the petitioner's representation after one month and communicating the same to the petitioner after four days. He argued that delay and latches committed by the Central Government in considering the detenue/petitioner's representation has infringed fundamental rights of the detenue enshrined under Articles 21 and 22 (5) of the Constitution of India. He argued that on this count alone, the impugned order of detention is liable to be quashed.

(13) To strengthen his submission, learned Counsel for the detenue/ petitioner has placed reliance upon **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 (D.B), **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 & others :** A.I.R. 1981 SC 1126.

(14) While supporting the impugned order of detention and the impugned consequential orders, learned Additional Government Advocate appearing on behalf of the State/respondents No. 2 to 4 has vehemently argued that the complete procedure as provided in the N.S.A. has been adopted. The detenue /petitioner was served the orders promptly. The State Government approved the detention order well within 12 days as provided under Section 3 (4) N.S.A. The State Government forwarded the copy of the detention order etc. to the Central Government within 7 days from the date of approval as required under Section 3 (5) of the N.S.A.. The State Government forwarded the detention order and ground of detention etc. to U.P. Advisory Board (Detentions), Lucknow well within 3 weeks from the date of actual detention as required under Section 10 of the N.S.A. The U.P. Advisory Board heard the detenue in person and sent its report alongwith the opinion that there is sufficient cause for preventive detention of

the petitioner well within 7 weeks from the date of detention of the petitioner as provided under Section 11 (1) of the N.S.A. The detention order was confirmed tentatively for 3 months from the date of actual detention and was served upon the detenue. Thereafter, the detention order was extended time to time in the manner as mentioned above.

(15) Elaborating his submission, learned AGA has further submitted that in exercise of powers under Section 3 (3) of the N.S.A., the State Government is empowered to pass the detention order at the first instance for 3 months and if satisfied to extend such period from time to time by any period not exceeding 3 months at any one time. The maximum period of detention for which any person may be detained in pursuance of any detention order which has been confirmed under Section 12 of N.S.A. shall be twelve months from the date of detention (subject to the proviso). Thus, in view of Article 22 (4) of the Constitution of India read with Sections 3 (3) and Section 13 of the N.S.A., the detention of the petitioner for 12 months from the date of actual detention is completely justified and legal and there is no illegality in extending the period of detention time to time for a total period of 12 months.

(16) Learned A.G.A. has further argued that the State Government has rejected the petitioner's representation without any delay. The act/offence committed by the detenue is in nature of effecting public order. The District Magistrate, after having gone through the report of Sponsoring Authorities and after being satisfied that to prevent the detenue from acting prejudicial to maintenance of public order, passed the order of detention after recording its subjective satisfaction. He also argued that a single act in the nature of effecting public order is sufficient for the Detaining Authority to exercise its power given under the NSA. It is not the number of acts matters but what has to be seen is the effect of the act on even tempo of life, the extent of its reach upon society and its impact as has been held by the Apex Court in ***State of U.P. vs. Sanjay Pratap Gupta*** :2004 (8) SCC 591.

(17) Learned AGA has further argued that the Act/offence committed by the detenue/petitioner clearly violates the rights of other religion and is in the nature of insulting the religious sentiments of one community. The calculated tendency of this aggravated form of insult is clearly to disrupt the public order and the section. The act committed by the detenue/petitioner is in the nature of insulting the religion with deliberate and malicious intention of outraging the religious feelings of one class. He has placed reliance upon **Ramji Lal Modi vs. State of U.P**.: AIR 1957 (SC) 620 and argued that nobody can exercise the fundamental rights by putting the public order in jeopardy. The maintenance of the public order is paramount in the larger interest of the society.

(18) Learned AGA has also placed reliance upon **Gulam Abbas and others vs. State of U.P. and others** : 1984 (1) SCC 81) and argued that the tweet/post and the comments of different persons against Hindu Goddess cannot be said to be any religious right of the petitioner and others rather it is an offence provoking the sentiments of another religion. The petitioner is seeking his right given under Article 21 of the Constitution of India, who himself is not having faith in the Constitution and the judicial system of the

country. He argued that after the verdict of the Hon'ble Supreme Court in respect of Ram Janam Bhumi dispute, it is law of land and that giving an open challenge to the verdict of the Hon'ble Supreme Court by posting a tweet, clearly shows the deliberate and malicious intention against one religion and against the highest Court of the Nation. The intention is very clear that the petitioner does not have faith in the laws of the land. He also argued that the extension of detention period is well within the jurisdiction of the Detaining Authority/State Government. At the time of further extension of detention order, it is not necessary to furnish the grounds of extension to the detenue, each and every time. The detention period was extended on the grounds, which were already communicated to the petitioner and no prejudice was likely to be caused to the petitioner. In support of his submission, he has placed reliance upon **Rakesh Singh Vs. Union of India and 3 others** : 2021 Law Suit (All 159).

(19) Learned AGA has further argued that there is no illegality in the order of detention. The petitioner's activities are prejudicial to the maintenance of the public order. The subjective satisfaction of the Detaining Authority is well founded, based on clinching material on record. Hence, the writ petition is liable to be dismissed.

(20) Ms. Pooja Singh, learned Counsel for the Union of India/respondent no.1 has submitted that the representation of the detenue/petitioner was considered with all promptness and there was no negligence or delay in this regard.

(21) Having heard the learned Counsel for the parties and gone through the impugned order of detention as well material brought on record, the main thrust of arguments of the learned Counsel for the detenue/petitioner while challenging the impugned order of detention and consequential impugned orders are as under :-

(1) The sponsoring authority, without ascertaining the fact from the Facebook Company that the alleged material is posted with the petitioner's I.D. or not as mandated under Section 65 B of the Indian Evidence Act, has recommended to slap N.S.A. upon the detenue/petitioner.

(2) The Detaining Authority i.e. District Magistrate, Lakhimpur Kheri has passed the impugned detention order in a routine manner without application of mind on the report submitted to him by the sponsoring/police authority and that the District Magistrate has failed to record any real subjective satisfaction in the impugned order of detention;

(3) The first extension order dated 08.12.2020 was not supplied to the detenue/petitioner but after the order passed by this Court, the order of extension dated 08.12.2020 has been supplied to the detenue/petitioner on 19.02.2021;

(4) In the impugned order of detention dated 17.09.2020 passed by the detaining authority as well as impugned order of affirmation passed by the State Government dated 25.09.2020, the period for which detention has been ordered, does not specify, hence, in view of the ratio laid down by the Apex Court in **Lahu Shrirang Gatkal Vs. State of Maharashtra through the Secretary and others (Supra),** the impugned order of detention and consequential affirmation order are illegal.

(5) There was undue delay in the disposal of the representation of the

detenue/petitioner on the part of the Central Government, Ministry of Home Affairs, New Delhi.

(22) With regard to first and second point of challenge by the detenue/petitioner, learned Additional Government Advocate has placed reliance upon the judgment of the Apex Court in **Ramji Lal Modi Vs. State of Uttar Pradesh (Supra)** and **Gulam Abbas and others Vs. State of U.P. and others (Supra)** and has contended that the act/offence committed by the detenue clearly violates the right of other religion and is in the nature of insulting the religious sentiments of one community. Thus, the calculated tendency of this aggravated form of insult is clearly to disrupt the public order and the act committed by the petitioner is in the nature of insulting the religion with deliberate and malicious intention of outraging the religious feelings of one class. He argued that the Detaining Authority has considered the entire material placed before him by the sponsoring authority, particularly the fact that the material posted by the detenue/petitioner through his Facebook I.D. has absolutely disturbed the communal harmony of the society and more so the statement recorded under Section 161 Cr.P.C., the detenue/petitioner has himself admitted the fact that he has posted the alleged material from his facebook I.D., rightly satisfies that after being released on bail, the detenue/petitioner shall again indulge in activities prejudicial to the public order. Hence, there is no illegality or infirmity in passing the impugned order of detention by the Detaining Authority.

(23) A perusal of the grounds of detention reveals that a provocative post *"Babri maszid ek din dubara banai Jayegi, jis tarah Turki ki Sofiya maszid banai gai thi'* alleged to have been posted by the detenue/petitioner on his Facebook Wall on 5.8.2020 was taken into consideration by the detaining authority while coming to the subjective satisfaction that the petitioner should be detained under the N.S.A. On careful perusal of the grounds of detention dated 17.09.2020, particularly para-1, it would indicate that the detenue/petitioner had been charged for posting aforesaid provocative message/tweet on his Facebook Wall on 17.09.2020, which amounts to causing fear or alarm in the public, or to any section of the public whereby any person may be induced to commit offence against the State and also disturb the communal harmony. For that offence, one Sri Sagar Kapoor lodged an FIR, which was registered as F.I.R. No. 595 of 2020, under Sections 153A, 292, 505 (2), 506, 509 I.P.C. and Section 67 of the Information Technology (Amendment) Act, 2008, at Police Station Mohammadi, District Kheri on 06.08.2020, at 12:46 P.M. During the investigation, Sections 292/509 I.P.C. were dropped, however, Section 295-A I.P.C. was added. On 08.08.2020, the petitioner was arrested in connection with the aforesaid F.I.R. and was sent to jail. After his arrest, confessional statement of the detenue/petitioner was recorded and in his statement, the detenue/petitioner has confessed his guilt in posting the aforesaid provocative message on his Facebook. The grounds of detention further shows that in view of communal tension and enmity, people at different places gathered and raised slogans against the said message, by which communal harmony was disturbed and, therefore, additional police force was deployed and after serious efforts, the public order could be restored. It has also been mentioned in the grounds of detention that after arrest of the petitioner, he has

moved an application for bail, which was rejected by the Court concerned and thereafter, the detenue/petitioner has moved an application for bail before the Sessions' Court. Therefore, the Detaining Authority, after considering the entire material on record, satisfied that in order to prevent the detenue/petitioner from acting in a any manner prejudicial to the maintenance of public order, it became necessary to pass order of detention of the petitioner.

(24) Observing that aim of preventive detention is not to punish a man for having done something but to intercept and to prevent him from doing so, the Supreme Court in the case of **Naresh Kumar Goyal v. Union of India and others**, (2005) 8 SCC 276, and ingeminated in **Union of India and another v. Dimple Happy Dhakad**, AIR 2019 SC 3428, has held that an order of detention is not a curative or reformative or punitive action, but a preventive action, avowed object of which being to prevent antisocial and subversive elements from imperilling welfare of the country or security of the nation or from disturbing public tranquility or from indulging in smuggling activities or from engaging in illicit traffic in narcotic drugs and psychotropic substances, etc. Preventive detention is devised to afford protection to society. The authorities on the subject have consistently taken the view that preventive detention is devised to afford protection to society. The object is not to punish a man for having done something but to intercept before he does it, and to prevent him from doing so.

(25) To sum up, a law of preventive detention is not invalid because it prescribes no objective standard for ordering preventive detention, and leaves the matter to subjective satisfaction of the Executive. The reason for this view is that preventive detention is not punitive but preventive and is resorted to with a view to prevent a person from committing activities regarded as prejudicial to certain objects that the law of preventive detention seeks to prescribe. Preventive detention is, thus, based on suspicion or anticipation and not on proof. The responsibility for security of State, or maintenance of public order, or essential services and supplies, rests on the Executive and it must, therefore, have necessary powers to order preventive detention. Having said that, subjective satisfaction of a detaining authority to detain a person or not, is not open to objective assessment by a Court. A Court is not a proper forum to scrutinize the merits of administrative decision to detain a person. The Court cannot substitute its own satisfaction for that of the authority concerned and decide whether its satisfaction was reasonable or proper, or whether in the circumstances of the matter, the person concerned should have been detained or not. It is often said and held that the Courts do not even go into the question whether the facts mentioned in grounds of detention are correct or false. The reason for the rule is that to decide this, evidence may have to be taken by the Courts and that is not the object of law of preventive detention. This matter lies within the competence of Advisory Board. While saying so, this Court does not sit in appeal over decision of detaining authority and cannot substitute its own opinion over that of detaining authority when grounds of detention are precise, pertinent, proximate and relevant.

(26) It is apt to mention here that our Constitution undoubtedly guarantees various freedoms and personal liberty to all persons in our Republic. However, it

should be kept in mind by one and all that the constitutional guarantee of such freedoms and liberty is not meant to be abused and misused so as to endanger and threaten the very foundation of the pattern of our free society in which the guaranteed democratic freedom and personal liberty is designed to grow and flourish. The larger interests of our multi-religious nation as a whole and the cause of preserving and securing to every person the guaranteed freedom peremptorily demand reasonable restrictions on the prejudicial activities of individuals which undoubtedly jeopardize the rightful freedoms of the rest of the society. Main object of Preventive Detention is the security of a State, maintenance of public order and of supplies and services essential to the community demand, effective safeguards in the larger interest of sustenance of peaceful democratic way of life.

(27) In the instant case, on examining the grounds of detention, briefly referred to herein-above, on the touchstone of the legal position as emerging from the aforementioned decisions, we are of the considered view that the activities relied upon by the Detaining Authority to come to the conclusion that in order to prevent the petitioner from acting in any manner prejudicial to the maintenance of public order, it became necessary to pass order for detention of the detenue/petitioner, cannot be said to be mere disturbance of law and order. As mentioned in the ground of detention, the activities of the detenue/petitioner pertains to disturb the communal harmony of the Society. The posting of the provocative message through his Facebook wall, as referred to herein-above, strikes at the root of the State's authority and is directly connected to "public order'. This act of the detenue/petitioner was not directed against a single individual, but against the pubic at large having the effect of disturbing the even tempo of life of the community and thus breaching the "public order'.

(28) This Court, therefore, has no hesitation in holding that the instance of petitioner's activities enumerated in the grounds of detention, clearly show that his activities cover a wide field and fall within the contours of the concept of "public order' and the Detaining Authority was justified in law in passing the impugned order of detention. Hence, there is no substance on the plea of the petitioner in this regard.

(29) So far as the argument relating to non-supply of the first order of extension dated 08.12.2020 to the detenue/petitioner is concerned, it transpires from the record that the order of extension dated 08.12.2020 has been challenged by the detenue/petitioner by means of amendment and further as per own submission of the petitioner that the order of extension dated 08.12.2020 has been supplied to the detenue on 19.02.2021, therefore, it is immaterial at this stage to raise the issue of non-supply of the first order of extension dated 08.12.2020. Moreso, there was no such requirement to furnish grounds of extension to the detenue because the grounds of detention were the same, so no any prejudice was likely to be caused to the petitioner.

(30) So far as the argument of the learned Counsel for the petitioner that the detention order does not specify the period for which detention has been ordered, hence in view of the law laid down by the Apex Court in **Lahu Shrirang Gatkal Vs. State of Maharashtra through the Secretary and others** (supra), the

impugned detention order is illegal, it is relevant to mention here that this Court, while adjudicating this issue in Habeas Corpus No. 24213 of 2020 : *Kanhaiya Awasthi Thru Next Friend Shivangi Awasthi Vs. Union of India Thru Secy. Home Affairs New Delhi & Ors*, decided on 16.08.2021, has taken note of the ratio laid down by the Apex Court in **T. Devaki Vs. Government of Tamil Nadu and others** : 1990 (2) SCC 456, which has subsequently been followed in **State of Maharashtra & others vs. Balu S/o Waman Patole** (Criminal Appeal No. 1681 of 2019, decided on 13.11.2019) as well as the ratio laid down by the Apex Court in **Secretary to Government of Tamil Nadu Public (Law and Ordre) Revenue Department and others Vs. Kamala and others** : (2018) 5 SCC 322 and held that there is no substance in the plea of the detenue/petitioner that the impugned detention order and the impugned order confirming the detention order, both are bad in law as they do not mention the period of detention at the first instance. Hence, the plea of the detenue/petitioner in this regard has no force and the same is rejected.

(31) The next submission of the learned Counsel for the detenue/ petitioner is that there is undue delay in the disposal of the representation of the detenue/petitioner on the part of the Central Government, Ministry of Home Affairs, New Delhi.

(32) For appreciating the aforesaid submission of the detenue/petitioner, we deem it appropriate to reproduce para-4 of the supplementary counter affidavit filed by Smt. Meena Sharma, Under Secretary, Ministry of Home Affairs, Government of India, New Delhi, in which details of dealing of the petitioner's representation have been narrated. Para-4 of the aforesaid affidavit reads as under :-

"That, in addition to para 4 of the counter affidavit dated 07.01.2021, it is further submitted that a copy of the representation dated 29.09.2020 of the detenue along with parawise comments of the detaining authority was forwarded by the Under Secretary, Government of Uttar Pradesh to the Central Government in the Ministry of Home Affairs vide letter no. 84/2/59/2020-C.X-5 dated 06.10.2020. The same was received in the section concerned in the Ministry of Home Affairs on 12.10.2020. It is pertinent to mention that after relaxation of few COVID norms, the section received 72 nos. of receipts including 12 nos of representations from various State Governments. Also, as per guidelines of DOPT, a roaster system was there as preventive measures to contain the spread of Novel Coronavires (COVID-19). Unfortunately, the dealing hand fell ill on 14th and was on leave on 15th October, 2020. On 16th , he somehow manages to come to office for dealing urgent receipts. There was an intervening period of two holidays i.e. Saturday and Sunday on 17th and 18th October, 2020. After that on 19th and 20th, the facts were consolidated and a note was prepared after going through records received from the detaining authority and State Government. Thereafter, the file was put up for the consideration of Union Home Secretary on 21.10.2020. The file reached the Under Secretary (NSA) on 21.10.2020. The Under Secretary (NSA) with her comments forwarded the same to the Deputy Legal Advisor (DLA) on 22.10.2020. The Deputy Legal Advisor (DLA) forwarded the same to the Joint Secretary (IS-II) on 22.10.2020. The file reached the office of Joint

Secretary (IS-II) on 23.10.2020. It is pertinent to mentione that the officer of Deputy Legal Advisor is at Major Dhyan Chand National Stadium and the office of Joint Secretary (IS-II) is at North Block. The Joint Secretary (IS-II) with his comments forwarded the same to the Union Home Secretary on 24.10.2020. Thereafter, it was felt that an independent report from the Central Agency is also needed to ascertain detenu's involvement in the case and as to whether his release has the potential to further disturb the peace and public order in the area. There was an intervening period on 25th October, 2020 being Sunday. The file reached the section concerned from aforesaid level of officers on 27.10.2020. Accordingly, the same report was sought on 27.10.2020. The report from the Central Agency was received in the section concerned on 06.11.2020. Thereafter, there was an intervening period of 2 holidays on 07th and 8th November, 2020 being Saturday and Sunday. After receiving input from the Central Agency, the case was again processed for consideration of the Union Home Secretary on 09.11.2020. The Under Secretary with her comments forwarded the same to the Deputy Legal Advisor on 10.11.2020. The Deputy Legal Advisor forwarded the same to the Joint Secretary (IS-II) on 11.11.2020. The file reached the Joint Secretary on 12.11.2020. The file was further examined by the Joint Secretary (IS-II) and then he, with the comments; forwarded the file to the Union Home Secretary on 13.11.2020. 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 detenu, the comments of the detaining authority thereon and the input from central agency concluded that the detenu had failed to bring forth any material cause or grounds 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 on 13.11.2020. The file reached the section concerned through aforesaid level on 17.11.2020. During the intervening period, 14th and 15th November were holidays being Saturday and Sunday. Accordingly, the detenu was informed vide Wireless Message No. II/15028/163/2020-NSA dated 17.11.2020. It is further submitted that the representation was examined with utmost care and caution with promptitude. Hence, there was no bonafide or deliberate delay in disposal of the representation on part of the Respondent No. 01 i.e. the Union of India."

(33) From the affidavit submitted by the Under Secretary, Ministry of Home Affairs, Government of India, it transpires that the petitioner's representation dated 29.09.2020, which was forwarded by the State Government vide letter dated 06.10.2020, has been received in the second concerned of the Ministry of Home Affairs on 12.10.2020 but it could not be processed between 13.10.2020 to 20.10.2020 due to 72 numbers of receipts including 12 numbers of the representations from various State Governments have been received after relaxation of few Covid norms and further the dealing hand fell ill on 14th October, 2020 and was on leave on 15th October, 2020 and on 17th and 18th October, 2020 were Saturday and Sunday. We have given out anxious consideration whether this could have been a proper explanation for withholding the representation. In our considered opinion, the Central Government were at fault. It appears that the Central Government

though has received the petitioner's representation on 12.10.2020 but it could only be processed on 21.10.2020 when it has been placed before the Under Secretary and day-to-day process of the file w.e.f. 13.10.2020 to 21.10.2020 has not been properly explained in the affidavit. Moreso, the file relating to the petitioner's representation had reached to the office of Joint Secretary (IS-II) on 23.10.2020 and the same was forwarded by the Joint Secretary (IS-II) to the Union Home Secretary on 24.10.2020. Thereafter, report was sought from Central Agency and the required report of Central Agency was received by section concerned on 06.11.2020. It transpires that the report of the Central Agency was received on 06.11.2020 but it only processed for consideration of the Union Home Secretary on 09.11.2020. The day-to-day explanation while dealing with the petitioner's representation between 25.10.2020 to 05.11.2020 have not been made by the Central Government. Furthermore, the petitioner's representation was rejected on 13.11.2020 but it was communicated to the detenue/petitioner on 17.11.2020 only via wireless message. Again, there is no day-to-day explanation between 14.11.2020 to 16.11.2020 on behalf of the Central Government. Thus, there was delay in disposal of the representation of the petitioner by the Central Government and having regard to the nature of detention and rigor of law, we are of the view that there was disproportionate delay at the end of the Central Government.

(34) For the reasons aforesaid, we are of the view that the plea of the detenue/petitioner that there is delay in forwarding the petitioner's representation on the part of the respondent no.1 (Union of India), has substance and on this count alone, the impugned detention order is liable to be quashed.

(35) In the result, the instant Habeas Corpus Petition is **allowed**. The impugned order of detention dated 17.09.2020 and the consequential orders are hereby quashed. The detenue/petitioner is ordered to be set at liberty by the respondents forthwith unless required in connection with any other case.

(36) For the facts and circumstances of the case, there is no order as to costs.

(2021)09ILR A819
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 01.09.2021

BEFORE

THE HON'BLE MANISH MATHUR, J.

Habeas Corpus No. 24874 of 2019

Garv Mishra (Minor) ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Upendra Kumar, Samarth Saxena

Counsel for the Respondents:
G.A., Anil Kumar Mishra, Vivek Kumar Verma

(A) Habeas Corpus - Hindu Minority & Guardianship Act, 1956 - Section 6 - Indian Penal Code, 1860 - Section 498-A, 323, 504 - The Code of criminal procedure, 1973 - Section 125 - Dowry Prohibition Act, 1961 - Section 3/4 - welfare of the minor would be of paramount consideration even if writ for habeas corpus is maintainable.(Para -10)

Petition filed for a direction to opposite parties concerned - to produce minor son of petitioner -

for his custody to be handed over to petitioner. (Para - 2)

HELD:- It is apparent that writ petition for habeas corpus in the present case seeking custody of the minor child is maintainable. Petitioner being father of the minor and natural guardian in terms of Section 6 of the Act of 1956 would be entitled to custody of the minor particularly since it is admitted that he has a better financial condition to look after the minor himself.(Para - 9,18)

Habeas corpus petition allowed. (E-7)

List of Cases cited:-

1. Reetu & anr. Vs St. of U.P. & ors., Habeas Corpus Writ Petition No.406 of 2020

2. Ram Naik Misra & anr. Vs Km. Gauri & ors. , First Appeal No.53 of 2018

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

1. Heard Mr. Samarth Saxena, learned counsel for petitioner, learned Additional Government Advocate for opposite parties 1 to 3 and Mr. Anil Kumar Mishra, learned counsel for opposite parties 4 to 7.

2. This petition for a writ in the nature of Habeas Corpus has been filed for a direction to opposite parties concerned to produce Garv Mishra, minor son of petitioner and for his custody to be handed over to petitioner.

3. Learned counsel for petitioner submits that the detenu Garv Mishra is only one and half years old with his date of birth being 05.09.2018. It is submitted that opposite parties 4 and 5 are the parents of wife of petitioner who passed away on 10.08.2019. Opposite parties 6 & 7 are her brothers with opposite party no.6 being married and having his own family and opposite party no.7 being unmarried as yet.

4 . It is noticed from the order sheet that the issue pertaining to maintainability of a writ petition for habeas corpus seeking custody of child had been framed earlier. With regard to the issue of maintainability of a petition for habeas corpurs seeking custody of a minor child has been dealt with by Hon'ble the Supreme Court in Tejaswini Gaud and others v. Shekhar Jagdish Prasad Tewari and others reported in (2019) 7 SCC 42.

5. In the aforesaid case, the issue was with regard to maintainability of a writ of habeas corpus for custody of minor when efficacious alternative remedy is available under the Hindu Minority & Guardianship Act, 1956 (hereinafter referred to as the Act of 1956). Hon'ble the Supreme Court in the aforesaid case thereafter has held that in child custody matters, a writ in the nature of habeas corpus is maintainable where it is proved that detention of minor child by a parent or others was illegal and without authority of law. It has subsequently also been held that the welfare of the child is of paramount interest and where the court is of the view that a detailed enquiry is required, the court would decline to exercise the extra-ordinary jurisdiction and direct the parties to approach Civil Court. It has been further held that it is only in exceptional cases, that rights of the parties to the custody of minor will be determined in a petition for habeas corpus. Relevant paragraphs of the aforesaid decision are as follows:-

"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 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."

"21. In the present case, the appellants are the sisters and brother of the mother Zelam who do not have any authority of law to have the custody of the minor child. Whereas as per Section 6 of the Hindu Minority and Guardianship Act, the first respondent father is a natural guardian of the minor child and is having the legal right to claim the custody of the child. The entitlement of father to the custody of child is not disputed and the child being a minor aged 1½ years cannot express its intelligent preferences. Hence, in our considered view, in the facts and circumstances of this case, the father, being the natural guardian, was justified in invoking the extraordinary remedy seeking custody of the child under Article 226 of the Constitution of India."

6. Following the aforesaid judgment, a coordinate Bench of this Court in its judgment and order dated 17.09.2020 rendered in **Reetu & another v. State of U.P. and others,** Habeas Corpus Writ Petition No.406 of 2020 has also held that a writ of habeas corpus can be issued in matters relating to custody of a child where the child is in custody of a relative or a person, who is not the lawful guardian, though not an utter stranger. The relevant paragraph is as follows:-

"13. A writ of habeas corpus can certainly be issued in matters relating to custody of a child where the child is in custody of a relative or a person, who is not the lawful guardian, though not an utter stranger. A kinsman or a relative of the child, who holds the child in custody back from the lawful guardian, would entitle the lawful guardian to seek restoration of custody through a writ of habeas corpus. The question, whether the person who applies for the writ is the lawful guardian or not, is generally to be determined with reference to the personal law, applicable to parties. However so, the

Court may also inquire into for the purpose of determining the legality of the custody, from which liberation is sought, vis-a-vis the right of the person asking for the writ, the question of welfare of the minor. "

7. Upon applicability of the aforesaid judgments in the present case, it is admitted between the parties that petitioner is the father of minor Garv Mishra. It is also undisputed that the minor in question is in custody of opposite parties 4 to 7 since the time when mother of the child was undergoing treatment and subsequently passed away.

8. In view of aforesaid judgments, it is apparent that writ petition in the nature of habeas corpus would be maintainable with regard to custody of child who is in the custody of a person who is not a natural lawful guardian but is also not an utter stranger, as in the present case, while opposite parties 4 to 7 are related to the minor through mother. Since it is admitted between the parties that petitioner is father of the minor child, naturally in terms of the Act of 1956, father is the natural guardian of the minor.

9. In view of aforesaid facts, and upon applicability of aforesaid judgments, it is apparent that writ petition for habeas corpus in the present case seeking custody of the minor child is maintainable.

10. In the aforesaid judgments, it has also been held that welfare of the minor would be of paramount consideration even if writ for habeas corpus is maintainable. In the present case, learned counsel for petitioner has drawn attention to his financial and social standing with the submission that the answering opposite parties do not have the financial capability to look after the minor child and it would be in the interest of minor in case custody is given to petitioner who admittedly has the financial wherewithal to take care of the interest of the minor.

11. Learned counsel appearing on behalf of opposite parties 4 to 7 on the other hand has contended that petitioner did not take care of his wife when she was diagnosed with cancer and has in fact left her at the mercy of her parents and brothers. It is submitted that due to ill-treatment by petitioner of his wife, a first information report was also lodged against him under Section 498-A, 323, 504 I.P.C. and Section 3/4 Dowry Prohibition Act, 1961 and, therefore, interest of the minor would not be served in case custody is handed over to petitioner. Learned counsel has also placed reliance on a Division Bench decision of this Court in the case of **Ram Naik Misra and another v. Km. Gauri and others** rendered in First Appeal No.53 of 2018 in which considering the paramount consideration of welfare and interest of the minor child, the Court declined to provide custody to father of the minor.

12. In paragraph 4 of the writ petition, it has been stated that petitioner belongs to a respected family and is running business of a general store in his neighbourhood. Father of petitioner has superannuated from Forest Department and is getting his pension while his mother is a house wife. It has also been stated that petitioner resides with his parents in own house in Lakhimpur Kheri. The aforesaid contents of writ petition with regard to financial and social standing of petitioner have not been denied by the answering opposite parties in their counter affidavit but it has been merely stated that conduct and behaviour of

father of the child and his family was never been good towards mother of the child and petitioner has not cared for the minor. In paragraph 19 of the counter affidavit, it has also been stated that a petition under Section 125 Cr.P.C. has been filed by the maternal grand father of the minor (arrayed as opposite party no.4 to the present petition) before the Principal Judge, Family Court, Lakhimpur Kheri, registered as Case No.834 of 2019.

13. A perusal of the petition under Section 125 Cr.P.C. indicates that in paragraph 5, it has been stated that the maternal grand father is not in a financial position to take care of the minor. In paragraph 6, it has been stated that father of the minor, i.e. the petitioner herein has the financial wherewithal to take care of the minor. It has also been stated that petitioner herein is the owner of a general store and does not earn less than Rs.50,000/- per month and is, therefore, in a better financial position to take care of the minor.

14. Considering the fact that the opposite parties have not denied the good financial condition of petitioner while at the same time indicating their precarious financial position, it is evident from the material on record that petitioner being not only the natural guardian of the minor in terms of Section 6 of the Act of 1956 would also be in a better position to take care of the minor rather than the answering opposite parties.

15. With regard to said submission, it is apparent from a perusal of the first information report brought on record as Annexure 6 to the petition that the same has been lodged at the instance of opposite party no.4 (who is father in law) and not the wife. The treatment prescriptions on record annexed to the petition indicates treatment of wife of petitioner, Arti Misra having taken place at the instance of the petitioner. From a perusal of the documents on record, it is apparent that the dispute with regard to custody of minor had cropped up after demise of Arti Misra, between the petitioner and his in-laws, which has also resulted in acrimonious litigation.

16. From the aforesaid, it is evident that the opposite parties have not denied the fact that petitioner is the father and, thus, the natural guardian of the minor. Similarly, his better financial condition vis-a-vis opposite parties 4 to 7 has also been admitted by the opposite parties in their counter affidavit, which is also evident from the averments made in the petition under Section 125 Cr.P.C. As such, in the considered opinion of this Court, since petitioner is admittedly the natural guardian of the minor and is in a better financial condition than opposite parties 4 to 6, he would, thus, be better placed to look after the interest and welfare of the minor, particularly in the absence of any pleading by opposite party that petitioner has misbehaved with the minor.

17. So far as the judgment relied upon by learned counsel for answering opposite parties is concerned, a perusal of the same in **Ram Naik Misra**(supra) indicates that the court refused to grant custody of minor children to the father on the ground that the minors therein who were aged about 15 years and 13 years categorically stated before the court that they did not want to live with their father. Even in the said judgment, it has been held that it is the settled position of law that the father is the natural guardian of minor children and, therefore, he has preferential rights to

custody of a minor. As is evident, the facts and circumstances of aforesaid case are clearly distinguishable and are not applicable in the present case.

18. In view of aforesaid, this Court is of the considered opinion that petitioner being father of the minor and natural guardian in terms of Section 6 of the Act of 1956 would be entitled to custody of the minor particularly since it is admitted that he has a better financial condition to look after the minor himself.

19. In view of aforesaid, the petition for habeas corpus succeeds and is **allowed.** Consequently, it is ordered that the minor be set at liberty by opposite parties 4 to 7 who shall deliver custody of the minor, Garv Mishra to petitioner Anurag Mishra within four weeks from the date of this judgment. In case custody of the minor is not delivered by opposite parties 4 to 7 or anyone claiming through them, the learned Chief Judicial Magistrate, Lakhimpur Kheri shall cause the minor to be delivered to petitioner Anurag Mishra by employment of necessary force through the Superintendent of Police, Lakhimpur Kheri, who is directed to act in the aid of learned Chief Judicial Magistrate, Lakhimpur Kheri in the matter. It is further directed that on the first Sunday of every month, between 10.00 a.m. to 2.00 p.m., petitioner Anurag Mishra shall permit opposite parties 4 to 7 to meet the minor Garv Mishra at his residence and during each such visit, petitioner Anurag Mishra shall extend all due courtesies to opposite parties 4 to 7 and will facilitate the meeting between them.

20. Let this order be communicated forthwith by the Registrar to learned District Judge, Lakhimpur Kheri, learned Chief Judicial Magistrate, Lakhimpur Kheri and the Superintendent of Police, Lakhimpur Kheri for consequential action.

(2021)09ILR A824
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.08.2021

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Misc. Single No. 3001 of 2021

Pradeep Kumar Singh @ Atma Singh & Anr. ...Petitioner
Versus
A.D.J., Barabanki & Ors. ...Respondents

Counsel for the Petitioner:
Ghufran Hussain

Counsel for the Respondents:
Pankaj Kumar Verma

A. Civil Law - Small Causes Court Act, 1887: Section 17 - The Court held that on reading proviso to Section 17 of the Act it is observed that if the deposit made by the tenant falls short of amount required to deposited, the tenant will be deprived of the benefit, even if shortfall in such deposit was because of tenant's ignorance or without any malafide intention. Thus, due to the aforesaid reason application for setting aside the ex parte decree will not be maintainable. (Para 27)

The petitioner had deposited Rs. 19,200 only and had made no application to the court saying that they were ready and willing to deposit security for any amount which was further found due on them. (Para 28)

Writ Petition Rejected. (E-10)

List of Cases cited:

1. Kedar Nath Vs Mohan Lal Kesarwari & ors. AIR 2002 SC 582

2. Raj Kumar Makhija & ors. Vs M/s SKS & Co. & ors. 2000 (3) ARC 117

3. Ramesh Kumar Vs Kesho RamAIR 1992 SC 700

4. Parimal Vs Veena AIR 2011 Supreme Court 1150

5. Ram Bharose Vs Ganga Singh 1931 ALJR 1049

6. Naseeruddin & ors. Vs SItaram Aggarwal JT 2003 (2) SC 56

7. Shakeel Ahmad Vs Zameer Ahmad Siddiqui & anr. SCC Revision No. 39 of 2016

8. Smt. Sushma Agarwal Vs D.J., Agra & 2 ors. Article 227 No. 4089 of 2018

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.)

1. Heard Sri Ghufran Hussain, learned counsel for the petitioners and Sri Sudeep Seth, learned Senior Counsel assisted by Sri Pankaj Kumar Verma, learned counsel appearing for landlord.

2. This writ petition has been filed challenging the order dated 20.10.2020 passed by opposite party no.1/ Additional District Judge, Court no.2, Barabanki in Small Causes Revision No.1 of 2019 .

3. It is the case of the petitioners that the petitioners were the initially tenant of one shop situated at Malgodam Road, Haidergarh, District Barabanki of Sri Baldev Prasad Khare. Thereafter wife of petitioner no.1 bought the shop in question from the grandson of Beldav Prasad Khare, the original landlord. The mother of respondent nos. 2 and 3 filed a suit for eviction before the Civil Judge (J.D.), Court No.13, Barabanki on the ground that she is the owner of the disputed shop without disclosing the source of title and also mentioning the wrong boundaries of the tenanted premises.Petitioners appeared and filed the written statement denying the ownership of plaintiff and saying that they are not the tenants of the shop but had bought the property for Rs.50,000/- from Sri Arind Khare, the legal heir of the earlier owner and landlord. The opposite party no.2 admitted the existence of sale-deed dated 16.01.2013 executed by Arivind Khare, grandson of Sri Baldev Prasad Khare in favour of the wife of petitioner no.1 when they filed the Suit for cancellation of sale-deed before learned Civil Judge (S.D.) Court no.20 , Barabanki. The Said suit is pending for disposal where the petitioner had filed written statement and order of maintenance of status quo has been passed therein on 08.03.2017.

4. It is the case of the petitioners, as argued by learned counsel for the petitioners that the petitioner no.1 was doing parivi of SCC case and he became ill and was unable to contact his lawyer and the SCC Suit proceeded ex parte on 25.09.2017 and was ultimately decreed on 18.12.2017.

5. It has been argued by learned counsel for the petitioners that respondent nos.2 and 3 was duty bound to reveal before the Small Causes Court about the proceedings of Regular Suit no. 27 of 2015 and interim order granted therein on 08.03.2017 passed for maintenance of status quo. However, they concealed the interim order from the learned trial court as a result whereof the SCC suit was decreed in their favor.

6. It has been argued by learned counsel for the petitioners that SCC suit

was not maintainable as the Court of Small Causes has no power to decide the intricate question of title and ownership and once the title and ownership was denied and tenancy was also specifically denied then SCC Court had no jurisdiction to decide the case. Also an interim order had been passed in Regular Suit No.27 of 2015 and the suit for cancellation of sale-deed of was pending before civil court.

7. Learned counsel for the petitioners has placed reliance Section 23 of the provisions of Small Causes Court Act (herein after referred to as "Act'). To substantiate his arguments, it has been submitted that respondent nos. 2 has initiated criminal proceedings by filing an F.I.R. under Sections 406,419,420, 452,504, 506 I.P.C. Police Station Kotwali, against petitioner no.1 and wife of petitioner no.1 Smt. Sita Singh, who had bought the property in question. This fact shows that there was technical question of fact involving ownership and civil and criminal litigation were going on. The Small Causes Court should have returned the plea under section 23 of the Act.

8. It has been submitted that after the suit was decreed ex-parte, execution case was filed by respondent no.2 and 3 and on receipt of summons of the execution case on 22.01.2019, the petitioners moved an application under Order IX Rule 13 of C.P.C. alongwith application for condonation of delay under Section 5 of the Limitation Act and also moved a separate application under Section 17 of the Act praying for recall of the order. It has been submitted that learned trial court after hearing the parties rightly allowed the three applications in favour of the petitioner on 06.09.2019.Thereafter petitioners deposited an amount of Rs.21161/-on 07.09.2019. However, respondent nos. 2 and 3 filed SCC Revision No. 1 of 2019 which was allowed on hyper technical ground without considering the facts that SCC Court has no jurisdiction to entertain the suit and pass the decree ex parte.

9. It has been argued by learned counsel for the petitioners that opposite party no.1 has failed to appreciate that it was not a simple tenant and landlord dispute, rather it was a dispute relating to title and declaration as to who was the real owner of the property in question.

10. Learned counsel for the petitioners has also argued that opposite party no.1 failed to appreciate the provisions of Section 17 of the Act when it opined that application under section 17 of the Act should be moved within 30 days from the date of knowledge of decree passed ex-parte, and the decreetal amount alongwith interest should be deposited before under Order IX Rule 13 C.P.C. application is considered by the learned trial court.

11. Learned counsel for the petitioners has placed reliance upon the judgment rendered by coordinate Bench of this Court in SCC Revision No. 39 of 2016 (Shakeel Ahmad Vs. Zameer Ahmad Siddiqui and another) decided on 05.04.2016 wherein this Court considered the provisions of Section 17 of the Act and also the law settled by Hon'ble Supreme Court in the case of K*edar Nath Vs. Mohan Lal Kesarwari and others AIR 2002 SC 582* wherein the Court had interpreted the scope of the proviso of sub- section (1) of Section 17 read with provision of Order IX Rule 13 C.P.C. as well as Section 20 (2) of the U.P. Act no.13 of 1972 and held that the proviso is mandatory, the application seeking to set

aside decree or review must be accompanied by a deposit of decretal amount in Court. The application for dispensation of deposit can be filed upto the date of filling the application for setting aside the decree, and the proviso does not provide for extension of time. The court considered that the Order IX Rule 13 C.P.C. application had been moved by the tenant/ revisionist for setting aside ex parte decree before depositing the decretal amount as provided under Section 17 of the Act, therefore, Misc Case No. 2C of 2008 was rejected. However since the parties had agreed before the revisonal court. The Court had directed that if the revisionist deposits entire decreetal amount, the application under Order IX Rule 13 C.P.C. may be considered in accordance with law.

12. Learned counsel for the petitioners has placed reliance upon a judgment rendered by me in the matter under Article 227 No. 4089 of 2018 (Smt. Sushma Agarwal Vs. District Judge, Agra and 2 others) decided on 30.05.2018 wherein this Court after considering the Division Bench's judgment of Supreme Court in *Raj Kumar Makhija and others Vs. M/s SKS and Co. and others, 2000 (3) ARC 117* observed that it is duty of the applicant to calculate the correct decretal amount as per the decree and Court is not required to get the decretal amount calculated for the applicant. The Court can ignore the shortfall in deposit of a negligible amount on the principle of deminiuis. The Court had observed the bonafide intent of the tenant had undoubtedly been established in depositing the decreetal amount alongwith cost and interest and in compliance of the Section 17 of the Act and it is the relevant factor that has to be considered by the Court while allowing the application under Section 17 of the Act and the section itself was added to avoid possibility of a litigant taking advantage of recall application being moved without first establishing his bonafide to pursue the litigation further, and to avoid the decree holder from being prejudiced due to the pendency of the litigation. The tenant cannot be non-suited on a hyper technical ground.

13. Learned counsel for the petitioner to substantiate his arguments that subsequent event ought to have been brought to the notice of the learned Small Causes Court has referred the judgment rendered by Hon'ble Supreme Court in *Ramesh Kumar Vs. Kesho Ram, AIR 1992 SC 700* wherein para-4 it has been observed that the normal rule is that in any litigation the rights and obligations of the parties are adjudicated upon as they obtained at the commencement of the lis. But this is subject to an exception that whenever subsequent documents of fact or law which have a material bearing on the entitlement of the parties to relief or on aspects which bear on the molding of the relief occur, the court is not precluded from taking a "cautious cognizance' of the subsequent changes to mold the relief.

14. Learned counsel appearing on behalf of respondents however, has pointed out the plaint in suit filed by Gulab Devi mother of respondent no.2 wherein Smt. Gulab Devi has stated clearly that she had bought tenanted premises on 29.06.2009 and became its owner and landlord and the tenant had not given any rent to her till the date of filing of SCC suit for eviction in August, 2012. It has also been stated in the plaint that notice under section 106 of the Transfer of Property Act was served upon the tenant on 16.08.2012 till date they did not deposit any rent in favour of landlady. In the plaint, it was also stated that that

defendant no.1/Pradeep Kumar Singh was initially tenant but later on he sub-let the shop in question to defendant no.2/ Ram Gopal Singh .

15. It has been argued by Sudeep Senth that in the written statement that was fled by defendant They stated in para-15 that the owner and landlord of the shop in question was initially Babu Baldev Prasad Khare Advocate, and after his death his son and grand sons became owners of the property and defendant no.2 had bought the property from Arvind Khare son of late Satyadav Prasad Khare for a sum of Rs. 50,000/- and that before sale-deed was executed, defendant no.1 was the tenant of the property in question and that plaintiff/ Smt. Gulab Devi was not landlord or owner of the disputed shop. The written argument was filed by both the defendants jointly on 21.05. 2013, while the sale-deed they had relied upon was executed by Sri Arvind Khare on 16.01.2013 after filing of the SCC Suit in August, 2012. The sale-deed was made out by Sri Arvind Khare in favour of Sita Singh , wife of defendant no.1,and not in favour of defendant no.2 and a misleading reply had been given in the written statement filed by the defendant nos. 1 and 2 in SCC Suit .

16. Learned counsel for the respondent nos. 2 and 3 has also referred to a Will executed by Sri Baldev Prasad Khare dated 16/17.12.1985 in favour of his five sons and daughter of Krishna Dev Khare and his sister Sobha Srivastava children of Baldev Prasad Khare had inherited the disputed shops. It has been argued that sale deed of respondent no.2 and 3 is of a prior date i.e. 29.06.2009, whereas sale deed of the petitioners is of a later date i.e. 16.01.2013.

17. It has been argued by Sri Sudeep Seth that a perusal of the application filed under section 17 of the Act as well as an application under Section 5 of the Limitation Act and Order IX Rule 13 C.P.C. filed by the petitioner on 15.03.2018 would show that the knowledge of the ex parte decree dated 18.10.2017 was derived by the petitioners on 22.01.2018 or when the summons of execution case was served upon them on 18.01.2018 However, the petitioners did not file any application for recall nor deposit the amount under Section 17 of the Act within 30 days from the knowledge of ex parte decree. They waited till 15.03.2018 to file three applications simultaneously. Respondent nos. 2 and 3 raised an objection regarding maintainability of the application under Section 17 of the Act before the Small Causes Court which also noticed that shortfall was there in the amount that the petitioners had offered to deposit, yet the application was allowed. In the order passed by District Judge had correctly appreciated the law with regard to Section 17 of the Act and Order IX Rule 13 C.P.C. on the basis of judgment rendered by this Court by a Division Bench in Raj Kumar Makhija and others (supra) and *Vijay Kumar Agarwal Vs. Subhash Chandra and another, 2018 (141) RD 273* and also the Supreme Court's Judgment rendered in *Parimal Vs. Veena, AIR 2011 SC 1150* that "sufficient cause' has to be shown for condonation of delay and allowing the application for recall.

18. Learned counsel for the respondent has argued that on the basis of provisions of Article 123 of the Schedule attached to the Limitation Act, that limitation for filing an application for setting aside ex parte decree, is 30 days and,therefore, application under Section 17 of the Act should also be filed within 30 days from the date either of the decree, or

from the date of knowledge of ex parte decree.

19. It has been submitted that petitioners did not deposit the decretal amount alongwith interest as directed by learned Small Causes Court in decree dated 18.10.2017.They only offered to deposit through challan the decretal amount regarding arrears of rent to the tune of Rs. 14400/- and cost of litigation to the tune of Rs. 4800/- i.e. total Rs.19200/- without taking into account 12% interest incurred thereon from the date of decree till the date of offer to deposit. Learned counsel has read out various paragraphs of the Judgment of Raj Kumar Makhija and others (supra) and also of the judgment rendered by by this Court in Vijay Kumar Agarwal (supra) to say that there is limitation of 30 days of filing of application under Section 17 of the Act which has to be respected.

20. He has also argued that learned District Judge was considering only the legality of the order dated 06.09.2019, allowing the application under Section 17, Order IX Rule 13 and Section 5 of the Limitation Act. He was not supposed to go into the merit of the decree and the decree was also not challenged before the writ petition.The arguments raised by learned counsel for the petitioners with regard to merit of their case and that the learned trial court should have returned the plaint under section 23 of the Act are irrelevant the controversy being decided by this Court in this writ petition.

21. Learned counsel for the respondents has also pointed out that sufficient cause as has been explained in the judgment rendered in the case of Parimal and others (supra) judgments of this Court relating to of bonafide attempt by the defendant who appeared later and they do not give any relaxation to a defendant, who having knowledge of the proceedings deliberately avoids appearing in the case. He has pointed out from the Medical Certificate issued by doctor concerned to the petitioner no.1 on page 91 and page 93 of the paper book that they have been issued referring to future dates and also that this fact has been considered by the District Judge to come to the conclusion that medical certificates are apparently fabricated documents .

22. Learned counsel for the respondents have also pointed out that in regular suit filed for cancellation of sale-deed the defendants continued to appear. The petitioner no.1 in fact appeared on three dates during the time when he was allegedly ill in between 16.07.2017 to 14.01. 2018.

23. In ***Parimal versus Veena AIR 2011 Supreme Court 1150*** Supreme Court was considering a case where summon was tried to be served upon the wife of the Appellant twice. Each time the process server reported that she read the summons but refused to accept it. The court thereafter directed publication in the newspaper which was sent to her address. The newspaper was placed on record and not rebutted by the wife in any manner. After service by publication as well as by affixation the case was proceeded ex parte in the divorce proceedings. The marriage was dissolved by the Learned trial court. Two years after passing of the decree the appellant got married. He had children from the second marriage. After expiry of four years of passing of the ex parte decree the wife moved an application under Order IX rule 13 of the CPC along with an

application under Section 5 of the Indian limitation Act for condonation of delay in moving the same. The trial court examined the issues at length and came to the conclusion that the respondent wife had miserably failed to establish the grounds taken by her in her application to set aside ex parte decree. The application was rejected. However the Delhi High Court allowed the First Appeal. Against such order, the appellant approached the Supreme Court.The Supreme Court considered the language of Order IX Rule 13 and the proviso thereof and then observed in paragraphs 8,9 and 12 as follows :-

"8. Shri M.C. Dhingra, learned counsel appearing for the appellant has submitted that the service stood completed in terms of statutory provisions of CPC by the refusal of the respondent to take the summons. Subsequently, the registered post was also not received by her as she refused it. It was only in such circumstances that the trial court entertained the application of the appellant under Order 5 Rule 20 CPC for substituted service. The summons were served by publication in the daily newspaper National Herald published from Delhi which has a very wide circulation and further service of the said newspaper on the respondent wife by registered post. The High Court committed a grave error by taking into consideration the conduct of the appellant subsequent to the date of decree of divorce which was totally irrelevant and unwarranted for deciding the application under Order 9 Rule 13 CPC. More so, the High Court failed to take note of the hard reality that after two years of the ex parte decree the appellant got married and now has two major sons from the second wife. Therefore, the appeal deserves to be allowed and the judgment impugned is liable to be set aside.

9. On the contrary, Ms Geeta Dhingra, learned counsel appearing for the respondent wife has vehemently opposed the appeal, contending that once the respondent wife made the allegations of fraud and collusion of the appellant with the postman, etc. as he succeeded in procuring the false report, the burden of proof would be upon the appellant and not upon the respondent wife to establish that the allegations of fraud or collusion were false. The conduct of the appellant even subsequent to the date of decree of divorce i.e. not disclosing this fact to the respondent wife during the proceedings under Section 125 CrPC, disentitles him from any relief before this Court of equity. No interference is required in the matter and the appeal is liable to be dismissed.

12. It is evident from the above that an ex parte decree against a defendant has to be set aside if the party satisfies the court that summons had not been duly served or he was prevented by sufficient cause from appearing when the suit was called on for hearing. However, the court shall not set aside the said decree on mere irregularity in the service of summons or in a case where the defendant had notice of the date and sufficient time to appear in the court. The legislature in its wisdom, made the second proviso mandatory in nature. Thus, it is not permissible for the court to allow the application in utter disregard of the terms and conditions incorporated in the second proviso herein."

It then observed that the Delhi High Court should not have interfered in the Trial Court order and allowed the appeal.

24. In *Rajkumar Makhija* (supra), the Division Bench of this Court was considering whether the proviso to section 17 of the Provincial Small causes Court Act completely bars any rectification or removal of a bona fide error after the expiry of the period of limitation when substantial compliance by way of deposit of the decretal amount and furnishing security has been made within the period of limitation particularly when Section 5 of the Limitation Act 1963 has been made applicable to Order IX Rule 13 of the Code of Civil Procedure?

25. The Division Bench was considering a case where the cash amount deposited by the applicant towards pendante lite and future damages covered only 117 months whereas the actually 125 months rent was liable to be deposited under the Proviso to Section 17 of the Act. The amount was found to be short for eight months. The case of the applicant was that monthly rent was Rs.700/- but the ex-parte decree had wrongly decided the rate of pendente lite and future rent as Rs.1000 per month. The court observed on the basis of judgement rendered by the Supreme Court in the case of Kedarnath versus Mohanlal Kesarwani (supra) that the defendant did not file any application for permission to furnish security instead of cash deposit. The defendant applicant deposited rent at the rate of Rs.700/- per month along with the cost of the suit. The Court considered the language of the Proviso to Section 17 of the Act and observed that the applicant must either deposit in the Court the amount due from him under the decree, or in pursuance of the judgement give a security for the performance of the decree for compliance with the judgement as the Court may on a previous application made by him in this behalf, have directed.

26. The Division Bench observed that a Full Bench of Allahabad High Court in ***Ram Bharose versus Ganga Singh 1931 ALJR 1049***, was considering a case where the application was accompanied with security bond which was large enough to cover the decretal amount. The Court held that the application was filed within time and the order for furnishing the security was passed after 30 days, the proviso to section 17 stood complied with. However where shortfall in cash deposit was not accompanied with any application for depositing security large enough to cover the decretal amount, such an application should be rejected as the proviso to section 17 of the act is mandatory. The Supreme Court in the case of Kedarnath (supra) had observed the Objects and Reasons of the 1935 Amendment to the Act, and observed that the proviso was couched in such language which could not be treated to be directory. The Court observed that the proviso does not provide for the extension of time by which an application for dispensation of deposit in cash may be filed along with an application for furnishing security, however, it should be filed at any time up to the time of presentation of the application for setting aside ex parte decree, or for review, and the Court may treat it as a previous application. The obligation of the applicant is to move a previous application for dispensation. It is then for the Court to make a prompt order. The compliance of the proviso has to be made by a person within a specified time, that is prior to the filing of the application for setting aside the ex parte decree. The applicant is required to deposit the entire amount due under the decree and also to apply for furnishing security which will cover the entire decretal amount in case of any shortfall. If there is a shortfall, the consequence would be that the proviso to

section 17 which is mandatory has not been complied and the application would be rejected. The court also considered the applicability of Section 5 of the Limitation Act to late deposit of the decretal amount. It observed in paragraph 22 that it does not apply to such deposit. The proviso to section 17 talks about filing of a previous application for furnishing security prior to the application for setting aside the ex parte decree. The period for limitation for filing such application has been provided under the said proviso.

27. The Division Bench considered the observations made by the Supreme Court in the case of ***Naseeruddin and others versus Sitaram Aggarwal JT 2003(2)SC 56,*** and observed that a similar controversy was being dealt with by the Supreme Court and while considering the Rajasthan Rent Control Act it was observed that if there is a provision giving power to the court to extend the prescribed period of limitation and condone the delay in default of payment of rent, the court can condone the delay, but not otherwise. A clear line of distinction has been drawn between the provisions providing applicability of Section 5 of the Limitation Act to the deposits and the legal provisions bereft of applicability of section 5 of the Limitation Act, to such deposits. It was held that where the statute does not provide either for extension of time or to condone the default in depositing the rent within the stipulated period, the court does not have power to do so. Where the Statute prescribes a specific period within which the deposit has to be made, provision of Section 5 of the Limitation Act cannot be extended if the default takes place. The Court observed that there is no provision under section 17 of the Act conferring power on the Court to condone the delay in complying with its conditions. It is not correct to say that Section 5 of the Limitation Act would still be available to such person who has committed default in making the full deposit and the Court can condone the delay in making the deposit. The Court considered the argument raised regarding substantial compliance of the proviso to section 17 of the Act but observed that as per the language of the proviso if the deposit made by the tenant falls short of amount required to be deposited, the tenant will be deprived of the benefit, even if shortfall in such deposit was because of tenant's ignorance or without any malafide intention. There being a shortfall of the amount required to be deposited, the application for setting aside the ex parte decree will not be maintainable, for want of compliance of the proviso to section 17 of the Act. In such a case even the bonafides of the tenant are not relevant. What is required to be seen is the amount that is not paid or deposited on the due date. If the amount is found to be small, which is of no Consequence, the Court would be justified in ignoring the said mistake by extending the doctrine of "de minimis non curat lex' to such a case. As to what is the case deserving to benefit of the aforesaid Rule is again a question of fact to be decided on a case to case basis. The Court considered that the applicant before it had taken a conscious decision to deposit the amount at a lower rate, than the amount specified in the ex-parte degree itself. This being so, it could not be said by any stretch of imagination that there was a compliance of the proviso to section 17 of the Act in any manner, or it is a case of bonafide mistake or mistake in calculation. The applicant had a duty to calculate the correct decretal amount as per the decree and the Court was not required to get the decretal amount calculated for the applicant.

28. In the instant writ petition the decretal amount had to be deposited along

with 12% interest incurred thereon from the date of decree till the date of offer to deposit. The writ petitioners had deposited Rs.19,200 only and had made no application to the court saying that they were ready and willing to deposit security for any amount which was further found due on them. The Munsarim put up a report that the amount that was offered by way of application by the tenants was short by two thousand rupees. The application should have been rejected on this ground alone.

29. Having heard learned counsel for the parties and having gone through the order impugned, this Court is of the opinion that learned District Judge has correctly appreciated the fact as well as the law, and there is no legal and factual infirmity in the order impugned.

30. The writ petition is **dismissed** as devoid of merit.

31. Costs made easy.

(2021)09ILR A833
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 28.09.2021

BEFORE

THE HON'BLE RAJAN ROY, J.
THE HON'BLE RAVI NATH TILHARI, J.

Misc. Bench No. 13940 of 2021

Shishir Patel ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Sharad Pathak, Gaurav Shukla, Piyush Pathak

Counsel for the Respondents:
A.S.G., Kumar Sambhav

A. Words & phrases - legitimate expectation - The law is settled that a legitimate expectation, even wehn made out, does not always entitle the expectant to a relief. Public interest, change in policy, conduct of the expectant or any other valid or bonafide reason given by the decision-maker, may be sufficient to negative the legitimate expectation. (Para 23)

In pursuance to an advertisement issued by the Indian Oil Corporation (IOC) for award of Regular Retail Outlet Dealership, the petitioner was given the opportunity to provide suitable piece of land at the advertised location vide letter dated 04.09.2019. Thereafter, the petitioner entered into a lease agreement for 20 years on rent/premium with a private person. The Brochure classified the applicants into three categories based on the land offered or land not offered by them in the application. After perusing the clauses of the brochure, The Court is of the view that mere offer of land to the IOC by the applicant may be in Group 1, 2 or 3 does not give rise to any legitimate expectation to get the dealership of the Retail Outlet as the offered land must be a suitable land confirming to the specified criteria and also satisfying other conditions with respect to offering of land. Moreover, the company reserve the right to cancel/withdraw the advertisement, as it is sole discretion. (Para 22)

Furthermore, the Court find the reasoning given by the Corporation to be valid and bona fide for cancelling the subject location i.e., wrong description and publication of the name of district in the advertisement. **The error in the advertisement with respect to subject location contravenes the principles of fairness and transparency in the matter of grant of dealership of the Retail Outlet. (Para 24)**

Writ Petition Rejected. (E-10)

List of Cases cited:

1. St. of M.P. & anr. Vs Shri Ram Ragubhir Prasad Agarwal & ors. (1979) 4 SCC 686

2. ICICI Bank & anr. Vs Municipal Corporation of Greater Bombay & ors. (2005) 6 SCC 404

3. U.O.I. Vs Hindustan Development Corporation (1993) 3 SCC 499

4. Ram Pravesh Singh Vs St.of Bihar (2006) 8 SCC 381

5. Kerala State Beverages (M and M) Corp. Ltd. & ors. Vs P.P. Suresh & ors. (2019) 9 SCC 710

(Delivered by Hon'ble Ravi Nath Tilhari, J.)

1. Heard Sri Sharad Pathak, learned counsel for the petitioner. Learned A.S.G. and Sri Kumar Sambhav, learned counsels appearing for the opposite parties and perused the material on record.

2. This writ petition has been filed for the following main relief:

"i) issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 18.05.2021 issued by opposite party No.4 for cancellation of location between Kilometer Stone No. 45 and 48 at NH-128 Sultanpur Akbarpur Road (Annexure No.1).

ii) Issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 13.01.2021 (Annexure No.2).

iii) Issue a writ, order or direction in the nature of mandamous commanding the opposite parties to take steps including issuing letter of intent to petitioner for awarding of Retail Outlet Dealership on location in between Kilometer Stone No. 45 and 48, NH-128, Sultanpur Akbarpur Road."

3. Facts of the case are that in pursuance to an advertisement dated 24.11.2018 issued by the Indian Oil Corporation (10C) for award of Regular Retail Outlet Dealership, the petitioner had applied for one of the locations, location No. 268 between Kilometer Stone No. 45 and 48 at NH-128 Sultanpur-Akbarpur Road, District Ambedkar Nagar which district was erroneously published in the advertisement, correct being District Sultanpur. As the petitioner had not offered any land in terms of item No. 4 (v) of the Brochure on selection of dealers for Regular and Rural Retail outlets (in short "the Brochure"), he was placed in Group 3 and one Mahima Gupta was selected to whom a letter of intent dated 12.01.2019 was issued, but as the Initial Security Deposit (ISD) and the documents for further selection process were not submitted her candidature was cancelled and her name was placed in Group 3. The petitioner was then given the opportunity to provide suitable piece of land at the advertised location/stretch vide letter dated 04.06.2019. To offer the land, the petitioner entered into a lease agreement with one Ram Charitra for 20 years and informed the opposite parties through e-mail on 04.09.2019. However, the letter of intent was not issued and vide communication letter dated 13.01.2020 it was informed that the subject location No. 268 was cancelled against which the petitioner filed Writ Petition No. 6632 (MB) of 2020: Shishir Patel Vs. Union of India and others, but in the meantime, as the Indian Oil Corporation vide letter dated 04.03.2020, kept the letter dated 13.01.2020 in abeyance, the writ petition was disposed of finally vide order dated 05.03.2020 providing that no further direction was required, however, granting liberty to the petitioner to assail the order, if any adverse

action was taken against him. On 29.01.2021 the petitioner submitted a representation for decision being taken in the matter and also filed Writ Petition No. 5366 (MB) of 2021, but as the opposite party No.4-Deputy General Manager (RS) Allahabad Divisional Office, by order dated 18.05.2021 decided the representation giving the reasons for cancellation, the petitioner challenging the orders dated 13.01.2020 and 18.05.2021 filed the present petition.

4. Sri Sharad Pathak, learned counsel for the petitioner has submitted that the cancellation of the location after more than two and half years of the advertisement at this belated stage is illegal and arbitrary. The reason assigned for cancellation i.e. the error in publication of district Ambedkar Nagar, instead of correct district Sultanpur was a typographical error and was not material. He submitted that in pursuance of the letter of the Indian Oil Corporation dated 04.06. 2019 the petitioner having entered into a lease agreement, to offer land to the Indian Oil Corporation, acquired a legitimate expectation of getting the Retial Outlet dealership which could not, now, be denied.

5. Learned counsel for the opposite parties submitted that the order dated 18.05.2021 is speaking one and assigns the reasons for cancellation of the location, which is error in the publication of the name of district Ambedkar Nagar, whereas the location falls in district Sultanpur and on noticing this mistake the subject location was cancelled and communication dated 13.01.2020 was made as the land should be in the advertised area/stretch and wrong description of the district must have deprived many eligible prospective candidates from participating in the selection process which is required to be fair and transparent and under the circumstances the plea of legitimate expectation is not open to the petitioner.

6. We have considered the submissions advanced by the learned counsels for the parties and perused the material on record.

7. The reason assigned in the order dated 18.05.2021 for cancellation of the subject location, is that it falls in district Sultanpur and not in district Ambedkar Nagar which was erroneously advertised. It has not been disputed by the petitioner that the subject location falls in district Sultanpur but in the advertisement district Ambedkar Nagar was published.

8. The procedure for selection, as per Clause 14 of the Brochure, with respect to the advertisement reads as under:

"14. Selection Procedure

Selection will be basically made through draw of lots or bidding process depending upon the type of Retail outlet site as defined in Clause 3. This will also be indicated against each location in the advertisement.

A. Draw of Lots

Selection through draw of lots amongst eligible candidates will be made for:

.Corporation Owned Dealer operated outlets under Corpus Fund Scheme (CFS sites)

.Dealer Owned Dealer Operated outlets ("B" / "DC" sites)

B. Bidding Process

Selection through Bidding process will be made for Corporation Owned Dealer Operated Sites ("A" / "CC" sites) except for Corpus fund locations mentioned above. However, in case of tie in bid amount, selection will be made through Draw of Lots amongst tied up bidders.

***C Advertisement** :*

Advertisements will be released in Newspapers intimating selection of RO dealerships.

All details in this regard like name of RO location, District, State, Category etc. will be hosted in website www.petrolpumpdealerchayan.in

*Guidelines for selection (Brochure) will also be hosted in website**www.petrolpumpdealerchayan.in***

*Brochure for Selection of Retail Outlet dealerships can be down loaded from the website OMCS/ **www.petrolpumpdealerchayan.in** free of cost.*

Interested applicants should go through the Brochure carefully for filling up their application form."

9. Thus Clause 14 C of the Brochure clearly provides for release of advertisements in newspapers intimating selection of Retail Outlet dealership, filling all the details like name of the Retail Outlet location, district, State, Category etc.

10. T he error in the advertisement with respect to the district in which the subject location falls would also not be in consonance with the principles of fairness and transparency in the matter of grant of dealership.

11. Clause 14C of the Brochure provides that advertisements will be "released". One of the meanings of "release" is to publish. In the context of release of an advertisement in the newspapers, it would mean the publication of the advertisement in the newspapers. In **State of Madhya Pradesh and another Vs. Shri Ram Ragubir Prasad Agarwal and others (1979) 4 SCC 686,** it has been held that "Contextually speaking, we are satisfied that 'Publication' means more than mere communication to concerned officials or departments. To publish a news item is to make known to people in general; "an advising of the public or making known of something to the public for a purpose". In our view, the purpose of Section 3 animates the meaning of the expression "publish'. "Publicaiton' is "the act of publishing anything; offering it to public notice, or rendering it accessible to public scrutiny.....an advising of the public; making known of something to them for a purpose".

12. "Advertisement" in common parlance means to make publicly known an information by some device and to draw or attract attention of public/individual concerned to such information. In **ICICI Bank and another Vs. Municipal Corporation of Greater Bombay and others (2005) 6 SCC 404**, the Hon'ble Apex Court, held that an advertisement is a matter that draws attention of the public or segment of public to a product, service, person, organization or line of conduct in a manner calculated to promote or oppose directly or indirectly that product, service, person,

organization or line of conduct intended to promote sale or use of product or range of products. Paragraphs, 14 and 15 of the **ICICI Bank (supra)** are quoted as under:

"14. .....The dictionary definitions of the word 'advertisement' are as under :-

BLACK'S LAW DICTIONARY, 8TH EDITION

Advertising -1. The action of drawing the public's attention to something to promote its sale. 2 The business of producing and circulating advertisements

LAW AND COMMERCIAL DICTIONARY

Advertisement - Notice given in a manner designed to attract public attention. Edwards v. Lubbock Country, Information communicated to the public, or to an individual concerned, as by handbills, newspaper, television, bill-boards, radio. First Nat. Corporation v. Perrine.

NEW ENCYCLOPAEDIA BRITTANICA VOLUME-I

Advertising.- the techniques used to bring products. services, opinions, or causes to public notice for the purpose of persuading the public to respond in a certain way toward what is advertised. Most advertising involves promoting a good that is for sale, but similar methods are used to encourage people to drive safely, to support various charities, or to vote for political candidates, among many other examples.

COLLINS DICTIONARY OF ENGLISH LANGUAGE

Advertisement- any public notice, as a printed display in a newspaper, short film on television, announcement on radio, etc designed to sell goods, publicize an event, etc.

Advertising -(1) the action or practice of drawing public attention to goods, services, events etc., as by the distribution of printed notices, broadcasting. etc. 2) the business that specializes in creating such publicity, 3) advertisements collectively: publicity.

THE CHAMBERS DICTIONARY

Advertisement - the act of advertising; a public notice with the purpose of informing and / or changing public attitudes and behaviour; a short performance recorded for radio, T.V. etc. to advertise goods or services; news.

15. An advertisement is a matter that draws attention of the public or segment of public to a product, service, person, organization or line of conduct in a manner calculated to promote or oppose directly or indirectly that product, service, person, organization or line of conduct intended to promote sale or use of product or range of products. An advertisement is an information that producer provides about its products or services. An advertisement tries to get consumers to buy a product or a service. An advertisement is generally of goods and services and is an information intended for the potential customers and not a mere display of the name of the company unless the same happens to be a trade mark or trade name."

13. Thus, release of advertisement in newspaper is not an empty formality. The purpose is to make publicly known an information and to attract the attention of the public/individual concerned to such

information for the purposes for which such advertisement is published or released. In the context of the selection for the Retail Outlet Dealership, the purpose of the advertisement is to make publicly known that at a particular location the dealership of Retail Outlet is to be granted, inviting and attracting the attention of the public to such information to enable the willing persons to apply for the same. The information, therefore, must be correct and complete. Incomplete information or incorrect information defeats the object of the publication as in such a case the attention of the public shall not be drawn to the correct information which may result in depriving many willing and eligible persons to respond to the information published.

14. We now proceed to consider the submission of the petitioner's counsel based on the doctrine of legitimate expectation. His submission is that the petitioner entered into lease agreement with a private person to offer the land to the Corporation in pursuance of letter of the Corporation dated 04.06.2019 and once, the petitioner, acting upon the said letter, entered into twenty years lease agreement with the private person, the petitioner cannot be denied the dealership of Retail Outlet.

15. In order to consider the above submission we proceed to consider the doctrine of legitimate expectation and whether in the facts and circumstances of the case, the petitioner had any legitimate expectation based upon which the relief as prayed can be granted to the petitioner.

16. The doctrine of legitimate expectation has been elaborately discussed; its dimensions explained and law laid down in the leading case of **Union of India Vs. Hindustan Development Corporation reported in (1993) 3 SCC 499** followed in the subsequent judgments, We would refer to the Case of **Ram Pravesh Singh Vs. State of Bihar (2006) 8 SCC 381** in which the Hon'ble Supreme Court has held as under in paragraphs 15 to 20 :

"15. What is legitimate expectation? Obviously, it is not a legal right. It is an expectation of a benefit, relief or remedy, that may ordinarily flow from a promise or established practice. The term 'established practice' refers to a regular, consistent predictable and certain conduct, process or activity of the decision-making authority. The expectation should be legitimate, that is, reasonable, logical and valid. Any expectation which is based on sporadic or casual or random acts, or which is unreasonable, illogical or invalid cannot be a legitimate expectation. Not being a right, it is not enforceable as such. It is a concept fashioned by courts, for judicial review of administrative action. It is procedural in character based on the requirement of a higher degree of fairness in administrative action, as a consequence of the promise made, or practice established. In short, a person can be said to have a 'legitimate expectation' of a particular treatment, if any representation or promise is made by an authority, either expressly or impliedly, or if the regular and consistent past practice of the authority gives room for such expectation in the normal course. As a ground for relief, the efficacy of the doctrine is rather weak as its slot is just above 'fairness in action' but far below 'promissory estoppel'. It may only entitle an expectant : (a) to an opportunity to show cause before the expectation is dashed; or (b) to an explanation as to the cause for denial. In appropriate cases, courts may grant a direction requiring the

Authority to follow the promised procedure or established practice. A legitimate expectation, even when made out, does not always entitle the expectant to a relief. Public interest, change in policy, conduct of the expectant or any other valid or bonafide reason given by the decision-maker, may be sufficient to negative the 'legitimate expectation'.

The doctrine of legitimate expectation based on established practice (as contrasted from legitimate expectation based on a promise), can be invoked only by someone who has dealings or transactions or negotiations with an authority, on which such established practice has a bearing, or by someone who has a recognized legal relationship with the authority. A total stranger unconnected with the authority or a person who had no previous dealings with the authority and who has not entered into any transaction or negotiations with the authority, cannot invoke the doctrine of legitimate expectation, merely on the ground that the authority has a general obligation to act fairly.

16. In ***Union of India V. Hindustan Development Corporation [1993 (3) SCC 499],*** *this Court explained the nature and scope of the doctrine of 'legitimate expectation' thus : (SCC P. 540, para 28)*

"For legal purposes, the expectation cannot be the same as anticipation. It is different from a wish, a desire or a hope nor can it amount to a claim or demand on the ground of a right. However earnest and sincere a wish, a desire or a hope may be and however confidently one may look to them to be fulfilled, they by themselves cannot amount to an assertable expectation and a mere disappointment does not attract legal consequences. A pious hope even leading to a moral obligation cannot amount to a legitimate expectation. The legitimacy of an expectation can be inferred only if it is founded on the sanction of law or custom or an established procedure followed in regular and natural sequence. Again it is distinguishable from a genuine expectation. Such expectation should be justifiably legitimate and protectable. Every such legitimate expectation does not by itself fructify into a right and therefore it does not amount to a right in the conventional sense."

[Emphasis supplied]

17. This Court also explained the remedies flowing by applying the principle of legitimate expectation : (SCC pp. 546-47, para 33)

"it is generally agreed that legitimate expectation gives the applicant sufficient locus standi for judicial review and that the doctrine of legitimate expectation is to be confined mostly to right of a fair hearing before a decision which results in negativing a promise or withdrawing an undertaking is taken. The doctrine does not give scope to claim relief straightaway from the administrative authorities as no crystallized right as such is involved. The protection of such legitimate expectation does not require the fulfillment of the expectation where an overriding public interest requires otherwise. In other words where a person's legitimate expectation is not fulfilled by taking a particular decision then decision-maker should justify the denial of such expectation by showing some overriding public interest. Therefore even if substantive protection of such expectation is contemplated that does not grant an

absolute right to a particular person. It simply ensures the circumstances in which that expectation may be denied or restricted. A case of legitimate expectation would arise when a body by representation or by past practice aroused expectation which it would be within its powers to fulfil. The protection is limited to that extent and a judicial review can be within those limits. But as discussed above a person who bases his claim on the doctrine of legitimate expectation, in the first instance, must satisfy that there is a foundation and thus has locus standi to make such a claim. In considering the same several factors which give rise to such legitimate expectation must be present. The decision taken by the authority must be found to be arbitrary, unreasonable and not taken in public interest. If it is a question of policy, even by way of change of old policy, the courts cannot interfere with a decision. In a given case whether there are such facts and circumstances giving rise to a legitimate expectation, it would primarily be a question of fact. If these tests are satisfied and if the court is satisfied that a case of legitimate expectation is made out then the next question would be whether failure to give an opportunity of hearing before the decision affecting such legitimate expectation is taken, has resulted in failure of justice and whether on that ground the decision should be quashed. If that be so then what should be the relief is again a matter which depends on several factors." (emphasis supplied).

18. In ***Punjab Communication Ltd. v. Union of India- 1999 (4) SCC 727, this Court observed : (SCC pp. 729-30)***

"The principle of legitimate expectation is still at a stage of evolution. The principle is at the root of the rule of law and requires regularity, predictability and certainty in the Governments dealings with the public The procedural part of it relates to a representation that a hearing or other appropriate procedure will be afforded before the decision is made."

"However, the more important aspect is whether the decision maker can sustain the change in policy by resort to Wednesbury principles of rationality or whether the court can go into the question whether the decision-maker has properly balanced the legitimate expectation as against the need for a change.. In sum, this means that the judgment whether public interest overrides the substantive legitimate expectation of individuals will be for the decision-maker who has made the change in the policy. The choice of the policy is for the decision-maker and not for the court. The legitimate substantive expectation merely permits the court to find out if the change in policy which is the cause for defeating the legitimate expectation is irrational or perverse or one which no reasonable person could have made."

19. Recently, a Constitution Bench of this Court in Secretary, State of Karnataka v. Umadevi [2006 (4) SCC 1] referred to the circumstances in which the doctrine of legitimate expectation can be invoked thus : (SCC pp.38-39, para 46)

"The doctrine can be invoked if the decisions of the administrative authority affect the person by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there have been communicated to him some rational grounds for withdrawing it on which he has

been given an opportunity to comment; or (ii) he has received assurance from the decision-maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn."

20. Another Constitution Bench, referring to the doctrine, observed thus in Confederation of Ex-servicemen Associations vs. Union of India: (SCC pp. 416-17, paras 33 & 35)

"33.....No doubt, the doctrine has an important place in the development of Administrative Law and particularly law relating to 'judicial review'. Under the said doctrine, a person may have reasonable or legitimate expectation of being treated in a certain way by an administrative authority even though he has no right in law to receive the benefit. In such situation, if a decision is taken by an administrative authority adversely affecting his interests, he may have justifiable grievance in the light of the fact of continuous receipt of the benefit, legitimate expectation to receive the benefit or privilege which he has enjoyed all throughout. Such expectation may arise either from the express promise or from consistent practice which the applicant may reasonably expect to continue."

35. "In such cases, therefore, the Court may not insist an administrative authority to act judicially but may still insist it to act fairly. The doctrine is based on the principle that good administration demands observance of reasonableness and where it has adopted a particular practice for a long time even in absence of a provision of law, it should adhere to such practice without depriving its citizens of the benefit enjoyed or privilege exercised."

17. *Recently, in* ***Kerala State Beverages (M and M) Corporation Limited and others Vs. P.P. Suresh and others (2019) 9SCC710*** the Hon'ble Supreme Court held as under in paragraphs 15 to 20 and 23 to 25, which are being reproduced as under:-

"***B. Legitimate Expectation***

14. .....

15. The principle of legitimate expectation has been recognized by this Court in Union of India v. Hindustand Development Corporation & Ors. If the promise made by an authority is clear, unequivocal and unambiguous, a person can claim that the authority in all fairness should not act contrary to the promise.

16. M. Jagannadha Rao, J. elaborately elucidated on legitimate expectation in ***Punjab Communications Ltd. v. Union of India and Ors*** *. He referred (at SCC pp. 741-42, para 27) to the judgment in Council of Civil Service Unions and Ors. v. Minister for the Civil Service in which Lord Diplock had observed that for a legitimate expectation to arise, the decisions of the administrative authority must affect the person by depriving him of some benefit or advantage which,*

" 27.....(i) he had in the past been permitted by the decision- maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on

which he has been given an opportunity to comment; or

(ii) he has received assurance from the decision-maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.

17. Rao, J. observed in this case, that the procedural part of legitimate expectation relates to a representation that a hearing or other appropriate procedure will be afforded before the decision is made. The substantive part of the principle is that if a representation is made that a benefit of a substantive nature will be granted or if the person is already in receipt of the benefit, that it will be continued and not be substantially varied, then the same could be enforced.

18. It has been held by R. V. Raveendran, J. in Ram Pravesh Singh v. State of Bihar that legitimate expectation is not a legal right. Not being a right, it is not enforceable as such. It may entitle an expectant (SCC p. 391, para 15)

"(a) to an opportunity to show cause before the expectation is dashed;

or

(b) to an explanation as to the cause of denial. In appropriate cases, the Courts may grant a direction requiring the authority to follow the promised procedure or established practice.

Substantive Legitimate Expectation

19. An expectation entertained by a person may not be found to be legitimate due to the existence of some countervailing consideration of policy or law. Administrative policies may change with changing circumstances, including changes in the political complexion of governments. The liberty to make such changes is something that is inherent in our constitutional form of government.

20. The decision makers' freedom to change the policy in public interest cannot be fettered by applying the principle of substantive legitimate expectation. So long as the Government does not act in an arbitrary or in an unreasonable manner, the change in policy does not call for interference by judicial review on the ground of a legitimate expectation of an individual or a group of individuals being defeated.

21. .....

Procedural Legitimate Expectation

22. .....

23. ***In case of a complaint that an administrative authority has reneged from a promise without giving an opportunity of hearing which was the past practice, a claim of legitimate expectation can be raised. In other words,*** *if the policy or practice was to give an opportunity before the benefit is withdrawn, the non-compliance of such a practice would result in defeating the legitimate expectation of an individual or group of individuals. In Attorney General of Hong Kong v. Ng Yuen Shiu, the Privy Council was concerned with a dispute relating to an assertion of legitimate expectation of hearing, by an*

illegal immigrant. The Respondent in that case entered Hong Kong illegally and remained for a long period of time without being detected. He became part owner of a factory which employed several workers. A change in immigration policy was announced whereby illegal immigrants would be interviewed in due course, but no guarantee was given that they would not be removed from Hong Kong. The Respondent approached the immigration authorities for interview and after being interviewed he was detained until a removal order was made by the Director of Immigration. His appeal was dismissed by the Immigration Tribunal. The Court of Appeal of Hong Kong granted the Respondent an order of prohibition till an opportunity was given to him to explain the circumstances of his case before the Director. The Appeal filed by the Attorney General of Hong Kong was dismissed by the Privy Council. The only question raised by the Respondent in the Appeal was whether he was entitled to have a fair inquiry under common law, before a removal order was made against him. ***Without expressing any opinion on violation of principles of natural justice, the right of hearing of the Respondent in the peculiar facts of the case was adjudicated upon. It was held that the Respondent had a ''legitimate expectation' of being accorded a hearing before an order of removal was passed.***

24. We have referred to the above judgment to demonstrate that there can be situation where the very claim made can be with regard to an opportunity not being given before withdrawing a promise which results in defeating the ''legitimate expectation'.

25. The principle of procedural legitimate expectation would apply to cases where a promise is made and is withdrawn without affording an opportunity to the person affected. The imminent requirement of fairness in administrative action is to give an opportunity to the person who is deprived of a past benefit. In our opinion, there is an exception to the said rule. If an announcement is made by the Government of a policy conferring benefit on a large number of people, but subsequently, due to overriding public interest, the benefits that were announced earlier are withdrawn, it is not expedient to provide individual opportunities to such innominate number of persons. In other words, in such cases, an opportunity to each individual to explain the circumstances of his case need not be given. In Union of India v. Hindustan Devlopment Corporation and Ors. (supra) it was held that in cases involving an interest based on legitimate expectation, the Court will not interfere on grounds of procedural fairness and natural justice, if the deciding authority has been allotted a full range of choice and the decision is taken fairly and objectively."

18. In view of the aforesaid, some of the following principles of law on legitimate expectation may be summarized as under:-

(1) Legitimate expectation is an expectation of a benefit, relief or remedy, that may ordinarily flow from a promise or established practice. The term 'established practice' refers to a regular, consistent predictable and certain conduct, process or activity of the decision-making authority. The expectation should be legitimate, that is, reasonable, logical and valid. Any expectation which is based on sporadic or casual or random acts, or which is unreasonable, illogical or invalid cannot be a legitimate expectation. The expectation

cannot be the same as anticipation. It is different from a wish, a desire or a hope, however earnest and sincere a wish, a desire or a hope may be.

(2) A person can be said to have a 'legitimate expectation' of a particular treatment, if any representation or promise is made by an authority, either expressly or impliedly, or if the regular and consistent past practice of the authority gives room for such expectation in the normal course.

(3) It is not a legal right and as such a legitimate expectation, even if made, does not entitle the expectant to relief straightaway from the administrative authorities.

(4) It is procedural in character based on the requirement of a higher degree of fairness in administrative action, as a consequence of the promise made, or practice established.

(5) Legitimate expectation if made may only entitle an expectant : (a) to an opportunity to show cause before the expectation is dashed; or (b) to an explanation as to the cause for denial.

(6) However, the requirement of fairness in administrative action by giving an opportunity of hearing to the expectant is not in all cases but is where such person is deprived of a past benefit.

(7) If some policy is announced conferring benefit on a large number of people but is subsequently withdrawn or changed due to overriding public interest, an opportunity to each individual to explain the circumstances of his case need not be given.

(8) Public interest, change in policy, conduct of the expectant or any other valid or bonafide reason given by the decision-maker, may be sufficient to negative the legitimate expectation, even if made out.

(9) So long as the Government does not act in an arbitrary or in an unreasonable manner interference by judicial review on the ground of legitimate expectation is not called for. The Court will not interfere on grounds of procedural fairness and natural justice, if the deciding authority has been allotted a full range of choice and the decision is taken fairly and objectively.

(10) A person who bases his claim on the doctrine of legitimate expectation, in the first instance, must satisfy that there is a foundation and thus he has locus standi to make such a claim. The decision taken by the authority must be found to be arbitrary, unreasonable and not taken in public interest.

(11) Whether there are such facts and circumstances giving rise to a legitimate expectation, it would primarily be a question of fact in each case.

19. Keeping in view the aforesaid principles on legitimate expectation, we now proceed to consider the petitioner's case to determine if the petitioner can be said to have legitimate expectation.

20. The only ground on which the petitioner claims legitimate expectation is that he entered into a lease agreement for 20 years on rent/premium with a private person pursuant to the Corporation's letter dated 04.09.2019 asking him to offer suitable land, and if such a letter had not

been given, he would not have entered into the lease agreement.

21. So far as the offering of land by the applicant for Retail Outlet dealership is concerned, the Brochure provided that all the applicants meeting the eligibility criteria will qualify for further selection process. Clause 4 of the Brochure provided for the eligibility criteria for individual applicants-proprietorship/partnership. Sub-Clause (v) of Clause 4 deals with the land (applicable to all categories). It provides that the applicants would be classified into three groups based on the land offered or land not offered by them in the application form. The applicants having suitable piece of land in the advertised location/area either by way of ownership/long term lease for a period of minimum 19 years 11 months or as advertised by the Corporation were classified in Group 1. The applicants having Firm Offer for a suitable piece of land for purchase or long term lease for a period of minimum 19 years 11 months or as advertised by the Corporation were classified in Group 2 and the applicants who had not offered the land were classified in Group 3. The applicants in Group 3 would be processed/advised to offer land, only in case no eligible applicant is found or no applicant gets selected under Group 1 and 2. The applicants under Group 3, who did not offer land along with application, would be advised by the Corporation to provide suitable land in the advertised location/stretch within a period of three months from the date of issuance of intimation letter to them and in case, such applicant fails to provide suitable land within the prescribed period or the land provided is found not meeting the satisfied criteria, the application would be rejected.

22. These provisions of the Brochure make it clear that mere offer of land to the Corporation by the applicant may be in Group 1, Group 2 or Group 3 does not give rise to any legitimate expectation to get the dealership of the Retail Outlet as the offered land must be a suitable land confirming to the laid down/ specified criteria and also satisfying other conditions with respect to offering of land as mentioned in the Brochure, under which the company reserved the right to cancel/withdraw the advertisement, at it is sole discretion. So it cannot be said that any such promise was made as alleged for grant of the dealership of Retail Outlet, if the petitioner provided any land. The expectation of the petitioner, in view of the letter of intimation issued to him for offering the land, that if he offers the land after entering into lease agreement, he would get the dealership, cannot be a reasonable or a logical expectation flowing from any promise made or established practice that the applicant offering the land would necessarily be granted the dealership.

23. As aforesaid the law is settled that a legitimate expectation, even when made out, does not always entitle the expectant to a relief. Besides, public interest, change in policy, conduct of the expectant any **other valid or bona fide reason given by the decision-maker,** may be sufficient to negative the legitimate expectation. As a ground for relief, the efficacy of this doctrine of legitimate expectation is weak one. The decision maker has to justify the public interest or any other valid or bona fide reason.

24. We find that the Corporation has given valid and bona fide reasons for cancelling the subject location i.e. wrong description and publication of the name of district in the advertisement. The error in the advertisement with respect to the

subject location, contravenes the principles of fairness and transparency in the matter of grant of dealership of the Retail Outlet.

25. In view of the aforesaid, we are not convinced with the submission of Mr. Sharad Pathak that the error in publication of the district name could not be corrected after two and half years of the publication. It could not be shown to us that in the mean time the petitioner acquired any indefeasible right by lapse of time and particularly when the petitioner had yet not been selected and the Indian Oil Corporation under the Brochure reserved the right to cancel/withdraw/amend the advertisement at its sole discretion, which right of the Corporation has neither been disputed nor challenged.

26. We are of the further considered view that the Corporation cannot be directed to proceed for the subject location in pursuance of the advertisement, it being erroneous, which gives incorrect information about the subject location.

27. We do not find any illegality in the orders under challenge. The writ petition is devoid of merits and is hereby dismissed.

(2021)09ILR A846
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.09.2021

BEFORE

THE HON'BLE RAJAN ROY, J.
HE HON'BLE RAVI NATH TILHARI, J.

Misc. Bench No. 14773 of 2021

Smt. Shiv Kumari Soni ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Ved Prakash Yadav

Counsel for the Respondents:
C.S.C.,Manish Jauhari

A. Civil Law - The Executive Engineer, sultanpur has given work to M/s Variegate Project private limited, Hyderabad ("the firm"). The firm entered into a rental agreement with the petitioner and took on lease the petitioner's premises for storing electrical goods subject to the terms and conditions mentioned in the rental agreement. In the meantime, firm was blacklisted. On blacklisting the official opposite party stationed the guards at the premises for safety and paid off the rent for that relevant period. However, as far as the dues i.e., rent payable by the firm are concerned, this Court failed to comprehend as to how the official party will be held liable when the agreement was between the petitioner and the firm. (Para 17)

The issue involved in the instant writ petition is purely based on the question of fact therefore, this Court directed the petitioner to avail other civil remedies as may be prescribed by the law. (para 19)

Writ Petition Rejected.(E-10)

List of Cases cited:

1. Hari Krishna Mandir Trust Vs St of Mah & ors. (2020) 9 SCC 356

2. U.O.I. & anr. Vs V.V.F. Limited & anr. Etc. 2020 SCC Online SC 378

(Delivered by Hon'ble Ravi Nath Tilhari, J.)

1. Heard Sri Ved Prakash Yadav, learned counsel for petitioner, learned Additional Chief Standing Counsel for State-opposite party No.1 and Shri Manish Jauhari, learned counsel for opposite parties no. 2 & 3.

2. This petition has been filed seeking a writ, order or direction in the nature of

mandamus commanding the State of U.P. through Principal Secretary, Department of Energy-opposite party No.1 and the Managing Director, Madhyanchal Vidyut Vitran Khand-4A, Lucknow-opposite party No.2 to direct the Executive Engineer, Madhyanchal Vidyut Vitran Khand-2, Sultanpur, opposite party No.3 to give the admitted amount being the total remaining rental amount with interest to the petitioner as well as to direct the Managing Director, Madhyanchal Vidyut Vitran Khand, Lucknow to consider and take appropriate decision in pursuance of Annexure Nos. 6 and 7 submitted before him by the District Magistrate, Sultanpur.

3. The facts of the case as submitted by the learned counsel for the petitioner are that for electrification in Rural areas of District Sultanpur, under the "Rajiv Gandhi Gramin Vidyutikaran Scheme", the Executive Engineer, Madhyanchal Vidyut Vitran Khand-2 Sultanpur had given work to M/s Variegate Projects Private Limited, Hyderabad (herein after called as "the Firm"). The Firm entered into a rental agreement dated 01.03.2015 with the petitioner and took on lease the petitioner's premises for storing electrical goods subject to the terms and conditions mentioned in the rental agreement. The Firm was later on blacklisted and consequently when the opposite party No.3 tried to take possession of the electrical goods stored by the Firm, to shift it to its departmental store, the petitioner raised objection that the Firm had not made payment of rent and unless the payment was made, the petitioner would not let the electrical goods to be lifted and shifted from her premises. It has been submitted that the Executive Engineer apprised the District Magistrate, Sultanpur about the said situation vide letter dated 06.08.2016 and in pursuance thereof, the Sub Divisional Magistrate, Lambhua was directed to resolve the dispute. Thereafter on 08.08.2016 the Executive Engineer assured the petitioner for payment of the entire arrears of rent due against the Firm out of which payment of Rs. 1,10,000/- vide Cheque No. 039028 and of Rs. 3,97,767/- vide cheque No. 87174, drawn on Punjab National Bank, District Sultanpur, in total amounting to Rs. 5,07,767/-, was paid to the petitioner by the opposite party No.3 with promise to make payment of the balance of Rs. 5,32,707/- after shifting of the electrical goods. However, despite repeated request as the payment was not made, the petitioner submitted representation to the Managing Director-opposite party No.2 before whom the District Magistrate Sultanpur had also submitted its reports vide letters dated 17.11.2020, 02.01.2021 and 25.02.2021, but till date neither any decision has been taken by the Managing Director nor the payment has been made.

4. On our specific query to the petitioner's counsel, whether opposite party Nos. 1 to 3 are party to the rental agreement he submitted that the agreement is only between the petitioner and M/s Variegate Projects Private Limited, Hyderabad. However, he further submitted that in view of the assurance given and the promise made by the Executive Engineer-opposite party No.3, to make payment of the entire outstanding rent amount the opposite parties made themselves liable for payment of the entire rent amount.

5. Learned Additional Chief Standing Counsel submitted that the District Magistrate, Sultanpur has already sent letters to the Managing Director, Madhyanchal Vidyut Vitran Khand-

Lucknow-opposite party No.2 and the payment, if any, is to be made by the opposite party Nos. 2 and 3.

6. Sri Manish Jauhari, learned counsel for opposite party Nos. 2 and 3 submitted that the rental agreement was between the petitioner and the Firm. There is no liability of the opposite party Nos. 2 and 3 for payment of the arrears of rent due against the Firm. He submitted that the payment of Rs. 5,07,767/- was made by the Executive Engineer-opposite party No.3 for the period with effect from 18.01.2016 up to August, 2016, during which, the opposite parties had deputed its personnel for the safety and security of the electrical goods stored in the petitioner's premises by the firm. He further submitted that there is no statutory or any contractual liability of the opposite parties for payment as prayed by the petitioner, and any promise or assurance, even if given by the Executive Engineer, cannot bind the opposite party Nos. 2 and 3 as nothing has been brought on record to show that any such promise was made or/and the Executive Engineer had been authorized to make any such promise to bind the opposite party Nos. 2 and 3.

7. We have considered the submissions advanced by the learned counsels for the parties and perused the material on record.

8. A perusal of the rental agreement, Annexure 1 to the writ petition, shows that it is only between the petitioner and M/s Variegate Projects Private Limited, Hyderabad. On this point there is no dispute. Any statutory or even any contractual liability of the opposite party Nos. 1 to 3 for payment of the arrears of rent of the M/s Variegate Projects Private Limited could not be shown to us.

9. The Sheetanchor of the petitioner is the letter dated 18.05.2017 and the letter dated 17.11.2020, Annexure No.6, in support of the submission that the promise was made by the Executive Engineer-opposite Party No.3 to the petitioner to make the payment of the entire outstanding amount of rent of the firm.

10. We have perused the aforesaid documents. By letter dated 18.05.2017 the Sub Divisional Magistrate, Lambhua, District Sultanpur had directed the then Executive Engineer (Second), Electricity Distribution Division, Sultanpur to ensure payment of the balance amount of Rs. 532707/- to the petitioner mentioning in the said letter that on 08.08.2016 the said Executive Engineer, in presence of the Sub Divisional Magistrate, Lambhua, the Circle Officer, Lambhua and the Station House Officer Kotwali Dehat had given assurance to the petitioner that the payment of the balance amount of Rs. 5,32,707/- would be made without delay as it was not possible at that time to make full payment of arrears of rent amounting to Rs. 1040474/- out of which an amount of Rs. 5,07,767/- was paid vide two cheques.

11. The letter No. 283 dated 17.11.2020 of the District Magistrate, Sultanpur, to the Managing Director although refers to the letter dated 18.05.2017, but also mentions about the letter of the Superintending Engineer dated 07.10.2020 to the effect, inter alia, that on 08.08.2016 a consensus was arrived at between the petitioner and the electricity distribution division for payment of rent for the period the electricity distribution division deputed its Guard for security and safety of the electrical goods stored in petitioner's premises upto the date i.e. 08.08.2016 at the rate of the same rent as

was settled between the petitioner and the firm, of which full payment was made to the petitioner. The letter dated 17.11.2020 further mentions that the petitioner had denied any such agreement dated 08.08.2016 to have been signed by her.

12. Thus from the perusal of the record before us, we find that there is a serious dispute between the parties as regards promise made or assurance given by the Executive Engineer-opposite party No.3 for payment of the entire outstanding arrears of rent as also that the payment of Rs. 5,07,767/- was part payment or it was full payment for the period w.e.f. 18.01.2016 up to 08.08.2016 in pursuance of the alleged agreement dated 08.08.2016 which agreement itself is disputed by the petitioner.

13. In a petition under Article 226 of the Constitution of India, the High Court has jurisdiction to try issues both of fact and law and merely because in considering the petitioner's right to relief, question of fact may fall to be determined, the High Court is not deprived of its jurisdiction to entertain a writ petition under Article 226. However, exercise of jurisdiction is discretionary and the discretion is to be exercised on sound judicial principles. When the petition raises a question of fact of complex nature requiring the oral evidence for determination or the nature of claim is such that it cannot be conclusively determined on the basis of material available on the record of the writ petition or that it would be inappropriate to try such issues in the writ jurisdiction for analogous reasons, the High Court may refuse to exercise its discretionary writ jurisdiction.

14. It will be apt to refer the case of **Hari Krishna Mandir Trust vs. State of Maharashtra and Ors. [(2020) 9 SCC 356],** wherein in paragraphs 104 & 105, Hon'ble Supreme Court has held as under:-

"104. The High Court is not deprived of its jurisdiction to entertain a petition under Article 226 merely because in considering the petitioner's right to relief questions of fact may fall to be determined. In a petition under Article 226 the High Court has jurisdiction to try issues both of fact and law. Exercise of the jurisdiction is, it is true, discretionary, but the discretion must be exercised on sound judicial principles. Reference may be made inter alia to the judgments of this Court in Gunwant Kaur v. Municipal Committee, Bhatinda 11 and State of Kerala v. M. K. Jose, this Court held : (SCC pp. 442-43, para 16)

"16. Having referred to the aforesaid decisions, it is obligatory on our part to refer to two other authorities of this Court where it has been opined that under what circumstances a disputed question of fact can be gone into. In Gunwant Kaur v. Municipal Committee, Bhatinda, it has been held thus: (SCC p. 774, paras 14-16)

"14. The High Court observed that they will not determine disputed question of fact in a writ petition. But what facts were in dispute and what were admitted could only be determined after an affidavit-in-reply was filed by the State. The High Court, however, proceeded to dismiss the petition in limine. The High Court is not deprived of its jurisdiction to entertain a petition under Article 226 merely because in considering the petitioner's right to relief questions of fact may fall to be determined. In a petition under Article 226 the High Court has jurisdiction to try issues both of fact and law. Exercise of the jurisdiction is,

it is true, discretionary, but the discretion must be exercised on sound judicial principles. When the petition raises questions of fact of a complex nature, which may for their determination require oral evidence to be taken, and on that account the High Court is of the view that the dispute may not appropriately be tried in a writ petition, the High Court may decline to try a petition. Rejection of a petition in limine will normally be justified, where the High Court is of the view that the petition is frivolous or because of the nature of the claim made dispute sought to be agitated, or that the petition against the party against whom relief is claimed is not maintainable or that the dispute raised thereby is such that it would be inappropriate to try it in the writ jurisdiction, or for analogous reasons.

15. From the averments made in the petition filed by the appellants it is clear that in proof of a large number of allegations the appellants relied upon documentary evidence and the only matter in respect of which conflict of facts may possibly arise related to the due publication of the notification under Section 4 by the Collector.

16. In the present case, in our judgment, the High Court was not justified in dismissing the petition on the ground that it will not determine disputed question of fact. The High Court has jurisdiction to determine questions of fact, even if they are in dispute and the present, in our judgment, is a case in which in the interests of both the parties the High Court should have entertained the petition and called for an affidavit-in reply from the respondents, and should have proceeded to try the petition instead of relegating the appellants to a separate suit." (emphasis supplied)

105. In ABL International Ltd. v. Export Credit Guarantee Corporation of India Ltd., this Court referring to previous judgments of this Court including Gunwant Kaur (supra) held: (ABL International Ltd. Case, SCC pp. 568-69 & 572, paras 19 & 27)

"19. Therefore, it is clear from the above enunciation of law that merely because one of the parties to the litigation raises a dispute in regard to the facts of the case, the court entertaining such petition under Article 226 of the Constitution is not always bound to relegate the parties to a suit. In the above case of Gunwant Kaur this Court even went to the extent of holding that in a writ petition, if the facts require, even oral evidence can be taken. This clearly shows that in an appropriate case, the writ court has the jurisdiction to entertain a writ petition involving disputed questions of fact and there is no absolute bar for entertaining a writ petition even if the same arises out of a contractual obligation and/or involves some disputed questions of fact.

27. From the above discussion of ours, the following legal principles emerge as to the maintainability of a writ petition:

a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

b) Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule;

c) A writ petition involving a consequential relief of monetary claim is also maintainable."

15. In view of the complex nature of the disputed question of fact as aforesaid, we consider it not appropriate to try this question in exercise of our writ jurisdiction.

16. With respect to the submission of the petitioner's counsel based on the doctrine of promissory estoppel we are of the considered view that where the person acting upon the promise made by the Government or the public authority has changed his position, this doctrine can be pressed into aid to compel the Government or the public authority to carry out a representation or promise made, but there are also well recognized exceptions and as this doctrine is equitable one it must yield when the equity so demands, if it can be shown, having regard to the facts and circumstances of the case that it would be inequitable to hold the Government or the public authority to its promise, assurance or representation. Most importantly the doctrine of promissory estoppel cannot be invoked in the abstract. To invoke this doctrine clear, sound and positive foundation must be laid in the petition itself by the party invoking the doctrine. We may refer the judgment of the Hon'ble Supreme Court in the case of ***Union of India and Another Etc. Etc. vs. V.V.F. Limited and Another Etc. Etc. [2020 SCC Online SC 378]*** in which, in paragraph 41 it has been held as under:

"41. In the case of Kasinka Trading (supra), in paragraphs 12, 20 and 23, it is observed and held as follows:

"12. It has been settled by this Court that the doctrine of promissory estoppel is applicable against the Government also particularly where it is necessary to prevent fraud or manifest injustice. The doctrine, however, cannot be pressed into aid to compel the Government or the public authority to carry out a representation or promise which is contrary to law or which was outside the authority or power of the officer of the Government or of the public authority to make. There is preponderance of judicial opinion that to invoke the doctrine of promissory estoppel clear, sound and positive foundation must be laid in the petition itself by the party invoking the doctrine and that bald expressions, without any supporting material, to the effect that the doctrine is attracted because the party invoking the doctrine has altered its position relying on the assurance of the Government would not be sufficient to press into aid the doctrine. In our opinion, the doctrine of promissory estoppel cannot be invoked in the abstract and the courts are bound to consider all aspects including the results sought to be achieved and the public good at large, because while considering the applicability of the doctrine, the courts have to do equity and the fundamental principles of equity must for ever be present to the mind of the court, while considering the applicability of the doctrine. The doctrine must yield when the equity so demands if it can be shown having regard to the facts and circumstances of the case that it would be inequitable to hold the Government or the public authority to its promise, assurance or representation.

20. The facts of the appeals before us are not analogous to the facts In Indo-Afghan Agencies [(1968) 2 SCR 366 : AIR 1968 SC 718] or M.P. Sugar Mills [(1979) 2 SCC 409 : 1979 SCC (Tax) 144 : (1979) 2 SCR 641]. In the first case the petitioner therein had acted upon the unequivocal promises held out to it and exported goods on the specific assurance given to it and it was in that fact situation

that it was held that Textile Commissioner who had enunciated the scheme was bound by the assurance thereof and obliged to carry out the promise made thereunder. As already noticed, in the present batch of cases neither the notification is of an executive character nor does it represent a scheme designed to achieve a particular purpose. It was a notification issued in public interest and again withdrawn in public interest. So far as the second case (M.P. Sugar Mills case [(1979) 2 SCC 409 : 1979 SCC (Tax) 144 : (1979) 2 SCR 641]) is concerned the facts were totally different. In the correspondence exchanged between the State and the petitioners therein it was held out to the petitioners that the industry would be exempted from sales tax for a particular number of initial years but when the State sought to levy the sales tax it was held by this Court that it was precluded from doing so because of the categorical representation made by it to the petitioners through letters in writing, who had relied upon the same and set up the industry.

23. The appellants appear to be under the impression that even if, in the altered market conditions the continuance of the exemption may not have been justified, yet, Government was bound to continue it to give extra profit to them. That certainly was not the object with which the notification had been issued. The withdrawal of exemption "in public interest" is a matter of policy and the courts would not bind the Government to its policy decisions for all times to come, irrespective of the satisfaction of the Government that a change in the policy was necessary in the "public interest". The courts, do not interfere with the fiscal policy where the Government acts in "public interest" and neither any fraud or lack of bona fides is alleged much less established. The Government has to be left free to determine the priorities in the matter of utilisation of finances and to act in the public interest while issuing or modifying or withdrawing an exemption notification under Section 25(1) of the Act."

Thus, it can be seen that this Court has specifically and clearly held that the doctrine of promissory estoppel cannot be invoked in the abstract and the courts are bound to consider all aspects including the objective to be achieved and the public good at large. It has been held that while considering the applicability of the doctrine, the courts have to do equity and the fundamental principles of equity must forever be present to the mind of the court, while considering the applicability of the doctrine. It is further held that the doctrine must yield when the equity so demands if it can be shown having regard to the facts and circumstances of the case that it would be inequitable to hold the Government or the public authority to its promise, assurance or representation. It is further held that an exemption notification does not make items which are subject to levy of customs duty etc. as items not leviable to such duty. It only suspends the levy and collection of customs duty, etc., wholly or partially and subject to such conditions as may be laid down in the notification by the Government in "public interest". Such an exemption by its very nature is susceptible of being revoked or modified or subjected to other conditions. The supersession or revocation of an exemption notification in the "public interest" is an exercise of the statutory power of the State under the law itself. It has been further held that under the General Clauses Act an authority which has the power to issue a notification has the undoubted power to rescind or modify the notification in a like manner. It has

been observed that the withdrawal of exemption "in public interest" is a matter of policy and the courts would not bind the Government to its policy decisions for all times to come, irrespective of the satisfaction of the Government that a change in the policy was necessary in the "public interest". It has been held that where the Government acts in "public interest" and neither any fraud or lack of bonafides is alleged, much less established, it would not be appropriate for the court to interfere with the same."

17. The rent agreement was between the petitioner and the firm. Admittedly, official opposite parties were not party to it. The official opposite parties i.e. Madhyanchal Vidyut Vitran Nigam Limited and its officials entered into an agreement with the firm naming Variegate Projects Private Limited for rural electrification. Petitioner was not a party to it. It appears in pursuance to the said contract between the firm and official opposite parties the firm took the premises of the petitioner for storing electrical goods etc, but did not pay the rent. In the meantime, the firm was blacklisted. On such blacklisting the official opposite parties stationed guards at the premises for safety of the electrical goods kept in the rental premises as they belonged to them. For that period rent or consideration whatever it may be called was paid by the official opposite parties to the petitioners. In so far as other dues i.e. rent payable by the firm, it is a dispute between the petitioner and firm. We fail to comprehend as to how official opposite parties can be made liable in this regard. There in nothing on record to show that the Executive Engineer was ever authorized by the Corporation to give any such assurance, even if given, on which aspect we are not recording any finding, for payment of such rent.

18. We have already considered above that the writ petition involves disputed questions of fact and consequently what we find is that a clear, sound and positive foundation has not been laid in the writ petition for invoking the doctrine of legitimate expectation.

19. We are of the opinion that such matters are not amenable to writ jurisdiction merely because the official opposite parties are instrumentalities of State, as, essentially, it is a dispute pertaining to rent involving a money claim and complicated as also disputed question of fact as also pinciples of civil law are involved. The petitioner may therefore pursue other civil remedies as may be prescribed in law.

20. Observation made herein are only for purpose of these proceedings and shall not have any bearing on such other proceedings, if initiated by the parties herein.

21. In view of the aforesaid, the writ petition is dismissed, but with the aforesaid observations.

(2021)09ILR A853
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.08.2021

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.

Misc. Single No. 19318 of 2020

Bhupendra Singh ...Petitioner
Versus
Ziladhikari, Amethi & Ors. ...Respondents

Counsel for the Petitioner:
Rudra Mani Shukla, Girish Chandra Sinha, Mayank Sinha

Counsel for the Respondents:
C.S.C.

A. Land Law - U.P. Revenue Code - Sections 67 & 230 - U.P. Zamindari abolition & Land Revenue Act, 1950: Section 122-B - Section 230 of the Code clearly shows that all the notifications and powers conferred under the earlier Act, which are not in conflict with the Code, will continue to be in force. Under Section 122-B of the Act of 1950 similar provisions existed and powers of the Assistant Collector under the Acts were delegated to the Tehsildar. In absence of any conflict, and Sections being parallel to the earlier Acts, the conferment of power is saved under Section 230 of the Code. (Para 8-10) (E-10)

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

1. Present writ petition is filed by the petitioner, challenging the order dated 14.10.2020 passed by the Collector, District Amethi in Case No.652 of 2020 *"Bhupendra Singh vs. Tehsildar, Gauriganj and others"*.

2. The facts of the case are that the Tehsildar, Gauriganj, District Amethi initiated proceedings under Section 67 of the U.P. Revenue Code (for short 'the Code') against the petitioner for his eviction on the ground that he is on wrongful and unauthorized occupation of the property of the Gaon Sabha and by an order dated 15.09.2020, eviction order was passed by the Tehsildar, Gauriganj, District Amethi. Against the said order, the petitioner preferred an appeal under Section 67 of the Code before the Collector, District Amethi. After hearing the appeal, the Collector, District Amethi, by his order dated 14.10.2020, finding that proper opportunity of hearing was not given to the petitioner, remanded the matter back to the Tehsildar, Gauriganj, District Amethi with a direction that the matter may be decided expeditiously on merits, after giving proper opportunity of evidence and hearing to the petitioner. Present writ petition is filed against the aforesaid order dated 14.10.2020 passed by the Collector, District Amethi.

3. Learned counsel for the petitioner has raised a ground that proceedings under Section 67 of the Code can be initiated and decided by an Assistant Collector and, therefore, the Tehsildar would not have any jurisdiction to hear the said proceedings. He further submits that there is no delegation of power made under the Code and, therefore, in absence of any such delegation, the Tehsildar cannot exercise the power of Assistant Collector.

4. Learned Standing Counsel has filed a counter affidavit and submitted that on 29.12.2020, such a notification has been issued by the State Government, whereby the powers of the Assistant Collector with regard to Section 67 of the Code are delegated to the Tehsildar and Tehsildar (Judicial) w.e.f. 11.2.2016 and, therefore, the Tehsildar and Tehsildar (Judicial) can exercise power of the Assistant Collector.

5. Learned counsel for the petitioner submits that there cannot be any retrospective delegation of power by a notification and such power can be exercised by the Tehsildar only with effect from the date of notification i.e. 29.12.2020. He submits that since the present proceedings were initiated much before that, therefore, the same are not maintainable.

6. I have heard learned counsel for the petitioner Sri Girish Chandra Sinha, learned Standing Counsel for the State Sri

V.P. Nag, Sri Pankaj Gupta for the private respondent and perused the record.

7. Section 230 of the Code reads as follows:

*"**230. Repeal-** (1) The enactments specified in the First Schedule are hereby repealed.*

(2) Notwithstanding anything contained in sub-section (1), the repeal of such enactments shall not affect-

(a) the continuance in force of any such enactment in the State of [Uttarakhand] "Uttaranchal" by U.P. Act No.4 of 2016 (w.e.f. 16.12.2015);

(b) the previous operation of any such enactment or anything duly done or suffered thereunder; or

(c) any other enactment in which such enactment has been applied, incorporated or referred to; or

(d) the validity, invalidity, effect or consequences of anything already done or suffered, or any right, title or obligation or liability already acquired, accrued or incurred (including, in particular, the vesting in the state of all estates and the cessation of all rights, title and interest of all the intermediaries therein), or any remedy or proceeding in respect thereof, or any release or discharge of or from any debt, penalty, obligation, liability, claim or demand, or any indemnity already granted or the proof of any past act or thing; or

(e) any principle or rule of law or established jurisdiction, form or course of pleading, practice or procedure or existing usage, custom, privilege, restriction, exemption, office or appointment :

***Provided that anything done or any action taken (including** any rules, manuals, assessments, appointments and transfers made, **notifications**, summonses, notices, warrants, proclamations **issued, powers conferred,** leases granted, boundary marks fixed, records of rights and other record prepared or maintained, right acquired or liabilities incurred) **under any such enactment shall, in so far as they are not inconsistent with the provisions of this Code, be deemed to have been done or taken under the corresponding provisions of this Code, and shall continue to be in force accordingly, unless and until they are superseded by anything done or action taken under this Code."** (Emphasis added)*

8. A perusal of proviso to Section 230 of the Code, clearly shows that all the notifications and powers conferred under the earlier Act, which are not in-conflict with the U.P. Revenue Code, continue to be in force.

9. Admittedly, under Section 122-B of the U.P.Z.A. and L.R. Act, 1950, similar provisions existed and powers of the Assistant Collector under the said Acts were delegated to the Tehsildars. In State of U.P., since the very initial stage, such powers are exercised by the court of Tehsildar.

10. Learned counsel for the petitioner could not point out any conflict between the provisions of U.P. Revenue Code with the earlier notifications or power conferred upon the Tehsildar. In absence of any conflict, and Sections being parallel to the

earlier Acts, the conferment of power is saved under Section 230 of the Code.

11. The Notification dated 29.12.2020 issued by the State Government, at best, is only clarificatory and reconfirms the position which always existed under law. Therefore, there is no force in the ground raised by learned counsel for the petitioner.

12. In view of aforesaid, present writ petition is ***dismissed.***

13. However, respondent no.2-Tehsildar, Gauriganj, District Amethi, is directed to decide the proceedings as directed by the Collector, District Amethi, by his order dated 14.10.2020, as expeditiously as possible.

14. It is made clear that the Tehsildar, Gauriganj, District Amethi, shall not grant any unnecessary adjournments including on the ground of strike of lawyers.

15. The other connected matters i.e. Writ Petition Nos.25301 (MS) of 2020 and 894 (MS) of 2021 are delinked from this writ petition.

(2021)09ILR A856
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.09.2021

BEFORE

THE HON'BLE RAJAN ROY, J.
HE HON'BLE RAVI NATH TILHARI, J.

Misc. Bench No. 36348 of 2019

Shiv Kumar Mishra ...Petitioner
Versus
State of U.P.& Ors. ...Respondents

Counsel for the Petitioner:
Brijesh Kumar Singh, Sanjay Kumar Pandey

Counsel for the Respondents:
C.S.C., Neeraj Chaurasiya , S.G. Singh

A. Cooperative Societies - U.P. Cooperative Societies Act, 1965 - Sections 128, 98 & 99 - U.P. Cooperative Societies Rule, 1968 - Rule 269 - The Court held that there is no power of review in the Registrar against its order passed under Section 128 of the Co-operative Societies Act, 1965, but if the order has been passed under an erroneous assumption of its own power going to the root of the matter, or, if, inter alia, it is found that there was willful suppression of material fact or fraud was practiced the Registrar will have the power to review its earlier order.

The scope of Rule 269 of the Rules, 1968 is only for correction of clerical or arithmetical mistakes in judgments or orders or errors arising therein from any accidental slip or omission and any error or omission which goes to the merits of the case is beyond the scope of rule 269 of the Rules, 1968. Therefore the order dated 11.11.2019 is illegal and without jurisdiction.(Para 26)

Writ Petition Allowed. (E-10)

List of Cases cited:

1. Patel Narshi Thakershi & ors. Vs Shri Pradyumansinghji AIR 1970 SC 1273

2. Lily Thomas, Etc. Vs U.O.I. & ors. (2006) SCC 224

3. Dwaraka Das Vs St. of M.P. & ors. (1999) 3 SCC 500 *(followed)*

4. St.of Pun. Vs Darshan Singh (2004) 1 SCC 328

(Delivered by Hon'ble Ravi Nath Tilhari, J.)

1. Heard Sri Brijesh Kumar Singh, learned counsel for the petitioner, learned standing counsel for opposite party Nos. 1 and 2 and Sri S.G.Singh, learned counsel

for opposite party No.3 and perused the material on record.

2. This petition has been filed for the following main reliefs:

(i) issue a writ, order or direction in the nature of certiorari, to quash the ex parte order dated 11.11.2019 passed by opposite party No.2 as contained in Annexure No.1 to this writ petition.

(ii) issue a writ, order or direction in the nature of mandamus, thereby commanding and directing the opposite parties to allow the petitioner on the post of deligate, as he was working earlier.

3. No counter affidavit has been filed, filing of which is also dispensed with as only legal question is involved and the parties counsels are *ad idem* that there is no factual dispute.

4. Learned counsel for the petitioner submits that the petitioner made a complaint to the Joint Commissioner and Joint Registrar, Cooperative Society, Ayodhya Mandal, Ayodhya-opposite party No.2 regarding corruption/misuse of public money in the contruction of cooperative bank building. The matter was investigated in which finally the opposite party No.2 vide order dated 26.02.2019 directed that at the time of payment for construction work, an amount of Rs. 3.19 lakhs shall be deducted and if payment had already been made the same amount shall be recovered. The petitioner started receiving threats from the Contractor and the Chairman of the co-operative society due to which the petitioner submitted an application for withdrawal from the membership on the post of delegate on 18.04.2019, upon which the Committee of Management of the District Cooperative Bank Limited, Faizabad-opposite party No.3 vide resolution No. 23 dated 31.07.2019 accepted the petitioner's application, but without following the due procedure. The Vice Chairman of the society and seven other delegates filed application dated 01.08.2019 before the Joint Commissioner and Joint Registrar of the co-operative society to annul the resolution dated 31.07.2019 upon which finally the Joint Commissioner and Joint Registrar passed order dated 01.11.2019 (Annexure 8) under Section 128 of the U.P. Co-operative Societies Act, 1965, and annuled the resolution No. 23, providing that the said resolution shall be void and inoperative and be deleted from the records of the co-operative society. Liberty was, however, granted to the Committee of Management to take fresh decision as per the majority. Later on, the opposite party No.3 filed an application dated 05.11.2019, upon which an ex parte order dated 11.11.2019 without any opportunity of hearing to the petitioner was passed and thereby the earlier order dated 01.11.2019 has been stayed. The writ petition has been filed challenging the order dated 11.11.2019.

5. Learned counsel for the petitioner has submitted that the Joint Commissioner and Joint Registrar has passed the order dated 11.11.2019 reviewing the order dated 01.11.2019 and in exercise of power under Rule 269 of the U.P. Cooperative Societies Rules, 1968, which is mentioned in the order itself. His submission is that there is no power of review with the Commissioner and Joint Registrar, Cooperative Societies and further as any clerical or arithmetical error or accidental slip or omission in the order dated 1.11.2019 has not been pointed out, Rule 269 of the Rules, 1968 is not attracted.

6. Learned counsel for opposite party No.3 has supported the order dated 11.11.2019 on the ground that the Committee of Management vide application dated 05.11.2019 assured the opposite party No.2 that the meeting of the Committee of Management shall be convened at the earliest pursuant to the earlier letter of the opposite party No.2 dated 02.08.2019, by which the Committee of Management/ Chief Executive Officer was directed to reconsider the resolution dated 31.07.2019.

7. We have heard the submissions advanced by the learned counsels for the parties and perused the material on record.

8. A perusal of the order dated 11.11.2019 shows that it has been passed specifically mentioning to be under Rule 269 of the Rules, 1968. It has also been recorded in the order that the application dated 05.11.2019 of the opposite party No.3 deserved review.

9. The points which arise for our consideration are:

1) Whether the Registrar, Co-operative Societies has the power of review under the U.P. Cooperative Societies Act, 1965 to review an order passed by him under Section 128 of the Act, 1965 ?

2) What is the scope of Rule 269 of the Rule 1968 ? and

3) Whether the impugned order dated 11.11.2019 is without jurisdiction and deserves to be quashed ?

10. To consider the above aspects it would be appropriate to refer to the provisions of Sections 128, 98 and 99 of the Act, 1965 and Rule 269 of the Rules,1968.

11. Section 128 of the U.P. Co-operative Societies Act, 1965 reads as under:-

"128. Registrar's power to annul resolution of a co-operative society or cancel order passed by an officer of a co-operative society in certain cases.-

The Registrar may-

(i) annul any resolution passed by the Committee of Management, or the general body of any co-operative society; or -

(ii) cancel any order passed by an officer of a co-operative society

if he is of the opinion that the resolution or the order, as the case may be, is not covered by the objects of the society or is in contravention of the provisions of this Act, the rules or the bye-laws of the society, whereupon every such resolution or order shall become void and inoperative and be deleted from the records of the society :

'[Provided that, the Registrar shall, before making any order, require the Committee of Management, general body or officer of the co-operative society to reconsider the resolution, or as the case may be, the order, within such period as he may fix but which shall not be less than fifteen days, and if he deems fit may stay the operation of that resolution or the order during such period.]

12. Section 98 of the U.P. Cooperative Societies Act, 1965 reads as under:-

*"**98. Appeal against the award, orders and decisions**.- (1) An appeal against-*

"(a) an order of the Registrar made under sub-section (2) of Section 7 refusing to register a co-operative society ;

[(b) an order of the Registrar under sub- section (3) of Section 12 refusing to register, or under sub - section (2) of Section 14 registering an amendment in the bye - laws of a co-operative society :

(c) a decision of co- operative society refusing to admit any person as a member of the society under sub- section (2) of Section 26 or expelling any member of the society under sub-section (1) of Section 27 [or an order passed under sub- section (1) of Section 38 for removal of an officer from the office held by him or to disqualify him from holding any office] ;

(d) an order of the Registrar under sub- section (2) of Section 27 expelling or removing a member or under sub- section (2) of Section 38 removing or disqualifying any officer of a co- operative society;

(e) an order of the Registrar superseding the Committee of Management of a co- operative society under Section 35;

(f) an order made by the Registrar, under Section 67 apportioning the cost of an enquiry held under Section 65 or an inspection made under Section 66 ;

(g) an order of surcharge made by the Registrar under Section 68 ;

(h) an award made by an arbitrator or Board of Arbitrators under sub - section (1) or sub - section (2) of Section 71;

(i) an order made by the Registrar under Section 72 directing the winding up of a co- operative society;

(j) any order made by the liquidator of a co-operative society in exercise of the powers conferred on him by clauses (b) and (g) of Section 74 ;

(k) any order made by the Registrar on a question arising between the parties or proceedings under clause (b) of Section 92 and of the nature referred to in Section 47 of the Code of Civil Procedure, 1908 (Act V of 1908);

(1) an order for attachment of any property made by the Registrar under Section 94 ;

(m) an order of the Registrar under Section 125 directing amalgamation or merger, or under Section 126 directing division;

(n) an order passed by the Registrar under Section 128 annulling any resolution or cancelling any order, may, within thirty days of the communication of the order, decision or award to be appealed against, be preferred by the aggrieved party to the authorities mentioned in sub-section (2) in the manner prescribed.

*(2) An appeal under [clauses (c), (d), (e), (f), (g), (k) and (I)] of sub-section (1) shall be preferred to the Tribunal, **and an appeal under [clauses (a), (b), (h),***

(i),(j), (m) and (n) of the said sub-section shall be preferred-

(a) if the decision or the order was made by the Registrar, to the State Government, or

(b) if the decision or order or award was made by any other person or authority, to the Registrar;

(c) if the order or award was made on a dispute relating to an election , to the Tribunal .

(3) Notwithstanding anything contained in clause (b) of sub- section

(2) the State Government may by notification in the Gazette, direct that appeals against awards mentioned in clause (h) of sub - section (1) shall , in respect of such cases or class of cases, as may be specified in the said notification lie to the Tribunal, and thereupon any person aggrieved by such award, may appeal to the Tribunal.

(4) The appellate authority after hearing an appeal under this section may pass such orders as it may deem fit .

13. Section 99 of the U.P. Cooperative Societies Act, 1965 reads as under:-

*"**99. Review of order of appellate authority-** (1) The appellate authority under Section 97 or Section 98, as the case may be, may on the application of any party, review its order in any case and pass in reference thereto such order as it thinks fit :*

Provided that no such application shall be entertained unless the appellate authority is satisfied that there has been a discovery of new and important matter of evidence which, after exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the order was made or that there has been some mistake or error apparent on the face of the record or for any other sufficient reason :

Provided further that no such order shall be made under this sub- section unless notice has been given to all interested parties and they have been afforded a reasonable opportunity of being heard.

(2) An application for review under sub-section (1) by any party shall be made within thirty days from the date of communication of the order of the appellate authority sought to be reviewed.

14. Rule 269 of the U.P. Cooperative Societies Rules, 1968 reads as under:-

"269. Clerical or arithmetical mistake in orders, decisions, or awards made by the Registrar, Arbitrator or the Board of Arbitrators or in the orders made by the appellate authority or errors arising in such orders (including the orders of appellate authority), decisions or awards from any accidental slip or omission may at any time be corrected by the authority concerned, either of its own motion or the application moved by any of the parties to the dispute."

15. The aforesaid provisions make it clear, from a bare reading thereof, that under Section 128 of the U.P. Co-operative Societies Act, 1965, the Registrar has the power to annual any resolution passed by the Committee of Management, or the

general body of any co-operative society, or to cancel any order passed by an officer of a co-operative society, if he is of the opinion that the resolution or the order, as the case may be, is not covered by the objects of the society or is in contravention of the provisions of the Act, 1965, the rules, 1968 or the bye-laws of the society. An order passed under Section 128 by the Registrar is appealable under Section 98(1) (n) of the Act, 1965, before the State Government under Section 98(2) (a). Section 99 of the Act, 1965, provides for review which is against the order passed by the appellate authority under Section 97 or Section 98, by the appellate authority of its orders.

16. Section 99 of the Act, 1965 does not, therefore, provide for review against the order passed by the Registrar under Section 128. Any provision conferring the power of review on the Registrar against the order passed by him under Section 128 of the Act could not be brought to our notice by the learned counsels appearing in the case.

17. The power of review is not an inherent power. In **Patel Narshi Thakershi And Ors. vs Shri Pradyumansinghji, AIR 1970 SC 1273,** the Hon'ble Supreme Court held that "It is well settled that the power to review is not an inherent power. It must be conferred by law either specifically or by necessary implication." In **Lily Thomas, Etc. vs Union Of India & Ors (2006) SCC 224** also it has been held that "the dictionary meaning of the word "review" is "the act of looking; offer something again with a view to correction or improvement. It cannot be denied that the review is the creation of a statute. Therefore, the power of review unless conferred by the statue cannot be exercised by a Court, Tribunal or authority".

18. We have considered above, that the Co-operative Societies Act, 1965 does not confer any power of review on the Registrar with respect to the order passed under Section 128 of the Act, 1965. However, in cases where the appeal lies to the Registrar under Section 98 (2) (b) of the Act, the Registrar as appellate authority may review its order passed in exercise of appellate jurisdiction under Section 99 of the Act.

19. We are not oblivious of the concept of procedural review, which inheres in every judicial, quasi judicial or even an administrative authority, if the order is passed under an erroneous assumption of one's own power going to the root of the matter or if it is found that a fraud has been practiced or there was willful suppression, which is not the case here, as, the order dated 11.11.2019 does not contain any such ground for reviewing the order dated 01.11.2019.

20. A bare reading of Rule 269 of the Rules, 1969 shows that it gives power for correction of clerical or arithmetical mistakes in the orders, decisions, or award made by the Registrar, Arbitrator or the Board of Arbitrators or in the orders made by the appellate authority or error arising in such orders, decisions or awards from any accidental slip or omission which can be corrected by the authority concerned at any time either of its own motion or on the application of any of the parties to the dispute. The condition precedent for exercise of power under Rule 269 of the Rules, 1968 is that there must be a clerical or arithmetical mistake in the order or an error from any accidental slip or omission. If no such error exists the power under Rule 269 would not be available at all.

21. Rule 269 of the Rules, 1968 is analogous to Section 152 of the Code of Civil Procedure, 1976 (C.P.C.). Section 152 C.P.C. is being reproduced as under:

*"**152. Amendment of judgments, decrees or orders-** Clerical or arithmetical mistakes in judgments, decree or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the parties."*

22. While considering the scope of Section 152 C.P.C., the Hon'ble Supreme Court in the case of **Dwaraka Das Vs. State of M.P. and others (1999) 3 SCC 50**0 has held that the exercise of this power contemplates the correction of mistakes by the Court of its ministerial actions and does not contemplate of passing effective judicial orders after the judgment, decree or order. The settled position of law is that after the passing of the judgment, decree or order, court or the tribunal becomes functus officio and thus being not entitled to vary the terms of the judgments, decrees and orders earlier passed. The correction contemplated are of correcting only accidental omission or mistakes and not all omissions and mistakes which might have been committed by the Court while passing the judgment, decree or order. The omission sought to be corrected which goes to the merits of the case is beyond the scope of Section 152 for which the proper remedy for the aggrieved party is to file appeal or review application. It implies that the Section cannot be pressed into service to correct an omission which is intentional, how erroneous that may be. No Court can under the cover of the sections 151 and 152 C.P.C. modify, alter or add to the terms of its original judgment, decree or order. It is appropriate to quote paragraph 6 of the **Dwaraka Das (supra)** as under:

"Section 152 CPC provides for correction of clerical or arithmetical mistakes in judgments, decrees or orders of errors arising therein from any accidental slip or omission. The exercise of this power contemplates the correction of mistakes by the court of its ministerial actions and does not contemplate of passing effective judicial orders after the judgment, decree or order. The settled position of law is that after the passing of the judgment, decree or order, the court or the tribunal becomes functus officio and thus being not entitled to vary the terms of the judgments, decrees and orders earlier passed. The corrections contemplated are of correcting only accidental omissions or mistakes and not all omissions and mistakes which might have been committed by the court while passing the judgment, decree or order. The omission sought to be corrected which goes to the merits of the case is beyond the scope of Section 152 for which the proper remedy for the aggrieved party is to file appeal or review application. It implies that the section cannot be pressed into service to correct an omission which is intentional, however erroneous that may be. It has been noticed that the courts below have been liberally construing and applying the provisions of Sections 151 and 152 of the CPC even after passing of effective orders in the lis pending before them. No court can, under the cover of the aforesaid sections, modify, alter or add to the terms of its original judgment, decree or order. In the instant case, the trial court had specifically held the respondent- State liable to pay future interest only despite the prayer of the appellant for grant of interest with effect from the date of alleged breach which impliedly meant that the Court had

rejected the claim of the appellant insofar as pendente lite interest was concerned. The omission in not granting the pendente lite interest could not be held to be accidental omission or mistake as was wrongly done by the trial court vide order dated 30-11-1973. The High Court was, therefore, justified in setting aside the aforesaid order by accepting the revision petition filed by the State."

23. The law as laid down in **Dwaraka Das (supra**) would apply with equal force to an order passed under Rule 269 of the Rules, 1968 which is in pari materia with Section 152 C.P.C. but with the difference that the omission etc. contemplated in rule 269 and sought to be corrected occurring in an order passed under Section 128 of the Act, which goes to the merits of the case the proper remedy would be to file an appeal under Section 97 or 98 of the Act, 1965, as the case may be, and not the remedy of review. In Dwaraka Das (supra) the remedy of appeal or review was held to be proper remedy as C.P.C. confers the power of review on the courts, which power of review is not with the Registrar to review an order passed under Section 128 of the Act.

24. In **State of Punjab Vs. Darshan Singh (2004) 1 SCC 328** also the Hon'ble Supreme Court has held that "the power under Section 152 of the Code are neither to be equated with the power of review nor can be said to be akin to review or even said to clothe the court concerned under the guise of invoking after the result of the judgment earlier rendered, in its entirety or any portion or part of it."

25. The order dated 11.11.2019, as is evident has not been passed on any such ground of clerical or arithmetical mistake or errors from accidental slip or omission in the order dated 01.11.2019.

26. We therefore hold, on points 1 to 3 as framed in paragraph 9 above, as under:

1) There is no power of review in the Registrar against its order passed under Section 128 of the Co-operative Societies Act, 1965, but if the order has been passed under an erroneous assumption of its own power going to the root of the matter, or, if, inter alia, it is found that there was willful suppression of material fact or fraud was practised the Registrar will have the power to review its earlier order.

2) The scope of rule 269 of the Rules, 1968 is only for correction of clerical or arithmetical mistakes in judgments or order or errors arising therein from any accidental slip or omission and any error or omission which goes to the merits of the case is beyond the scope of rule 269 of the Rules, 1968.

3) The order dated 11.11.2019 is illegal and without jurisdiction.

27. In view of the aforesaid, the order dated 11.11.2019 cannot be sustained and is hereby quashed. The order dated 01.11.2019 stands revived in terms thereof.

28. The writ petition is allowed.

(2021)09ILR A863
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.08.2021

BEFORE

THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Matters Under Article 227 No. 1328 of 2021

Prem Das ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ram Jatan Yadav

Counsel for the Respondents:
A.G.A.

A. Criminal Law - Criminal Procedure Code, 1973 - Section 156(3) - Upon receiving an application under Section 156(3) of the Code disclosing a cognizable offence, the Magistrate while exercising its discretion may direct the police to register the F.I.R. and investigate or alternatively the Magistrate can take cognizance of the complaint, register it as complaint case and follow the procedure under Chapter XV of the Code. (Para 16)

Writ Petition Rejected. (E-10)

List of Cases cited:

1. Gopal Das Sindhi & ors. Vs St. of Assam & anr. AIR 1961 SC 989

2. Sukhwasi Vs St. of U.P. 2007 (9) ADJ 1 (DB)

3. Jagannath Verma & ors. Vs St.of U.P. & anr. 2014 (8) ADJ 439 (FB)

4. Madhao & anr. Vs St. of Mah. & anr. (2013) 5 SCC 615

5. Gulab Chand Upadhyaya Vs St. of U.P. & ors. 2002 CrLJ 2907 (Alld)

6. Kailash Nath Dwivedi Vs St. of U.P. & ors. 2021 (6) ADJ 686

(Delivered by Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard Sri Ram Jatan Yadav, learned counsel for the petitioner and Ms. Sushma Soni, learned Additional Government Advocate appearing for the State-Respondents.

2. The present petition under Article 227 of the Constitution of India has been filed principally for the following prayers:

"(i) To set aside the judgment order dated 19.10.2020 passed by Additional District and Sessions Judge, Room No.20, Agra in Criminal Revision No.408 of 2019 (Prem Das Vs. State of U.P. and Others) as well as order dated 31.05.2019 passed by Additional Chief Judicial Magistrate, Room No.6, Agra in Misc. Case No.24928 of 2019 (Prem Das vs. Sandeep Agrawal) under Section 156(3) Cr.P.C., Police Station -Hariparvat, District Agra. (Annexure Nos. 4 and 2 of this Petition).

(ii) To direct the respondent nos. 2 and 3 to register the first information report against the respondent nos. 4 to 6 and investigate the matter and submit the police report before the court concern in accordance with law."

3. The records of the case indicate that upon an application dated 4.2.2019 under section 156(3) of the Code of Criminal Procedure, 19731, the Additional Chief Judicial Magistrate, Court No. 6 Agra by means of an order dated 31.5.2019 has treated the same as a complaint and directed it to be registered as complaint case.

4. Learned Magistrate while passing the aforesaid order has noticed that the entire facts of the case are within the knowledge of the complainant and the necessary material evidence in regard to the same can be placed before the court by the complainant and in view thereof, there was no reason to direct investigation of the case by the police.

5. Aggrieved, against the aforesaid order the applicant preferred a revision being Criminal Revision No. 408/2019 which has also been rejected by order dated

19.10.2020, after recording similar reasons. Both the courts below have relied upon the legal proposition that the Magistrate is not bound to allow the application under section 156(3) of the Code and direct an investigation; in appropriate cases the Magistrate has a discretion to treat the application under section 156(3) of the Code as a complaint.

6. Learned counsel for the applicant has referred to the factual aspects of the case, as stated in the complaint, in order to assail the orders passed by the courts below.

7. Learned Additional Government Advocate has supported the order passed by the learned Magistrate as well as the Revisional Court by contending that a bare reading of the complaint would disclose that the necessary facts are within the knowledge of the applicant and accordingly, the view taken by the courts below that the case does not require any investigation by the police cannot be said to suffer from any illegality so as to call for interference.

8. The scope and parameters for exercise of discretionary powers by a Magistrate in dealing with a complaint on an application under section 156(3) of the Code, are fairly well settled.

9. The Magistrate upon receiving a complaint or an application under Section 156(3) of the Code, with regard to facts disclosing commission of an offence, "may take cognizance", which in the context of Section 190 of the Code, cannot be read as "must take cognizance". The use of the expression "may" under Section 190 of the Code gives a discretion to the Magistrate to either take cognizance or to forward the complaint to the police and order investigation under Section 156(3) of the Code.

10. The question as to whether it is mandatory for the Magistrate to order registration of a criminal case and direct the officer in charge of the concerned police station to hold a proper investigation, is no longer res integra and it has been consistently held that where a Magistrate receives an application under Section 156(3) of the Code, he is not bound to take immediate cognizance even if the alleged facts disclose commission of an offence.

11. In the case of **Gopal Das Sindhi and others v State of Assam and another2,** while considering the provisions of Section 190 of the Code it was held that once a complaint is filed a Magistrate is not bound to take cognizance as the word "may" cannot be construed so as to be "must" and it would be within the discretion of the Magistrate to send the complaint to the police for investigation under Section 156(3) of the Code or to exercise his discretion and take cognizance and thereafter proceed. It was stated thus:-

"7. ...We cannot read the provisions of S. 190 to mean that once a complaint is filed, a Magistrate is bound to take cognizance if the facts stated in the complaint disclose the commission of any offence. We are unable to construe the word 'may' in section 190 to mean 'must'. The reason is obvious. A complaint disclosing cognizable offences may well justify a Magistrate in sending the complaint, under S. 156 (3) to the police for investigation. There is no reason why the time of the Magistrate should be wasted when primarily the duty to investigate in cases involving cognizable offences is with

the police. On the other hand, there may be occasions when the Magistrate may exercise his discretion and take cognizance of a cognizable offence. If he does so then he would have to proceed in the manner provided by Chapter XVI of the Code..."

12. T he question whether the Magistrate is bound to pass an order on each and every application under Section 156(3) of the Code containing allegations of commission of a cognizable offence for registration of the F.I.R. and its investigation by the police, even if those allegations, prima facie, do not appear to be genuine and do not appeal to reason, or he can exercise discretion in the matter and can pass an order for treating the same as "complaint" or to reject it in suitable cases, was referred for consideration before a Division Bench in **Sukhwasi v State of U.P3**, and the Division Bench answered the reference by holding that there is no legal mandate under which the Magistrate is bound to allow an application under Section 156(3) of the Code and he has a discretion to treat an application under Section 156(3) of the Code as a complaint. The observations made by the Division Bench are as follows:-

"23. The reference is, therefore, answered in the manner that it is not incumbent upon a Magistrate to allow an application under Section 156(3) Cr.P.C. and there is no such legal mandate. He may or may not allow the application in his discretion. The second leg of the reference is also answered in the manner that the Magistrate has a discretion to treat an application under Section 156(3) Cr.P.C. as a complaint."

13. The power conferred upon the Magistrate to order investigation under Section 156(3) of the Code again came up for consideration before a Full Bench of this Court in Jagannath Verma and others v State of U.P. and another4, and taking note of the provisions contained under Section 190 of the Code which uses the expression "the Magistrate may take cognizance" and not "the Magistrate must take cognizance", it was held that under Section 190 a Magistrate is not bound, once a complaint is filed, to take cognizance even though the complaint may disclose a cognizable offence and he may well be justified in sending the complaint under Section 156(3) to the police for investigation.

14. The powers of the Magistrate, upon receiving complaint with regard to a cognizable offence again came up for consideration in the case of **Madhao and another v State of Maharashtra and another5,** and amongst the courses open, it was held that the Magistrate concerned can on the one hand invoke power under Section 156(3) of the Code, direct investigation in such matter and on the other hand he may take cognizance and embark upon the procedure embodied in Chapter XV. The relevant extracts from the judgment are as follows:-

"15. Chapter XIV of the Code speaks about conditions requisite for initiation of proceedings. Section 190 deals with cognizance of offences by Magistrates. In terms of sub-section (1) subject to the provisions of the said Chapter, any Magistrate of 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.

16. Sub-section (3) of Section 156 of the Code enables any Magistrate empowered under Section 190 to order such an investigation in terms of sub-section (1) of that section.

17. In CREF Finance Ltd. vs. Shree Shanthi Homes (P) Ltd., (2005) 7 SCC 467, while considering the power of a Magistrate taking cognizance of the offence, this Court held: (SCC p.471, para 10)

"10. ...Cognizance is taken at the initial stage when the Magistrate peruses the complaint with a view to ascertain whether the commission of any offence is disclosed. The issuance of process is at a later stage when after considering the material placed before it, the court decides to proceed against the offenders against whom a *prima facie* case is made out. It is possible that a complaint may be filed against several persons, but the Magistrate may choose to issue process only against some of the accused. It may also be that after taking cognizance and examining the complainant on oath, the court may come to the conclusion that no case is made out for issuance of process and it may reject the complaint. It may also be that having considered the complaint, the court may consider it appropriate to send the complaint to the police for investigation under Section 156(3) of the Code of Criminal Procedure."

It is clear that any judicial magistrate before taking cognizance of the offence can order investigation under Section 156(3) of the Code. If he does so, he is not to examine the complainant on oath because he was not taking cognizance of any offence therein.

18. When a Magistrate receives a complaint he is not bound to take cognizance if the facts alleged in the complaint disclose the commission of an offence. The Magistrate has discretion in the matter. If on a reading of the complaint, he finds that the allegations therein disclose a cognizable offence and the forwarding of the complaint to the police for investigation under Section 156(3) will be conducive to justice and save the valuable time of the Magistrate from being wasted in enquiring into a matter which was primarily the duty of the police to investigate, he will be justified in adopting that course as an alternative to taking cognizance of the offence itself. As said earlier, in the case of a complaint regarding the commission of cognizable offence, the power under Section 156(3) can be invoked by the Magistrate before he takes cognizance of the offence under Section 190(1)(a). However, if he once takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to revert back to the pre-cognizance stage and avail of Section 156(3)."

15. It may be apposite to refer to the case of **Gulab Chand Upadhyaya v State of U.P. and others6,** wherein considering the question whether the Magistrate was justified in directing that an application under Section 156(3) of the Code seeking for registration of an F.I.R. and investigation, be registered as complaint, certain guidelines were formulated for exercise of discretion by the Magistrate in regard to such cases. The relevant observations made in the judgment are as follows:-

"22. The scheme of Cr.P.C. and the prevailing circumstances require that the option to direct the registration of the case and its investigation by the police should be exercised where some "investigation" is required, which is of a nature that is not possible for the private complainant, and which can only be done by the police upon whom statute has conferred the powers essential for investigation, for example

(1) where the full details of the accused are not known to the complainant and the same can be determined only as a result of investigation, or

(2) where recovery of abducted person or stolen property is required to be made by conducting raids or searches of suspected places or persons, or

(3) where for the purpose of launching a successful prosecution of the accused evidence is required to be collected and preserved. To illustrate by example cases may be visualised where for production before Court at the trail (a) sample of blood soaked soil is to be taken and kept sealed for fixing the place of incident; or (b) recovery of cases property is to be made and kept sealed; or (c) recovery under Section 27 of the Evidence Act; or (d) preparation of inquest report; or (e) witnesses are not known and have to be found out or discovered through the process of investigation.

23. But where the complainant is in possession of the complete details of all the accused as well as the witnesses who have to be examined and neither recovery is needed nor any such material evidence is required to be collected which can be done only by the police, no "investigation" would normally be required and the procedure of complaint case should be adopted. The facts of the present case given below serve as an example. It must be kept in mind that adding unnecessary cases to the diary of the police would impair their efficiency in respect of cases genuinely requiring investigation. Besides even after taking cognizance and proceeding under Chapter XV the Magistrate can still under Section 202(1) Cr.P.C. order investigation, even thought of a limited nature..."

16. It is therefore seen that upon an application received under Section 156(3) of the Code disclosing a cognizable offence, the Magistrate may direct the police to register the F.I.R. and investigate or alternatively the Magistrate can take cognizance of the complaint, register it as complaint case and follow the procedure under Chapter XV of the Code. While exercising this discretion and taking either of the courses, it would be incumbent upon the Magistrate to apply judicial mind and the exercise of discretion would have to be guided by interest of justice, depending upon the facts of the case. In a situation where the investigation required is of a nature which can only be made by a police officer upon whom the statute has conferred the powers of investigation, the Magistrate may be well within his discretion to direct the registration of an F.I.R. and its investigation by the police officer. In a case where the complainant is in possession of the complete details of the case and also the material evidence, such that 'investigation' by the police may not be required, the Magistrate may follow the procedure of a complaint case.

17. The aforementioned legal position with regard to the exercise of discretion by the Magistrate upon receiving an

application under section 156(3) of the Code has been considered in a recent judgment of this Court in **Kailash Nath Dwivedi Vs State of U.P. and Others7.**

18. Learned counsel for the petitioner has not been able to dispute the aforesaid settled legal position with regard to the ambit and scope of exercise of discretionary powers by a Magistrate under section 156(3) of the Code with regard to issuing a direction for registration of an F.I.R. and its investigation or in a case where the complainant is in possession of the complete details of the case and also the material evidence, issuing a direction for registration of the case as a complaint case.

19. The courts below having followed the aforestated principles with regard to the exercise of powers under section 156(3) of the Code, the orders, which are sought to be assailed by means of the present petition cannot be said to suffer from any infirmity so as to warrant interference in exercise of jurisdiction under Article 227 of the Constitution of India.

20. The petition stands accordingly, **dismissed.**

(2021)09ILR A869
ORIGINAL JURISDICTION
CIVILL SIDE
DATED: ALLAHABAD 30.07.2021

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE GAUTAM CHOWDHARY, J.

Civil Misc. Review Application No. 121 of 2021
In
Writ C No. 14512 of 2021

Manoj Kumar & Ors. ....Petitioners

Versus

State of U.P. & Anr. ...Respondents

Counsel for the Petitioners:
Sri Sudhanshu Srivastava, Sri Jagannath Maurya

Counsel for the Respondents:
Sri Ajay Kumar, Sri Amrendra Nath Singh (Senior Adv.)

A. Practice & Procedure - Review Application - The petitioners are elected members of Zila Panchayat and have not been disqualified to cast their vote in election of President of Zila Panchayat, Firozabad. Therefore, the petitioner failed to point out any error apparent on the face of the record of the judgment dated 02.07.2021. (Para 11)

Review Application Rejected. (E-10)

List of Cases cited:

1. Chief Election Commissioner & ors. Vs Jan Chaukidar (Peoples Watch) & ors. (2013) 7 SCC507

2. Boddula Krishnaiah Aiyar & ors. Vs State Election Commissioner A.P. & ors. (1996) 3 SCC 416

3. Northern India Caterers (India) Ltd. Vs Lt. Governor of Delhi AIR 1980 SC 674

4. Kamlesh Verma Vs Mayawati (2013) 8 SCC 320

5. Sarla Mudgal Vs U.O.I.(1995) 3 SCC 635

6. Kerala State Electricity Board Vs Hitech Electronics & Hydropower Ltd. & ors.(2005) 6 SCC 651

7. M/s Jain Studios Ltd. Vs ShinSatellite Public Co. Ltd. (2006) 5 SCC 501

8. Moran Mar Basselios Catholics Vs The Most Rev. Mar Poulose Athanasius AIR 1954 SC 526

9. T.C. Basappa Vs T. Nagappa & anr. AIR1954 SC 440

10. Hari Vishnu Kamath Vs Sayed Ahmad Isaque & ors. AIR 1955 SC 233

11. UOI Vs Sandur Manganese and Iron Ores Ltd. & ors. (2013) 8 SCC 337

12. Kamlesh Verma Vs Mayawati (2013) 8 SCC 320

13. Akshay Kumar Singh Vs State (N.C.T. of Delhi) (2020) 3 SCC 431

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri Manish Goyal, learned Additional Advocate General, alongwith Sri Ajeet Kumar Singh, learned Additional Advocate General assisted by Sri J.N. Maurya, learned Chief Standing Counsel and Sri Sudhanshu Srivastava, learned Additional Chief Standing counsel; and Sri Amrendra Nath Singh, learned senior advocate, assisted by Sri Ajay Kumar, learned counsel for the petitioners.

2. Sri **Manish Goyal, learned Additional Advocate General submits as under :**

i. The writ petition was filed by the petitioners concealing material facts of the case with respect to FIR being Case Crime No.222/2021, dated 08.06.2021, under Section 364 IPC, P.S. Narkhi, District - Firozabad, against petitioner Nos. 1,2 & 3, Case Crime No. 68/2021, dated 07.04.2021, under Sections 147, 188, 341, 353, 171 E, 171 H, I.P.C. read with Section 7 of the Criminal Law (Amendment) Act, 1932 against the petitioner No.4 and rejection of his anticipatory Bail Application No.1802 of 2021 by the Additional Sessions Judge Fast Track Court No.1 Firozabad, vide order dated 30.06.2021, rejection of anticipatory bail application No.292 of 292 of 2021 arising out of case crime no.222 of 2021, under Section 364 I.P.C. by the Court of Additional District Judge/Specal Judge POSCO Court No.2, Firozabad, vide order dated 02.07.2021 and Case Crime No.73/2021, under Sections 341, 323, 504, 506 and 307 I.P.C., P.S. Basai, Mohamadpur, District - Firozabad (FIR dated 09.05.2021) against the petitioner No.6.

ii. Since against the petitioners F.I.Rs. were registered, therefore, the petitioners even though elected members of Zila Panchayat; have no right to vote in the election of President, Zila Panchayat of Firozabad, in view of the law laid down by **Hon'ble Supreme Court in Chief Election Commissioner and others Vs. Jan Chaukidar (Peoples Watch) and others (2013) 7 SCC 507 (paras 6 & 7)** inasmuch as persons in lawful custody have no right to vote and they shall not be deemed to be electors.

iii. The writ petition was not maintainable in view of the provisions of Article 243 O of the Constitution of India which provides that no election of any Panchayat shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any law made by the legislature of a State. Reliance is placed on the judgment of Hon'ble Supreme Court in **(1996) 3 SCC 416 (para 7,8, 9, and 11) Boddula Krishnaiah Aiyar and another Vs. State Election Commissioner A.P. and others.** Since the facts regarding criminal cases as stated above have been concealed by the petitioners, the petitioners can not be said to have approached the Court with clean hands which shall dis-entitle them to any relief under Article 226 of the Constitution of India.

iv. The effect of the order dated 02.07.2021, passed by this Court is that the petitioners' arrest have been stayed.

3. **Sri Amrendra Nath Singh, learned senior counsel representing the petitioners, opposed the Review Application and submits as under :**

i. A review application can be entertained only if the order sought to be reviewed suffers from patent error of law, glaring omission of facts and apparent mistake which neither exists nor has been alleged in the review application nor has been argued. Therefore, the review application itself is not maintainable. Reliance is placed upon a judgment of Hon'ble Supreme Court in **Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi AIR 1980 SC 674.**

ii. The submissions made by the learned Additional Advocate Generals and the allegations made in the Review Application are false inasmuch as the petitioners have disclosed in paragraphs 13 and 14 about the Case Crime No.73 of 2021, under Sections 341, 323, 504, 506 and 307 I.P.C., P.S. - Basai, Mohamadpur, District - Firozabad and Case Crime No. 68/2021, dated 7.4.2021, under Section 147, 188, 341, 353, 171E, 171 H, I.P.C. read with Section 7 of the Criminal Law (Amendment) Act 1932, P.S. - Eka, District - Firozabad. The petitioners have also disclosed in paragraph 7 of the writ petition the fact regarding FIR being Case Crime No.222/2021, under Section 364 IPC, P.S. Narkhi, District - Firozabad, lodged against unknown persons and also annexed as Annexure 3 to the writ petition.

iii. The respondents have not disputed at all the facts stated in paragraphs 8,9,10,11 and 12 of the writ petition which clearly proves that ruling political party and members in collusion with the police authorities and District Administration are bent upon to ensure that the candidate of the ruling party wins as President of Zila Panchayat. For that purpose alone, petitioners have been falsely implicated which is nothing but a political vendetta.

iv. The conduct of the respondents is in contrast to their constitutional duty for free and fair election. In fact the respondents are destroying the democracy.

v. Bare perusal of the order dated 02.07.2021, passed by this court leaves no manner of doubt that the order was passed with the consent of learned counsels for the parties. The factum of consent has not been disputed. Therefore, the review application is not entertainable. All the petitioners have casted their votes today. Therefore, no cause of action survives for filing the review application.

vi. This court while passing the order dated 02.07.2021 neither stayed the arrest of the petitioners nor made any comment with respect to the FIRs. lodged against the petitioners nor interfered with the FIRs. in any manner and for this reason the petitioners, after they casted their votes today; have been arrested by the police.

vii. The petitioners shall take legal recourse against the criminal cases in which they have been falsely implicated.

viii. The petitioners have neither been disqualified as elected members of Zila Panchayat nor they have been declared disqualified to cast their vote in the election of President Zila Panchayat, Firozabad.

Therefore, the order dated 02.07.2021 does not suffer from any manifest error of law.

ix. The Review Application is wholly groundless, misconceived and frivolous and deserves to be dismissed with exemplary cost.

4. Before we proceed to examine the rival contentions of the parties, it would be appropriate to reproduce the order dated 02.07.2021 passed by this Court, against which the State-respondents have filed the present review application. The aforesaid order dated 02.07.2021 passed by this Court, is reproduced below:

"Heard Sri Amrendra Nath Singh, learned senior advocate assisted by Sri Ajay Kumar, learned counsel for the petitioners and Sri Ajeet Kumar Singh, learned Additional Advocate General for the State-respondents.

Petitioners claim that they are elected members of Zila Panchayat and have a right to vote in the election of President of Zila Panchayat, District Firozabad scheduled for 03.07.2021 but the respondents are attempting not to allow the petitioners to cast their votes on the basis of a First Information Report No.0222 of 2021, dated 08.06.2021 under Section 364, I.P.C., P.S. Narkhi, District Firozabad with respect to an alleged incident dated 06.05.2021. The aforesaid FIR is against unknown persons. The petitioners are not named in it. Learned counsel for the petitioners further submits that the petitioners have a right to cast their votes but they are being prevented by the respondents from doing so, so as to help another candidate. He further submits that a direction may be issued to the respondents to ensure that the petitioners may cast their vote safely.

Sri Ajeet Kumar Singh, learned Additional Advocate General for the State-respondents submits that if the petitioners are members of Zila Panchayat and have a right to cast vote in the election of President of Zila Panchayat, Firozabad, the State is under constitutional duty for free and fair election.

Considering the submissions of the learned counsels for the parties and with their consent, this writ petition is being finally disposed off without calling for a counter affidavit, directing the respondents to ensure that the petitioners may cast their votes safely in the election of President, Zila Panchayat, Firozabad, scheduled to be held on 03.07.2021.

Sri Ajeet Kumar Singh, learned Additional Advocate General for the State-respondents shall intimate this order in writing today itself to the respondent Nos.2 to 6 for compliance.

It is made clear that we have not expressed any opinion with respect to the criminal case, if any, either registered against the petitioners or in which they are wanted.

With the aforesaid directions, the writ petition is disposed off."

5. Perusal of the aforesaid order would clearly reveal that the aforesaid order was passed with the consent of the learned counsels for the parties and on the statement of the learned Additional Advocate General that if the petitioners are members of Zila Panchayat and have a right to cast vote in the election of President of Zila Panchayat, Firozabad, the State is under constitutional duty for free and fair election. Nothing has been brought

before us even by the aforesaid review application that either the petitioners are not members of Zila Panchayat, Firozabad or their memberships have been discontinued by a competent authority or that they have no right to vote. In the absence of these basic facts, there does not arise any question for review of the afore-quoted order dated 02.07.2021.

6. During course of hearing of review application, Sri Amrendra Nath Singh, learned senior advocate has stated that the petitioners have casted their votes today in the election of President, Zila Panchayat, Firozabad. We requested learned Additional Advocate Generals to verify the statement and to state as to whether the petitioners have casted their votes today? After seeking instructions, learned Additional Advocate Generals assisted by Sri Sudhanshu, learned Additional Chief Standing Counsel confirmed and stated before this court that the petitioners have casted their votes today in the election of President, Zila Panchayat, Firozabad. This statement of fact is recorded in our order dated 03.07.2021 by means of the order dated 02.07.2021, we have merely directed the respondents to ensure that the petitioners may cast their votes safely in the election of President, Zila Panchayat, Firozabad scheduled to be held on 03.07.2021. We have also made it clear that in the said order, we have not expressed any opinion with respect to the criminal cases, if any, either registered against the petitioners or in which they are wanted. Thus, after the petitioners casted their votes as admitted by learned Additional Advocate Generals appearing for the applicants/ State-respondents, no cause of action survived to press the review application, yet the learned Additional Advocate Generals pressed it and argued the matter.

Scope of Review:-

7. It is well settled that a party is not entitled to seek review of a judgment or order of this court merely for rehearing and a fresh decision. A review application for review of a judgment or order of this court under Article 226 of the Constitution of India, can be justified only when circumstances of a substantial and compelling character make it necessary to do so. Review may be justified if a manifest wrong has been done and it is necessary to pass an order to do full and effective justice. Review proceeding cannot be equated with the original hearing of the case. A judgment and order can be reviewed only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. An order can also be reviewed on the ground of discovery of new and important matter for evidence which even after exercise of due diligence was not within the knowledge of the applicant or could not be produced by him at the time of hearing.

8. Principles for review of a judgment or order have been summarised by the Apex Court in **Kamlesh Verma vs. Mayawati, (2013) 8 SCC 320 (paras 20, 20.1 and 20.2),** as under:

"20. Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute:

20.1. When the review will be maintainable:

(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;

(ii) Mistake or error apparent on the face of the record;

(iii) Any other sufficient reason.

The words "any other sufficient reason" have been interpreted in Chhajju Ram v. Neki (1922) 16 LW 37 and approved by this Court in Moran Mar Basselios Catholicos v. Most Rev.Mar Poulose Athanasius, AIR 1954 SC 526 to mean "a reason sufficient on grounds at least analogous to those specified in the rule". The same principles have been reiterated in Union of India v. Sandur Manganese & Iron Ores Ltd., (2013) 8 SCC 337.

20.2. When the review will not be maintainable:

(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.

(ii) Minor mistakes of inconsequential import.

(iii) Review proceedings cannot be equated with the original hearing of the case.

(iv) Review is not maintainable unless the material error, manifest on the facts of the order, undermines its soundness or results in miscarriage of justice.

(v) A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.

(vi) The mere possibility of two views on the subject cannot be a ground for review.

(vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.

(viii) The appreciation of evidence on record is fully within the domain of the appellate Court, it cannot be permitted to be advanced in the review petition.

(ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived."

9. The power of review can be exercised for correction of a mistake but not to substitute a view. In the case of **Sarla Mudgal vs. Union of India, (1995) 3 SCC 635,** Hon'ble Supreme Court has laid down the law that mistake or error apparent on the face of record may require review. Error apparent on the face of the proceeding is an error which is based on clear ignorance or disregard of the provisions of law. In a review petition, it is not open to re-appreciate the evidence and to reach to a different conclusion even if that is possible. Conclusions arrived at by appreciation of facts cannot be assailed in a review petition unless there is an error apparent on the face of the record or for some reason akin, vide **Kerala State Electricity Board vs. Hitech Electrothermics & Hydropower Ltd.and others, (2005) 6 SCC 651.** The principles summarised in foregoing paragraphs have also been reiterated by Apex Court in **M/S Jain Studios Limited vs Shin Satellite Public Co. Ltd, (2006) 5 SCC 501, Moran Mar Basselios Catholicos vs The Most Rev. Mar Poulose Athanasius AIR 1954 SC 526, T. C. Basappa vs T. Nagappa and Another, AIR 1954 SC 440, Hari Vishnu Kamath vs Syed**

Ahmad Ishaque and Others, AIR 1955 SC 233, Union of India vs. Sandur Manganese and Iron Ores Ltd. and others, (2013) 8 SCC 337, Kamlesh Verma vs. Mayawati, (2013) 8 SCC 320 and Akshay Kumar Singh vs. State (N.C.T. of Delhi) (2020) 3 SCC 431 (Para-11).

10. The submissions made by learned counsel for the applicants as afore-quoted would reveal that the applicants have merely stated that first information report has been registered against the petitioner just before the Election of President, Zila Panchayat, Firozabad. The petitioners have fully disclosed in the writ petition the criminal cases lodged against them. The State applicants have not disputed the allegations made in the paragraphs- 8, 9, 11 and 12 of the writ petition, which are reproduced below:

"8. That on this First Information Report which was lodged as Case Crime No.222 of 2021, the victim Pravesh Kumar also filed an affidavit before the Superintendent of Police Firozabad which was not considered and Investigating Officer recorded the statement of two persons and four petitioners made as an accused. For kind perusal of this Hon'ble Court, A Photo copy of the Affidavit filed by Victim Pravesh Kumari is being filed herewith and Marked as ***Annexure-No.4*** *to this writ petition.*

9. That the Police on the basis of criminal case wants to arrest the petitioners and restrain to cost their votes an election of President of Zila Panchayat, which was going-on 3.7.2021.

11. That the Constitution of India also provides to petitioners as well as Citizen of India to cost their votes for his free will in Election, but the Ruling party in State (Bhartiya Janta Party) with collusion of local administration want to restrain the petitioners to cast their votes, hence Lordship kindly permit to petitioners to cast their votes an election of Zila Panchayat of President which is going on 3.7.2021, otherwise the petitioners shall suffer irreparable loss and injury, which was not compensated in any manner.

*12. That in District Firozabad total members of Zila Panchayat are 33, the Six Members of Zila Panchayat (They are petitioners in the present writ petition) were falsely implicated in C*riminal case due to they are not cost their votes in favour of ruling party candidate."

11. Since the petitioners are elected members of Zila Panchayat and have not been disqualified to cast their votes in election of President of Zila Panchayat, Firozabad. Therefore, there was no apparent error either in the statement of the learned Additional Advocate General as noted in the order or in the direction of this court to allow the petitioner to cast their votes. The submissions of learned Additional Advocate General or the Review Application neither discloses any manifest error/ glaring omission/ patent mistake in the order dated 02.07.2021 nor discloses discovery of any new facts requiring review of the order. None of the circumstances requiring review of the order dated 02.07.2021, as paer settled principles; exists in the present set of facts.

12. From the facts as narrated above and the contents of review application, it may be safely observed that the present review application has been filed by the State-respondents merely to avoid the order

dated 02.07.2021 so that somehow the petitioners who are lawfully elected members of Zila Panchayat, may not cast their votes for the election of President, Zila Panchayat, Firozabad. A review filed for such purpose is not maintainable and deserves rejection with exemplary cost.

13. For all the reasons afore-stated, we are of the view that the applicants/ State-respondents have filed a frivolous review application, which deserves to be dismissed with costs.

14. In view of the aforesaid, **the review application is dismissed with costs.**

(2021)09ILR A876
ORIGINAL JURISDICTION
CIVILL SIDE
DATED: LUCKNOW 03.09.2021

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.
THE HON'BLE MRS. SAROJ YADAV, J.

Civil Misc. Review Application Defective No.138 of 2021

State Of U.P. & Ors. ....Applicants
Versus
Rajit Singh & Anr. ...Respondents

Counsel for the Applicants:
C.S.C.

Counsel for the Respondents:

A. Practice & Procedure - Review Application - The Review is not an appeal in disguise. Rehearing of matter is impermissible in the garb of review. In the present case, the petitioner failed to point out any error in the judgment under challenge. (Para 11)

Review Application Rejected. (E-10)

List of Cases cited:

1. Rajendra Kumar Vs Rambai AIR 2003 SC 2095 *(followed)*

2. Zahira Habibullah Sheikh Vs St.of Guj. (2004) 5 SCC 353 *(followed)*

3. Thungabhadra Industries Ltd. Vs The Government of Andhra Pradesh AIR 1964 SC 1372 *(followed)*

4. Parsion Devi & ors. Vs Sumitri Devi & ors. 1997 (8) SCC 715 *(followed)*

5. Lily Thomad Vs U.O.I. AIR 200 SC 1650 *(followed)*

6. Inderchand Jain Vs Motilal (2009) 4 SCC 665 *(followed)*

(Delivered by Hon'ble Karunesh Singh Pawar, J.
&
Hon'ble Mrs. Saroj Yadav, J.)

(Application No.98887 of 2021)

1. The application seeks condonation of delay in filing the review application.

2. Learned counsel for the applicant submits that due to pandemic of Covid-19 (Corona virus) all over the country, resulting into lockdown and closure of High Court, the appeal could not be filed within the limitation period.

3. It is next submitted that the Apex Court in Suo Motu Writ Petition (Civil) No. 3 of 2020 has also extended the limitation considering the spread of Covid-19 (Corona Virus).

4. Considering the circumstances of Covid-19 (Corona Virus) as well as order dated 23.03.2020 passed by the Apex Court in Suo Motu Writ Petition (Civil) No. 3 of

2020, the delay in filing the review application is condoned.

1. This application seeks review of judgment dated 27.2.2020 passed in Writ Petition No.5554 (S/B) of 2020 (State of U. P. Vs. Rajit Singh and another) whereby writ petition has been dismissed by Division Bench of this court.

2. Notices to respondent nos. 1 and 2 are dispensed with.

3. Learned counsel for the petitioners while arguing the case could not point out any error in the impugned judgment which is apparent on the face of record, rather it is admitted case of the State, as has been rightly considered by learned Tribunal, that the admission made by the State in para 5 of the reply in the application dated 13.6.2014, which was filed before the enquiry officer, has come to the conclusion that the doctrine of equality will be applicable in the case of the petitioners because regarding the same incident several other engineers and officers were not found guilty and have been exonerated of the charges during the course of enquiry and only the petitioner has been found guilty. Thus, on the ground of equal treatment, his claim petition was allowed.

The writ petition filed before the High Court has been dismissed upholding the judgment and order passed by learned tribunal as it is admitted case of the State that all the other officers who are involved in respect of the same incident have been exonerated and only the respondent has been found guilty thus the order of the learned tribunal quashing the punishment order was found to be just and proper.

4. Learned counsel for the review petitioner could not show any error apparent on the face of record.

5. The law is settled that review can be entertained against the order only on two grounds:-

(a) The impugned order suffers from any error apparent on the face of the record, and

(b) permitting the order to stand will lead to failure to justice.

6. In **Rajendra Kumar Vs. Rambai, AIR 2003 SC 2095,** the Apex Court has observed about limited scope of judicial intervention at the time of review of the judgment and said:

"The limitations on exercise of the power of review are well settled. The first and foremost requirement of entertaining a review petition is that the order, review of which is sought, suffers from any error apparent on the face of the order and permitting the order to stand will lead to failure of justice. In the absence of any such error, finality attached to the judgement/order cannot be disturbed.".

7. In **Zahira Habibullah Sheikh vs. State of Gujarat reported in (2004) 5 SCC 353**, Hon'ble Apex while referring its earlier judgements on the ground has observed that review application are not to be filed for the pleasure of the parties or even as advice for ventilating remorseless, but ought to be resorted to with a great sense of responsibility as well.

8. Review is also by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies

only for patent error **(vide Thungabhadra Industries Ltd. Vs. The Government of Andhra Pradesh AIR 1964 SC 1372).**

9. In **Parsion Devi and others Vs. Sumitri Devi and others 1997 (8) SCC 715** the Apex court held that an error, which is not self evident and has to be detected by process of reasoning, can hardly be said to be error apparent on the face of the record justifying the court to exercise powers of review in exercise of review jurisdiction.

10. Thus, Review is not an appeal in disguise. Rehearing of the matter is impermissible in the garb of review. It is an exception to the general rule that once a judgment is signed or pronounced, it should not be altered. In **Lily Thomas Vs. Union of India AIR 2000 SC 1650,** the Court said that power of review can be exercised for correction of a mistake and not to substitute a new. Such powers can be exercised within limits of the statute dealing with the exercise of power. The aforesaid view is reiterated in I**nderchand Jain Vs. Motilal (2009) 4 SCC 665.**

11. In view of the above, we do not find any error in the judgment under challenge, hence, dismissed.

(2021)09ILR A878

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 23.09.2021

BEFORE

THE HON'BLE RAVI NATH TILHARI, J.

Review Petition No. 264 of 2003

Chandra Bhan Major & Ors. ....Petitioners

Versus

Aditiya Prakash ...Respondent

Counsel for the Petitioners:

Mohd. Abid Ali, Avadhesh Kumar, Om Prakash Pandey, Onkar Nath Tiwari, R.N. Gupta

Counsel for the Respondent:

R.S. Pandey, Chandra Bhooshan, R.S. Pandey

A. Civil Law - Civil Procedure Code, 1908 - Section 100 - The Court find that the admission of second appeal without framing any substantial question of law, neither at the time or admission o at any time thereafter, is an error apparent on the face of the record of the judgment dated 14.08.2003 which the High Court is bound to correct it. (Para 10)

Review Petition Allowed. (E-10)

List of Cases cited:

1. Nazir Mohammad Vs J. Kamala & ors. 2020 (38) LCD 1969 (SC) *(followed)*

2. Kondiba Dagadu Kadam Vs Savitribai Sopan Gujar (1999) 3 SCC 722 *(followed)*

3. Kamlesh Verma Vs Mayawati (2013) 8 SCC 320 *(followed)*

4. Perry Kansagra Vs Smriti Madan Kansagra (2019) 20 SCC 753 *(followed)*

5. S. Nagraj Vs St.of Karn. (1993) Supp. 4 SCC 595 *(followed)*

6. M.M. Thomas Vs St. of Kerala & anr. (2000) 1 SCC 666 *(followed)*

7. F.C.I. & anr.. Vs M/s Seil Ltd. & ors. (2008) 3 SCC 440 *(followed)*

(Delivered by Hon'ble Ravi Nath Tilhari, J.)

1. Heard Sri Avadhesh Kumar, learned counsel for the review petitioner and Sri Chandra Bhooshan, learned counsel for opposite parties/respondents.

2. This review petition has been filed by the defendant appellants for review of the judgment and decree dated 14.08.2003 passed by this Court in Second Appeal no. 224 of 1986 in Re: Chandra Bhan and others versus Aditya Prakash and others, by which the defendant-appellants' appeal was dismissed.

3. The review was admitted and the execution of the decree was stayed till the next date of listing, vide order dated 02.11.2006.

4. Sri Avadhesh Kumar, learned counsel for the review- applicant submits that the second appeal was an admitted second appeal, which could not be decided without framing any substantial question of law which is a mandatory requirement for decision of second appeal under Section 100 of the Code of Civil Procedure. He has placed reliance on the judgment of Hon'ble Supreme Court in the case of ***Nazir Mohammad vs. J. Kamala and Ors. [2020 (38) LCD 1969 (SC)].***

5. The second appeal was admitted by order dated 02.04.1986, however, any substantial question of law was not framed, neither at the time of admission nor at any time thereafter. Judgment dated 14.08.2003 also does not frame any substantial question of law. In ***Nazir Mohammad (supra),*** the Hon'ble Supreme Court has held that a condition precedent for entertaining and deciding of second appeal is the existence of a substantial question of law. In K***ondiba Dagadu Kadam vs. Savitribai Sopan Gujar [(1999) 3 SCC 722], t***he Hon'ble Supreme Court has held that the High Court is oblized to satisfy itself regarding the existence of a substantial question of law. If satisfied, the High Court has to formulate the substantial question of law involved in the case. The appeal is required to be heard on the question, so formulated.

6. The basic principles in which review application can be entertained and cannot be entertained have been eloquently laid down by Hon'ble the Apex Court in the case of ***Kamlesh Verma vs. Mayawati [(2013) 8 SCC 320].*** Paragraph 20 under the heading "summary of principles" is being reproduced hereunder:-

20. Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute:

20.1. When the review will be maintainable:

(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;

(ii) Mistake or error apparent on the face of the record;

(iii) Any other sufficient reason.

The words "any other sufficient reason" have been interpreted in Chhajju Ram v. Neki [(1921-22) 49 IA 144 : (1922) 16 LW 37 : AIR 1922 PC 112] and approved by this Court in Moran Mar Basselios Catholicos v. Most Rev. Mar Poulose Athanasius [AIR 1954 SC 526 : (1955) 1 SCR 520] to mean "a reason sufficient on grounds at least analogous to those specified in the rule". The same principles have been reiterated in Union of India v. Sandur Manganese & Iron Ores Ltd. [(2013) 8 SCC 337 : JT (2013) 8 SC 275]

20.2. When the review will not be maintainable:

(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.

(ii) Minor mistakes of inconsequential import.

(iii) Review proceedings cannot be equated with the original hearing of the case.

(iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.

(v) A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.

(vi) The mere possibility of two views on the subject cannot be a ground for review.

(vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.

(viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.

(ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived.

7. In the case of ***Perry Kansagra v. Smriti Madan Kansagra [(2019) 20 SCC 753],*** the Hon'ble Apex Court on the scope and power of review has reiterated the same principles. It is apt to reproduce paragraph nos. 14 to 16, which are as under:-

14. The issues that arise for our consideration can broadly be put under two heads:

14.1. (a) Whether the High Court was justified in exercising review jurisdiction and setting aside the earlier judgment?

14.2. (b) Whether the High Court was correct in holding that the reports of the Mediator and the Counsellor in this case were part of confidential proceedings and no party could be permitted to use the same in any court proceedings or could place any reliance on such reports?

15. As regards the first issue, relying on the decisions of this Court in Inderchand Jain v. Motilal [Inderchand Jain v. Motilal, (2009) 14 SCC 663 : (2009) 5 SCC (Civ) 461] , Ajit Kumar Rath v. State of Orissa [Ajit Kumar Rath v. State of Orissa, (1999) 9 SCC 596 : 2000 SCC (L&S) 192] and Parsion Devi v. Sumitri Devi [Parsion Devi v. Sumitri Devi, (1997) 8 SCC 715], it was submitted by the appellant that the exercise of review jurisdiction was not warranted at all.

15.1. In Inderchand Jain [Inderchand Jain v. Motilal, (2009) 14 SCC 663 : (2009) 5 SCC (Civ) 461] it was observed in paras 10, 11 and 33 as under: (SCC pp. 669 & 675)

"10. It is beyond any doubt or dispute that the review court does not sit in appeal over its own order. A rehearing of

the matter is impermissible in law. It constitutes an exception to the general rule that once a judgment is signed or pronounced, it should not be altered. It is also trite that exercise of inherent jurisdiction is not invoked for reviewing any order.

11. Review is not appeal in disguise. In Lily Thomas v. Union of India [Lily Thomas v. Union of India, (2000) 6 SCC 224 : 2000 SCC (Cri) 1056] this Court held: (SCC p. 251, para 56)

"56. It follows, therefore, that the power of review can be exercised for correction of a mistake but not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated like an appeal in disguise.'

33. The High Court had rightly noticed the review jurisdiction of the court, which is as under:

"The law on the subject--exercise of power of review, as propounded by the Apex Court and various other High Courts may be summarised as hereunder:

(i) Review proceedings are not by way of appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 CPC.

(ii) Power of review may be exercised when some mistake or error apparent on the fact of record is found. But error on the face of record must be such an error which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on the points where there may conceivably be two opinions.

(iii) Power of review may not be exercised on the ground that the decision was erroneous on merits.

(iv) Power of review can also be exercised for any sufficient reason which is wide enough to include a misconception of fact or law by a court or even an advocate.

(v) An application for review may be necessitated by way of invoking the doctrine actus curiae neminem gravabit.'

In our opinion, the principles of law enumerated by it, in the facts of this case, have wrongly been applied."

15.2. In Ajit Kumar Rath [Ajit Kumar Rath v. State of Orissa, (1999) 9 SCC 596 : 2000 SCC (L&S) 192] , it was observed: (SCC p. 608, para 29)

"29. In review proceedings, the Tribunal deviated from the principles laid down above which, we must say, is wholly unjustified and exhibits a tendency to rewrite a judgment by which the controversy had been finally decided. This, we are constrained to say, is not the scope of review under Section 22(3)(f) of the Administrative Tribunals Act, 1985...."

15.3. Similarly, in Parsion Devi [Parsion Devi v. Sumitri Devi, (1997) 8 SCC 715] the principles were summarised as under: (SCC p. 719, para 9)

"9. Under Order 47 Rule 1 CPC a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to

exercise its power of review under Order 47 Rule 1 CPC. In exercise of the jurisdiction under Order 47 Rule 1 C.P.C. it is not permissible for an erroneous decision to be "reheard and corrected". A review petition, it must be remembered has a limited purpose and cannot be allowed to be "an appeal in disguise".

16. On the other hand, reliance was placed by the respondent on the decision in BCCI v. Netaji Cricket Club [BCCI v. Netaji Cricket Club, (2005) 4 SCC 741] to submit that exercise in review would be justified if there be misconception of fact or law. Para 90 of the said decision was to the following effect: (SCC p. 765)

"90. Thus, a mistake on the part of the court which would include a mistake in the nature of the undertaking may also call for a review of the order. An application for review would also be maintainable if there exists sufficient reason therefor. What would constitute sufficient reason would depend on the facts and circumstances of the case. The words "sufficient reason" in Order 47 Rule 1 of the Code are wide enough to include a misconception of fact or law by a court or even an advocate. An application for review may be necessitated by way of invoking the doctrine actus curiae neminem gravabit."

8. It has thus been settled in law that;

(i) the power of review may be necessitated by way of invoking the doctrine "actus curiae neminem gravabit' which means that no act of the court in the course of whole of the proceedings does an injury to the suitors in the court. It has been held in Food Corporation of India and Another vs. M/s Seil Ltd. & Ors. [(2008) 3 SCC 440] that a writ court exercises its power of review under Article 226 of the Constitution of India itself and while exercising the jurisdiction it not only acts as a court of law but also as a court of equity. A clear error or omission on the part of the court to consider a justifiable claim would be subject to review, amongst others, on the "actus curiae neminem gravabit'.

(ii) The mistake or error must be apparent on the face of record i.e. that it must strike one on more looking at the record and would not require any long drawn process of reasoning. It should not be an error which has to be fished out and searched. Such an error must also be material which undermines the soundness of the judgment or results in miscarriage of justice. An error which may be apparent but is of inconsequential import, that would not furnish a ground for review.

9. It would also be apt to refer the judgment in the case of S**.** ***Nagraj vs. State of Karnataka [(1993) Supp. 4 SCC 595],*** wherein Hon'ble Apex Court has observed that it is the duty of the Court to rectify, revise and recall its orders as and when it is brought to its notice that certain of its orders were passed on a wrong or mistaken assumption of facts and that implementation of those orders would have serious consequences. Again in the case of ***M.M. Thomas vs. State of Kerala & Another [(2000) 1 SCC 666]*** the Hon'ble Apex Court has held that the High Court, as a Court of record, has a duty to itself to keep all the records correctly and in accordance with law. Hence, if any apparent error is noticed by the High Court in respect of any orders passed by it, the High Court has not only power, but a duty to correct it.

10 . In view of the aforesaid, there is an error apparent on the face of record of the judgment dated 14.08.2003.

11. The review petition is **allowed**. The judgment dated 14.08.2003 is recalled. The second appeal is restored to its original number for fresh decision.

12. The review applicant has also filed some supplementary affidavits along with applications as also application for permission to file additional evidence, annexing certain documents against which the respondent has raised certain objections.

13. As the review has been allowed, the Court does not enter into the controversy as to whether the application under Order 41 Rule 27 C.P.C. is maintainable in review application or not, leaving it open to the applicants, if so advised, to file appropriate application under Order 41 Rule 27 C.P.C. or such other provisions as may be open to them, in the second appeal itself.

14. List this second appeal before appropriate Bench in the next month, as the appeal pertains to the year 1986.

(2021)09ILR A883
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 06.09.2021

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MANISH KUMAR, J.

U/S 378 CR. P.C. No. 1 of 2021

State of U.P. ...Applicant

Versus

Prem & Ors. ...Opposite Parties

Counsel for the Applicant:
G.A.

Counsel for the Opposite Parties:

(A) Criminal Law - The Code of criminal procedure, 1973 - Section 378 (3),313,164 - Indian Penal Code, 1860 - Section 363, 366, 376D - leave to appeal against order of acquittal -The Protection of Children from Sexual Offences Act, 2012 - Section 3/4 - ocular evidence - in an appeal against the acquittal the Court has to examine the evidence keeping in mind that accused has been found not guilt by the trial court which gives force to the principle that accused is considered innocent until proved guilty, beyond reasonable doubt except where the law provides otherwise - in case of acquittal, there is a double presumption in favour of the accused - it cannot be disputed that there can be a conviction solely based on the evidence of the prosecutrix - evidence must be reliable and trustworthy.(Para-22,23)

(B) Evidence Law - sterling witness - What would be more relevant - consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court - Should be natural and consistent with the case of the prosecution qua the accuse .(Para - 25)

First Information Report registered in Crime - disclosing therein - daughter of the informant - aged about 15 years - disappeared while she was sleeping with her family - after enquiring it has been told to the informant - one resident of same village with the help of his brothers enticed his daughter and took her away. (Para - 4)

HELD:-There are material contradictions and change of the version by the prosecutrix at every stage, made the evidence of prosecutrix unreliable and untrustworthy. In these

circumstances the deposition / evidence of prosecutrix does not inspire the confidence to place implicit reliance to act on its basis to record the conviction of the respondents. No perversity and reasonable ground to interfere with the acquittal recorded by the trial court.(Para - 26,27)

Application for leave to appeal U/S 378(3) Cr.P.C. rejected. (E-7)

List of Cases cited:-

1. Achhar Singh Vs St. of H.P. , 2021 SCC Online HP 870

2. Woolmington Vs Director of Public Prosecutions, [1935] AC 462 (HL)

3. Chandrappa Vs St. of Karn. (2007) 4 SCC 415, p. 42,

4. St. of A.P. Vs M. Madhusudhan Rao, (2008) 15 SCC 582, p. 20-21 and

5. Raveen Kumar Vs St. of H.P. 2020 SCC Online SC 869, 11.)

6. Chaman Lal Vs The St. of H.P. , 2020 SCC online SC 988

7. Batcu Venkateshwarlu &ors. Vs Public Prosecutor High Court of Andhra Pradesh , (2008) 16 SCC 256

8. Criminal Appeal No.264 of 2020, arising out of SLP (Criminal) No.3780/2018; Santosh Prasad @ Santosh Kumar Vs The St. of Bihar

9. Rajoo & ors. Vs St. of M.P., (2008) 15 SCC 133

10. Rai Sandeep @ Deepu Vs St. (NCT of Delhi), (2012) 8 SCC 21

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

1. This Criminal Appeal has been filed by the appellant-State of Uttar Pradesh against the judgment and order dated 22.09.2020 passed by Additional Sessions Judge (POCSO Act and Created for adjudication of Rape Cases), Court No.14, Hardoi in Sessions Trial No.451 of 2016, Crime No.592 of 2016, registered under Section 363, 366, 376D I.P.C. and Section 3/4 of The Protection of Children from Sexual Offences Act, 2012 (in shourt POCSO Act), in Police Station - Kotwali Sahar, District - Hardoi, whereby the Court acquitted the accused- respondents Prem, Rameshwar, Ramteerth and Parmeshwar.

2. In compliance of this Court's order dated 08.01.2021, the notices have been issued and as per office report dated 27.08.2021, notices have been served personally upon Respondent Nos. 1. Prem, 2. Rameshwar and 4. Parmeshwar, whereas served upon Respondent No.3 Ramteerth through heir.

3. Heard Smt. Smriti Sahai, learned A.G.A. for the State -appellant and perused the impugned judgement and order passed by the trial court and the lower court record.

4. The brief facts necessary for disposal of this appeal as culled out from the case of prosecution are :-

i. On 26.10.2016 a First Information Report (in short F.I.R) was registered in Crime No.592 of 2016 under Section 363 and 366 I.P.C. disclosing therein, that daughter of the informant aged about 15 years had disappeared while she was sleeping with her family and after enquiring it has been told to the informant that one Prem, resident of same village with the help of his brothers Rameshwar, Ramteerth and Parmeshwar enticed his daughter and took her away.

ii. After investigation the chargesheet was filed under Section 363,

366, 376D I.P.C. and Section 3/4 POCSO Act, in the Court against the accused persons. The concerned Magistrate after taking cognizance committed the case to the Sessions Court for trial.

iii. The trial court framed charges against the accused Prem, Rameshwar, Ramteerth and Parmeshwar under Section 363, 366, 376D I.P.C. and Section 3/4 POCSO Act. The accused persons denied the charges and claimed to be tried.

iv. The prosecution in order to prove its case examined P.W.1 Gopal (informant), PW.2 the Prosecutrix (X), PW. 3 Dr. Smita Singh, PW.4 Dr. Indu Singh, Radiologist, PW.5 S.I. Javed Akhtar, PW.6 Lady Constable Harjit Kaur and PW.7 S.I. Rajkishor Kanaujiya.

v. As a documentary evidence, the prosecution has proved copy of F.I.R. Ext. Ka -1, statement of prosecutrix recorded under Section 164 Cr.P.C. Ext. Ka-2, Medical Examination Report of the prosecutrix Ext. Ka-3, Supplementary Medical Examination Report of the prosecutrix Ext. Ka-4, X-ray report Ext. Ka-5, Site Plan Ext. Ka-6, Chargesheet Ext. Ka-7 , Chick F.I.R. Ext. Ka-8, Mukadama Kaymi/ General Diary Ext. Ka-9, Student Admission Register Ext. Ka-10, Fard Baramadgi Ext. Ka-11, and Fard Supurdginama Ext. Ka 12.

vi. Thereafter the statements of the accused persons were recorded under Section 313 of Code of Criminal Procedure (in short Cr.P.C.), wherein, they denied the commission of crime and stated that the case has been registered falsely.

5. The trial court after hearing the arguments of both the parties and analyzing the evidence came to the conclusion that the F.I.R. has been lodged with the delay of four days without assigning any reason particularly, when the informant on the very next day of the incident came to know that his daughter was enticed and taken away by Prem and his two brothers. Neither in the F.I.R. nor in the statements / depositions, examination-in-chief and cross-examination the informant had never disclosed that from whom he got the information that the accused persons enticed his daughter and took her away.

6. It is further observed by the trial court that there are contradictions in the statement of the prosecutrix recorded under Section 164 Cr.P.C. and the deposition during examination-in-chief and cross-examination and at every stage the version has been changed. In her statement recorded under Section 164 Cr.P.C., the prosecutrix has stated that in the night of 21-22.10.2016 at about 12-01 AM Prem, Rameshwar and Ramteerth enticed her on the pretext of taking her for a ride and gagged her by using clothes and all these three persons took her on a motorcycle and Permeshwar joined them later on.

7. It is also observed by the trial court that it is highly improbable that four persons would go on one motorcycle.

8. The trial court has further observed that in her cross-examination, the prosecutrix has stated that four accused persons came to her house and gagged her and took her away and after coming out from the village, Parmeshwar also met them on his motorcycle.

9. The trial court further observed that as per version by the prosecutrix that she was sleeping with her mother, brother and

sister and in her cross-examination at Page No.7, she has admitted that her father was sleeping in the courtyard, so it is naturally not possible to gag her and take her away while she was sleeping in between her mother, brother and sister. In her cross-examination at Page No.7, the prosecutrix has stated that Prem had called her then she came out and while she was going to wake up her father, Prem gagged her, so she introduced a new story. It is also not believable when she was sleeping with her other family members, instead of waking up her mother, brother and sister, she tried to woke up her father, who was sleeping in the courtyard.

10. The trial court further observed that in her cross-examination at Page No.5, the prosecutrix has stated that she went to the terrace through stairs, but the same has not been shown in the site plan i.e. Ext. Ka-6.

11. The trial court has also observed that there is a delay in lodging of the F.I.R. for the reason as per the prosecution case the prosecutrix was recovered after lodging of the F.I.R., whereas as per defence, the F.I.R. was lodged after the recovery of the prosecutrix and in support thereof it has been argued that no time has been mentioned in the recovery memo of "X" i.e. Ext. Ka-11 except the time has been mentioned of handing over of the prosecutrix to the police constable i.e. at 4.00 PM and that too by putting an arrow.

12. The trial court has further observed that the informant in her application has written that one month ago Vimlesh Pradhan had threatened him as his father was contesting the election against him, that is why, due to election of Pradhan, Vimlesh enticed his daughter through Prem, whereas as per the prosecution story, the prosecutrix was brought to the police station by Vimlesh and called the informant to reach the police station but at no point of time Vimlesh Pradhan was examined by the prosecution. How it could be believed that the person who is keeping enmity with the informant could come alongwith the prosecutrix i.e. daughter of the informant to the police station and intimate the informant and roped his friend Prem, who is accused in the present case specially when the case of the informant is that on the directions of the Vimlesh Pradhan, Prem had took his daughter.

13. The trial court has further observed that on the very same day the medical examination of the 'X' (prosecutrix) was conducted, in which neither any internal nor any external injury was found and no sperm has been found in the vaginal smear and pregnancy test reported was negative. The hymen was old torn and healed.

14. PW.3 Dr. Smita Singh -Medical Officer in her deposition has stated that no sign of rape has been found. The hymen was old torn and healed. The hymen healed within 15 days. She has specifically opined that she has not found any violence marks on the body of the prosecutrix. She has also categorically stated that there is no physical or pathological evidence of rape. It is true that thereafter she has stated that possibility of rape cannot be ruled out.

15. Learned A.G.A. assailed the judgement of the trial court and submitted that :

i. The judgement of the trial court is against the evidence produced by the

prosecution, all the accused persons are guilty beyond any reasonable doubt and the offence is proved.

ii. The prosecutrix was forcibly took by gagging by all the four accused persons to an unknown place and outraged her modesty for four days.

iii. The trial court has taken into consideration that the minor contradictions in the statements / depositions of the prosecutrix, which have been at different stages, which is not proper.

iv. For an offence of rape, motive is not necessary. The trial court has acquitted the accused persons on the basis of surmises and conjecture.

16. After hearing the learned A.G.A. and as per the settled law that in an appeal against the acquittal the Court has to examine the evidence keeping in mind that accused has been found not guilt by the trial court which gives force to the principle that accused is considered innocent until proved guilty, beyond reasonable doubt except where the law provides otherwise.

17. Hon'ble Apex Court in the case of **Achhar Singh Vs. State of Homachal Pradesh reported in 2021 SCC Online HP 870** in this regard has laid down as under:

"13. It is fundamental in criminal jurisprudence that every person is presumed to be innocent until proven guilty, for criminal accusations can be hurled at anyone without him being a criminal. The suspect is therefore considered to be innocent in the interregnum between accusation and judgment. History reveals that the burden on the accuser to prove the guilt of the Accused has its roots in ancient times. The Babylonian Code of Hammurabi (1792-1750 B.C.), one of the oldest written codes of law put the burden of proof on the accuser. Roman Law coined the principle of actori incumbit (onus) probatio (the burden of proof weighs on the Plaintiff) i.e., presumed innocence of the Accused. In ***Woolmington v. Director of Public Prosecutions [1935] AC 462 (HL)****, the House of Lords held that the duty of the prosecution to prove the prisoner's guilt was the "golden thread" throughout the web of English Criminal Law. Today, Article 11 of the Universal Declaration of Human Rights, Article 14 of the International Covenant on Civil and Political Rights and Article 6 of the European Convention on Human Rights all mandate presumption of innocence of the Accused.*

14. A characteristic feature of Common Law Criminal Jurisprudence in India is also that an Accused must be presumed to be innocent till the contrary is proved. It is obligatory on the prosecution to establish the guilt of the Accused save where the presumption of innocence has been statutorily dispensed with, for example, Under Section 113-B of the Evidence Act, 1872. Regardless thereto, the 'Right of Silence' guaranteed Under Article 20(3) of the Constitution is one of the facets of presumed innocence. The constitutional mandate read with the scheme of the Code of Criminal Procedure, 1973 amplifies that the presumption of innocence, until the Accused is proved to be guilty, is an integral part of the Indian criminal justice system. This presumption of innocence is doubled when a competent Court analyses the material evidence, examines witnesses and acquits the Accused. Keeping this cardinal principle of invaluable rights in mind, the appellate Courts have evolved a self-restraint policy whereunder, when two reasonable and

possible views arise, the one favourable to the Accused is adopted while respecting the trial Court's proximity to the witnesses and direct interaction with evidence. In such cases, interference is not thrusted unless perversity is detected in the decision-making process.

15. It is thus a well crystallized 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 Code of Criminal Procedure 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 acquittal1. This Court has held in a catena of decisions (including ***Chandrappa v. State of Karnataka (2007) 4 SCC 415, p. 42, State of Andhra Pradesh v. M. Madhusudhan Rao (2008) 15 SCC 582, p. 20-21 and Raveen Kumar v. State of Himachal Pradesh, 2020 SCC Online SC 869, 11.)*** *that the Code of Criminal Procedure 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."*

18. In **Chaman Lal Vs. The State of Himachal Pradesh reported in 2020 SCC online SC 988**, the Hon'ble Apex Court in this regard has expressed the similar views.

19. Now in the present case having examined the rationale behind the conclusion arrived at by the trial court while acquitting the accused persons after analyzing the judgement and evidence available on record, it appears that the contentions of the learned A.G.A. have no force for the reason that the F.I.R. has been lodged with the delay of four days without explaining the reason for the same, particularly when the informant on the very next day in the morning came to know about the persons behind the offence alleged in the F.I.R. Neither in the F.I.R. nor in the statement, the informant had ever taken the name of a person from whom he came to know that her daughter was taken away by the present accused persons.

20. There are contradictions in the statements / deposition of the prosecutrix recorded under Section 164 Cr.P.C., in her examination-in-chief and her cross-examinations, at all the stages she came with a different story. At one place, she has stated that she was kidnapped by three accused persons namely, Prem, Ramteerth and Rameshwar, but at other place she came with a story that Prem called her while she was sleeping. At one place she has stated that Rameshwar took her at his motorcycle to an unknown place and at other place she has come with a case that Prem, Rameshwar and Ramteerth took her on their motorcycle and Parmeshwar joined them later on, but how it can be possible that four persons had gone on one motorcycle. At one place, she has come with a case that all had come to her house and gagged her and took her from terrace and when reached outside the village, there Parmeshwar came with a motorcycle. It is also unbelievable that she was sleeping alongwith her mother, brother and sister but instead of waking them, she tried to wake up her father who was sleeping in the courtyard when Prem had called her. At one place, she has stated that Prem had

asked her let us go for a ride to his Jijaji's place. At one place, she has stated that she reached terrace by using staircase of her house, whereas no stairs were shown in site plan prepared by the Investigating Officer Ext. Ka-6.

21. From the medical examination report of the prosecutrix and the statement of the PW.3 Dr. Smita Singh, the offence of outraging the modesty of the prosecutrix has not been found, as the medical examination of the prosecutrix was conducted on the very same day of her recovery and as per her statement she was raped by four persons from last four days, then somthing should have come in the medical examination report, but nothing in the medical examination report, so the ocular evidence of the prosecutrix does not corroborate with the medical evidence.

22. The Hon'ble Apex Court in the case of ***Batcu Venkateshwarlu and others Vs. Public Prosecutor High Court of Andhra Pradesh reported in (2008) 16 SCC 256*** has held as under: -

"12. It cannot, however, be forgotten that in case of acquittal, there is a 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 should be presumed to be innocent unless he is proved to be uilty by a competent court of law. Secondly, the accused having secured an acquittal, the presumption of his innocence is certainly not weakened but reinforced, reaffirmed and strengthened by the trial court."

23. The Hon'ble Supreme Court in its judgement dated 14.02.2020 passed in Criminal Appeal No.264 of 2020, arising out of SLP (Criminal) No.3780/2018; ***Santosh Prasad @ Santosh Kumar vs. The State of Bihar,*** has held that it cannot be disputed that there can be a conviction solely based on the evidence of the prosecutrix. However, the evidence must be reliable and trustworthy.

24. The Hon'ble Supreme Court in the case of ***Rajoo and others vs. State of Madhya Pradesh (2008) 15 SCC 133*** has held as under:

" 11. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants,but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration.

12. Reference has been made in Gurmit Singh's case to the amendments in 1983 to Sections 375 and 376 of the India Penal Code making the penal provisions relating to rape more stringent, and also to Section 114A of the Evidence Act with respect to a presumption to be raised with regard to allegations of consensual sex in a case of alleged rape. It is however significant that Sections 113A and 113B too were inserted in the Evidence Act by the same amendment by which certain

presumptions in cases of abetment of suicide and dowry death have been raised against the accused. These two Sections, thus, raise a clear presumption in favour of the prosecution but no similar presumption with respect to rape is visualized as the presumption under Section 114A is extremely restricted in its applicability. This clearly shows that in so far as allegations of rape are concerned, the evidence of a prosecutrix must be examined as that of an injured witness whose presence at the spot is probable but it can never be presumed that her statement should, without exception, be taken as the gospel truth. Additionally her statement can, at best, be adjudged on the principle that ordinarily no injured witness would tell a lie or implicate a person falsely. We believe that it is under these principles that this case, and others such as this one, need to be examined."

25. In the case of **Rai Sandeep @ Deepu Vs. State (NCT of Delhi) (2012) 8 SCC 21,** Hon'ble Supreme Court has held as under:

"22. In our considered opinion, the 'sterling witness' should be of a very high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should have co-relation with each and everyone of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a 'sterling witness' whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

26. Having gone through the evidence and considered the deposition of the prosecutrix, we find that there are material contradictions and change of the version by

the prosecutrix at every stage, made the evidence of prosecutrix unreliable and untrustworthy. In these circumstances the deposition / evidence of prosecutrix does not inspire the confidence to place implicit reliance to act on its basis to record the conviction of the respondents.

27. In the light of the above discussions and the principles of law laid down by the Hon'ble Apex Court cited above, there is no perversity and reasonable ground to interfere with the acquittal recorded by the trial court.

28. Hence the application for leave to appeal against the acquittal moved under Section 378(3) Cr.P.C. is rejected, therefore no order requires to be passed on the memo of appeal filed alongwith the application to grant leave to file the appeal.

(2021)09ILR A891
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 12.08.2021

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MRS.SAROJ YADAV, J.

U/S 378 CR. P.C. No. 22 of 2021

State of U.P. ...Appellant
Versus
Ashok Kumar & Anr. ...Respondents

Counsel for the Appellant:
Shri Arunendra, Additional Government Advocate

Counsel for the Respondents:

(A) Criminal Law - Code of Criminal Procedure, 1973 - Section 378 (3),313 - Indian Penal Code, 1860 - Section 302 read with Section 34 I.P.C. - leave to appeal against order of acquittal - murder - plea of alibi - surmises and conjectures - illicit relations - circumstantial evidence - In a case based on circumstantial evidence, the court has to examine the evidence more cautiously and more carefully - To record a conviction on the basis of circumstantial evidence, it is necessary that all the links of the circumstantial evidence should be intact - Absence of notice in a case based on circumstantial evidence weakens the case of prosecution and goes in favour of the accused .(Para - 10,15)

(B) Criminal Law - Code of Criminal Procedure, 1973 - No bar on the High Court's power to re-appreciate evidence in an appeal against acquittal - Cr.P.C does not differentiate in the power, scope, jurisdiction or limitation between appeals against judgments of conviction or acquittal - 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.(Para - 21)

Complainant mentioned in F.I.R. - his brother left the house in the night - received phone call from someone - did not come back - used to sit on the Tea shop daily - dead body of his brother found in morning - lying on the roadside near the tea shop - doubt that somebody killed his brother - kept body on the roadside - accused not named as an author of the crime - prosecution failed to prove the charges against the accused persons beyond reasonable doubts - trial court acquitted accused persons - appellant State preferred this appeal.(Para - 7,9)

HELD:-No 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. Motive of the crime has not been established. Nothing on record to connect the accused persons with crime. Mobile numbers from which call was given and on which call was received have not been

disclosed. Weapon of offence i.e. axe allegedly recovered at the pointing out of accused persons has not been produced and proved in court. No injury of 'axe' was found on cadaver. View taken by the court below is a possible view. Court below has given cogent, convincing and satisfactory reasons while passing the order of acquittal.(Para - 22)

Application for leave to appeal U/S 378(3) Cr.P.C. rejected. (E-7)

List of Cases cited:-

1. Shivaji Chintappa Patil Vs St. of Mah. , (2021) 5 SCC 626

2. Anwar Ali and another Vs The St. of H.P. ,(2020) 10 SCC 166

3. Suresh Chandra Bahri Vs St. of Bihar, 1995 Supp (1) SCC 80

4. Achhar Singh Vs St. of H.P. , (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 the State/appellant with the prayer that leave to appeal may be granted against the judgement and order dated 8.12.2020 passed by Additional Sessions Judge, Court No.1, Ambedkar Nagar in Sessions Trial No.211 of 2011, under Section 302 of the Indian Penal Code (in short **'I.P.C.'),** Police Station Kotwali Akbarpur, District Ambedkar Nagar whereby the trial court acquitted the accused persons/ respondents.

2. Heard Shri Arunendra, learned Additional Government Advocate (in short **'A.G.A.')** for the appellant-State of U.P., perused the impugned judgement 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 Awadh Bihari, at Case Crime No.350 of 2011, under Section 302 I.P.C., Police Station Kotwali Akbarpur, District Ambedkar Nagar. In the written report, it was stated that on the previous night at about 10.00 p.m., somebody gave a ring on the mobile phone of his elder brother Jitendra Kumar, on it he (Jitendra Kumar) said that he was reaching in five minutes. He left the house and did not come back. On the next day i.e. 5.6.2011 at about 5-6 O' Clock in the morning, when the complainant went to defecate, he saw a crowd of some persons near the road at Tea Shop of Ashok Kumar. When the complainant reached there, he saw that the dead body of his brother Jitendra was lying on the roadside. His brother Jitendra used to go on the shop of Ashok everyday. He had doubt that his brother was killed and dead body kept on the roadside. On the basis of these allegations, investigation was made and a chargesheet under Section 302 I.P.C. was submitted in the court against Ashok Kumar and Agya Ram. The court concerned took cognizance of the crime and committed the same to the court of Sessions for trial. The learned Sessions Court framed charges against the accused/ respondents under Section 302 read with Section 34 I.P.C. The accused persons denied the charge and claimed to be tried.

5. In order to prove the charges against the accused persons, the prosecution examined Awadh Bihari the complainant as P.W.-1, Shakuntala Devi, the mother of the deceased as P.W.-2, Shri

Santoshi Ram as P.W.-3,Shri Ram Shakal as P.W.-4, Shri Raj Narayan as P.W.-5 and Dr. Pradeep as P.W.-6.

6. The statements of the accused persons were recorded under Section 313 of the Cr.P.C.. They denied the crime and stated that they have been implicated falsely due to enmity. The accused Agya Ram also took the plea of *alibi* and he got examined himself as D.W.-1 and Vinod Kumar as D.W.-2 in order to prove that he was elsewhere on the date of the incident.

7. After analysing the evidences available on record, the learned trial court came to the conclusion that the prosecution has failed to prove the charges against the accused persons beyond reasonable doubts. The case is based on circumstantial evidence and the prosecution could not prove all the links to connect the accused persons with the crime. Hence, the trial court acquitted the accused persons. Being dissatisfied with this acquittal, the appellant State has preferred this appeal.

8. The learned A.G.A. has assailed the impugned judgement and order by submitting that the learned trial court has not appreciated the evidence in a right perspective and the impugned judgment and order is legally not sustainable as it is based on surmises and conjectures. The learned A.G.A. also submitted that the witnesses have stated that the accused Ashok had doubt that his wife had illicit relations with the deceased and the wife of Ashok Kumar called the deceased to eat fish by giving ring on his mobile phone. The wife of Ashok Kumar had illicit relations with Agya Ram co-accused and the deceased is becoming a hurdle. So both the accused killed the deceased. P.W.-4 Ram Shakal had stated that he heard the accused persons talking that they killed Jitendra. Learned trial court has ignored this evidence. Learned A.G.A. has further submitted that all the six witnesses have supported the prosecution case. Postmortem report also corroborates the same. The weapon of the crime was recovered at the pointing out of the accused persons. The prosecution has also proved all the documents filed on the record hence the prosecution has proved the case beyond reasonable doubt yet the learned trial court has acquitted the accused persons and committed a grave error.

9. Admittedly, the case is based on circumstantial evidence. There is no eye witness of the crime. In the F.I.R., the complainant has mentioned that his brother left the house in the night when he received a phone call from someone and did not come back. He used to sit on the Tea shop of Ashok Kumar, daily. In the morning he found that dead body of his brother was lying on the roadside near the shop of Ashok. He had doubt that somebody killed his brother and kept the body on the roadside. Even in the F.I.R., the accused was not named as an author of the crime or the complainant did not even averred that he has doubt that Ashok killed his brother and put the body on roadside.

10. In a case based on circumstantial evidence, the court has to examine the evidence more cautiously and more carefully. To record a conviction on the basis of circumstantial evidence, it is necessary that all the links of the circumstantial evidence should be intact. There should be no gap in the links.

11. Recently, in the case of ***Shivaji 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 circumstantial evidence has been very well crystalised in the judgment of this Court in Sharad 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,

(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.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

12. Now in the light of these principles, we have to examine the facts and evidences of the case and also the impugned judgement.

13. First of all, if we peruse the F.I.R., it comes out that in the F.I.R., nobody was named as author of the crime, only it was written that the deceased used to go on the tea shop of Ashok everyday. He left the house on getting a phone call of someone and on the next day in the morning, when the complainant the brother of the deceased, went to defecate, he saw a crowd of some people near the tea shop of Ashok. When he reached there, he found the dead body of his brother, the deceased, was lying on the roadside. In the F.I.R., there is no mention about the fact as to who called his deceased brother on his mobile phone. There is no mention of motive of the crime even there is no mention about the alleged illicit relations of the deceased with the wife of the accused Ashok. The complainant has been examined as P.W.-1.

In his examination-in-Chief, he has stated that the incident took place on 4.6.2011. In the night at about 10.00 O' Clock, Kesha Devi (wife of Ashok) called on mobile phone of his deceased brother. He has stated that at that time, he had no knowledge that Kesha Devi called his brother. Next day, he came to know about the phone call. He has also stated that his brother used to sell milk on the shop of Ashok Kumar. He started selling the milk about 12 days prior to the incident. In the night of incident, his brother went there and in the morning, he came to know that his brother was killed and his dead body is lying just 50 metres away from the tea shop on the roadside. He also saw that there was injury on the head of his deceased brother. He has also stated that his brother might be murdered by Ashok Kumar and Agya Ram because Ashok Kumar had doubt that his deceased brother had illicit relations with the wife of Ashok Kumar. This witness has lodged the F.I.R. on the next date and he did not mention that Kesha Devi called on the mobile phone of his deceased brother. Even any mobile phone has not been disclosed in the F.I.R. from which mobile no., call was made and on which mobile no. the call was received. In his statement before the court, this witness has stated that he came to know about the phone call made by Kesha Devi on the next date in the morning. The report was lodged on the next day at 7.45 a.m. but in the F.I.R., it was not there that Kesha Devi called his brother. In the F.I.R., even there was no whisper about the motive of the crime which has been stated in the court by the complainant that the accused Ashok had doubt that the deceased had illicit relations with his wife. The F.I.R. was lodged when the dead body was found. In such circumstances, it was expected from the complainant that he mentioned the phone number from which call was made and also the mobile number of his brother on which the call was received. Even the investigating officer did not try to do that as there is nothing on the record to show that any attempt was made to connect the links of the alleged call made on the mobile number of the deceased.

14. In the cross examination, the complainant has stated that nobody informed him about the murder of his brother but he himself went there and he was alone. No family member came there on the road alongwith him.

The mother of the deceased has been examined as P.W.-2. She has also stated that Kesha Devi the wife of Ashok Kumar called his son to eat fish but there is nothing in her statement how she came to know that Kesha Devi called her son because P.W.-1 has not mentioned the name of Kesha Devi in his F.I.R.

P.W.-2 has also stated in her cross examination that she went to the spot after getting the information of the murder of her son and remained there alongwith her family members till 10-11 O'Clock. There is no eye witness of the crime.

P.W.-4 Ram Shakal has been examined who has stated that he knows accused persons very well as they all belong to his village. He has further stated that Kesha Devi, the wife of Ashok had illicit relations with Agya Ram. The deceased Jitendra used to work on the shop of Ashok Kumar. Jintendra had no relations with the wife of Ashok. Agya Ram was feeling inconvenient due to presence of Jitendra, so Agya Ram and Ashok killed Jitendra. He has further stated that Agya Ram and

Ashok told him that everything has gone messed as it is open now that they have killed Jitendra. By examining this witness, the prosecution has tried to prove extra judicial confession of the accused persons but the motive disclosed by this witness and also the complainant in itself is very shaky. The complainant has stated that Ashok had doubt that the deceased had illicit relations with his wife while this witness has stated that the wife of Ashok had illicit relations with Agya Ram and the deceased is creating hurdles so Ashok and Agya Ram killed Jitendra. There is no cogent and reliable evidence to prove this motive.

15. No doubt, to prove a motive is not a ***sine qua non***, but if the case is based on circumstantial evidence, then a strong motive should be established for commission of the crime. In the present case, the motive disclosed and the evidence to prove that motive is of very weak type that too has not been proved. Absence of notice in a case based on circumstantial evidence weakens the case of prosecution and goes in favour of the accused.

16. 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 thisCourt 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."

Further prosecution has stated that the weapon of offence i.e. an axe was recovered at the pointing out of the accused persons. The alleged recovered weapon has neither been presented in the court nor proved as required.

Furthermore, no injury of axe was found on the cadaver by the doctor conducting postmortem. In the cross-examination, the doctor has stated that no injury found on the body was caused by axe.

17. There is nothing on record to show that the investigating officer had tried to trace mobile phone number of the deceased on which call was received and the phone number from which the call was made on the mobile phone of the deceased but how the accused persons were connected with the crime has not been established. It has not been proved that Kesha Devi called the deceased on his mobile phone number. The person before whom the extra judicial confession was allegedly been made i.e. P.W.-4 has stated in his cross examination that he lives in Delhi since 1983. He came to the village after hearing about the incident. It is noteworthy that when the alleged extra judicial confession was made the accused persons were already enlarged on bail. So it is unnatural that a person after getting the bail, will make extra judicial confession to a person who was residing in Delhi at the time of the incident that the accused persons have committed the crime. There is no last seen evidence and no evidence to connect the accused persons with the crime.

18. In short, the prosecution has failed to prove the motive to commit the crime, to prove the fact that there was illicit relations between the deceased and the wife of accused Ashok or the illicit relations between Agya Ram and the wife of Ashok. Even if it is assumed that

Agya Ram and the wife of Ashok had illicit relations and Jitendra is creating hurdles, then why Ashok would have killed the deceased.

The alleged recovery of weapon also appears to be false as no injury of the recovered weapon was found on the dead body of the deceased and the recovered weapon has not been presented and proved before the court.

19. Furthermore, the mother of the deceased has admitted in her cross examination that her son used to consume liquor. He developed the habit of consuming liquor due to the bad company. She has also admitted that she did not know in what circumstances, her son died. As far as accused Agya Ram is concerned, he has examined himself as D.W.-1 and stated that he was in the village Dalpatpur on the date of the incident as there was some function in the house of the sister of his wife. He alongwith his wife, went to Dalpatpur to attend the function and came back to his own village on 6.6.2011. On 9.6.2011, police called him and sent to jail. As D.W.-2, the brother-in-law of Agya Ram has been examined, he has also proved the fact that Agya Ram alongwith his wife was at his place on the date of incident.

20. There is no evidence on record to establish the guilt of the accused persons. The chain of circumstance is not only incomplete but can be said as broken at many points. In fact no evidence is there to connect the accused persons with the

crime. In order to convict an accused person, it is necessary that prosecution has to prove the guilt of the accused beyond reasonable doubt.

21. In this regard, 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".*

22. 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 nothing on record to connect the accused persons with crime. The mobile numbers from which call was given and on which call was received have not been disclosed. The weapon of offence i.e. axe allegedly recovered at the pointing out of accused persons has not been produced and proved in court. Furthermore, no injury of 'axe' was found on cadaver. Moreover, the view taken by the court below is a possible view. The court below has given cogent, convincing and satisfactory reasons while passing the order of acquittal.

23. We therefore, do not consider it to be a fit case for grant of leave to appeal to the appellant. The application seeking leave to appeal is, accordingly ***rejected*** and the appeal is also ***dismissed.***

(2021)09ILR A898
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 24.08.2021

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MRS. SAROJ YADAV, J.

U/S 378 CR. P.C. No. 44 of 2021

State of U.P. ...Appellant
Versus
Chhote Verma & Anr. ...Respondents

Victim ...Complainant

Counsel for the Appellant:
Ms. Nand Prabha Shukla, Additional Government Advocate

Counsel for the Opposite Parties:

(A) Criminal Law - leave to appeal against order of acquittal - The Code of criminal procedure, 1973 - Section 378(3),313,164 - Indian Penal Code, 1860 - Section 376-D - the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Section 14-A , Section 3(2)(V) - to hold an accused guilty for commission of an offence of rape, the solitary evidence of prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality - sterling witness - What would be more relevant - consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court - Should be natural and consistent with the case of the prosecution qua the accuse .(Para - 7)

(B) Criminal Law - if two views are possible, the High Court ought not to interfere with the trial Court's judgment - No bar on the High Court's power to re-appreciate evidence in an appeal against acquittal - Cr.P.C does not differentiate in the power, scope, jurisdiction or limitation between appeals against judgments of conviction or acquittal - 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.(Para - 15)

F.I.R. lodged by victim/complainant (married lady ,belongs to the scheduled caste) against the accused-respondents - gone to ease herself in the field of sugarcane - accused persons ambushing in the field of sugarcane - caught her and gagged her mouth - committed rape on her one by one - victim did not return home - husband reached at the spot - accused persons ran away from the spot - victim narrated the entire incident to her husband - Trial Court did not find the statement of the victim of the standard to place reliance for convicting the accused respondents - Hence appeal.(Para - 3)

HELD:-No factual or legal error in the appreciation of evidence by the trial Court while acquitting the accused-respondents because there are material contradictions in the evidence of the victim. Medical evidence does not support the prosecution version. Statement of the victim is not of 'sterling' quality. No corroboratory evidence on record. Even P.W. 2, the husband of the victim, has given contradictory statements. view taken by the trial Court is a possible view. Trial Court has given valid, convincing and satisfactory reasons while passing the order of acquittal for not relying on the evidence of victim. No ground to disturb the acquittal recorded by the trial Court.(Para -16)

Application for leave to appeal U/S 378(3) Cr.P.C. rejected. (E-7)

List of Cases cited:-

1. Krishna Kumar Malik Vs St. of Har., (2011) 7 SCC 130

2. Rai Sandeep @ Deepu Vs St. (NCT of Delhi), (2012) 8 Supreme Court Cases 21

3. Santosh Prasad @ Santosh Kumar Vs St. of Bihar, (2020) 3 Supreme Court Cases 443

4. Achhar Singh Vs St. of H.P. , 2021 SCC Online HP 870

(Delivered by Hon'ble Mrs. Saroj Yadav, J.)

1. This appeal along with application under Section 378(3) of the Code of Criminal Procedure 1973 (in short "Cr.P.C.") read with Section 14-A of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (in short "SC/ST Act") has been filed by the State-appellant against the judgment and order passed by Additional Sessions Judge/Special Judge, SC/ST Act, Lakhimpur Kheri in Special Sessions Trial No. 106 of 2017, Crime No. 264 of 2017,

under Section 376-D of The Indian Penal Code, 1860 (in short "IPC") and Section 3(2)(V) SC/ST Act, Police Station Fardhan, District Lakhimpur Kheri, whereby the accused-respondents have been acquitted.

2. Heard Ms. Nand Prabha Shukla, learned Additional Government Advocate appearing on behalf of the State-appellant.

3. Shorn off unnecessary details, the facts necessary for disposal of this appeal are:-

A First Information Report (in short "F.I.R.") was lodged by the victim/complainant against the accused-respondents on 13.09.2017 stating that on 09.09.2017 at about 7.00 PM, while she had gone to ease herself in the field of sugarcane near her village, the accused persons namely Chhote Verma and Hemnath, who were ambushing in the field of sugarcane, caught her and gagged her mouth and committed rape on her one by one. When the victim did not return home, her husband reached at the spot, then accused persons Chhote Verma and Hemnath ran away from the spot. Thereafter, the victim narrated the entire incident to her husband.

4. The case was investigated and charge sheet submitted against the accused persons/respondents. The Magistrate concerned after taking cognizance of the offence committed the case to Sessions Court for trial. The Sessions Court framed charges against the accused persons. They denied the charges and claimed to be tried. The prosecution in order to prove charges levelled against the accused respondents examined the victim as P.W. 1, Sushil Kumar (husband of the victim) as P.W. 2, Dr. Yamini Badal as P.W. 3, Constable Sarita as P.W. 4 and Ravindra Verma, Investigating Officer/Circle Officer, Sadar as P.W. 5. Necessary documents were also proved by the prosecution i.e. Exhibits 1 to 5.

5. Learned A.G.A. assailed the impugned judgment submitting that learned Trial Court discarded the evidence of the victim and her husband without any proper and legal reason. The prosecution has proved charges levelled against the accused persons by the evidence of P.W. 1-victim. The victim is a married lady and she belongs to the scheduled caste. The trial Court has committed a grave error in not relying on the statement of the victim. The medical evidence has also corroborated the version of prosecution. Hence the impugned judgment and order is illegal, not sustainable in the eyes of law and liable to be set aside.

6. Considered the submissions advanced by learned A.G.A., perused the impugned judgment and order and the record of the Trial Court.

7. It is settled law that conviction can be made in case of rape on the basis of sole testimony of the victim but the testimony should be such as to raise confidence of the Court and the Court finds that genuine and reliable. If the evidence of victim sufferes from contradictions and not of high quality, then it shall not be just and legal to convict the accused relying upon her evidence. In such situation, the Court should look for corroboration. Hon'ble Apex Court in the case of **Krishna Kumar Malik Versus State of Haryana (2011) 7 SCC page-130** has held as under:-

"No doubt, it is true that to hold an accused guilty for commission of an

offence of rape, the solitary evidence of prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality."

The Hon'ble Apex Court in the case of **Rai Sandeep Alias Deepu Versus State (NCT of Delhi) (2012) 8 Supreme Court Cases 21** has laid down as under:-

"In our considered opinion, the ''sterling witness' should be of a very high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross- examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should have co-relation with each and everyone of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a ''sterling witness' whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

This view has again rehashed by the Hon'ble Apex Court in the case of ***Santosh Prasad Alias Santosh Kumar Versus State of Bihar (2020) 3 Supreme Court Cases 443.***

8. The incident allegedly took place on 09.09.2017 and the F.I.R. was lodged on 13.09.2017. P.W. 1- victim/complainant in her statement has stated that while she had gone to ease herself in the field of sugarcane of Awadhesh Mishra, the accused respondents Chhote Verma and Hemnath Pasi, who were ambushing in the field of Sugarcane, caught her and after gagging her mouth, dragged in the field of sugarcane and committed rape on her, at the same time, her husband reached at the spot and on seeing him the accused respondent run away. The witness Sushil Kumar, the husband of the

victim/complainant, has been examined as P.W. 2. He has stated that the victim is his wife and on the fateful day, while her wife had gone to ease herself in the field and when she did not come back, he tried to search her carrying a torch and reached at the field of sugarcane and witnessed that the accused respondents were committing rape on her. On flashing torch light, the accused respondents ran away leaving her wife.

9. Learned Trial Court did not find the statement of the victim of the standard to place reliance for convicting the accused respondents. Perusal of the record shows that there are major contradictions in the statement of P.W. 1 (victim). In her cross-examination, the victim has stated that the accused dragged her in "Khanti" (trench) near the sugarcane field and committed rape there but there is no mention of "Khanti" (trench) in the F.I.R. or statement of the victim recorded under Section 164 Cr.P.C. or in the site plan prepared by the Investigating Officer. The accused respondent Chhote Verma has been named in the F.I.R. and the victim in her examination-in-chief has stated that he committed rape upon her but in her cross-examination, she has stated that she did not know how the name of Chhote Verma was written in the FIR and further stated that it might be possible that the name of Chhote Verma mentioned by Kulwant Singh- ex-Pradhan of the village. Her signature was taken on the written report. She has also stated that she never met Chhote Verma @ Sanjay on the way, which goes "Guthna Bujurg" to "Khutna Khurd".

10. The medical evidence also does not corroborate the prosecution version or the statement of the victim. P.W. 3- Dr Yamini Badal, who examined the victim/complainant (P.W. 1), has stated that neither any external nor internal injury was found on the private parts or the person of the victim and as per the report of Forensic Science Laboratory, Lucknow, no spermatozoa were found in the vaginal smear of the victim. In her cross-examination, she has further stated that at the time of examination, no sign of rape was found.

11. P.W. 2-Sushil Kumar (husband of the victim), who has been produced as eye-witness of the crime, has also given contradictory statement. In his examination in chief, he has stated that he saw Chhote Verma was committing rape on her wife but in his cross-examination, he has stated that he did not see Hemnath committing rape.

12. The accused respondents Chhote Verma and Hemnath have stated in their statements recorded under Section 313 Cr.P.C. that they have been falsely implicated in the case and they further stated that they have no concern with the alleged incident and they are innocent.

13. The aforesaid analysis makes it clear that prosecution failed to prove charges levelled against the accused persons beyond reasonable doubt.

14. Learned A.G.A. could not evince that the findings given by the Court below while acquitting the accused-respondents were factually or legally incorrect.

15. Hon'ble Apex Court in the case of ***Achhar Singh Vs. State of Himachal Pradesh reported in 2021 SCC Online HP 870*** in this regard has laid down as under:-

"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 acquittal11. This Court has held in a catena of decisions (including ***Chandrappa v. State of Karnataka, (2007) 4 SCC 415, 42. State of Andhra Pradesh v. M. Madhusudhan Rao, (2008) 15 SCC 582 20-21 and Raveen Kumar v. State of Himachal Pradesh, 2020 SCC Online SC 869****, 11.) 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".*

16. We do not find any factual or legal error in the appreciation of evidence by the trial Court while acquitting the accused-respondents because there are material contradictions in the evidence of the victim. Medical evidence does not support the prosecution version. The statement of the victim is not of 'sterling' quality. There is no corroboratory evidence on record. Even P.W. 2, the husband of the victim, has given contradictory statements. Moreover, the view taken by the trial Court is a possible view. The trial Court has given valid, convincing and satisfactory reasons while passing the order of acquittal for not relying on the evidence of victim. For the aforesaid reasons, there appears no ground to disturb the acquittal recorded by the trial Court.

17. We, therefore, do not consider it to be a fit case for grant of leave to appeal to the appellant. The application seeking leave to appeal is, accordingly, rejected and the appeal is also dismissed.

(2021)09ILR A903
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.08.2021

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Applictation U/S 482 No.1863 of 2021

Pramod Kumar & Ors. ....Applicants
Versus
State of U.P. & Anr. ....Opposite Parties

Counsel for the Applicants:
Sri Onkar Singh, Sri Sachin Malik.

Counsel for the Opposite Parties:
A.G.A., Sri Dheeraj Singh (Bohra)

(A) Criminal Law - The Code of criminal procedure, 1973 - Section 482 - Inherent power - Indian Penal Code, 1860 - Sections 498A, 323, 504, 506, 354, 354B, 376, 511 - Dowry prohibition Act,1961 (D.P. Act) - Section 3/4 - legal position for quashing of the proceedings at the initial stage - test to be applied - 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 - quashing of the criminal proceedings is an exception than a rule - power of High Court should be exercised very cautiously to do real and substantial justice for which the court alone exists.(Para - 11)

Offences are of matrimonial private dispute and differences - compromise between parties - compliance of order - withdraw all criminal and civil cases filed against each other - quashing of chargesheet and proceedings.

HELD:-Keeping in view the nature and gravity and the severity of the offence which are more particularly is matrimonial private dispute and differences it is deem proper and meet to the ends of justice. Proceedings liable to be quashed. (Para - 12)

Application u/s 482 Cr.P.C. allowed. (E-7)

List of Cases cited:-

1. B.S. Joshi Vs St. of Har. & ors., 2003 (4) ACC 675

2. Gian Singh Vs St. of Pun., 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 Jharkh.& ors., 2014 (9) SCC 653

6. Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur & ors. Vs St. of Guj. & anr., (2017) 9 SCC 641

7. S.W. Palankattkar & ors. Vs St. of Bihar, 2002 (44) ACC 168

8. R.P. Kapoor Vs St. of Pun., AIR 1960 S.C. 866

9. St. of Har. Vs Bhajanlal, 1992 SCC (Crl.)426

10. St. of Bihar Vs P.P. Sharma, 1992 SCC (Crl.)192

11. Z & u Pharmaceutical Works Ltd. Vs Mohd. Saraful Haq & anr., 2005 SCC (Cri.) 283

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard Sri Onkar Singh, learned counsel for the applicants, Sri Dheeraj Singh (Bohra), learned counsel for the opposite party no. 2 as well as learned A.G.A. 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 entire proceedings in Case No.14943 of 2020 (Pramod Kumar and others vs. State) in view of the charge sheet dated 9.9.2020 arising out of case crime no.29 of 2020, under Sections 498A, 323, 504, 506, 354, 354B, 376, 511 IPC and Section 3/4 D.P. Act, P.S. Mahila Thana District Meerut.

3. In compliance of the order dated 22.7.2021 passed by this Court, applicant no.1-Pramod Kumar and his son Vipin Kumar has brought two drafts before this Court. The first draft is of Rs.9,00,000/- dated 24.8.2021 bearing Draft No.911254 in the name of Tanu Sharma (opposite party no.2) and the second draft is of Rs.6,00,000/- dated 24.8.2021 bearing Draft No.911253 in the name of Tanu Sharma (opposite party no.2). The total sum of two drafts is Rs.15,00,000/-. The same has been handed over to opposite party no.2 Tanu Sharma by the applicants before this Court which was acknowledged by Sri Dheeraj Singh (Bohra), learned counsel for opposite party no.2 and Sri Arunendra Kumar Singh, learned AGA. The photostat copy of both the drafts is being kept on the record in the file of the case as well as in the file of learned AGA.

4. Opposite party no.2 Tanu Sharma has stated before the Court that she will withdraw all criminal and civil cases filed against Vipin Kumar, his father Pramod Kumar (applicant no.1) and his family members pending before any court of law and in future also she will not file any case against them.

5. The same assurance has been given by the father of Tanu Sharma namely Sri Satya Prakash Sharma.

6. Sri Pramod Kumar and his son Vipin Kumar have also stated before this Court that from today they will also not file any criminal or civil case against Tanu Sharma and her father Sri Satya Prakash Sharma or against any family members before any court of law and withdraw all criminal and civil cases filed against Tanu Sharma, Satya Prakash Sharma and other family members in any court of law.

7. Vipin Kumar and Tanu Sharma jointly state before the Court that from today they will live separately and live their independent life and nobody will interfere in any manner in their peaceful life and they will be free to live independently on their own sweet will anywhere they wants.

8. 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.

9. 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."

10. 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.**

11. 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.

12. 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 matrimonial private dispute and differences it is deem proper and meet to the ends of justice. The proceeding of the aforementioned case be quashed.

13. 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 Vipin Kumar as well as opposite party no.2 and the observation made above, the entire proceedings of Case No.14943 of 2020 (Pramod Kumar and others vs. State), arising out of case crime no.29 of 2020, under Sections 498A, 323, 504, 506, 354, 354B, 376, 511 IPC and Section 3/4 D.P. Act, P.S. Mahila Thana District Meerut is hereby quashed and both the parties are free to live their independent life.

14. 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.

15. 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)09ILR A907
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 08.09.2021

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

U/S 482/378/407 No. 2796 of 2021

Shafiya Khan @ Shakuntala Prajapati ...Applicant

Versus

State of U.P. & Anr. ...Respondents

Counsel for the Applicant:
Ajay "Madhavan"

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law - Indian Penal Code, 1860 - Section 494,495,416,420,504,506 - The Code of criminal procedure, 1973 - Section 198 - Prosecution for offences against marriage - Section 155(4) - Where a case relates to two or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are non-cognizable.(Para - 9)

Accused - wife of deceased husband committed the offences - solemnized second marriage with the complainant's brother/deceased by concealing her first marriage - after his death

she fraudulently obtained all the service benefits including job and pension - Charge sheet filed under Sections 494/416/420/504/506 I.P.C - magistrate took cognizance - issued process - petitioner also committed the offence punishable under Sections 420/ 504/ 506/ 467/ 468/471 I.P.C. apart from the offence under Section 494 I.P.C. - case relates to more than two offence, out of which at least one is cognizable. (Para - 9)

HELD:-The magistrate in this case has committed no illegality while taking cognizance as the charge sheet discloses the commission of more than two offences out of which at least one is cognizable, hence, the case shall be treated to be a cognizable case notwithstanding that the other offences are non-cognizable.(Para - 10,11)

Petition dismissed. (E-7)

List of Cases cited:-

2004 CRI. L.J. 2329 ,Parminder Kaur & ors. Vs Jaginder Kaur & anr.

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

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

2.Notice is dispensed with to respondent no. 2.

3. Learned counsel for the petitioner submits that in this case, the F.I.R. has been lodged by the brother of the alleged husband of the petitioner under Section 494/495/416/420/504/506 I.P.C., Police Station Bazaar Khala, District Lucknow.

4. It is further submitted that these are illegal proceedings and the same cannot be permitted to continue in view of the specific bar provided under Section 198 Cr.P.C.

5. It is next submitted that while filing charge sheet, Section 495 I.P.C. has been dropped by the investigating officer and the informant in this case is not a person aggrieved so as to lodge an F.I.R. or complaint under Section 494 I.P.C.

6. Learned counsel for the petitioner in support of his contention has relied on judgment reported in ***2004 CRI. L.J. 2329 "Parminder Kaur and others Vs. Jaginder Kaur and another"*** and also on the judgment reported in "1964 SCC Online Kar 148" "State Vs. Gangaram and others".

7. Per contra learned A.G.A. has submitted that when the first information given to the police having contents of both cognizable and non-cognizable i.e. two or more offence out which at least one is cognizable, the case shall be deemed to be a cognizable case irrespective of the fact that the other offences are non-cognizable and thus, the F.I.R. can certainly be lodged by the brother of the deceased husband and there is no illegality in the same.

8. Learned A.G.A. has submitted that law in this regard has been settled. When the accused commits other offences apart from the offence under Section 494 I.P.C. and they are cognizable and if the police files a charge sheet, the magistrate can definitely take cognizance of Section 494 I.P.C. along with other cognizable offences in view of the specific provisions of Section 155(4) of Criminal Procedure Code.

9. On due consideration to the arguments advanced by learned counsel for the parties so also the perusal of the record, this Court finds that in the present case the accused who is alleged wife of the deceased husband has committed the

offences under Section 494/495/416/420/504/506 I.P.C. and allegedly she had solemnized the second marriage with the complainant's brother/deceased by concealing her first marriage and after his death it is alleged that she fraudulently obtained all the service benefits including job and pension. Charge sheet in the case has been filed under Sections 494/416/420/504/506 I.P.C and upon that learned magistrate has taken the cognizance and issued the process. Since the petitioner has also committed the offence punishable under Sections 420/504/506/467/468/471 I.P.C. apart from the offence under Section 494 I.P.C., therefore, this case relates to more than two offence, out of which at least one is cognizable and therefore, in view of the law laid down by the Supreme Court in Criminal Appeal No. 1428/2011 "Subhash Babu Vs. State of Andhra Pradesh and another", the case must be deemed to be cognizable case notwithstanding that the other offences are non-cognizable. The relevant paras of the said judgment is extracted as under:-

"Even if it is assumed for the sake of argument that in view of Section 198(1)(c) of the Code of Criminal Procedure, the Magistrate is disentitled to take cognizance of the offences punishable under Section 494 and 495 IPC despite the State amendment making those offences cognizable, this Court notices that in Mavuri Rani Veera Bhadranna (supra), the Division Bench has considered effect of Section 155(4) of the Criminal Procedure Code and thereafter held that the bar under Section 198 would not be applicable as complaint lodged before police for offence under Section 494 IPC also related to other cognizable offences and if police files a charge sheet, the Court can take cognizance also of offence Reportable under Section 494 along with other cognizable offences by virtue of Section 155(4) of the Criminal Procedure Code.

15. Section 155(4) of the Code inter alia provides that:-

"Where a case relates to two or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are non-cognizable"

Here in this case in the charge sheet it is mentioned that the appellant has also committed offence punishable under Section 420 of the Indian Penal Code which is cognizable and therefore this is a case which relates to two or more offences of which at least one is cognizable and therefore the case must be deemed to be cognizable case notwithstanding that the other offences are non- cognizable.

This is not a case in which the FIR is exclusively filed for commission of offences under Section 494 and 495 IPC.

The case of the respondent no. 2 is that the appellant has committed offences punishable under Sections 417, 420, 494, 495 and 498A of the IPC. A question may arise as to Reportable what should be the procedure to be followed by a complainant when a case involves not only non-cognizable offence but one or more cognizable offences as well. It is somewhat anomalous that the aggrieved person by the alleged commission of offences punishable under Section 494 and 495 IPC should file complaint before a Court and that the same aggrieved person should approach the police officer for alleged commission of offences under Sections 417, 420 and 498A

of the Indian Penal Code. Where the case involves one cognizable offence also alongwith non-cognizable offences it should not be treated as a non- cognizable case for the purpose of sub-section 2 of Section 155 and that is the intention of legislation which is manifested in Section 155(4) of the Code of Criminal Procedure. Therefore, the argument that the learned Magistrate could not have taken cognizance of the offences punishable under Section 494 and 495 IPC on the basis of submission of charge sheet, cannot be accepted and is hereby rejected."

10. Hence, in view of the settled position of law, the magistrate in this case has committed no illegality while taking cognizance as the charge sheet discloses the commission of more than two offences out of which at least one is cognizable, hence, the case shall be treated to be a cognizable case notwithstanding that the other offences are non-cognizable.

11. In view of the above, it cannot be said that there is any illegality committed by the leaned Magistrate while taking cognizance. The petition lacks merits and is accordingly **dismissed**.

(2021)09ILR A910
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 31.08.2021

BEFORE

THE HON'BLE FAIZ ALAM KHAN, J.

U/s 482/378/407. No. 8150 of 2019
&
Criminal Revision No. 1593 of 2019

Om Prakash Jaiswal & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Pramod Kumar Shukla, Ashish Kumar Mishra, Rohit Kumar Singh

Counsel for the Opposite Parties:
G.A., A.S.G., Anurag Kumar Singh

(A) Criminal Law - Indian Penal Code, 1860 - Sections 120-B, 420 - The Code of criminal procedure, 1973 - Section 161,397(2) - Prevention of Corruption Act,1988 - Section 13(2) read with 13(1)(d) - falsehood or the truthfulness of the allegations can only be tested in the trial .(Para -52)

Joint surprise check conducted by a team of CBI officials, railways vigilance and RDSO officials - three samples - PVC Insulated Railway Signaling Cable, PVC Insulated Railway Signaling Cable and PVC Insulated Railway Signaling power cable - collected from the sites - sent by the CBI for quality analysis at the signal lab of RDSO, Lucknow - sample test report given by the signal lab - cables found failed in certain vital parameters - did not meet standards specifications - discharge application by the applicants and revisionist - rejected by the order of the Special Judge .(Para - 28,46,48)

HELD:- All the submissions are pertaining to the factual aspect of the case and the veracity of claims and counter claims by the applicants/ revisionist and the Central Bureau of Investigation could only be tested during the trial but at this stage it is not a case where the proceedings should have been culminated by discharging the accused persons. No illegality appears to have been committed by the Special Judge by rejecting the prayer of the applicants/ revisionist of their discharge and resultantly the revision as well as application under Section 482 Cr.P.C. moved by the applicants and revisionist is liable to be dismissed .(Para - 52,53)

Revision as well as Application U/S 482 Cr.P.C dismissed. (E-7)

List of Cases cited:-

1. Sajjan Kumar Vs C.B.I., (2010)3 SCC (Cri) 1371 (I)

2. St. of Raj. Vs Fatehkaran Mehdu, (2017)3 Supreme Court Cases 198.

3. Sajjan Kumar Vs C.B.I., (2010)3 SCC (Cri) 1371.

4. Sanjay Kumar Rai Vs St. of U.P. & anr. , Criminal Appeal No. 472 of 2021 (I)

5. Rakesh Bhajan Lal & ors. Vs St. of U.P. & anr., 2009 SCC OnLine All 1759

6. Sanghi Brothers (Indore) Private Limited Vs Sanjay Choudhary & ors., (2008)10 Supreme Court Cases 681

7. Akbar Hussain Vs St. of J & K & anr. , (2018) 16 Supreme Court Cases 85

8. Raman Bhuraria Vs C.B.I., (2016)92 ACC page 253

9. Tulsi Ram ETC Vs St. of U.P., AIR 1963 Supreme Court page no. 666

10. Criminal Revision No. 98/15, Dated 20.2.2015

11. Madhu Limaye Vs St. of Mah. (31.10.1977 - SC) : MANU/SC/0103/1977

12. Sanjay Kumar Rai Vs St. of U.P. & Ors. (07.05.2021 - SC) : MANU/SC/0346/2021

13. St. of Bihar Vs Ramesh Singh MANU/SC/0139/1977 : 1977CriLJ1606

14. St. of Supt. & Remembrancer of Legal Affairs, West Bengal Vs Anil Kumar Bhunja & ors. (1979) 4 SCC 274

15. U.O.I. Vs Prafulla Kumar Samal & ors. (06.11.1978 - SC) : MANU/SC/0414/1978

16. R.S. Nayak Vs A.R. Antulay MANU/SC/0198/1986(para 44) : (1986) 2 SCC 716

17. St. - Anti Corruption Bureau, Hyderabad & anr. Vs P. Suryaprakasam , 1999 Supreme Court Cases (Cri) 373

18. St. of Orissa Vs Debendra Nath Padhi, (2005) 1 SCC 568

19. St. of Bihar Vs Ramesh Singh MANU/SC/0139/1977:1977CriLJ1606,

20. St. of Delhi Vs Gyan Devi & Ors.MANU/SC/0649/2000 ,

21. St. of M.P. Vs S.B. Johari & Ors. MANU/SC/0025/2000

22. Maharashtra Vs Priya :Sharan Maharaj MANU/SC/1146/1997: 1997CriLJ2248

23. Corruption Bureau, Hyderabad 2000CriLJ944 & St. of & Ors.

24. St. Anti- & anr. Vs P. Suryaprakasam, 1999 SCC (Crl.) 373

25. Sajjan Kumar Vs C.B.I., (2010) 9 SCC 368

26. Asim Sharif Vs National Investigation Agency, MANU/SC/0863/2019 : (2019) 7 SCC 149

27. Tarun Jit Tejpal Vs St. of Goa & other: MANU/SC/1121/2019

28. St. of Raj. Vs Ashok Kumar Kashyap, MANU/SC/0275/2021

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

1. Applicants- Om Prakash Jaiswal and M/s Shankar Cable Industries through its Proprietor Om Prakash Jaiswal has moved application under Section 482 Cr.P.C. No. 8150 of 2019 and revisionist Satyendra Narayan Soni has preferred Criminal Revision No. 1593 of 2019 with the prayer to quash the order dated 27.09.2019 passed by learned Special Judge Anti-Corruption C.B.I., (West), Lucknow in Criminal Case No. 400 / 2016, pertaining to FIR No. R.C. 0062014 A000027 dated 29.8.2014, Case No.1/2016, under Sections 120-B, 420 IPC and Section 13(2) read with 13(1)(d) P.C. Act, 1988, whereby the application for discharge of the applicants and revisionist has been

rejected by the Special Judge by passing common order dated 27.09.2019, as well as to quash the entire proceedings of the instant case .

2. As the aforementioned application under Section 482 Cr.P.C. No. 8150 of 2019 and Criminal Revision No. 1593 of 2019 have been preferred against the same order dated 27.9.2019 passed by the Special Judge Anti corruption C.B.I., whereby the discharge application of the applicants no.1 and 2 of petition under Section 482 Cr.P.C. No. 8150 of 2019 and revisionist in Criminal Revision No. 1593 of 2019 have been rejected by passing common order dated 27.9.2019, for convenience and to avoid repetition of facts, law and discussion both cases i.e. petition under Section 482 Cr.P.C. No. 8150 of 2019 and Criminal Revision No. 1593 of 2019 are being disposed of by passing this common order.

3. In the judgment, now onwards applicants/ petitioners of 482 Cr.P.C. No. 8150 of 2019 will be called applicants and revisionist of Criminal Revision No. 1593 of 2019 will be called as revisionist.

4. Heard Shri Jyotindra Mishra, learned Senior Advocate assisted by Shri Pramod Kumar Shukla, learned counsel for the applicants in petition under Section 482 Cr.P.C. No. 8150 of 2019 and Shri Purnendu Chakarvarty in Crl. Revision No. 1593 of 2019 and Shri Anurag Kumar Singh, learned counsel appearing for C.B.I. as well as perused the record.

5. Learned Senior advocate submits that mere availability of some other remedy in the Code of Criminal Procedure will not circumcise the powers of this Court in entertaining an application under Section 482 Cr.P.C. when the abuse of the process of the Court is apparent on the face of record. Learned counsel in support of his submissions has relied on ***Sajjan Kumar Vs. Central Bureau of Investigation*** (2010)3 SCC (Cri) 1371 .

6. Learned Senior Advocate appearing for the applicants as well as Shri Purnendu Chakarvarty, learned counsel for the revisionist, while referring to the order dated 27.9.2019 passed by the Special Judge submits that the special court has not considered the submissions and grounds taken in discharge application by the applicants and revisionist in right perspective and without adverting to the material and evidence available on record has rejected the discharge application of the applicants and revisionist.

7. It is also submitted by them that the applicants in respect of a purchase order had supplied 65 Drums of of 2 Core PVC Insulated Railway Signaling power cable and the supply was made only after the inspection of officer of RDSO, Lucknow.

8. It is further submitted by Shri Jyotindra Mishra Ld. Senior Advocate and Shri Purenendu Chakarvarty that before the supply was made the cables were thoroughly inspected and after receiving the inspection certificate were dispatched on 18.1.2013 and 19.1.2013 and on 15.10.2013 a team of CBI Officers, Railway Vigilance and RDSO Officials alleged to have conducted a search operation and allegedly collected the samples of some cables supplied by the applicants, and other firm in their absence and got them tested in the lab of RDSO, Lucknow, which were allegedly failed in some parameters.

9. Highlighting the above factual matrix it is vehemently submitted by them

that there are certain guidelines issued in the manual of signal engineering which provides the terms of storage and transportation of the cables by the Indian Railways but the cable supplied by the applicant firm was transported and kept against the guidelines issued in this regard and there is possibility that due to these reasons the quality of cables may be deteriorated by the efflux of time.

10. It is also submitted by them that the trial court had not taken care of this aspect of the matter that the cables supplied by the applicants were stored in open sky for 9 months and therefore the same has been deteriorated due to wear and tear caused by the weather.

11. It is also submitted by them that no complaint of any kind has ever been raised by the railways with regard to the alleged inferior quality of the cable supplied by the applicants and the whole quantity of cable supplied by the applicants has been consumed by them, therefore by any stretch of imagination it could not be said that the cable supplied by the applicants was of inferior quality.

12. It is further submitted by them that the equipments which were used for testing of the cables prior to it supply to the railways by the RDSO officials for pre supply inspection were of the applicants and the testing of samples alleged to have been conducted by the CBI in the lab of RDSO, Lucknow and therefore minor differences in the parameters are bound to take place in the testing result values and the same could not attract criminal consequences.

13. It is also submitted by them that experts who were given the charge of evaluating the quality of the cable supplied by the applicants were not qualified enough to assess the defect and the parameters which have been mentioned in the charge sheet filed by the Central Bureau of Investigation are such which in any case could not attract any criminal liability.

14. It is further submitted by them that after the supply of the cable no communication with regard to the alleged inferior quality of the cable was ever made by the railways and the other suppliers who supplied the inferior quality of the cables and whose cables were also failed in the test have not been prosecuted and it is only the applicants who have been targeted.

15. It is further submitted by them that RTI answers procured by the revisionist placed at page 367 and 375 of the paper book of the criminal Revision No. 1593 of 2019 would reveal that it is admitted to the railways that all the cables supplied by Ms/ Shankar Cable Industries(applicants) have been consumed by the railways in different projects.

16. Learned Senior Counsel for the applicants as well as learned counsel for revisionist has relied on following case laws:-

(I) ***State of Rajasthan Vs. Fatehkaran Mehdu*** (2017)3 Supreme Court Cases 198.

(II) ***Sajjan Kumar Vs. Central Bureau of Investigation*** (2010)3 SCC (Cri) 1371.

(III) ***Sanjay Kumar Rai Vs. State of U.P. and another***, Criminal Appeal No. 472 of 2021 dated 7.5.2021 passed by Hon?ble Supreme Court.

17. Shri Anurag Kumar Singh Learned counsel for Central Bureau of Investigation submits that the submissions of learned Senior Counsel appearing for the applicants and learned counsel appearing for revisionist are against the factual position of the case and the cable which was supplied by the applicants has been found to be of inferior quality in the testing done at RDSO Lab and the experts were also of the opinion that the inferior quality of the cable could not be a result of in adequate storage or due to the cable stored in an open place.

18. It is also submitted that the samples of the cables were taken in the presence of the RDSO Officers and railway vigilance officials and as the cable supplied by the applicants has been found to be of inferior quality and has failed in vital parameters, thus the first information report was lodged against the applicants/Revisionist and during the course of investigation it is revealed that on 11.1.2013 and 12.1.10213 the two core cable supplied by the applicants was tested by revisionist Shri S.N. Soni, J.E. R.D.S.O. and the check test was performed by Shri Silas Minz, the then Deputy Director, RDSO, on 13.1.2013 at the premises of applicants at **Gorakhpur**. However, it is revealed that revisionist Shri S.N. Soni who alleged to have conducted the test on 13.1.2013 did not get his tour program approved and has not booked any ticket for that purpose. Similarly Shri Silas Minz also did not get his tour programme approved and has also not claimed any T.A. nor had booked any ticket, which shows that both these officers had in fact had not gone to Gorakhpur for the purpose of pre-inspection of the cables and as per the report of the experts there is huge difference in the quality of the cable (two core) assessed before and after the supply and this deterioration could not be the result of improper storage or due to wear and tear. The experts have also doubted the pre-supply inspection report and the Investigating Officer has found that in furtherance of a conspiracy, by supplying inferior quality cable to the railways the applicants have caused heavy monetary loss to the railways and the same has been done in connivance with the above mentioned officers of the R.D.S.O., Lucknow and thus no illegality has been committed by the Special Judge while rejecting the applications of the revisionist and applicants as there was sufficient material available for the purpose of framing charge against the applicants and revisionist.

19. Learned counsel for the CBI has relied on the following case laws:-

(I) ***Rakesh Bhajan Lal and others Vs. State of U.P. and another*** 2009 SCC OnLine All 1759.

(II***) Sanghi Brothers (Indore) Private Limited Vs. Sanjay Choudhary and others*** (2008)10 Supreme Court Cases 681.

(III) ***Akbar Hussain Vs. State of Jammu and Kashmir and another*** (2018) 16 Supreme Court Cases 85.

(IV) ***Raman Bhuraria vs. CBI*** (2016)92 ACC page 253.

(V***) Tulsi Ram ETC vs. State of U.P.*** AIR 1963 Supreme Court page no. 666.

(VI) ***Criminal Revision No. 98/15***, Dated 20.2.2015

20. Having heard learned counsel for the parties and having perused the record, it is evident that so far as the maintainability of proceeding under 482 Crpc and 397 /401 Crpc is concerned, suffice is to quote the following paragraphs ***from Madhu Limaye vs. The State of Maharashtra (31.10.1977 - SC) : MANU/SC/0103/1977;***

"9. At the outset the following principles may be noticed in relation to the exercise of the inherent power of the High Court which have been" followed ordinarily and generally, almost invariably, barring a few exceptions:

(1) That the power is not to be resorted to if there is a specific provision in the Code for the redress of the grievance of the aggrieved party ;

(2) That it should be exercised very sparingly to prevent abuse of process of any Court or otherwise to secure the ends of justice;

(3) That it should not be exercised as against the express bar of law engrafted in any other provision of the Code.

10. In most of the cases decided during several decades the inherent power of the High Court has been invoked for the quashing of a criminal proceeding on one ground or the other. Sometimes the revisional jurisdiction of the High Court has also been resorted to for the same kind of relief by challenging the order taking cognizance or issuing processes or framing charge on the grounds that the Court had no jurisdiction to take cognizance and proceed with the trial, that the issuance of process was wholly illegal or void, or that no charge could be framed as no offence was made out on the allegations made or the evidence adduced in Court. In the background aforesaid we proceed to examine as to what is the correct position of law after the introduction of a provision like Sub- section (2) of Section 397 in the 1973 Code.

11. As pointed out in Amar Nath's case (supra) the purpose of putting a bar on the power of revision in relation to any interlocutory order passed in an appeal, inquiry, trial or other proceeding is to bring about expeditious disposal of the cases finally. More often than not, the revisional power of the High Court was resorted to in relation to interlocutory orders delaying the final disposal of the proceedings. The Legislature in its wisdom decided to check this delay by introducing Sub-section (2), in Section 397. On the one hand, a bar has been put in the way of the High Court (as also of the Sessions Judge) for exercise of the revisional power in relation to any interlocutory order, on the other, the power has been conferred in almost the same terms as it was in the 1898 Code.

21. On a plain reading of Section 482, however, it would follow that nothing in the Code, which would include Sub-section (2) of Section 397 also, "shall be deemed to limit or affect the inherent powers of the High Court". But, if we were to say that the said bar is not to operate in the exercise of the inherent power at all, it will be setting at naught one of the limitations imposed upon the exercise of the revisional powers.

22. In such a situation, what is the harmonious way out ? In our opinion, a happy solution of this problem would be to say that the bar provided in Sub-section (2) of Section 397 operates only in exercise of the revisional power of the High Court,

meaning thereby that the High Court will have no power of revision in relation to any interlocutory order. Then in accordance with one of the other principles enunciated above, the inherent power will come into play, there being no other provision in the Code for the redress of the grievance of the aggrieved party. But then, if the order assailed is purely of an interlocutory character which could be corrected in exercise of the revisional power of the High Court under the 1898 Code, the High Court will refuse to exercise its inherent power.But in case the impugned order clearly brings about a situation which is an abuse of the process of the Court or for the purpose of securing the ends of justice interference by the High Court is absolutely necessary, then nothing contained in Section 397(2) can limit or affect the exercise of the inherent power by the High Court. But such cases would be few and far between.

23. The High Court must exercise the inherent power very sparingly.

24. One such case would be the desirability of the quashing of a criminal proceeding initiated illegally, vexatiously or as being without jurisdiction.

25. The answer is obvious that the bar will not operate to prevent the abuse of the process of the Court and/or to secure the ends of justice. The label of the petition filed by an aggrieved party is immaterial. The High Court can examine the matter in an appropriate case under its inherent powers."

26. Following paragraphs of **Sanjay Kumar Rai vs. State of Uttar Pradesh and Ors. (07.05.2021 - SC) : MANU/SC/0346/2021 are also relevent ;**

"15. The correct position of law as laid down in Madhu Limaye (supra), thus, is that orders framing charges or refusing discharge are neither interlocutory nor final in nature and are therefore not affected by the bar of Section 397(2) of Code of Criminal Procedure. That apart, this Court in the above-cited cases has unequivocally acknowledged that the High Court is imbued with inherent jurisdiction to prevent abuse of process or to secure ends of justice having regard to the facts and circumstance of individual cases. As a caveat it may be stated that the High Court, while exercising its afore-stated jurisdiction ought to be circumspect. The discretion vested in the High Court is to be invoked carefully and judiciously for effective and timely administration of criminal justice system. This Court, nonetheless, does not recommend a complete hands off approach. Albeit, there should be interference, may be, in exceptional cases, failing which there is likelihood of serious prejudice to the rights of a citizen. For example, when the contents of a complaint or the other purported material on record is a brazen attempt to persecute an innocent person, it becomes imperative upon the Court to prevent the abuse of process of law."

27. Thus without entering into the academic question of maintainability of the petitions , keeping in view the aforesaid law, I intend to proceed to decide the lis on merits.

28. The case of the prosecution in nut shell is that on receipt of a reliable information joint surprise check was conducted by a team of Central Bureau of Investigation, Railways Vigilance and RDSO Official on 15.10.2013 at Gaghra Ghat, Choaka Ghat Section of N.E.R.,

Lucknow Division and also at the store of senior section Engineer (S.S.D.)/ Signal / CON/NER Aishbagh, Lucknow.

29. The FIR was lodged and after investigation the charge sheet was filed against revisionist Satyendra Narayan Soni, Silas Minz and applicants- Om Prakash Jaiswal and Ms/ Shankar Cable through its proprietor. It is stated in the charge sheet that in pursuance of the purchase order dated 28.9.2012 issued by the Chief Material Manager, N.E.R. Gorakhpur Ms Shankar Cable Industries has supplied (65 Drums) of 2 Core PVC Insulated Railway Signaling power cable and the supply was made on the basis of inspection certificate issued by RDSO, Lucknow. Subsequently on the basis of further demand 7 Drums out of 65 drums were provided to the SSE Aishbagh vide issue note dated 6.9.2013. On 15.10.2013 a surprise check was conducted by the CBI along with the officers of Railways and RDSO Vigilance and samples of the cables supplied by the applicants as well as by the other firm were collected in the presence of the railway officials as well as RDSO Officers and the samples so collected were forwarded to RDSO, Lucknow Lab for its testing and quality analysis and as per the summary of test results the first sample of 2 Core Cable was found failed in six parameters and sample of six Core 1.5 Sq. m.m., Railway signaling cable was found failed in 4 parameters while first sample of 12 Core x 1.5 sq. m.m. Railway signaling cable was found failed in 8 parameters Thereafter 2nd and 3rd out of above types were tested by signal lab of RDSO, Lucknow and they were also found failed in 6 parameters.

30. During the course of investigation it was also found that the accused Silas Minz and revisionist accused S.N. Soni had not conducted the pre supply testing and has given report without visiting the firm of the applicants. During the course of investigation the statement of technical experts e.g. Shri M.P. Singh, Senior Provisional Signal Tel. Com. Engineer (Works) N.E.R., Lucknow, Sarvada Nand Pandey, Senior Section Engineer (Signal) complainant, NER Lucknow and Dr. Gauthama, Associate Professor IIT, Kanpur, Dr. Pradeep Maji, Assistant Professor IIT, Rurki and Shri Modit Anand, Joint Director Signal Lab RDSO, Lucknow and others were recorded by the Investigating Officer who had specifically stated that the reading recorded by the accused RDSO Officials (accused persons) pertaining to pre inspection of the cables are unlikely to be the result of a genuine laboratory test and difference in parameters found in the sample report prepared by RDSO Lab in respect of failed parameters with regard to 2 Core cable supplied by the applicants, vis a vis pre inspection parameters, could not be the result of environmental effect or due to man handling in transportation.

31. It is also stated in the charge sheet that all the cables supplied by the applicants and other company were kept in similar conditions and therefore Investigating Officer had concluded that the applicants had conspired with accused revisionist Satyendra Narayan Soni, J.E. RDSO, Lucknow , accused Silas Minz., Deputy Director to cheat railways by supplying the sub standard cable , who have also issued certificate of pretesting without actually testing the cable at the premises of Shankar Cable Industries at Gorakhpur and in furtherance of the criminal conspiracy had caused a huge monetary loss to the railways and monetary gain to the accused persons.

32. Perusal of the order of the subordinate court would also reveal that Special Judge was of the view that the allegation as has been levelled in the charge sheet filed by the CBI could only be tested during the course of trial having regard to the quality of evidence which will be produced by the prosecution. The trial court was also of the view that as to whether proper samples have been collected at the time of inspection is the subject matter of evidence. It is also opined by the Special Judge that during the course of investigation the opinion of the experts has also been recorded wherein it is revealed that the quality of cables supplied by applicants, as is evident by the parameters recorded in the lab, could not be deteriorated due to improper storage of the cables or due to man handling during transportation. The Special Judge also opined that the fact as to whether the inspection certificates were issued by the co-accused persons revisionist Shri S.N. Soni and Silas Minz after testing the cable or as claimed by the prosecution without visiting the site of the applicants could only be determined after full fledged trial and also that at the stage of framing of charge only a prima facie case is to be seen and the charge could also be framed even on the basis of strong suspicion founded upon the material presented before the court and thus discharge application moved on behalf of the applicants was dismissed.

33. Keeping in view the submissions of learned Counsel for the applicants and revisionist that the Court below has materially erred in rejecting their applications of discharge which has also occasioned failure of justice, the facts of the instant case are required to be seen in the background of various submissions made by learned Counsel for the applicants/ revisionist in the backdrop of settled law on this point. It is fruitful at this stage to recall the settled law on the subject.

34. In **State of Bihar v. Ramesh Singh MANU/SC/0139/1977 : 1977CriLJ1606** , considering the scope of Sections 227 and 228 of the Code, it was held as under :-

"...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."

35. Hon?ble Supreme Court in the case of **State of Supt. And Remembrancer of Legal Affairs, West Bengal Vs. Anil Kumar Bhunja and others (1979) 4 SCC 274** has held as under:-

"18. It may be remembered that the case was at the stage of framing charges; the prosecution evidence had not yet commenced. The Magistrate had therefore, to consider the above question on a general consideration of the materials placed! before him by the investigating police officer. At this stage, as was pointed out by this Court in ***State of Bihar v. Ramesh Singh MANU/SC/0139/1977 : 1977Cri LJ 1606****, the truth, veracity and effect of the evidence which the prosecutor proposes to adduce are not to be meticulously judged. The standard of test, proof and judgment which is to be applied finally before finding the accused guilty or otherwise, is not exactly to be applied at the stage of Section 227 or 228 of the CrPC, 1973. At this stage, even a very strong suspicion founded upon materials before the Magistrate, which leads him to form a presumptive opinion as the existence of the factual ingredients constituting the offence alleged; may justify the framing of charge against the accused in respect of the commission of the offence.?*

36. Hon?ble Supreme Court in the case of ***Union of India (UOI) vs. Prafulla Kumar Samal and Ors. (06.11.1978 - SC) : MANU/SC/0414/1978*** held as under:-

"10. Thus, on a consideration of the authorities mentioned above, the following principles emerge :

(1) That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out:

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and largo 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 Judge cannot act merely as a Post Office or a mouth-piece 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."

37. Hon'ble Supreme Court in the case of ***R.S. Nayak v. A.R. Antulay MANU/SC/0198/1986(para 44) : (1986) 2 SCC 716.*** opined as follows:

?44...The Code contemplates discharge of the accused by the Court of Sessions 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 police report are dealt with in Section 245. The three sections contain some what different provisions in regard to discharge of the accused. Under Section 227, the trial Judge is required to discharge the accused if he 'considers that there is not sufficient ground for proceeding against the accused.' Obligation to discharge the accused under Section 239 arises 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." It is a fact that Sections 227 and 239 provide for discharge being ordered before the recording of evidence and the consideration as to whether charge has to be framed or not is required to be made on the basis of the record of the case, including documents and oral hearing of the accused and the prosecution or the police report, the documents sent along with it and examination of the accused and after affording an opportunity to the two parties to be heard. The stage for discharge under Section 245, on the other hand, is reached only after the evidence referred to in Section 244 has been taken.

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."

38. Hon'ble Supreme Court in the case of ***State- Anti Corruption Bureau, Hyderabad and another Vs. P. Suryaprakasam reported in 1999 Supreme Court Cases (Cri) 373*** has held as under:

"5. .....we are constrained to say that the settled law is just the reverse of what the High Court has observed in the

above- quoted passage as would be evident from even a cursory reading of Sections 239 and 240Cr.P.C.,which admittedly govern the case of therespondent.According to the above sections, at the time of framing of a charge what the trial court is required to, and can, consider are only the police report referred to under Section 173 Cr.P.C. and the documents sent with it. The only right the accused has at that stage is of being heard and nothing

beyond that.....”

39. Hon?ble Supreme Court in the case of **State of Orissa Vs. Debendra Nath Padhi (2005) 1 SCC 568** has held as under:

“6. At the stage of framing charge, the trial court is required to consider whether there are sufficient grounds to proceed against the accused. Section 227 of the Code provides for the eventuality when the accused shall be discharged. If not discharged, the charge against the accused is required to be framed under Section 228. ..

7. Similarly, in respect of warrant cases triable by Magistrates, instituted on a police report, Sections 239 and 240 of the Code are the relevant statutory provisions. Section 239 requires the Magistrate, to consider 'the police report and the documents sent with it under Section 173' and, if necessary, examine the accused and after giving accused an opportunity of being heard, if the Magistrate considers the charge against the accused to be groundless, the accused is liable to be discharged by recording reasons thereof.

8. What is to the meaning of the expression 'the record of the case' as used in Section 227 of the Code. Though the word 'case' is not defined in the Code but Section 209 throws light on the interpretation to be placed on the said word. Section 209 which deals with the commitment of case to Court of Session when offence is triable exclusively by it, inter alia, provides that when it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall commit 'the case' to the Court of Session and send to that court 'the record of the case' and the document and articles, if any, which are to be produced in evidence and notify the Public Prosecutor of the commitment of the case to the Court of Session. It is evident that the record of the case and documents submitted therewith as postulated in Section 227 relate to the case and the documents referred in Section 209. That is the plain meaning of Section 227 read with Section 209 of the Code, No provision in the Code grants to the accused any right to file any material or document at the stage of framing of charge. That right is granted only at the stage of the trial.

9. Further, the scheme of the Code when examined in the light of the provisions of the old code of 1898, makes the position more clear. In the old code, there was no provision similar to Section 227. Section 227 was incorporated in the Code with a view to save the accused from prolonged harassment which is a necessary concomitant of a protracted criminal trial. It is calculated to eliminate harassment to accused persons when the evidential materials gathered after investigation fall short of minimum legal requirements. If the evidence even if fully accepted cannot show that the accused committed the offence, the accused deserves to be discharged. In the old Code, the procedure as contained in Sections 207 and 207(a) was fairly lengthy. Section 207, inter alia, provided

that the Magistrate, where the case is exclusively triable by a Court of Session in any proceedings instituted on a police report, shall follow the procedure specified in Section 207(a). Under Section 207(a) in any proceeding instituted on a police report the Magistrate was required to hold inquiry in terms provided under Sub-section (1), to take evidence as provided in Sub-section (4), the accused could cross-examine and the prosecution could re- examine the witnesses as provided in Sub-section (5), discharge the accused if in the opinion of the Magistrate the evidence and documents disclosed no grounds for committing him for trial, as provided in Sub-section (6) and to commit the accused for trial after framing of charge as provided in Sub-section (7), summon the witnesses of the accused to appear before the court to which he has been committed as provided in Sub-section (11) and send the record of the inquiry and any weapon or other thing which is to be produced in evidence, to the21 Court of Session as provided in Sub-section (14). The aforesaid Sections 207 and 207(a) have been omitted from the Code and a new Section 209 enacted on the recommendation of the Law Commission contained in its 41st Report. It was realised that the commitment inquiry under the old Code was resulting in inordinate delay and served no useful purpose. That inquiry has, therefore, been dispensed with in the Code with the object of expeditious disposal of cases. Instead of committal Magistrate framing the charge, it is now to be framed by Court of Session under Section 228 in case the accused is not discharged under Section 227. This change brought out in the code is also required to be kept in view while determining the question. Under the Code, the evidence can be taken only after framing of charge."

40. Thereafter Honble Apex Court by referring to the ratio laid down in **State of Bihar v. Ramesh Singh MANU/SC/0139/1977:1977CriLJ1606, State of Delhi v. Gyan Devi and Ors.MANU/SC/0649/2000 , State of Madhya Pradesh v. S.B. Johari and Ors. MANU/SC/0025/2000 Maharashtra v. Priya :Sharan Maharaj MANU/SC/1146/1997: 1997CriLJ2248 Corruption Bureau, Hyderabad 2000CriLJ944 and State of and Ors. State Anti- and Anr. v. P. Suryaprakasam 1999 SCC (Crl.) 373** wherein the Supreme Court reiterated that at the stage of framing of charge the trial court is not to examine and assess in detail the materials placed on record by the prosecution nor is it for the court to consider the sufficiency of the materials to establish the offence alleged against the accused persons and also held that the charge can be quashed if the evidence which the prosecutor proposes to adduce to prove the guilt of the accused, even if fully accepted, can not show that the accused committed the particular offence. In that case, there would be no sufficient ground for proceeding with the trial and at the stage of framing of charge there can only be limited evaluation of materials and documents on record and sifting of evidence to prima facie find out whether sufficient ground exists or not for the purpose of proceeding further with the trial, have so held with reference to materials and documents produced by the prosecution and not the accused. The above mentioned decisions proceed on the basis of settled legal position that the material as produced by the prosecution alone is to be considered and not the one produced by the accused. The latter aspect relating to the accused though has not been specifically stated, yet it is implicit in the decisions. It seems to have not been specifically so stated as it was taken to be well settled

proposition. This aspect, however, has been adverted to in where considering the scope of Sections 239 and 240 of the Code it was held that at the time of framing of charge, what the trial court is required to, and can consider are only the police report referred to under Section 173 of the Code and the documents sent with it. The only right the accused has at that stage is of being heard and nothing beyond that. The Supreme Court further held that judgment of the High Court quashing the proceedings by looking into the documents filed by the accused in support of his claim that no case was made out against him even before the trial had commenced was reversed by the Supreme Court.

41. It was thus concluded that at Sections 227 and 228 stage 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. The court may, 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.

42. Hon?ble Supreme Court in the case of **Sajjan Kumar Vs. Central Bureau of Investigation (2010) 9 SCC 368** has held as under:

"Exercise of jurisdiction under Sections 227 & 228 of Cr.P.C.

On consideration of the authorities about the scope of Section 227 and 228 of the Code, the following principles emerge:

(i) The Judge while considering the question of framing the charges under Section 227 of the Cr.P.C. has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case.

(ii) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained, the Court will be fully justified in framing a charge and proceeding with the trial.

(iii) The Court cannot act merely as a Post Office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities etc. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

(iv) If on the basis of the material on record, the Court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.

(v) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the Court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.

(vi) At the stage of Sections 227 and 228, the Court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value discloses the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

(vii) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal."

43. In the case of **Asim Sharif Vs. National Investigation Agency, MANU/SC/0863/2019 : (2019) 7 SCC 149**, the Supreme Court has again reiterated the principle that while considering the application for discharge, the court has power to sift and weigh the evidence only for limited purpose to find out whether or not prima facie case exists against the accused. If the material placed before this Court raises strong suspicion against the accused, the Court is wholly justified in framing of the charge.

44. Hon'ble Supreme Court in **Tarun Jit Tejpal Vs. State of Goa and other: MANU/SC/1121/2019 held as under;-**

"9.2. In the subsequent decision in the case of (State by the Inspector of Police, Chennai v. S. Selvi and Ors. MANU/SC/1663/2017) this Court has summarised the principles while framing of the charge at the stage of Section 227/228 of the Code of Criminal Procedure. 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, MANU/SC/0414/1978 : (1979) 3 SCC 4 : 1979 SCC (Cri.) 609], Dilawar Balu Kurane v. State of Maharashtra [Dilawar Balu Kurane v. State of Maharashtra, MANU/SC/0005/2002 : (2002) 2 SCC 135: 2002 SCC (Cri.) 310], Sajjan Kumar v. CBI [Sajjan Kumar v. CBI, MANU/SC/0741/2010 : (2010) 9 SCC 368: (2010) 3 SCC (Cri.) 1371], State v. A. Arun Kumar [State v. A. Arun Kumar, MANU/SC/1174/2014 : (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, MANU/SC/0127/2015 : (2015) 3 SCC 424: (2015) 2 SCC (Cri.) 265], State of Orissa v. Debendra Nath Padhi [State of Orissa v. Debendra Nath Padhi, MANU/SC/0077/2003 : (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, MANU/SC/0337/1990 : (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, MANU/SC/0266/1979 : (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 Code of Criminal Procedure 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."

45. In **State of Rajasthan vs. Ashok Kumar Kashyap, MANU/SC/0275/2021** Hon?ble Supreme Court observed as under:-

"9.1. In the case of P. Vijayan (supra), this Court had an occasion to consider Section 227 of the Code of Criminal Procedure. What is required to be considered at the time of framing of the charge and/or considering the discharge application has been considered elaborately in the said decision. It is observed and held that at the stage of Section 227, the Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the Accused. It is observed that in other words, the sufficiency of grounds would take within its fold the nature of the evidence recorded by the police or the documents produced before the Court which ex facie disclose that there are suspicious circumstances against the Accused so as to frame a charge against him. It is further observed that if the Judge comes to a conclusion that there is sufficient ground to proceed, he will frame a charge Under Section 228 Code of Criminal Procedure, if not, he will discharge the Accused. It is further observed that while exercising its judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution, it is not necessary for the court to enter into the pros and cons of the matter or into a weighing and balancing of evidence and probabilities which is really the function of the court, after the trial starts.

9.2. In the recent decision of this Court in the case of M.R. Hiremath (supra), one of us (Justice D.Y. Chandrachud) speaking for the Bench has observed and held in paragraph 25 as under:

25. The High Court ought to have been cognizant of the fact that the trial court was dealing with an application for discharge under the provisions of Section 239 Code of Criminal Procedure. The parameters which govern the exercise of this jurisdiction have found expression in several decisions of this Court. It is a settled principle of law that at the stage of considering an application for discharge the court must proceed on the assumption that the material which has been brought on the record by the prosecution is true and evaluate the material in order to determine whether the facts emerging from the material, taken on its face value, disclose the existence of the ingredients necessary to constitute the offence. In ***State of T.N. v.***

N. Suresh Rajan [State of T.N. v. N. Suresh Rajan, MANU/SC/0011/2014 : (2014) 11 SCC 709*, adverting to the earlier decisions on the subject, this Court held: (SCC pp. 721-22, para 29)*

29. ... 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."

46. Having heard learned counsel for the applicants as well as the revisionist, it is evident that the applicants as well as the revisionist is aggrieved by the order of the Special Judge whereby their application for discharge has been rejected on the score that Special Jduge has not taken care of this fact that cable which was supplied to the railways was first tested by the officials of the RDSO, at the premises of the company and thereafter supply was made and the testing of the samples by the CBI has been done in the lab of RDSO Lucknow and the difference of values found in the testing report is within permissible limits and it is normal that the test results of two different labs on different equipments may differ with each other even if performed by the same persons. The parties are also aggrieved that Special Judge has not considered that simply by not buying any ticket or not sending any tour program or by not claiming TA it could not be inferred or presumed that the revisionist S.N.Soni and co-accused Silas Minz has not inspected the cable at the site of the supplier company and thus the trial court has materially erred in not considering this aspect of the matter.The applicants and revisionist are also aggrieved that the Special Judge has also not considered that difference of values/ parameters in the pre- supply report and the testing report of the RDSO Lab wherein the samples allegedly collected by the CBI were tested is very negligible and thus in any case the criminal liability is not attracted as the difference in parameters may be the result of wear and tear occurred due to inappropriate storage or due to the placing of cables under open sky or also due to poor transportation.

47. It is also hammered that the experts whose statements were recorded by the Investigating Officer are not having any expertize in the field and therefore their evidence was not sufficient to frame charge against the revisionist and the applicants. The applicants and revisionist are also aggrieved that the railways has never made any complaint about the alleged poor quality of cable and the whole supply of cable has been consumed by them and it could not be believed that the cable was of poor quality and also that the biasness of the investigating agency towards the applicants company is apparent as despite the samples of other company S.P.M. were also found failed in vital parameters but that company was neither charge sheeted nor the testing results of the cables supplied by that company were made part of the charge sheet.

48. It is not in dispute that ordinarily for the purpose of framing charge the

material submitted by the investigating agency is to be taken into consideration and it is not a stage where defense of the accused persons will be taken into consideration or minute scrutiny of the material/evidence is done as is required for assessing the guilt of the accused persons. The charge sheet contains the fact that on the joint surprise check conducted by a team of CBI officials, railways vigilance and RDSO officials on 15.10.2013 at Ghaghra Ghat and Choaka Ghat Section of N.E.R. Division, Lucknow and at the Store Senior Section Engineer Signal, Aishbagh, Lucknow three samples each of 6 Core 1.5 Sq. m.m., PVC Insulated Railway Signaling Cable, 12 Core x 1.5 Sq. m.m. PVC, Insulated Railway Signaling Cable and 2 Core x 25 Sq. m.m. PVC Insulated Railway Signaling power cable were collected from the above sites and were sent by the CBI for quality analysis at the signal lab of RDSO, Lucknow. As per the sample test report given by the signal lab RDSO, Lucknow these cables were found failed in certain vital parameters and did not meet standards specifications.

49. It is also found during the investigation that 65 drums of 2 Core x 25 Sq. m.m. of PVC Insulated Power Cable was supplied by Ms. Shankar Cable Industries (applicants) of 482 Cr.P.C. This supply was made on the basis of inspection certificate issued by the RDSO, Lucknow vide demand note dated 5.9.2013. 7 Drums out of these 65 Drums were sent from SSE Aishbagh, Lucknow to SSE Gorakhpur. As per the results of the RDSO lab the 2 Core x 25 Sq. m.m. Railway Signaling Power Cable was found failed in 6 parameters. Perusal of the summary of test results which has been made part of the charge sheet would reflect that 2nd & 3rd samples of 2 Core x 25 Sq. m.m. Power Cable supplied by the applicants were also found failed in 6 parameters.

50. It is also a case of prosecution that as per the established procedure the supplier company used to send a call letter to RDSO for inspection and approval of the manufactured material. The test is done by the RDSO Inspector as per a sampling plan and thereafter a test check is required to be done by an officer of RDSO on the cable and inspection certificate is issued by the RDSO. It is also evident that acceptance test was done with regard to the 2 Core x 25 Sq. m.m. Cable at the site of the applicants by Shri S.N. Soni (revisionist) who was the J.E. of RDSO at that point of time on 11.1.2013 to 12.1.2013 and the test check was conducted by Silas Minz, Deputy Director on 13.10.2013.

51. During the investigation it was also found that Shri Silas Minz did not get his tour program approved and did not claim TA for his visit to Gorakhpur for conducting these tests and also did not book any ticket on his metal pass to visit M/s Shankar Cable Industries for the purpose of checking the cable and there is no proof that they actually visited Gorakhpur, where M/s. Shankar Cable Industries is situated, while with regard to Shri S.N. Soni (revisionist) it was found that though he got his tour program approved but travelled without booking a ticket, thus according to the Investigating Officer of Central Bureau of Investigation this suggests that both these officials have not visited the site of M/s. Shankar Cable Industries and prepared the report without pre-inspecting the cables meant to be supplied to the Railways. Certain experts of the subject, namely, Shri M.P. Singh, Senior Divisional Signal and Telecom Engineer (Works), NER, Lucknow,

Sarvadanand Pandey, Senior Section Engineer (Signal), NER, Lucknow, Dr. Gouthama, Associate Professor, IIT,Kanpur, Dr. Pradeep Maji, Assistant Professor, IIT, Roorkee and Sh. Mudit Anand, Joint Director, Signal Lab, RDSO etc. have been examined on the aspect of degradation in the quality of cable due to storage conditions and their statements under Section 161 Cr.P.C. have stated to be recorded by the Investigating Officer. Experts viz. S/Sh. M.P. Singh, Sarvadanand Pandey, Dr. Gouthama and Dr. Pradeep Maji, have confirmed that there is a significant difference between the standard specifications as compared to the readings obtained during sample test as well as between the acceptance test readings given by accused RDSO officials compared with sample test readings in respect of failed parameters of 2 core x 25 Sq. mm Cable supplied by the applicants and this cannot happen due to environmental effect or improper transportation or man handling. The experts from IIT have also confirmed that the readings recorded by the accused RDSO official during Acceptance Test/ Pre-supply inspection are unlikely to be the result of a genuine laboratory test as the readings of acceptance report are unbelievably close to the standard specifications.

52. Thus the quantum of values between the Pre-supply test result and the test conducted by the CBI at RDSO Lab., Lucknow were found differred in vital parameters pertaining to 2 core power cable supplied by the applicants M/s Shankar Cable Industries, Gorakhpur. The truthfulness of the statements of these experts and other evidence collected during investigation could only be tested during the trial when they will be produced as witnesses. The procedure of collection of samples and testing of cables at RDSO, Lucknow or at the site of M/s Shankar Cable Industries at Gorakhpur could also be questioned and established during the trial and also that sub standard values are not the result of poor storage conditions and are due to wear and tear from weather could also be established when the prosecution will produce its witnesses before the trial court. The accused persons could also question the prosecution witnesses about the authenticity of the values of lab report of the RDSO, Lucknow. The burden to prove all the facts necessary to establish the guilt of the accused persons is definitely on the prosecution during trial. The fact that the test check report prepared by the accused RDSO officials was genuine and was given after inspecting the cable, could also be established during the course of trial by the revisionist and whether the defects of the cables(if any) were known to M/s Shankar Cable Industries from before the supply and also that whether there was a conspiracy between the accused persons to cheat the Railways are all facts which could only be established during the course of trial and the accused persons could impeach the prosecution witnesses in order to show that the case of the prosecution is not achieving the required standard i.e. proof beyond reasonable doubt, but at this stage i.e. the stage of framing of charges, it could not be said that there is no sufficient material on the basis of which charges against accused could be framed. All the submissions made by learned Senior Counsel, Shri Jyotindra Mishra, appearing for the applicants in petition under Section 482 Cr.P.C. No. 8150 of 2019 and Shri Purnendu Chakravarty in the Criminal Revision No. 1593 of 2019 are pertaining to the factual aspect of the case and the veracity of claims and counter claims by

the applicants/ revisionist and the Central Bureau of Investigation could only be tested during the trial but at this stage it is not a case where the proceedings should have been culminated by discharging the accused persons. I have gone through the whole record and have perused the material within the permissible limits as required for the purpose of framing of charge, including the material/ documents, which have been relied on by learned counsels for the parties but I am not inclined to accept the submission that there are no sufficient grounds in this case to proceed further. Culmination of trial at the stage of framing of charge, requires very strong and cogent grounds and inherent weaknesses in the version of prosecution apparent on the face to demonstrate that trial will either result in failure of justice or will be a futile exercise or will operate as engines of oppression or no ingredients of alleged penal offences are existing. Law leans in favour of trial unless there are strong, compelling and substantial grounds to culminate the same. Needless to say that the falsehood or the truthfulness of the allegations can only be tested in the trial. The trial of a criminal case is nothing but a journey to unearth the truth and this course can only be disrupted when some strong, compelling grounds and material is available, which uproots the prosecution from its roots and nothing is left for the prosecution. Unfortunately that is not a case here. Further discussion of the facts of the case may effect the fate of trial and suffice is to say that material available before the Special Judge was sufficient enough, on the basis of which charges under appropriate sections could be framed against accused persons. The case laws relied on by applicants and revisionist are also not helpful to them for the reasons mentioned herein before.

53. Thus in the considered opinion of this Court keeping in view all the facts, circumstances and evidence, as well as the law placed above, no illegality appears to have been committed by the Special Judge by rejecting the prayer of the applicants/ revisionist of their discharge and resultantly the revision as well as application under Section 482 Cr.P.C. moved by the applicants Om Prakash Jaiswal and M/s Shankar Cables Industries through its Proprietor and revisionist Shri S. N. Soni is liable to be ***dismissed*** and dismissed accordingly.

54. Trial court is directed to proceed with the trial and conclude the same strictly in accordance with law, with expedition.

55. The observations made herein above are made only for the purpose of disposal of these cases and the same shall not be construed as opinion of this Court on merits of the case.

56. A copy of this judgment be placed on record of the Criminal Revision No. 1593 of 2019.

(2021)09ILR A929
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.08.2021

BEFORE

THE HONBLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Application U/S 482. No. 8478 of 2021

Adesh Tyagi ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Rahul Kumar Tyagi

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

(A) Criminal Law - The Code of criminal procedure, 1973 - Section 482 - Inherent power - Section 319 - Power to proceed against other persons appearing to be guilty of offence - *doctrine judex damnatur cum nocens absolvitur* - Judge is condemned when guilty is acquitted - Indian Penal Code, 1860 - 489-B - Using as genuine forged or counterfeit curency - notes or bank notes - a person whose name does not appear even in the FIR or in the charge-sheet or whose name appears in the FIR and not in the charge-sheet, can still be summoned by the court provided the conditions under the section 319 stand fulfilled.(Para -10 ,12)

Branch manager (PW-1) lodged FIR - against two accused - accused no. 1 submitted certain currency notes at the cash counter of bank - checked by cashier (PW-2) - found to be counterfeit - enquired from accused no. 1 - currency notes handed over to him by the accused no. 2 (applicant) - chargesheet submitted against accused no. 1 and not against accused no.2 - application moved by prosecution before trial court - two prosecution witnesses - taken name of applicant in examination in chief - evidence available on record - necessary that accused no.2 be also tried together with the accused no.1 - application allowed - applicant summoned for trial.

HELD:-The power under Section 319 of the Code to summon even those persons who are not named in the charge-sheet to appear and face trial, being unquestionable and the object of the provision being not to allow a person who deserves to be tried to go scot-free by being not arraigned in the trial inspite of possibility of his complicity which can be gathered from the evidence during the course of trial, the order passed under Section 319 of the Code summoning the applicant does not contain any material error so as to warrant inference. (Para -26)

Application u/s 482 Cr.P.C. dismissed. (E-7)

List of Cases cited:-

1. Hardeep Singh & ors. Vs St. of Punj., (2014) 3 SCC 92

2. S. Mohammed Ispahani Vs Yogendra Chandak & rs., (2017) 16 SCC 226

3. Rajesh & Ors. Vs St. of Har., (2019) 6 SCC 368

4. Saeeda Khatoon Arshi Vs St. of U.P. & anr., (2020) 2 SCC 323

(Delivered by Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard Sri Rahul Kumar Tyagi, learned counsel for the applicant and Sri Pankaj Saxena, learned AGA-I appearing for the State-opposite party.

2. The present application under Section 482 of the Code of Criminal Procedure1 has been filed to quash the judgment and order dated 27.02.2018 passed by the First Additional Session Judge, Baghpat in Application 28-B in Sessions Trial No. 41 of 2014 (State vs. Jahangir) arising out of Case Crime No. 417 of 2013, under Section 489-B Indian Penal Code2, P.S. Khakera, District Baghpat.

3. The proceedings of the case were initiated pursuant to an FIR dated 22.11.2013 registered as Case Crime No. 419 of 2013, under Section 489-B of the Penal Code at P.S. Khakera, District Baghpat. The said FIR was lodged by the Branch Manager, State Bank of India, Khakera, Baghpat. Among the two accused named in the FIR the applicant's name was mentioned as accused No.2. The incident as described in the FIR is that on 22.11.2013 at about 3:00 p.m. the accused no.1 submitted certain currency notes at the cash

counter of the Bank which upon being checked by the cashier were found to be counterfeit and upon an inquiry from the said accused no.1 he stated in writing that the currency notes had been handed over to him by the accused no.2, applicant herein.

4. Upon investigation, a charge sheet dated 10.01.2014 was submitted against the accused no.1, whereupon cognizance was taken on 16.01.2014. During the course of trial, the first informant (Bank Manger) examined himself as PW-1 and reiterated the FIR version by stating that upon the currency notes having been found to be counterfeit, the accused no.1 was questioned and he stated that the said counterfeit currency notes had been handed over to him by the accused no.2.

5. The cashier of the Bank, who appeared as PW-2, during the course of trial also corroborated the FIR version by stating that upon the currency notes having been found to be counterfeit the matter was inquired from the accused no.1 who clearly stated that the currency notes had been handed over to him by the accused no.2.

6. An application dated 31.08.2017 was moved by the prosecution before the trial court stating that despite the two prosecution witnesses having taken the name of the applicant herein in their examination in chief and also the name of the said accused having specifically been mentioned in the FIR, the police report did not mention his name and accordingly on the basis of evidence available on record it was necessary that the said accused be also tried together with the other accused. The aforesaid application came to be allowed by the Additional Sessions Judge First, Baghpat by order dated 27.02.2018, wherein upon noticing the FIR version and also the statements of the two prosecution witnesses and the necessary legal provisions under Section 319 of the Code the application has been allowed and the applicant herein has been summoned for trial.

7. Learned counsel for the applicant has sought to assail the aforesaid order passed by the trial judge summoning the applicant in exercise of powers under Section 319 of the Code by referring to the statements recorded during the course of investigation to contend that since the Investigating Officer did not find sufficient material against the applicant and no charge sheet was submitted against him, there was no further material on the basis of which the trial court could have summoned the applicant in exercise of powers under Section 319 of the Code. He placed reliance upon the Constitution Bench judgment of the Supreme Court in **Hardeep Singh and others vs. State of Punjab3**, to support his submission.

8. Learned A.G.A.-I has controverted the submissions made by the counsel for the applicant by drawing attention to the fact that the applicant herein was named in the FIR and looking to the facts as narrated in the FIR, the applicant would be the prime accused. It is further pointed out that the testimony of PW-1 and PW-2 during the course of trial made it imperative for the court below to invoke the powers under Section 319 of the Code to summon the applicant for trial. It is also contended that the testimony before the trial judge would be required to be given more weight than the statements recorded by the investigating officer during the course of investigation. Learned A.G.A.-I has also sought to place reliance upon the Constitution Bench

judgment in the case of **Hardeep Singh** (supra).

9. In order to appreciate the rival contentions the provisions of Section 319 of the Code are required to be referred to. Section 319 of the Code reads as follows :-

"**319.Power to proceed against other persons appearing to be guilty of offence.-**

(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub-section (1), then-

(a) the proceedings in respect of such person shall be commenced afresh, and witnesses re-heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced."

10. The ambit and scope of the powers of the Magistrate under Section 319 of the Code were considered in the Constitution Bench judgment of the Supreme Court in **Hardeep Singh** (supra). Referring to the object of the provision it was held that the object of the provision is that the real culprit should not get away unpunished and in a situation where the investigating agency for any reason does not array one of the real culprits as an accused, the court is not powerless in calling the said accused to face trial. It was stated thus :-

"8.The constitutional mandate under Articles 20 and 21 of the Constitution of India, 1950 provides a protective umbrella for the smooth administration of justice making adequate provisions to ensure a fair and efficacious trial so that the accused does not get prejudiced after the law has been put into motion to try him for the offence but at the same time also gives equal protection to victims and to society at large to ensure that the guilty does not get away from the clutches of law. For the empowerment of the courts to ensure that the criminal administration of justice works properly, the law was appropriately codified and modified by the legislature under CrPC indicating as to how the courts should proceed in order to ultimately find out the truth so that an innocent does not get punished but at the same time, the guilty are brought to book under the law. It is these ideals as enshrined under the Constitution and our laws that have led to several decisions, whereby innovating methods and progressive tools have been

forged to find out the real truth and to ensure that the guilty does not go unpunished.

9.The presumption of innocence is the general law of the land as every man is presumed to be innocent unless proven to be guilty. Alternatively, certain statutory presumptions in relation to certain class of offences have been raised against the accused whereby the presumption of guilt prevails till the accused discharges his burden upon an onus being cast upon him under the law to prove himself to be innocent. These competing theories have been kept in mind by the legislature. The entire effort, therefore, is not to allow the real perpetrator of an offence to get away unpunished. This is also a part of fair trial and in our opinion, in order to achieve this very end that the legislature thought of incorporating provisions of Section 319 Code of Criminal Procedure. It is with the said object in mind that a constructive and purposive interpretation should be adopted that advances the cause of justice and does not dilute the intention of the statute conferring powers on the court to carry out the abovementioned avowed object and purpose to try the person to the satisfaction of the court as an accomplice in the commission of the offence that is the subject matter of trial.

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12. Section 319 Code of Criminal Procedure springs out of the doctrine judex damnatur cum nocens absolvitur (Judge is condemned when guilty is acquitted) and this doctrine must be used as a beacon light while explaining the ambit and the spirit underlying the enactment of Section 319 CrPC.

13. It is the duty of the court to do justice by punishing the real culprit. Where the investigating agency for any reason does not array one of the real culprits as an accused, the court is not powerless in calling the said accused to face trial. The question remains under what circumstances and at what stage should the court exercise its power as contemplated in Section 319 CrPC.

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17. Section 319 CrPC allows the court to proceed against any person who is not an accused in a case before it. Thus, the person against whom summons are issued in exercise of such powers, has to necessarily not be an accused already facing trial. He can either be a person named in Column 2 of the chargesheet filed under Section 173 Code of Criminal Procedure or a person whose name has been disclosed in any material before the court that is to be considered for the purpose of trying the offence, but not investigated. He has to be a person whose complicity may be indicated and connected with the commission of the offence.

18. The legislature cannot be presumed to have imagined all the circumstances and, therefore, it is the duty of the court to give full effect to the words used by the legislature so as to encompass any situation which the court may have to tackle while proceeding to try an offence and not allow a person who deserves to be tried to go scot free by being not arraigned in the trial in spite of possibility of his complicity which can be gathered from the documents presented by the prosecution.

19. The court is the sole repository of justice and a duty is cast upon

it to uphold the rule of law and, therefore, it will be inappropriate to deny the existence of such powers with the courts in our criminal justice system where it is not uncommon that the real accused, at times, get away by manipulating the investigating and/or the prosecuting agency. The desire to avoid trial is so strong that an accused makes efforts at times to get himself absolved even at the stage of investigation or inquiry even though he may be connected with the commission of the offence."

11. As regards the degree of satisfaction required for invoking the powers under Section 319 of the Code, it was held that the test that has to be applied is one which is more than *prima facie* case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. It was observed as follows :-

"105. Power under Section 319 Code of Criminal Procedure is a discretionary and an extra-ordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

106. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court not necessarily tested on the anvil of Cross-Examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 Code of Criminal Procedure. In Section 319 Code of Criminal Procedure the purpose of providing if "it appears from the evidence that any person not being the accused has committed any offence" is clear from the words "for which such person could be tried together with the accused." The words used are not "for which such person could be convicted". There is, therefore, no scope for the Court acting under Section 319 Code of Criminal Procedure to form any opinion as to the guilt of the accused.

12. The question as to in what situations the power under the section can be exercised in respect of persons not named in the FIR or named in the FIR, but not charge-sheeted or discharged was also considered, and it was held that a person whose name does not appear even in the FIR or in the charge-sheet or whose name appears in the FIR and not in the charge-sheet, can still be summoned by the court provided the conditions under the section stand fulfilled. It was observed as follows :-

"111. Even the Constitution Bench in Dharam Pal (CB) has held that the Sessions Court can also exercise its original jurisdiction and summon a person as an accused in case his name appears in Column 2 of the chargesheet, once the case had been committed to it. It means that a person whose name does not appear even in the FIR or in the chargesheet or whose name appears in the FIR and not in the

main part of the chargesheet but in Column 2 and has not been summoned as an accused in exercise of the powers under Section 193 Code of Criminal Procedure can still be summoned by the court, provided the court is satisfied that the conditions provided in the said statutory provisions stand fulfilled.

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117.6 A person not named in the FIR or a person though named in the FIR but has not been chargesheeted or a person who has been discharged can be summoned under Section 319 Code of Criminal Procedure provided from the evidence it appears that such person can be tried along with the accused already facing trial. However, in so far as an accused who has been discharged is concerned the requirement of Sections 300 and 398 Code of Criminal Procedure has to be complied with before he can be summoned afresh. "

13. The word 'evidence' as used under Section 319(1) of the Code was also considered and it was held as follows :-

"84. The word "evidence" therefore has to be understood in its wider sense both at the stage of trial and, as discussed earlier, even at the stage of inquiry, as used under Section 319 Code of Criminal Procedure.The court, therefore, should be understood to have the power to proceed against any person after summoning him on the basis of any such material as brought forth before it. The duty and obligation of the court becomes more onerous to invoke such powers cautiously on such material after evidence has been led during trial.

85. In view of the discussion made and the conclusion drawn hereinabove, the answer to the aforesaid question posed is that apart from evidence recorded during trial, any material that has been received by the court after cognizance is taken and before the trial commences, can be utilised only for corroboration and to support the evidence recorded by the court to invoke the power under Section 319 Code of Criminal Procedure. The "evidence" is thus, limited to the evidence recorded during trial. "

14. The principles with regard to exercise of power by the court to summon an accused under Section 319 of the Code were reiterated in **S. Mohammed Ispahani Vs. Yogendra Chandak and others4**, and it was held that the power under Section 319 to summon even those persons who are not named in the charge-sheet to appear and face trial, is unquestionable. It was observed thus:-

"28.Insofar as power of the Court Under Section 319 of the Code of Criminal Procedure, to summon even those persons who are not named in the charge sheet to appear and face trial is concerned, the same is unquestionable. Section 319 of the Code of Criminal Procedure, is meant to rope in even those persons who were not implicated when the charge sheet was filed but during the trial the Court finds that sufficient evidence has come on record to summon them and face the trial. In Hardeep Singh's case, the Constitution Bench of this Court has settled the law in this behalf with authoritative pronouncement, thereby removing the cobweb which had been created while interpreting this provision earlier. As far as object behind Section 319 of the Code of

Criminal Procedure, is concerned, the Court had highlighted the same as under:

19.The court is sole repository of justice and a duty is cast upon it to uphold the Rule of law and, therefore, it will be inappropriate to deny the existence of such powers with the courts in our criminal justice system where it is not uncommon that the real accused, at times, get away by manipulating the investigating and/or the prosecuting agency. The desire to avoid trial is so strong that an Accused makes efforts at times to get himself absolved even at the stage of investigation or inquiry even though he may be connected with the commission of the offence. '

15. The power to proceed against persons named in FIR with specific allegations against them, but not charge-sheeted, was reiterated in **Rajesh and others Vs. State of Haryana,5** and it was held that persons named in the FIR but not implicated in charge-sheet can be summoned to face trial, provided during the trial some evidence surfaces against the proposed accused.

16. The exercise of powers under Section 319 of the Code for summoning an additional accused again came up for consideration in **Saeeda Khatoon Arshi Vs. State of Uttar Pradesh and another6** and it was held that it is the duty of the court to give full effect to the words used by the legislature so as to encompass any situation which the court may have to tackle while proceeding to try an offence and not allow a person who deserves to be tried to go scot-free by being not arraigned in the trial inspite of the possibility of his complicity which can be gathered from the documents presented by the prosecution.

17. In the case at hand the FIR was registered with regard to an offence under Section 489-B of the Penal Code which relates to using forged or counterfeit currency notes, and the applicant herein was named as an accused. The FIR version shows complicity of the applicant inasmuch as the currency notes, which were presented at the cash counter of the bank, are stated to have been handed over to the accused no. 1 by the applicant herein, named as accused no. 2 in the FIR. The accused no. 1, who is stated to have brought the currency notes to the bank, in fact submitted a statement in writing to the bank cashier stating therein that the currency notes had been handed over to him by the applicant. Upon investigation the police submitted a charge-sheet against accused no. 1 under Section 489-B of the Penal Code. During the course of trial, the Bank Manager and the cashier appeared as witnesses, PW-1 and PW-2 respectively, and in their testimony corroborated the FIR version by stating that upon the currency notes having been found to be counterfeit, when the accused no. 1 was questioned, he stated that the said currency notes had been handed over to him by the accused no. 2.

18. The charge in respect of which trial is proceeding is an offence under Section 489-B of the Penal Code, which relates to using forged or counterfeit currency notes and in view thereof the source of the currency notes or the person from whom the said notes had been received would be relevant. The FIR version as well as the testimony of two witnesses having indicated that the accused no. 1 i.e. the person who had presented the currency notes at the cash counter of the bank had specifically stated that currency notes had been handed over to him by the accused no. 2, the complicity of the said

accused could not be ruled out. The evidence before the trial judge being indicative of the complicity of the applicant, though not arraigned as an accused in the charge-sheet, it was open to the trial court to form a view that the applicant be tried together with the accused, and for the said purpose summon the applicant in exercise of powers under Section 319 of the Code.

19. The broad principles which have been laid down for exercise of powers under Section 319 of the Code underline the object of the enactment that the real perpetrator of the offence should not get away unpunished and in a situation where the investigating agency for any reason does not array the real culprit as an accused the court would not be powerless in calling the accused to face trial; rather it would be duty of the court to do justice by punishing the real culprit.

20. The test which has been laid down with regard to the degree of satisfaction required for invoking the powers under Section 319 is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction.

21. The power to proceed under Section 319 has also been held to be exerciseable in respect of persons though named in the FIR but not charge-sheeted provided the court is satisfied that the conditions provided under the section stand fulfilled.

22. The only ground which has been canvassed on behalf of the applicant to raise a challenge to the order of summoning under Section 319 of the Code, is that the statements recorded by the investigating officer during the course of investigation did not indicate any material against the applicant and that no charge-sheet was submitted against the applicant.

23. Section 319 (1) of the Code envisages that where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

24. The word evidence used under Section 319 (1) of the Code has been held to be understood to refer to the evidence recorded during trial, and also any material that has been received by the court after cognizance is taken and before the trial commences, to be utilized for corroboration and to support the evidence recorded by the court.

25. The evidence recorded by the court during trial is thus to be accorded primacy and for the purpose of exercise of power under Section 319 of the Code would have to be given weight over the material which was collected during the course of investigation. The contention which has been sought to be raised placing reliance upon the material collected by the investigating officer during the course of investigation, for the purpose of exercise of powers under Section 319 of the Code, thus cannot be accepted.

26. The power under Section 319 of the Code to summon even those persons who are not named in the charge-sheet to appear and face trial, being unquestionable and the object

of the provision being not to allow a person who deserves to be tried to go scot-free by being not arraigned in the trial inspite of possibility of his complicity which can be gathered from the evidence during the course of trial, the order passed under Section 319 of the Code summoning the applicant does not contain any material error so as to warrant inference.

27. Counsel for the applicant at this stage submits that he does not dispute the aforementioned legal position with regard to the exercise of powers under Section 319 of the Code and states that the applicant would submit to the jurisdiction of the court below and seek bail.

28. It goes without saying that in case any such application is moved, the court below would be expected to dispose it of in accordance with the settled principles of law.

29. Subject to the aforesaid observation, the application stands dismissed.

(2021)09ILR A938
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.08.2021

BEFORE

THE HON'BLE GAUTAM CHOWDHARY, J.

Application U/S 482. No. 8735 of 2021

Sr. Kafeel @ Dr. Kafeel Ahmed Khan ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Rajrshi Gupta, Sri Dileep Kumar (Senior Adv.), Sri Manish Singh, Sri Nazrul Islam Jafri (Senior Adv.), Sri Sambhavi Shukla

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

(A) Criminal Law - The Code of criminal procedure, 1973 - Section 482 - Inherent power , Section 196 - prior sanction from Central Government or State Government before cognizance is taken of any offence punishable under Chapter-VI I.P.C. , Indian Penal Code, 1860 - Section 153 A - promoting enemity between different groups on grounds of religion, Section 153 B - imputations, assertions prejudicial to national integration , Section 505 (2) - statements creating or promoting enmity , hatred or ill - will between classes , Section109 - Punishment for abetment - Prior sanction either of the State Government or of the Central Government is necessary before taking cognizance of the offences under Sections 153-A and 153-B of the Indian Penal Code - Magistrate had no jurisdiction to take cognizance of the offences under Sections 153-A and 153-B of the Indian Penal Code in absence of any sanction as envisaged under Section 196(1)(a)(1-A)(a) CrPC.(Para - 9)

Criminal proceedings against applicant - Alleged Inflammatory Speech against CAA - Chargesheet and cognizance order passed against applicant - requisite prior sanction of prosecution not taken by the Central government or the State government or the district magistrate under Section 196(A) CrPC.

HELD:-The entire criminal proceedings and the cognizance order passed by the Chief Judicial Magistrate quashed , on the ground that prior requisite sanction of prosecution not taken by the Central government or the State government or the district magistrate under Section 196(A) of the Criminal Procedure Code (CrPC). Matter remanded back to the court of chief judicial magistrate , with the direction that as per the provision of Section 196 CrPC, Order of cognizance under the sections 153A , 153B , 505(2) , 109 of IPC may be passed against the applicant only after obtaining prior sanction of prosecution by the Central government or the State government or the district magistrate.(Para – 16,17)

Application u/s 482 Cr.P.C. allowed. (E-7)

List of Cases cited:-

1. Manoj Rai Vs St. of M.P., 1999 (1) SCC 728

2. Mohd. Waris @ Raza Vs St. , Jail Appeal No. 8326 of 2007

3. Swaraj Thackeray Vs St. of Jharkhand & ors. , 2008 CRI. L. J. 3780 (Precedent followed)

4. Sarfaraz Sheikh Vs The St. of M. P.

5. Bakhshish Singh Brar Vs Gurmej Kumar & anr., (1987) 4 SCC 663

6. CBI Vs B.A.Srinivasan , (2020) 2 Supreme Court Cases 153

7. Dharmesh @ Nanu Nitinbhai Shah Vs St. of Guj. , (2022) 45 ACC 519

8. Devinder Singh & ors. Vs St. of Punjab Through CBI , (2016) 12 SCC 87

9. Swaraj Thackeray Vs St. of Jharkhand & ors. , 2008 CRI. L. J. 3780

(Delivered by Hon'ble Gautam Chowdhary, J.)

1— आवेदक की ओर से धारा 482 दं0प्र0सं0 के अन्तर्गत यह आवेदन पत्र, मु0अ0सं0—700 सन् 2019, अन्तर्गत धारा 153—ए, 153—बी, 505 ;2द्ध, 109 भा0दं0वि0, थाना सिविल लाइन्स, जिला अलीगढ़ में प्रेषित आरोप पत्र सं0 055 सन 2020, दिनांकित 16—3—2020 से उद्भूत वाद सं0 3250 सन 2020, स्टेट वर्सेस डा0 कफील, जो मुख्य न्यायिक मजिस्ट्रेट, अलीगढ़ के न्यायालय में लम्बित है तथा इसमें पारित प्रसंज्ञान आदेश दि0 28—7—2020 के विरूद्ध दायर किया गया है।

2— आवेदक के विद्वान अधिवक्ता श्री मनीष सिंह, साम्भवी शुक्ला एवं उनके वरिष्ठ अधिवक्ता श्री दिलीप कुमार तथा विपक्षी सं0 1 की ओर से विद्वान अपर शासकीय अधिवक्ता श्री पतंजलि मिश्र एवं विद्वान अपर महाधिवक्ता श्री मनीष गोयल को सुना तथा पत्रावली का परिशीलन किया।

3— वाद के तथ्य संक्षेप में इस प्रकार हैं कि दि0 12—12—2019 को एस0 आई0 मो0 दानिश, पी0एस0 सिविल लाइन, अलीगढ़ द्वारा थाना सिविल लाइन, जिला अलीगढ़ में एक प्राथमिकी पंजीकृत करायी गयी कि ष श्रीमान प्रभारी निरीक्षक महोदय, थाना सिविल लाइन, अलीगढ़ महोदय, आज दिनांक 12—12—19 को मुझ एस0आई0 दानिश मय हमराही कां0 2290 अखिलेश के साथ ए0एम0यू0 बाब—ए—सय्यद गेट पर शान्ति व्यवस्था ड्यूटी लगायी गयी थी। समय करीब 18.30 बजे बाब—ए—सय्यद गेट पर ए0एम0यू0 के करीब 600 छात्रों द्वारा बाहर से आये डा0 कफील व योगेन्द्र यादव प्रेसीडेन्ट स्वराज इण्डिया द्वारा सम्बोधित किया गया। डा0 कफील द्वारा अपने संबोधन में दिये भाषण में सभा में उपस्थित ए0एम0यू0 के मुस्लिम छात्रों को उनकी धार्मिक भावनाओं को भड़काने दूसरे समुदाय के प्रति घृणा शत्रुता व व्यमनस्य भावनाओं को भड़काने का प्रयास किया गया जिससे समुदायों के बीच सौहार्द बने रहने पर प्रतिकूल प्रभाव पड़ना व लोक शान्ति में विध्न पड़ने की संभावना है। डा0 कफील द्वारा अपने भाषणों में कहा गया कि मोटा भाई सिखाता है हमें कि हिन्दू बनेगा या मुसलमान बनेगा मगर इन्सान नहीं बनेगा। क्यों कत्ल करने वाले तू क्या जाने जिसके खुद कपड़े खून के छीटों से दाग लगे हों वो कातिल खुद कपड़े खून के छीटों से दाग लगे हो वो कातिल उस दाग को छिपा कैसे पाएगा। जिस दिन से आर0एस0एस0 पैदा हुई है उस दिन से उसे संविधान पर विश्वास नहीं है। सी0ए0बी0 से तुम्हें दोयम दर्जे का नागरिक बनाया जा रहा है इसके बाद से एन0आर0सी0 लागू करेंगे, तुम्हें परेशान करेंगे। तुम्हारे अब्बा का सर्टिफिकेट ठीक नहीं है कहकर तुम्हें दौड़ाया जायेगा, यह हमारे वजहूद की लड़ाई है। हमें लड़ना पड़ेगा। इसके बाद डा0 कफील ने अपने भाषण में कहा कि सी0ए0बी0 ऐसा है कि पड़ोस में चोरी करने वाले चोर को हम अपने घर में नौकरी दे रहे हो। डा0 कफील के इस भाषण से सी0ए0बी0 के अन्तर्गत आने वाले हिन्दू, सिख, ईसाई, फारसी के लिए ए0एम0यू0 के मुस्लिम छात्रों में घृणा फेलाने का प्रयास किया गया, जिससे लोक शान्ति में विध्न करने की संभावना है। इसके बाद डा0 कफील ने अपने भाषण में कहा कि आर0आर0एस0 के स्कूलों में सिखाया जाता है कि दाड़ी वाले टेरोरिस्ट होते हैं। सी0ए0बी0 से आपको दिखाया जा रहा है कि यह देश अपना नहीं है एन0आर0सी0 के लिए तैयार हो जाओ, हम पच्चीस करोड़ है न तुम हमें डरा सकते हो, हम तुम्हें बतायेंगे कि देश कैसे चलेगा। मुझ उप निरीक्षक द्वारा डा0 कफील के भाषणों की बीडियो रिकोर्डिग की गयी जिसकी सी0डी0. संलग्न है। डा0 कफील का यह भाषण ए0एम0यू0 के मुस्लिम छात्रों में धृणा फैलाने का प्रयास तथा ए0एम0यू0 छात्रों को उनकी धार्मिक भावनाओं को भड़काने, दूसरे समुदाय के प्रति घृणा, शत्रुता व व्यमनस्य भावनाओं को भड़काने का प्रयास किया गया, जिससे समुदायों के बीच सौहार्द बने रहने का प्रतिकूल प्रभाव पड़ना व लोक शान्ति में विध्न पड़ने की सम्भावना है।

डा0 कफील के विरूद्ध अभियोग पंजीकृत करने की कृपा करें।"

4— उक्त प्रथम सूचना रिपोर्ट की विवेचना विवेचक द्वारा की गयी तथा प्रथम सूचना रिपोर्ट में लिखाए गए आरोप सही पाते हुए विवेचक द्वारा डा0 कफील के विरूद्ध मुख्य न्यायिक मजिस्ट्रेट, अलीगढ़ के न्यायालय में आरोप पत्र सं0 055 सन 2020, दिनांकित 16—3—2020 प्रेषित किया गया, जिस पर न्यायालय द्वारा संज्ञान का आदेश पारित करते हुए दर्ज रजिस्टर करने एवं तलब करने संबंधित आदेश दि0 28—7—2020 पारित किया गया, जिससे क्षुब्ध होकर आवेदक की ओर से धारा 482 दं0प्र0सं0 के अन्तर्गत यह आवेदन पत्र प्रस्तुत किया गया है।

5— आवेदक के विद्वान अधिवक्तागण का कथन है कि आवेदक बी0 आर0 डी0 मेडिकल कालेज, गोरखपुर में लेक्चरर के पद पर कार्यरत है। दि0 10/11 अगस्त, 2017 को बी0 आर0 डी0 मेडिकल कालेज, गोरखपुर में अचानक लिक्विड आक्सीजन की सप्लाई बाधित हुयी, जिसके कारण बहुत से बच्चों की मृत्यु हो गयी, उस दिन आवेदक अवकाश पर था, किन्तु एक डाक्टर होने के नाते उसने आक्सीजन सिलेन्डर की व्यवस्था अपने खर्चे पर प्राइवेट किया तथा 3—4 सौ बच्चों की जान उसने बचाई, तथा वह प्राइवेट सप्लायर्स एवं प्राइवेट हास्पिटल के संपर्क में रहा। इसके बावजूद भी उसे दि0 22—8—2017 को निलंबित कर दिया गया तथा चिकित्सा शिक्षा एवं प्रशिक्षण, उ0 प्र0, लखनउ द्वारा थाना कोतवाली हजरतगंज, जिला लखनउ मे उसके एवं अन्य अधिकारियों के विरूद्ध दि0 23—8—2017 को प्राथमिकी दर्ज करा दी गयी। आवेदक के विरूद्ध आक्सीजन की कमी के संबंध में कोई विश्वसनीय साक्ष्य नहीं था। इसके बाद आवेदक को दि0 2—9—2017 को गिरफ्तार कर लिया गया, आवेदक को दि0 12—9—2017 को आरोप पत्र मिला, आवेदक कई माह कारागार में निरूद्ध रहा तथा जमानत पर मुक्त होने के बाद आवेदक विभागीय जॉच करने वाले संबंधित अधिकारी के पास लगाए गए आरोपों की जानकारी करने गया, इसके बाद आवेदक ने निलंबन आदेश के खिलाफ उच्च न्यायालय आया तथा माननीय उच्चतम न्यायालय भी गया एवं इस मध्य कोविड—19 का दौर भी आ गया, जिसके बाद उसने तथाकथित मु0अ0सं0—700 सन् 2019, अन्तर्गत धारा 153—ए, 153—बी, 505 ;2द्ध, 109 भा0दं0वि0, थाना सिविल लाइन्स, जिला अलीगढ़ में प्रेषित आरोप पत्र सं0 055 सन 2020, दिनांकित 16—3—2020 से उद्भूत वाद सं0 3250 सन 2020, स्टेट वर्सेस डा0 कफील, जो मुख्य न्यायिक मजिस्ट्रेट, अलीगढ़ के न्यायालय में लम्बित है तथा इसमें पारित प्रसंज्ञान आदेश दि0 28—7—2020 के विरूद्ध धारा 482 दं0प्र0सं0 के अन्तर्गत यह आवेदन पत्र प्रस्तुत किया।

6— आवेदक के विद्वान अधिवक्तागण ने तर्क प्रस्तुत किया कि धारा 196 दं0प्र0सं0 की उपधारा 1 ;अद्ध में यह प्राविधानित है कि न्यायालय को धारा 153—अ, 153—ब, 505 ;2द्ध भा0दं0वि0 में अपराध का संज्ञान लेने के पूर्व किसी व्यक्ति के अभियोजन हेतु केन्द्र सरकार अथवा राज्य सरकार अथवा जिलाधिकारी द्वारा पूर्व अभियोजन स्वीकृति लेना आवश्यक है, ऐसी पूर्व स्वीकृति/अनुमति के बिना सम्बन्धित अपराधों के अभियोजन हेतु संज्ञान नहीं लिया जा सकता है तथा बिना पूर्व अभियोजन स्वीकृति के संज्ञान लेने के आदेश को अवैधानिक माना जाएगा। उनका कथन है कि धारा 196 एवं 196—ए दं0प्र0सं0 के प्राविधान आज्ञापक ;बाध्यकारीद्ध प्रकृति के हैं। प्रश्नगत वाद में मुख्य न्यायिक मजिस्ट्रेट, अलीगढ़ द्वारा पारित प्रश्नगत आदेश दि0 28—7—2020, जिसके द्वारा आरोप पत्र को दर्ज रजिस्टर करते हुए अपराध धारा 153—अ, 153—ब, 505 ;2द्ध एवं 109 भा0दं0वि0 के अन्तर्गत संज्ञान लिया गया एवं आवेदक को तलबी आदेश द्वारा आहूत किया गया तथा यह संज्ञान लेने एवं तलबी आदेश पारित करने के पूर्व केन्द्र सरकार अथवा राज्य सरकार अथवा जिलाधिकारी से कोई स्वीकृति नहीं ली गयी। इस संबंध में उनकी ओर से संबंधित न्यायालय के समक्ष Application For Information (Chapter IX Rule 1F) प्रस्तुत किया गया था और उसमें प्रश्न पूछा गया था कि क्या वाद सं0 3250 सन 2020 में अभियोजन द्वारा आरोप पत्र दाखिल करने से पूर्व केन्द्र सरकार या राज्य सरकार या जिलाधिकारी, अलीगढ़ से धारा 196 दं0प्र0सं0 के अन्तर्गत (Sanction) स्वीकृति लिया गया है, जिस पर जवाब "NO" दिया गया है। अतः पूर्व अभियोजन स्वीकृति के अभाव में एवं मुख्य न्यायिक मजिस्ट्रेट, अलीगढ़ के न्यायालय में लम्बित उपरोक्त संपूर्ण कार्यवाही एवं संज्ञान के संबंध में पारित प्रश्नगत आदेश अपास्त किए जाने योग्य है।

7— आवेदक के विद्वान अधिवक्ता ने अपने तर्क के समर्थन में मान्नीय उच्चतम न्यायालय द्वारा **Manoj Rai Vs. State of Madhya Pradesh 1999 (1) SC**ृ 728 में प्रतिपादित विधि व्यवस्था के प्रस्तर 2 की ओर न्यायालय का ध्यान आकृष्ट किया, जो निम्नवत् है :—

"2. Since the learned counsel for the State fairly states, on instructions, that no sanction was given in accordance with Section 196(1) of the Criminal Procedure

Code to prosecute the appellants for the offence under Section 295-A of the Indian Penal Code, we allow this appeal and quash the impugned proceedings. Let the written instructions received by the learned counsel for the respondent-State in this regard be kept on record as desired by him."

8– इस सम्बन्ध में आवेदक के विद्वान अधिवक्तागण ने उच्च न्यायालय, इलाहाबाद की द्वय–न्यायपीठ द्वारा **Mohd. Waris @ Raza Vs. State, Jail Appeal No. 8326 of 2007 decided on 5.8.2019** के प्रस्तर 33, 34, 35, 36 एवं 37 की ओर न्यायालय का ध्यान आकृष्ट किया, जो कि निम्नवत् है :–

"33. A perusal of Section 196 Cr.P.C., clearly shows that it contemplates a prior sanction from Central Government or State Government before cognizance is taken of any offence punishable under Chapter-VI I.P.C. Therefore, apparently, it cannot be disputed and learned AGA has also fairly stated that as per requirement of Section 196 Cr.P.C., no cognizance could have been taken of offence punishable under Chapter-VI I.P.C. unless prior sanction from Central Government or State Government is obtained.

34. In the present case, opportunity was granted to State to show whether such sanction was given of categorical statement has been made by learned AGA before this Court that no such sanction was granted or even sought to be obtained, hence, question of grant by competent authority does not arise. Prosecution, in fact, strangely proceeded in complete and absolute ignorance of Section 196 Cr.P.C. It is really surprising that prosecution was not aware that for offences punishable under Chapter-VI I.P.C., there was/is a statutory requirement of obtaining prior sanction of Competent Authority. No efforts at all were made to obtain the same.

35. Proceeding further now we have to examine, "whether requirement of "prior sanction' under Section 196 Cr.P.C. is mandatory" and secondly, if no such issue was raised before Magistrate, who committed proceedings to Court of Sessions/Trial Court, whether it will stop appellants from raising issue for the first time in appeal, or flaw is so inherent it goes to the root of the matter and even in appeal, it can be taken for the first time and may vitiates Trial and conviction.

36. The object of Section 196 Cr.P.C. is to ensure prosecution after due consideration by appropriate authority so that frivolous or needless prosecution is avoided. To appreciate the nature of "sanction" contemplated under Section 196 Cr.P.C., in correct perspective, it would be appropriate to bear in mind and examine Section 465 Cr.P.C., which reads as under :-

465. Finding or sentence when reversible by reason of error, omission irregularity.

(1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution, unless in the opinion of that

Court, a failure of justice has in fact been occasioned thereby.

(2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.

(Emphasis added)

37. A perusal of Section 465 Cr.P.C. shows that it runs into two parts; (i) "on any error, omission or irregularity", and three words have been used and it is said that the same will not justify setting aside of conviction in appeal or revision etc. but with reference to "sanction" only two words "error or irregularity" have been used and the word "omission" has not been mentioned. Meaning thereby, in the cases where sanction is required, if there is an error or irregularity in the "sanction", then conviction or finding will not be reversed in appeal or revision. It contemplates that sanction is there but there is some error or irregularity in granting sanction. If there is a complete "omission" of sanction, then in our view, Section 465 Cr.P.C. will not come into picture and will not help prosecution. It, therefore, leads to irrestible inference that if there is no sanction, whatsoever, by competent authority as contemplated in Section 196 Cr.P.C., it will be a serious flaw and an illegality and would vitiate the entire proceedings."

9— आवेदक के विद्वान अधिवक्ता ने न्यायालय का ध्यान **Swaraj Thackeray Vs. State of Jharkhand & Ors. 2008 CRI. L. J. 3780 & Sarfaraz Sheikh Vs. The State of Madhya Pradesh** में प्रतिपादित विधि व्यवस्थाओं की ओर भी न्यायालय का ध्यान आकृष्ट किया, जिनमें अवर न्यायालय के समक्ष लम्बित वाद की कार्यवाही को अपास्त करते हुए, प्रकरण को 196 दं0प्र0सं0 का अनुपालन करने के पश्चात गुण–दोष पर प्रसंज्ञान का आदेश पारित करने हेतु प्रतिप्रेषित करने का निर्देश दिया गया है।

Swaraj Thackeray Vs. State of Jharkhand & Ors. 2008 CRI. L. J. 3780 में पारित निर्णय का प्रस्तर 14 एवं 15 निम्नवत है :–

"14. Regarding the points raised by the petitioner that prior sanction under Section 196, CrPC was must before taking cognizance of the offences under Sections 153-A and 153-B IPC, I find that from a bare perusal of Section 196(1)(a) and (1-A)(a), quoted herein above, it is absolutely clear that there is complete bar for taking cognizance of the offences punishable under Sections 153-A, 153-B, Section 295-A or Sub-sections (1), (2) and (3) of Section 505,IPC.

In the present case, the cognizance of the offences under Sections 153-A, 153-B and 504 IPC has been taken by the learned Magistrate. There is no dispute of the fact that prior to taking cognizance of the offences alleged under Sections 153-A and 153-B IPC, no sanction either of the Central Government or of the State Government was taken. The decision cited by the counsel for the petitioner in the case of Shailbhadra Shah and Ors. v. Swami Krishna Bharati and Anr. of Gujarat High Court reported in 1981 Cr LJ 113, supports his contention that prior sanction either of the State Government or of the Central Government is necessary before taking cognizance of the offences under Sections 153-A and 153-B of the Indian Penal Code. Therefore, in such a situation, it is held that the learned

Magistrate had no jurisdiction to take cognizance of the offences under Sections 153-A and 153-B of the Indian Penal Code against the petitioner in absence of any sanction as envisaged under Section 196(1)(a)(1-A)(a) CrPC. Consequently, that part of the impugned order taking cognizance for the aforesaid two offences, i.e., under Sections 153-A and 153-B, IPC only by the learned Magistrate cannot be sustained and, as such, is hereby quashed.

15. So far as for taking cognizance of the offence under Section 504 IPC, taken by the learned Magistrate, there is no such legal bar for taking cognizance of the aforesaid Section 504 IPC, and I find that the learned Magistrate after full application of mind and on consideration of the materials on record has taken cognizance of the offences under Section 504 IPC also and, therefore, the same does not require any interference by this Court."

Sarfaraz Sheikh Vs. The State of Madhya Pradesh में पारित निर्णय का अन्तिम प्रस्तर निम्नवत है :–

"The offence under sections 153-A and 153-B IPC are of the nature of promoting enmity between different groups on the ground of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity etc; or any act which is imputation, assertions THE HIGH COURT OF MADHYA PRADESH MCRC. No.174/2017 (Sarfaraz Sheikh vs. The State of M.P.) prejudicial to national-integration in place of public worship the maintenance of harmony between different religious, racial, language or regional groups or castes or communities and as such are offence against the public at large and State. The inclusion of offence under sections 147and 149 of IPC, in the charge-sheet, in fact, are in conjunction with such offence under section 153 A and 153 B IPC are inseparable. Consequently, for want of sanction for offence under sections 153 A and 153 B of IPC as on the date of cognizance on 05.03.2016, the prosecution continued pursuant to the impugned order cannot be sustained. It is accordingly quashed. However, based on subsequent sanction on 16.08.2016, the respondent/State is always at liberty to take recourse to law for filing supplementary charge-sheet."

10– विद्वान अपर महाधिवक्ता श्री मनीष गोयल एवं विद्वान अपर शासकीय अधिवक्ता श्री पतंजलि मिश्र ने आवेदक के विद्वान अधिवक्तागण के तर्को का खण्डन करते हुए तर्क प्रस्तुत किया कि आवेदक एक सरकारी डाक्टर हैं इसलिए धारा 197 दं0प्र0सं0 के प्राविधान भी लागू होते हैं, तथा धारा 482 दं0प्र0सं0 के अन्तर्गत आवेदन पत्र प्रस्तुत करके अभियोजन अनुमति के आधार पर सम्पूर्ण कार्यवाही के निरस्तीकरण की याचना पोषणीय नहीं है। आवेदक द्वारा संज्ञान के स्तर पर या आरोप विरचित होने के अवसर पर अभियोजन अनुमति न होने के आधार पर उन्मोचन याचना का पूर्ण अधिकार है। उनका यह भी कथन है कि धारा 196 एवं 197 दं0प्र0सं0 के प्राविधान कोर्ट द्वारा प्रसंज्ञान लेने के सन्दर्भ में लगभग समान हैं, ऐसे में विधायिका की मंशा के अनुरूप प्राविधान 197 भी लागू होंगे तथा आवेदक के प्रकरण में धारा 196, 197 दं0प्र0सं0 के प्राविधानों को संयुक्त रूप से पढ़ने की आवश्यकता है तथा संज्ञान लेने के बाद अभियोजन अनुमति प्राप्त होने से सम्पूर्ण कार्यवाही दूषित नहीं हो जाएगी तथा इस प्रकरण में दि0 27–5–2021 को अनुमति लेने के पश्चात उसे अवर न्यायालय में दि0 3–8–2021 को दाखिल कर दिया गया है। उनका यह भी कथन है कि धारा 460 ;ब्द्ध में उल्लिखित प्राविधान किसी अपराध का संज्ञान अगर धारा 190 ;1द्ध मे क्लाज ;।द्ध या ;ठद्ध के तहत मजिस्ट्रेट द्वारा ले लिया गया है तो वह सिर्फ इररेगुलर होगी और प्रोसीडिंग को दूषित नहीं करेगी। प्रस्तुत प्रकरण में पुलिस रिपोर्ट में धारा 190 ;1द्ध ठ में मजिस्ट्रेट द्वारा दि0 28–7–2020 को प्रसंज्ञान लिया गया है, ऐसी स्थिति में संबंधित मजिस्ट्रेट द्वारा पारित किया गया संज्ञान का आदेश बिल्कुल सही है तथा उसमें हस्तक्षेप करने की कोई आवश्यकता नहीं है। उन्होंने अपने तर्क के समर्थन

में मान्नीय उच्चतम न्यायालय द्वारा **Bakhshish Singh Brar Vs. Gurmej Kumar and another (1987) 4 Supreme Court Cases 663** में प्रतिपादित विधि व्यवस्था के प्रस्तर 4 की ओर न्यायालय का ध्यान आकृष्ट किया, जो निम्नवत् है :–

"4. There are rival versions involved in this case. The question was whether without the sanction under section 197 of the Code of Criminal Procedure the proceedings could go on. It is quite apparent that as a result of the alleged search and raid, which was conducted by the petitioner in discharge of his official duties certain injuries, which are described as grievous, injuries had been inflicted on the complainant and one of the alleged offenders had died. In this case, admittedly, the petitioner is a Government servant. Admittedly, there was no sanction under section 197 of the Cr. P.C. had been taken. The trial in this case is one of the offences mentioned under section 196 of the Cr. P.C. The contention of the petitioner was that under section 196 of the Cr. P.C. the cognizance of the offence could not be taken nor the trial proceeded without the sanction of the appropriate authorities. The learned Additional Sessions Judge, Kapurthala after consideration of the facts and circumstances of the case in view of the observations of this Court in Pukhraj v. State of Rajasthan and another, [1974] 1 S.C.R. S59 that unless cognizance is taken and the facts and in the circumstances and the nature of the allegations involved in this case are gone into the question whether the raiding party exceeded its limits or power while acting in the official duties cannot be determined. The learned Judge observed after gathering the materials and some evidence, it would be possible to determine whether the petitioner while acting in the discharge of his duties as a police officer had exceeded the limit of his official capacity in inflicting grievous injuries on the accused and causing death to the other accused."

मेरे विचार से उक्त निर्णय में धारा 196 दं0प्र0सं0 एवं धारा 197 दं0प्र0सं0 को एक साथ विचारित किया गया है तथा वर्तमान मामले में सिर्फ धारा 196 दं0प्र0सं0 विचारित किया जा रहा है, इसलिए उक्त निर्णय में उल्लिखित तथ्य, वर्तमान प्रकरण से भिन्न हैं।

11– विद्वान अपर महाधिवक्ता ने अपने तर्क के समर्थन में मान्नीय उच्चतम न्यायालय द्वारा **CBI Vs. B.A.Srinivasan (2020) 2 Supreme Court Cases 153** में प्रतिपादित विधि व्यवस्था की ओर न्यायालय का ध्यान आकृष्ट किया। किन्तु यह निर्णय धारा 197 दं0प्र0सं0 के संबंध में पारित किया गया है, जबकि वर्तमान मामले में सिर्फ धारा 196 दं0प्र0सं0 विचारित किया जा रहा है, इसलिए उक्त निर्णय में उल्लिखित तथ्य, वर्तमान प्रकरण में लागू नहीं होंगे।

12– विद्वान अपर महाधिवक्ता ने अपने तर्क के समर्थन में मान्नीय उच्चतम न्यायालय द्वारा **Dharmesh @ Nanu Nitinbhai Shah Vs. State of Gujarat (2022) 45 ACC 519** में प्रतिपादित विधि व्यवस्था की ओर न्यायालय का ध्यान आकृष्ट किया। किन्तु उक्त निर्णय के तथ्य वर्तमान प्रकरण के तथ्यों से भिन्न हैं।

13– विद्वान अपर महाधिवक्ता ने अपने तर्क के समर्थन में मान्नीय उच्चतम न्यायालय द्वारा **Devinder Singh and others Vs. State of Punjab Through CBI (2016) 12 SCC 87 में** प्रतिपादित विधि व्यवस्था के प्रस्तर 39ण्8 की ओर न्यायालय का ध्यान आकृष्ट किया, जो निम्नवत् है :–

"39.8. Question of sanction may arise at any stage of proceedings. On a police or judicial inquiry or in course of evidence during trial. Whether sanction is necessary or not may have to be determined from stage to stage and material brought on record depending upon facts of each case. Question of sanction can be considered at any stage of the proceedings. Necessity for sanction may reveal itself in the course of the progress of the case and it would be open

to accused to place material during the course of trial for showing what his duty was. Accused has the right to lead evidence in support of his case on merits."

किन्तु उक्त निर्णय के तथ्य वर्तमान प्रकरण के तथ्यों से भिन्न हैं, इसलिए उक्त निर्णय का कोई लाभ उन्हें नहीं मिल सकता है।

14– मैंने उभय पक्ष के विद्वान अधिवक्ताओं के तर्को के परिप्रेक्ष्य में पत्रावली पर उपलब्ध साक्ष्य एवं उनके द्वारा, माननीय उच्चतम न्यायालय एवं उच्च न्यायालयों द्वारा पारित निर्णयों एवं विधि व्यवस्थाओं का अवलोकन किया।

15– इस प्रकरण के निस्तारण हेतु धारा 196 को अवतरित किया जाना आवश्यक है, जो निम्नवत है :–

"196. *Prosecution for offences against the State and for criminal conspiracy to commit such offence.*

(1) No Court shall take cognizance of-

(a) any offence punishable under Chapter VI or under section 153A, (Section 295 A or sub section (1) of section 505] of the Indian Penal Code (45 of 1860) or

(b) a criminal conspiracy to commit such offence, or

(c) any such abetment, as is described in section 108A of the Indian Penal Code (45 of 1860), except with the previous sanction of the Central Government or of the State Government.

(1A) No Court shall take cognizance of-

(a) any offence punishable under section 153B or sub- section (2) or sub- section (3) of section 505 of the Indian Penal Code (45 of 1860), or

(b) a criminal conspiracy to commit such offence, except with the previous sanction of the Central Government or of the State Government or of the District Magistrate.]

(2) No Court shall take cognizance of the offence of any criminal conspiracy punishable under section 120B of the Indian Penal code (45 of 1860), other than a criminal conspiracy to commit [an offence] punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, unless the State Government or the District Magistrate has consented in writing to the initiation of the proceedings:

Provided that where the criminal conspiracy is one to which the provisions of section 195 apply, no such consent shall be necessary.

(3) The Central Government or the State Government may, before according sanction [under sub- section (1) or sub- section (1A) and the District Magistrate may, before according sanction under sub- section (1A) and the State Government or the District Magistrate may, before giving consent under sub-section (2), order a preliminary investigation by a police officer not being below the rank of Inspector, in which case such police officer shall have the powers referred to in sub-section (3) of section 155."

16– मेरे विचार से आवेदक के विद्वान अधिवक्तागण के तकों एवं उनके द्वारा अपने तर्क के समर्थन में **Swaraj Thackeray Vs. State of Jharkhand & Ors. 2008 CRI. L. J. 3780 & Sarfaraz Sheikh Vs. The State of Madhya Pradesh** में प्रतिपादित विधि व्यवस्थाओ के प्रकाश में एवं धारा 196 दं0प्र0सं0 की उपधारा 1

;अद्ध के प्राविधानों के अनुसार धारा 153–अ, 153–ब, 505 ;2द्ध भा0दं0वि0 में अपराध का संज्ञान लेने के पूर्व केन्द्र सरकार अथवा राज्य सरकार अथवा जिलाधिकारी द्वारा पूर्व अभियोजन स्वीकृति नहीं ली गयी है तथा विद्वान मजिस्ट्रेट ने प्रसंज्ञान का आदेश पारित करते समय सुसंगत प्राविधानों का समुचित अनुपालन नहीं किया।

17– तदनुसार संबंधित अवर न्यायालय की कार्यवाही में ज्यादा विलम्ब न हो, इसलिए धारा 482 दं0प्र0सं0 के अन्तर्गत दायर यह आवेदन पत्र स्वीकार किया जाता है तथा मु0अ0सं0–700 सन् 2019, अन्तर्गत धारा 153–ए, 153–बी, 505;2द्ध, 109 भा0दं0वि0, थाना सिविल लाइन्स, जिला अलीगढ़ में प्रेषित आरोप पत्र सं0 055 सन 2020, दिनांकित 16–3–2020 से उद्भूत वाद सं0 3250 सन 2020, स्टेट वर्सेस डा0 कफील, जो मुख्य न्यायिक मजिस्ट्रेट, अलीगढ़ के न्यायालय में लम्बित है तथा इसमें पारित प्रसंज्ञान आदेश दि0 28–7–2020 की कार्यवाही अपास्त की जाती है तथा प्रकरण को मुख्य न्यायिक मजिस्ट्रेट, अलीगढ़ के न्यायालय में इस निर्देश के साथ **प्रतिप्रेषित** किया जाता है कि धारा 196 ;अद्ध दं0प्र0सं0 के प्राविधानों के अनुसार केन्द्र सरकार अथवा राज्य सरकार अथवा जिलाधिकारी द्वारा पूर्व अभियोजन स्वीकृति प्राप्त होने पर ही आवेदक के विरूद्ध उपरोक्त धाराओं के अन्तर्गत प्रसंज्ञान का आदेश पारित किया जाय।

18– कार्यालय को निर्देश दिया जाता है कि इस आदेश की एक प्रतिलिपि संबंधित अवर न्यायालय को अविलम्ब भेजना सुनिश्चित किया जाय।

(2021)09ILR A946
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.08.2021

BEFORE

THE HON'BLE VIVEK AGARWAL, J.

Application U/S 482. No. 9331 of 2021

Naveen Saxena ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Amit Daga

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

(A) Criminal Law - The Code of criminal procedure, 1973 - Section 482 - extra ordinary jurisdiction - The Negotiable instruments Act, 1981 - Section 138 - Dishonour of cheque for insufficiency of funds - Section 139 - Presumption in favour of holder - "stop payment instructions" - where there existed any outstanding liability or not are questions of facts and theses issues can only be determined by the trial court after recording evidence - once a cheque is issued and on presentation is dishonored, penal provision is attracted as stopping of payment will not preclude an action under Section 138 N.I. Act. (Para - 10,11,22)

Cheque bounce - applicant lost a cheque - lodged report with SSP - certificate issued by the Branch Manager - applicant made request to stop payment of cheque - criminal complaint - summoning order- Quashing of - present application.

HELD:-Thus, in view of the judicial scrutiny and legal proposition of law, though the presumption under Section 139 is rebuttable but it is for the trial court to examine after evidence is led before it and this is not a fit case to exercise extra ordinary jurisdiction under Section 482 Cr.P.C.(Para - 23)

Application u/s 482 Cr.P.C. dismissed. (E-7)

List of Cases cited:-

1. Amzad Pasha Vs H.N. Lakshmana, 2011 Cri. L.J. 552

2. Raj Kumar Kh urana Vs St. of (NCT of Delhi) & anr., (2009) 6 SCC 72

3. R. Kalyani Vs Janak C. Mehta & ors., 2009(1) SCC 516

4. DCM Financial Services Ltd. Vs J.N. Sareen & ors. 2008 (8) SCC 1.

5. HMT Watches Ltd.Vs M.A. Abida & anr., (2015) 11 SCC 776

6. Modi Cements Ltd.Vs Kuchil Kumar Nandi, (1998) 3 SCC 249

7. Pulsive Technologies (P) Ltd. Vs St. of Gujarat & ors., 2014 (13) SCC 18

8. Electronics Trade & Technology Development Corpn. Ltd., Secunderabad Vs Indian Technologists & Engineers (Electronics) Pvt. Ltd. & ors. (1996) 2 SCC 739

9. K.K. Sidharthan Vs T.P. Praveena Chandran & ors. (1996) 6 SCC 369

10. Rangappa Vs Mohan (2010) 11 SCC 441

11. Krishna Janardhan Bhat Vs Dattatraya G. Hegde (2008) 4 SCC 54

12. Goaplast Pvt. Ltd. Vs Chico Ursula D'Souza & ors. (2003) 3 SCC 232

13. Acer India (P) Ltd.Vs St. of Gujarat, Criminal Misc. Application No.1757 of 2007

14. Ramswaroop Tyagi Vs Omkarnath Pandey (2015) 4 MP LJ 237

15. M.M.T.C. Ltd. & Ors. Vs Medchl Chemicals & Pharma (P) Ltd. & ors., (2002) 1 SCC 234

16. Deepak Goel v. St. of U.P., (2013) 82 ACC 210

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

1. Sri Amit Daga, learned counsel for the applicant and learned AGA for the State.

2. Learned counsel for the applicant submits that the applicant is seeking quashing of the criminal complaint dated 08.04.2019 as well as entire proceedings registered in its pursuance as Criminal Complaint Case No.927 of 2019 (Brajendra Kumar Vyas vs. Naveen Saxena) under Section 138 of NI Act, Police Station Sipra Bazar, District Jhansi, including summoning order dated 15.02.2021 passed by the learned Chief Judicial Magistrate, Court No.2, Jhansi.

3. Grounds which have been put forth by learned counsel for the applicant to assail the impugned order are that applicant has been falsely implicated in a case of cheque bounce. It is submitted that the applicant had lost a cheque bearing no. 740500 issued by Dena Bank, Jhansi on account of applicant's account no.114010001415, which had slipped out of his pocket, though it was signed but blank alongwith a hundred rupee stamp paper bearing no. DA498435 dated 21.12.2016. Applicant had lodged a report with the SSP, Jhansi by sending him an application through registered post on 06.12.2017, copy of complaint is enclosed as annexure no.8 to the application. It is submitted that thereafter a certificate was issued by the Branch Manager of Dena Bank on 29.11.2018 to the affect that on 01.11.2017 on request so made by the applicant to stop payment of cheque no.740500 (annexure no.6) was noted. It is submitted that on 09.02.2018 intimation in this regard of loss of cheque was published in Daily News Paper, copy of which has been enclosed as annexure no.9 to the application, for which Amar Ujala Publications Limited issued a receipt on 07.02.2018. It is further submitted that applicant had obtained a certificate from the office of the Senior Post Master, Jhansi that registered article sent on 06.12.2017 and addressed to SSP, Jhansi was delivered on 07.12.2017. This certificate was issued in pursuance to the complaint made by the present applicant on 20.02.2019.

4. It is further submitted that the complainant lodged a complaint by misappropriating a lost cheque and filled huge sum of Rs.80,00,000/- in the name of

money transaction made earlier whereas according to the applicant, there was no occasion for such huge transaction and never ever any such amounts as have been claimed by the complainant were transferred to his account and, therefore, on this ground also, complaint is liable to be quashed.

5. Learned counsel for the applicant has placed reliance on the judgment of Karnataka High Court in case of **Amzad Pasha vs. H.N. Lakshmana, 2011 Cri. L.J. 552,** wherein it is held that when complainant has not placed any evidence to show that he had financial capacity to lend substantial amount of Rs.4,50,000/-, and admittedly when no document evidencing the loan transaction has come into existence, then case of the complainant becomes highly improbable and not acceptable. It has been held that when none of the witnesses, in the presence of whom, loan was paid by the complainant were examined, then adverse inference can be drawn against the complainant and accused is liable to be acquitted.

6. Reliance is also placed on the judgment of Supreme Court in case of ***Raj Kumar Kh urana vs. State of (NCT of Delhi) & Another; (2009) 6 SCC 72***, wherein it is held that if cheque is returned by Bank on ground, then report of loss of cheque was filed by drawer, then Section 138 of N.I. Act, is not attracted. It is submitted that a complaint under Section 138 of N.I. Act will be maintainable only when cheque is returned by the bank unpaid. Such non-payment made either be; (i) because of the amount of money standing to the credit of that amount is insufficient to honor the cheque, or (ii) it exceeds the amount arranged to be paid from that account by an agreement made with that bank.

7. Applicant has also placed reliance on the judgment of Co-ordinate Bench of this High Court dated 22.01.2020 passed in an application under Section 482 No.33953 of 2013, where the application filed on behalf of applicant- Rahisuddin Saifi, accused in the matter of Complaint Case No.145 of 2013 (Javed Akhtor vs. Rahisuddin Saifi), has been allowed because it was averred before the co-ordinate Bench that the cheque was not encashed on the ground that account holder i.e. applicant had stopped payment.

8. Learned AGA could not dispute the proposition of law laid down in case of ***Raj Kumar Khurana (supra),*** so also in case of ***R. Kalyani vs. Janak C. Mehta and Ors., 2009(1) SCC 516*** and ***DCM Financial Services Ltd. vs. J.N. Sareen and Ors. 2008 (8) SCC 1.***

9. Learned AGA for the State on the other hand opposes the prayer made by learned counsel for the applicant and submits that it is matter of trial where it will be determined that whether factual defences taken by the present applicant/accused are entertainable or not.

10. After hearing learned counsel for the parties and going through the record, it is evident that in case of ***HMT Watches Limited vs. M.A. Abida and Another, (2015) 11 SCC 776,*** in paragraph 14, it is held that in case of ***Modi Cements Limited vs. Kuchil Kumar Nandi, (1998) 3 SCC 249*** so also in case of ***Pulsive Technologies (P) Limited vs. State of Gujrat and Others, 2014 (13) SCC 18***, it has been held that if a cheque is dishonored because of stop

payment instruction, even then the offence punishable under Section 138 of N.I. Act gets attracted.

11. It is further held that where there existed any outstanding liability or not are questions of facts and theses issues can only be determined by the trial court after recording evidence. High Court erred in giving its finding on disputed questions of fact, therefore, it is held that interference of High Court under Section 482 Cr.P.C. is unsustainable as the High Court travelled beyond its jurisdiction. This aspect and the case law on the subject has not been considered by a co-ordinate Bench of this Court while delivering its order in case of Rahisuddin Saifi (supra) and, therefore, if an order has been obtained by not presenting the correct and up to date legal position before the Court concerned, then that order of Co-ordinate Bench is not binding on this Court. Therefore, as the law laid down in case of Rahisuddin Saifi (supra) is contrary to the principles of law reiterated by the Supreme Court, it is neither a binding precedent nor binding on a Co-ordinate Bench.

12. In fact a Three Judge Bench of Supreme Court in case of Modi Cements Limited (supra) has held that stop payment instructions cannot obviate the offence under Section 138 if otherwise made out. It has been further held that neither the said liability could have been avoided by giving notice to the payee or holder in due course prior to presentation of the cheque wherein the payee or holder in due course was advised not to present the same in encashment and he thus presented it and the cheque is returned with stop payment instructions. It further held that the ruling in case of ***Electronics Trade and Technology Development Corpn. Ltd., Secunderabad vs. Indian Technologists and Engineers (Electronics) Pvt. Ltd. and Ors (1996) 2 SCC 739 and followed in K.K. Sidharthan vs. T.P. Praveena Chandran and Ors. (1996) 6 SCC 369*** being contrary to the object and purpose of Sections 138-142 overruled.

13. It is held that presumption under Section 139 is attracted to such situation and this was wrongly ignored. Drawer of the cheque will have opportunity to rebut the presumption at the trial and, thereafter, High Court was not justified on facts in quashing the complaint under Section 482 Cr.P.C. at the threshold.

14. In case of ***Rangappa vs. Mohan (2010) 11 SCC 441***, again a Three Judge Bench of Supreme Court held that presumption mandated by Section 139 includes a presumption that there exists a legally enforceable debt or liability however such presumption is rebuttable in nature. It outlines the manner in which defence can be raised by accused and further held that dishonor of post dated cheque on account of stop payment instructions, sent by drawer to his bank will attract the provisions of Section 138 irrespective of insufficiency of funds in his account.

15. This judgment of Supreme Court overrules the judgment in case ***of Krishna Janardhan Bhat vs. Dattatraya G. Hegde (2008) 4 SCC 54*** and affirmed the law laid down in case of ***Goaplast Pvt. Ltd. vs. Chico Ursula D'Souza and Ors. (2003) 3 SCC 232.*** Again this issue came up for consideration before a Division Bench of Supreme Court in case of Pulsive Technologies Private Limited (supra) and it is held that dishonor of cheque on "stop payment instructions" are sufficient to prosecute accused under Sections 138, 139

and 142 of N.I. Act. It is held that quashment of proceedings without invoking presumption under Section 139 ; drawing conclusions in absence of any evidence; and on ground that contents of reply sent by accused not pleaded in complaint are unsustainable. It held that High Court exercising its inherent power, drew certain conclusions on facts and quashed the proceedings holding that "stop payment" instruction did not attract Section 138 N.I. Act is unsustainable. It is held that if cheque is dishonored relying on "stop payment" instruction, then also penal provision under Section 138 is attracted. It reversed the judgment in case of ***Acer India (P) Limited vs. State of Gujrat,*** Criminal Misc. Application No.1757 of 2007, decided on 08.09.2011 (GUJ).

16. As discussed above, this issue again came up before Supreme Court in case of HMT Watches Limited (supra), where again it is held that High Court should not exercise its inherent powers under Section 482 Cr.P.C. on disputed question of fact, they can be determined only by trial court after recording evidence. It is further held that High Court erred in deciding validity or otherwise of demand notice issued under Section 138 of N.I. Act and authenticity of signature thereon.

17. Similar matter had cropped up before of High Court of Madhya Pradesh, Bench at Gwallior in MCRC No.247/2011**,** ***Ramswaroop Tyagi vs. Omkarnath Pandey (2015) 4 MP LJ 237*** when drawer of the cheque had invoked the jurisdiction of the High Court under Section 482 Cr.P.C. to assail the order whereby the court below had rejected the application preferred under Section 245 Cr.P.C. The factual backdrop of that case is that non applicant complainant filed a complaint under Section 138 of N.I. Act and the cheque was returned by bank with an endorsement that applicant had asked for "stop payment" complainant had sent a legal notice and ultimately filed a complaint. Summons were issued, charges were framed. Applicant-accused preferred an application under Section 245 Cr.P.C. seeking dropping of charges against him. It was averred that applicant's cheque book was not traceable. He had immediately informed that fact to the police and bank authorities and had requested for stop payment. Accordingly bank had stopped payment on the instructions of the applicant. In this backdrop, applicant had placed reliance on judgment of Supreme Court in case of Raj Kumar Khurana (supra).

18. Placing reliance on the judgment of Supreme Court in case of Goaplast (P) Limited (supra), learned Single Judge of Madhya Pradesh High Court held that the provisions of the N.I. Act were introduced in order to discourage people from not honoring their commitments by way of payment through cheques and it is a trite law that Court should lean in favour of an interpretation which serves the object of the statute. After dealing with the provisions contained in Section 139 of N.I. Act and the law laid down in case of ***M.M.T.C. Ltd. and Ors. vs. Medchl Chemicals and Pharma (P) Ltd. and Ors., (2002) 1 SCC 234,*** the Apex Court opined that when cheque is dishonored by reason of stop payment instructions, then by virtue of Section 139, Court has to presume that the cheque was received by the holder for the discharge, in whole or in a part of any debt or liability. Of course, this is rebuttable presumption.

19. Reliance is also placed on the judgment of Three Judge Bench of Supreme Court in case of Rangappa (supra) and Pulsive Technologies Private Limited (supra) and HMT Watches Private Limited (supra) and held that law laid down by a Division Bench judgment in case of Raj Kumar Khurana

(supra) is of no assistance to the applicant, more so when, the view taken in MMTC Limited (supra) and Rangappa (supra) is consistently followed by the Supreme Court in subsequent judgments vis Pulsive Technologies (supra) and HMT Watches Private Limited (supra) and in this backdrop held that since a great deal of caution is required in its exercise of extra ordinary jurisdiction under Section 482, a defence of an accused although may appear to be plausible should not be taken into consideration for exercise of such jurisdiction.

20. In the present case, facts are similar and, therefore, when there are judgments of Supreme Court rendered by Three Judges in case of Modi Cements Private Limited (supra) and Rangappa (supra), which have been consistently followed and Supreme Court in case of Raj Kumar Khurana (supra) has not taken into consideration, law laid down in case of Modi Cements Private Limited (supra), judgment in case of Modi Cements Private Limited (supra) will be a binding precedent. Therefore, law laid down in case of Raj Kumar Khurana will be no assistance to the applicant and similarly law laid down by Karnatak High Court in case of Amzad Pasha (supra) ignoring judgment of Supreme Court in case of Rangappa (supra) whereby judgment and order dated 16.10.2005 of the High Court Karnataka Bengaluru has been upheld, whereby High Court of Karnataka reversed the finding of acquittal made by learned JMFC, judgment of High Court passed oblivious of the law laid down in case of Rangappa (supra), which is a Supreme Court judgment too will be of no assistance to the applicant.

21. Needless to say that judgment of co-ordinate Bench in case of Rahisuddin Saifi (supra) will also be of no assistance to the applicant, inasmuch as, it has failed to take into consideration law prior to and subsequent to Raj Kumar Khurana (supra) rendered by Three Judges' Bench of Supreme Court having a binding precedent.

22. Allahabad High Court in case of ***Deepak Goel v. State of U.P., (2013) 82 ACC 210*** also held that in view of the judgment of Supreme Court in case of Modi Cements Private Limited (supra), once a cheque is issued and on presentation is dishonored, penal provision is attracted as stopping of payment will not preclude an action under Section 138 N.I. Act. A co-ordinate Bench of this Court considered law laid down in case of Raj Kumar Khurana (supra) and held it to be distinguishable on facts.

23. Thus, in view of the above judicial scrutiny and legal proposition of law, though the presumption under Section 139 is rebuttable but it is for the trial court to examine after evidence is led before it and this is not a fit case to exercise extra ordinary jurisdiction under Section 482 Cr.P.C.

24. Application fails and is ***dismissed.***

(2021)09ILR A951
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.09.2021

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 482. No. 10843 of 2021

Puttul Sahani ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:

Sri Pramod Kumar Pandey, Sri Sanjeev Kumar Khare

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

(A) Criminal Law - The Code of criminal procedure, 1973 - Section 482 - Inherent power - Section 125 - interim maintenance - Provisions of Section 125 of Cr.P.C are beneficial provisions which are enacted to stop the vagrancy of a destitute wife and provide some succour to them, who are entitled to get the maintenance which has been wrongly denied. (Para -6)

Opposite party no.2 (wife) living separately from applicant (Husband) - application of interim maintenance - allowed by family court - awarded Rs.2000/- per month to the wife - Rs.1000/- per month to each children.(Para - 3)

HELD:-There is no illegality, impropriety and incorrectness in the impugned order and also there seems to be no abuse of court's process. To meet the ends of justice, does not require any interference. (Para - 7)

Application u/s 482 Cr.P.C. dismissed. (E-7)

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard Sri Sanjeev Kumar Khare, learned counsel for the applicant, learned A.G.A. for the State and perused the record.

2. This application under Sections 482 Cr.P.C. has been filed by the applicant (husband) against the impugned judgement and order dated 14.01.2020 passed by Additional Principal Judge, Family Court No.01, Varanasi, in Case No.332 of 2015 (Smt. Mala Sahani Vs. Puttul Sahani), under Section 125 of Cr.P.C., Police Station Bhelpur, District Varanasi, whereby the application of the interim maintenance has been allowed by the court below and awarded Rs.2000/- per month to the wife and Rs.1000/- per month to each children from the date of order.

3. Submission made by the counsel for the applicant is that the applicant is an illiterate person and daily wager labour. He is working as sailor and as such he is unable to pay Rs.6000/- per month to the wife and children. He further submitted that the court below has not considered that the opposite party no.2 (wife) is living separately from the applicant without any reasonable reason so she is not liable to take maintenance from the applicant. After recording the statements of the contesting parties and without considering the facts and evidence on record, the court below allowed the application of opposite party no.2 and awarded maintenance to the opposite party no.2. The applicant made several attempt to settle the dispute but all in vain. He further submits that the applicant is still ready to keep her wife and children but she has not co-operated.

4. Per contra learned AGA has stated that the court below has passed the impugned order after considering the facts and circumstances of the case and the statements of the applicant and opposite party no.2, in such circumstances to meet the ends of justice does not required any interference. There is no illegality, impropriety and incorrectness in the impugned order and also there seems to be no abuse of court's process.

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

6. Learned counsel for the applicant has not been able to point out any such illegality or impropriety or incorrectness in the

impugned order which may persuade this Court to interfere in the same. The amount fixed for maintenance was Rs.2000/- for the wife and Rs.1000/- for the each child, which in the present days of high price rise cannot be said to be either excessive or disproportionate. The provisions of Section 125 of Cr.P.C are beneficial provisions which are enacted to stop the vagrancy of a destitute wife and provide some succour to them, who are entitled to get the maintenance which has been wrongly denied. The fact that the applicant is the husband of respondent no.2 has not been denied.

7. In such circumstances to meet the ends of justice, does not require any interference. There is no illegality, impropriety and incorrectness in the impugned order and also there seems to be no abuse of court's process.

8. In view of the above, the present application under Section 482 Cr.P.C. lacks merit and stands **dismissed.**

(2021)09ILR A953
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.08.2021

BEFORE

THE HON'BLE DR YOGENDRA KUMAR SRIVASTAVA, J.

Application U/S 482. No. 11934 of 2021

Vertika Chitravanshi ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Dhirendra Nath Srivastava, Sri Raj Kumar Srivastava

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

(A) Criminal Law - The Code of criminal procedure, 1973 - Section 482 - Inherent jurisdiction - to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself - powers are to be exercised *ex debito* justitiae to do real and substantial justice for the administration of which alone the Courts exist - Inherent powers are coextensive with the text of the Code - may be exercised only in respect of any of the matters covered by the Code - Expression "any Court" under the section would refer to a Criminal Court - powers are to be exercised in relation to proceedings pending before or disposed of by a Criminal Court .(Para - 6,8,10)

Proceedings u/s 9 of the Hindu Marriage Act, 1955 - direction was issued to proceed ex parte - date was fixed for evidence - aggrieved by order passed by family court - present application u/s 482 - quashing of. (Para - 2)

HELD:- In the facts of the present case, order having been passed in proceedings under section 9 of the HMA, it would not be open to the applicant to invoke the inherent powers of this Court under section 482 of the Code, seeking quashing of the aforesaid order. Applicant does not dispute legal position with regard to the ambit and scope of exercise of jurisdiction under section 482 of the Code and does not wish to press the application. Para - 11,12)

Application u/s 482 Cr.P.C. dismissed. (E-7)

List of Cases cited:-

Emperor Vs Khwaja Nazir Ahmed, AIR 1945 PC 18

(Delivered by Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard Sri Raj Kumar Srivastava, learned counsel for the applicant and Ms. Sushma Soni, learned Additional

Government Advocate appearing for the State-opposite party.

2. The present application under section 482 of the Code of Criminal Procedure, 19731 has been filed with a prayer to quash the order dated 25.03.2021 passed by the Principal Judge, Family Court, District Kanpur Nagar in Case No.1167 of 2020 (Apurva Saxena v. Smt. Vartika Chitravanshi), in proceedings under Section 9 of the Hindu Marriage Act, 19552, whereby a direction was issued to proceed ex parte and a date was fixed for evidence.

3. The previous order dated 04.08.2021 indicates that a preliminary objection had been raised by the learned Additional Government Advocate to the effect that provisions of section 482 of the Code cannot be invoked to quash proceedings of a civil nature, and accordingly the relief sought by means of the present application to quash the order passed by the Principal Judge, Family Court, in proceedings under section 9 of the HMA, cannot be granted.

4. In order to examine as to whether the inherent powers of the High Court under section 482 of the Code, may be invoked to seek quashing of the order passed in proceedings under the HMA, the provisions contained under section 482 of the Code are required to be adverted to. Section 482 of the Code reads as follows:

"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."

5. Section 482 of the Code envisages three situations under which the inherent powers of the High Court may be exercised, namely: (i) to give effect to any order under the Code, (ii) to prevent abuse of the process of the Court, or (iii) to otherwise secure the ends of justice.

6. The inherent jurisdiction under the section though wide, is to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself. The powers are to be exercised *ex debito* justitiae to do real and substantial justice for the administration of which alone the Courts exist.

7. Section 482 of the Code provides for saving of the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under the Code or prevent abuse of process of any Court or otherwise to secure the ends of justice.

8. The invocation of inherent powers of the High Court, therefore, can be made in respect of proceedings pending before or disposed of by Criminal Courts and such powers cannot ordinarily be exercised in relation to orders passed by an authority not functioning under the Code or in respect of proceedings which are not criminal proceedings in a Court.

9. Referring to Section 561-A of the Code of Criminal Procedure, 1898 (which corresponds to Section 482 of the new Code) the Privy Council in **Emperor vs. Khwaja Nazir Ahmed3**, held that the said section does not give to the High Court any increased powers, it only provides that those which the Court already inherently

possess, shall be preserved. It was stated thus :-

"It has sometimes been thought that Section 561A has given increased powers to the Court which it did not possess before that section was enacted. But this is not so. The section gives no new powers, it only provides that those which the Court already inherently possess shall be preserved and is inserted, as their Lordships think, lest it should be considered that the only powers possessed by the Court are those expressly conferred by the Criminal Procedure Code and that no inherent power had survived the passing of that Act."

10. It is, therefore, seen that the inherent powers of the High Court under Section 482 can be invoked only to make such orders, as may be necessary, to give effect to any order under the Code or to prevent abuse of process of any Court or otherwise to secure the ends of justice. The inherent powers are coextensive with the text of the Code and may be exercised only in respect of any of the matters covered by the Code. The expression "any Court" under the section would refer to a Criminal Court. The language and the phraseology used under the section make it clear that the powers are to be exercised in relation to proceedings pending before or disposed of by a Criminal Court and such powers would not be exercisable in relation to an order passed by an authority not functioning under the Code or in respect of proceedings which are not criminal proceedings.

11. Applying the aforestated principles, in the facts of the present case, the order dated 25.03.2021 having been passed in proceedings under section 9 of the HMA, it would not be open to the applicant to invoke the inherent powers of this Court under section 482 of the Code, seeking quashing of the aforesaid order.

12. Learned counsel for the applicant has fairly submitted that he does not dispute to the aforesaid legal position with regard to the ambit and scope of exercise of jurisdiction under section 482 of the Code. He accordingly submits that he does not wish to press the application.

13. The application stands accordingly dismissed.

(2021)09ILR A955
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.09.2021

BEFORE

THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Application U/S 482. No. 12300 of 2021

Yas Mohammad ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Ramesh Kumar Chaurasia, Sri Harish Pratap Singh

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

(A) Criminal Law - The Code of criminal procedure, 1973 - Section 482 - Inherent power - Section 451- Order for custody and disposal of property pending trial in certain cases - Section 452 - Order for disposal of property at conclusion of trial - Section 457 - Procedure by police upon seizure of property - The Uttar Pradesh Prevention of Cow Slaughter Act, 1955 (PCSA) - Sections 3/5-A/8 , The

Prevention of Cruelty to Animal Act, 1960 (PCAA) - Section 11(Para - 3)

Vehicle carrying animals seized - applicant claimed to be owner of vehicle - application before magistrate (ACJM-I) - release of vehicle - application rejected - Criminal Revision - held - no illegality or irregularity in the order passed by the Magistrate - dismissed the revision - Hence present application. (Para - 3)

HELD:-Vehicle in question having been confiscated and seized in exercise of powers under Section 5-A of the PCSA, which is in the nature of a special Act and a local law under Section 5 of the Code, the same would clearly have the effect of denuding the Magistrate of his power to pass any order under Sections 451, 452 and 457 of the Code for release of the vehicle seized for alleged violation of the provisions of the Act. View taken by the courts below in declining to entertain the application of the applicant for release of the vehicle during the pendency of proceedings under the PCSA cannot be said to suffer from illegality so as to warrant interference. (Para -21,22)

Application u/s 482 Cr.P.C. dismissed. (E-7)

List of Cases cited:-

1. Sunderbhai Ambalal Desai Vs St. of Gujarat, AIR 2003 SC 638

2. Maru Ram Vs U.O.I., (1981) 1 SCC 107

3. St. (U.O.I.) Vs Ram Sharan, (2003) 12 SCC 578

4. Vikki Vs St. of U.P. & anr., Application U/S 482 No. 17735 of 2020

(Delivered by Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard Sri Ramesh Kumar Chaurasia, learned counsel for the applicant and Sri Vinod Kant, learned Additional Advocate General appearing along with 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 with a prayer to set-aside the order dated 18.03.2021 passed by Additional Sessions Judge, F.T.C-1, Ballia in Criminal Revision No. 28 of 2021 (Yash Mohammad Vs. State), arising out of order dated 09.02.2021 passed in Case Crime No. 360 of 2020 under Sections 3/5-A/8 of The Uttar Pradesh Prevention of Cow Slaughter Act, 19552 and Section 11 of The Prevention of Cruelty to Animal Act, 19603, Police Station-Bairiya, District Ballia.

3. The pleadings of the case indicate that pursuant to proceedings initiated with lodging of an F.I.R. dated 21.9.2020 under section 3/5-A/8 of the PCSA and Section 11 of the PCAA registered as Case Crime No. 360 of 2020 at Police Station-Bairiya, District-Ballia, the vehicle stated to be carrying the animals was seized under section 5-A of the PCSA. The applicant claiming to be the owner of the vehicle in question, filed an application before the court of ACJM-I, Ballia, seeking release of the vehicle. The learned Magistrate upon taking into consideration the scheme of the Act and in particular, sub-section (7) of Section 5-A, which has been inserted by U.P. Act No. 20 of 2020, rejected the application. Aggrieved, against the order the applicant preferred a revision being Criminal Revision No. 28 of 2021 (Yash Mohammad Vs. State) and the learned Additional Sessions Judge/F.T.C.-1, Ballia held that there was no illegality or irregularity in the order passed by the Magistrate and accordingly, dismissed the revision by order dated 18.03.2021.

4. Learned counsel for the applicant has sought to assail the orders passed by the revisional court and the Magistrate by seeking to contend that since the vehicle of the applicant had been confiscated, the courts below have committed an error in rejecting the application for release, ignoring the powers exercisable under section 451 and 457 of the Code. He submits that the property in question i.e. the vehicle which is lying with the authorities is liable to be released. Reliance is sought to be placed on the judgement in the case of **Sunderbhai Ambalal Desai v. State of Gujarat4**

5. Learned Additional Government Advocate-I has controverted the aforesaid contention by submitting that the proceedings have been initiated under the PCSA, which is a Special Act, and provides a separate procedure with regard to confiscation and seizure under Section 5-A thereof, and in view of the provisions contained under Section 5 of the Code, the powers under Sections 451 to 457 relating to disposal of property would not be applicable. Accordingly, he submits that the orders passed by the Magistrate and the revisional court cannot be said to be faulted with.

6. In order to appreciate the rival contentions the provisions as contained under Sections 5, 451, 452 and 457 of the Code 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.

(2) 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."

7. The provisions contained under the PCSA, would also be required to be adverted to.

8. The PCSA is an Act to prevent the slaughter of cow and its progeny in the State of Uttar Pradesh. Section 5-A of the Act which is with regard to regulation on transport of cow, etc., and is relevant for the purposes of the controversy involved in the present case, is being extracted below:-

"5-A. 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 hundred 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 offence 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 abatement 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."

9. It would be pertinent to note that sub-sections (6), (7), (8), (9), (10) and (11)

have been inserted after sub-section (5) of Section 5-A in terms of the Uttar Pradesh Prevention of Cow Slaughter (Amendment) Act, 2020. [U.P. Act no. 20 of 2020].

10. A plain reading of the provisions contained under Section 5-A of the PCSA would indicate that the transportation of cow, etc., is regulated in terms thereof. Sub-section (1) of Section 5-A contains a clear prohibition on transportation of any cow or bull or bullock, the slaughter whereof in any place in Uttar Pradesh is punishable under the Act, from any place within the State to any place outside the State, except under a permit to be 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. Sub-section (4) mandates that the form of permit, the form of application therefor and the procedure for disposal of such application shall be such as may be prescribed.

11. In exercise of powers under Section 10 of the PCSA read with Section 21 of the U.P. General Clauses Act, 1904, and in supersession of Uttar Pradesh Prevention of Cow Slaughter Rules, 1956, the Uttar Pradesh Prevention of Cow Slaughter Rules, 19645 were made. Rule 16 of the Rules, 1964 provides for issuance of a permit in a prescribed form to any person intending to transport or to offer for transport or to cause to transport any cow, bull or bullock, the slaughter whereof is punishable under the Act in any place in Uttar Pradesh from any place within the State to any place outside the State. For ease of reference, Rule 16 of the Rules, 1964 is being reproduced below:-

"16. (1) Any person intending to transport or the offer for transport or to cause to transport any cow, bull or bullock, the slaughter whereof is punishable under this Act in any place in Uttar Pradesh from any place within the State to any place outside the State shall apply for a permit to the officer authorised under Section 5-A of the Act on prescribed Form "G"."

12. In terms of Section 2 of the Amending Act i.e. U.P. Act No. 20 of 2020 by means of which sub-sections (6), (7), (8), (9), (10) and (11) have been inserted in Section 5-A, the powers with regard to confiscation and seizure of which vehicle used in transportation of the beef or cow and its progeny, in violation of the provisions of this Act and the relevant rules have been delineated.

13. As per terms of sub-section (7) of Section 5-A, the vehicle by which the beef or cow and its progeny are being transported in violation of the Act and the relevant rules is to be confiscated and seized by the law enforcement officers and concerned District Magistrate/Commissioner of Police are to undertake proceedings of confiscation and release, as the case may be.

14. Sub-section (11) of Section 5-A provides that where the provisions of Act or the related rules in context of search, acquisition, disposal and seizure are silent, the relevant provisions of the Code shall be effective thereto. The provisions inserted under Section 5-A in terms of the aforesaid Amending Act, i.e. U.P. Act No. 20 of 2020 in respect of confiscation and release of vehicle would therefore, go to show that the scheme of the Act provides a complete procedure with regard to proceedings relating to confiscation and release. The necessary provisions with regard to confiscation, seizure and release of vehicle

used for transportation in violation of the provisions of PCSA and the Rules made therein, having being provided for, and the Act and the Rules not being silent in regard thereto as per the stipulation under sub-section (11) of Section 5-A, the provisions of the Code would not be invocable in matters relating to confiscation, seizure and release under the PCSA.

15. Section 5 of the Code contains a saving clause and as per terms thereof nothing contained in the 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.

16. The applicability of the provisions 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 India6** and also in **State (Union of India) Vs. Ram Sharan7**, 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.

17. The PCSA is a "local law" within the meaning of Section 5 of the Code and in view thereof, the general provisions contained under Sections 451 of the Code with regard to custody and disposal of the property pending trial or the power for making an order for disposal of property at the conclusion of trial under Section 452 or the procedure under Section 457 would therefore, be subject to the powers exercisable under Section 5-A of the PCSA which makes a special provision with regard to confiscation and seizure of the vehicle used for transport in contravention of the provisions of the Act.

18. The provisions under Section 451 to 457 of the Code are in the nature of general provisions whereas the provisions relating to seizure, confiscation and release as contained under Section 5-A of the PCSA which expressly deal with these matters would be in the nature of special provisions contained under a special Act and in view thereof, the normal rule of interpretation that the special provision must prevail over the general and if a case is covered by a special provision, the general provision would not be attracted, would be applicable.

19. In the case of Sunderbhai Ambalal Desai (supra), 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, 18608 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.

20. A similar question as to whether the Magistrate would have jurisdiction to exercise powers under Sections 451, 452 and 457 of the Code to direct release of any property which was subject matter of confiscation proceedings under Section 72 of the U.P. Excise Act, 19109 before the Collector, was considered in a recent judgement of this Court in the case of **Vikki Vs State of U.P. and Another10** and taking into consideration that the Excise Act is a local law within the meaning of Section 5 of the Code, it was held that the provisions contained under 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.

21. Applying the aforesaid principle to the facts of the present case, the vehicle in question having been confiscated and seized in exercise of powers under Section 5-A of the PCSA, which is in the nature of a special Act and a local law under Section 5 of the Code, the same would clearly have the effect of denuding the Magistrate of his power to pass any order under Sections 451, 452 and 457 of the Code for release of the vehicle seized for alleged violation of the provisions of the Act.

22. Having regard to the aforesaid, the view taken by the courts below in declining to entertain the application of the applicant for release of the vehicle during the pendency of proceedings under the PCSA, cannot be said to suffer from illegality so as to warrant interference.

23. The application under section 482 of the Code is thus, **dismissed.**

(2021)09ILR A962
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.08.2021

BEFORE

THE HON'BLE AJAY BHANOT, J.

Application U/S 482. No. 16310 of 2020
With
Application U/S 482. No. 14919 of 2020

Hasae @ Hasana Wae & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Adeel Ahmad Khan

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

(A) Criminal Law - Indian Penal Code, 1860 - Sections 188, 269, 270, 271 - Epidemic Diseases Act, 1897 - Section 3 - Foreigners Act, 1946 - Section 14B - Summoning - Once the government is seized of the matter, the Court does not deem it appropriate to say anything which may fetter the lawful discretion of the State - Statements made by high officials on behalf of the Government in Court have highest sanctity and full weight have to be given to the same.(Para -64)

Applicants are foreigners - application registered - directed against the chargesheet - against the applicants and the proceedings before the trial court initiated in pursuance thereof - personal appearance of the Principal Secretary/Legal Remembrancer, Department of Law, Government of U.P., Lucknow to explain the

stand of the State - Certain confidential documents were produced which depict governmental processes and also attest to the sincerity of the statement made on behalf of the State before this Court.(Para - 3,4,6,64)

HELD:-The trial has almost concluded and the statement of the accused under Section 313 Cr.P.C. was made before the trial court and all evidences have been tendered, the cause of instituting this Application U/S 482 Cr.P.C. does not survive. Applicants can take up various objections on facts, law and evidence before the trial court .Trial court to decide the trial proceedings expeditiously. (Para - 66 to 71)

Application u/s 482 Cr.P.C. disposed of. (E-7)

List of Cases cited:-

1. Naresh Shridhar Mirajkar & ors. Vs St. of Mah. & anr. , AIR 1967 SC 1

2. Tirupati Balaji Developers (P) Ltd. & ors. Vs St. of Bihar & ors. , 2004 (5) SCC 1

3. Royal Medical Trust Vs U.O.I. , (2017) 16 SCC 605

4. Santhini Vs Vijaya Venketesh, (2018) 1 SCC 1

5. Ishwari Prasad Vs Mohd. Isa, AIR 1963 SC 1728

6. Alok Kumar Roy Vs Dr. S. N. Sarma & anr., AIR 1968 SC 453

7. K.P. Tiwari Vs St. of M.P., 1994 Supp (1) SCC 540

8. Brij Kishore Thakur Vs U.O.I. , (1997) 4 SCC 65

9. A.M. Mathur Vs Pramod Kumar Gupta, (1990) 2 SCC 533

10. "K' A Judicial Officer In re case, (2001) 3 SCC 54

11. U.P. Vs Mohd. Naim, AIR 1964 SC 703

12. St. of Bihar Vs Neelmani Sahu, (1993) 9 SCC 211

13. Amar Pal Singh Vs St. of U.., 2012 (6) SCC 491

14. S.N. Dhingra Vs St. (NCT of Delhi), (2014) 13 SCC 768

15. St. of U.P. & ors. Vs Jasvir Singh & ors. , 2011 (4) SCC 288

16. St. of Guj.Vs Turabali Gulamhussain Hirani & anr. , 2007 (14) SCC 94

17. St. of U.P. & ors. Vs Dr. Manoj Kumar Sharma, Civil appeal No. 2320 of 2021

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

1. These Applications U/S 482 Cr.P.C. have been connected and are being decided by a common judgement.

2. The application registered as Application under Section 482 Cr.P.C. No. 16310 of 2020 (Hasae @ Hasana Wae and Others Vs. State of U.P. and another) is directed against the chargesheet dated 07.06.2020 filed by the investigating agency in Case Crime No. 198 of 2020 under Sections 188, 269, 270, 271 I.P.C. and Section 3 of the Epidemic Diseases Act,1897, and Section 14B Foreigners Act, Police Station Sadar Bazar, District Shahjahanpur and the proceedings before the trial court taken out in pursuance thereof.

3. The application registered as Application U/S 482 Cr.P.C. No. 14919 of 2020 (Daha Dasai and Others Vs. State of U.P and another) is directed against the chargesheet dated 10.05.2020 filed by the investigating agency in Case Crime No. 138 of 2020 under Sections 188, 269, 270 I.P.C. and Section 3 of the Epidemic

Diseases Act, 1897 and Section 14B of the Foreigners Act, 1946 Police Station Pilkhuwa, District Hapur, against the applicants and the proceedings before the trial court initiated in pursuance thereof.

4. The matter had acquired certain urgency since most of the applicants are foreigners. There is also a request of the Supreme Court to expedite the hearing of the matter. The matters were connected and placed before me after nomination for the first time on 08.06.2021. Certain impediments were created in the hearing of the matter which are evident from the perusal of the ordersheet. Lack of assistance and accountability from the State side was delaying the hearing.

5. Learned counsels for the applicants contended with credibility that the capacity of the judicial process to show that justice will be seen to be done will be impaired in case such conduct goes unnoticed and unaccounted for.

6. When no answer whatsoever was forthcoming from the State side, the Court was compelled to direct the personal appearance of the Principal Secretary/Legal Remembrancer, Department of Law, Government of U.P., Lucknow to explain the stand of the State.

7. The order of summoning was resisted by State counsels, albeit in respectful undertones. Reference to the latest holding of the Supreme Court in point was alluded to. The question being relevant is being decided on its merits.

8. The Allahabad High Court has a history of more than 155 years which predates most constitutional courts in the country. Rectitude of conduct of the judges, adherence to ethical norms by lawyers, and professional achievements which set standards of excellence form the quintessence of its storied reputation and animates the Court even today. The Allahabad High Court has thus earned the abiding trust of the people of the State by dispensing fair and impartial justice and by the probity of conduct of the Bar and the Bench alike.

9. The Bar of this Court was in the frontline of the freedom struggle and the Court has been at the vanguard of protection of rights and liberties of citizens in times of maximum peril.

10. The paradox of the Allahabad High Court is that the unconditional trust of the citizens is its most precious asset but also poses the most pressing challenge. The people of the State of U.P. approach this Court with full confidence and no constraint. The result of the people of the State approaching the Court in huge numbers is the largest docket size in the country. The workload on Judges in the Allahabad High Court is the highest in the country.

11. Unremitting the toil of judges and unsurpassed industry of lawyers has allowed the Court to keep the faith and confidence of the people in its ability to deliver justice.

12. The distant vision of the founding fathers was reflected in the creation of the comity of constitutional courts which included the High Courts of the States and the Supreme Court of India. The High Courts and the Supreme Court have been vested with analogous powers by the Constitution of India. Constitutional autonomy of the High Courts is paired with

the attribute of finality to the holdings of the Supreme Court as the highest appellate court in the country. These features are integral to the scheme of judicial federalism in the Constitution of India.

13. The High Courts possess supervisory powers over the District Courts under Article 227 of the Constitution of India. However it is noteworthy that no such powers of superintendence over the High Courts are vested in the Supreme Court by the Constitution of India. The reasons are not far to seek.

14. Considering the unique circumstances of our country, most citizens are not likely to go beyond the High Court in search of justice.

15. An overwhelming majority of the citizens make the Allahabad High Court the final temple in their pursuit of justice. Primarily it is the quality of justice and trust in the institution which persuades the majority of our citizens to accept the finality of the judgements of the Allahabad High Court. High Court is the litigative terminus for other reasons as well, including litigation fatigue, financial burden and desire for closure. The Allahabad High Court is final because of the citizens' choice as the court of last resort.

16. Absent powers equivalent and analogous to that of the Supreme Court or sans the constitutional autonomy, the High Courts will not be able to effectively and faithfully discharge these constitutional functions and will be unable to retain the confidence of the people in their capacity to do justice.

17. Judicial federalism unequivocally contemplates full and equal autonomy to all constitutional courts; with the unconditional understanding that the Supreme Court is the final court of appeal in the country. To effectuate the latter part, there are other provisions in the Constitution like Article 142 and Article 144. The foremost constitutional aim of dispensing fair and impartial justice to all citizens and evolution of just laws in a country as vast and variegated as India cannot be achieved without a credible structure and effectively functioning system of judicial federalism.

18. Judicial federalism is distinct, in the sense, that unlike federations of States and legislatures, subjects are not divided into separate lists. Judicial federalism envisages congruent areas of responsibility of the High Courts and the Supreme Court.

19. The balance in judicial federalism is delicate. The concept of judicial federalism has to be shepherded with care in judicial pronouncements and restraint in conduct for it to thrive. Judicial federalism shall prosper or perish depending upon mutual respect between constitutional courts, and the quality of the constitutional dialogues between them.

20. Constitutional autonomy of the High Courts and comity of the constitutional courts are concepts on which there is substantial consensus of judicial authorities. However, at times the agreement of authorities in point is disturbed. Words like "superior" (as understood in Indian English) which occasionally enter the lexicon do not manifest ambiguity in the constitutional scheme. These constitutional debates mostly reflect the dilemma of a hierarchical society with an egalitarian constitution.

21. Dilution of constitutional autonomy of the High Courts would threaten the concept of judicial federalism envisaged in the Constitution and affirmed by judicial precedents. The consequences of High Courts denuded of their constitutional autonomy would be a decline in the quality of justice to the people of the country and weakening in the implementation of law. A failure to realise the preambled aim of securing justice to all its citizens would stare us in the face, and loss of faith of the common citizen in the judiciary will surely follow.

22. The constitutional autonomy of the High Courts may be diminished by various factors. Construing appellate jurisdiction as conferring supervisory powers may compromise the constitutional autonomy of the High Courts.

23. Acknowledging the powers of both constitutional courts namely the High Courts and the Supreme Court to issue writs, but also noticing that powers of High Courts under Article 226 of the Constitution of India are wider, the Supreme Court **in Naresh Shridhar Mirajkar and others Vs State of Maharashtra and another1 :**

"53. It is well-settled that the powers of this Court to issue writs of certiorari under Art. 32(2) as well as the powers of the High Courts to issue similar writs under Art. 226 are very wide. In fact, the powers of the High Courts under Art. 226 are, in a sense, wider than those of this Court, because the exercise of the powers of this Court to issue writs of certiorari are limited to the purposes set out in Art. 32(1) "

24. Writs issued in exercise of inherent powers of the High Court were not open to challenge by writ proceedings before the Supreme Court according **to Naresh Shridhar Mirajkar (supra)** wherein it was held:

"59. If a judicial order like the one with which we are concerned in the present proceedings made by the High Court binds strangers, the strangers may challenge the order by taking appropriate proceedings in appeal under Art 136. It would, however, not be open to them to invoke the jurisdiction of this Court under Art. 32 and contend that a writ of certiorari should be issued in respect of it. The impugned order is passed in exercise of the inherent jurisdiction of the Court and its validity is not open to be challenged by writ proceedings."

25. **Naresh Shridhar Mirajkar (supra)** stating the attributes of a superior court of record, including the entitlement to determine for itself questions about its own jurisdiction by holding:

" 60. There is yet another aspect of this matter to which it is necessary to refer. The High Court is a superior Court of Record and under Art. 215, shall have all powers of such a Court of Record including the power to punish contempt of itself. One distinguishing characteristic of such superior courts is that they are entitled to consider questions of their jurisdiction raised before them. This question fell to be considered by this Court in Special Reference No. 1 of 1964 (1965) 1 S.C.R. 413. In that case, it was urged before this Court that in granting bail to Keshav Singh, the High Court had exceeded its jurisdiction and as such, the order was a nullity. Rejecting this argument, this Court observed that in the case of a superior Court of Record, it is for the court to consider whether any matter

falls within its jurisdiction or not. Unlike a court of limited jurisdiction, the superior court is entitled to determine for itself questions about its own jurisdiction. That is why this Court did not accede to the proposition that in passing the order for interim bail, the High Court can be said to have exceeded its jurisdiction with the result that the order in question was null and void. In support of this view, this Court cited a passage from Halsbury's Laws of England where it is observed that

"prima facie, no matter is deemed to be beyond the jurisdiction of a superior court unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior court unless it is expressly shown on the face of the proceedings that the particular matter is within the cognizance of the particular Court." (Halsbury's Laws of England, Vol. 9, p. 349).

If the decision of a superior Court on a question of its jurisdiction is erroneous, it can, of course, be corrected by appeal or revision as may be permissible under the law; but until the adjudication by a superior Court on such a point is set aside by adopting the appropriate course, it would not be open to be corrected by the exercise of the writ jurisdiction of this Court. "

26. Exploring various facets of the relationship of the Supreme Court with the High Courts, the Supreme Court in **Tirupati Balaji Developers (P) Ltd. and others Vs State of Bihar and others2** stated:

"8. Under the constitutional scheme as framed for the judiciary, the Supreme Court and the High Courts both are courts of record. The High Court is not a court 'subordinate' to the Supreme Court. In a way the canvass of judicial powers vesting in the High Court is wider Inasmuch as it has jurisdiction to issue all prerogative writs conferred by Article 226 of the Constitution for the enforcement of any of the rights conferred by Part III of the Constitution and for any other purpose while the original jurisdiction of Supreme Court to issue prerogative writs remains confined to the enforcement of fundamental rights and to deal with some such matters, such as Presidential election or inter-state disputes which the Constitution does not envisage being heard and determined by High Courts. The High Court exercises power of superintendence under Article 227 of the Constitution over all subordinate courts and tribunals; the Supreme Court has not been conferred with any power of superintendence. If the Supreme Court and the High Courts both were to be thought of as brothers in the administration of justice, the High Court has larger jurisdiction but the Supreme Court still remains the elder brother. There are a few provisions which give an edge, and assign a superior place in the hierarchy, to Supreme Court over High Courts. So far as the appellate jurisdiction is concerned, in all civil and criminal matters, the Supreme Court is the highest and the ultimate court of appeal. It is the final interpreter of the law. Under Article 139-A, the Supreme Court may transfer any case pending before one High Court to another High Court or may withdraw the case to itself. Under Article 141 the law declared by the Supreme Court shall be binding on all courts, including High Courts, within the territory of India. Under Article 144 all authorities, civil and judicial, in the territory of India -- and that would include High Court as well -- shall act in aid of the Supreme Court.

9. In a unified hierarchical judicial system which India has accepted under its Constitution, vertically the Supreme Court is placed over the High Courts. The very fact that the Constitution confers an appellate power on the Supreme Court over the High Courts, certain consequences naturally flow and follow. Appeal implies in its natural and ordinary meaning the removal of a cause from any inferior court or tribunal to a superior one for the purpose of testing the soundness of decision and proceedings of the inferior court or tribunal. The superior forum shall have jurisdiction to reverse, confirm, annul or modify the decree or order of the forum appealed against and in the event of a remand the lower forum shall have to re-hear the matter and comply with such directions as may accompany the order of remand. The appellate jurisdiction inherently carries with it a power to issue corrective directions binding on the forum below and failure on the part of latter to carry out such directions or show disrespect to or to question the propriety of such directions would -- it is obvious -- be destructive of the hierarchical system in administration of justice. The seekers of justice and the society would lose faith in both. "

27. **Tirupati Balaji Developers** (supra) explained the word "superior court" in the following terms:

"24. The Supreme Court, exercising its appellate jurisdiction, is called upon to issue directions which is not only its privilege as appellate forum but often a necessity for meeting the demands of justice and effective exercise of appellate power. Yet, it cautiously abstains from issuing any 'directions' as such and rather uses the alternative and polite expressions like -- "we request the High Court", "the High Court is expected to", "we trust and hope that the High Court will/shall", spelled out by courtesy and the respect and regards which the Supreme Court has -- and must have -- for High Courts. The practice has developed and gained ground as tradition. Barring may be an instance or two, which too must have been avoidable, there has been no occasion either for any disrespect having been shown by the Supreme Court to the High Court or vice versa or for this Court having been called upon to take cognizance of any instance of disrespect shown to it by any High Court."

"29. While quoting the several authorities and references as hereinabove we should not be misunderstood as calling 'the Supreme Court a superior Court and the High Court an inferior court'; all that we wish to say is that jurisdictionally, and in the hierarchical system, so far as the exercise of appellate jurisdiction is concerned, undoubtedly the Supreme Court is a superior forum and the High Court an inferior forum in the sense that the latter is subjected to jurisdiction, called 'appellate jurisdiction', of the former."

28. Further the importance of collegiality and the relationship between the collegiality and independence as spelt out by Harry T. Edwards, Chief Judge, US Court of Appeals for the DC Circuit was invoked to support the narrative in **Tirupati Balaji Developers** (supra):

"25. Harry T. Edwards, Chief Justice, U.S. Court of Appeals for the D.C. Circuit emphasises self-restraint as helping build up the Courts constitutional legitimacy overtime inasmuch as judicial self-restraint helps both to generate and to preserve judicial independence. In the

context of dealing of judges by judges, he uses the term 'collegiality' and then he mentions the relationship between collegiality and independence by saying-

" ... an aspect of judicial practice that has seemed increasingly important to me over the last decade: the practice of collegiality. By collegiality I mean an attitude among judges that says, we may disagree on some substantive issues, but we all have a common interest and goal in getting the law right. We are, in a word, one another's colleagues. An attitude of collegiality means, in practice, that we respect one another's views, listen to one another, and, where possible, aim to identity areas of agreement... Collegiality does mean, however, that, even when I disagree with another judge, I recognize that we are part of a common endeavor, and that each of us is, almost always, acting in good faith according to his or her own view of what the law requires... Because I see myself as engaged in a common endeavor with my judicial colleagues, it follows that I have the interest of the judiciary as a whole at heart. .. When there is little or no judicial collegiality, there is less incentive for judges to exercise self-restraint. ... collegiality is important not only for working together effectively, but also at a deeper structural level. An attitude of judicial collegiality helps reinforce judges' incentives to behalf in a principled and responsible fashion. I think that any discussion of judicial independence, either at the level of institutions or individuals, should take this practice of collegiality into account". (See - Judicial Norms: A Judge's Perspectives - Washington University School of Law)."

29. The doctrine of precedents is another feature which predates the Constitution. Under Article 141 of the Constitution of India the law declared by the Supreme Court is binding on all courts. Binding nature of the law laid down by the Supreme Court would exist even if Article 141 was not incorporated in the Constitution. Article 141 of the Constitution of India is a constitutional acknowledgment of the preexisting tradition of binding nature of judicial precedents. What constitutes a binding precedent in a judgment has long been settled by ancient but constant authorities of high standing. Cases in point hold that a judgement is a precedent for what it decides.

30. The binding force of the judgement depends upon the facts which were in issue and the point which was decided. (Ref: ***Royal Medical Trust Vs. Union of India3).*** It is in light of said authorities that the doctrine of binding precedents has to be applied. Deviation from said authorities would not be in conformity with Article 141 of the Constitution of India and inconsistent with the concept of constitutional autonomy of the High Courts.

31. A constitutional dialogue happens in the comity of constitutional Courts by rendering of judgments and use of judicial precedents. The tone and terms of this dialogue, have to be marked by civility, leavened with mutual respect, and powered by honest convictions. This is predicated with the certain understanding that the final word in the controversy rests with Supreme Court. The dialogue between the constitutional courts is one of reason and purpose, and not of power and authority.

32. The High Courts are best placed to understand and respond to the local problems of the State and the special needs of its people. Upholding the law and

dispensing justice on a day to day basis in this setting provides an acute insight to the High Court judges and imparts great value to their judgements. Legal practices evolved by the High Courts from the experience gained by proximity to ground realities of the State and which have eminently served the cause of justice should not be readily reversed.

33. Participation in the judicial process is restricted. Consequences of judicial verdicts can be widespread. Judicial federalism by enlarging participation in legal debates and deepening sensitivity in judicial approach enables constitutional courts to effectively address myriad facets of justice in a diverse society. A culture which accords equal respect to the judgements of the High Courts will foster rich legal debate across the comity of constitutional courts, give enduring foundations to the holdings of the Supreme Court, and strengthen judicial fedaralism. When all High Courts have a share in creating common constitutional values, it will add a judicial content to the unity of India. Unity of judicial values contributes to the inherent oneness of India.

34. The judgement of the Supreme Court in **Santhini Vs. Vijaya Venketesh4** is one instance where the decisions of the High Courts were given full weight in the dissenting view rendered by Hon'ble Dr. D. Y. Chandrachud, J. After a comprehensive survey of the judgements of the various High Courts in the country allowing use of video conferencing in the judicial process, Hon'ble Dr. D. Y. Chandrachud, J. (speaking for himself) held as under:

"100. These are words of wisdom and perspicacity across the spectrum. Voices from within the judiciary in a federal structure should merit close listening by the Supreme Court."

This statement of law mirrors the vision of the Constitution makers and also shines some light on the path to the future.

35. The dissentient view in **Santhini** (supra) concludes by finding:

"115. There is, in my view, no basis either in the Family Courts Act, 1984 or in law to exclude recourse to videoconferencing at any stage of the proceedings. Whether videoconferencing should be permitted must be determined as part of the rational exercise of judgment by the Family Court."

Prescience of the minority view in **Santhini** (supra) which had the advantage of the judgements of the High Courts is being borne out during Covid-19 pandemic.

36. The Supreme Court has consistently emphasized the importance of tempered and civil language in the judgments rendered by all courts and has set its face against employing strong or disparaging language in judicial speech. Civility in judicial speech is the precursor to judicial wisdom.

37. Untempered language often gives the impression that it is not the lis which is being judged but the author of the judgment who is on trial. Consequences of derogatory and unrestrained language in the process of courts transcend the facts of the case. The damage is of a lasting nature. It sullies the name of the judge who is in no position to defend himself. It also brings the entire institution into disrepute which takes the blow silently. The overall

environment of independent judicial decision making too is adversely affected.

38. A greater cause of concern is the consequent reluctance of judges to exercise lawfully vested constitutional or inherent powers in the service of justice. The latter hesitancy is attended by the subtle danger of losing justice in procedures. This would imperceptibly but in a certain manner weaken the constitutional autonomy of the High Courts, and mark a shift away from the constitutional vision of comity of constitutional courts. The result will be High Courts which are a pale shadow of a luminous constitutional vision and an ecosystem which will occasion failure of justice.

39. The narrative will be fortified by authorities in point.

40. The issue regarding use of temperate language in judicial pronouncements even in the face of strongly divergent judicial opinion arose early in the evolution of constitutional law in **Ishwari Prasad Vs. Mohd. Isa5.** The Supreme Court in **Ishwari Prasad** (supra) discussed various aspects of judicial decision making process and emphasized the use of temperate language in judicial pronouncements :

"27.... Judicial experience shows that in adjudicating upon the rival claims brought before the courts it is now always easy to decide where the truth lies. Evidence is adduced by the respective parties in support of their conflicting contentions and circumstances are similarly pressed into service. In such a case, it is , no doubt, the duty of the Judge to consider the evidence objectively and dispassionately, examine it in the light of probabilities and decide which way the truth lies. The impression formed determine of conclusion which he reaches. But it would be unsafe to overlook the fact that all judicial minds may not react in the same way to the said evidence and it is not unusual that evidence which appears to be respectable and trustworthy to one Judge may not appear to be respectable and trustworthy to another Judge. That explains why in some court on its appreciation of oral evidence. The knowledge that another factor and leads to the use of temperate language and recording judicial conclusions. Judicial approach in such cases [would] always be based on the consciousness that one may make a mistake; that is why the use of unduly strong words in expressing conclusions or the adoption of unduly strong intemperate, or extravagant criticism, against the contrary view, which are often founded on a sense of infallibility should always be avoided."

41. A similar controversy regarding the unconditional necessity of employing civil phraseology even while expressing deep disagreement arose before the Constitutional Bench in **Alok Kumar Roy Vs. Dr. S. N. Sarma And Anr6**. In this case the learned Chief Justice of a High Court while disagreeing with the order passed by an Hon'ble Judge of the High Court observed that the order was passed "in unholy haste and hurry". Certain other adverse observations were also made in that case.

42. The Supreme Court in **Alok Kumar Roy** (supra) held against employing such language or making such remarks in a judgment against a colleague and observed:

" 8... It is necessary to emphasise that judicial decorum has to be maintained at all times and even where criticism is justified it must be in language of utmost restraint, **keeping always in view that the**

person making the comment is also fallible.... Even when there is justification for criticism, the language should be dignified and restrained." (emphasis supplied)

43. Reiterating the use of language of utmost restraint and the impact of scathing remarks against judicial officers in **K.P. Tiwari Vs. State of M.P.7** Supreme Court set forth:

"4....A judge tries to discharge his duties to the best of his capacity. While doing so, sometimes, he is likely to err. It is well said that a judge who has not committed an error is yet to be born. And that applies to judges at all levels from the lowest to the highest. Sometimes, the difference in views of the higher and the lower courts is purely a result of a difference in approach and perception. On such occasions, the lower courts are not necessarily wrong and the higher courts always right. It has also to be remembered that the lower judicial officers mostly work under a charged atmosphere and are constantly under a psychological pressure with all the contestants and their lawyers almost breathing down their necks - more correctly up to their nostrils. They do not have the benefit of a detached atmosphere of the higher courts to think coolly and decide patiently. Every error, however gross it may look, should not, therefore, be attributed to improper motive. It is possible that a particular judicial officer may be consistently passing orders creating a suspicion of judicial conduct which is not wholly or even partly attributable to innocent functioning. Even in such cases, the proper course for the higher court to adopt is to make note of his conduct in the confidential record of his work and to use it on proper occasions. The judges in the higher courts have also a duty to ensure judicial discipline and respect for the judiciary from all concerned. The respect for the judiciary is not enhanced when judges at the lower level are criticised intemperately and castigated publicly. No greater damage can be done to the administration of justice and to the confidence of the people in the judiciary than when the judges of the higher courts publicly express lack of faith in the subordinate judges for one reason or the other. It must be remembered that the officers against whom such strictures are publicly passed, stand condemned for ever in the eyes of their subordinates and of the members of the public. No better device can be found to destroy the judiciary from within. The judges must, therefore, exercise self-restraint. There are ways and ways of expressing disapproval of the orders of the subordinate courts but attributing motives to them is certainly not one of them. That is the surest way to take the judiciary downhill.

44. In **Brij Kishore Thakur Vs. Union of India8** the Supreme Court held that disparaging language against judges will damage the administration of justice and impair the confidence of people in the judicial system. Restraint in judicial language and humility in judicial functioning was advocated in **A.M. Mathur Vs. Pramod Kumar Gupta9.** Departure from norms of sobriety, moderation and reserve was not countenanced by the Supreme Court in **''K' A Judicial Officer In re case10** and State of **U.P. Vs. Mohd. Naim11**.

45. Degrading remarks were made against the dignity of an Hon'ble Judge of the Patna High Court in a judgement of the Supreme Court. The Hon'ble High Court

Judge was compelled to approach the Supreme Court for expunction of said remarks, to redeem his honour and to restore the prestige of his institution in **State of Bihar Vs. Neelmani Sahu12**. The Supreme Court expunged the remarks by holding:

"1... When this Court uses an expression against the judgment of High Court it must be in keeping with the dignity of the person concerned."

46. Position of law discussed in the preceding paragraphs was reiterated **in Amar Pal Singh Vs. State of U.P.13** and **in S.N. Dhingra Vs. State (NCT of Delhi)14.** The regularity of authorities shows constancy of the problem.

47. The damage to the cause of justice by use of intemperate language in the judicial process is yet to be fully assessed but the impact can be felt.

48. Inherent powers are conferred under Section 482 Cr.P.C. upon the High Court. Wide ambit of powers are vested in the High Courts by virtue of Article 226 of the Constitution of India. The inherent powers are the cornerstones of the constitutional autonomy granted to the High Courts and comprise the basic structure of the Constitution.

49. The understanding of particularized circumstances of the society and the facts of the case is essential to dispense justice in a State like Uttar Pradesh. The richness of the State of U.P. is reflected in the diversity of its heritage. The disparities in the society are manifested in the challenges faced by the State and the complex issues arising before the High Court.

50. Apathy of the bureaucracy and at times of citizens, poverty, inequalities, prejudices, environmental degradation and above all the need to give hope for justice are some of the local circumstances which make the process of law and administration of justice vibrant and evolutionary concepts in the State of U.P. In this diverse setting the High Court often have to evolve procedures and apply novel approaches by invoking plenary or inherent powers to serve the ends of justice. Special facts and circumstances may cause deviation from the routine procedure and a nuanced application of law to dispense justice.

51. At times an interdisciplinary engagement has to be made by the High Courts. In such situations for the High Courts to adhere to a fail safe approach in all matters or to adopt rote responses in unique facts of a case may lead to miscarriage of justice. Procedure should always remain the handmaiden of justice. Adherence to procedure imparts credibility to the process of law. Subservience to procedure may occasion failure of justice. Establishing the primacy of the courts while the litigation is still on foot is an important aspect in the process of administering justice and implementing the law. The process cannot be confined to mere exchange of affidavits or defined in terms of rigid procedures alone.

52. Among the plenary powers or inherent powers to which resort is had by the High Courts in the service of justice are those vested under Article 226 of the Constitution of India or under Section 482 Cr.P.C. Summoning of officers or other parties to the court are at times required in the facts and circumstances of a case. The power of summoning officials or other parties is exercised from time to time in the

Allahabad High Court solely for the high purpose for which it is vested namely in the interests of justice.

53. In an individual case or even cases there may be an error of judgement or two views regarding an order to summon an official. The appellate court can always take a view on the facts of a case. Errors in judgements are the perils of confiding the divine function of dispensing justice in mortal hands.

54. The orders of the High Courts requiring personal presence of officers have been considered in various judicial authorities. The locus classicus in point is the judgment of the Supreme Court in **State of U.P. and others Vs Jasvir Singh and others15.** Acknowledging the breadth of the powers of the High Court under Article 226 of the Constitution of India, the well settled norms and procedures for exercise of such power were thus stated in **Jasveer Singh (supra):**

"14. It is a matter of concern that there is a growing trend among a few Judges of the High Court to routinely and frequently require the presence, in court, of senior officers of the government and local and other authorities, including officers of the level of Secretaries, for perceived non-compliance with its suggestions or to seek insignificant clarifications. The power of the High Court under Article 226 is no doubt very wide. It can issue to any person or authority or government, directions, orders, writs for enforcement of fundamental rights or for any other purpose. The High Court has the power to summon or require the personal presence of any officer, to assist the court to render justice or arrive at a proper decision. But there are well settled norms and procedures for exercise of such power.

15. This Court has repeatedly noticed that the real power of courts is not in passing decrees and orders, nor in punishing offenders and contemnors, nor in summoning the presence of senior officers, but in the trust, faith and confidence of the common man in the judiciary. Such trust and confidence should not be frittered away by unnecessary and unwarranted show or exercise of power. Greater the power, greater should be the responsibility in exercising such power.

16. The normal procedure in writ petitions is to hear the parties through their counsel who are instructed in the matter, and decide them by examining the pleadings/affidavit/evidence/ documents/material. Where the court seeks any information about the compliance with any of its directions, it is furnished by affidavits or reports supported by relevant documents. Requiring the presence of the senior officers of the government in court should be as a last resort, in rare and exceptional cases, where such presence is absolutely necessary, as for example, where it is necessary to seek assistance in explaining complex policy or technical issues, which the counsel is not able to explain properly. The court may also require personal attendance of the officers, where it finds that any officer is deliberately or with ulterior motives withholding any specific information required by the court which he is legally bound to provide or has misrepresented or suppressed the correct position.

17. Where the State has a definite policy or taken a specific stand and that has been clearly explained by way of affidavit, the court should not attempt to impose a contrary view by way of suggestions or proposals for settlement. A

court can of course express its views and issue directions through its reasoned orders, subject to limitations in regard to interference in matters of policy. But it should not, and in fact, it cannot attempt to impose its views by asking an unwilling party to settle on the terms suggested by it. At all events the courts should avoid directing the senior officers to be present in court to settle the grievances of individual litigants for whom the court may have sympathy. The court should realize that the state has its own priorities, policies and compulsions which may result in a particular stand. Merely because the court does not like such a stand, it cannot summon or call the senior officers time and again to court or issue threatening show cause notices. The senior officers of the government are in-charge of the administration of the State, have their own busy schedules. The court should desist from calling them for all and sundry matters, as that would amount to abuse of judicial power. Courts should guard against such transgressions in the exercise of power. Our above observations do not of course apply to summoning of contemnors in contempt jurisdiction."

55. More importantly in **Jasvir Singh (supra)** it was emphasized that the observations made thereunder did not limit the exercise of the extraordinary jurisdiction of the High Courts under Article 226 of the Constitution of India:

"18. We have made the above observations rather reluctantly. Our observations should not be construed as restricting or limiting the exercise of the extraordinary jurisdiction of High Courts under Article 226 of the Constitution of India. The observations are intended to be guidance for self-regulation and self-restriction by courts. It became necessary as we have noticed that the learned Presiding Judge of the Bench has been frequently making such orders directing senior officers of the Government to be present and settle claims. It is a coincidence that another case where a similar procedure was adopted by the learned Presiding Judge of the bench, came up before us today Lake Development Authority, Nainital v. Heena Khan (CA No. 10087-10090 of 2010 decided on 26.11.2010). We have no doubt that the learned Judge bona fide believes that by requiring the presence of senior officers, he could expedite matters and render effective justice. But it is not sufficient that the object of the Judge is noble or bonafide. The process of achieving the object should be just and proper, without exceeding the well recognised norms of judicial propriety. "

56. Similarly in **State of Gujarat Vs Turabali Gulamhussain Hirani and another16** , the power of the High Court to summon officials remained unquestioned but it was stated that the power should be exercised in rare and exceptional circumstances and not in a routine manner:

"7. There is no doubt that the High Court has power to summon these officials, but in our opinion that should be done in very rare and exceptional cases when there are compelling circumstances to do so. Such summoning orders should not be passed lightly or as a routine or at the drop of a hat.

8. Judges should have modesty and humility. They should realize that summoning a senior official, except in some very rare and exceptional situation, and that too for compelling reasons, is counter

productive and may also involve heavy expenses and valuable time of the official concerned.

9. The judiciary must have respect for the executive and the legislature. Judges should realize that officials like the Chief Secretary, Secretary to the government, Commissioners, District Magistrates, senior police officials etc. are extremely busy persons who are often working from morning till night. No doubt, the ministers lay down the policy, but the actual implementation of the policy and day to day running of the government has to be done by the bureaucrats, and hence the bureaucrats are often working round the clock. If they are summoned by the Court they will, of course, appear before the Court, but then a lot of public money and time may be unnecessarily wasted. Sometimes High Court Judges summon high officials in far off places like Director, CBI or Home Secretary to the Government of India not realizing that it entails heavy expenditure like arranging of a BSF aircraft, coupled with public money and valuable time which would have been otherwise spent on public welfare."

57. In a more recent judgment in **State of U.P. and others Vs Dr. Manoj Kumar Sharma17,** Civil Appeal no. 2320 of 2021, the Supreme Court deprecated in strong terms the practice in certain High Courts of summoning officials to pressurize them and reiterated the need to exercise this power with restraint by holding:

"17. A practice has developed in certain High Courts to call officers at the drop of a hat and to exert direct or indirect pressure. The line of separation of powers between Judiciary and Executive is sought to be crossed by summoning the officers and in a way pressurizing them to pass an order as per the whims and fancies of the Court.

18. The public officers of the Executive are also performing their duties as the third limbs of the governance. The actions or decisions by the officers are not to benefit them, but as a custodian of public funds and in the interest of administration, some decisions are bound to be taken. It is always open to the High Court to set aside the decision which does not meet the test of judicial review but summoning of officers frequently is not appreciable at all. The same is liable to be condemned in the strongest words.

20. Thus, we feel, it is time to reiterate that public officers should not be called to court unnecessarily. The dignity and majesty of the Court is not enhanced when an officer is called to court. Respect to the court has to be commanded and not demanded and the same is not enhanced by calling public officers. The presence of public officer comes at the cost of other official engagement demanding their attention. Sometimes, the officers even have to travel long distance. Therefore, summoning of the officer is against the public interest as many important tasks entrusted to him gets delayed, creating extra burden on the officer or delaying the decisions awaiting his opinion. The Court proceedings also take time, as there is no mechanism of fixed time hearing in Courts as of now. The Courts have the power of pen which is more effective than the presence of an officer in Court. If any particular issue arises for consideration before the Court and the Advocate representing the State is not able to answer, it is advised to write such doubt in the order and give time to the State or its officers to respond."

58. The position of law which can be distilled from the immediately preceding narrative is this.

59. The power to summon an official or any other person is inherent in the constitutional courts. The powers have been vested in constitutional courts to empower them to achieve the foremost constitutional goal of securing justice to the citizens. The power is too sacrosanct to be blighted by any oblique motives or extraneous considerations. The power has to be used sparingly and regulated by self-discipline. Comprehensive guidelines containing the manner of exercise of inherent powers is an elusive goal. Constitutional courts have not attempted to confine the exercise of such inherent powers in a fixed formula to be applied irrespective of the facts of the case. Judicial authorities give illustrative examples of use of such power but do not provide an exhaustive scheme. Inherent powers cannot be ringed fenced by narrow definitions. Narrow definitions will militate against the very purpose of vesting inherent powers in constitutional courts, denude their constitutional autonomy, and will impede the quest for justice.

60. In summation, inherent powers for summoning of officials or any other person should be exercised as an exceptional measure to achieve the high end of securing justice. It is in the nature of things that this will always depend on the facts and circumstances of the case and the better judgement of the Court.

61. In this case for reason as stated earlier the personal presence of the officer was necessitated to retain the faith of the litigants in judicial process, to remove the impediments in the hearing, and for the State to account for its actions and omissions.

62. Shri Pramod Kumar Srivastava, Legal Remembrancer, Department of Law, Government of U.P., Lucknow, was present in Court on 02.08.2021. Shri M. C. Chaturvedi, learned Additional Advocate General for the State requested that the proceedings may be conducted in camera because some confidential facts and documents had to be placed before the Court.

63. In the proceedings held in camera, Shri Pramod Kumar Srivastava, Legal Remembrancer, Department of Law, Government of U.P., Lucknow, stated that the State Government is cognizant of the concerns of the Court and is committed to the principle of accountability. Relevant processes have been initiated. The Court was also assured that no impediment will be caused in the hearing and that the Court shall be assisted with full honesty in the matters.

64. Certain confidential documents were produced which depict governmental processes and also attest to the sincerity of the statement made on behalf of the State before this Court. Once the government is seized of the matter, the Court does not deem it appropriate to say anything which may fetter the lawful discretion of the State. Statements made by high officials on behalf of the Government in Court have highest sanctity and full weight have to be given to the same.

65. With these observations the matter relating to the personal presence of the Legal Remembrancer in person is finally disposed of.

66. On merits in Application U/S 482 Cr.P.C No. 16310 of 2020 (Hasae @ Hasana Wae and 11 others Vs. State of U.P. and another) it is submitted by Shri M. C. Chaturvedi, learned Additional

Advocate General, Shri A.K. Sand, Additional Government Advocate for the State that the trial has almost concluded and the statement of the accused under Section 313 Cr.P.C. was made before the trial court on 03.08.2021. Thereafter the matter is liable to be posted for final hearing on 06.08.2021.

67. Learned counsels for the applicants do not dispute the contention on behalf of the State that since the trial has concluded and all evidences have been tendered, the cause of instituting this Application U/S 482 Cr.P.C. does not survive.

68. Similarly on merits in Application U/S 482 Cr.P.C No. 14919 of 2020 (Daha Desai and 12 others vs. State of U.P. and another) it is submitted by Shri M. C. Chaturvedi, learned Additional Advocate General, Shri A.K. Sand, Additional Government Advocate for the State that the trial has almost concluded and the statement of the accused under Section 313 Cr.P.C. was made before the trial court on 03.08.2021. Thereafter the matter is liable to be posted for final hearing on 10.08.2021.

69 . Learned counsels for the applicants do not dispute the contention on behalf of the State that since the trial has concluded and all evidences have been tendered, the cause of instituting this Application U/S 482 Cr.P.C. does not survive.

70. The applicants can take up various objections on facts, law and evidence before the learned trial court.

71. In wake of the preceding discussion, these Applications Under Section 482 Cr.P.C. are being disposed of with the direction to the learned trial court to decide the trial proceedings expeditiously.

72. The Applications U/S 482 Cr.P.C. are disposed of finally.

(2021)09ILR A978
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.09.2021

BEFORE

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

Application U/S 482. No. 37040 of 2016

Arvind Upadhyay ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Mrs. Alka Singh, Sri Vipin Kumar Singh

Counsel for the Opposite Parties:
A.G.A., Sri Anil Kumar Chaudhary, Sri Ved Prakash Shukla, Smt. Priyanka Upadhyay (In Person)

Counsel for the Intervener:
Sri Rajiv Upadhyay, Sri Rahul Misha

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Domestic Violence Act, 2005

Intervention application - question of maintenance of a married woman and her small daughter - husband of a woman (applicant and opposite party no.2 herein) not available - her mother-in-law and father-in-law, who are like her father and mother become their responsibility - question of peaceful life, safety and education of a girl child.

HELD:- Commissioner of Police to file his affidavit on or before next date and appear before this Court for explaining as to why the

applicant is not traceable by the Police, despite the fact that a first information report about the missing of the applicant has been lodged and various orders have been passed by this Court for production of the applicant before the Court - On the next date, the District Judge as well as the Commissioner of Police shall inform the Court of the similar cases, where the maintenance has been awarded by the courts but the same has not been executed, as summons have not been served till date. (Para - 10,11,13)

Application u/s 482 Cr.P.C. pending. (E-7)

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

1. On the matter being taken up, Mr. J.K. Upadhyay, learned A.G.A. assisted by Mr. Gaurav Pratap Singh, brief holder for the State and Mrs. Priyanka Upadhyaya, opposite party no.2 (in person) are present. Mr. Rajiv Upadhyay, Advocate holding brief of Mr. Rahul Mishra, Advocate who has filed an intervention application on behalf of one Laxmi Prasad Upadhyay, who happens to be the father of the applicant is also present. However, neither Mrs. Alka Singh and nor Mr. Vipin Kumar Singh, Advocates who have filed the present application on behalf of the applicant and also appeared before the Court earlier, are not present in the Court today, even in the revised reading of the list.

2. At this stage, this case has turned into a strange case, in which, being wife i.e. opposite party no.2 filed a case against her husband i.e. the applicant herein under the provisions of Protection of Women from Domestic Violence Act, 2005 before the court below and the court below passed order dated 4th November, 2016 directing the husband to provide a separate living room to wife and daughter as also to give Rs. 1000/- for their maintenance. On the application filed by wife i.e. opposite party no.2, the court below passed another order dated 8th November, 2016 that if the husband i.e. applicant does not comply the order dated 4th November, 2016, the Station House Officer, Sarnath shall ensure the compliance of the said order. Against both the orders, the present application has been filed by the husband i.e. applicant, who obtained an interim order dated 5th December, 2016 ex parte, whereby the orders dated 4th and 8th November, 2016 were stayed till the next date of listing. Thereafter the wife i.e. opposite party no.2 appeared in the present case to defend her case in the present application. When the Court asked the learned counsel for the applicant to ensure production of the applicant before the Court, it has been informed by the learned counsel for the applicant that he is missing since 9th April, 2017 and a first information report about his missing has also been lodged on 16th May, 2018 at Police Station-Sarnath, District-Varanasi. Learned counsel for the applicant has further informed the Court that now he has no instruction on behalf of the applicant, as he is not in his contact. Thereafter Court passed various orders directing the learned counsel for the applicant as well as District Police Varanasi to ensure the production of the applicant before the Court but the applicant has not been produced before this Court either by the learned counsel for the applicant or by the District Police, Varanasi.

3. In compliance of the order of the Court dated 28th March, 2021, an affidavit sworn by Mr. Vikrant Vir, Deputy Commissioner of Police, Varuna Zone, Varanasi has been filed today in the Court on behalf of the State, which is taken on

record. In paragraph nos. 4 to 6, it has been stated as follows:

"4. That in compliance of the order passed by this Hon'ble Court the earlier Incharge of Police D.I.G./Senior Superintendent of Police, Varanasi has constituted a team for the search of applicant namely Arvind Upadhyay vide order dated 26.02-2021.

5. That the team constituted vide order dated 26.2.201 has with great effort tried to search the whereabouts of the applicant on various dates and places, which has been entered in G.D. record and the same can be produced before this Hon'ble Court as and when the Court wishes to peruse, however, the entire gist with regard to the efforts made by the searching team is being placed before this Hon'ble Court by way of progress report dated 02.04.2021 through the answering respondent. A Photostat copy of the progress report dated 02.04.2021 is being annexed herewith and marked as ANNEXURE-2 to this affidavit.

6.That the police team constituted earlier is still searching the applicant namely Arvind Upadhyay with serious efforts and the same will be produced as and when recovered without wasting any time in compliance of the orders of this Hon'ble Court."

4. This Court is sorry to record that the affidavit filed on behalf of the District Police of Varanasi is too flimsy to be accepted by this Court. The story made out in the affidavit from the side of Police is highly improbable, which is nothing else but a scene of drama. A person, who is missing since 9th April, 2017 and whose missing report has been lodged on 16th May, 2018, is not traceable inspite of all the efforts of the police. The same appears to be fishy as stated by the wife of the applicant i.e. opposite party no.2 herein. In today's modern era, where the policemen have got all the facilities, yet the police is not able to find out a person, despite several orders of this Court. This creates a doubt in the mind of a common ordinary person. Either the police can say that they have not got full powers or facilities or they are not able to find out the person, who is missing since 9th April, 2017 and this case should be given to some other agency.

5. The opposite party no.2, wife of the applicant, who is present, states before this Court that she has disclosed to the Police regarding whereabouts of the applicant but the Police reaches the place after giving space to the applicant to flee from there. It has also been brought to the knowledge of the Court that several cases, wherein maintenance has been awarded by the orders of the court, are pending and even notices have not been served upon the parties due to which women are suffering, as in the present case, which is the best example of harassment faced by the women even after passage of nearly five years from the date of orders in her favour.

6. An Intervention Application has been filed by Mr. Rahul Mishra, Advocate on behalf of one Laxmi Prasad Upadhyay, who happens to be the father of the applicant. In the affidavit filed in support of the intervention application, it has been stated that it is only because of the applicant's mental imbalance induced due to long standing acrimony, differences, disputes with opposite party no.2 that he went missing and could not be found till date despite Gumshudagi Report lodged in the year 2017 itself. It is further stated that

neither he nor any of his relatives have any knowledge about the whereabouts of the applicant-Arvind Kumar Upadhyay and therefore, he and his wife who are ailing senior citizens may be rescued from the police authorities, who are harassing and victimising them on the pretext of complying with various orders of the Hon'ble Court. In the intervention application, it has also been stated that during the pendency of the present application, the applicant-Arvind Kumar Upadhyay suffered with mental imbalance and was subjected to treatment at Mental Hospital, Varanasi and while he was receiving treatment, he left the house and went missing since 9th April, 2017, true copies of medical treatment from Mental Hospital, Varanasi has been enclosed as Annexure-1 to the affidavit accompanying the Intervention Application.

7. To the averments made in the affidavit accompanying the Intervention Application, opposite party no.2 submits before this Court that the applicant is not missing anywhere, he has deliberately left his house and is hidden somewhere. The father and other family members of the applicant have also helped him only in order to disobey the orders of the court below dated 4th November, 2016 and dated 8th November, 2016. Opposite party no.2 further submits that after the orders of the court below dated 4th and 8th November, 2016, father of the applicant (Intervenor before this Court) has deliberately sold his properties only for harassing opposite party no.2 and her female child as well as to disobey the orders of the court below and this Court. Opposite party no.2 further submits that the averment made in the intervention application that the applicant was suffering from some mental imbalance for which his treatment was going on in Mental Hospital Varanasi, is also incorrect, because the medical prescriptions, which have been enclosed along with the affidavit accompanying the intervention application, do not establish as to the exact mental ailment of the applicant. Lastly, opposite party no.2 submits that the conduct of the father of the applicant (Intervenor) and other family members of the applicant is doubtful.

8. Prima facie, the submissions made by opposite party no.2 appears to be correct.

9. Opposite party no.2 may file response, if any, to the aforesaid intervention application on or before the next date.

10. In this case, there is a question of maintenance of a married woman and her small daughter in these hard days. Now when the husband of a woman (applicant and opposite party no.2 herein) is not available, then her mother-in-law and father-in-law, who are like her father and mother, also become their responsibility. After marriage, a woman's husband and in-laws are everything. In this case, there is a question of peaceful life, safety and education of a girl child, who is none other but grand-daughter of the parents of the applicant. In-laws of a woman or grand parents of a girl child cannot leave her daughter-in-law or grand daughter alone if the husband of said woman or father of the said girl child, is missing.

11. In view of the present facts and circumstances of the case, this Court is left with no option but to direct the Commissioner of Police, Varanasi to appear before this Court for explaining the fair conduct of the Police of District

Varanasi. However, seeing the intricacies, this Court constrains itself in passing such orders without affording one opportunity to such a Senior Officer of the Police Department at Varanasi. This Court, therefore, directs the Commissioner of Police, Varanasi to file his personal affidavit categorically explaining as to why the applicant is not traceable by the Police, despite the fact that a first information report about the missing of the applicant has been lodged on 16th May, 2018 at Sarnath Police Station, Varanasi and various orders have been passed by this Court for production of the applicant before the Court. In the affidavit it shall also be disclosed about the prima facie observations made by this Court herein above. In the affidavit, it shall also be indicated as to how many days, the applicant shall be traceable by the Police. The affidavit shall be filed on or before the next date i.e. 29th September, 2021.

12. Seeing this pitiable predicament of a woman, who has been grappling from pillar to post and getting hoodwinked by multifarious impediments, which are purportedly for the objective of harbouring the applicant from the shrewdness of this Court, excogitated by the family of the husband, is an archetype illustration of the loopholes in way of our criminal justice system. To counteract and proscribe kindred occurrences in future and to safeguard the right to maintenance of wives, this Court directs the Commissioner of Police, Varanasi also to find out properties/whereabouts of the applicant as well as in-laws of opposite party no.2 promptly and after searching the same, in any one of the property/whereabout, he shall ensure that opposite party no.2 and her daughter are permitted to stay, so that the orders of the court below dated 4th and 8th November, 2016 may be complied with, as interim order granted earlier by this Court staying the operation of the same has not been extended and same stood discharged earlier. He shall also take assistance of opposite party no.2 i.e. wife of the applicant in tracing him as well as finding out the properties of the applicant and his father.

13. On the next date, the District Judge, Varanasi as well as the Commissioner of Police Varanasi, shall inform the Court of the similar cases, where the maintenance has been awarded by the courts but the same has not been executed, as summons have not been served till date.

14. On earlier occasions, the Court has been informed that the applicant is not missing and he is in contact with his counsels, who are not present in the Court today. On the last occasion also i.e. 1st March, 2021, learned counsels for the applicant were not present.

15. The appearance of Mrs. Alka Singh and Mr. Vipin Kumar Singh, Advocates, who have filed their vakalatnama on behalf of the applicant in the present application and also appeared earlier, before the Court on his behalf, are necessarily required in the present strange case.

16. The Secretary, Allahabad High Court Bar Association, Allahabad shall ensure that Mrs. Alka Singh (A/A-0060/16) and nor Mr. Vipin Kumar Singh, Advocates, (En. No.-04687105, AOR No.-A/V.-0438/12, Mobile No. 9415630302), resident of 148A, N.B. H.C., Allahabad, appear in the Court on the next date i.e. 29th September, 2021.

17. Put up this case on 29th September, 2021 at 02:00 p.m.

18. A copy of this order shall be provided to the learned A.G.A., who shall communicate the same to the District Judge, Varanasi, Commissioner of Police, Varanasi as well as to the Secretary, Allahabad High Court Bar, Association for necessary compliance by Wednesday i.e. 15th September, 2021.

19. The party shall file computer generated copy of this order downloaded from the official website of the High Court, Allahabad, self attested by the party concerned along with a self attested identity proof of the said person(s) (preferably Aadhar Card) mentioning the mobile number(s) to which the said Aadhar Card is linked.

20. 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 made a declaration of such verification in writing.

(2021)09ILR A983
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.08.2021

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE DINESH PATHAK, J

Special Appeal No. 25 of 2021
&
Special Appeal Defective No. 225 of 2021
& others

State of U.P. & Ors. ...Petitioners
Versus
The C/M Sri Durga Ji Purva Madhyamik Balika Jamin Rasoolpur, Azamgarh & Anr. ....Respondents

Counsel for the Petitioners:
Sri M.C. Chaturvedi, Sri Rajiv Singh

Counsel for the Respondents:
Sri Kunwar Bhaskar Parihar, Sri R.K. Ojha

A. Service Law – UP Basic Education Act, 1972 – Section 12 – UP Junior High Schools (Payment of Salaries of Teachers and other Employees) Act, 1978 – Appointment on the post of Headmaster/ Assistant Teacher – Cancellation – Inquiry set up by the Commissioner – Jurisdiction – Held, report that was forwarded by the Commissioner, though may not form the basis for the action as directed, but it could very well be treated as an information justifying initiation of an enquiry and consequential action that is otherwise permissible under the statutory scheme – Held, further the learned Single Judge while allowing the writ petitions has not left it open for the educational authorities empowered under the 1972 Act and 1978 Act to examine the validity of the appointments under the provisions of the Act – Division Bench modified the writ order. (Para 18 and 19)

B. Service Law – Appointment on the post of Headmaster/Assistant Teacher – Approval granted – Power of Review, when can be exercised – Held, there is no power of review of the order of approval once accorded – But, it is well settled, where an appointee does not possess the minimum qualifications prescribed by a statutory rule, the appointment would be void and can be questioned at any stage – Similarly, where appointments are obtained by a procedure not known to law or by following a procedure which is in flagrant violation of the statutory provisions, it can be questioned at any stage. (Para 18)

C. Rule of Law – Power under law must be exercised in its true spirit – Held, when the administration is governed by a

statutory scheme, it has to be carried in the manner provided therein and through such authorities who have been conferred powers thereunder – If the law requires that a particular thing should be done in a particular manner it must be done in that way and none other. (Para 16)

D. Interpretation of Statute – Word 'Otherwise' – Meaning and Scope – Term 'otherwise' as it occurs in Sections (2) of Section 12 of the Act of 1972 is of wide import and it can include information which may have been received from sources other than inspection. (Para 18)

Four Appeal partly allowed; Two Appeal disposed of. (E-1)

Cases relied on :-

1. Manohar Lal (Dead) By Lrs. Vs Ugrasen (Dead) By Lrs. & ors. (2010) 11 SCC 557

2. Dipak Babaria Vs St. of Guj., (2014) 3 SCC 502

3. R & B Falcon (A) Pvt Ltd. Vs Commissioner of Income Tax, (2008) 12 SCC 466

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

1. These six intra-court appeals arise from a common judgment and order dated 14.10.2020 of a learned Single Judge passed in six connected writ petitions, namely, Writ A No. 5540 of 2020; Writ A No. 5795 of 2020; Writ A No. 5831 of 2020; Writ A No. 5743 of 2020; Writ A No. 5592 of 2020; and Writ A No. 5582 of 2020.

2. As the aforementioned writ petitions were decided by a common order, with the consent of the learned counsel for the parties, these appeals were heard together and are being decided by a common judgment and order.

3. Briefly stated the facts giving rise to these intra-court appeals are that in the district of Azamgarh, appointments on the post of Headmaster/Assistant Teacher in various Junior High Schools on the grant-in-aid list of the State were made and approved by the Basic Shiksha Adhikari, Azamgarh (for short BSA). Questioning their appointment on various grounds, complaints made to the Commissioner of Azamgarh Division (for short the Commissioner) were entertained and the Commissioner set up a four-member Inquiry Committee that prepared a report on 28.1.2020 which was forwarded to the Commissioner by letter dated 29.01.2020 of the Additional Commissioner (Administration) i.e., the Chairman of the Inquiry Committee. The report was thereafter sent to the State Government. The Special Secretary of the State Government, vide letter/order dated 17.02.2020 addressed to the Assistant Director of Education (Basic), Azamgarh Division, Azamgarh, directed that a first information report be lodged against the officers, employees (teachers) and managers of the concerned institutions. Acting on the letter/order dated 17.02.2020, the BSA separately issued show cause notices to the management of the institutions calling upon them to submit a reply as to why the selection/approval with regard to the appointments be not cancelled. In addition to above, on 27.06.2020 letters were issued by the BSA to the Finance and Accounts Officers (for short the Accounts Officer) attached to its office to stop payment of salary to all those appointees whose appointment procedure was found faulty in the report dated 28.01.2020.

4. Writ A Nos. 5540 of 2020; 5743 of 2020; 5795 of 2020; and 5831 of 2020 giving rise to Special Appeal Nos. 25 of 2021; Special Appeal (Defective) No. 238

of 2021; Special Appeal (Defective) No. 255 of 2021; and Special Appeal (Defective) No. 241 of 2021, respectively, were filed by the management of those Junior High Schools who were aggrieved with the Enquiry Report dated 28.01.2020 (forwarded on 29.1.2020), the order dated 17.02.2020 and the show cause notice. Whereas, Writ A Nos. 5582 of 2020 and 5592 of 2020 giving rise to Special Appeal (Defective) No. 225 of 2021 and Special Appeal (Defective) No. 234 of 2021, respectively, were filed by those teachers who were aggrieved with the direction seeking stoppage of their salary.

5. The common ground taken in all the six writ petitions before the learned Single Judge was that basic education including recruitment and payment of salary of teachers related thereto, particularly, those working in institutions on grant in aid list of the State, is governed by statutes and the rules framed thereunder. It was urged that appointment of teachers in a recognized junior high school, receiving grant-in-aid from the State, is to be made in accordance with the provisions of U.P. Recognized Basic Schools (Junior High Schools) (Recruitment and Conditions of Services of Teachers) Rules, 1978 (for short 1978 Rules) which are framed and notified by the State Government in exercise of its power under Section 19 of the Basic Education Act, 1972 (for short 1972 Act) and the salary of such teachers is paid under the provisions of U.P. Junior High Schools (Payment of Salaries of Teachers and other Employees) Act, 1978 (for short 1978 Act). Neither in the 1978 Rules nor under the 1972 Act or 1978 Act, the Commissioner has a role to play. In the statutory scheme, the Commissioner has no supervisory role over the institutions including their staff/teachers/management and, therefore, the enquiry set up by him was without jurisdiction. Thus, the consequential report is of no consequence and could not be made basis of any further action. Similarly, the order passed by the Commissioner appointing an enquiry committee in respect of appointment of teachers, duly approved by the BSA under the provisions of the 1978 Rules, was completely void and any action flowing from the report of such an Inquiry Committee is void and liable to be quashed.

6. The learned Single Judge after examining the scheme of 1972 Act, 1978 Rules and 1978 Act concluded that the provisions of the aforesaid Acts and the Rules conferred powers on specified authorities other than the Commissioner or other administrative officers therefore, setting up an enquiry committee by the Commissioner, the report of the Inquiry Committee and the consequential direction of the State Government based on that report being in the teeth of the provisions of the Acts and the Rules were all liable to be quashed. Likewise, the show cause notice and salary stoppage order, not being an outcome of independent exercise of power but the dictate of officers not falling in the hierarchy of educational authorities contemplated by the Act and the Rules, were also liable to be quashed. Thus, all the six petitions were allowed by the learned Single Judge.

7. Aggrieved by the decision of the learned Single Judge, the State is in appeal.

8. We have heard Sri M.C. Chaturvedi, learned senior counsel, assisted by Sri Rajiv Singh, learned Standing Counsel, in all the appeals, for the appellants; Sri R.K. Ojha, learned senior counsel, assisted by Sri Kunwar Bhaskar

Parihar and Sri Shivendu Ojha for the respondents in Special Appeal No. 25 of 2021, Special Appeal (Defective) No. 255 of 2021, Special Appeal (Defective) No. 241 of 2021 and Special Appeal (Defective) No. 238 of 2021; Sri Indraraj Singh for the respondents in Special Appeal (Defective) No. 234 of 2021; and Sri H.P. Shahi for the respondents in Special Appeal (Defective) No. 225 of 2021.

9. The submissions of the learned counsel for the appellants is that assuming that the Commissioner of a Division does not have a place in the hierarchy of educational authorities as per the scheme of the Acts (supra) and the Rules (supra) but, section 12 of the 1972 Act confers power on the Director to inspect or cause to be inspected any basic school and, under sub-section (2) thereof, he may direct the management of a basic school to remove any defect/deficiency found on inspection or **'otherwise'.** The term 'otherwise' used in sub-section (2) is of significance and enables the Director to take information from various other sources also, to initiate and take action contemplated under the Acts and the Rules. Sub-section (3) of section 12 of the 1972 Act empowers the Director to refer the case to the Board for withdrawal of recognition of such school if management of basic school fails to comply with the direction made under sub-section (2). It is submitted that section 13 of the 1972 Act envisages control by the State Government by providing that the Board shall carry out such directions as may be issued to it from time to time by the State Government for the efficient administration of the Act. As 1978 Rules are framed and notified in exercise of power conferred upon the State Government by section 19 of 1972 Act, any information received by the State Government in respect of violation of the provisions of 1972 Act or 1978 Rules, could be passed on to the authorities to ensure proper administration of the provisions of the 1972 Act therefore, it cannot be said that the Commissioner held no jurisdiction to direct for an enquiry. It is submitted that even assuming that Commissioner held no jurisdiction to bind the educational authorities with the report submitted by the Inquiry Committee set up under its directions, even then the educational authorities were empowered to take notice of the report and proceed further in accordance with law. It was urged that by quashing the report, the notice issued in pursuance of the report and the order issued by the State Government, the learned Single Judge has closed the doors to scrutinize the legality and validity of the appointment that is, whether the appointments were made by following the procedure prescribed by the 1978 Rules.

10. In addition to above, it was urged on behalf of the appellants that section 4 of the 1978 Act empowers the Education Officer to inspect or cause to be inspected any institution or call for such information and records from its management with regard to payment of salaries to its teachers or employees or give its management any direction for the observance of such canons of financial propriety including any direction for retrenchment of any teacher or employee for prohibition of any wasteful expenditure, as he thinks fit. It is urged that the BSA is the Education Officer as per the definition under Section 2 (b) of the 1978 Act. Thus, the show cause notices impugned in the writ petitions, issued by the BSA, were referable to Section 4 of the 1978 Act and were not liable to be quashed at the threshold. More so, when the BSA

was authorised to issue notice to the management calling for its explanation in respect of irregularity in the appointment of teachers in the institutions concerned. It is submitted that the impugned judgment and order of the learned Single Judge fails to take notice of the relevant provisions of the 1972 Act, the 1978 Act and the 1978 Rules therefore, the same is liable to be set aside.

11. **Per contra**, on behalf of the management, it was urged by Sri R.K. Ojha that neither the 1972 Act nor the 1978 Act contemplates a role for the Commissioner to examine the validity of the appointments approved by the Basic Education Officer. Thus, the setting up of an enquiry committee by him is a void act with no statutory backing. Accordingly, the learned Single Judge was justified in quashing the order/notice impugned in the writ petition. In the alternative, it was submitted on behalf of the respondents that if any irregularity in appointments had been noticed, the same could be reported to the Director or to the Board to act in accordance with the provisions of law. But, issuance of notice at the dictates of the State authorities, having no place in the statutory scheme governing basic education, is completely unjustified and has rightly been quashed by the learned Single Judge.

12. On behalf of teachers (respondents in Special Appeal (Defective) Nos. 225 of 2021 and 234 of 2021), it was urged by Sri Indraraj Singh and Sri H.P. Shahi that the appointments were made in accordance with the 1978 Rules and had received approval of the BSA and so long the appointments are not cancelled by a procedure known to law there could be no stoppage of salary. Therefore, the judgment of the learned Single Judge in that regard calls for no interference.

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

14. Before we proceed to weigh the rival submissions, we may notice the reasoning of the learned Single Judge in the impugned judgment.

15. The learned Single Judge placed reliance on a decision of the Apex Court in ***Manohar Lal (Dead) By Lrs. vs Ugrasen (Dead) By Lrs. & Ors (2010) 11 SCC 557***, wherein, after noticing various decisions, the apex court had concluded as follows:

"Therefore, the law on the question can be summarised to the effect that no higher authority in the hierarchy or an appellate or revisional authority can exercise the power of the statutory authority nor can the superior authority mortgage its wisdom and direct the statutory authority to act in a particular manner. If the appellate or revisional authority takes upon itself the task of the statutory authority and passes an order, it remains unenforceable for the reason that it cannot be termed to be an order passed under the Act."

16. The legal principle forming the basis of the decision of the Apex Court in Manohar Lal's case (supra) is well settled. The principle is that when the administration is governed by a statutory scheme, it has to be carried in the manner provided therein and through such authorities who have been conferred powers thereunder. That is, if the law requires that a particular thing should be done in a particular manner it must be done in that way and none other. Following this principle in ***Dipak Babaria V. State of***

Gujarat, (2014) 3 SCC 502, the Apex Court, in paragraph 72, observed:

"*The State cannot ignore the policy intent and procedure contemplated by the statute...It is not merely the end but the means which are of equal importance, particularly if they are enshrined in the legislative scheme. The minimum that was required was an enquiry at the level of the Collector who is the statutory authority. Dictating him to act in a particular manner on the assumption by the Minister that it is in the interest of industrial development would lead to a breach of the mandate of statute framed by the legislature."*

17. Applying the above legal principle and upon finding that in the scheme of the 1972 Act and 1978 Rules a separate set of authorities have been conferred powers and the Commissioner finds no place in that statutory scheme, the learned Single Judge justifiably held that the Commissioner exceeded its jurisdiction and powers by directing an enquiry and, similarly, the Secretary Education, without independently applying his mind, erred in issuing a command to the educational authorities to straight away lodge a first information report and to act in a particular manner. To this extent, the order of the learned Single Judge being well founded on settled legal principles calls for no interference. However, what has been overlooked by the learned Single Judge is, whether the impugned report doubting the validity of the appointments on the ground that the procedure prescribed for appointments was not followed, could be treated as an information to form basis for initiation of a proper enquiry within the framework of the Acts (i.e. 1972 Act and 1978 Act) and the Rules. In this context, the learned counsel for the State has submitted that the doors to examine irregularities in the appointment ought not to have been closed. We find substance in this submission of the appellant's counsel. We, therefore, now proceed to examine the statutory scheme of the 1972 Act and the 1978 Act to find out as to in what manner the validity of such appointments could be tested once approval to them was accorded by the BSA.

18. The 1972 Act is an Act to provide for the establishment of a Board of basic education and for the matters connected therewith. Section 2 (b) defines basic education as education up to class eighth. Section 19 empowers the State Government to make rules for carrying out the purposes of the Act. Clause (c) of sub-section (2) of Section 19 of the 1972 Act specifically provides that rules may provide for the recruitment, and the conditions of service of the persons appointed, to the posts of teachers and other employees of basic schools recognised by the Board. 1978 Rules framed under the 1972 Act provide for the procedure as well as qualification for appointment of teachers to such schools. Sub -rule (5) of Rule 10 casts a duty upon the BSA, before granting approval to the appointment, to be satisfied that the candidates recommended by the Selection Committee possess the minimum qualifications prescribed for the post and that the procedure laid down in the Rules for the selection of Head Master or Assistant Teacher, as the case may be, has been duly followed. No doubt, there is no power of review of the order of approval once accorded. But, it is well settled, where an appointee does not possess the minimum qualifications prescribed by a statutory rule, the appointment would be void and can be questioned at any stage. Similarly, where appointments are obtained by a procedure not known to law or by

following a procedure which is in flagrant violation of the statutory provisions, it can be questioned at any stage. More over, the BSA, under section 4 of the 1978 Act, is empowered to inspect or cause to be inspected any institution or call for records from its management with regard to the payment of salaries to its teachers or employees or give its management any direction for the observance of such canons of financial propriety (including any direction for retrenchment of any teacher or employee for prohibition of any wasteful expenditure) as he thinks fit. For enforcement of a direction issued under section 4 of the 1978 Act, procedure is prescribed under section 6 thereof. Likewise, section 12 of the Act, 1972 envisages control of the Director over Basic Schools. As a junior high school is a basic school within the meaning of section 2(b) of the 1972 Act, it cannot be said that the Director has no control over it. Further, sub-section (2) of section 12 provides that the Director may direct the management of a basic school to remove any defect or deficiency found on inspection or otherwise. The term ***'otherwise'*** in ***P. Ramanatha Aiyar's Advanced Law Lexicon*** has been attributed different meaning in different contexts. One of them is "by other like means; contrarily; different from that to which it relates; in a different manner; in another way; in any other way; differently in other respects in different respects; in some other like capacity." The above meaning attributed to the term otherwise has been adopted by the Apex Court in its decision in the case of ***R & B Falcon (A) Pvt Ltd. V Commissioner of Income Tax, (2008) 12 SCC 466***. What we find from the above is that the term "***otherwise"*** as it occurs in sub-section (2) of section 12 of the 1972 Act is of wide import and it can include information which may have been received from sources other than inspection. Hence, in our view, the report that was forwarded by the Commissioner, though may not form the basis for the action as directed, but it could very well be treated as an information justifying initiation of an enquiry and consequential action that is otherwise permissible under the statutory scheme of the 1972 Act and 1978 Act.

19. As the learned Single Judge while allowing the writ petitions has not left it open for the educational authorities empowered under the 1972 Act and 1978 Act to examine the validity of the appointments under the provisions of the Act and the Rules framed thereunder, we are of the view that the judgment and order of the learned Single Judge is liable to be modified to that extent.

20. We, therefore, **partly** allow Special Appeal No. 25 of 2021; Special Appeal (Defective) No. 238 of 2021; Special Appeal (Defective) No. 255 of 2021; and Special Appeal (Defective) No. 241 of 2021 and modify the judgment and order of the learned Single Judge dated 14.10.2020 to the extent indicated below:-

"The enquiry report dated 28/29.01.2020 as well as the order of the State Government dated 17.02.2020 though, would not be binding on the educational authorities but may be taken as an information to initiate a fresh proceeding within the framework and the scheme of the 1972 Act and 1978 Act. Similarly, the order dated 17.02.2020 will not be treated as a binding direction to lodge the FIR but if the educational authority by applying its own independent mind is of the opinion that there is sufficient material reflecting commission of

cognizable offence then it would be free to report such offence."

21. The order of the learned Single Judge quashing the orders stopping the payment of salary is affirmed subject to the liberty to examine the legality/propriety of the appointments given above. Special Appeal (Defective) No. 225 of 2021 and Special Appeal (Defective) No. 234 of 2021 are disposed off accordingly.

(2021)09ILR A990
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 26.08. 2021

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAY, J.
THE HON'BLE AJAI KUMAR SRIVASTAVA -I, J.

Special Appeal No. 177 of 2019
AND
Special Appeal No. 178 of 2019
AND
Special Appeal No. 183 of 2019

U.P.S.R.T.C., Lko . & Ors. ...Appellants
Versus
Shubash Chandra Gautam & Anr. ...Respondents

Counsel for the Appellants:
Ratnesh Chandra

Counsel for the Respondents:
Ghaus Beg

A. Service Law – UP Road Transport Corporations Act, 1950 – 34 – GO dated 10.10.2012 and Circular dated 25.10.2012 – Pension – Entitlement – Initially appointed against non-pensionable post; however, subsequently promoted against pensionable post – Exclusion from the benefit of departmental pension – Permissibility – Held, there cannot be any doubt about the power of the State Government emanating from Section 34 of 1950 Act to issue instructions or give directions to the Corporation in respect of conditions of service of the employees of the Corporation – GO dated 10.10.2012 does not differentiate between the employees who were getting pension under the EPF Pension Scheme and those who were not getting such benefit. However, contrary to the stipulation available in the GO dated 10.10.2012, the Corporation while issuing the circular dated 25.10.2012 has drawn such a distinction – Division Bench found no illegality in writ order quashing circular dated 25.10.2012. (Para 30 and 35)

B. Service law – Pension – Significance – Payment of pension forms a condition of service. (Para 30)

Appeal dismissed. (E-1)

Cases relied on :-

1. Krishena Kumar Vs U.O.I. & ors., (1990) 4 SCC 207

2. D. S. Nakara & ors.Vs U.O.I.,(1983) 1 SCC 305

3. S. P. Dubey Vs Madhya Pradesh State Road Transport Corporation & anr. 1991 Supp (1) SCC 426

(Delivered by Hon'ble Devendra Kumar Upadhyay, J.
&
Hon'ble Ajai Kumar Srivastava -I, J.)

1. These special appeals filed by the appellant-U.P. State Road Transport Corporation (hereinafter referred to as the Corporation) raise similar questions of law and facts and are therefore being decided by the common judgment, which follows as under :

2. Special Appeals No.177 of 2019 and 178 of 2019 assail the judgment and

order dated 22.02.2019 passed by Hon'ble Single Judge whereby Writ Petition Nos.385 (SB) of 2014 and Writ Petition No.728 (SB) of 2014 were allowed, the orders dated 05.12.2013 and 19.02.2013 whereby the benefit of departmental pension to the petitioners of the said writ petition was denied, have been quashed and a portion of circular dated 25.10.2012 issued by the Corporation sofar as it excludes the employees getting the benefit of pension under the EPF Pension Scheme from being paid the departmental pension, has also been quashed. Learned Single Judge, accordingly, while allowing the writ petitions by the said judgment dated 22.02.2019 has further directed the Corporation to fix the pension of the petitioners and make payment thereof after adjusting the amount of employer's share in the EPF Pension Scheme which had been received by the petitioners. The learned Single Judge has further provided that neither the petitioners nor the Corporation shall claim any interest either on pension amount or on amount of employer's share in the EPF Pension Scheme.

3. In Special Appeal No.183 of 2019, the order under challenge has been passed by learned Single Judge, dated 22.02.2019 whereby the Writ Petition No.1530 (SS) of 2014 has been allowed and the benefits made available to the petitioners in Writ Petition No.385 (SB) of 2014 and 728 (SB) of 2014 vide judgment and order dated 22.02.2019 have been extended to the petitioner of Writ Petition No.1530 (SS) of 2014 as well.

4. We have heard Shri Ratnesh Chandra along with Shri Abhinav Singh, learned counsel representing the U.P. State Road Transport Corporation and Shri Gaus Beg, learned counsel representing the respondents (who shall hereinafter be referred to as the petitioners for convenience) in all the special appeals and have also perused the record available before us.

5. U.P. State Road Transport Corporation was established on 01.06.1972 under Section 3 of Road Transport Corporations Act, 1950 (hereinafter referred to as the 1950 Act) and has accordingly been incorporated as a body corporate having its own perpetual succession and a common seal. Prior to incorporation of the Corporation, in the State of U.P., Public Transport was being taken care of by a government department which was commonly known as U.P. Government Roadways Organization. On establishment and incorporation of the Corporation under Section 3 of the Act, 1950 in the State of Uttar Pradesh, under a government arrangement the assets, liabilities and even the employees working in the erstwhile Government Roadways Organization were transferred to the newly established Transport Corporation.

6. All the employees working in the Government Roadways Organization were required to submit their options, if they wanted their services to be transferred to and subsequently absorbed in the newly created Corporation. That is how initially the human resource in the newly established Corporation was inducted/created.

7. By means of a Government Order dated 05.07.1972, it was also provided that service conditions of the employees working in Government Roadways Organization, who gave their options for being absorbed in the services of the Corporation, would not in any manner be

inferior to the service conditions, which they had enjoyed while working in the Government Roadways Organization. However, for governing the condition of service of the employees of the Corporation no service rules or regulations were framed prior to framing of the U.P. State Road Transport Corporation (Other than Officers) Service Regulations, 1981, which were notified on 19.06.1981. The concept of retirement benefits was accordingly introduced by promulgating the said 1981 regulations as Regulation 39 provided that an employee of the Corporation shall not be entitled to pension but he shall be entitled to retirement benefits mentioned in Sub-Regulation 2 of Regulation 39. Thus, the employees of the Corporation were not made available the benefit of pension ; rather certain retirement benefits provided in Regulation 39 were made available to them. However, the said provision carves an exception in respect of those employees who were earlier working with the State Government in the Government Roadways Organization and were subsequently absorbed in the services of the Corporation and such employees were, thus, made entitled to pension and other retirement benefits in terms of the Government Order dated 05.07.1972. This exception has a rationale as the Government Order dated 05.07.1972 specifically provided that those government employees who were to opt to be absorbed in the services of the Corporation shall not be given benefits, which may be inferior to the benefits they would have got had they continued to work and discharge their duties as government employees.

8. It has been stated at the Bar that prior to incorporation of the Corporation, in the Government Roadways Organization there were two categories of posts generally and the classification based on payment of pension did exist, according to which certain posts were pensionable and certain other posts were non-pensionable. On transfer/merger of assets and liabilities and other ancillary things which earlier belonged to U.P. Government Roadways Organization with the newly created Corporation, the posts of both these categories, namely, pensionable and non-pensionable got transferred to the Corporation as well. Accordingly, even after establishment of the Corporation appointments were made both against pensionable and non-pensionable posts.

9. All three petitioners in these matters were initially appointed in the Corporation against non-pensionable posts, however, they were subsequently promoted in pensionable posts. The details of service rendered by the petitioners are given below :

1.Subhash Chandra Gautam

Srl. No.	Date	Appointed/Promoted	Post	Nature of Post
1.	18.07.1973	Appointed	Assistant Mechanic	Non-Pensionable
2.	26.07.1977	Promoted	Mechanic	Non-Pensionable
3.	14.08.1978	Promoted	Junior Foreman	Pensionable
4.	17.07.1984	Promoted	Senior Foreman (Grad	Pensionable

			e-II)	
5.	02.01.1992	Promoted	Senior Foreman (Grade-I)	Pensionable
6.	15.07.2007	Promoted	Assistant Regional Manager (Technical)	Pensionable

Retired on 31.12.2007

2. Bhishma Deo Mishra

Srl. No.	Date	Appointed/Promoted	Post	Nature of Post
1.	12.12.1975	Appointed	Mechanic	Non-Pensionable
2.	13.01.1979	Promoted	Junior Foreman	Pensionable
3.	22.03.1986	Promoted	Senior Foreman (Grade-II)	Pensionable
4.	02.11.1996	Promoted	Senior Foreman (Grade-I)	Pensionable
5.	22.12.2004	Promoted	Assistant Regional Manager (Technical)	Pensionable

Retired on 31.08.2010

3. Gopi Shyam Pandey

Srl. No.	Date	Appointed/Promoted	Post	Nature of Post
1.	23.12.1972	Appointed	Cleaner	Non-Pensionable
2.	23.10.1979	Promoted	Office Assistant (Grade-II)	Pensionable
3.	2004	Promoted	Office Assistant (Grade-I)	Pensionable

Retired on 31.07.2007

10. It appears that on a proposal submitted by the Corporation, the State Government issued an order on 20.10.2004, which provides that the employees of the Corporation who were appointed between the period commencing on 01.06.1972 and ending on 19.06.1981 will also be entitled to grant of pension provided they were appointed on a pensionable posts. These two dates, namely, 01.06.1972 and 19.06.1981 have some significance. On 01.06.1972, the Corporation was established under Section 3 of the 1950 Act whereas on 19.06.1981, the Regulations of

1981 came into force which inter alia provide that the employees of the Corporation will not be paid pension rather they shall be entitled to certain retirement benefits with the exception that those who were appointed prior to 01.06.1972 with the State Government Roadways Organization and whose services were later on merged with the Corporation shall be entitled to pension. This was clearly in conformity with the earlier Government Order dated 05.07.1972 which in a manner made a representation or a promise to the employees of erstwhile State Government Roadways Organization that if they opted for absorption in the services of the Corporation the service benefits available to them would not be in any manner

11. Based on the said Government Order dated 20.10.2004, the UPSRTC issued a circular on 26.12.2005 which inter alia provided that since the Board of Directors of the Corporation has resolved in its 160th meeting to give effect to the Government Order dated 20.10.2004, as such, benefit of pension be made available to those employees who are covered by the Government Order dated 20.10.2004.

12. Thereafter in respect of the employees, who were appointed in the Corporation against non-pensionable posts and were, however, subsequently promoted on a pensionable post, the State Government issued another Government Order dated 10.10.2012 which provided that such employees shall also be eligible to pension in terms of the Government Order dated 20.10.2004. After issuance of the said Government Order dated 10.10.2012, the Managing Director of the Corporation issued a circular dated 25.10.2012 in pursuance of the said Government Order dated 10.10.2012. However, the circular provides that those retired employees who are getting pension/family pension from EPF Pension Scheme will not be eligible to the benefit of the pension in terms of Government Order dated 10.10.2012. It is this stipulation, which excludes the retired employees from the benefit of pension in terms of the Government Order dated 10.10.2012, that became subject matter of challenge in the writ petitions filed by the petitioners which have been decided by the learned Single Judge.

13. It is not in dispute that the petitioners herein were initially appointed against non-pensionable post, however, they were subsequently promoted against pensionable posts in the Corporation. It is also not in dispute that all the petitioners had retired from the service of the Corporation prior to issuance of the Government Order dated 10.10.2012 and issuance of the circular by the Corporation, dated 25.10.2012.

14. The only question which thus needs to be considered and answered by us is as to whether the exclusion from the benefit of departmental pension of such retired employees who were being benefited by the EPF related pension is vitiated and erroneous and such employees could or could not be excluded from the benefit emanating from the Government Order dated 10.10.2012.

15. Lengthy arguments have been made by learned counsel representing the respective parties and we have given our anxious consideration to the same.

16. Learned counsel appearing for the appellant-Corporation has argued that the circulars dated 25.10.2012 and 26.12.2005 only contained guidelines which in fact

were policy decisions taken by the Corporation, as such, legally no interference in such policy decisions was permissible by learned Single Judge while the writ petitions filed by the petitioners were decided by the orders which are under appeal in this case.

17. It has further been argued by the learned counsel for the appellant that the Government Order dated 10.10.2012 has to be read in conjunction with Government Order dated 20.10.2004 which only provided no objection of the State Government for making available the benefit of pension to particular class of employees and in fact right to seek benefit of pension actually flows from the circular dated 25.10.2012 wherein considering the financial health of the Corporation, a conscious decision was taken not to make available the benefit of the departmental pension to those retired employee of the Corporation who were already getting pension under the EPF Scheme.

18. It has further been contended by learned counsel appearing for the appellant that in terms of the circular dated 25.10.2012, no option was ever exercised by the petitioners and as such in accordance with the stipulations available in the said circular dated 25.10.2012 itself, it would be deemed that the petitioners did not opt for the benefit of the pension on the basis of the Government Order dated 10.10.2012 and the circular dated 25.10.2012. Thus, the claim to the petitioner is barred by their non-exercise of the option as was required by the circular dated 25.10.2012.

19. It has further been argued that there exists a reasonable classification permissible under Article 14 of the Constitution of India between the retired employees who were getting pension under the EPF Pension Scheme and those who were not getting such benefit under the said EPF Pension Scheme and accordingly, since this classification has a rational basis, it is not open to the learned counsel for the petitioners to argue that the petitioners have been subjected to any kind of discrimination, much less any hostile discrimination.

20. Learned counsel for the appellant has further submitted that in fact the Government Order dated 10.10.2012 does not direct the Corporation to make payment of pension, rather it only expresses its no objection if pension is paid to the employees of the Corporation and, thus, it was well within the authority and jurisdiction of the Corporation to have framed the guidelines which are contained in the circular dated 25.10.2012 and exclude a particular category of employees from the benefit of the departmental pension.

21. Further submission is that intention of the State Government while issuing the Government Order dated 10.10.2012 was not to cover each and every employee of the Corporation with the benefit of the departmental pension, instead it was left open to the Corporation to take a decision, depending on the contingencies and exigencies of the Corporation, to cover or not to cover with the benefit of departmental pension scheme any set of employees or even to exclude them.

22. Certain other arguments have also been made by learned counsel for the appellant, who has attempted to point out certain flaws in the judgment under appeal.

23 . On behalf of the appellant-Corporation heavy reliance has been placed on the judgment in the case of **Krishena**

Kumar vs. Union of India and others reported in **(1990) 4 SCC 207** wherein, according to the learned counsel for the appellant, the ratio laid down by Hon'ble the Supreme Court in the case of **D. S. Nakara and others vs. Union of India** reported in **(1983) 1 SCC 305** has been diluted. It has been submitted that the facts of the present case are similar to the facts in the case of **Krishena Kumar (supra)** and in view of what has been decided by the Hon'ble Supreme Court in the aforesaid case of **Krishena Kumar (supra)** the writ petitions ought to have been dismissed and accordingly, this appeal deserves to be allowed.

24. On the other hand, Sri Gaus Beg, refuting the submissions made by learned counsel for the appellant, has argued that the Government Order dated 10.10.2012 is referable to Section 34 of the Act, 1950, which clearly provides that any such direction issued by the State Government shall be binding upon the Corporation. He has, thus, contended that in fact right of getting benefit of departmental pension flows from the Government Order dated 10.10.2012 which does not differentiate between two sets of employees, namely, the employees who were getting pension from the EPF Pension Scheme and those who were not getting such pension. He has further submitted that any deviation in the circular dated 25.10.2012 from the stipulations and prescriptions available in the Government Order dated 10.10.2012 would not be permissible in view of the mandate of Section 34 of the 1950 Act. The submission is that in fact the circular dated 25.10.2012 could not over ride the Government Order dated 10.10.2012 and thus exclusion of those employees from the benefit of departmental pension who were getting pension under the EPF Pension Scheme is absolutely arbitrary and has, thus, rightly been quashed by learned Single Judge while passing the judgment and order under appeal.

25. Having heard the learned counsel for the parties, what we notice is that there is no dispute between the parties that petitioners are those employees who were initially appointed in the Corporation against non-pensionable post, however, were subsequently promoted on pensionable posts in the Corporation. It is also not in dispute that at the time of initial appointment of the petitioners against non-pensionable post there were no statutory service rules or regulations governing the conditions of their service. It is only in the year 1981 that the service conditions of the employees of the Corporation were sought to be regulated by framing the service regulations in terms of the provision contained in Section 45 of 1950 Act. It is also not in dispute that all the petitioners retired before issuance of the Government Order dated 10.10.2012 followed by the circular of the Corporation, dated 25.10.2012. The parties also do not dispute the fact that while in service the employer's contribution to the EPF Pension Scheme was also made, however, the bone of contention between the parties is as to whether the exclusion of the petitioners and other similarly circumstanced employees from operation of the pension scheme introduced by the Government Order 10.10.2012 read with the circular dated 25.10.2012 is lawful.

26. As observed above, U.P. State Roadways Corporation has been established and incorporated under Sections 3 and 4 of the 1950 Act. It is, thus, a statutory Corporation having an entity distinct from that of a Government

department. The affairs of the Corporation are, thus, to be governed by the scheme of the 1950 Act and the prescriptions available therein.

27. Section 44 of the 1950 Act empowers the State Government to make rules by way of a notification to be published in the official gazette, to give effect to the provisions of the said Act.

28. Section 45 empowers the Corporation to make regulations, of course, with the previous sanction of the State Government which may be not inconsistent with the provisions of 1950 Act and the rules made, if any, under Section 44.

29. Section 34 contains a provision which is very significant and relevant to decide the controversy which has arisen in this case. It empowers the State Government to give general instructions to the Corporation which are to be followed by the Corporation. Section 34 further provides that such directions can be issued after consultation with the Corporation and such instructions or directions relate to recruitment, condition of service and training of employees, wages to be paid and reserves to be maintained and further disposal of the profits and stocks of the Corporation. Section 34 of the 1950 Act is extracted herein below for ready reference :-

"Section 34. Directions by the State Government.--(1) The State Government may, after consultation with a Corporation established by such Government, give to the Corporation general instructions to be followed by the Corporation, and such instructions may include directions relating to the recruitment, conditions of service and training of its employees, wages to be paid to the employees, reserves to be maintained by it and disposal of its profits or stocks.

(2) In the exercise of its powers and performance of its duties under this Act, the Corporation shall not depart from any general instructions issued under sub-section (1) except with the previous permission of the State Government."

30. From a bare perusal of the above quoted provision contained in Section 34 of 1950 Act, it is abundantly clear that the State Government has been statutorily empowered to issue mandatory directions to the Corporation on certain subjects including the conditions of service. It is not in dispute that payment of pension forms a condition of service and, accordingly, there cannot be any doubt about the power of the State Government emanating from Section 34 of 1950 Act to issue instructions or give directions to the Corporation in respect of conditions of service of the employees of the Corporation.

31. So far as the petitioners in these matters are concerned, the Government Order dated 20.10.2004 and the related circular dated 26.12.2005 do not have any application, rather these petitioners would be governed by the Government Order dated 10.10.2012 and circular dated 25.10.2012. Thus we would discuss the nature of the directions issued in the Government Order dated 10.10.2012 and the prescriptions available in the circular dated 25.10.2012.

32. From a perusal of the Government Order dated 10.10.2012, it is clear that the same was issued in consultation with the Corporation as the said Government Order

itself makes a reference of a letter of the Finance Controller of the Corporation. It appears that some proposal was made by the Finance Controller of the Corporation, on which the government issued the order dated 10.10.2012. The said government order, as observed above, provides that those employees of the Corporation who were initially appointed against non-pensionable post but were further promoted on a pensionable post between 01.06.1972 to 19.06.1981 shall be eligible for grant of pension and on this the State Government gives its no objection. The Government Order clearly states that further action may be taken by the Corporation according to the stipulation made in the Government Order dated 10.10.2012. Under the scheme of the 1950 Act, there is no other provision which empowers the State Government to give direction to the Corporation except Section 34 which empowers the State Government to give general instructions which are to be followed by the Corporation.

33. The language in which the provisions of Section 34 are couched does not leave any doubt in our mind that any such instruction referable to Section 34 of the 1950 Act are binding on the Corporation. In fact the Corporation does not have any escape of not following or not abiding by any instructions issued or directions given by the State Government to it under Section 34 of the Act, 1950.

34. Sub Section 2 of Section 34 mandatorily prohibits the Corporation from departing or deviating from instruction issued by the Government except with the previous permission of the State Government.

35. The submission of the learned counsel for the appellant that the Government Order dated 10.10.2012 only expresses its no objection for the reason that it is to be read along with the prescriptions available in the Government Order dated 20.10.2004, in our considered opinion, is highly misconceived for the reason that the Government Order dated 10.10.2012 clearly directs the Corporation to take further action in terms of the stipulations made therein. Further, learned counsel for the appellant has failed to show any provision to us which requires no objection of the State Government in case of any policy decision. If the Government Order dated 10.10.2012 was to be mandatorily followed as per the mandate of Section 34 of 1950 Act, it was not open to the Corporation to provide anything other than what is provided in the Government Order dated 10.10.2012. The Government Order dated 10.10.2012 does not differentiate between the employees who were getting pension under the EPF Pension Scheme and those who were not getting such benefit. However, contrary to the stipulation available in the Government Order dated 10.10.2012, the Corporation while issuing the circular dated 25.10.2012 has drawn such a distinction which in our considered opinion was legally impermissible for what has been provided under Section 34 of the 1950 Act.

36. It is worth noticing here that nothing has been shown to us from where we can infer that any permission by the State Government was ever accorded to the Corporation, as contemplated in Section 34 (2) of the Act. In absence of any such permission the Corporation could not have deviated in any manner from the stipulations available in the Government Order dated 10.10.2012.

37. What we have observed about the mandatory nature of Section 34 of 1950 Act is fortified by a decision of Hon'ble Supreme Court in the case of **S. P. Dubey**

vs. Madhya Pradesh State Road Transport Corporation and another reported in **1991 Supp (1) SCC 426.**

38. So far as the submission made by learned counsel for the appellant that the circular dated 25.10.2012 was a policy decision in the form of guidelines is concerned, we may state that even such guidelines or the policy decision could not go beyond the mandate of the State Government contained in the Government Order dated 10.10.2012. Any decision of any nature to be taken by the Corporation has to be subservient to the directions or instructions given or issued by the State Government which are referable to Section 34 of the 1950 Act. It is also noticeable at this juncture itself that circular dated 25.10.2012 clearly makes a mention of what has been provided for in the Government Order dated 10.10.2012. Hence, having noticed the stipulations and prescriptions available in the Government Order dated 10.10.2012, it was not open to the Corporation to have provided anything other than what has been provided by the Government Order dated 10.10.2012.

39. So far as the submission of learned counsel for the appellant that in absence of any option having been exercised by the petitioners pursuant to the circular dated 25.10.2012 it will be deemed that the petitioners were not covered by the said benefit, we may only notice that the circular dated 25.10.2012 was issued at a time when the petitioners had retired from the service of the Corporation. There is nothing on record to show that these petitioners were ever required by the Corporation by any written or even oral notice to them to exercise their options as per the stipulations made in the circular dated 25.10.2012. The submission by the learned counsel for the appellant that the circular was general in nature and it was not required to be served individually on each and every employee will have no application or bearing in this case for the reason that such a contention may be true (though even this is argueable) in respect of serving employees but for the employees who had retired from the service of Corporation, this refuge to the appellant is not available. This issue has, in fact, been elaborately dealt with by learned Single Judge in his judgment and order under appeal.

40. Drawing attention of the Court to a paragraph mentioned by Hon'ble Single Judge, it has been stated that it was never an admitted fact that the petitioners were entitled to get regular departmental pension. The said paragraph, we are afraid, has not been read by the appellant in conjunction with the discussions made in rest of the judgment and accordingly no flaw worth the name can be found therein.

41. The submission made by learned counsel for the appellant in this regard thus merits rejection, which is hereby rejected.

42. As regards the judgment relied upon by learned counsel for the appellant in the case of **Krishena Kumar (supra)** it is observed that there cannot be any dispute as regards the ratio laid down by the Hon'ble Apex Court in the said case that the dependent on the fact situation even pension retirees may not necessarily form a homogeneous class, however, the facts of the present case are that though the State Government while issuing the Government Order dated 10.10.2012 did not differentiate between two separate groups of employees but it is only the Corporation which created a separate class of

employees who were paid pension form EPF Pension scheme. As already observed above, it was not open to the Corporation to have deviated from what has been provided by the State Government in its order dated 10.10.2012 and, thus, the reliance placed by learned counsel for the appellant on the case of **Krishena Kumar (supra)** does not come to the rescue of the appellant.

43. In view of the discussions made and the reasons given herein above, in our considered opinion, special appeals are highly misconceived, which are hereby **dismissed.**

44. However, we provide that benefit of the judgment and order passed by learned Single Judge, shall, thus now be made available within a period of two months from the date a certified copy of this order is presented before the authority concerned.

45. In the facts of the case, cost is made easy.

(2021)09ILR A1000
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.09.2021

BEFORE

THE HON'BLE RAJAN ROY, J.
THE HON'BLE RAVI NATH TILHARI, J.

Service Bench No. 1426 of 2021

Devendra Kumar Mishra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Suresh Chandra Tiwari

Counsel for the Respondents:
C.S.C.

A. Service Law – UP Public Services (Tribunals) Act, 1976 – Section 5 – UP Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 – Rule 4(1) (b) (iv), 14 (2), 23 and 25 – Punishment – Claim petition before Tribunal – Limitation of one year – Filing of representation under Rule 25 on 10.01.2019, it's effect in counting limitation – Held, remedy by way of representation to approach the Government under Rule 25 of the Rules, 1991 cannot be said to be a remedy available under the service rules – Revision under Rule 23 dismissed on 14.03.2013 is final order – Period of limitation of one year to file claim petition would be counted from the date of order on revision and on expiry of one year the claim petition became barred. (Par 23 and 24)

Writ petition dismissed. (E-1)

Cases relied on :-

1. S. S.Rathore Vs St. of M.P. (1989) 4 SCC 582

2. C. Jacob Vs Director of Geology & Mining & anr. 2008 (10) SCC 115

3. U.O.I. Vs Har Dayal; 2010 (1) SCC 394

4. St.of U.P. & anr. Vs Vivekanand Singh & anr.; 2015 (4) AWC 4130 (LB) (DB),

5. Prem Swaroop Singhal Vs St. of U.P. & ors. 2017(4) AWC 3915 (LB) (DB)

(Delivered by Hon'ble Ravi Nath Tilhari, J.)

1. Heard Sri Suresh Chandra Tiwari, learned counsel for the petitioner and Sri Manjeev Shukla, learned Additional Chief Standing Counsel appearing for opposite parties.

2. The writ petition has been filed challenging inter alia the judgment and order dated 06.02.2020 passed by the State

Public Service Tribunal, Lucknow in reference No. 896 of 2019: Devendra Kumar Mishra Vs. State of U.P. and others, by which the reference/claim petition filed by the petitioner was rejected being barred by limitation. The prayers made in the petition are as under:

"i. Issue a writ order or direction in the nature of certiorari quashing the impugned order dated 6.2.2020 passed by State Public Service Tribunal Lucknow as well as punishment order dated 5.5.2012 passed by Additional Superintendent of Police Traffic Lucknow and order dated 29.09.2012 passed by appellate authority and order dated 14.03.2013 passed by revisional authority contained in Annexure no.1,5,7 and 8 to the writ petition in the interest of justice.

ii. Issue a writ order or direction in the nature of mandamus commanding and directing opposite parties to consider the case of the petitioner for promotion on the post of Head Constable in the interes of justice.

iii. Issue a writ order or direction which deemed fit and proper may kindly be passed in favour of the petitioners.

iv. Allow the writ petition with costs. "

3. The petitioner was appointed on the post of Constable Civil Police on 01.01.1987 and during his posting at Lucknow Police Line, a preliminary enquiry was held and in view of the preliminary inquiry report dated 03.11.2021, the petitioner was served with a Show Cause Notice dated 23.12.2011 under Rule 14 (2) of the U.P. Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 (herein after referred to as "Rules, 1991") for imposing the penalty of "censure' under Rule 4 (1) (b) (iv) of the Rules, 1991. The petitioner filed reply dated 09.01.2012.

4. Another Show Cause Notice dated 24.01.2012 was issued on the same charges for imposing fine equivalent to one month salary under Rule 4 (1) (b) (ii) of the Rules, 1991 against which the petitioner filed reply dated 08.02.2012. The Additional Superintendent of Police, Traffic, Lucknow vide order dated 05.05.2012 imposed the penalty of fine equivalent to one month salary. The petitioner preferred departmental appeal, which was dismissed on 29.09.2012 and his revision against this order was also rejected on 14.03.2013 by the Inspector General of Police, Lucknow Zone, Lucknow. Thereafter, the petitioner had filed a representation dated 10.01.2019 under Rule 25 of the Rules, 1991 and during its pendency, the petitioner filed Reference No. 896 of 2019 which has been rejected by the U.P. State Public Service Tribunal, as barred by limitation.

5. Learned counsel for the petitioner has submitted that as the petitioner had preferred representation on 10.01.2019 as provided by rule 25 of the Rules, 1991, the claim petition filed on 27.05.2019 was within the period of limitation of one year as provided under Section 5 (1) (b) (i) of the U.P. Public Services (Tribunals) Act, 1976 (in short "Act, 1976) and as such the Tribunal erred in rejecting the reference as barred by limitation.

6. Sri Manjeev Shukla, learned Additional Chief Standing Counsel has submitted that the claim petition was filed on 27.05.2019 whereas the petitioner's revision was dismissed on 14.03.2013 and

as such the claim petition was preferred after more than six years. The claim petition was highly time barred and has been rightly rejected by the Tribunal. He further submitted that mere filing of representation under Rule 25 of the Rules, 1991 would not extend the period of limitation nor would it revive a stale claim. The representation, itself, was filed in the year 2019 and was also not maintainable nor permissible under Rule 25 of the Rules, 1991, as the petitioner had already availed the remedy of appeal which was rejected way back in the year 2012. He submitted that the Tribunal did not commit any illegality in rejecting the claim petition as barred by limitation.

7. We have considered the submissions advanced by the learned counsels for the parties and perused the material on record.

8. It would be appropriate to refer the provisions of Sections 4 and 5 of the U.P. Public Services (Tribunals) Act, 1976, at this very stage.

9. Section 4 of the U.P. Public Services (Tribunals) Act, 1976 reads as under:

*"**4. Reference of claim to Tribunal.-(1)** Subject to the other provision of this Act, a person who is or has been a public servant and is aggrieved by an order pertaining to a service matter within the jurisdiction of the Tribunal, may make a reference of claim to the Tribunal for the redressal of his grievance.*

Explanation.-For the purpose of this sub-section "order" means an order or omission or in-action of the State Government or a local authority or any other Corporation or company referred to in clause (b) of Section 2 or of an officer, committee or other body or agency of the State Government or such local authority or Corporation or company:

Provided that no reference shall, subject to the terms of any contract, be made in respect of a claim arising out of the transfer of a public servant.

Provided further that in the case of the death of a public servant, his legal representative, and where there are two or more such representatives, all of them jointly, may make a reference to the Tribunal for payment of salary, allowances, gratuity, provident fund, pension and other pecuniary benefits relating to services due to such public servant.

(2) Every reference under sub-section (1) shall be in such form and be accompanied by such documents or other evidence and by such fee in respect of the filling of such reference and by such other fees for the services or execution of processes, as may be prescribed.

(3) On receipt of a reference under sub-section (1), the Tribunal shall, if satisfied after such inquiry as it may deem necessary that the reference is fit for adjudication or trial by it, admit such reference and where the Tribunal is not so satisfied, it shall summarily reject the reference after recording its reasons.

(4) Where a reference has been admitted by the Tribunal under sub-section (3), every proceeding under the relevant service rules or regulation or any contract as to redressal of grievances in relation to the subject-matter of such reference pending immediately before such admission

shall abate, and save as otherwise directed by the Tribunal, no appeal or representation in relation to such matter shall thereafter be entertained under such rules, regulations or contract.

(5) The Tribunal shall not ordinarily admit a reference unless it is satisfied that the public servant has availed of all the remedies available to him under the relevant service rules, regulations or contract as to redressal of grievances.

(6) For the purposes of sub-section (5) a public servant shall be deemed to have availed of all the remedies available to him if a final order has been made by the State Government, an authority or officer thereof or other person competent to pass such order under such rules or regulations or contract rejecting any appeal preferred or representation made by such public servant in connection with the grievance:

Provided that where no final order is made by the State Government, authority officer or other person competent to pass such order with regard to the appeal preferred or representation made by such public servant within six months from the date on which such appeal was preferred or representation was made, the public servant may, by a written notice by registered post, require such competent authority to pass the order and if the order is not passed within one month of the service of such notice, the public servant shall be deemed to have availed of all the remedies available to him.

(7) For the purposes of sub-section (5) and(6) any remedy available to the public servant by way of submission of a memorial to the Governor or to any other functionary shall not be deemed to be one of the remedies, which are available unless the public servant had elected to submit such memorial.

10. Section 5 of the U.P. Public Services (Tribunals) Act, 1976 reads as under:

5. Powers and procedure of the Tribunal.-(*1)(a) The Tribunal shall not be bound by the procedure laid down in the Code of Civil Procedure, 1908 (Act 5 of 1908), or the rules of evidence contained in the Indian Evidence Act, 1872(Act 1 of 1872), but shall be guided by the principles of natural justice, and subject to the provisions of this section and of any rules made under Section 7, the Tribunal shall have power to regulate its own procedure (including the fixing of places and times of its sittings and deciding whether to sit in public or in private):*

Provided that where, in respect of the subject- matter of a reference, a competent court has already passed a decree or order or issued a writ or direction, and such decree, order, writ or direction has become final, the principle of res judicata shall apply;

(b) The provisions of the Limitation Act, 1963 (Act 36 of 1963) shall mutatis mutandis apply to reference under section 4 as if a reference were a suit filed in civil court so, however, that:-

(i) notwithstanding the period of limitation prescribed in the Schedule to the said Act, the period of limitation for such reference shall be one year;

(ii) in computing the period of limitation the period beginning with the date on which the public servant makes a

representation or prefers an appeal, revision or any other petition (not being a memorial to the Governor), in accordance with the rules or orders regulating his conditions of service, and ending with the date on which such public servant has knowledge of the final order passed on such representation, appeal, revision or petition, as the case may be, shall be excluded:

Provided that any reference for which the period of limitation prescribed by the Limitation Act, 1963 is more than one year, a reference under Section 4 may be made within the period prescribed by that Act, or within one year next after the commencement of the Uttar Pradesh Public Services (Tribunals) (Amendment) Act, 1985, whichever period expires earlier :

Provided further that nothing in this clause as substituted by the Uttar Pradesh Public Service (Tribunal) (Amendment) Act, 1985, shall affect any reference made before and pending at the commencement of the said Act.

(2) The Tribunal shall decide every reference expeditiously and ordinarily, every case shall be decided by it on the basis of perusal of documents and representations, and of oral or written arguments, if any.

(3) The Tribunal may admit in evidence in lieu of any original document, a copy thereof attested by a gazetted officer or by a notary.

(4) The Tribunal shall not ordinarily call for or allow to be adduced oral evidence, and may, if necessary, require any party to file an affidavit.

(5) The Tribunal shall, for the purpose of holding any inquiry under this Act, have, subject to the provisions of sub-section (1), the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908(Act V of 1908), while trying a suit, in respect of the following matters:-

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) subject to the provisions of Sections 123 and 124 of the Indian Evidence Act, 1872(Act I of 1872), requisitioning any public record or copy thereof from any office;

(e) issuing commission for the examination of witnesses or documenstes;

(f) recording a lawful agreement, compromise or satisfaction and making an order in accordance therewith;

(g) reviewing its decision;

(h) dismissing a reference for default or deciding it ex parte;

(i) setting aside an order of dismissal for default or an order passed by it ex parte;

(j) passing interlocutory orders pending final decision of any reference on such terms, if any, as it thinks fit to impose;

(k) any other matter which may be prescribed.

(5-A) No interim order (whether by way of injunction or stay or in any other manner) shall be passed by the tribunal on or in any proceedings relating to any reference unless--

(a) copies of such reference and application for interim order, along with all documents in support of the plea for such interim order are furnished to the party against whom such petition is filed, and

(b) at least fourteen days' time is given to such party to file a reply and opportunity is given to it to be heard in the matter:

Provided that the Tribunal may dispense with the requirements (a) and (b) and may, for reasons to be recorded, make an interim order, as an exceptional measure, if it is satisfied that it is necessary so to do for preventing any loss to the petitioner which cannot be adequately compensated in money, but any such interim order shall, if it is not vacated earlier, cease to have effect on the expiry of the period of 14 days from the date on which it is made unless the said requirements have been complied with before the expiry of the said period and the Tribunal has continued the operation of that order.

(5-B) Notwithstanding anything in the foregoing sub-sections, the Tribunal shall have no power to make an interim order (whether by way of injunction or stay or in any other manner) in respect of an order made or purporting to be made by an employer for the suspention, dismissal, removal, reduction in rank, termination, compulsory retirement or reversion of a public servant, and every interim order (whether by way of injunction or stay or in any other manner), in respect of such matter, which was made by a Tribunal before the date of commencement of this sub-section and which if in force on that day, shall stand vacated.

(5-C) Notwithstanding anything in the forgoing sub-sections, the Tribunal shall have no power to make an interim order (whether by way of injunction or stay or in any other manner) in respect of an adverse entry made by an employer against a public servant, and every interim order (whether by way of injunction or stay or in any other manner) in respect of an adverse entry, which was made by a Tribunal before the commencement of the Uttar Pradesh Public Services (Tribunal) (Amendment) Act, 2000 and which is in force on the date of such commencement shall stand vacated.

(6) A declaration made by the Tribunal shall be binding on the claimant and his employer as well as on any other public servant who has, in respect of any claim affecting his interest adversely, been given an opportunity of making a representation against it, and shall have the same effect as a declaration made by a court of law.

(7) The order of the Tribunal finally disposing of a reference shall be executed in the same manner in which any final order of the State Government or other authority or officer or other person competent to pass such order under the relevant service rules as to redressal of grievances in any appeal preferred or representation made by the claimant in

connection with any matter relating to his employment to which the reference relates would have been executed.

(8)(a) The employer may appoint a public servant or a legal practitioner, to be known as the Presenting Officer, to present its case before the Tribunal.

(b) The public servant may take the assistance of any other public servant to present his case before the Tribunal on his behalf, but may not engage a legal practitioner for the purpose unless either (i) the Presenting Officer appointed by the employer is a legal practitioner, or (ii) the Tribunal, having regard to the circumstances of the case, so permits.

(9) Any proceeding before the Tribunal shall be deemed to be a judicial proceeding within the meaning of Sections 193, 219 and 228 of the Indian Penal Code(Act XLV of 1860).

(10) A reference or a reply to a reference or an application may be singed either by the appointing authority or by the Presiding Officer or, where the appointing authority is the Governor, by an officer not below the rank of Deputy Secretary authorized by the State Government in this behalf, and in the case of a local authority, corporation or company by the Chief Executive Officer or Secretary thereof, as the case may be.

11. A perusal of Section 4 of the Act, 1976 shows that the Tribunal shall not ordinarily admit a reference unless it is satisfied that the public servant has availed of all the remedies available to him under the relevant service rules, regulations or contract as to redressal of grievances, meaning thereby, that if the public servant is aggrieved by an order pertaining to a service matter he may make reference to the Tribunal for the redressal of his grievances, but for making such reference, the public servant has to first avail of all the remedies available under the service rules, regulation or contract as to redressal of grievances, otherwise, the Tribunal shall not ordinarily admit such a reference.

12. Section 4 of the Act, 1976, which speaks of the public servant to avail of all the remedies available before filing the claim petition, refers to those remedies which are provided by the relevant service rules, regulations or the contract for redressal of grievances. If a remedy is not provided by the service rules, regulations or the contract governing the public servant then such other remedy is not contemplated by Section 4. Further, such statutory remedies are to be availed of within the period of limitation prescribed therefor.

13. Section 5 (1) (b) of the Act, 1976 makes applicable the provisions of the Limitation Act, 1963 (Act 36 of 1963) mutatis mutandis, to reference under Section 4 of the Act, 1976 as if the reference was a suit filed in civil court, but the period of limitation for such reference shall be one year, notwithstanding the period of limitation prescribed in the schedule of the Limitation Act.

14. In **S. S.Rathore Vs. State of Madhya Pradesh (1989) 4 SCC 582** the Hon'ble Supreme Court, in the context of Section 20 of the Administrative Tribunals Act,1985, wherein also, the public servant was required to avail of all the remedies available to him under the relevant service rules as to redressal of grievances before approaching the Central Administrative Tribunal, held that the cause of action shall

be taken to arise not from the date of the original adverse order but on the date when the order of the higher authority, where a statutory remedy is provided entertaining the appeal or representation, is made and where no such order is made, though the remedy has been availed of, a six months' period from the date of preferring of the appeal or making of the representation shall be taken to be the date when cause of action shall be taken to have first arisen, but, made it clear that this principle may not be applicable when the remedy availed of has not been provided by law and the repeated unsuccessful representations not provided by law are not governed by this principle.

It is appropriate to refer paragraphs 15 to 20 of the **S.S.Rathore (supra)** as under:

"15. In several States the Conduct Rules for government servants require the administrative remedies to be exhausted before the disciplinary orders can be challenged in court. Section 20(1) of the Administrative Tribunals Act, 1985 provides:

"20. (1) A Tribunal shall not ordinarily admit an application unless it is satisfied that the applicant had availed of all the remedies available to him under the relevant service rules as to redressal of grievances."

16. The Rules relating to disciplinary proceedings do provide for an appeal against the orders of punishment imposed on public servants. Some Rules provide even a second appeal or a revision. The purport of Section 20 of the Administrative Tribunals Act is to give effect to the Disciplinary Rules and the exhaustion of the remedies available thereunder is a condition precedent to maintaining of claims under the Administrative Tribunals Act. Administrative Tribunals have been set up for government servants of the Centre and several States have already set up such Tribunals under the Act for the employees of the respective States. The law is soon going to get crystallized on the line laid down under Section 20 of the Administrative Tribunals Act.

17. In this background if the original order of punishment is taken as the date when cause of action first accrues for purposes of Article 58 of the Limitation Act, great hardship is bound to result. On one side, the claim would not be maintainable if laid before exhaustion of the remedies; on the other, if the departmental remedy though availed is not finalised within the period of limitation, the cause of action would no more be justiciable having become barred by limitation. Redressal of grievances in the hands of the departmental authorities take an unduly long time. That is so on account of the fact that no attention is ordinarily bestowed over these matters and they are not considered to be governmental business of substance. This approach has to be deprecated and authorities on whom power is vested to dispose of appeals and revisions under the Service Rules must dispose of such matters as expeditiously as possible. Ordinarily, a period of three to six months should be the outer limit. That would discipline the system and keep the public servant away from a protracted period of litigation.

18. We are satisfied that to meet the situation as has arisen here, it would be appropriate to hold that the cause of action

first arises when the remedies available to the public servant under the relevant Service Rules as to redressal are disposed of.

19. The question for consideration is whether it should be disposal of one appeal or the entire hierarchy of reliefs as may have been provided. Statutory guidance is available from the provisions of sub-sections (2) and (3) of Section 20 of the Administrative Tribunals Act. There, it has been laid down:

"20.(2) For the purposes of sub-section (1), a person shall be deemed to have availed of all the remedies available to him under the relevant service rules as to redressal of grievances,-

(a) if a final order has been made by the government or other authority or officer or other person competent to pass such order under such rules, rejecting any appeal preferred or representation made by such person in connection with the grievance; or

(b) where no final order has been made by the government or other authority or officer or other person competent to pass such order with regard to the appeal preferred or representation made by such person, if a period of six months from the date on which such appeal was preferred or representation was made has expired.

3) For the purposes of sub-sections (1) and (2), any remedy available to an applicant by way of submission of a memorial to the President or the Governor of a State or to any other functionary shall not be deemed to be one of the remedies which are available unless the applicant had elected to submit such memorial."

20. We are of the view that the cause of action shall be taken to arise not from the date of the original adverse order but on the date when the order of the higher authority where a statutory remedy is provided entertaining the appeal or representation is made and where no such order is made, though the remedy has been availed of, a six months' period from the date of preferring of the appeal or making of the representation shall be taken to be the date when cause of action shall be taken to have first arisen. We, however, make it clear that this principle may not be applicable when the remedy availed of has not been provided by law. Repeated unsuccessful representations not provided by law are not governed by this principle."

15. In **C. Jacob Vs. Director of Geology and Mining and another 2008 (10) SCC 115,** the Hon'ble Supreme Court held that the representation with respect to the matters which have become stale or barred by limitation even if considered and rejected would not give a fresh cause of action or revive a stale claim. Paragraph Nos. 10 and 11 of **C. Jacob (supra)** are being quoted as under:

"10. Every representation to the Government for relief, may not be replied on merits. Representations relating to matters which have become stale or barred by limitation, can be rejected on that ground alone, without examining the merits of the claim. In regard to representations unrelated to the Department, the reply may be only to inform that the matter did not concern the Department or to inform the appropriate Department. Representations with incomplete particulars may be replied by seeking relevant particulars. The replies to such representations, cannot furnish a

fresh cause of action or revive a stale or dead claim.

11. When a direction is issued by a court / tribunal to consider or deal with the representation, usually the directee (person directed) examines the matter on merits, being under the impression that failure to do so may amount to disobedience. When an order is passed considering and rejecting the claim or representation, in compliance with direction of the court or tribunal, such an order does not revive the stale claim, nor amount to some kind of "acknowledgment of a jural relationship" to give rise to a fresh cause of action."

16. In **Union of India Versus Har Dayal 2010 (1) SCC 394** also the Hon'ble Supreme Court has held that merely giving representation will neither extend the limitation nor wipe out the delay and laches.

17. In **State of U.P. and another Vs. Vivekanand Singh and another 2015 (4) AWC 4130 (LB) (DB)**, this Court held that on a conjoint reading of Sections 4 and 5 (1) (b) of the Act, it is evident that if a remedy has been availed under the statutory service rules and final orders are passed therein, the limitation will be counted from the date of passing of final order, subject of course to the remedy having been availed within the period of limitation prescribed, if any for the said purpose prior to filing of the claim petition. It is appropriate to refer paragraph 19 of **Vivekanand Singh (supra)** as under:

" 19. Thus, on a conjoint reading of Sections 4 and 5 (1) (b) of the Act it is making evident that if a remedy has been availed under the statutory service the rules and final orders are passed therein, the limitation will be counted from the date of passing of final order, and not from the date of passing of the original order. If the remedy has been availed, but no final order has been passed and a period of six months has expired from the date of availing such remedy, a one month's written notice may be given and on expiry of the said period it is to be deemed that the remedy as provided under the Rules had been availed by the public servant and a claim petition would be maintainable and the same would be treated within the limitation prescribed under Section 5 (1) (b) (i) subject of course to the remedy having been availed within the period of limitation prescribed, if any, for thė said purpose, prior to filing of the claim petition."

18. In **Prem Swaroop Singhal Vs. State of U.P. and others reported in 2017(4) AWC 3915 (LB) (DB)** this Court has held that the period consumed in decision of an appeal, revision, representation will be excluded only when such remedy is provided under Rules or Orders regulating conditions of service and availed by public servant and not otherwise. When there is no such provision under Rules or Orders regulating conditions of service, Section 5 (1) (b) (ii) will have no application and hence limitation will be only one year from that date when cause of action arose.

19. From the aforesaid, it is well settled that in order to raise the plea that the claim petition is within the period of limitation and not barred by it, it must be shown that the remedy been followed or availed of was a statutory remedy i.e. provided by the relevant service rules, regulations or the contract relating to public servant and such remedy was availed of

within the period of limitation prescribed, if any.

20. Keeping in view the settled principles as aforesaid, we now proceed to consider the merit of the submission of the petitioner's counsel that as representation was filed under rule 25 of the Rules, 1991 on 10.01.2019 the claim petition filed on 27.05.2019 was not barred by limitation.

21. The question which requires consideration is as to whether the remedy of representation under rule 25 of the Rules, 1991 was a statutory remedy available to the petitioner before filing of the claim petition. If the answer is in the negative and the claim petition had become time barred on the date of its filing or even before filing of the representation under rule 25, such representation would not revive the time barred claim of the petitioner.

22. Now, it would be appropriate to reproduce Rule 25 of the Rules, 1991 which reads as follows:

*"**25. Powers of Government.** - Notwithstanding anything contained in these Rules, the Government may, on its own motion or otherwise call for and examine the records of any case decided by an authority, subordinate **to it in the exercise of any power conferred on such authority by these rules and against which no appeal has been preferred under these rules and***

(a) confirm , modify or revise the order passed by such authority , or

(b) direct that a further inquiry be held in the case ; or (c) reduce or enhance the penalty imposed by the order ; or

(d) make such other order in the case as it may deem fit :

Provided that where it is proposed to enhance the penalty imposed by any such order the Police Officer concerned shall be given an opportunity of showing cause against the proposed enhancement ."

23. A perusal of Rule 25 of the Rules, 1991 shows that notwithstanding anything contained in the Rules, 1991 the Government may on its own motion or otherwise call for and examine the records of any case decided by authority subordinate to it in the exercise of any power conferred on such authority by the Rules, 1991 and against which no appeal has been preferred under these Rules. We emphasize the expression "against which no appeal has been preferred under the Rules, 1991". So the power of the Government under Rule 25, can be invoked by the public servant if the appeal has not been preferred under the Rules, 1991 against the order of punishment pertaining to his service matter. Rule 20 of the Rules, 1991 provides for appeal against the order of punishment mentioned in sub-clauses (i) to (iii) of Clause (a) and sub-clauses (i) to (iv) of Clause (b) of Rule 4, to the authorities mentioned in Rule 20. The order of punishment in the petitioner's case was passed under Rule 4 (1) (b) (ii) which is appealable under Rule 20 and undisputedly the petitioner preferred such appeal, which was dismissed on 29.09.2012. Even the revision preferred under Rule 23 against the said order was dismissed on 14.03.2013. In view thereof the remedy by way of representation to approach the Government under Rule 25 of the Rules, 1991, was not available to the petitioner. Such a remedy cannot be said to be a

remedy available under the service rules, so far as the petitioner is concerned, to have been availed of before filing the claim petition.

24. The petitioner's revision was dismissed on 14.03.2013, which is the final order under the Rules, 1991. The period of limitation of one year to file the claim petition would therefore be counted from this date and on expiry of one year the claim petition became barred, in view of the settled proposition of law that period of limitation once starts running would not stop in the absence of any statutory provision, and would run it's full course. Filing of representation under Rule 25 on 10.01.2019, which representation was even not maintainable, would not revive the petitioner's claim, which had already become time barred in view of the law laid down in the cases of **S.S. Rathore (supra)** and **C. Jacob (supra)** that by filing representation any fresh cause of action can not arise nor it revives stale or dead claim.

25. In view of the aforesaid, we are of the considered view that the remedy under Rule 25 of the Rules, 1991 not being available to the petitioner, the claim petition, admittedly filed after six years of the order of rejection of the petitioner's revision, was barred by limitation under Section 5 (1) (b) of the Act, 1976.

26. The claim petition has rightly been rejected by the Tribunal. The order of the Tribunal is perfectly justified and calls for no interference.

27. The writ petition is dismissed.

(2021)09ILR A1011
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.09.2021

BEFORE

THE HON'BLE MUNISHWAR NATH BHANDARI, A.C.J.
THE HON'BLE AJAY TYAGI, J.

Special Appeal No. 1467of 2012 & other cases

Badri Narain Sharma & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Siddharth Khare, Sri Ashok Khare

Counsel for the Respondents:
C.S.C., Sri Yatindra

A. Service Law – Right of Children to Free and Compulsory Education Act, 2009 – National Council for Teacher Education Act, 1993 – Section 12-A – Post of Assistant Teacher – Compassionate appointment cancelled – Qualification of having TET certificate, non-fulfillment thereof – Its effect – Applicability of Act of 2009 – Held, Section 12-A of the Act of 1993 cannot to operate in conflict to the provisions of the Act of 2009 and notification issued therein. The field is now occupied by the Act of 2009 to provide educational qualification for appointment of teachers – Compassionate appointment cannot be given dehors the statutory provisions only in reference to the GO dated 04.09.2000. (Para 21, 24 and 25)

B. Interpretation of Statute – Statutory provision and administrative order – Conflict – Overriding effect – Held, Act of 1993 has no overriding effect over the Act of 2009 – Section 12-A of the Act of 1993 cannot govern the provisions of the Act of 2009 in absence of non-obstante clause rather protection is in reference to their Regulation to provide qualification – Held further, Administrative order cannot stand in conflict with statutory provisions.(Para 15 and 25)

Appeal dismissed. (E-1)

Cases relied on :-

1. Basic Education Board, U.P. Vs Upendra Rai & ors. (2008) 3 SCC 432

2. Irrigineni Venkata Krishna Vs Government of A.P., (2010) 15

SCC 319

3. State of U.P. & ors. Vs Bhupendra Nath Tripathi & ors. (2010) 13 SCC 203

(Delivered by Hon'ble Munishwar Nath Bhandari, A.C.J.)

1. Heard Sri Ashok Khare, learned Senior Advocate, assisted by Sri Siddharth Khare, learned counsel for the petitioner-appellants and Sri Gopal Chandra Saxena, learned Standing Counsel for the State-respondents.

2. By this batch of appeals, the challenge is made to the judgment dated 25th July, 2012 whereby the writ petitions preferred by the petitioner-appellants were dismissed. The writ petitions were preferred to challenge the order dated 12th June, 2012 whereby Secretary, Basic Education Board, U.P. Allahabad directed for disengagement of Assistant Teachers appointed on compassionate ground. The appointments to the petitioner-appellants were on the terms and conditions contained in the Government Order dated 4th September, 2000. The petitioner-appellants were to acquire the BTC training qualification to get regular appointments. Some of the petitioner-appellants were sent for BTC training but pursuant to the order dated 12th June, 2012 of the Uttar Pradesh Basic Education Board, all the petitioner-appellants were disengaged on the ground that untrained teachers could not have been appointed after enforcement of the Uttar Pradesh Right of Children to Free and Compulsory Education Rules, 2011 (for short "Rules of 2011").

3. The controversy raised in these appeals mainly rests on the Rules of 2011 and the Right of Children to Free and Compulsory Education Act, 2009 (for short "Act of 2009"). After the enactment of Act of 2009, and Notification dated 23rd August, 2010 under Section 23 of the Act of 2009, the appointment on the post of teachers could not have been given unless one has passed the Teachers Eligibility Test (for short "TET"). It is an admitted fact that none of the petitioner-appellants were possessing TET certificate prior to their appointment or giving effect to the Rules of 2011.

4. The learned Single Judge had considered the issue in detail and after referring to the provisions of Act of 2009 so as the Rules of 2011 apart from consideration of U.P. Basic Education Ordinance, 1972 and U.P. Basic Education (Teachers) Service Rules, 1981, dismissed the writ petitions.

5. Learned counsel for the appellants submits that the learned Single Judge has referred to the Rules of 2011 given effect from 27th July, 2011 and the Act of 2009 but failed to take note of Section 12-A of the National Council for Teacher Education Act, 1993 (for short "Act of 1993"). It is submitted that Amendment in the Act of 1993 by the Act No. 18 of 2011 was given effect since 1st June, 2012. The appointments of those teachers engaged in pre- primary, primary, upper primary, secondary and senior secondary etc. were saved even if they were not qualified prior to Amending Act of 2011 but has been ignored by the learned Single Judge. He submits that the petitioner-appellants were given appointment on compassionate basis knowing it well that they have not passed out TET, therefore, subsequently they

could not have been disengaged either in reference to the Rules of 2011 or the Act of 2009. Their appointments were otherwise saved by Section 12-A of the Act of 1993.

6. Coming to the facts of this case, it is submitted that on earlier occasion special appeals were dismissed by the Division Bench but on a review petition, the judgment was recalled and matters were transmitted for fresh hearing. The judgment of the learned Single Judge is in ignorance of Section 12-A of the Act of 1993, brought by Amendment of 2011 with effect from 1st June, 2012. Accordingly, the case of the petitioner-appellants should have been governed by the said provision. The proviso to Section 12-A has given protection to all appointments made prior thereto despite such appointments not being in conformity with the qualifications specified in that regard.

7. It is submitted that in exercise of the powers given under Section 23(1) of the Act of 2009, the Central Government designated National Council for Teacher Education as academic authority for laying down qualifications of the teachers. The National Council for Teacher Education issued a notification on 23rd August, 2010 specifying the qualification for the teachers which includes TET. The TET is to be conducted by the State Government or Central Government as was made one of the qualification for the teachers. Section 12-A of the Act of 1993 was brought to save all those appointments made prior to Amendment which include even the requirement of TET certificate.

8. A reference of circular dated 12th June, 2012 issued by the State Government has been given to show requirement of TET with effect from 27th July, 2011 that is the date of enforcement of the Rules of 2011. The reference of the appointments made between 23rd August, 2010 to 27th July, 2011 and subsequently between 27th July, 2011 to 12th June, 2012 has been given. The compassionate appointments given prior to 27th July, 2011 were not affected rather incumbents were continued without the TET certificate while it was given effect on the appointments made subsequent 27th July, 2011. The circular was issued ignoring Section 12-A of the Act of 1993.

9. Learned counsel for the appellants has made reference of the judgment of the Apex court in the case of **Basic Education Board, U.P. Vs. Upendra Rai and others, (2008) 3 SCC 432 and also in the case of Irrigineni Venkata Krishna Vs. Government of Andhra Pradesh, (2010) 15 SCC 319** to support his argument. He has also submitted that compassionate appointments are governed by the Government Order dated 4th September, 2000 which permits appointments of untrained teachers also. The appointment of the petitioner-appellants were in consonance to the aforesaid Government Order as otherwise U.P. Basic Education (Teachers) Service Rules, 1981 are totally silent with regard to compassionate appointment. The field of compassionate appointment is occupied by the Government Order dated 4th September, 2000 thus, the learned Single Judge should have considered the case in reference to the aforesaid apart from Section 12-A of the Act of 1993.

10. The appeals have been contested by the counsel for the non-appellants/respondents. It is submitted that learned Single Judge has considered all the issues in reference to the provisions

applicable to the case. There is no error therein so as to cause interference rather the judgment of the learned Single Judge may be upheld. It has not only considered the provisions of the Act of 2009 but the provisions of the Act of 1993 apart from other provisions. The prayer is accordingly to dismiss the appeals.

11. We are not elaborately discussing the argument of the learned counsel for the non-appellants/respondents at this stage rather it would be discussed during the course of discussion of the arguments of the learned counsel for the appellants.

12. The judgment of the learned Single Judge was earlier tested by the Division Bench of this Court in the batch of appeals. The judgment of the learned Single Judge was upheld finding no infirmity therein. The judgment however reviewed and accordingly listed again for fresh consideration. The writ petition was filed involving various questions for consideration. However, the present appeals were pressed only in reference to Section 12-A of the Act of 1993.

13. The brief facts of the case shows that all the appellants were appointed in the month of August, 2011 on temporary basis. It was in terms of the Government Order where there was a condition to undergo BTC training. The Secretary, Basic Education Board, U.P. Allahabad however issued a circular on 12th June, 2012 and in pursuance to which an order was issued on 29th June, 2012 by the Basic Shiksha Adhikari for cancellation of appointment. It was challenged in bunch of writ petitions which were dismissed by the judgment dated 25th July, 2012. The case of the appellants is that they were appointed as untrained Assistant Teachers on temporary basis with a condition to undergo BTC training. The order of cancellation of appointment came while few appellants were sent for training. The circular dated 12th June, 2012 was not issued in reference to the BTC training but the Act of 2009 and the Rules of 2011. The appointment on the post of teachers was made subject to possession of certificate of TET. Finding appointments dehors the Act and Rules, the order was issued for their cancellation.

14. The issue now raised by the learned counsel for the appellants is in reference to Section 12-A of the Act of 1993 which, according to them, saves all the appointments made on or before giving effect to the Amendment of year 2011 in the Act of 1993. The provision aforesaid is quoted herein for ready reference:

"12-A. Power of Council to determine minimum standards of education of school teachers. - For the purpose of maintaining standards of education in schools, the Council may, by regulations, determine the qualifications of persons for being recruited as teachers in any pre-primary, primary, upper primary, secondary, senior secondary or intermediate school or college, by whatever name called, established, run, aided or recognised by the Central Government or a State Government or a local or other authority;

Provided that nothing in this section shall adversely affect the continuance of any person recruited in any pre-primary, primary, upper primary, secondary, senior secondary or intermediate school or colleges, under any rule, regulation or order made by the Central Government, a State Government, a local or other authority, immediately before

the commencement of the National Council for Teacher Education (Amendment) Act, 2011 solely on the ground of non-fulfilment of such qualifications as may be specified by the Council;

Provided further that the minimum qualifications of a teacher referred to in the first proviso shall be acquired within the period specified in this Act or under the Right of

Children to Free and Compulsory Education Act, 2009 (35 of 2009)]."

15. The main provision gives power to the Council to determine the qualification by a Regulation. It is to maintain the standard of the schools. The first proviso to Section 12-A of the Act of 1993 protect those recruited as teachers under any rule, regulation or order of the Central Government, State Government or local or other authority, immediately before the commencement of the Amendment Act of 2011. It is despite non-fulfilment of the qualifications specified by the Council under its Regulation. The protection under the first proviso is to the qualification specified by the Council in the Regulation and obviously it should be under the Act of 1993 and the Regulation made thereunder. The Act of 1993 has no overriding effect on the Act of 2009. Section 12-A of the Act of 1993 cannot govern the provisions of the Act of 2009 in absence of non-obstante clause rather protection is in reference to their Regulation to provide qualification.

16. A Notification dated 23rd August, 2010 was issued by the Council to provide qualification under Section 23 of the Act of 2009 and not under the Act of 1993. Section 23 of the Act of 2009, as was existing in the year 2011 is quoted hereunder for ready reference:

"23. Qualifications for appointment and terms and conditions of service of teachers. - (1) Any person possessing such minimum qualifications, as laid down by an academic authority, authorised by the Central Government, by notification, shall be eligible for appointment as a teacher.

(2) Where a State does not have adequate institutions offering courses or training in teacher education, or teachers possessing minimum qualifications as laid down under sub-section (1) are not available in sufficient numbers, the Central Government may, if it deems necessary, by notification, relax the minimum qualifications required for appointment as a teacher, for such period, not exceeding five years, as may be specified in that notification:

Provided that a teacher who, at the commencement of this Act, does not possess minimum qualifications as laid down under sub-section (1), shall acquire such minimum qualifications within a period of five years:

(3) The salary and allowances payable to, and the terms and conditions of service of, teacher shall be such as may be prescribed."

17. Sub-section (1) requires possession of the minimum qualifications for appointment as teacher. It is as laid down by the academic authority authorized by the Central Government.

18. It is a fact that in pursuance to the powers given to the Central Government, the NCTE was nominated as academic

authority and notification dated 23rd August, 2010 was issued thereunder to provide the minimum qualification for appointment of teachers. The qualification of TET was provided under the said notification. Section 12-A of the Act of 1993 does not supersede the provisions of the Act of 2009 or the Rules made thereunder. The Act of 1993 is for maintaining standards of the education in the school. The Council under the Act of 1993 is to govern the training course and regulate the institution for the teachers training. The minimum qualification for the appointment of the teachers is now governed by the Act of 2009 and the Rules made thereunder. The Notification dated 23rd August, 2010 was published under the Act of 2009 to provide minimum qualification for the teachers.

19. The Notification issued on 23rd August, 2010 was made applicable without exception to provide minimum qualification for the teachers. The State of U.P. come out with the Rules of 2011 to provide the minimum qualification for the teachers. It was given effect from 27th July, 2011. It is admitted case of the petitioner-appellants that they were appointed on the post of Assistant Teachers subsequent to it. According to Rules of 2011 also one was required to be in possession of the certificate of TET which the petitioner-appellants were not possessing. The qualification prescribed under the Act of 2009 by the notification dated 23rd August 2010 has been enforced by all the States.

20. The first proviso to Section 23 of the Act of 2009 gives protection of five years to the teachers, who at the commencement were not possessing the qualification. It is not for those to be appointed after commencement. Section 12-A of the Act of 1993 cannot be read in conflict to the substantive provisions of the Act of 2009. It is also a fact that appellants have not qualified TET even now, as admitted by their counsel.

21. In view of the above, a candidate was not eligible to be appointed as Assistant Teacher, if he was not in possession of the certificate of TET.

22. The learned Single Judge has elaborately discussed the issue in regard to the operation of the Act of 2009 and the Act of 1993. Both the Acts operate separately. The Act of 1993 was enacted with an object to achieve planned and coordinated development for teacher education system throughout the country. It was to come out with the norms and standards for teachers education system and for the matters connected therewith. The functions of the Council are enumerated in Section 12 of the Act of 1993. The Act of 1993 contemplates recognition and permission of NCTE for running the courses or training for teachers education. Section 17 governs the course and training of teacher education with a stipulation that in violation thereof, grant of the degree/certificate would not be a valid qualification. The Council thus operate for recognition and all other related issues pertaining to the institutions for the training courses. The Act of 1993 does not operate in reference to the qualification of teachers for appointment though the Rules were brought to provide minimum qualification. The Apex Court in the case of **State of U.P. and Others Vs. Bhupendra Nath Tripathi and Ors., (2010) 13 SCC 203** however clarified the aforesaid.

23. Article 41 in Part IV read with Article 45 of the Constitution of India

provides for State endeavour to come out with free and compulsory education for the children and accordingly by Constitutional (86th Amendment) Act, 2002, the Parliament also recognized "Right to Education' and after inserting Clause (k) in Article 51A vide Section 4 of Constitution (86th Amendment) Act, 2002, it enacted the Act of 2009 which was given effect from 1st April, 2010.

24. The qualification for appointment of teachers is now governed by the Act of 2009 and Rules made thereunder. Section 12-A of the Act of 1993 cannot to operate in conflict to the provisions of the Act of 2009 and notification issued therein. The field is now occupied by the Act of 2009 to provide educational qualification for appointment of teachers. Section 12-A of the Act of 1993 would not apply only for the reason that notification dated 23rd August, 2010 was issued by the Council. It was not under the Act of 1993 but the Act of 2009. It is by the Council as an academic authority. Under Section 23 of the Act of 2009, the Government of India had nominated Council as academic authority to lay down the qualification for appointment under the Act of 2009. The proviso to Section 12-A cannot apply dehors the Act of 2009 and Rules made thereunder. Therefore, we are not inclined to accept the argument of learned counsel for the petitioner-appellants that even if the appellants were not possessing TET certificate, their appointments should not have been cancelled in reference to the circular of the Government.

25. t this stage, it is to be clarified that even compassionate appointment cannot be given dehors the statutory provisions only in reference to the Government Order dated 4th September, 2000. The administrative order cannot stand in conflict with statutory provisions.

26. The elaborate discussion of all other issues has been made by the learned Single Judge and is not being challenged other than argument in reference to Section 12-A of the Act of 1993. Finding no merit in the arguments, appeals fail and are dismissed accordingly.

(2021)09ILR A1017
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.09.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Single No. 2295 of 2021

Jitendra Singh ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Dinesh Kumar Singh (D.K.S.

Counsel for the Respondents:
A.S.G., Raj Kumar Singh

A. Service Law – Rajiv Gandhi National Aviation University Act, 2013 – Termination order – Nature – Simplicitor or punitive, how it can be determined – Held, the language of the impugned order of termination would establish the nature of termination order, whether it is simplicitor or punitive. (Para 30)

B. Service law – Termination order – Opportunity of hearing – Principle of Natural Justice – Held, the language of the impugned orders in the present case imputes something over and above mere unsuitability for the job and, therefore, such impugned order should have not been issued against the petitioner without

affording him an opportunity of hearing in conformity of principles of natural justice – High Court set aside the impugned order. (Para 31 and 37)

C. Service Law – Termination – Order passed during probation period – Validity – Held, services of the probationer during probation period can be terminated by the order of 'simplicitor' and to indicate that the services of the petitioner were not satisfactory during the probation period is not ex-facie stigmatic. (Para 33)

Writ petition allowed. (E-1)

Cases relied on :-

1. Pavanendra Narayan Verma Vs Sanjay Gandhi PGI of Medical Sciences & anr.; (2002) 1 SCC 520

2. Purshottam Lal Dhingra Vs U.O.I. AIR 1958 SC 36

3. Radhey Shyam Gupta Vs U.P. State Agro Industries Corpn. Ltd.; (1999) 2 SCC 21

4. Dipti Prakash Banerjee Vs Satyendra Nath Bose National Centre for Basic Sciences, Calcutta; (1999) 3 SCC 60

5. Chandra Prakash Shahi Vs St. of U.P.; (2000) 5 SCC 152

6. Kishnadevaraya Education Trust Vs L.A. Balakrishna; (2001) 9 SCC 319 2002 SCC (L&S) 53 : (2001) 1 Scale 196

7. H.F. Sangati Vs Registrar General High Court of Kamataka; (2001) 3 SCC 117 2001 SCC (L&S) 534

8. Chandra Prakash Shahi Vs St.of U.P. (2000) S SCC 152 : 2000 SCC (L&S) 613

9. V.P. Ahuja Vs St. of Pun. (2000) 3 SCC 239 : 2000 SCC (Cri) 606

10. Dipti Prakash Banerjee Vs Satyendra Nath Bose National Centre for Basic Sciences, Calcutta; (1999) 3 SCC 60 : 1999 SCC (L&S)

11. Radhey Shyam Gupta Vs UP State Agro Industries Corpon. Ltd.; (1999) 2 SCC 21 : 1999 SCC (L&S) 439

12. St. of U.P. Vs Kaushal Kishore Shukla; (1991) 1 SCC 691 : 1991 SCC (L&S) 587 : (1991) 16 ATC 498

13. Mohinder Singh Gill Vs Chief Election Commr., New Delhi; (1978) 1 SCC 405 AIR 1976 DC 851

14. S.P. Vasudeva Vs St. of Har. (1976) 1 SCC 236 : 1976 SCC (L&S) 12

15. Samsher Singh Vs St.of Pun. (1974) 2 SCC 831: 1974 SCC (L&S) 500

16. Benjamin (A.G.) Vs U.O.I. (1967) 1 LLJ 718 (SC)

17. St. of Orissa Vs Ram Narayan Das; AIR 1961 SC 177

18. Parshotam Lal Dhingra Vs U.O.I.AIR 1958 SC 36

19. Shrinivas Ganesh Vs U.O.I. AIR 1956 Bom 455 : 58 Bom LR 673

20. Nehru Yuva Kendra Sangathan Vs Mehbub Alam Laskar; (2008) 2 SCC 479

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Jitendra Singh, who has appeared in person and Sri S.B. Pandey, learned Senior Advocate and Assistant Solicitor General of India assisted by Sri Raj Kumar Singh for the Union of India.

2. By means of this petition the petitioner has prayed following relief :

"i) issue a writ, order or direction in the nature of Certiorari quashing the order of competent authority dated 26.12.2019, contained as Annexure No.1, to the present writ petition with all consequential benefits.

ii) issue a writ, order or direction in the nature of Certiorari quashing the proposal letter dated 17.12.2019 referred in the order of competent authority, contained as Annexure No. 2, to the present writ petition with all consequential benefits.

iii) issue a writ, order or direction in the nature of Certiorari quashing the letter dated 09.01.2020 issued by under Secretary to the Government of India Ministry of Civil Aviation (opposite party no.3), contained as Annexure No. 3, to the present writ petition with all consequential benefits.

iv) issue a writ, order or direction in the nature of Certiorari quashing the advertisement for filing up the post Registrar of University in the month of 04.05.202 contained as Annexure No.4, to the present writ petition, with all consequential benefits."

3. The questions to be considered in this writ petition are :

(i) as to whether the services of the probationer during the probation period can be terminated by the order of 'simplicitor' or by the punitive order?

(ii) what should be the nature of simplicitor order?

(iii) If only this much has been indicated by the employer that the services of the probationer were not satisfactory during the probation period, as to whether, in that case, the opportunity of hearing would be required or not ?

(iv) If the services of the probationer is terminated leveling serious allegation against him / her as to whether, in that case, the opportunity of hearing should be provided to him / her or not? and

(v) As to whether the order passed by the President of India as an ex-officio visitor of the University can be interfered with by the writ Court or not?

4. So as to appreciate the aforesaid questions of law, ignoring the exhaustive facts of the issue in question, some relevant facts which are directly touching the issue are being considered.

5. The petitioner applied for the post of Registrar, Rajiv Gandhi National Aviation University (hereinafter referred to as University in short) on 14.8.2018. The petitioner was interviewed by the competent authority on 23.10.2018. On the basis of satisfactory interview the offer of appointment was issued to the petitioner on 1.3.2019 and the petitioner submitted his joining on the post of Registrar of the University on 8.4.2019. The petitioner has informed that since he had submitted his joining on the post of Registrar of the University on 8.4.2019 so that period would be expiring on 8.4.2022.

6. As per the offer of appointment dated 1.3.2019 such appointment of the petitioner was on contract basis for the period of three years as per Rajiv Gandhi National Aviation University Act No. 26 of 2013 (hereinafter referred to as Act, 2013 in short). Further, as per aforesaid offer of appointment the probation period was of one year from the date of appointment subject to further extension at the discretion of competent authority as per prevailing rules. However, the services of the petitioner might have been terminated during the period of probation by giving one months notice or by making payment of one months salary in lieu thereof.

7. Appointment, terms and condition of service of employees of the Rajiv Gandhi National Aviation University Fursatganj Raebareilly now District Amethi (hereinafter referred to as University) governed by the Act, 2013 and Rajiv

Gandhi National Aviation University first Statutes. 2016 (hereinafter referred as to First Statutes).

8. Section 2 (y) of the Act. 2013 provides that "University" means the National Aviation University Established under this Act. Act.

9. Section 9 (1) of the Act, 2013 says that the President of India shall be the Visitor of the University.

10. Provided that the President may, by order, nominate any person to be the visitor and such person so nominated shall hold office for such term, not acceding five years as may be specify in the order and the person so nominated shall exercise the powers and discharge duties of the visitor.

11. Section 46(b) of the Act, 2013 says that the First Registrar of the University shall be appointed by the visitor and shall hold office for a term of three years.

12. Clause 28 of the first statute of the University deals with the removal of the employees of the University.

13. Section 2(l) defines 'employee' which means any person appointed by the University and includes teachers and other staff of the University.

14. Clause 28 further provides that on the allegation of misconduct the Executive Council of the University, in respect of teachers and other academic staff and the appointing authority in respect of other staff shall have the power to remove such employee by affording them a reasonable opportunity of showing cause against the action proposed to be taken.

15. The petitioner has drawn attention of this Court towards Annexure no. 1 which is an I.D. letter dated 26.12.2019 issued from the Secretariat of President of India (Rastrapati Sachivalaya), which reads as under :

"PRESIDENT'S SECRETARIAT

(Rashtrapati Sachivalaya)

Subject: Termination of Incumbent Registrar Shri Jitendra Singh of Rajiv Gandhi National Aviation University reg.

The Ministry of Civil Aviation may kindly refer to their I.D. Note No. AV-28060/16/2019-ER(NAU)(Pt) dated 17.12.2010 on the subject cited above.

2 The President, In his capacity as the Visitor of Rajiv Gandhi National Aviation University (RGNAU), is pleased to approve the proposal contained in para 2 of the summery note.

(Pawan Kumar Sain)
Director"

16. Since one I.D. Note dated 17.12.2019 has been referred in the letter dated 26.12.2019 (Annexure no. 1), therefore, the petitioner has drawn attention of this Court towards such I.D. Note dated 17.12.2019, which is contained as Annexure no. 2 to the writ petition, which reads as under :

"CONFIDENTIAL

Government of India
Ministry of Civil Aviation

Subject : Termination of incumbent Registrar, Rajiv Gandhi National Aviation

This is regarding the proposal for termination of incumbent Registrar, Rajiv Gandhi National Aviation Uversity (RGNAU) Shri Jitendra Singh. The following points have been noticed against the Registrar, RGNAU, Shri Jitendra Singh:

a) Indiscipline

b) Gross insubordination

c) Breach of protocol (including while dealing with the office of the President of India)

d) Discourtesy and disobedience

e)Making unsubstantiated allegations and use of derogatory language against superior officers

f) Continued defiance of official orders

g) Obstructing an officer from discharging his duties

h) Conduct highly unbecoming of an officer,

i) Wrongful claim of transport allowance

j) Substandard performance

Based on the above tests and evidences, it is proposed that

(i) The probation of Shri Jitendra Singh, Registrar, RGNAU may be terminated and that he may be removed from his position with immediate effect.

(ii) Smt Garima Singh Director, Ministry of Civil Aviation may be appointed as Acting Registrar till the new Registrar is appointed or until further orders, whichever is earlier

(iii) The selection process for the new Registrar of RGNAU may be initiated at the earliest.

3. The relevant file along with all the documents is enclosed herewith

4. This issues with the approval of Hon'ble Minister of State for Civil Aviation (I/c)

sd/- Illegible
(Amber Dubay)
Joint Secretary to the Government of India

17. Pursuant to the letter dated 26.12.2019 (Annexure no. 1) the Under Secretary, Government of India, Ministry of Civil Aviation, issued an order dated 8.1.2020 which is contained as Annexure no. 7 to the writ petition, which reads as under :

"ORDER

Order of the Competent Authority hereby conveyed for the termination of probation of Shri Jitendra Singh, Registrar, Rajiv Gandhi National Aviation University (RGNAU) with immediate effect, Shri Jitendra Singh, Registrar, RGNAU accordingly stands removed and relieved from the position of the Registrar, RGNAU with immediate effect.

2. Shri Jitendra Singh is directed to vacate the office of the Registrar, RGNAU immediately and also vacate the official residence within 7 (seven) days of the issue of a order. Shri Jitendra Singh is further directed to surrender the official IDs and other items issued to him immediately.

Sd/- Illegible
(Kameshwar Mishra)
Under Secretary to the Govt. of India"

18. The said authority has intimated the order dated 8.1.2020 to the petitioner vide letter dated 9.1.2020 which is contained as Annexure no. 3 to the writ petition, which reads as under :

"Shri Jitendra Singh,
Dated 9th January 2020

Ex-Registrar,
RGNAU,
Fursatganj, Amethi (UP), Reabareli

it is hereby informed that as per order No AV 26000/16/2016-ER(P) dated 8.01 2020, your probation as Registrar, Rajiv Gandhi National Aviation University (RGNAU) was terminated Further, the Order dated 8.01.2020 directed for your removal and relieving from the position of Registrar, RGNAU with immediate effect.

2. You may please note that your services were terminated on the following grounds

i) Obstructing an officer appointed by the Government from discharging his duties.

ii) Fabricating a complaint of sexual harassment by involving two girl students of the university. The girl students were called by you on 30.11.2019 on Saturday in your office. The complaint was drafted by you and the two students were made to append their signatures to the complaint.

iii) For willful insubordination and indiscipline by exhibiting defiance to the official orders.

3. As per clause (ii) of the offer of appointment dated 01.03.2019, payment of sum equivalent to the emoluments of a month will be made to you, in lieu of the notice period of one month.

Sd/- Illegible
(Kameshwar Mishra)
Under Secretary to the Government of India
Tele 24648983"

19. Referring the aforesaid enclosures the petitioner has submitted that the President of India being the appointing authority of the petitioner as a visitor of the University was pleased to approve the para 2 of the proposal bearing I.D. Note dated 17.12.2019 which is stigmatic in nature inasmuch as para 2 of the I.D. Note dated 17.12.2019 clearly indicates that the allegation / imputations against the petitioner vide 'a' to 'j' which are serious allegations and before accepting those allegations, the petitioner has not been afforded an opportunity of hearing of any kind whatsoever. If the services of the petitioner being probationer has been terminated on the basis of facts and evidences relating to 'a' to 'j' of I.D. Note dated 17.12.2019 without affording any opportunity of hearing to the petitioner,

then the impugned orders / letter dated 26.12.2019 (Annexure no. 1) would be punitive order and such punitive order cannot be passed even against the probationer without affording an opportunity of hearing in conformity with the principles of natural justice.

20. Besides, the letter dated 9.1.2020 (Annexure no. 3) is addressed to the petitioner whereby in para 2 it has been categorically indicated that the services of the petitioner have been terminated on three grounds and all three grounds are casting stigma against the petitioner and such stigmatic order has been passed without even conducting any fact finding enquiry as the petitioner has not been associated with any fact finding enquiry nor any opportunity has been given to the petitioner to submit his bona fide, therefore, it may not be doubted that on account of serious allegations and expressions the services of the petitioner have been terminated.

21. The simple inference from aforesaid orders may not likely tobe drawn as if the services of the petitioner were not satisfactory during his period of probation but the serious allegation and aspersions against the petitioner as per I.D. Note dated 17.12.2019 (Annexure no. 2) and letter dated 9.1.2020 (Annexure no. 3) were having far reaching effect inasmuch as after the termination of the services of the petitioner vide letter dated 9.1.2020, the petitioner has not been given any appointment at anywhere.

22. The petitioner has lastly submitted that the University has issued an employment notification advertising the post of Registrar, Finance Officer and Consultant in the month of June, 2020 which is contained in Annexure no. 4 to the writ petition. He has submitted that since the services of the petitioner has been terminated illegally, therefore, he may be permitted to discharge his duties of Registrar in the University till expiry of the period of his employment i.e. up to 8.4.2022, ignoring the employment notification.

23. Per contra, Sri S.B. Pandey, learned Senior Advocate assisted by Sri Raj Kumar Singh, learned counsel for the opposite parties has submitted that since the order impugned has been passed from the Secretariat of the President of India, therefore, the said order is not amenable under the writ jurisdiction. He has further submitted that for terminating the services of the probationer the full fledged departmental enquiry would not be required and the services of such probationer may be terminated by giving one months notice or one months salary in lieu thereof and such exercise has been carried out in this case, therefore, the order impugned may not be interfered with. In support of his aforesaid argument Sri Pandey has drawn attention of this Court towards the dictum of Apex Court in re: P***avanendra Narayan Verma vs. Sanjay Gandhi PGI of Medical Sciences and another reported in (2002) 1*** Supreme Court Cases 520 referring para 31 which reads as under :

31. Returning now to the facts of the case before us. The language used in the order of termination is that the appellant's "work and conduct has not been found to be satisfactory. These words are almost exactly those which have been quoted in Dipti Prakash Banerjee case as clearly falling within the class of non-stigmatic orders of termination. It is, therefore, safe to conclude that the impugned order is not ex facie stigmatic."

24. As per Sri Pandey in the aforesaid judgment the Apex Court has considered almost all relevant judgment of the Apex Court relevant for the issue in question right from ***Purshottam Lal Dhingra vs. Union of India reported in AIR 1958 SC 36, Radhey Shyam Gupta vs. U.P. State Agro Industries Corpn. Ltd. reported in (1999) 2 SCC 21, Dipti Prakash Banerjee vs. Satyendra Nath Bose National Centre for Basic Sciences, Calcutta reported in (1999) 3 SCC 60 and Chandra Prakash Shahi vs. State of U.P. reported in (2000) 5 SCC 152.***

25. Sri Pandey has further submitted that the Apex Court has observed that when the probationer's appointment is terminated it means that the probationer is unfit for the job whether by the reason of misconduct or ineptitude, whatever the language used in the termination order may be.

26. Further, in the case of ***Pavanendra Narayan Verma (supra)*** the term used to terminate the services of the probationer was 'work and conduct has not been found to be satisfactory' and the Apex Court has held that it can, therefore, safely be held that the impugned order is not ex-facie stigmatic.

27. Therefore, even if the work and conduct of the petitioner has been considered by the competent authority being not satisfactory, that order cannot be treated as stigmatic, so the termination of the services of the petitioner should not be interfered with.

28. Having heard learned counsel for the parties and having perused the material available on record, at the very outset, I am going through the dictum of Apex Court in re: ***Pavanendra Narayan Verma (supra)*** being referred by Sri S.B. Pandey, learned Senior Advocate.

The Apex Court in re: ***Pavanendra Narayan Verma (supra)*** has considered the cases in re:

1. (2001) 9 SCC 319 2002 SCC (L&S) 53 : (2001) 1 Scale 196, Kishnadevaraya Education Trust v. L.A. Balakrishna

2. (2001) 3 SCC 117 2001 SCC (L&S) 534, H.F. Sangati v. Registrar General High Court of Kamataka

3. (2000) S SCC 152 : 2000 SCC (L&S) 613, Chandra Prakash Shahi v. State of U.P.

4. (2000) 3 SCC 239 : 2000 SCC (Cri) 606, V.P. Ahuja v. State of Punjab

5. (1999) 3 SCC 60 : 1999 SCC (L&S) Dipti Prakash Banerjee v. Satyendra Nath Bose National Centre for Basic Sciences, Calcutta.

6. (1999) 2 SCC 21 : 1999 SCC (L&S) 439, Radhey Shyam Gupta v. UP State Agro Industries Corpon. Ltd.

7. (1991) 1 SCC 691 : 1991 SCC (L&S) 587 : (1991) 16 ATC 498, State of U.P. v. Kaushal Kishore Shukla

8. (1978) 1 SCC 405 AIR 1976 DC 851, Mohinder Singh Gill v. Chief Election Commr., New Delhi

9. (1976) 1 SCC 236 : 1976 SCC (L&S) 12, S.P. Vasudeva v. State of Haryana

10. (1974) 2 SCC 831: 1974 SCC (L&S) 500, Samsher Singh v. State of Punjab

11. (1967) 1 LLJ 718 (SC), Benjamin (A.G.) v. Union of India

12. AIR 1961 SC 177, State of Orissa v. Ram Narayan Das

13. AIR 1958 SC 36, Parshotam Lal Dhingra v. Union of India

14. AIR 1956 Bom 455 : 58 Bom LR 673, Shrinivas Ganesh v. Union of India

29. After considering all the aforesaid cases the Apex Court vide para 28 to 30 has observed that in order to amount a stigma an order must be in a language which imputes something over and above mere unsuitability for the job. Para 28 to para 30 reads as under :

28. Therefore, whenever a probationer challenges his termination the court's first task will be to apply the test of stigma or the "form" test. If the order survives this examination the "substance" of the termination will have to be found out

29. Before considering the facts of the case before us one further, seemingly intractable, area relating to the first test needs to be cleared viz. what language in a termination order would amount to a stigma? Generally speaking when a probationer's appointment is terminated it means that the probationer is unfit for the job, whether by reason of misconduct or ineptitude, whatever the language used in the termination order may be. Although strictly speaking, the stigma is implicit in the termination, a simple termination is not stigmatic. A termination order which explicitly states what is implicit in every order of termination of probationer's appointment, is also not stigmatic. The decisions cited by the parties and noted by us earlier, also do not hold so. In order to amount to a stigma, the order must be in a language which Imputes something over and above mere unsuitability for the job.

30. As was noted in Dipti Prakash Banerjee v. Satyendra Nath Bose National Centre for Basic Sciences (SCC p. 73, para 28)

"28. At the outset, we may state that in several cases and in particular in State of Orissa v. Ram Narayan Das it has been held that use of the word 'unsatisfactory work and conduct' in the termination order will not amount to a stigma."

30. The bare perusal of the aforesaid paras make it crystal clear that the language of the impugned order of termination would establish the nature of termination order, whether it is simplicitor or punitive. In the case in re: ***Pavanendra Narayan Verma (supra)*** the services of that petitioner was terminated saying that the 'work and conduct has not been found to be satisfactory' but in the present case the facts considered against the petitioner are that he committed 'indiscipline, gross insubordination, breach of protocol, discourtesy and disobedience' making unsubstantiated allegations and use of derogatory language against the superior officers, continued defiance of official orders, obstructing the officer from conducting duty, conduct highly unbecoming of an officer, wrongful claim of transport allowance and substandard performance. Not only the above the

impugned order dated 9.1.2020 (Annexure no. 3) addressed to the petitioner clearly says that 'petitioner may please note that his services were terminated on the ground indicated in para 2 of that letter whereby the stigma has been casted against the petitioner.

31. Therefore, the language of the impugned orders in the present case imputes something over and above mere unsuitability for the job and, therefore, such impugned order should have not been issued against the petitioner without affording him an opportunity of hearing in conformity of principles of natural justice.

The Apex Court in re: ***Dipti Prakash Banerjee (supra)*** in para 19 has observed as under :

"19. As to in what circumstances an order of termination of a probationer can be said to be punitive or not depends upon whether certain allegations which are the cause of the termination are the motive or foundation. In this e area, as pointed out by Shah, J. (as he then was) in Madan Gopal v. State of Punjab1 there is no difference between cases where services of a temporary employee are terminated and where a probationer is discharged. This very question was gone into recently in Radhey Shyam Gupta v. U.P. State Agro Industries Corpn. Ltd.2 and reference was made to the development of the law from time to time starting from Parshotam Lal Dhingra v. Union of India3 to the concept of "purpose of enquiry" introduced Shah, J. (as he then was) in State of Orissa v. Ram Narayan Das and to the seven-Judge Bench decision in Samsher Singh v. State of Punjab and to post-Samsher Singh case-law. This Court had occasion to make a detailed examination of what is the "motive" and what is the "foundation" on which the innocuous order is based."

32. The Apex Court in re : ***Nehru Yuva Kendra Sangathan vs. Mehbub Alam Laskar reported in (2008) 2 Supreme Court Cases 479*** has observed that there exists a distinction between motive and foundation. If misconduct is foundation of such order, the same would be bad in law even if appears to be innocuous one. The Apex Court has further observed that only in the event of unsatisfactory performance by the employee the termination of probation would have been held to be justified. However, when the foundation for such an order is not unsatisfactory performance on the part of the employee but overt acts amount to misconduct, an opportunity of hearing to the employee concerned is imperative. In other words if the employee is found to have committed misconduct although an order terminating probation would appear to be innocuous on its face, the same would be vitiated if in effect and substance it is found to be stigmatic in nature.

33. In view of what has been considered above the reply to the question no. 3(i), (ii) and (iii) would be the services of the probationer during probation period can be terminated by the order of 'simplicitor' and to indicate that the services of the petitioner were not satisfactory during the probation period is not ex-facie stigmatic. However, for question no. 3(iv), I am of the opinion that in order to amount a stigma an order must be in a language which imputes something over and above, mere unsuitability for the job. In the present case the language of the impugned order imputes something over and above a mere unsuitability for the job and the

alleged misconduct of the petitioner is a foundation of such order which is not limited to the unsatisfactory performance on the part of the petitioner but alleged overt acts of the petitioner amounts to misconduct, therefore, an opportunity of hearing must be provided to the petitioner. Therefore, all the questions are answered accordingly.

34. Now, I am considering the argument of Sri Pandey, learned A.S.G. that the order impugned has been passed by the President of India, therefore, on account of immunity granted to such office the impugned order may not be interfered.

35. Article 361 of the Constitution of India provides that the President or the Governor shall not be answerable to any court for the exercise and performance of the power and duties of his office or for any act done or purported to be done by him in exercise and performance of those powers and duties. This Article further provides that nothing in this clause shall be construed as restricted right of any person to bring appropriate proceedings against the Government of India or the Government of State.

36. Section 9(1) of the Act, 2013 provides that the President of India shall be the visitor of the University, therefore, such appointment of the petitioner has been made under the Act. For the University he acts as a statutory authority not as the President of India. The law is trite that the action of any statutory authority shall be subjected to the judicial review, therefore, the impugned order dated 26.12.2019 passed by the Visitor of the University under the statute may be subjected to judicial review and for that order no immunity may be granted for the reason that such order has been passed by the President as an ex-officio Visitor of the University. Therefore, the question no. 3(v) is answered in affirmative.

37. In view of the facts and circumstances and case laws so considered above, I hereby set aside / quash the letter dated 26.12.2019 (Annexure no. 1), I.D. Note dated 17.12.20129 issued by the Joint Secretary, Government of India, Ministry of Civil Aviation, New Delhi (Annexure no. 2), letter dated 9.1.2020 issued by Under Secretary, Government of India, Ministry of Civil Aviation, New Delhi (Annexure no. 3).

38. A writ in the nature of mandamus is issued commanding the opposite parties to reinstate the petitioner on the post of Registrar of the University with all consequential service benefits in terms of his offer of appointment dated 1.3.2019 ignoring the employment notification for making appointment on the post of Registrar etc. in the University.

39. Since the services of the petitioner has been terminated by means of punitive and stigmatic orders, therefore, the petitioner shall be treated in service with back wages. However, his term of appointment shall be governed with the offer of appointment of the petitioner dated 1.3.2019.

40. Compliance of the aforesaid order shall be made with promptness preferably within a period of one month from the date of receipt of certified copy of this order, failing which the petitioner shall be entitled for the interest on the dues as per the current market rate.

41. Accordingly, writ petition is ***allowed***.

42. No order as to costs.

(2021)09ILR A1028
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.02.2021

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE RAVI NATH TILHARI, J.

Writ C No. 494 of 2021

M/s Fiserv India Private Ltd., Noida ...Petitioner

Versus

The Assist. Director, Directorate of Enforcement, Zonal Office, Lucknow, Govt. of India & Anr. ...Respondents

Counsel for the Petitioner:
Sri Rahul Agrawal

Counsel for the Respondents:
C.S.C.

A. Company Law - Foreign Exchange Management Act, 1999 - Section 13 - Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000: Rule 4

Initially, in the present case, the company was incorporated as M/s Results India Systems Private Limited and later on acquired by Fiserv Group. To which the Court observed that it is not the case that the M/s Results India stood liquidated and changed its name and therefore the control of the company was taken over by different group. The company is a body corporate notwithstanding change of its management its existence continues. Therefore, in the eyes of the law, the legal person committed the contravention of the provisions of the FEMA with continued even after changing its name. (Para 18)

The proceedings against the petitioner company have been initiated in respect of not utilizing, within stipulated period, certain export advances. As utilization of those advances might have to be proved by submitting information and documents to the authorized dealer i.e., the Bank, whether any export advance has been utilized or not, within the prescribed period, might not, on expiry of the stipulated period, automatically come in the knowledge of the enforcement directorate or the prosecuting agency as it would depend on the mode and the manner in which the information is shared with the relevant authorities. Thus, whether the enforcement directorate was lethargic in prosecuting the defaulter is pure question of fact and cannot be the basis of quashing a show-cause notice at the threshold, which otherwise discloses all the ingredients necessary for initiated proceedings under FEMA. (Para 19, 20)

Writ Petition Rejected. (E-10)

List of Cases cited:

1. Adjudicating Officer, Securities and Exchange Board of India Vs Bhavesh Pabari (2019) 5 SCC 90

2. Joint Collector Ranga Reddy District & anr. Vs D. Narsingh Rao & ors. (2015) 3 SCC 695 *(distinguished)*

3. Sanghvi Reconditioners Pvt. Ltd. Vs U.O.I. & ors. MANU/MH/3805/2017 *(distinguished)*

4. Shrish Harshvardhan Shah Vs Deputy Director, E.D. MANU/MH/0635/2010 *(distinguished)*

5. M/s Keshav Marble and Granites Vs U.O.I. S.B. Civil Writ Petition No. 12937of 2020

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

1. By this petition the petitioner has sought quashing of a show cause notice dated 30th September 2020 issued by the Assistant Director, Directorate of Enforcement, Zonal Office, Lucknow (first respondent) thereby calling for an explanation from the noticee (the petitioner) as to why adjudication

proceeding as contemplated in Section 13 of the Foreign Exchange Management Act, 1999 (for short FEMA) be not held against it in the manner as provided in Rule 4 of the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000 (as amended), read with rules and regulations made thereunder and as to why penalty as provided under Section 13 (1) of FEMA be not imposed for the contraventions as brought under the complaint.

2. Before noticing and addressing the issues raised it would be apposite to briefly notice the background facts of the case, as could be elicited from the petition –

(i) The petitioner is a private limited company incorporated under the Companies Act with its registered office at NOIDA.

(ii) The company had been engaged in the business of software development and export of computer & business support services. Initially, the company was incorporated as M/s. Results India Systems Private Limited but as it was acquired by Fiserv Group (based in U.S.A.) in the year 2004, with effect from 24.11.2005, the name of the company was changed to Fiserv India Private Limited.

(iii) On 17.08.2017, under Section 37 of FEMA, 1999, read with Section 133(6) of the Income-Tax Act, 1961, a notice was issued to the petitioner requiring it to furnish information along with documentary evidence for not utilising certain export advances within the stipulated period which the petitioner received through its authorised dealer i.e. ICICI Bank Ltd. According to the petitioner, this notice was never served upon it but, subsequently, the petitioner got it as an annexure with the impugned show cause notice.

(iv) On 05.12.2017, the first respondent sent another letter to the petitioner requiring the petitioner to furnish information along with documentary evidence in respect of not utilising, within stipulated period, 16 export advances that were received by the petitioner through its authorised dealer during financial years 2003-04 and 2004-05.

(v) The petitioner acknowledged the said notice vide letter dated 19.12.2017 and sought two months time to collate relevant documents and information required by the first respondent.

(vi) On 07.03.2018, the petitioner received a reminder letter dated 26.02.2018 from the first respondent, by way of last opportunity, to submit the required information/documents to which, vide letter dated 14.03.2018, the petitioner replied by claiming that there were no export advances outstanding in the books of accounts of the petitioner at the end of financial year 2003-04 and 2004-05. However, as the documents and information sought were from a period 13 years ago, further time was sought to substantiate the defence and make further submissions.

(vii) Thereafter, on 12.04.2018, the petitioner vide letter to the first respondent reiterated its position that there were no non-utilised advances outstanding in petitioner's books of accounts. The petitioner also submitted that the details sought by the first respondent related to a very old period and as relevant employee/officers of the petitioner were no

more in petitioner's employment, hence, the petitioner was handicapped in providing details/information of such old transactions. The petitioner also cited certain judicial pronouncements so as to contend that where no period of limitation is provided for initiation of proceedings, the proceedings could only be initiated within a reasonable time.

(viii) On 30.09.2020, in exercise of power under section 16(3) FEMA, a complaint was filed against the petitioner. As per paragraph 2 thereof, the basis of the complaint was a report received from ICICI Bank (authorised dealer) giving details of 10 export advances, amounting to Rs. 1,83,52,635, which were pending utilisation beyond stipulated period and with respect to which inward remittances were received into the account of the petitioner, but requisite documents were not submitted to the authorised dealer to substantiate actual export of goods/ services/ software. In paragraph 5 of the complaint it was mentioned that vide letter dated 18.10.2017 an updated list was provided by the ICICI Bank of 16 export advances (including the 10 reported initially) pending utilisation by the petitioner bringing the total amount of un-utilised advances to Rs.1,96,98,815.67. Thus, alleging that the company had contravened the provisions of FEMA and the person responsible is liable to be punished under section 7(3) of FEMA read with Regulations 10 and 16 of Foreign Exchange Management (Export of Goods and Services) Regulation, 2000, complaint was filed.

(ix) On filing of the said complaint, the first respondent issued impugned show cause notice bearing No. T-4/18/FEMA/LKZO/2020/AD(RV)/2717 dated 30.09.2020, annexing the complaint therewith and calling upon the petitioner to show cause in writing, within 30 days from the date of receipt of the notice, as to why adjudication proceedings as contemplated in Section 13 of FEMA should not be held against the petitioner, in the manner as provided in Rule (4) of the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000 (as amended) read with rules and regulations made thereunder, and as to why penalty as provided under Section 13(1) of FEMA be not imposed on him for the contraventions as set out in the complaint.

3. Sri Shashi Nandan, learned senior counsel, assisted by Sri Rahul Agarwal, appearing for the petitioner, urged that although section 7 of FEMA requires every exporter of goods to furnish certain information as specified therein and non furnishing of that information may result in a penalty under Section 13 of FEMA but for initiating proceeding for imposition of such penalty, a complaint has to be filed before the Adjudicating Authority, under Section 16(3) of FEMA, within a reasonable period of such contravention, even though no specific period of limitation for filing such complaint has been provided by FEMA. He submitted that the notice dated 17.08.2017 and the subsequent notice dated 05.12.2017 issued to the petitioner company by the first respondent does not disclose the date as to when the Directorate of Enforcement came to know of non-utilisation of export advances taken by the petitioner company. It has been urged that in absence of disclosure of the date as to when information with regard to non-utilisation of export advances taken by the petitioner company was received by the Directorate of Enforcement, the notice is defective as it fails to disclose as to when

the cause of action arose to initiate the proceeding, under the circumstances, considering that the notice deals with alleged contravention that took place more than ten years ago, it is much beyond the reasonable period for commencement of the adjudication proceedings, resulting in serious prejudice to the right of the petitioner to defend itself, hence, the show cause notice, initiating penal proceeding, at such a belated stage, is liable to be quashed.

4. To support the aforesaid submissions, the learned counsel for the petitioner has placed reliance on the following decisions:-

(***i) Adjudicating Officer, Securities and Exchange Board of India v. Bhavesh Pabari : (2019) 5 SCC 90;***

(ii) Joint Collector Ranga Reddy District and another v. D. Narsingh Rao and others : (2015) 3 SCC 695 (paragraph 32 thereof);

(iii) Sanghvi Reconditioners Pvt. Ltd. v. Union of India and Ors., decided on 12.12.2017 by High Court of Bombay, reported in MANU/MH/3805/2017;

(iv) Shirish Harshavadan Shah v. Deputy Director, E.D., decided on 28.01.2020 by High Court of Bombay, reported in MANU/MH/0635/2010 Equivalent to 2010 (254) ELT 259 (Bom.); and

(v) An interim order dated 20.11.2020 passed by Jaipur Bench of Rajasthan High Court in S.B. Civil Writ Petition No. 12937 of 2020 (M/s. Keshav Marble and Granites v. Union of India and another).

5. We have considered the submissions of the learned counsel for the petitioner and have perused the petition carefully.

6. Before we address the submissions advanced, it would be apposite to notice the relevant provisions of FEMA. FEMA was enacted as an Act to consolidate and amend the law relating to foreign exchange with the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange market in India.

7 . Section 3 of FEMA, 1999, inter alia, provides that save as otherwise provided in the Act, rules or regulations made thereunder, or with the general or special permission of the Reserve Bank, no person shall deal in or transfer any foreign exchange or foreign security to any person not being an authorised person. Clause (c) of section 3 of FEMA, 1999 further mandates that no person shall receive otherwise through an authorised person, any payment by order or on behalf of any person resident outside India in any manner.

8. Section 2 (c) defines authorised person as follows:-

"Authorised person" means an authorised dealer, money changer, off-shore banking unit or any other person for the time being authorised under sub-section (1) of section 10 to deal in foreign exchange or foreign securities."

9. Section 7 casts certain obligations on exporters of goods and services. Sub-section (3) of section 7 provides that every exporter of services shall furnish to the Reserve Bank or to such other authorities a

declaration in such form and in such manner as may be specified, containing the true and correct material particulars in relation to payment for such services. Sub-section (1) of section 7 casts a similar duty on exporter of goods.

10. Section 10 of FEMA, 1999, inter alia, provides in respect of authorisation of any person to be known as authorised person to deal in foreign exchange or in foreign securities, as an authorised dealer, money changer or off-shore banking unit or in any other manner as it deems fit. Sub-section (2) of section 10 confers power on the Reserve Bank to make such authorisation subject to conditions laid down therein and sub-section (4) thereof, inter alia, casts a duty on the authorised person to comply with such general or special directions or orders as the Reserve Bank may, from time to time, think fit to give.

11. Sub-section (5) of section 10, inter alia, enables an authorised person, before undertaking any transaction in foreign exchange on behalf of any person, to require that person to make such declaration and to give such information as will reasonably satisfy him that the transaction will not involve, and is not designed for the purpose of any contravention or evasion of the provisions of this Act or of any rule, regulation, notification, direction or order made thereunder.

12. Sub-section (6) of section 10, inter alia, provides that any person, other than an authorised person, who has acquired or purchased foreign exchange for any purpose mentioned in the declaration made by him to authorised person under sub-section (5) does not use it for such purpose or does not surrender it to authorised person within the specified period or uses the foreign exchange so acquired or purchased for any other purpose for which purchase or acquisition of foreign exchange is not permissible under the provisions of the Act or the rules or regulations or direction or order made thereunder shall be deemed to have committed contravention of the provisions of the Act for the purpose of this section.

13. Section 11 of FEMA, 1999, inter alia, empowers the Reserve Bank to issue directions to authorised person for the purpose of securing compliance with the provisions of the Act and of any rules, regulations, notifications or directions made thereunder. Sub-section (2) of section 11 empowers the Reserve Bank to direct any authorised person to furnish such information, in such manner, as it deems fit for the purpose of ensuring compliance of the provisions of the Act or of any rule, regulation, notification, direction or order made thereunder. Sub-section (3) of section 11 confers power on Reserve Bank of India to impose penalty on the authorised person in the event of contravention of any such direction. Section 12 empowers Reserve Bank of India to inspect the authorised person.

14. Section 13 of FEMA, 1999 provides for the penalties. It, inter alia, provides that if any person contravenes any provision of the Act, or contravenes any rule, regulation, notification, direction or order issued in exercise of the powers under the Act, or contravenes any condition subject to which an authorisation is issued by the Reserve Bank, he shall, upon adjudication, be liable to penalty.

15. Section 16 of the Act deals with appointment of Adjudicating Authority and

the process of adjudication on any complaint in writing made by any officer authorised by a general or special order by the Central Government.

16. We have neither been taken through nor we could find any provision in FEMA which may provide a limitation for initiation of the adjudicatory proceeding for imposition of penalty. No doubt, where no provision of limitation is provided then the action is to be taken within a reasonable period. But as to what would be the reasonable period is to depend upon the facts and circumstances of each case, the nature of the Statute, prejudice caused and whether third party rights have been created, etc.

17. In the instant case, the proceedings are against a company. Section 42 of FEMA specifically provides that where a person committing a contravention of any of the provisions of the Act or of any rule, direction or order made thereunder is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly. Provided that nothing contained in that section would render any such person liable to punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention.

18. From the averments made in the petition, it does not appear that erstwhile company, namely, M/s. Results India Systems Pvt. Ltd., stood liquidated or dissolved though it appears from the pleadings that the control of the company was taken over by a different group and consequent thereto its name was changed. As the company is a body corporate notwithstanding change of its management its existence continues. Thus, in the eyes of law, the legal person that committed contravention of the provisions of the FEMA continues to exist albeit with a changed name. As to who had been responsible for the affairs of the company at the given time is a matter of evidence and that issue can be raised and even set up as a defence in the proceedings pursuant to the complaint.

19. The proceedings against the petitioner company have been initiated in respect of not utilising, within stipulated period, certain export advances. As utilisation of those advances might have to be proved by submitting information and documents to the authorised dealer i.e the Bank, whether any export advance has been utilised or not, within the prescribed period, might not, on expiry of the stipulated period, automatically come in the knowledge of the enforcement directorate or the prosecuting agency as it would depend on the mode and the manner in which the information is shared with the relevant authorities. Thus, whether the prosecuting agency or the enforcement directorate had been unduly lethargic in prosecuting the defaulter is a pure question of fact which cannot be made basis to quash a show-cause notice at the threshold, which, otherwise, coupled with the complaint, discloses all the necessary ingredients with regard to contravention of the provisions of FEMA warranting adjudicatory proceedings. More so, when the primary duty of furnishing information is on the person who takes export advance

and secondary duty, might perhaps be, of the authorised dealer to share the information with the relevant authorities. Only when information is received by the prosecuting agency, which in the present case would be the Directorate of Enforcement, that proceedings for penalty might be initiated.

20. The contention of the learned counsel for the petitioner that neither in the investigation process nor in the show cause notice, the date of receipt of information with regard to contravention of the provisions of FEMA has been mentioned, therefore, the show cause notice is liable to be quashed because it fails to disclose a jurisdictional fact, cannot be accepted because FEMA and the Rules and Regulations framed thereunder do not fix a time limit within which the proceeding is to be initiated. Under the circumstances, it cannot be said that the show cause notice fails to disclose a jurisdictional fact necessary to commence adjudicatory proceeding. Rather, the jurisdictional facts necessary to bring adjudicatory proceedings under FEMA, for imposition of penalty, have been adequately disclosed in the impugned notice coupled with the complaint by alleging that the fact of utilisation of specified export advances within the specified period was not provided by the noticee by furnishing requisite information within the stipulated period. Hence, in our considered view, the notice does not suffer from any such fundamental defect which may warrant its quashment at the threshold.

21. Now, we shall examine the decisions cited by the learned counsel for the petitioner. In ***Sanghvi Reconditioners Pvt. Ltd.(supra),*** in a matter arising out of Customs Act, the Bombay High Court had closed the proceedings by taking notice of the fact that the Revenue/Department was not able to justify its failure to adjudicate upon a show cause notice for more than 15 years. In that case, a show cause notice was issued on 28th March 2002. The same was replied by the petitioner on 14th September 2002. The petitioner was called for personal hearing in the year 2004 but, thereafter, there was no communication from the respondents. As the respondents had slept over their right and took no steps for as long as 15 years, despite submission of reply, the proceedings were closed.

22. In the instant case, information was sought from the petitioner in the year 2017 and when, despite letters, information was not provided and a prima facie case with regard to contravention of the provisions of FEMA, 1999 was made out, a complaint was filed in the year 2020 on which the impugned notice has been issued. The facts of the present case are therefore totally distinguishable from those which were there before the Bombay High Court in the case of ***Sanghvi Reconditioners Pvt. Ltd. (supra).***

23. Similarly, in the case of ***Shirish Harshavadan Shah (supra),*** which arose out of Foreign Exchange Regulation Act, 1947 and FEMA, 1999, the facts before the Bombay High Court were that consequent to search operations in the month of March, 1990, a memorandum dated 18th March 1991 relating to acts and omission chargeable under the Acts was drawn arising out of certain work carried out by the company in the year, 1982, whereas, notice for hearing on the memorandum was issued to the company and its Director in the month of January, 2004. In those facts, the Bombay High Court took the view that as for a period of 12 years no steps were

taken by the respondent to proceed with the adjudication, such a belated proceeding was liable to be quashed.

24 . The facts of the instant case are clearly distinguishable from that case inasmuch as here, after receipt of information in respect of contravention of the provisions of FEMA, 1999, notice was issued calling for information and, thereafter, within 3 years, a complaint was filed and impugned notice was issued soon thereafter.

25 . In Adjudicating Officer, Securities and Exchange Board of India (supra), the apex court in paragraph 35 of its judgment had not taken any specific decision to close the proceeding on the ground of delay but it only reiterated the general legal principle that when for taking certain action the period of limitation is not prescribed, then such action must be taken within a reasonable time. As to what would be the reasonable time would depend upon the facts and circumstances of the case, nature of the default/statute, prejudice caused, whether the third party rights had been created, etc.

26. In the instant case, as we have already noticed, the information in respect of default by the petitioner company cannot be deemed to be with the Directorate of Enforcement, that is the prosecuting agency, therefore, the reasonable period to commence the adjudicatory proceeding would be counted from the date when that information was received by the prosecuting agency. As this is a pure question of fact and it is not shown to us that the default had been in the knowledge of the prosecuting agency far in excess of the reasonable period, the issue whether there had been an unreasonable delay in drawing adjudicatory proceeding would have to be raised and dealt with at the appropriate stage of the adjudicatory proceeding and not at this stage, while addressing a challenge to the show cause notice because the show cause notice, by disclosing the institution of the complaint and specifying the contravention of the provisions of FEMA, discloses all the necessary requirements to warrant initiation of adjudicatory proceeding against the petitioner.

27. Another submission of the learned counsel for the petitioner is that in ***Joint Collector Ranga Reddy District and another (supra),*** the apex court in paragraph 32 of its judgment had observed that the notice to initiate proceeding for correction of fraudulent entries ought to have disclosed as to when the alleged fraud was discovered by the State therefore, applying that principle, the impugned show cause notice, which fails to disclose the date of receipt of information with regard to contravention of the provisions of FEMA, 1999, is liable to be quashed.

28. Upon a careful perusal of the judgment of the apex court in ***Joint Collector Ranga Reddy District and another (supra),*** it appears that the apex court in that case was dealing with a case where the entries in revenue records were long standing and in public domain and made by Government employees therefore it could be presumed that the entries were made in ordinary course of official business. But, by exercising revisional power suo-motu, long standing entries were sought to be corrected. In that fact scenerio, the Apex Court finding the delay inordinate, in absence of any explanation in the notice, held the delay fatal to the proceeding. In our view, the decision of the

apex court in ***Joint Collector Ranga Reddy District and another (supra)*** is on entirely different set of facts because there the information of incorrect entries was in public domain and with the authorities, as custodian of the records, who sought their correction, whereas in the instant case the information with regard to non-reconciliation of the export advances was either with the authorised dealer or with the noticee itself and not with the Enforcement Directorate or the complainant, therefore the principle of law laid down by the apex court in ***Joint Collector Ranga Reddy District and another (supra)*** would not come to the aid of the petitioner in maintaining a challenge to the show cause notice.

29. In view of the discussion made above, as we find that the complaint discloses all the necessary ingredients to make out a prima facie case with regard to contravention of the provisions of FEMA, the impugned show cause notice issued for adjudication of that complaint does not suffer from any legal infirmity which may justify its quashing, as has been prayed for. The petition is **dismissed.**

30. It is made clear that dismissal of this petition and any observation made in this order will not prejudice the right of the petitioner to set up its defence, as may be advised, to the notice and in the adjudicatory proceeding.

(2021)09ILR A1036
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.03.2021

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.

THE HON'BLE RAVI NATH TILHARI, J.

Writ C No. 1037 of 2021

Dr. Mukesh Tandon ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Avneesh Tripathi, Sri Anoop Trivedi (Senior Adv.)

Counsel for the Respondents:
C.S.C., A.S.G.I.,Sri Arvind Kumar Goswami, Sri Arvind Kumar Singh, Sri Suryabhan Singh, Sri Madhukar Ojha

A. Practice & Procedure - Natural Justice - The non issuance of show cause notice to the petitioner's hospital before passing the order of de-empanelment and imposition of the penalty has resulted in breach of principle of natural justice. (Para 18)

Writ Petition Disposed of. (E-10)

List of Cases cited:

1. Uma Nath Pandey & ors. Vs St. of U.P. & anr. (2009) 12 SCC page 40

(Delivered by Hon'ble Surya Prakash Kesarwani, J.
& Hon'ble Ravi Nath Tilhari, J.)

1. Heard Sri Anoop Trivedi, learned Senior Advocate, assisted by Sri Avneesh Tripathi, learned counsel for the petitioner, Sri Suryabhan Singh, learned Counsel for the respondent Nos. 1 and 5, Sri Arvind Kumar Goswami, learned Central Government Counsel for the respondent Nos. 2 and 4 and Sri Madhukar Ojha, learned counsel for the respondent Nos. 3, 6, and 7.

Order on Impleadment Application

2. With the consent of the learned counsels for the parties, the Impleadment Application No.2 of 2021 is partly allowed and the proposed respondent Nos. 6 and 7 are allowed to be impleaded.

This writ petition has been filed praying for the following relief:-

3. *(I) To issue a writ, order or direction in the nature of certiorari, quashing the impugned order dated 24.12.2020 (Annexure-10 to the writ petition) passed by the respondent no.3.*

4. **Order on writ petition**

With the consent of the learned counsels for the parties, this writ petition is being finally heard without calling for a counter affidavit.

5. **Facts**

Briefly stated facts of the present case are that according to the petitioner, he owns and runs a Hospital under the name and style of "Dayal Nursing Home, having its registered office A-1 H.I.G., Mundera, Prayagraj". The aforesaid hospital is empanelled under the scheme of Central Government called as "Pradhan Mantri Jan Arogya Yojana (PMJAY)". Earlier the aforesaid scheme was known as Ayushman Bharat Jan Arogya Yojana. According to the respondents, on receipt of certain information from National Anti Fraud Unit (NAFU) with respect to the working of the petitioner's hospital, the petitioner's hospital was put on "Watch-List" of the State Anti Fraud Unit (SAFU). Super specialist was hired by the State Health Agency (SHA) i.e. Avighna Mednet (OPC) Pvt. Ltd, which submitted its analysis report. On the basis of alleged prima facie fraudulent activity, **the empanelment of the petitioner's hospital was suspended by order dated 04.12.2020 with immediate effect**, by the State Health Agency.

6. According to the respondents, after the hospital was suspended from the empanelment, certain investigations were made, the statement of the petitioner was recorded on 09.12.2020 and certain evidences were collected. The field investigation was allegedly conducted on 09.12.2020. The field investigation report and comparative analysis (Desk Audit vs Case Sheets allegedly found in the hospital at the time of Hospital Audit) was submitted on 15.12.20202. Based on the aforesaid material, the empanelment of the petitioner's hospital was cancelled, three times of the disputed amount was imposed as penalty and the entire amount was directed to be recovered by the impugned order dated 24.12.2020 passed by the Chief Executive Officer-SHA (Uttar Pradesh), Lucknow. Aggrieved with this aforesaid order, the petitioner has filed the present writ petition.

7**. Discussion and Findings**

It is admitted by the learned counsels for the parties that empanelment as well as action for de-empanelment is governed by the guidelines issued by the Central Government with respect to Ayushman Bharat Pradhan Mantri Jan Arogya Yojana (ABPMJAY). Copy of the aforesaid guidelines has been produced before us by both the learned counsels for the parties, which is kept on record. The copy of instructions as produced by learned counsel for the respondent Nos. 3,6 and 7 is also kept on record.

8. The process for disciplinary proceeding of the de-empanelment is provided in **Para 1.10** of the aforesaid guidelines. **Part-A of para 1.10 of the**

aforesaid guidelines provides for institutional mechanism. **Part-B provides for steps for disciplinary proceedings,** which is relevant for the purposes of the present case and **is reproduced below:-**

B. Steps for Disciplinary Proceedings

Pradhan Mantri Rashtriya Swasthya Suraksha Mission (PMRSSM)- Guideline

Step 1 *- Putting the provider on "Watch-list"*

Based on the claims, data analysis and/or the provider visits, if there is any doubt on the performance of a Provider, the SEC on the request of the IC or the SHA or on its own findings or on the findings of the DEC, can put that hospital on the watch list. The data of such hospital shall be analyzed very closely on a daily basis by the SHA/SEC for patterns, trends and anomalies and flagged events/patterns will be brought to the scrutiny of the DEC and the SEC as the case may be. The IC shall notify such service provider that it has been put on the watch-list and the reasons for the same.

Step 2 *- Issuing show-cause notice to the hospital*

Based on the activities of the hospital if the insurer/ trust believes that there are clear grounds of hospital indulging in wrong practices, a show cause notice shall be issued to the hospital. Hospital will need to respond to the notice within 7 days of receiving it.

Step 3 *- Suspension of the hospital*

A Provider can be temporarily suspended in the following cases:

(i) ***For the Providers which are on the "Watch-list" or have been issued show cause notice if the SEC observes continuous patterns or strong evidence of irregularity based on either claims data or field visit of the hospital or in case of unsatisfactory reply of the hospital to the show cause notice, the hospital may be suspended from providing services to beneficiaries under the scheme and a formal investigation shall be instituted****.*

(ii) If a Provider is not in the "Watch-list", but the SEC observes at any stage that it has data/ evidence that suggests that the Provider is involved in any unethical Practice/ is not adhering to the major clauses of the contract with the Insurance Company / Involved in financial fraud related to health insurance patients, it may immediately suspend the Provider from providing services to policyholders/insured patients and a formal investigation shall be instituted. A formal letter shall be send to the concerned hospital regarding its suspension with mentioning the time frame within which the formal investigation will be completed.

Step 4 *- Detailed Investigation*

The detailed investigation shall be undertaken for verification of issues raised in disciplinary proceedings and may include field visits to the providers, examination of case papers, talking with the beneficiary/ policyholders/insured (if needed), Pradhan Mantri Rashtriya Swasthya Suraksha Mission (PMRSSM) - Guideline

Examination of provider records etc. If the investigation reveals that the report/ complaint/ allegation against the provider is not substantiated, the Insurance Company/SHA would immediately revoke the suspension (in case of suspension) on the direction of the SEC. A letter regarding revocation of suspension shall be sent to the provider within 24 hours of that decision.

Step 5 - Presentation of Evidence to the SEC

The detailed investigation report should be presented to the SEC and the detailed investigation should be carried out in stipulated time period of not more than 7 days. The insurance company (Insurance mode)/SHA (Trust Mode) will present the findings of the detailed investigation. If the investigation reveals that the complaint/allegation against the provider is correct, then the following procedure shall be followed:

***i) The hospital must be issued a "show-cause" notice** seeking an explanation for the aberration.*

*ii) In case the proceedings are under the SEC, after receipt of the explanation and its examination, the charges may be dropped or modified or an action can be taken as per the guidelines depending on the severity of the malafide/error. **In cases of de-empanelment, a second show cause shall be issued to the hospital to make a representation against the order and after considering the reply to the second show cause, the SEC can pass a final order on de-empanelment. If the hospital is aggrieved with actions of SEC/SHA, the former can approach the SHA to review its decision, following which it can request for redressal through the Grievance Redressal Mechanism as per guidelines.***

iii) In case the preliminary proceedings are under the DEC, the DEC will have to forward the report to the SEC along with its findings and recommendations for a final decision. The SEC may ask for any additional material/investigation to be brought on record and to consider all the material at hand before issuing a final order for the same.

***The entire process should be completed within 30 days from the date of suspension**. The disciplinary proceedings shall also be undertaken through the online portal only.*

***Step 6** - Actions to be taken after De- empanelment*

Once the hospital has been de-empanelled, following steps shall be taken:

i) A letter shall be sent to the hospital regarding this decision.

ii) A decision may be taken by the SEC to ask the SHA/Insurance Company to lodge an FIR in case there is suspicion of criminal activity.

iii) This information shall be sent to all the other Insurance Companies as well as other regulatory bodies and the MoHFW/ NHA.

(iv) The SHA may be advised to notify the same in the local media, informing all policyholders/insured about the de-empanelment ensuring that the beneficiaries are aware that the said

hospital will not be providing services under PMRSSM.

(v) A de-empanelled hospital cannot re-apply for empanelment for at least 2 years after deempanelment. However, if the order for de-empanelment mentions a longer period, such a period shall apply for such a hospital.

9. **From a bare perusal of the Step-3 of Part-B of para 1.10 of afore- quoted guidelines, it is evident that where the provider who was on the "Watch- List"** or has been issued show cause notice if the SEC observes continuous patterns or strong evidence or irregularity based on either claims data or field visit of the hospital or in case of unsatisfactory reply of the hospital to the show cause notice, the hospital may be suspended from providing services to beneficiaries under the scheme and a formal investigation shall be instituted.

10. Learned counsel for the petitioner and learned counsels for the respondents both jointly stated before us that the procedure has been followed till the stage of suspension and, therefore, that may not be interfered at this stage. Accordingly, **we hold that the suspension of empanelment of the petitioner's hospital dated 04.12.2020 shall continue and shall be subject to the final decision as may be taken by the competent authority in accordance with law.**

11. Breach of principles of natural justice is an important issue involved in the present writ petition. It has been submitted by learned counsel for the petitioner that the impugned order has been passed without show cause notices and thus the principles of natural justice has been violated.

Law of Natural Justice

12. In the case of ***Uma Nath Pandey & Ors. vs State of U.P.& Anr. [(2009) 12 SCC page 40 para 3], t***he Hon'ble Supreme Court noted the concept of natural justice and observed that it is another name of common sense justice. The adherence to principles of natural justice as recognized by all civilized States is of supreme importance when a quasi-judicial body embarks on determining disputes between the parties, or any administrative action involving civil consequences is in issue.

13. **The first** and foremost principle of natural justice is commonly known as **audi alteram partem rule**. It says that no one should be condemned unheard. Notice is the first limb of this principle. It must be precise and unambiguous. It should appraise the party determinatively the case he has to meet. Time given for the purpose should be adequate so as to enable him to make his representation. **In the absence of a notice of the kind and reasonable opportunity, the order passed becomes wholly vitiated**. Thus, it is but essential that a party should be put on notice of the case before any adverse order is passed against him. It is an approved rule of fair play.

14. **The principles of natural justice are those rules which have been laid down by the Courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice. Even an administrative order which involves civil**

consequences must be consistent with the rules of natural justice.

15. Expression **`civil consequences'** encompasses infraction of not merely property or personal rights but of civil liberties, material deprivations, and non-pecuniary damages. In its wide umbrella comes everything that affects a citizen in his civil life.

16. **Natural justice** has been variously defined by different Judges, for instance a duty to act fairly, the substantial requirements of justice, the natural sense of what is right and wrong, fundamental justice and fair-play in action. Over the years by a process of judicial interpretation two rules have been evolved as representing the principles of natural justice in judicial process, including therein quasi-judicial and administrative process. They constitute the basic elements of a fair hearing, having their roots in the innate sense of man for fair-play and justice which is not the preserve of any particular race or country but is shared in common by all men. The first rule is `nemo judex in causa sua' or `nemo debet esse judex in propria causa sua' that is no man shall be a judge in his own cause. The second rule is `audi alteram partem', that is, `hear the other side'. **A corollary has been deduced from the above two rules and particularly the audi alteram partem rule i.e. 'he who shall decide anything without the other side having been heard, although he may have said what is right, will not have been what is right' or in other words, as it is now expressed, `justice should not only be done but should manifestly be seen to be done'. Natural justice is the essence of fair adjudication, deeply rooted in tradition and conscience, to be ranked as fundamental. The purpose of following the principles of natural justice is the prevention of miscarriage of justice.**

17. Whenever an order is struck down as invalid being in violation of principles of natural justice, there is no final decision of the case and fresh proceedings are left upon. All that is done is to vacate the order assailed by virtue of its inherent defect, but the proceedings are not terminated.

18. Step-5 of Part-B of para 1.10 of the guidelines specifically requires issuance of two show cause notices. Learned counsel for the respondent Nos. 3,6 and 7 has stated before us on instruction that no show cause notice was issued to the petitioner's hospital before passing the impugned final order of De-empanelment and the imposition of the penalty. Thus, we find that non issuance of show cause notice to the petitioner's hospital before passing the final order , has resulted in breach of principle of natural justice.

19. Since it is admitted case of the respondents that neither any show cause notice was issued nor any opportunity of hearing was afforded to the petitioner confronting with the material available in the hands of the respondents, therefore, the impugned order dated 24.12.2020 passed by the Chief Executive Officer of State Health Agency (SHA), U.P. Lucknow cannot be sustained and is hereby ***quashed***. The writ petition is ***disposed of*** with the following directions:-

(i) The concerned authority shall follow the procedure as provided in Step-5 of Part-B of Para 1.10 of the guidelines and pass a final order within 30 days after affording a reasonable opportunity of hearing to the petitioner.

(ii) The order of suspension dated 04.12.2020 shall remain subject to the final order as may be passed by the competent authority regarding De-empanelment and penalty, if any.

(iii) The competent authority shall take decision in accordance with law without being influenced by any of the observations on merits of the case made by this Court in the body of this order.

(2021)09ILR A1042
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.03.2021

BEFORE

THE HON'BLE SANJAY YADAV, J.
THE HON'BLE PRAKASH PADIA, J.

Writ C No. 1868 of 2021

M/s Ramraja Traders, Jhansi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Udayan Nandan, Sri Shashi Nandan

Counsel for the Respondents:
C.S.C.

A. Practice & Procedure - U.P. Minor Minerals (Concession) Rules, 1963 - The Court rejected the contention of the petitioner that the order passed by the Supreme Court in the SLP applied only to the Courts and Tribunals and not to the Authorities like the Revisional Authority under 78 of the Rules, 1963 who are quasi-judicial in nature. The Revisional Authority, a quasi judicial authority, can be brought within the ambit of Tribunal. (Para 16)

Revision under Rule 78 of 1963 lies even against an order remitting the matter. (Para 18)

Certain requisite conditions were laid down for the bidders for the settlement of mining leases of sand/moram. The petitioner did not comply with the conditions which led to forfeiture of his earnest money. (Para 19)

Writ Petition Rejected. (E-10)

List of Cases cited:

1. Shivji Nathubhai Vs UOI & ors. AIR 1960 SC 606

2. Harinagar Sugar Mills Ltd. Vs Shyam Sunder Jhunjhunwala & ors. AIR 1961 SC 1669

(Delivered by Hon'ble Sanjay Yadav, J.
&
Hon'ble Prakash Padia, J.)

Sri Shashi Nandan, learned Senior Counsel assisted by Sri Udayan Nandan, learned counsel appears on behalf of petitioner.

Learned Standing Counsel appears on behalf of State-Respondents.

1. A Notice Advertisement was published on 13.09.2018 by District Magistrate, Banda for the settlement of mining leases of sand/moram under the U.P. Minor Minerals (Concession) Rules, 1963 for 5 mining Blocks, by e-tendering and as per Condition No. 13 (6) of the Government Order dated 14.08.2017 respective applicants had to deposit Rs.15,000/- as application fee and 25% of the bid amount as earnest money separately for each area. That term and condition no.19 and 22 (1) of the Advertisement stipulated that within three days from the date of acceptance of bid, the successful bidder shall deposit the requisites mentioned therein and that before participating in the bid the bidders were first require to satisfy themselves by

physically verifying the determined quantity of mineral and the approach road to the site. These clauses are reproduced for ready reference:

19ण ई–निलामी समाप्त होने के पश्चात 03 कार्य दिवस के अन्दर सफल बोलीदाता को अपने मूल अभिलेख का सत्यापन उस जनपद के जिलाधिकारी जहॉ क्षेत्र स्थित है, के द्वारा अथवा निदेशक, भूतत्व एवं खनिकर्म, निदेशालय के द्वारा कराना होगा। निदेशक द्वारा मूल अभिलेख के सत्यापन की स्थिति में अभिलेख–सत्यापन की आख्या ई–मेल के माध्यम से सम्बन्धित जिलाधिकारी को प्रेषित की जायेगी। अभिलेख–सत्यापन के पश्चात ही जिलाधिकारी द्वारा लेटर ऑफ इन्टेंट जारी किया जायेगा। सत्यापन में यदि कोई अभिलेख अथवा प्रमाण–पत्र कूटरचित, असत्य अथवा गलत पाया जाता है तो लेटर ऑफ इन्टेंट जारी नहीं किया जावेगा तथा बयाने की धनराशि (अर्नेस्ट मनी) जब्ज कर ली जायेगी।

22ण शर्तेः–

(1) ई–निविदा सह ई–नीलामी में भाग लेने से पूर्व क्षेत्र में आंकलित उपखनिज की मात्रा एवं खनन स्थल के लिए पहुॅच मार्ग आदि के सम्बन्ध में मौके का निरीक्षण कर बिडर स्वयं आश्वस्त हो लें। ई–निविदा सह ई–निलामी में भाग लेने के पश्चात इस सम्बन्ध में किसी भी प्रकार का दावा स्वीकार नहीं किया जायेगा।

2. The petitioner after visiting the area participated in the bid by getting himself registered with all formalities with MSTC and after transfer of earnest money and application fee Rs.15,000/-, and the earnest money Rs.1,57,50,000/- through RTGS applied online on MSTC Portal for grant of mining lease for the area in question, viz Gata No.3/1/1, Khand-1, Area 21 hectares of Village Barsanamanpur, Tehsil Narayani, District Banda. The bid of the petitioner @ Rs.207/ cubic meter being highest, was accepted. And as per Condition No.17 of the Government Order dated 14/08/2017 which was Condition No.19 of the Advertisement the petitioner was under an obligation to get the original documents verified within three days from the date of completing of e-tender. The petitioner however did not comply the said condition which led the respondent to issue Letter No.2698/Khanij-30, Banda dated 22/10/2018. However, as the petitioner did not comply the same, the District Magistrate vide order dated 24/1/2019 forfeited the earnest money.

3. In the interregnum i.e. between the period of acceptance of bid and the passing of order dated 24/1/2019, the petitioner visited this Court vide Writ-C No. 36068/2018 for the following directions:

"i. issue a writ, order or direction in the nature of mandamus commanding the respondent no. 2 to accept the request of the petitioner with regard to the withdrawal of site for mining operation on plot no. 3/1/1 (Part-I) situated at Barsana Manpur, Tehsil Naraini, District Banda;

ii. issue an appropriate writ, order or direction in the nature of mandamus commanding the respondent no. 2 to refund the earnest money deposited by the petitioner in pursuance of the advertisement dated 13.09.2018 along with the interest @ 9% per annum;

iii. issue an appropriate writ, order or direction in the nature of mandamus commanding the respondent no. 2 to decide the representation dated 25.10.2018 of the petitioner (Annexure No. 4 to the writ petition);

iv. issue an appropriate writ, order or direction in the nature of mandamus commanding the respondent no. 2 to issue a survey panel to examine the exact quantity of mineral available on the site."

4. With the contention that since there was no minerals as advertised, the respondents be directed to look into the grievance before issuing the letter of intent.

The petitioner was however non-suited by order dated 30/10/2018 whereon the petition was dismissed in the following terms:

"4. We have considered the submissions raised and find that Clause 22 (1) of the Advertisement dated 13.09.2018 reads as under:

22ण शर्तें:–

(1) ई–निविदा सह ई–नीलामी में भाग लेने से पूर्व क्षेत्र में आंकलित उपखनिज की मात्रा एवं खनन स्थल के लिए पहुँच मार्ग आदि के सम्बन्ध में मौके का निरीक्षण कर बिडर स्वयं आश्वस्त हो लें। ई–निविदा सह ई–निलामी में भाग लेने के पश्चात इस सम्बन्ध में किसी भी प्रकार का दावा स्वीकार नहीं किया जायेगा।ष

5. In view of the aforesaid clause, the aforesaid relief cannot be granted as the petitioner had made the offer with open eyes."

5. The order being not assailed by the petitioner has attained finality.

6. The petitioner thereafter preferred an appeal against the order dated 24/1/2019 passed by the District Magistrate before the Commissioner, Division Chitrakoot Dham, wherein on 26/04/2019 by an interim order Commissioner directed for spot inspection whereas certain report was furnished on 28/05/2019 stating that approximately in 18 hect. area mixed minerals were found deposited in crevices at the base of river Ken. The report led the Commissioner pass an order on 20/12/2019 whereby he set aside the order dated 24/01/2019 and remanded the matter with a direction to the Collector to take action as per the report.

7. Evidently, the Commissioner did not dwell on the aspect of non compliance of the stipulation contained in Condition No.17 of the Government Order dated 14/08/2017, nor of the fact that the claim of the petitioner for waiver was negatived in Writ -C No.36068/2018.

8. Be that as it may. Revision under Rule 78 of the Rules, 1963 was preferred by the Collector against the order dated 20.12.2019 before the State Government with an application for condonation of delay on 19/06/2020. The petitioner besides raising an objection against condonation of delay also filed the counter affidavit on merit. However, as evident therefrom there was no whisper as to non compliance of Condition No.17 nor was there denial of dismissal of Writ-C No.36068/2018. However it was stated that the issue raised in the Writ Petition had no relation with the order dated 24/1/2019 passed in Appeal.

9. The Revisional Authority vide order dated 28/9/2020 while condoning the delay set aside the order passed by Commissioner and upheld the order of Collector on the findings:

षनिगरानीकर्ता का कथन है कि, शासनादेश संख्या–1875/86–2017–57 (सा0)/2017 टी0सी0–1 दिनांक 14.08.2017 में दिये गये निर्देशानुसार शर्त सं0–20 (1) में उल्लिखित कि ''ई–निविदा सह ई–नीलामी में भाग लेने से पूर्व क्षेत्र में आंकलित उपखनिज की मात्रा एक खनन स्थल के लिए पहुंच मार्ग आदि के सम्बन्ध में मौके का निरीक्षण कर बिडर स्वयं आश्वस्त हो लें। ई– निविदा सह ई–नीलामी में भाग लेने के पश्चात् इस सम्बन्ध में किसी भी प्रकार का दावा स्वीकार नहीं किया जाएगा।'' विज्ञप्ति संख्या –60/खनिज–30, बांदा दिनांक 13.09.2018 के शर्त संख्या –22 (1) में उल्लिखित है कि ''ई–निविदा सह ई–नीलामी में भाग लेने से पूर्व क्षेत्र में आंकलित उपखनिज की मात्रा एवं खनन स्थल के लिए पहुंच मार्ग आदि के सम्बन्ध में मौके का निरीक्षण कर विडर स्वयं आश्वस्त हो लें। ई–निविदा सह ई–नीलामी में भाग लेने के पश्चात इस सम्बन्ध में किसी भी प्रकार का दावा स्वीकार नहीं किया जायेगा।'' मा0 उच्च न्यायालय इलाहाबाद में प्रस्तावक द्वारा प्रस्तुत रिट याचिका संख्या–36068/2018 श्री रामराजा ट्रेडर्स बनाम उ0प्र0 राज्य व अन्य योजित किया गया था, जो दिनांक 30.10.2018 को निरस्त कर दी गयी, उक्त आधार पर भी मा0 न्यायालय आयुक्त चित्रकूट धाम मण्डल, बांदा द्वारा पारित आदेश दिनांक 20.12.2019 निरस्त योग्य है। उ0प्र0 उपखनिज (परिहार)

(तैतालिसवां संशोधन) नियमावली–1963 के नियम 23 (4) के प्राविधानों के तहत शासनादेश संख्या–1875/86–2017–57 (सा0)/2017 टी0सी0–1 दिनांक 14.08.2017 के बिन्दु संख्या–06 के अन्तर्गत ई–निविदा/ई–नीलामी/ई–निविदा सह ई–नीलामी के लिए निर्धारित दिनांक के पूर्व न्यूनतम बोली या प्रस्ताव के निर्धारण के लिए खनिज की गुणवत्ता और मात्रा का मूल्यांकन जिलाधिकारी, बांदा द्वारा गठित समिति जिसमें अपर जिलाधिकारी (वि0/रा0) बांदा, सम्बन्धित उपजिलाधिकारी तथा जिले में तैनात खान अधिकारी, बांदा थे द्वारा उपखनिज की खनन योग्य मात्रा एवं उस क्षेत्र पर अर्नेस्ट मनी का निर्धारण किया गया था। अवर न्यायालय द्वारा अपने आदेश दिनांक 26.04.2019 द्वारा गठित समिति अपर जिलाधिकारी (वि0/रा0) के नीचे के अधिकारियों द्वारा उपखनिज का मूल्यांकन किया गया है, जिससे भी मा0 न्यायालय आयुक्त चित्रकूट धाम मण्डल बांदा द्वारा पारित आदेश दिनांक 20.12.2019 निरस्त योग्य है। प्रस्तावक को बोली समाप्त होने के उपरान्त पर्याप्त समय मौखिक रूप से/लिखित रूप से अभिलेखों को प्रस्तुत करने हेतु दिया गया परन्तु उसके द्वारा काफी समय व्यतीत होने के उपरान्त भी अभिलेख प्रस्तुत नहीं किये गये, जिसको अवर न्यायालय द्वारा संज्ञान में नहीं लिया गया। अतः मा0 न्यायालय आयुक्त चित्रकूट धाम मण्डल, बांदा द्वारा पारित आदेश दिनांक 20.12.2019 निरस्त योग्य है।

प्रतिवादी के विद्वान अधिवक्ता को विस्तारपूर्वक सुना गया तथा पत्रावली पर उपलब्ध अभिलेखों का अध्ययन करने से स्पष्ट है कि निगरानीकर्ता द्वारा प्रस्तुत पुनरीक्षण कोविड–19 व राज्य सरकार से प्राप्त अनुमति के कारण समयान्तर्गत है तथा शासनादेश संख्या–1875/86–2017–57 (सा0)/2017 टी0सी0–1 दिनांक 14.08.2017 में दिये गये निर्देशानुसार शर्त सं0–20 (1) में उल्लिखित कि "ई–निविदा सह ई–नीलामी में भाग लेने से पूर्व क्षेत्र में आंकलित उपखनिज की मात्रा एवं खनन स्थल के लिए पहुंच मार्ग आदि के सम्बन्ध में मौके का निरीक्षण कर बिडर स्वयं आश्वस्त हो लें" के अनुसार प्रतिवादी को विज्ञप्ति में प्रतिभाग करने से पूर्व बालू–खनन क्षेत्र को निरीक्षण कर आश्वस्त हो लेना चाहिए था। मा0 उच्च न्यायालय इलाहाबाद में प्रतिवादी द्वारा प्रस्तुत रिट याचिका संख्या–36068/2018 श्री रामराजा ट्रेडर्स बनाम उ0प्र0 राज्य व अन्य योजित किया गया था, जो दिनांक 30.10.2018 को निरस्त कर दी गयी, उक्त आधार पर भी मा0 न्यायालय आयुक्त चित्रकूट धाम मण्डल, बांदा द्वारा पारित आदेश दिनांक 20.12.2019 निरस्त योग्य है। प्रस्तावक को बोली समाप्त होने के उपरान्त पर्याप्त समय मौखिक रूप से/लिखित रूप से अभिलेखों को प्रस्तुत करने हेतु दिया गया परन्तु उसके द्वारा काफी समय व्यतीत होने के उपरान्त भी अभिलेख प्रस्तुत नहीं किये गये।

माननीय आयुक्त चित्रकूट धाम मण्डल, बांदा द्वारा पारित आदेश दिनांक 20.12.2019 निरस्त किया जाता है। अतः निगरानीकर्ता द्वारा पारित आदेश दिनांक 24.01.2019 में किसी हस्तक्षेप की आवश्यकता नहीं है।"

10. Aggrieved, the petitioner has filed this petition. It is contended that the Revision under Rule 78 of the Rules, 1963 was highly belated and it was beyond the Revisional Authority to have entertained the same after the expiry of Ninety Days and that the benefit of the order dated 23.3.2020 passed by Supreme Court in Suo Motu Writ Petition (Civil) No. 3/2020 was not available as the same was applicable only to the Courts and Tribunals.

11. Contradicting these contentions, it is urged on behalf of the respondent that by virtue of order dated 23.03.2020 in Suo Motu Writ Petition (Civil) No(s) 3/2020 In Re: Cognizance For Extension of Limitation the Supreme Court to obviate the difficulty faced in filling due to COVID-19 Virus directed that a period of Limitation prescribed under the general law on special law whether condonable or not stood extended w.e.f. 15th March, 2020 till further order. It is urged that in the instant Case the Revision was to be filed on or before 19.3.2020 could be filed on 19.6.2020 and as the limitation stood extended w.e.f. 15.3.2020, the Revisional Authority was within his right in condoning the delay.

12. In SLP (C) No(s) 3/2020 it was held on 23.3.2020:

"This Court has taken Suo Motu cognizance of the situation arising out of the challenge faced by the country on account of Covid-19 Virus and resultant difficulties that may be faced by litigants across the country in filing their petitions/applications/suits/appeals/all other proceedings within the period of limitation prescribed under the general law of limitation or under Special Laws (both Central and/or State).

To obviate such difficulties and to ensure that lawyers/litigants do not have to

come physically to file such proceedings in respective Courts/Tribunals across the country including this Court, it is herby ordered that a period of limitation in all such proceedings, irrespective of the limitation prescribed under the general law or Special Laws whether condonable or not shall stand extended w.e.f. 15th March 2020 till further order/s to be passed by this Court in present proceedings.

We are exercising this power under Article 142 read with Article 141 of the Constitution of India and declare that this order is a binding order within the meaning of Article 141 on all Courts/Tribunals and authorities.

This order may be brought to the notice of all High Courts for being communicated to all subordinate Courts/Tribunals within their respective jurisdiction.

Issue notice to all the Registrars General of the High Courts. Returnable in four weeks."

13. The said SLP has now been finally disposed of on 8/3/2021 in the following terms.

"1. Due to the onset of COVID-19 pandemic, this Court took suo motu cognizance of the situation arising from difficulties that might be faced by the litigants across the country in filing petitions/applications/suits/appeals/all other proceedings within the period of limitation prescribed under the general law of limitation or under any special laws (both Central or State). By an order dated 27.03.2020 this Court extended the period of limitation prescribed under the general law or special laws whether compoundable or not with effect from 15.03.2020 till further orders. The order dated 15.03.2020 was extended from time to time. Though, we have not seen the end of the pandemic, there is considerable improvement. The lockdown has been lifted

and the country is returning to normalcy. Almost all the Courts and Tribunals are functioning either physically or by virtual mode. We are of the opinion that the order dated 15.03.2020 has served its purpose and in view of the changing scenario relating to the pandemic, the extension of limitation should come to an end.

2. We have considered the suggestions of the learned Attorney General for India regarding the future course of action. We deem it appropriate to issue the following directions:

1. In computing the period of limitation for any suit, appeal, application or proceeding, the period from 15.03.2020 till 14.03.2021 shall stand excluded. Consequently, the balance period of limitation remaining as on 15.03.2020, if any, shall become available with effect from 15.03.2021.

2. In cases where the limitation would have expired during the period between 15.03.2020 till 14.03.2021, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 15.03.2021. In the event the actual balance period of limitation remaining, with effect from 15.03.2021, is greater than 90 days, that longer period shall apply.

3. The period from 15.03.2020 till 14.03.2021 shall also stand excluded in

computing the periods prescribed under Sections 23 (4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.

4. The Government of India shall amend the guidelines for containment zones, to state.

"Regulated movement will be allowed for medical emergencies, provision of essential goods and services, and other necessary functions, such as, time bound applications, including for legal purposes, and educational and job-related requirements."

3. The Suo Motu Writ Petition is disposed of accordingly."

14. Though a contention is raised on behalf of the petitioner that the order passed by Supreme Court in the SLP applied only to the Courts and Tribunals and not to the Authorities like the Revisional Authority under Rule 78 of the Rules, 1963 who are quasi-judicial in nature. The contentions are taken note of and rejected at the outset. In ***Shivji Nathubhai v. Union of India and Others, AIR 1960 SC 606*** it is held:

"6. This Court had occasion to consider the nature of the two kinds of acts, namely, judicial which includes quasi-judicial and administrative, a number of times. In Province of Bombay v. Kushaldas S. Advani 1950 SCR 621: (AIR 1950 SC 222), it adopted the celebrated definition of a quasi-judicial body given by Atkin L. J. in R. v. Electricity Commissioners 1924-1KB 171 which is as follows:-

"Whenever any body of persons having legal authority to determine questions affecting rights of subjects, and having the duty to act judicially act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs. " This definition insists on three requisites each of which must be fulfilled in order that the act of the body may be a quasi-judicial act, namely, that the body of persons (1) must have legal authority, (2) to determine questions affecting the rights of subjects, and (3) must have the duty to act judicially. After analysing the various cases, Das J. (as he then was) laid down the following principles as deducible therefrom in Kushaldas S. Advani's case (supra) at p.725 of SCR: (at p. 260 of AIR):

"(i) That, if a statute empowers an authority, not being a Court in the ordinary sense, to decide disputes arising out of a claim made by any party under the statute which claim is opposed by another party and to determine' the respective rights of the contesting parties who are opposed to each other, there is a lis and prima facie and in the absence of anything in the statute to the contrary it is the duty of the authority to act judicially and the decision of the authority is a quasi-judicial act; and (ii) that if a statutory authority has power to do any act which will prejudicially affect the subject, then, although there are not two parties apart from the authority and the contest is between the authority proposing to do the act and the subject opposing it, the final determination of the authority will yet be a quasi-judicial act provided the

authority is required by the statute to act judicially.

7. It is on these principles which are now well-settled that we have to see whether the Central Government when acting under R. 54 is acting in a quasi-judicial capacity or otherwise. It is not necessary for present purposes to decide - whether State Government when it grants a lease is acting merely administratively. We shall assume that the order of the State Government granting a lease under the Rules is an administrative order. We have, however, to see what the position is after the State Government has granted a lease to one of the applicants before it and has refused the lease to others.

8. Mr. Pathak contends that even in such a situation there is no right in favour of the person to whom the lease has been granted by the State Government till the Central Government has passed an order on a review application if any. Rule 55, however, makes it clear that the order of the State Government is final subject to any order on review by the Central Government under R. 54. Now when a lease is granted by the State Government, it is quite possible that there may be no application for review by those whose applications have been refused. In such a case the order of the State Government would be final. It would not therefore be in our opinion right to say that no right of any kind is created in favour of a person to whom the lease is granted by the State Government. The matter would be different if the order of the State Government were not to be effective until confirmation by the Central Government; for in that case no right would arise until the confirmation was received from the Central Government. But R. 54 does not provide for confirmation by the Central Government. It gives power to the Central Government to act only when there is an application for review before it under R. 54. That is why we have not accepted Mr. Pathak's argument that in substance the State Government's order becomes effective only after it is confirmed; R. 54 does not support this. We have not found any provision in the Rules or in the Act which gives any power to the Central Government to review suo motu the order of the State Government granting a lease. That some kind of right is created on the passing of an order granting a lease is clear from the facts of this case also. The order granting the lease was made in December 1952. In April 1953 the appellant was put in possession of the areas granted to him and actually worked them thereafter. At any rate, when the statutory rule grants a right to any party aggrieved to make a review application to the Central Government it certainly follows that the person in whose favour the order is made has also a right to represent his case before the authority to whom the review application is made. It is in the circumstances apparent that as soon as R. 52 gives a right to an aggrieved party to apply for review a lis is created between him and the party in whose favour the grant has been made. Unless therefore there is anything in the statute to the contrary it will be the duty of the authority to act judicially and its decision would be a quasi-judicial act."

15. In ***Harinagar Sugar Mills Ltd. v. Shyam Sunder Jhunjhunwala and others, AIR 1961 SC 1669*** it is held:

"(30) The orders which the Central Government passes, certainly fall within the words "determination" and "order". The proceeding before the Central

Government also falls within the wide words "any cause or matter". The only question is whether the Central Government, when it hears and decides an appeal, can be said to be acting as a Court or tribunal. That the Central Government is not a Court was assumed at the hearing. But to ascertain what falls within the expression "Court or tribunal", one has to begin with "Courts". The word "Court" is not defined in the Companies Act, 1956. It is not defined in the Civil Procedure Code. The definition in the Indian Evidence Act is not exhaustive, and is for the purposes of that Act. In the Now English Dictionary (Vol. II, pp. 1090, 1091), the meaning given is:

"an assembly of judges or other persons legally appointed and acting as a tribunal to hear and determine any cause, civil, ecclesiastical, military or naval."

All tribunals are not Courts, though all Courts are tribunals. The word "Courts" is used to designate those tribunals which are set up in an organised State for the administration of justice. By administration of justice is meant the exercise of judicial power of the State to maintain and uphold rights and to punish "wrongs". Whenever there is an infringement of a right or an injury, the Courts are there to restore the vinculum juris, which is disturbed. Judicial power, according to Griffith, C. J. in Huddart, Parker & Co. Proprietary Ltd. v. Moorehead (1909) 8 CLR 330 (357) means:-

"the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action."

(31) When rights are infringed or invaded, the aggrieved party can go and commence a querela before the ordinary Civil Courts. These Courts which are instrumentalities of Government, are invested with the judicial power of the State, and their authority is derived from the Constitution or some Act of legislature constituting them. Their number is ordinarily fixed and they are ordinarily permanent, and can try any suit or cause within their jurisdiction. Their numbers may be increased or decreased, but they are almost always permanent and go under the compendious name of "Courts of Civil Judicature". There can thus be no doubt that the Central Government does not come within this class.

(32) With the growth of civilisation and the problems of modern life, a large number of administrative tribunals have come into existence. These tribunals have the authority of law to pronounce upon valuable rights; they act in a judicial manner and even on evidence on oath, but they are not part of the ordinary Courts of Civil Judicature. They share the exercise of the judicial power of the State, but they are brought into existence to implement some administrative policy or to determine controversies arising out of some administrative law. They are very similar to Courts, but are not Courts. When the Constitution speaks of 'Courts' in Art. 136, 227 or 228 or in Arts. 233 to 237 or in the Lists, it contemplates Courts of Civil Judicature but not tribunals other than such Courts. This is the reason for using both the expressions in Arts. 136 and 227.

By "Courts" is meant Courts of Civil Judicature and by "tribunals", those bodies of men who are appointed to decide controversies arising under certain special laws. Among the powers of the State is included the power to decide such controversies. This is undoubtedly one of the attributes of the State, and is aptly called the judicial power of the State. In the exercise of this power, a clear division is thus noticeable. Broadly speaking, certain special matters go before tribunals, and the residue goes before the ordinary Courts of Civil Judicature. Their procedures may differ, but the functions are not essentially different. What distinguishes them has never been successfully established. Lord Stamp said that the real distinction is that Courts have "an air of detachment". But this is more a matter of age and tradition and is not of the essence. Many tribunals, in recent years, have acquitted themselves so well and with such detachment as to make this test insufficient. Lord Sankey, L.C. in Shell Company of Australia v. Federal Commissioner of Taxation (1931) A.C. 275 (296) observed:

"The authorities are clear to show that there are tribunals with many of the trappings of a Court, which, nevertheless, are not Courts in the strict sense of exercising judicial power.... In that connection it may be useful to enumerate some negative propositions on this subject: 1. A tribunal is not necessarily a Court in this strict sense because it gives a final decision. 2. Nor because it hears witnesses on oath. 3. Nor because two or more contending parties appear before it between whom it has to decide. 4. Nor because it gives decisions which affect the rights of subjects. 5. Nor because there is an appeal to a Court. 6. Nor because it is a body to which a matter is referred by another body.

(33).....

(34).....

(35).....

(36) Now, in its functions Government often reaches decisions, but all decisions of Government cannot be regarded as those of a tribunal. Resolutions of Government may affect rights of parties, and yet, they may not be in the exercise of judicial power. Resolutions of Government may be amenable to writs under Arts. 32 and 226 in appropriate cases, but may not be subject to a direct appeal under Art. 136 as the decisions of a tribunal. The position, however, changes when Government embarks upon curial functions, and proceeds to exercise judicial power and decide disputes. In those circumstances, it is legitimate to regard the officer who deals with the matter and even Government itself as a tribunal. The officer who decides, may even be anonymous; but the decision is one of a tribunal, whether expressed in his name or in the name of' the Central Government. The word "tribunal" is a word of wide import, and the words "Court" and "tribunal" embrace within them the exercise of judicial power in all its forms. The decision of Government thus falls within the powers of this Court under Art. 136. (Emphasis supplied)"

16. In view whereof the contention that the Revisional Authority which is a quasi-judicial Authority cannot be brought within the ambit of Tribunal is negatived. It is held that the respondents were entitled for the benefit under order passed in SLP and it was within the competence of the Revisional Authority to condone the delay and entertain the Revision on merit. The first contention therefore fails.

17. It is next contended that the Appellate Authority i.e. Commissioner, Banda, Division Chitrakoot Dham since remitted the matter, a revision under Rule 78 of 1963 Rule was not tenable. Rule 78 of the Rules, 1963 mandates:

"78. The State Government may, either suo moto at any time or on an application made within ninety days from the date of communication of the order, call for the examine the record relating to any order passed or proceeding taken by the District Officer, committee, Director or the Divisional Commissioner under these rules and pass such orders as it may think fit."

18. Thus Revision lies even against an order remitting the matter. The second contention accordingly fails.

19. The next contention that the Revisional Order suffers from the vice of perversity. It is observed that the Appellate Authority glossed over the vital facts, viz that in Writ-C No.36068/2018 the claim of petitioner for waiver was negatived on the anvil of Clause 19 and 22 (1) of the Advertisement and secondly, the petitioner who was under an obligation to deposit the credentials within 3 days from date of closing the bid proceeding; having failed to comply the same, it was not within the right of the petitioner to have questioned the tendering of the sand mine. In view whereof, in our considered opinion, the Revisional Authority was well justified in interfering with the Appellate Order and restore the order passed by District Magistrate.

20. Considering this we do not perceive any merit in the petition.

21. Consequently, petition fails and is dismissed. No costs.

(2021)09ILR A1051
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.08.2021

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE DINESH PATHAK, J.

Writ C No. 2959 of 2020
And
Writ C No. 42537 of 2019
And
Writ C No. 42577 of 2019
And
Writ C No. 43014 of 2019

Jaiveer Singh & Ors. ...Petitioners
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioners:
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Counsel for the Respondents:
C.S.C., Sri Abinav Gaur, Sri Rajnish Kumar Rai

A. Railways Act, 1989 - Section 20A, D, E - Land Acquisition - Opportunity of Hearing –

In the present case, the issue before the Court was whether the land once acquired in the district of Gautam Budh Nagar for special railway project i.e., Eastern Dedicated Freight Corridor, can be acquired again by way of notification dated 11.02.2019 under Section 20A for execution of the special railway project. To which the Court held that notwithstanding the earlier acquisition made vide declaration dated 30.07.2010, the Central Government had the power to issue fresh notification under Section 20A (1) of the 1989 Act by virtue of Section 14 of the General Clauses Act, 1897. It is clear that the acquisition in question was to align the track of the freight corridor in a manner that it gets straightened, shortened and, in turn, also save land of Greater Noida Industrial Development

Authority from getting landlocked or wasted. (Para 21 & 22)

The Court opined that once the written objection to the proposed acquisition has been filed within 30 days of the publication of the notification before the competent authority, it under an obligation to offer opportunity of hearing to the objector, either in person or through a legal practitioner. (Para 30)

The Court has taken into consideration that inspite of filing the objection to the proposed acquisition before the competent authority within time, their objections were neither entertained nor decided and they were nt heard on their objections. But the project being near completion, it would be result in huge wastage of public money as the entire alignment of the freight corridor would have to be redone. Therefore, the Court denied o quash the notification and directed to award compensation in accordance with the law, subject to the proof of their right. (Para 37)

Writ Petition No. 2959 of 2020; 42537 of 2019; 42577 of 2019 Partly Allowed.

Writ petition No. 43014 of 2019 Rejected. (E-10)

List of Cases cited:

1. Hindustan Petroleum Corp. Ltd. Vs Darius Shapur Chennai & ors. (2005) 7 SCC 627

2. U.O.I. Vs Shiv Raj (2014) 6 SCC 564

3. Surinder Brar Vs U.O.I . (2013) 1 SCC 403

4. Usha Stud & Agricultural Farms (P) Ltd. Vs St. of Har. (2013) 4 SCC 210

5. Gojer Bros. (P) Ltd. Vs St. of W.B. (2013) 16 SCC 660

6. Swadeshi Cotton Mills Vs U.O.I. (1981) 1 SCC 664

7. Kesar Enterprises Ltd. Vs St. of U.P. & ors. (2011) 13 SCC 733

8. St. of W.B. Vs Debasish Mukherjee & ors. (2011) 14 SCC 187

9. B.P. Singhal Vs U.O.I. (2010) 6 SCC 331

10. K.T. Plantation (P) Ltd. Vs St. of Karn. (2011) 9 SCC 1

11. Manohar Joshi Vs St. of Mah.a (2012) 3 SCC 619

12. Kalinga Mining Corporation Vs U.O.I .(2013)

13. Kalpana Mehta Vs U.O.I. & ors. (2018) 7 SCC 1

14. Railway Corridor Virodh Kishan Sangh Vs U.O.I. (2013) SCC Online Guj 6083

15. Nand Kishore Gupta Vs St. of U.P. & ors. (2010) 10 SCC 282

16. St. of T.N. Vs Vasanth Veerasekaran (2019) 7 SCC 342

17. Nareshbhai Bhagubhai & ors. Vs U.O.I. (2019) 15 SCC 1 *(followed)*

18. Savitri Devi Vs St. of U.P. (2015) 7 SCC 21

19. Project Director, Project Implementation Unit Vs P.V. Krishnamoorthy (2021) 3 SCC 572

20. Dedicated Freight Corridor Corp. of India Vs Subodh Singh & ors. (2011) 11 SCC 100 *(distinguished)*

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

1. As these four petitions question the acquisition of land under a common notification, they have been clubbed together. Writ petition (Group C) numbers 2959 of 2020; 42537 of 2019; and 42577 of 2019 seek quashing of notifications dated 11.02.2019 and 06.11.2019 issued under Sections 20-A and 20-E, respectively, of the Railways Act, 1989 (for short the 1989, Act) to acquire land for a Special Railway Project i.e. Eastern Dedicated Freight

Corridor (for short Freight Corridor) in district Gautam Budh Nagar. Whereas, Writ C No. 43014 of 2019 has been filed by persons who claim themselves to be aggrieved with the impugned notifications though their land is not included in the impugned notification. The petitioners of Writ C No. 2959 of 2020 have their land at village Chamrawali - Boraki, Tehsil Dadri, District Gautam Budh Nagar whereas the petitioners in the remaining three petitions have their land at village Rithauri in the same district.

2. As in Writ C No. 2959 of 2020 pleadings are elaborate and parties have exchanged their affidavits, the same is taken as the leading petition. However, we shall refer to the facts of the other three petitions also, wherever necessary.

3. The case of the petitioners in the leading Writ C No. 2959 of 2020 is that, to acquire land for the Special Railway Project - Freight Corridor in district Gautam Budh Nagar in the State of Uttar Pradesh, a notification under Section 20-A of the 1989 Act was issued on 24 August 2009, which was followed by declaration, dated 30 July, 2010, under Section 20-E of the 1989 Act. Pursuant thereto, an award was passed on 30 August 2011, under sub-section (2) of Section 20-F of the 1989 Act, and physical possession of 5.0844 hectare of land falling in village Chamrawali - Boraki was taken. Despite having taken possession of that land, the land was not utilised. Later, in a mala fide manner, on request of Greater Noida Authority (for short GNIDA), the impugned notifications were issued even though, for the purpose of the Special Railway Project, need for land stood satisfied by the earlier acquisition proceeding. Accordingly, by exercising statutory right available under sub-section (1) of section 20-D of the 1989 Act, an objection to the notification was taken. But, without addressing the objection as per sub-section (2) of Section 20-D of the 1989 Act, straight away the impugned declaration under sub-section (1) of Section 20-E of the 1989 Act was made by making an incorrect declaration that no objection was taken under sub-section (1) of Section 20-D of the 1989 Act. Similar, is the case of the petitioners in Writ C Nos. 42537 of 2019 and 42577 of 2019 though their pleadings are not as elaborate as is in the lead petition i.e. Writ C No. 2959 of 2020.

4. In the leading petition i.e. Writ C No. 2959 of 2020, several counter-affidavits have been filed. It would be useful to refer, in brief, to the contents of those counter-affidavits. These counter affidavits are as follows:

(A) Two counter affidavits dated 18.11.2020 and 12.02.2021 have been filed on behalf of Eastern Dedicated Freight Corridor Corporation of India Ltd. (for short the Corporation) by Sri Ram Manohar Agarwal. It is stated therein that the Corporation was incorporated as a government company under the provisions of the Companies Act, 1956 on 30.10.2006 as a Special Purpose Vehicle (SPV) in the form of Public Sector Undertaking (PSU) of the Ministry of Railways. It is stated that for completion of the Freight Corridor, land though was acquired earlier but more land was required for its completion and therefore, efforts to acquire the same began through agreement/consent of affected persons. But as the exercise could not be completely successful, as few persons, like the petitioners, refused to give consent, GNIDA, vide letter dated 06.12.2018, requested acquisition of 1.966 Ha land in 24 Khasras of village Chamrawali Boraki

and, vide letter dated 25.09.2018, requested acquisition of 0.7279 Ha land of Khasra Nos. 45 and 112 at village Hazratpur. It is stated that the Freight Corridor is a project of national importance and would be the lifeline of the economy. Moreover, it would reduce carbon emission as well as burden on the existing infrastructure for transportation of goods. It is stated that the competent authority had submitted a report that no objections were received in his office to the notification under Section 20-A; acting on the said report, the declaration under Section 20-E (1) of the 1989 Act was made, consequent to which, the land vested in the Central Government. In the counter-affidavit, dated 12.02.2021, it has been demonstrated that the project has been completed substantially. In that context, paragraph 35 thereof, is extracted below:

" In furtherance to the above, a perusal of another annexed table clearly reveals that as against an estimated cost of Civil Engineering Works of Rs. 824 Crores, the latest figures (upto 29th January 2021) show expenditure to the tune of Rs. 614 crores (approximately 74% of financial progress). Only 1.36 kms of linear length of land remains to be acquired out of total requirement of 54.38 kms. The various physical assets created upto date include completion of formation (earth foundation for laying of tracks and associated fittings) for 51.24 kms (76%) out of 54.38 Kms., completion of all 5 major bridges (above 12.2 meters), completion of 47 (92%) minor bridges out of a total of 51,32 (84%) out of 38 Railway under bridges and a whole range of associated works are in full swing as is evident from the bare perusal of the table which is marked and annexed as Annexure 3."

By annexing tables and map, an effort has been made to demonstrate that the work of the Freight Corridor has reached an advanced stage and that a minuscule part of the project remains, due to unavailability of land on account of resistance offered by some persons including the petitioners. Along with counter-affidavit, dated 12.02.2021, vide annexure 4, a table has been placed on record to indicate that the hindrance in the acquisition of land is limited to an area of 2.0783 Ha in a stretch of only 1.150 Kms. of the corridor. Out of which, 0.300 Km falls in village Rithori, which relates to Writ C No. 42537 of 2019 and Writ C No. 42577 of 2019 whereas 0.300 Km falls in village Hazaratpur and 0.550 Km falls in village Chamrawali Boraki, which relates to Writ C No. 2959 of 2020.

In the counter affidavit dated 12.2.2021, while giving para-wise reply to the averments made in Writ C No. 2959 of 2020, in paragraph ("l') it is stated: ".....that the instant acquisition proceedings are for a project of great national importance and over 95% of the project has already been developed and compensation to about 22 persons concerned has already been paid. It is only 300 meters running patch length of corridor and 550 meters running patch length of corridor in Hazratpur village and Chamrawali Boraki village, respectively, that have been unnecessarily and illegitimately hindered on account vexatious petitions based on false and frivolous grounds and for which the entire public purpose has come to a halt for so long.....".

In counter-affidavit dated 18.11.2020 more or less same narration of facts, as noticed above, is there. However, in addition thereto, the respondents have enclosed copy of the award, dated 27.07.2020, passed under Section 20-F(2)

of the 1989 Act. The award reflects that the objection of the petitioner no.1 (Jaiveer Singh) was dealt with at serial no. 5 whereas the objection of petitioner no.2 (Tejpal) was dealt with at serial no. 7 and objection of petitioner no.3 (Shyam Singh) was dealt with at serial no. 17. A perusal of the award would reveal that they had participated in proceedings relating to determination of compensation. Jaiveer Singh had claimed resettlement in a developed area and if the Railways held no land, compensation at the rate of Rs.28,000/- per square meter was claimed. Tejpal's and Shyam Singh's objections are similar except that they have demanded compensation at the rate of Rs.28,500/- per square meter.

(B). Counter-affidavit, dated 11.12.2020, sworn by Akhilesh Kumar, Tehsildar (J), Jewar, Gautam Budh Nagar. He states that he has been authorized to file counter-affidavit on behalf of respondent no.4 i.e. the Competent Authority. In paragraph 16 of the counter-affidavit, which is a reply to the averments made by the petitioners in respect of filing of written objections under Section 20-D (1), it is stated as follows:-

".....it is submitted that the petitioners did not file objection within time before the answering respondent and as such notification u/s 20E of the Act was issued in accordance with law there is no illegality at all. However, land in dispute is in the linear way to complete Dedicated Freight Corridor and is required for the completion of project of national level therefore fresh notification was issued in accordance with law."

In paragraph 18 of the counter-affidavit, which is a reply to the averments made by the petitioners that their objections were not considered and no hearing was afforded to them on their objections, it is stated as follows:-

"..... In reply, it is submitted that no any objection of petitioners was received in the office of answering respondent after notification of Section 20A of the Act, therefore answering respondent proceeded in accordance with law there is no illegality at all. "

In paragraph 20 of the counter-affidavit, which is a reply to the averments made in the writ petition that the notification fraudulently stated that no objection was filed in the office of the competent authority within the stipulated period, it is stated as follows:-

"..... In reply, it is submitted that no objection was received by (should be read as from) any of the land holders within the time after publication of notification U/S 20A of the Act therefore report was forwarded in accordance with law and in furtherance thereof notification U/S 20E was published on 28.11.2019 there is no illegality at all. "

In paragraph 22 of the counter-affidavit, which is a reply to the averments made in the petition that written objections were filed before the competent authority/fourth respondent within 30 days from the date of publication of the notification under sub-section (1) of Section 20A but no opportunity of hearing was provided to the petitioners by the competent authority, it is stated as follows:-

"....The contents of paragraph no. 29 of the writ petition are totally false as stated hence strongly denied. In reply, it is

submitted that competent authority/KALA/DFCC was City Magistrate Greater Noida and not at all S.D.M. Sadar Gautam Budh Nagar in the year 2019 therefore application which was annexed in the writ petition is not at all given in the office of competent authority/D.F.C.C./KALA and same is given in the office of S.D.M. Sadar Collectorate Gautam Budh Nagar and also application is not at all in accordance with provisions of Railway Act 1989 and as such no objection is filed by the any of the petitioners before competent authority which itself proved the report forwarded by the answering respondent. Therefore report forwarded by the answering respondent is in accordance with law there is no illegality at all. "

In paragraph 24 of the counter-affidavit, which is a reply to the averments made in the writ petition that the petitioners were deprived of the opportunity of hearing on their objections to the notification under Section 20A (1), it is stated as follows:-

".....The contents of paragraph no.31 of the writ petition are totally false as stated hence strongly denied. In reply, it is submitted that objection was not at all filed in the office of competent authority/KALA notified for this purpose and so called application which was not at all in the form of objection as per the procedure laid down in the Railway Act 1989 in the office of Sub Divisional Magistrate, Sadar, which was not at all competent authority therefore on the ground writ petition deserved to be dismissed."

Likewise, in paragraphs 26 and 27, which contains reply of paragraphs 33, 34, 35, 36, 37 and 38 of the writ petition wherein it is averred that in a mala fide manner it was reported that no objections under Section 20D(1) of the 1989 Act were filed, it is stated as follows:-

"26.....the contents of paragraph nos. 33 and 34 of the writ petition are totally false as stated hence strongly denied. In reply, it is submitted that from bare perusal of so called objection filed by the petitioners Annexure -8 to the writ petition it is crystal clear that objection is not at all in accordance with prescribed proforma as per the Railway Act 1989 and none of the objection by the petitioners in the office of competent authority/KALA/DFCC same is filed in the office of S.D.M., Sadar who has no any concern with the acquiring in the land in dispute therefore it is crystal clear from the Annexure 8 of the writ petition that no any objection filed by the petitioner after notification of 20A of the Act before the competent authority/KALA/DFCC hence writ petition is misconceived and is liable to be dismissed on the ground alone.

27. That the contents of paragraphs 35, 36, 37 and 38 of the petition are totally false as stated hence strongly denied. In reply, it is submitted that competent authority/KALA/DFCC forwarded the report in accordance with law after considering all facts and circumstances and evidence on record and after adopting due procedure and there is no any illegality as there was no any objection of any of the petitioners before competent authority/KALA/DFCC which itself is clear from the Annexure 8 of the writ petition as same is filed in the office of S.D.M. Sadar not at all in the office of competent authority/KALA/DFCC Gautam Budh Nagar, therefore answering respondent has taken action in accordance with law after following the due procedure

as prescribed in the Railway Act and it is totally wrong to say that no work on the earlier acquired land is going on, work on the earlier acquired land is in progress and only for completion of the project land in dispute along with other land is required as consent with the land holders is not at all settled with the acquiring body therefore the acquisition proceeding in accordance with law there is no illegality at all."

5. In Writ C No. 42537 of 2019, a counter-affidavit has been filed by Sri Ram Manohar Agarwal on behalf of Union of India as well as the Corporation raising similar pleas as were taken in the counter-affidavit filed in Writ C No. 2959 of 2020. In addition to above, it was pleaded that the petitioners had not enclosed record of rights to disclose that they held any right over the land proposed to be acquired. It was pleaded that the extract of record of rights annexed by them did not disclose entry of their name. It was specifically pleaded that the right to file an objection under Section 20D of 1989 Act is limited to the purpose of acquisition mentioned in sub-section (1) of section 20A of the 1989 Act. It was stated that the objection raised by the petitioners of Writ C No. 42537 of 2019 was not in respect of the purpose of acquisition mentioned in sub-section (1) of Section 20A but was in respect of compensation and rehabilitation. The stand therefore is that the objection taken by the petitioners of Writ C No 42537 of 2019 is not an objection contemplated by sub-section (1) of Section 20D of the 1989 Act, hence, it is no objection in the eyes of law. In the rejoinder affidavit, the petitioners of this petition submitted that against Abadi land name of the tenure holder is not entered but their long standing possession and existing structures establish their ownership.

6. Likewise, in Writ C No. 42577 of 2019 on behalf of Union of India as well as Corporation, counter-affidavit was filed by Sri Ram Manohar Agarwal in which similar case as in Writ C No.42537 of 2019 was set up. The petitioners also, in rebuttal, took similar pleas. Thus, the stand of the respondents in Writ C No. 42577 of 2019 and Writ C No. 42537 of 2019 is that the alleged objections were no objection as contemplated by sub-section (1) of Section 20D of 1989 Act; and that the petitioners name was not recorded in revenue records. In rejoinder, the stand of the petitioners was that it was Abadi land where they held possession and had their structures therefore, mere absence of their name in the revenue records is not sufficient to defeat their claim.

7. In Writ C No. 43014 of 2019, the stand of the respondents is that the land of the petitioners is not notified for acquisition and therefore, their petition is misconceived.

8. Having noticed, in brief, the pleadings of the parties in this bunch of petitions, we, now, proceed to notice the submissions of the learned counsel for the parties.

9. We have heard Sri N.P. Singh for the writ petitioners in the leading Writ C No. 2959 of 2020 and Sri Mukesh Kumar for the petitioners in connected Writ C Nos. 42577 of 2019, 42537 of 2019 and 43014 of 2019. In all the petitions we have heard Sri Manish Goyal, Additional Advocate General, assisted by Ms. Akansha Sharma, and Sri Abhishek Kumar for the Union of India as well as the Corporation; Sri A.K. Goyal and the learned standing counsel for the competent authority; Sri Anoop Trivedi, learned senior counsel, assisted by

Sri Abhinav Gaur, also appeared for the Corporation; and Sri Alok Singh, holding brief of Sri Ramendra Pratap Singh, appeared for Greater Noida.

SUBMISSIONS ON BEHALF OF THE PETITIONERS

10. Sri N.P. Singh, who led the arguments on behalf of the petitioners, submitted as follows:-

(a) A notification under Section 20A of the 1989 Act could be issued where the Central Government is satisfied that for a public purpose any land is required for execution of a Special Railway Project. Section 2 (37A) of 1989 Act provides that a Special Railway Project means a project, notified as such by the Central Government from time to time, for providing national infrastructure for a public purpose in a specified time frame, covering one or more States or the Union Territories. Since, by notification dated 24 August 2009, the Central Government through the Ministry of Railways notified its intention to acquire land for execution of the Freight Corridor, a special railway project, within the district of Gautam Budh Nagar in the State of Uttar Pradesh, and, in pursuance thereof, had issued notification on 30 July, 2010, under Section 20E of 1989 Act, the requirement of land for execution of that project stood satisfied and, therefore, there could be no further acquisition for that project. He submits that the impugned notification is, therefore, beyond the scope of the provisions of the 1989 Act and is mala fide.

(b) Under the earlier notification of the year 2010, an award was passed and physical possession of the land was taken yet, that land was not utilised even though it was agricultural land and, now, unnecessarily, a fresh notification has been brought, at the request of GNIDA, not to serve the purpose for which acquisition could be made under the 1989 Act but to benefit GNIDA. It was urged that the acquisition therefore, is not to serve the purpose contemplated under the 1989 Act but to serve GNIDA, which vitiates the notification.

(c) That even assuming that the notification could have been issued under the provisions of the 1989 Act, the procedure provided by the 1989 Act for making an acquisition under the Act was not followed inasmuch as the objections taken by the petitioners, under sub-section (1) of section 20 D of the 1989 Act, to the notification under sub-section (1) of Section 20A were not addressed; no date for personal hearing was fixed as is contemplated by the provisions of sub-section (2) of Section 20D of the 1989 Act; and it was wrongly reported that no objections were taken. The stand of the respondents that no objection was taken is in the teeth of the record because from the affidavit of Tehsildar it is clear that the objection was filed though, according to him, it was not before the competent authority because the competent authority was the City Magistrate, Greater Noida and not the S.D.M.(Sadar), Gautam Budh Nagar which is incorrect inasmuch as in the notification dated 11.2.2019, under Section 20A of 1989 Act, the competent authority was specified as Up Zila Adhikari, Gautam Budh Nagar, U.P. which is none other than the S.D.M. (Sadar), Gautam Budh Nagar and, otherwise also, the objection was titled in a manner that it was addressed to both S.D.M. (Sadar) as well as Up-Zila Adhikari, Gautam Budh Nagar therefore,

by no stretch of imagination it could be stated that there was no objection filed. Hence, the notification under Section 20E is liable to be quashed.

11. On behalf of the petitioners in Writ C Nos. 42577 of 2019 and 42537 of 2019, the learned counsel representing those petitioners, apart from adopting the above submissions made by Sri N.P. Singh, urged that the stand of the respondents that the objection taken by these writ petitioners were no objection, as contemplated by sub-section (1) of Section 20D of the 1989 Act, and were justifiably ignored, cannot be accepted inasmuch as sub-section (2) of section 20 D of the 1989 Act casts a duty on the competent authority to give the objector an opportunity of being heard. Therefore, once objections are taken, whether they relate to the purpose mentioned in sub-section (1) of section 20A of the 1989 Act, the competent authority has to invite the objector for personal hearing. In absence whereof, the declaration under sub-section (1) of Section 20E of the 1989 Act gets vitiated.

12. Learned counsel for the petitioners cited a number of decisions to demonstrate that the right to file an objection to a preliminary notification proposing to acquire land is a valuable right akin to a fundamental right; and that hearing on the objections must be effective and not a mere formality and a violation of that right vitiates the notification of declaration. The citation of those decisions are:-

(a) (2005) 7 SCC 627 : Hindustan Petroleum Corporation Ltd. v. Darius Shapur Chennai and others;

(b) (2014) 6 SCC 564 : Union of India v. Shiv Raj;

(c) (2013) 1 SCC 403 : Surinder Brar V. Union of India

(d) (2013) 4 SCC 210 : Usha Stud & Agricultural Farms (P) Ltd. v. State of Haryana.

13. To contend that the merit of the objections is to be considered by the competent authority and not the High Court, apex court decision in the case of **Gojer Bros. (P) Ltd. v. State of W.B., (2013) 16 SCC 660,** was cited.

14. To contend that failure to observe audi alteram partem rule at pre-decisional stage would vitiate the decision, apex court decision in **Swadeshi Cotton Mills v. Union of India, (1981) 1 SCC 664**, was cited. Apex court decision in **Kesar Enterprises Ltd. v. State of U.P and others, (2011) 13 SCC 733**, was cited to contend that the underlying purpose of the principles of natural justice is to check arbitrary exercise of power by State and its functionaries. Decisions of Apex Court in **State of West Bengal v. Debasish Mukherjee and others, (2011) 14 SCC 187, and B.P. Singhal v. Union of India, (2010) 6 SCC 331**, were cited to contend that in a democratic country, governed by rule of law, no authority has absolute discretion and even prerogative power is subject to judicial review; and that even the doctrine of pleasure cannot be a licence to act arbitrarily, whimsically, or capriciously with unfettered discretion/unaccountable action. Thus, where reasons given for exercise of such power are irrelevant or where the exercise of power is vitiated by self-denial on wrong appreciation of the full amplitude of the power or where the decision is arbitrary, discriminatory or mala fide, judicial review would be warranted.

15. Reliance on the judgment of the apex court in **K.T. Plantation (P) Ltd. v. State of Karnataka, (2011) 9 SCC 1,** was placed to urge that rule of law is one of the most important aspects of the doctrine of basic structure and any interference with the peaceful enjoyment of possession should be lawful - public purpose is a condition precedent for applicability of Article 300-A of the Constitution and its violation is amenable to judicial review - whether the purpose is primarily public or private, has to be decided by the legislature on the basis of object of the Statute and policy of legislation. The decision of apex court in the case of **Manohar Joshi v. State of Maharastra, (2012) 3 SCC 619** was cited to contend that town planning is to be done after elaborate planning keeping in mind the difficulties of public and that there should not be arbitrary shifting of plans - once a plan is formulated, the same has to be implemented as it is only in the rarest of rare case that a departure from it could be had. Decision in the case of Kalinga Mining Corporation v. Union of India, (2013) 5 SCC 252, was cited to contend that though the scope of judicial review with regard to the actual decision taken is limited but where the decision making process is vitiated, the power of judicial review could be exercised. Decision in the case of **Kalpana Mehta v. Union of India and others, (2018) 7 SCC 1,** was cited to urge that the constitutional courts cannot sit in oblivion when fundamental rights of individuals are in jeopardy - the Constitution is about empowerment and that indian society must move "from the culture of authority and submission to the law, to one of justification and rights under the law. Decision of Gujarat High Court reported in (**2013) SCC Online Guj 6083 in the case of Railway Corridor Virodh Kishan Sangh V. Union of India** was cited to urge that where the declaration under Section 20E of the 1989 Act is made without consideration of objections under section 20D not only the declaration is to be quashed but also the preliminary notification under section 20-A (1) if the statutory period prescribed by sub section (3) of Section 20E of the 1989 Act from the date of notification under section 20A (1) has expired.

SUBMISSIONS ON BEHALF OF THE RESPONDENTS

16. On behalf of respondents, Sri Manish Goyal, who led the arguments, as well as other counsels including Sri Anoop Trivedi, appearing for the respondents, submitted as follows:-

(a) The Special Railway Project as contemplated by section 2 (37A) of the 1989 Act was notified on 19.02.2008 by the Central Government as follows:-

"NOTIFICATION

New Delhi, the 19th February, 2008

S.O. 360(E)*---- In exercise of the powers conferred by clause (37A) of Section 2 of the Railways Act, 1989, the Central Government hereby notifies the following projects as special railway project, as mentioned in column (2) of the table below in the State mentioned in column (3) of the said table, with effect from the date of publication of this notification in the Official Gazette.*

TABLE

Special Railway Project

Sl.No.	***Name of Project***	***State/UT***
(1)	(2)	(3)
1.	Eastern Dedicated Freight Corridor	Bihar, Uttar Pradesh, Haryana, Punjab
2.	Western Dedicated Freight Corridor	Maharastra, Gujarat , Rajasthan, Haryana, Delhi, Uttar Pradesh

[F. No. 2008/LML/13/5]
MATHEWJOHN, Secy."

It was urged that from the above notification it is clear that the Eastern Dedicated Freight Corridor runs through four States, namely, Bihar, Uttar Pradesh, Haryana, Punjab. The project is not limited to any particular district or an area therefore, even if the land in the district of Gautam Budh Nagar was notified in the year 2009 for the Eastern Dedicated Freight Corridor (for short the Freight Corridor), the power to acquire further land for the Freight Corridor in the same district would not come to an end as that power can be exercised under Section 20A, read with Section 2 (37A) of the 1989 Act, from time to time, depending upon the need for the land for creating appropriate infrastructure for the Freight Corridor. It was urged, by inviting our attention on the site plan of the Freight Corridor project in the district of Gautam Budh Nagar, that earlier contemplated Freight Corridor line had a detour from the existing Indian Railway Track which was causing problem as a large chunk of land of Greater Noida was getting landlocked, therefore to straighten the Freight Corridor by aligning it and making it run parallel to the existing Indian Railway Track, after being informed that, except a few, a large number of tenure holders were ready to offer their land for transfer, the acquisition proceeding was initiated therefore, the acquisition proceeding cannot be said to be beyond the scope of Section 20A of the 1989 Act.

(b) It was contended that the plea that the competent authority was City Magistrate and, therefore, filing of the objections before some other authority can not be taken as filing of an objection, is not to be understood as an admission that objections to the notification under section 20-A (1) were filed. Because, in the first part of the counter-affidavit filed in Writ C No.2959 of 2020, it was clearly stated that no objection was filed within the time specified. Thus, the above plea should be understood as plea in the alternative and not as an admission regarding filing of the objection. It was urged that even if the objections, annexed by the petitioners in Writ C No. 2959 of 2020, are taken to have been filed, they do not specifically claim that the purpose of the acquisition is not what is contemplated by sub-section (1) of Section 20A of the 1989 Act. Rather, they only question the need for further acquisition. It was urged that in so far as the objection of Jaiveer Singh is concerned that does not even mention the notification to which objection has been taken and therefore the same cannot be treated as an objection to the notification. In the alternative, it was urged that the scope of the objection under Section 20D is limited to raising an objection with regard to the purpose mentioned in sub-section (1) of Section 20A whereas, none of the objections purports to question that, hence, the objection is no objection in the eyes of law. Lastly, it was contended that 95% of the project is complete, the petitioners have

participated in making of the award and have demanded compensation at the market value therefore, at this stage, there would be no justification to interfere with the acquisition notification when the land holders can be appropriately compensated with money. With regard to writ petition No. 42537 of 2019 and 42577 of 2019 it was submitted that in those petitions, firstly, the objectors are not recorded in the record of rights and, secondly, the objection taken by them is not that the acquisition did not subserve the purpose contemplated under sub-section (1) of Section 20A of the 1989 Act.

17. The learned counsel for the respondents placed reliance on the following authorities:-

(a) (2010) 10 SCC 282 : Nand Kishore Gupta v. State of U.P. and others

This authority was cited to contend that where a large project is undertaken and the majority of the farmers receive compensation and only a handful of them raise objection, the court can take into account that aspect for not interfering with the acquisition, particularly, when the project is of immense public importance like an express way and its alignment cannot be changed.

(b) (2019) 7 SCC 342 : State of Tamil Nadu vs. Vasanthi Veerasekaran

This authority was cited to contend that where the acquisition is for a project of MRTS (Railways) on behalf of Ministry of Railway, Government of India and, under the law of acquisition, there is no provision for rehabilitation or for providing alternative sites to the landlosers, a direction by the High Court in providing alternative land would not be appropriate and compensation alone could be awarded.

(c) (2019) 15 SCC 1 : Nareshbhai Bhagubhai and others v. Union of India

Reliance on this judgment was placed to contend that under Section 20D of the 1989 Act, the scope of the objection is limited to the purpose for which acquisition is made and it is not a general right to file objections as is under Section 5-A of the Land Acquisition Act, 1894 (for short the 1894 Act). This judgment was also relied upon to urge that even where notification under Section 20E gets vitiated in absence of an order passed on the objection under Section 20D of the 1989 Act, if the court finds that the Special Railway Project is on the verge of completion and only a minuscule part remains, in respect of which objections have been taken by the land-owners, the Court need not set aside the notification but may direct payment of compensation at the current market rate.

(d) (2015) 7 SCC 21 : Savitri Devi vs. State of U.P.

Paragraph 46 of this judgment was relied upon to contend that where developments have taken place and third party rights have been created even if the court finds acquisition to have vitiated, a workable solution could be arrived at by the Court by adequately compensating the landowners in the form of compensation etc.

(e) (2021) 3 SCC 572 : Project Director, Project Implementation Unit v. P.V. Krishnamoorthy

This was cited to contend that in matters relating to national highways and economic corridor, the decision taken by experts with regard to the route is not amenable to judicial review.

(f) (2011) 11 SCC 100 : Dedicated Freight Corridor Corporation of India V. Subodh Singh and others

This judgment was cited to contend that the period of limitation to pass an award would be counted from the date of the gazette notification and not from the date of publication in the newspaper.

ISSUES

18. Having noticed the rival submissions and having perused the record, in our view, the following issues arise for our consideration:-

(i) Whether the notification dated 11 February 2019 under Section 20A of the 1989 Act could have been issued to serve the public purpose for the special railway project as land had already been acquired for the project vide notification dated 30 July 2010 followed by an award and taking of possession?

(ii) Whether the petitioners of Writ C Nos. 2959 of 2020; 42537 of 2019; and 42577 of 2019 filed their objection under sub-section (1) of Section 20D of the Railways Act, 1989?. If so, whether in absence of consideration of their objection, the declaration notification dated 06 November 2019, under Section 20 E of the 1989 Act, stood vitiated?.

(iii) If the declaration notification dated 06 November 2019, under section 20-E of the 1989 Act, is vitiated, to what relief the petitioners are entitled to?

ANALYSIS AND CONCLUSION

19. **Issue No.1**: In respect of the validity of notification dated 11.02.2019, under Section 20A of Railways Act, 1989, the thrust of the submissions of the learned counsel for the writ petitioners is that once land was acquired in the district of Gautam Budh Nagar for the special railway project i.e. Eastern Dedicated Freight Corridor, there existed no public purpose for acquisition of land for execution of the special railway project and therefore, the notification, under Section 20A, dated 11.02.2019, is liable to be quashed. To buttress the above submission, the learned counsel for the petitioners placed reliance on the provisions of sub-section (37A) of Section 2 of the 1989 Act which defines a special railway project as a project notified as such by the Central Government from time to time, for providing national infrastructure for public purpose in a specified time-frame, covering one or more States or the Union Territories. It was urged that the notification dated 19 February 2008, under sub-section (37A) of Section 2, notified Eastern Dedicated Freight Corridor as a special railway project covering the State of Bihar, Uttar Pradesh, Haryana and Punjab. The notification under section 20-A of the 1989 Act of the year 2009 was specific for the Eastern Dedicated Freight Corridor in the district of Gautam Budh Nagar and it was followed by declaration and award with transfer of possession therefore, it would be deemed that the need for land for the Eastern Dedicated Freight Corridor in the district of Gautam Budh Nagar stood satisfied. Under the circumstances, the impugned notification dated 11 February

2019 does not serve the public purpose contemplated by the Act but some collateral purpose, such as releasing landlocked land of GNIDA, which is not permissible under the 1989 Act.

20. Per contra, on behalf of the respondents, the stand taken in their counter-affidavits is that a large chunk of land of GNIDA was to get landlocked on account of the circuitous route of the earlier proposed freight corridor and therefore, a decision was taken to properly align the freight corridor so as to run it parallel to the existing Indian Railway track. This was in larger public and national interest. Hence, the process of acquisition started. More than 75% of the land required for that end was acquired through sale-deeds and when resistance was offered by a handful of persons, notification was issued to acquire the land. It was urged on behalf of the respondents that for a special railway project, land can be acquired from to time dependent on the need that may arise. Aligning the freight corridor with the existing Indian Railway Track is a genuine need, relatable to public purpose, based on expert decision and the same is not amenable to judicial review.

21. We have given our anxious consideration to the rival submissions on the issue and have carefully examined the pleadings of the parties. No doubt, earlier also, the power vested in the Central Government under section 20A (1) was exercised to acquire land in the district of Gautam Budh Nagar for the Eastern Dedicated Freight Corridor but there is nothing in the Act which may lead us to infer that once the power is exercised the same cannot be exercised again, if need so arises. In this regard, it would be apposite to notice Section 14 of the General Clauses Act, 1897 which provides that where, by Central Act, any power is conferred, then unless a different intention appears, that power may be exercised from time to time as occasion requires. Thus, notification to acquire land for Eastern Dedicated Freight Corridor in the district of Gautam Budh Nagar issued in the year 2010 would not place an embargo on fresh acquisition of land in the district for the Freight Corridor, if there exists a public purpose.

22. From the averments made in the counter-affidavit including the own case of the writ petitioners, the earlier proposed freight corridor took a detour from the existing Indian Railway Track which resulted in large chunk of GNIDA land getting landlocked. GNIDA therefore, requested review of the route by offering land to align the freight corridor with existing Indian Railway track. It appears that 75% of the land could be garnered through sale deeds and the remaining was proposed to be acquired. This way, the route not only gets shortened but gets aligned with the existing railway tracks. Such a decision, in our view, would fall in the realm of an expert decision which, in our opinion, is not amenable to judicial review, particularly, in the light of the decision of the apex court in the case of **Project Director, Project Implementation Unit v. P.V. Krishnamoorthy (supra)** wherein, after examining the material brought on record, the Court had not interfered with the acquisition to cater to the altered plan upon finding that the alteration in the plan for the project necessitating acquisition was taken consciously on the basis of material available on record to ensure a shorter and a direct route. The apex court had also observed that such decision being based on expert opinion is beyond the purview of

judicial review. Here also, from the counter-affidavit, it appears, on 01.03.2013, the Chief Executive Officer, GNIDA, wrote a letter to the Managing Director, Dedicated Freight Corridor Corporation of India Ltd. explaining the difficulty that would arise if the Freight Corridor takes a detour as proposed. This letter has been brought on record as Annexure 6 to the counter-affidavit dated 12.02.2021 filed on behalf of respondents 1 and 2 in Writ C No. 2959 of 2020. The said letter apprises the Managing Director of the Dedicated Freight Corridor Corporation of India Ltd. that if the alignment is not changed, then 200-250 acres of land of Greater Noida would get wasted and would have adverse impact on the proposed Boraki railway station. The letter thus proposes alignment of the freight corridor with existing railway track and it also assures cooperation in providing land for the purpose. It is stated in paragraph "P' of the counter-affidavit, dated 12.02.2021, which is reply to paragraphs 37 and 38 of the writ petition, as follows:-

" .....The detour alignment of DFCCIL Track was changed on the request of GNIDA from detour to parallel of IR Track to avoid land locking of approx. 200-250 acre land as per GNIDA request vide Letter from CEO/GNIDA dated 01.03.2013.....

It was agreed during the meeting under the Chairmanship of Chief Secretary, IDC, UP Govt on dated 20.05.2013 to handover the land to DFCCIL by 30.06.2013 after straightening the alignment which was passing through the Abadi of Boraki village.....

The land coming under the Parallel Alignment of EDFC in village ChamrawaliBoraki (6.5167 Hac.) was to be handed over to DFCCIL (Ministry of Railways) by Greater Noida Industrial Devlopment Authority (GNIDA) after purchasing the same on mutual consent from People/Residents. GNIDA started the process and most of the land in village Boraki was purchased by GNIDA from the residents through mutual consent."

From the above, it is clear that the acquisition in question was to align the track of the freight corridor in a manner that it gets straightened, shortened and, in turn, also save land of GNIDA from getting landlocked or wasted. An acquisition exercise to serve such a purpose, based on review of the earlier proposed route, after examining its workability, cannot be said to serve no public purpose for execution of a special railway project as contemplated by sub-section (1) of Section 20-A of the 1989 Act. We, therefore, hold that notwithstanding the earlier acquisition made vide declaration dated 30 July 2010, the Central Government had the power to issue a fresh notification under section 20A (1) of the 1989 Act by virtue of Section 14 of the General Clauses Act, 1897 upon a review of the workability of the earlier proposed route. Such power having been exercised consciously, after taking into account the request of GNIDA and the practicality of the altered plan, is for a public purpose relatable to execution of a special railway project of economic importance and calls for no interference in exercise of the power of judicial review under Article 226 of the Constitution of India. The issue no.1 is decided accordingly.

23. **Issue No.2** : In respect of this issue, the stand of the petitioners had been categorical that upon publication of notification under Section 20A they had

submitted their objection under Section 20 D within the period specified in the publication. The petitioners have also enclosed copy of their objections which are addressed to the Up Zila Adhikari (Sadar), / S.D.M. (Sadar), Gautam Budh Nagar. The objection filed by Jaiveer (petitioner no.1 in Writ C No.2959 of 2020) is dated 12.3.2019; of Tejpal (petitioner no.2 in Writ C No.2959 of 2020) is dated 15.03.2020; and of Shyam Singh (petitioner no.3 in Writ C No.2959 of 2020) is dated 13.03.2020. These objections raise a question with regard to the justification for the acquisition by claiming that for the freight corridor, land had already been acquired in the past in the district of Gautam Budh Nagar. These objections were admittedly not decided.

24. The respondents contested the issue by taking the following pleas:-

(a) that the objections were not filed within the prescribed time;

(b) that the objections were not filed before the competent authority inasmuch as the competent authority was the City Magistrate, Greater Noida and not SDM (Sadar), Gautam Budh Nagar; and

(c) even if it is assumed that the objections were taken, they were not of the kind envisaged by section 20D of 1989 Act inasmuch as they do not specifically claim that the acquisition served no public purpose.

25. A perusal of Annexure 3 to Writ C No.2959 of 2020, which is typed copy of the impugned notification dated 11 February 2019, would reveal that it invited objections, under sub-section (1) of Section 20 D, within 30 days from the date of publication in the official gazette. As per the notification, objections were to be filed before competent authority, that is, the Up - Zila Adhikari Gautam Budh Nagar. If we count 30 days by excluding the date of the publication of notification in the gazette, keeping in mind that the month of February 2019 had 28 days, objections taken by Jaiveer, dated 12.3.2019, and Shyam Singh @ Shyamveer, dated 13.3.2019, were within the period of 30 days. Whereas, objection of Tej Pal would be beyond 30 days. But, from Annexure CA-2 filed along with counter-affidavit dated 18.11.2020 of respondent no.5 in Writ C No. 2959 of 2020, which is copy of the award dated 27.07.2020, it appears that the notification dated 11.2.2019, under section 20A (1), was published in newspapers Dainik Jagran and Amar Ujala on 26.02.2019. Under sub-section (1) of Section 20D of the 1989 Act, an objection is to be filed within a period of 30 days from the date of publication of the notification under sub-section (1) of Section 20A. Sub-section (4) of Section 20 A of the 1989 Act provides for the procedure for publication of notification under sub section (1) of section 20A by stating that the competent authority shall cause the substance of the notification to be published in two local newspapers, one of which shall be in a vernacular language. By contrast, Section 20-E of 1989 Act does not require publication of notification in newspapers therefore, the decision of the Apex Court in the case of **Dedicated Freight Corridor Corporation of India V. Subodh Singh and others (supra)** that the period within which award is to be passed, under Section 20F (2) of the 1989 Act, is to counted from the date of gazette notification, under section 20E (1), is of no help to the respondents. Rather, the period for filing an objection under sub-section (1) of section 20-D of the 1989 Act will have

to be counted from the last date of publication of the notification as is required by sub-section (4) of section 20-A of the 1989 Act. Since the notification under sub section (1) of section 20 A of the 1989 Act was published in the newspaper, under sub-section (4) of Section 20A of the 1989 Act, on 26.02.2019 and all the objections were filed by the petitioners within 30 days, when counted from 26.02.2019, they were all within time, therefore the stand taken by the respondents that objection was not within time is not correct. Similarly, in Writ C No. 42537 of 2019, objections were filed within time. One set of objections were filed on 28.02.2019 and the other set of objections were filed on 05.03.2019. Likewise, in Writ C No. 42577 of 2019, the petitioners filed objections in two sets. One set of petitioners filed objections on 28.02.2019 and the other set filed objections on 05.03.2019. Thus, the stand taken in the counter-affidavit that the objections were not filed within time is incorrect. We, therefore, hold that the objections were taken within time i.e. within 30 days of the publication of the notification, dated 11.02.2019, under Section 20A (4) of the 1989 Act.

26. The other stand of the respondents that the objections were not taken before the competent authority, which was the City Magistrate, Greater Noida and not the SDM (Sadar), Gautam Budh Nagar, is on the face of the record misconceived. Indisputably, the notification under Section 20A had specified the competent authority as Up Zila Adhikari, Gautam Budh Nagar, Uttar Pradesh. All the objections were addressed to Up-Zila Adhikari, Gautam Budh Nagar/ Sub Divisional Magistrate (Sadar), Gautam Budh Nagar. Thus, the stand taken by the respondent no.4, namely, the Tehsildar (J.), Jewar, Gautam Budh Nagar that it was the City Magistrate, Greater Noida, who was the competent authority, is outright rejected. Noticeably, the counter affidavit does not specifically state that no such objection is traceable in the office of the Up-Zila Adhikari / S.D.M. (Sadar), Gautam Budh Nagar. Another stand taken by the learned counsel for the respondents that the objections did not specify the notification against which they were made is too hyper technical and has no merit for the following reasons: (a) when objection is taken before the authority concerned pursuant to a publication, from the context, the authority can easily correlate to which it relates to; and (b) ordinarily, land losers are rustic villagers or the like, expecting them to draft an objection like a plaint would not be appropriate.

27. The third stand taken by the counsel for the respondents is a bit interesting. The learned counsel for the respondents urged that under sub-section (1) of section 20D of the 1989 Act, objection is limited to the purpose mentioned in the notification of sub-section (1) of section 20A and unless the objection questions the purpose, it cannot be treated as an objection and, therefore, even if there is a failure to consider the objections taken by the petitioners it would not vitiate the notification under Section 20E of the 1989 Act.

28. To examine the merit of the aforesaid contention, it would be useful for us to extract the provisions of Section 20A, Section 20D and Section 20E of the 1989 Act. These sections are extracted below:-

"20A. Power to acquire land, etc.-- *(1) Where the Central Government is satisfied that for a public purpose any land*

is required for execution of a special railway project, it may, by notification, declare its intention to acquire such land.

(2) Every notification under sub-section (1), shall give a brief description of the land and of the special railway project for which the land is intended to be acquired.

(3) The State Government or the Union territory, as the case may be, shall for the purposes of this section, provide the details of the land records to the competent authority, whenever required.

(4) The competent authority shall cause the substance of the notification to be published in two local newspapers, one of which shall be in a vernacular language.

***20D. Hearing of objections, etc**.-- (1) Any person interested in the land may, within a period of thirty days from the date of publication of the notification under sub-section (1) of section 20A, object to the acquisition of land for the purpose mentioned in that sub-section.*

(2) Every objection under sub-section (1), shall be made to the competent authority in writing, and shall set out the grounds thereof and the competent authority shall give the objector an opportunity of being heard, either in person or by a legal practitioner, and may, after hearing all such objections and after making such further enquiry, if any, as the competent authority thinks necessary, by order, either allow or disallow the objections.

***Explanation.--** For the purposes of this sub-section, "legal practitioner" has the same meaning as in clause (i) of sub-section (1) of section 2 of the Advocates Act, 1961(25 of 1961).*

(3) Any order made by the competent authority under sub-section (2) shall be final.

***20E. Declaration of acquisition.**-- (1) Where no objection under sub-section (1) of section 20D has been made to the competent authority within the period specified therein or where the competent authority has disallowed the objections under sub-section (2) of that section, the competent authority shall, as soon as may be, submit a report accordingly to the Central Government and on receipt of such report, the Central Government shall declare, by notification, that the land should be acquired for the purpose mentioned in sub-section (1) of section 20A.*

(2) On the publication of the declaration under sub-section (1), the land shall vest absolutely in the Central Government free from all encumbrances.

(3) Where in respect of any land, a notification has been published under sub-section (1) of section 20A for its acquisition, but no declaration under sub-section (1) of this section has been published within a period of one year from the date of publication of that notification, the said notification shall cease to have any effect:

Provided that in computing the said period of one year, the period during which any action or proceedings to be taken in pursuance of the notification issued under sub-section (1) of section 20A is stayed by an order of a court shall be excluded.

(4) A declaration made by the Central Government under sub-section (1) shall not be called in question in any court or by any other authority."

29. A perusal of the extracted provisions reflect that for a notification declaring intention to acquire the land, under sub-section (1) of Section 20A of the 1989 Act, the Central Government must be satisfied that for a public purpose any land is required for execution of a special railway project. Sub-section (1) of section 20D of the 1989 Act provides that any person interested in the land may, within a period of thirty days from the date of publication of the notification under sub-section (1) of section 20A, object to the acquisition of land for the purpose mentioned in that sub-section. Sub-section (2) of Section 20D provides that every objection, under sub-section (1), shall be made to the competent authority in writing, and shall set out the grounds thereof and the competent authority shall give the objector an opportunity of being heard, either in person or by a legal practitioner, and may, after hearing all such objections and after making such further enquiry, if any, as the competent authority thinks necessary, by order, either allow or disallow the objections.

30. From a plain reading of the aforesaid provisions, it is clear that the scope of the objection is set out in sub-section (1) of section 20 D of the 1989 Act whereas, the mode and manner in which the objection is to be taken and dealt with is laid down in sub-section (2). Importantly, sub-section (2) does not specify the grounds that are necessarily to be taken in the written objection. It merely states that the grounds for the objection must be set out. Once an objection is taken in writing, the competent authority has to give opportunity to the objector of being heard, either in person or through a legal practitioner. Importantly, sub-section (2) of section 20D does not state that if the grounds of objection are not proper, the competent authority may deny opportunity of hearing. Thus, taking into account that the provision to raise an objection is for the benefit of the landowner who is to lose his land, a construction that enables it to serve its purpose fully is to be preferred. Such purpose is best served by allowing the objector to be heard once he takes an objection. Accordingly, we are of the view that once written objection to the proposed acquisition is taken and submitted before the competent authority, the competent authority is under an obligation to offer opportunity of hearing to the objector, either in person or through a legal practitioner. No doubt, thereafter, it is open to the competent authority to reject the objection on the ground that the objection does not question the purpose of the acquisition as set out in sub-section (1) of section 20A of the 1989 Act. But, the competent authority cannot treat the objection as a waste paper, before hearing the objector, on the ground that the written objection is not worth consideration.

31. The decisions that have been cited before us are clear that wherever the statute provides for an opportunity to a person to oppose the acquisition of his land then that person should not be deprived of that opportunity except in rare circumstances. Even in cases where acquisition notifications were coupled with dispensation clause i.e. sub-section (4) of Section 17 of the 1894 Act to deprive a person of his right to object under section 5 A of the 1894 Act, the courts had been strict in allowing invocation of such

dispensation power and have consistently deprecated the practice of casual dispensation of the requirement of hearing. Here, under the 1989 Act, there is no provision to dispense with the requirement of hearing on objections under Section 20D of the 1989 Act therefore, in our considered view, once a written objection, under Section 20D, to the acquisition is taken, a duty is cast on the competent authority to take a decision on the objection after hearing the objector or his legal practitioner.

32. The decision of the apex court in ***Nareshbhai Bhagubhai and others v. Union of India (supra),*** on which reliance has been placed by the learned counsel for the respondents, though holds that the scope of the objection under section 20D of the 1989 Act is limited to the purpose for which acquisition is made and is not a general right to file objections as under Section 5A of the 1894 Act but, it simultaneously holds that the statute mandates that the order is required to be passed by the competent authority after hearing the land owners. The order cannot precede the hearing of objections. If an order is passed prior to the personal hearing, and enquiry by the Competent Authority, it would be contrary to the statute, invalid, and vitiated by a predetermined disposition. Thus, what is important is that once an objection is taken to the proposed acquisition, an obligation is cast upon the competent authority to hear the objector or his legal practitioner. It is only after hearing, that the merit of the objection can be examined and if the grounds for the objection are not germane to the statutory provisions, the same could be rejected.

33. In this case, from the affidavit dated 12.02.2021 filed by Ram Manohar Agarwal on behalf of respondents 1 and 2, it is clear that the Deputy Collector/Competent Authority, Gautam Budh Nagar reported to the Secretary, Ministry of Railways, Govt. of India, vide letter dated 24.09.2019, that no objection was taken by the land owners despite publication of the notification under Section 20A (4) on 26.02.2019 whereafter the declaration under section 20-D(1) was made. From this, it is clear that there was no adjudication on the objection taken by the land owners.

34. Based on the analysis above, we arrive at the following conclusions: (a) that the petitioners did take written objection to the notification under Section 20 A of the 1989 Act; (b) the objections were taken before the competent authority within the time specified by Section 20D (1) of the 1989 Act; and (c) that their objections were neither entertained nor decided and they were also not heard on their objections, despite the mandate of sub-section (2) of Section 20D of the 1989 Act.

35. As we have found that the mandate of sub-section (2) of Section 20D was not followed, in view of the clear statutory mandate of sub-section (1) of section 20 E that the declaration under sub section (1) of Section 20E could be made only where no objection under sub-section (1) of Section 20D has been taken before the competent authority within the period specified or where the competent authority has disallowed the objections under sub-section (2) thereof, the logical consequence that follows is that the impugned notification, dated 6 November 2019, under sub-section (1) of section 20E of the 1989 Act, is vitiated. The issue no. 2 is decided accordingly.

36. **Issue no.3**. As we have already found that the impugned declaration under

sub-section (1) of section 20E of the 1989 Act stood vitiated, the question that now arises for our consideration is whether on that ground the entire acquisition be invalidated, particularly when the Corporation on assumption that there were no objections had proceeded to substantially complete the project. At this stage, the decision of the Apex Court in ***Nareshbhai Bhagubhai and others v. Union of India (supra)*** be noticed wherein, the apex court upon finding that the project was almost complete and quashing of the declaration would result in wastage of public money, instead of quashing the notification, directed payment of compensation at the market rate. The relevant part of the judgment of the apex court in ***Nareshbhai Bhagubhai and others v. Union of India (supra)*** is extracted below:-

"34. The issue which remains to be decided is that in the absence of an order passed on the objections under Section 20-D, should the consequential steps be invalidated. We find that the challenge before this Court has been made by the Appellants with respect to a stretch of land admeasuring approximately 6 kms, out of the total stretch of 131 kms. The remaining stretch of land comprising of 125 kms has been acquired, and stands vested in the Government. The Respondents have stated on Affidavit that pre-construction activity and earth work has been completed on most parts of the stretch. Furthermore, most of the bridges are either in progress, or have already been completed.

35. The Senior Counsel representing the Appellants in all the present Civil Appeals, after taking instructions from his clients, submitted that since the land was being acquired for a public utility project, his clients would be satisfied if they were granted compensation by awarding the current rate for acquisition of land. Admittedly, no mala fides have been alleged by the Appellants against the Respondents in the acquisition proceedings. The larger public purpose of a railway project would not be served if the Notification under Section 20A is quashed. The public purpose of the acquisition is the construction and operation of a Special Railway Project viz. the Western Dedicated Freight Corridor in District Surat, Gujarat. In these extraordinary circumstances, we deem it fit to balance the right of the Appellants on the one hand, and the larger public purpose on the other, by compensating the Appellants for the right they have been deprived of. The interests of justice persuade us to adopt this course of action.

36. ***In Savitri Devi v. State of U.P.,*** this Court held that : (SCC p. 53, para 46)

"46. Thus, we have a scenario where, on the one hand, invocation of urgency provisions under Section 17 of the Act and dispensing with the right to file objection under Section 5-A of the Act, is found to be illegal. On the other hand, we have a situation where because of delay in challenging these acquisitions by the land owners, developments have taken in these villages and in most of the cases, third party rights have been created. Faced with this situation, the High Court going by the spirit behind the judgment of this Court in Bondu Ramaswamy and Others (supra) came out with the solution which is equitable to both sides. We are, thus, of the view that the High Court considered the ground realities of the matter and arrived at a more practical and workable solution by adequately compensating the land owners in the form of compensation as well as allotment of developed Abadi land at a higher rate i.e. 10% of the land acquired of each of the land owners against the eligibility and to the policy

to the extent of 5% and 6% of Noida and Greater Noida land respectively." (emphasis supplied)

37. In the present case, the relief is being moulded by granting compensation to the Appellants, to be assessed under Section 20G of the said Act as per the current market value of the land. The Competent Authority is directed to compute the amount of compensation on the basis of the current market value of the land, which may be determined with reference to Section 20-G(2) of the Act.

38. With respect to the remaining 125 kms stretch of land, the landowners were satisfied with the amount awarded, and have not approached this Court. Under these circumstances, despite our finding that the Respondents have breached the mandatory provisions of the Act, we do not think this is a fit case to set aside the entire acquisition proceedings. The relief granted in the present case is confined to the Appellants herein, and would not become a precedent for other land-owners who have not challenged the acquisition proceedings before this Court."

37. In this case also, as we have noticed earlier, out of a total cost of Rs.824 crores of the project, Rs. 614 crores have been spent up to 29.01.2021 and, out of total length of 54.38 kms, only 1.36 kms linear length remains to be completed due to resistance offered by few land-owners. Importantly, the completion of the project to the extent indicated above has been set out in the counter affidavits of which there is no specific denial. In these circumstances, if we set aside the declaration now, it would result in huge wastage of public money as the entire alignment of the freight corridor would have to be redone. Thus, following the decision of the Apex Court in ***Nareshbhai Bhagubhai and others v. Union of India (supra)*** prayer of the petitioners for quashing the notifications dated 11.02.2019 and 06.11.2019 is denied. It is however directed that the petitioners of Writ C Nos. 2959 of 2020; 42537 of 2019; and 42577 of 2019 shall be awarded compensation in accordance with the law, subject to proof of their right, calculated at the current market rate. **To that extent Writ C Nos.2959 of 2020; 42537 of 2019; and 42577 of 2019 are partly allowed.** But as the land of writ petitioners in **Writ C No. 43014 of 2019 is not subject matter of acquisition and they have also not challenged the notification, Writ C No.43014 of 2019 is dismissed. The interim orders passed in all these petitions stand discharged.**

38. Before parting, we deem it appropriate to require the respondents to hold an inquiry against the person responsible for submission of an incorrect report to the Central Government that no objection was taken by the land owners to the notification under sub-section (1) of Section 20 A of the 1989 Act.

39. Let a copy of this order be sent to the Chief Secretary, Government of U.P. to ensure an enquiry as directed above.

(2021)09ILR A1072
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.09.2021

BEFORE

THE HON'BLE ROHIT RANJAN AGARWAL, J.

Writ C No. 4340 of 2021

Maulana Mohammad Ali Jauhar Trust, Lucknow ...Petitioner

Versus

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

Counsel for the Petitioner:
Sri Syed Safdar Ali Khazmi

Counsel for the Respondents:
C.S.C.

A. Land Law - U.P. Revenue Code, 2006 - Sections 89, 98, 104/105 & 230 - U.P. Zamindari Abolition & Land Reforms Act, 1950 - Sections 154, 157-A, 157-C, 166 & 167

The Court observed that the Trust had purchased land from the members of the Scheduled Caste without taking any prior permission from the Collector, which is a clear violation of Section 157-A of the Act of 1950. Further, any order passed in proceedings under Section 104/105 of Code cannot be interfered and the land has rightly been vested with the State Government. (para 25)

As per Section 154(2) of the Act of 1950 the State is empowered to grant permission for transfer of land in excess of the prescribed limit in favour of registered co-operative society or institution established for charitable purpose, subject to a limitation, which, if violated, the same stands withdrawn. Moreover, the conditions laid in permission dated 07.11.2005 has not been complied with. The Trust has also violated the conditions laid down by the State by not completing the construction within stipulated period and did not submit the statement in regard to acquisition of land and construction made thereupon annually as well as construction of 'mosque' over the acquired land. (Para 28)

In addition to this, a case has been filed under Section 134 of the Code as the Trust has forcibly encroached upon the land of numbe rof tenure holders whose land was adjoining the Trust. The Chak Road, which is land of Gaon Sabha and land adjoining the river belt has also been included. (Para 33)

The declaration under Section 143 of the Act, 1950 will not save the case of the petitioner-Trust from being hit by provisions of Section 157-A and the violation of conditions of permission granted on 07.11.2005. Once the transfer is viod, subsequent proceedings under Section 143 woul dnot save the transfer made in favour of Trust by members of Scheduled Caste. (Para 35)

Writ Petition Rejected. (E-10)

List of Cases cited:

1. Kripa Shanker Vs Director Consolidation 1979 ALJ 693 (SC)

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

1. Heard Sri Syed Safdar Ali Kazmi, learned counsel for the petitioner and Sri Ajeet Kumar Singh, learned Additional Advocate General along with Sri Sudhanshu Srivastava, learned Additional Chief Standing Counsel for the State.

2. The present petition has been preferred for quashing of report dated 16.03.2020 submitted by Sub-Divisional Magistrate, Rampur as well as for quashing the order dated 16.01.2021 passed by Additional District Magistrate (Administration) Rampur/respondent No.2 in proceedings initiated under Section 104/105 of the U.P. Revenue Code, 2006 *(hereinafter called as "the Code").*

3. The facts, in nutshell, as disclosed in the petition are that petitioner is a Society registered under the provisions of Societies Registration Act, 1860 (hereinafter called as "Act, 1860") in the year 1995. It was in the year 2005 that State of Uttar Pradesh enacted U.P. Act No.19 of 2006 and thus came into existence the Mohammad Ali Jauhar University Act, 2005 *(hereinafter called as "Act, 2005").* The preamble of the Act, 2005 was as under :

"An Act to establish and incorporate a Teaching University

sponsored by Maulana Mohammad Ali Jauhar Trust at Rampur in Uttar Pradesh and to provide for matters connected therewith or incidental thereto."

4. Pursuant to the enactment of Act, 2005, the State Government in exercise of power under Section 154(2) of U.P. Zamindari Abolition & Land Reforms Act, 1950 (hereinafter called as "Act, 1950") on 07.11.2005 granted permission to Maulana Mohammad Ali Jauhar Trust (hereinafter called as "Trust") to acquire 400 acres of land against ceiling of 12.5 acres (5.0586 hectare) for establishment of University. The said permission was granted with certain restrictions/conditions, which are as under :

''(1) उक्त भूमि धारित करने हेतु किया गया संक्रमण प्रचलित अधिनियमों, नियमों, विनियमों आदि एवं समय≤ पर जारी किए गये शासनादेशों के अधीन होगा।

(2) उक्त ट्रस्ट द्वारा भूमि का उपयोग अंकित शैक्षणिक संस्थाओ की स्थापना/निर्माण हेतु यह आदेश जारी होने के 05 वर्ष के भीतर कर लिया जायेगा एवं किसी भी दशा में उक्त प्रयोजन से भिन्न प्रयोजन के लिए नहीं किया जायेगा।

(3) संस्था/उसके किसी भी पदाधिकारी द्वारा भूमि का कोई भी भाग किसी संस्था/व्यक्ति को किसी भी रूप में शासन की पूर्वानुमति के बिना हस्तान्तरण नहीं किया जायेगा, लेकिन ऋण प्राप्त करने के उद्देश्य से उक्त ट्रस्ट को प्रश्नगत भूमि बिना कब्जा दिए वित्तीय संस्थाओं के पक्ष में बन्धक रखने का अधिकार रहेगा।

(4) ट्रस्ट द्वारा प्रत्येक वित्तीय वर्ष के अन्त तक क्रय/धारित की गई भूमि/निर्माण आदि का विस्तृत विवरण जिलाधिकारी, रामपुर द्वारा शासन की प्रत्येक अप्रैल मास में प्रस्तुत किया जायेगा।

(5) उपर्युक्त किसी भी शर्त का उल्लंघन होने पर 12.50 एकड से, जो भी भूमि अधिक होगी, उसे राज्य सरकार में निहित कर लिया जायेगा तथा ऐसे निहितन के बदले कोई प्रतिकर नहीं दिया जाएगा, लेकिन ऐसे निहितन के पूर्व ट्रस्ट को सुनवाई को एक अवसर प्रदान किया जायेगा।

(6) ट्रस्ट द्वारा स्थापित किये जाने वाले शिक्षण संस्थानों/संकायों हेतु निर्धारित मानक के अनुसार भूमि तथा उससे सम्बन्धित एन0ओ0सी0 प्रशासनिक विभाग के निर्धारित मानक के अनुसार प्राप्त किया जाना होगा।''

5. Thereafter, on 17.01.2006, the State Government further permitted the petitioner-Trust to purchase 45.91 acres (18.587 hectare) land. The said permission was in continuation with earlier order dated 07.11.2005 with the same condition. Thereafter, on 16.9.2006, an additional permission for purchase of 25 acres land was granted by the State Government to the Trust with the same conditions as was laid down in the earlier order dated 7.11.2005. Copies of permission granted by the State Government have been brought on record as Annexures 3, 4 and 5 to the writ petition.

6. According to the petitioner-Trust, an inspection was made by Sub-Divisional Officer, Tanda, District Rampur on 28.4.2009 and a report was submitted to the District Magistrate, Rampur wherein it was stated that construction was going on over 24000 Sq.Mts. of land. Details of construction being carried out by the Trust was given in the said report.

7 . It was in the year 2020, on report submitted by Sub-Divisional Magistrate, Sadar to the District Magistrate under Section 10(2) of the U.P. Imposition of Ceiling on Land Holdings Act, 1960 *(hereinafter called as "Act, 1960")* that matter was assigned to the Additional District Magistrate (Finance & Revenue) Rampur. On 28.02.2020, the Additional District Magistrate (Finance & Revenue) directed the Sub-Divisional Magistrate to prepare a report observing that Section 10(2) of Act, 1960 was not applicable and was wrongly invoked. On 02.03.2020, the District Magistrate directed the Sub-

Divisional Magistrate to prepare report in accordance with the observation of Additional District Magistrate (Finance & Revenue) pursuant to which a detailed report was submitted by the Sub-Divisional Magistrate to respondent No.2 i.e. District Magistrate, Rampur on 16.03.2020. On 17.03.2020, the matter was referred to respondent No.3 by District Magistrate directing him to adjudicate the matter on merits under Section 104/105 of the Code.

8. The report dated 16.03.2020 contain four major allegations against the petitioner-Trust i.e.

(i) Violation of Condition No.1 of the permission granted by State Government in the year 2005 specially by violating Section 157-A of the Act, 1950 and also wrongfully acquiring the chak road.

(ii) Condition No.2 was also violated as the completion time fixed in the permission i.e. 5 years was also not adhered to by the petitioner-Trust and a mosque was constructed within the premises of University.

(iii) Condition No.4, which was in regard to the submission of annual report, the status of purchase and acquisition of land and construction thereon was to be reported to the District Administration annually but the Trust failed to adhere to the said condition.

(iv) The Trust was not doing any work in public interest.

9. Taking cognizance on the report, a notice was issued on 18.03.2020 by respondent no.3 to the Trust. On 14.08.2020, the petitioner Trust through an advocate had submitted an application before respondent No.3 that Chairman of the Trust was languishing in Sitapur Jail and no notice was served upon the petitioner-Trust and it came to the knowledge only through the media reports. It was further brought to the notice of respondent No.3 that as the Chairman and Secretary both are in Sitapur Jail, proper reply could not be filed. However, on 17.09.2020, a reply was filed on behalf of the Trust before respondent No.3 stating that report dated 16.03.2020 was an ex parte report.

10. The Additional District Magistrate (Administration) Rampur (respondent No.3), after hearing the State as well as the petitioner-Trust, vide order dated 16.01.2021 held that the petitioner-Trust had violated the condition laid down in the permission granted on 07.11.2005, as such land in excess of 12.50 acre stood vested in the State in view of Section 104/105 of the Code.

11. Sri Syed Safdar Ali Kazmi, learned counsel for the petitioner submitted that all the active members of the Trust such as Mohammad Azam Khan (President), Dr. Tazeen Fatima (Secretary) and Abdullah Azam Khan (Member) are in Sitapur Jail since 26.02.2020 and no notice was served upon them in jail. The objection was filed only on behalf of the Trust on 17.09.2020 and preliminary objection regarding jurisdiction was filed which was wrongly rejected on 14.10.2020. The said order is under challenge before the Board of Revenue. He further contended that written submission, which was submitted by the State was not served upon the petitioner and they were not granted time to rebutt the same.

12. Learned counsel emphasised that once the Trust was granted permission under Section 154(2) of the Act, 1950, the

land purchased from different tenure holders, details of which have been given in para 16 of the writ petition and declaration under Section 143 of the Act, 1950 was made for large part of the land. Further, the inspection report dated 28.4.2009 fortifies the fact that condition No.2 was fulfilled by the Trust as construction was made over 24000 Sq.Mts. of land.

13. Sri Kazmi further submitted that no land has been purchased in contravention of Section 157-A of the Act of 1950 and the proceedings, which was initiated, was turned down by the Sub-Divisional Magistrate, Rampur and Commissioner, Moradabad on 17.7.2013 and 7.11.2013, and the said orders were challenged before the Board of Revenue after considerable delay and the Board of Revenue, on 14.01.2020, reversed the orders of Sub-Divisional Magistrate and Commissioner, which is pending consideration before this Court.

14. As far as finding recorded for violation of Condition No.4 of the permission is concerned, he submitted that the District Authorities are well aware of the sale deeds executed in favour of the Trust and the report dated 28.4.2009 is ample proof for the said charge. He further tried to impress upon, that University was doing a great public work by imparting education in 23 different streams and was catering to large area of population. Lastly, it was contended that if the land was acquired in excess of permission granted under Section 154(2) of the Act, 1950, the same is saved by provisions of Section 154(3), which provides for approval of the State Government, if any application is filed and the approval is made after deposit of fine, as contained in the explanation to the said section.

15. Opposing the writ petition, learned Additional Advocate General Sri Ajit Kumar Singh, submitted that the order impugned under Section 104/105 of the Code was revisable under Section 210 of the Code and writ petition was not maintainable.

16. However, on merits, he contended that the permission granted on 07.11.2005 was very specific and it provided that any land, which was acquired, was subject to the provisions of the Act and Rules. In the present case, land was acquired from members of Scheduled Caste community such as Laxman Singh, Bhagwan Das, Rajveer, Mahesh, Chandrawati, Ram Prasad and Ram Chandra Singh, all resident of Village Seegankhera as well as Bansi Singh, who is a lease holder under Section 4-A of the Act, 1960, without obtaining mandatory permission under Section 157-A of the Act, 1950 i.e. Section 89 of the Code. Not only the land of Scheduled Caste community was taken without permission, but also the Chak Road and the land adjoining the river, which is a public utility land of Gaon Sabha, was also taken over by the Trust. Further, the land of number of tenure holders had been forcibly taken by the Trust and the proceedings under Section 134 of the Code is pending before the Revenue Authorities. It was further contended that not only this, the tenure holders had lodged first information report against the Trustees. It is also contended that the petitioner-Trust had taken over the land of enemy property. About 26 farmers had lodged a first information report against the Chairman of the Trust Mohammad Azam Khan for land grabbing.

17. Replying to the argument of petitioner that no land from the Scheduled Caste/Scheduled Tribe was purchased by the Trust without consent of District Magistrate, it was contended that after the order of Board of Revenue dated 14.01.2020 petitioner -Trust preferred Writ -B No.437 of 2020 (Maulana Mohammad Ali Jauhar Trust vs. State of U.P. and Another) and this Court on 21.10.2020 had dismissed the petition filed by the Trust in which the counsel, after filing the writ petition, did not appear before the Court. Once the writ was dismissed, and it was held that the sale deed executed by person belonging to Scheduled Caste in favour of the member of general category being hit by provision of Section 157-A, the condition No.1 stands violated.

18. Secondly, the permission granted on 7.11.2005 was specific in regard to completion of work within five years, while the report dated 28.4.2009 only takes note of the fact that certain constructions were in progress over certain part of land and the petitioner has not brought any material on record to prove that construction was completed within the time fixed by the State Government and the intimation was given. Sri Singh further contended that construction of a mosque inside the University premises was against the spirit of sanction granted by the State Government on 07.11.2005 which categorically provided that the land was strictly to be used for educational Trust and not otherwise.

19. I have heard rival submissions of the parties and perused the material available on record.

20. Before proceeding to decide the issue in hand, a necessary glance of certain provisions of Act, 1950 as well as Code is necessary. Relevant Sections 154, 157-A, 157-C, 166 and 167 of the Act, 1950 and Sections 89, 98, 104, 105 and 230 of Code are extracted hereasunder:

Provisions of Act, 1950

*"**154. Restriction on transfer by a bhumidhar**.- (1) Save as provided in sub-section (2), no bhumidhar shall have the right to transfer by sale or gift, any land other than tea garden to any person where the transferee shall, as a result of such sale or gift, become entitled to land which together with land, if any, held by his family will in the aggregate, exceed 5.0586 hectares (12.50 acres) in Uttar Pradesh.*

Explanation.- For the removal of doubt it is hereby declared that in this sub-section the expression "person" shall include and be deemed to have included on June 15, 1976 a "Co-operative Society" :

Provided that where the transferee is a Co-operative Society, the land held by it having been pooled by its members under Clause (a) of sub-section (1) of Section 77 of the Uttar Pradesh Co-operative Societies Act, 1965 shall not be taken into account in computing the 5.0586 hectares (12.50 acres) land held by it.

(2) Subject to the provisions of any other law relating to the land tenures for the time being in force, the State Government may, by general or special order, authorise transfer in excess of the limit prescribed in sub-section (1), if it is of the opinion that such transfer is in favour

of a registered cooperative society or an institution established for a charitable purpose, which does not have land sufficient for its need or that the transfer is in the interest of general public.

Explanation- For the purposes of this section, the expression "family" shall mean the transferee, his or her wife or husband (as the case may be) and minor children, and where transferee is a minor also his or her parents.

(3) For every transfer of land in excess of the limit prescribed under subsection (1) prior approval of the State Government shall be necessary :

Provided that where the prior approval of the State Government is not obtained under this sub-section, the State Government may on an application give its approval afterward in such manner and on payment in such manner of an amount, as fine, equal to twenty five per cent of the cost of the land as may be prescribed. The cost of the land shall be such as determined by the Collector for stamp duty.

Provided further that where the State Government is satisfied that any transfer has been made in public interest, it may exempt any such transferee from the payment of fine under this sub-section"

"157A. Restrictions on transfer of land by members of Scheduled Castes. - *(1) Without prejudice to the restrictions contained in Sections 153 to 157, no bhumidhar or asami belonging to a Scheduled Caste shall have the right to transfer any land by way of sale, gift, mortgage or lease to a person not belonging to a Scheduled Caste, except with the previous approval of the Collector:*

Provided that no such approval shall be given by the Collector in case where the land held in Uttar Pradesh by the transferor on the date of application under this section is less than 1.26 hectares or where the area of land so held in Uttar Pradesh by the transferor on the said date is after such transfer, likely to be reduced to less than 1.26 hectares.

(2) The Collector shall, on an application made in that behalf in the prescribed manner, make such inquiry as may be prescribed."

"157C. Mortgage of holdings by members of Scheduled Caste or Scheduled Tribe in certain circumstances. *- Notwithstanding anything contained in Sections 157-A and 157-B, a bhumidhar or asami belonging to a Scheduled Caste or Scheduled Tribe may mortgage without possession his holding or part thereof in the circumstances specified in sub-section (3) of Section 152.*

Explanation.- In. this chapter, the expressions 'Scheduled Castes' and 'Scheduled Tribes' shall mean respectively the Scheduled Castes and the Scheduled Tribes specified in relation to Uttar Pradesh under Articles 341 and 342 of the Constitution."

"166. Transfer made in contravention of the Act to be void.- *Every transfer made in contravention of the provisions of this Act shall be void."*

"167. Consequences of void transfers- *(1) The following consequences shall ensue in respect of every transfer*

which is void by virtue of Section 166, namely-

(a) the subject-matter of transfer shall with effect from the date of transfer, be deemed to have vested in the State Government free from all encumbrances;

(b) the trees, crops and wells existing on the land on the date of transfer shall, with effect from the said date, be deemed to have vested in the State Government free from all encumbrances; and

(c) the transferee may remove other moveable property or the materials of any immovable property existing on such land on the date of transfer within such time as may be prescribed.

(2) Where any land or other property has vested in the State Government under sub-section (1), it shall be lawful for the Collector to take over possession over such land or other property and to direct that any person occupying such land or property be evicted therefrom. For the purposes of taking over such possession or evicting such unauthorised occupants, the Collector may use or cause to be used such force as may be necessary."

Provisions of Code

*"**89. Restrictions on transfer by bhumidhar**.-(1) No bhumidhar shall have the right to transfer any holding or part thereof where such transfer contravenes or is likely to contravene the provisions of sub-section (2) or sub-section (3).*

(2) Subject to the provisions of sub-section (3), no person shall have the right to acquire by purchase or gift any holding or part thereof from a bhumidhar with transferable rights, where the transferee shall, as a result of such acquisition, become entitled to land which together with land, if any, held by such transferee and where the transferee is a natural person, also together with land, if any, held by his family shall exceed 5.0586 hectares in Uttar Pradesh.

(3) The State Government or an officer authorized for this purpose under this Act may approve an acquisition or purchased done or propose to be done, in excess of the limits specified in sub-section (2), if such acquisition or purchase is in favour of a registered firm, company, partnership firm, limited liability partnership firm, trust, society or any educational or a charitable institution; and if it is of opinion that the acquisition or purchase would be in public interest and likely to generate economic activities (other than agricultural) and provide employment. In such case, the provisions of the Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960 shall not apply to such acquisition :

Provided that where the land has been acquired or purchased by a registered firm, company, partnership firm, limited liability partnership firm, trust, society or any educational or a charitable institution, without obtaining prior approval under this sub-section the State Government or an officer authorized for this purpose under this Act, may give its approval for regularizing such acquisition or purchase afterwards on payment of an amount as fine, which shall be five percent of the cost of the land in excess of the limit

prescribed under sub-section (2), calculated as per the circulated as per the circle rate prevailing at the time of making the application.

(4) Permission under sub-section (3) for acquisition or purchase of land by a registered firm, company, partnership firm, limited liability partnership firm, trust, society or any educational or a charitable institution in excess of limits prescribed under sub-section (2) shall be granted, on the conditions and in the manner prescribed, by:-

(i) the Collector concerned for acquisition or purchase of land upto 20.2344 hectares ;

(ii) the Commissioner concerned for acquisition or purchase of land more than 20.2344 hectares and upto 40.4688 hectares ;

(iii) the State Government for acquisition or purchase of land more than 40.4688 hectares:

Provided that if the applicant fails to set up the project within a period of five years from the date of grant of permission under sub section (3), the same shall lapse and the land acquired or purchased in excess of the limit prescribed under sub-section (2) shall vest in the State and the consequences of section 105 shall become applicable:

Provided further that the State Government may extend the period of permission granted under sub section (3) for a further period of maximum three years, after recording reasons for the same."

*"**98. Restrictions on transfer by bhumidhars** belonging to a scheduled caste- (1) Without prejudice to the provisions of this Chapter, no bhumidhar belonging to a scheduled caste shall have the right to transfer, by way of sale, gift, mortgage or lease any land to a person not belonging to a scheduled caste, except with the previous permission of the Collector in writing:*

Provided that the permission by the Collector may be granted only when-

(a) the bhumidhar belonging to a scheduled caste has no surviving heir specified in clause (a) of sub-section (2) of Section 108 or clause (a) of Section 110, as the case may be; or

(b) the bhumidhar belonging to a scheduled caste has settled or is ordinarily residing in the district other than that in which the land proposed to be transferred is situate or in any other State for the purpose of any service or any trade, occupation, profession or business; or

(c) the Collector is, for the reasons prescribed, satisfied that it is necessary to grant the permission for transfer of land.

(2) For the purposes of granting permission under this section, the Collector may make such inquiry as may be prescribed."

"104. Every Lease or transfer of interest in any holding or part thereof made by a bhumidhar or any asami in contravention of the provisions of this Code shall be void."

***105. Consequences of transfer by bhumidhar in contravention of the Code**.- (1) Where transfer of interest in any holding or part made by a bhumidhar is void under Section 104, the following consequences shall, with effect from the date of such transfer, ensue, namely—*

(a) the subject matter of such transfer shall vest in the State Government free from all encumbrances;

(b) the trees; crops, wells and other improvements; existing on such holding or part shall vest in the State Government free from all encumbrances;

(c) the interests of the transferor and the transferee in the properties specified in clauses (a) and (b) shall stand extinguished;

(d) the extinction of interest of the transferor under clause (c) shall operate to extinguish the interest of any asami holding under him;

(e) the provisions of this section shall not apply to any lease made under section 94.

(2) Where any land or other property has vested in the State Government under subsection (1) it shall be lawful for the Collector to take over possession of such land and other property, and to direct that any person occupying such land or property be evicted therefrom, and for that purpose, the Collector may use or cause to be used such force as may be necessary and the provisions of Section 59 mutatis mutandis shall apply to such property."

***230. Repeal**.- (1) The enactments specified in the First Schedule are hereby repealed.*

(2) Notwithstanding anything contained in sub-section (1), the repeal of such enactments shall not affect—

(a) the continuance in force of any such enactment in the State of Uttarakhand;

(b) the previous operation of any such enactment or anything duly done or suffered thereunder; or

(c) any other enactment in which such enactment has been applied, incorporated or referred to; or

(d) the validity, invalidity, effect or consequences of anything already done or suffered, or any right, title or obligation or liability already acquired, accrued or incurred (including, in particular, the vesting in the State of all estates and the cessation of all rights, title and interest of all the intermediaries therein), or any remedy or proceeding in respect thereof, or any release or discharge of or from any debt, penalty, obligation, liability, claim or demand, or any indemnity already granted or the proof of any past act or thing; or

(e) any principle or rule of law or established jurisdiction, form or course of pleading practice or procedure or existing usage, custom, privilege, restriction, exemption, office or appointment:

Provided that anything done or any action taken (including any rules, manuals, assessments, appointments and transfers made, notifications, summonses, notices, warrants, proclamations issued, powers conferred, leases granted, boundary marks fixed, records of rights and other records prepared or maintained, right acquired or liabilities incurred) under any such enactment shall, in so far as they are not inconsistent with the provisions of this Code, be deemed to have been done or taken under the corresponding provisions of this Code, and shall continue to be in force accordingly, unless and until they are superseded by anything done or action taken under this Code."

21. The provisions of Section 89 of Code is corresponding to Section 154 of Act, 1950. Similarly, Section 98 of Code is corresponding Section 157-A of the Act, 1950. Further, Section 104 and 105 of the Code are corresponding to Sections 166 and 167 of the Act, 1950 while Section 230 of the Code was introduced on 11.2.2016 repealing the enactment enlisted in the First Schedule and Act of 1950 finds place at Serial No.19. Thus, from 11.2.2016, Act, 1950 stood repealed.

22. The proceedings, which had commenced in the year 2020 on the basis of report of Sub-Divisional Magistrate, Rampur was registered under Section 104/105 of the Code. The report indicated that the land purchased by the Trust pursuant to the permission granted on 07.11.2005, 17.01.2006 and 16.09.2006 was in contravention to the provisions contained in Section 157-A of Act of 1950, which is pari materia to Section 89 of the Code. The opening words lay a restriction upon bhumidhar or asami, belonging to Schedule Caste, to transfer any land by way of sale, gift, mortgage or lease to a person not belonging to a Scheduled Caste, except with the previous approval of the Collector. Thus, the mandatory requirement contained in Section 157-A of Act, 1950 has to be adhered to before any transaction is entered into between the parties in respect of any land belonging to members of Scheduled Caste. Explanation to Section 157-C defines the expression "Scheduled Castes' and "Scheduled Tribe', which means Scheduled Castes and Scheduled Tribes specified in relation to Uttar Pradesh under Articles 341 and 342 of the Constitution.

23. Learned Additional Advocate General had pointed out from the order impugned the names of various persons such as Laxman Singh, Bhagwan Das, Rajveer, Mahesh, Chandrawati, Ram Prasad, Ram Chandra Singh and Banshi Singh, belonging to Scheduled Caste category and no prior permission was taken from Collector by the Trust before entering into transaction, as contemplated under Section 157-A of the Act, 1950. The argument of petitioner's counsel to the extent that once permission was granted by the State Government on 07.11.2005, the Trust proceeded to purchase the land cannot be accepted. Furthermore, reliance upon the order of Sub-Divisional Magistrate, Rampur and Commissioner, Moradabad dated 17.7.2013 and 07.11.2013 regarding permission being granted by District Magistrate cannot be accepted as the said orders were quashed by the Board of Revenue on 14.01.2020 and writ petition filed before this Court was dismissed on 21.10.2020, wherein following order was passed :

"Case called out in the revised list. None has appeared to press this writ petition.

Similar has been the situation on earlier occasions.

I have perused the impugned orders and do not find any illegality, therein.
Land, which was subject matter of sale deed executed by a person belonging to the scheduled caste in favour of member of the general category has been found to be hit by Section 157-A of the U.P. Zamindari Abolition and Land Reforms Act having been executed without having obtained prior approval/ permission for the same.

As a consequence and in view of Section 167 and 166 of the said Act, the

land subject matter of this illegal sale deed has been ordered to vest in the State free from all encumbrances.

No evidence or order granting permission for executing the sale deed is filed with the writ petition, apart from the document which has been discarded by the Courts below for cogent reasons.

Accordingly, this Court finds that the impugned orders are perfectly justified and call for no interference.

The writ petition is accordingly, dismissed."

24. Once the order of Board of Revenue became final and the writ petition was dismissed, the stand of the petitioner looses ground that transfer of land was not in contravention to Section 157-A of Act, 1950.

25. The finding recorded by respondent No.3 as to the transfer made by members of Scheduled Caste has not been denied by the petitioner-Trust in the writ petition to the extent that they have not purchased the land from the persons mentioned in the said judgment. Bare averment that provisions of Section 157-A of Act, 1950 is not violated will not suffice, as order clearly mentions the name of members of Scheduled Caste and the area of land, which was transferred by them. Once such finding has come and the same having not been assailed in the writ petition, the order passed in proceedings under Section 104/105 of Code cannot be interfered and the land has rightly been vested with the State Government.

26. Now coming to the argument of the petitioner' counsel as to compliance of condition laid in permission dated 07.11.2005 and of year 2006, which is reflected from the report of Sub-Divisional Magistrate dated 28.4.2009 appears to be not convincing as the condition laid down in permission granted on 07.11.2005 specifically provided for construction to be completed within five years.

27. The report of the year 2009 only indicates that construction work was in progress over 24,000 Sq.Mts. of land. Moreover, no document was either produced before the authorities, nor placed before this court to sustantiate that the condition was fulfilled. Finding recorded by respondent No.3 as to the construction constrution of "Mosque' is also in violation of condition of sanction/permission as the Trust was required to use land only for educational purpose. The argument that the campus had residential premises for teaching as well as non-teaching staff, a "Mosque' was constructed for them cannot be accepted as it goes against the permission granted by the state.

28. As Section 154(2) of Act, 1950 clearly empowers the State to grant permission for transfer of land excess of the prescribed limit in favour of registered co-operative society or institution established for charitable purpose, the said permission comes with certain restriction/condition, which, if violated, the same stands withdrawn.

29. In the present case, permission for transfer of land in excess to 12.50 acres was granted solely for establishing an educational institution. The establishment of a "mosque' was against the permission granted on 07.11.2005 thus the Trust violated the conditions and Condition no.5 clearly provided that in case of violation of any of the condition, land excess of 12.50

acres will vest in the State Government after affording opportunity of hearing. Neither in the reply before respondent No.3 nor before this court petitioner-Trust could justify the action for establishing a "mosque' which was in clear violation of the condition laid down in the permission order dated 07.11.2005.

30. Coming to the next argument which relates to submission of annual reports and information in regard to the land and construction to the District Magistrate in the month of April every year, the petitioner-Trust could not place any document to substantiate that compliance of Condition No.4 was made. From bare reading of permission granted on 07.11.2005, it appears that Condition no.2 and 4 are quite inter-related as the intention of the State in granting permission was clear that the construction was to be made within five years and the Trust was required to submit annual report regarding status of purchase of land as well as construction made over it before the Collector in the month of April.

31. From perusal of reply filed before respondent no.3 as well as averment in this writ petition nothing has been brought on record to justify the cause of the petitioner- Trust and compliance made to the conditions laid down by the State Government while granting permission. The finding recorded by respondent No.3 that condition no.4 has been violated holds ground in view of the fact that apart from report of Sub-Divisional Magistrate dated 28.4.2009, no material has been brought on record regarding information to the Collector, as envisaged in the permission granted by the State Government.

32. The purpose and object of granting permission under Section 154(2) of Act, 1950 is that cooperative societies and charitable institution could acquire land by purchase above the ceiling limit of 12.50 acres, but this is subject to the restriction imposed by the State Government so that permission is not misused by the person in favour of whom the same is granted. The object of imposing condition is to prevent fraudulent transfer in garb of the permission granted under Section 154(2) of Act, 1950 and in case it is found that such transfer is in contravention, the land in excess of the prescribed limit will vest in the State as held by the Apex Court in case of **Kripa Shanker vs. Director Consolidation 1979 ALJ 693 (SC).**

33. The respondent No.3 has recorded finding to the effect that not only the Trust violated the provisions of Section 157-A of Act, 1950, condition Nos.2 and 4, but has forcibly encroached upon the land of number of tenure holders, whose land was adjoining the Trust and they had filed case under Section 134 of the Code. Furthermore, Chak Road, which is land of Gaon Sabha and land adjoining the river belt has also been included. A finding has been recorded that a first information report had been lodged against the former Cabinet Minister Mohammad Azam Khan, under Sections 342, 384, 447, 506 IPC for land grabbing.

34. Sri Kazmi while replying to the argument of State, submitted that 26 first information reports, as alleged in the order impugned, has been challenged before this Court in Criminal Misc. Writ Petition No.20665 of 2019 wherein this Court on 25.9.2019 had granted interim protection to the extent that Mohd. Azam Khan and Aley Hasan Khan shall not be arrested provided

both of them cooperate in the investigation and appear in the concerned police station as and when required for the purpose of investigation.

35. Coming to the argument raised by the petitioner in regard to maintainability of the proceedings, it was contended that once the declaration was made under Section 143 of the Act, 1950, the proceedings under the Code could not have been initiated. It is not in dispute that the Trust had acquired total of 70.005 hectare land which comprises of 18.074 hectare agricultural and 51.931 hectare non-agricultural land. Section 143 (2) of Act of 1950 though provides that upon grant of declaration mentioned in sub-section (1) the provisions of Chapter-VIII of Act, 1950 shall cease to apply to the bhumidhar with transferable rights, with respect to such land. Section 81 of Code is a pari materia to Section 143 of the Act, 1950. However, in the present case, the revenue authorities proceeded to declare the land surplus on the ground that transfer was made in contravention to Section 157-A of Act, 1950. The argument of Sri Kazmi does not hold ground that once the declaration was made under Section 143, Section 143(2) places an embargo and no proceedings can be initiated under Section 104/105 of Code, 2006, as the transfer of land had taken place prior to the declaration made under Section 143, which is hit by Section 157- A of Act, 1950. Once the transfer was void, subsequent proceedings under Section 143 would not save the transfer made in favour of the Trust by members of Scheduled Caste.

36. Moreover, the authorities had proceeded that the Trust had violated condition nos.2 and 4 by not completing the construction within the stipulated period and did not submit the statement in regard to acquisition of land and construction made thereupon annually as well as construction of "mosque' over the acquired land.

37. The declaration under Section 143 of Act, 1950 will not save the case of the petitioner- Trust from being hit by provisions of Section 157-A and the violation of conditions of permission granted on 07.11.2005. Had it been a simple transfer of land, not hit by provisions of Section 157-A, then the Trust could have raised the objections that revenue authorities could not have proceeded once declaration was made and was saved by sub-section (2) of Section 143 of Act, 1950.

38. It is a case where large part of land has been purchased as well as certain part of land belonging to tenure holders and Gaon Sabha has been encroached upon by a former Cabinet Minister of State for establishing an educational institution pursuant to an Act which has come up in the year 2005. The finding has not been assailed by placing documentary proof that the plots in question were purchased by the Trust and does not belong to Gaon Sabha or the tenure holders who have initiated proceedings under Section 134 of the Code.

39. From the order impugned, I find that the revenue authority, after considering not only the report dated 16.3.2020 but also the reply of the petitioner, as well as the representation of the State, had in depth recorded finding as to the violation of law and condition by the Trust in setting up the educational institution. The order impugned has rightly been passed in the proceedings under Section 104/105 of Code and the land except 12.50 acres vest in the State Government.

40. Considering the facts and circumstances of the case, I find that once this Court on 06.8.2021 took cognizance in the matter and directed the Standing Counsel to seek instructions in the matter, no question arises for relegating the matter under Section 210 of the Code on the ground of alternative remedy.

41. After hearing the counsel for the parties and on perusal of record, I find that no case for interference has been made out by the petitioner-Trust as the transfer of land by the Trust is hit by Section 157-A of Act, 1950 and further the conditions of the permission granted by the State on 7.11.2005 had been violated, which had required the institution to strictly follow the same and any contravention would lead to the land vesting in the State Government except 12.5 acres.

42. No interference is required in the order impugned dated 16.01.2021 and report dated 16.03.2020 submitted by Sub-Divisional Magistrate, Rampur.

43. Writ petition stands **dismissed.**

(2021)09ILR A1086
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.07.2021

BEFORE

THE HON'BLE DINESH PATHAK, J.

Writ B No. 209 of 2021

Akhil Kumar Agarwal ...Petitioners
Versus
D.D.C., Jalaun at Orai & Ors. ...Respondents

Counsel for the Petitioners:
Sri Rituvendra Singh Nagvanshi, Sri Narayan Dutt Shukla, Sri R.C. Singh Sr. Advocate

Counsel for the Respondents:
C.S.C., Sri Chaudhary Subash Kumar , Sri Rudreshwari Prasad

Civil Law - U.P. Consolidation of Holdings Act (5 of 1954) – Sections 48,12 & 9A(2) - Revision against rejection of delay condonation application - Scope of Interference - Revisional court not justified in travelling beyond the scope and merits of order, what is challenged before him.

S.O.C. simply dismissed the appeal on the ground of laches, without applying his mind to the merits of case - Challenge in revision was limited qua merits of delay condonation application - However D.D.C. entered into merits of case & gave finding qua genuineness of claim of one of the parties - *Held* - D.D.C. ought to have only discussed the sufficiency of grounds for condoning the delay in filing the appeal - Grounds of condoning the delay, in case, found sufficient by D.D.C., he should have remitted the matter before the S.O.C. to decide the appeal on merits - D.D.C. exceeded its jurisdiction in remitting the matter before the C.O. to decide the objection afresh, without examining the legality and correctness of dismissal of appeal being barred by time - Merits of right and title of the parties was not in question before him therefore, he should not have responded in this regard (Para 11, 12)

Allowed. (E-5)

List of Cases cited :

Tirath Vs Joint Director of Consolidation & ors. 1985 RD 276

(Delivered by Hon'ble Dinesh Pathak, J.)

1. Heard Sri R.C. Singh, Senior Advocate assisted by Sri Narayan Dutt Shukla, learned counsel for the petitioner,

Sri Rudreshwari Prasad and Sri Chaudhary Subhash Kumar, learned counsel for respondent nos.2/1 and 2/2 and learned Standing Counsel representing respondent no.1 and perused the record.

2. In view of the peculiar facts and circumstances of the case, the order proposed to be passed hereinunder as well as with the consent of the parties, this Court proceeded to finally decide this matter at the admission stage, without calling for their respective affidavits, i.e. counter affidavit and rejoinder affidavit, with liberty to the contesting respondents to move a recall application, in case, any fact is found incorrect.

3. Under challenge in the present writ petition is order dated 30.10.2020 (Annexure-18) passed by the Deputy Director of Consolidation (in brevity "D.D.C.') (respondent no.1) in Revision No.2019530633000004 (Jagram vs. Balram) under Section 48 of the U.P. Consolidation of Holdings Act, 1953 (in brevity "U.P.C.H. Act').

4. Present writ petition is arising out of a proceeding under Section 12 of the U.P.C.H. Act. Land in dispute was recorded in the name of Balle, who died on 14.02.1978. Smt. Bhura wife of Balle has moved an application dated 05.04.1978 (Annexure-3) for recording name of her son Balram (respondent no.3) in place of recorded tenure holder, Balle. Aforesaid application moved by Smt. Bhura (mother of respondent no.3) was allowed vide order dated 26.07.1978 (Annexure-4) passed by Consolidation Officer (in brevity 'C.O.') directing to record the name of Balram (respondent no.3) under the guardianship of his mother Smt. Bhura alias Badi Bahu. At a belated stage, Jagram (predecessor in interest of respondent nos.2/1 and 2/2) have filed an appeal dated 26.07.1994 (Annexure-6) before the Settlement Officer of Consolidation (in brevity "S.O.C.') on the ground that he is also one of the son of recorded tenure holder Balle, but his mother has deliberately ignored him in mutating his name in the Revenue Record along with his brother Balram in place of his deceased father. Aforesaid appeal was dismissed vide order dated 07.10.1998 (Annexure-7) on the ground of laches. Feeling aggrieved, Jagram has preferred revision before respondent no.1, who has dismissed the same vide its order dated 12.02.2019 (Annexure-16). Respondent nos.2/1 and 2/2 (heirs and legal representatives of Jagram) have filed a writ petition before this Hon'ble Court against the order dated 12.02.2019, which was registered as Writ B no.950 of 2019 (Ramu Kushwaha and another vs. Balram and others). Aforesaid writ petition was allowed vide order dated 30.05.2019 (Annexure-17) remitting the matter back before respondent no.1 to decide the revision afresh. After remand, respondent no.1 has allowed the revision vide order dated 30.12.2020 (Annexure-18), which is under challenge in the present writ petition.

5. Present petitioner is claiming his right and title over the property in question being a bonafide purchaser from Balram (respondent no.3) who has executed the registered sale deed in favour of present petitioner. On the basis of aforesaid sale deed, mutation order dated 22.02.1989 was passed in favour of petitioner.

6. Learned counsel for the petitioner submits that respondent no.1 has illegally allowed the revision and remitted the matter before the "C.O.' for deciding it afresh, whereas the limited question was

involved in the revision with respect to the merits of delay condonation application, which was rejected by the S.O.C. It is further submitted that respondent no.1 has illegally entered into the merits of the case and accidentally given some observation with respect to genuineness of Jagram, being son of Balle which can affect the merits of the case before the C.O. It is further submitted that Notification under section 4 of the U.P.C.H. Act was promulgated on 10.02.1973 with respect to the aforesaid land in question and the same was denotified under section 52 of the U.P.C.H. Act on 07.06.1980. During this period, name of respondent no.3 (vendor of petitioner) was recorded in the Revenue Record, who had executed the registered sale deed after denotification and, on the basis thereof, mutation order was passed in favour of present petitioner.

7. Per contra, learned counsel for the contesting respondent nos.2/1 and 2/2 has contended that respondent no.1 has rightly allowed the revision remitting the matter before the C.O. to decide right and title of the parties afresh. Claim of Jagram, on the basis of succession being son of recorded tenure holder Balle, has illegally been discarded by the C.O. and affirmed by the S.O.C. Dismissing the appeal on the ground of laches, the S.O.C. was influenced with several litigation which were going on between the parties before Civil Court and Revenue Court, whereas legal right of Jagram being son of Balle has never been adjudicated upon at any stage of litigation before any competent court. He has further contended that opportunity is still open to the parties to get their right and title decided before the court competent in pursuance of impugned order passed by respondent no.1. There is no illegality or perversity in the order passed by the respondent no.1 to be interfered by this Hon'ble Court.

8. Perused the record on board and considered the submissions advanced by learned counsel for the parties.

9. From the record it emerges that the dispute arose with respect to the property belonging to one Balle. At an initial stage, respondent no.3 has got his name recorded in revenue record in place of Balle, being his only son. Subsequently, Jagram (predecessor in the interest of respondent nos.2/1 and 2/2) while came to know about the aforesaid fact, has filed an appeal claiming his right and title over the property in question, being second son of Balle. He came up with a case that, in fact, Balle had two sons namely, Balram and Jagram. Under mischievous play, his mother has got the name of respondent no.3 only, recorded in the Revenue Record and left the name of Jagram, to be recorded for the reasons best known to her.

10. The limited question, which arose for consideration before this Court is, as to whether respondent no.1 is justified in remitting the matter before the C.O. after considering the merits of the original case with respect to the genuineness of claim made by Jagram, whereas the S.O.C. has examined only merits of application for condonation of delay.

11. Order passed by the S.O.C. clearly reveals that he has not applied his mind with respect to the merits of the right and title of the parties. It has simply dismissed the appeal on the ground of laches. No sufficient ground was found by the S.O.C. for condoning delay in filing the appeal. Challenge in revision was limited qua merits of delay condonation application.

Respondent no.1, ought have discussed the sufficiency of grounds for condoning the delay in filing the appeal but, accidentally, he has given finding qua genuineness of Jagram, justifying his claim, being son of Balle. Record reveals that validity and genuineness of the claim of Jagram was not in question before respondent no.1, inasmuch as, same has not been scrutinized by the S.O.C. in its order dated 07.10.1988, which was challenged in revision before respondent no.1. Grounds of condoning the delay, in case, found sufficient by respondent no.1, he should have remitted the matter before the S.O.C. to decide the appeal on merits.

12. In my opinion, respondent no.1 has exceeded its jurisdiction in remitting the matter before the C.O. to decide the objection under Section 9 A(2) of the U.P.C.H. Act afresh, without examining the legality and correctness of dismissal of appeal being barred by time. Respondent no.1 is not justified in travelling beyond the scope and merits of order, what has been challenged before him. Merits of right and title of the parties was not in question before respondent no.1, therefore, he should not have responded in this regard.

13. In the matter of Tirath vs. Joint Director of Consolidation and other reported in **1985 RD 276**, a Divison Bench of this Court has expounded that appeal, in case, dismissed being barred by limitation, revision petition cannot be allowed on merits without examining the legality and correctness of order under challenge. In the aforesaid cited case, following question was referred for determination :

"whether the revisional authority under Section 48 of the U.P. Consolidation of Holdings Act can allow revision petition without indicating whether the appeal filed by the applicant in revision having been dismissed on the ground of limitation was illegally, incorrectly and improperly decided or the appellant had sufficient cause for condonation of delay in preferring the appeal."

14. Aforesaid question was replied in negative by Division Bench of this Court, which is reproduced below:

"We venture to think that the proper course for the Revisional Authority would have been to interfere with the order of the Appellate Authority- set aside the order of the dismissal of the appeal (as time barred) and in directing the Appellate Authority to decide the appeal on the merits, instead of doing so himself. The Appellate Authority, after hearing the parties, could very well pass appropriate orders in accordance with law. In case the order passed by the Consolidation Officer called for any interference it would be open to the Appellate Authority to do so. In case the appeal was rejected on the merits the Revisional Authority could examine the record to see if it should exercise its power under Section 48(1) of the Act."

15. In this conspectus, as above, I am fully satisfied that the subject matter of revision, challenging the order of the S.O.C. was limited up to the merits of delay condonation application. Respondent no.1 has exceeded its jurisdiction in discussing the merits of original case and remitting the matter before the C.O. to examine the right and title of the parties afresh. Order dated 30.12.2020 (Annexure-18) passed by respondent no.1 is not sustainable in the eyes of law, to that extent.

16. Resultly, present writ petition is partly allowed and the order dated

30.12.2020 passed by the respondent no.1 is modified to the extent that matter is remitted before the S.O.C. for deciding the appeal, filed before him by Jagram, on its own merits. Benefit given by respondent no.1 under section 5 of Limitation Act, 1963 by condoning the delay in filing the appeal is, accordingly, affirmed.

(2021)09ILR A1090
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.09.2021

BEFORE

THE HON'BLE RAVI NATH TILHARI, J.

Consolidation No. 359 of 1998

Sant Ram ...Petitioner
Versus
D.D.C., Faizabad ...Respondents

Counsel for the Petitioner:
S.K.Mehrotra, Balram Yadava, G.S.L. Verma

Counsel for the Respondents:
C.S.C., Manzer Ali, Mayank Pandey, Shikha Sinha

Civil Law - Legal Services Authorities Act, 1987 - Section 20 - in Lok Adalat matter can be decided only with the compromise or settlement between the parties - in absence of any compromise or settlement between parties matter cannot be decided on merits - if no settlement takes place in Lok Adalat then the matter should be sent to the court concerned, for decision

In Lok Adalat matter was heard by Deputy Director of Consolidation - No compromise or settlement was arrived at by the petitioner with the opposite party - Held - D.D.C. exceeded its jurisdiction in deciding the revision on merits in Lok Adalat (Para 22)

Allowed. (E-5)

List of Cases cited :

1. St. of Pun. & ors. Vs Mohinderjit Kaur (2005) 2 SCC 743

2. U.O.I. Vs Ananto (Dead) & anr.(2007) 10 SCC 748

(Delivered by Hon'ble Ravi Nath Tilhari, J.)

1. Heard Sri Balram Yadav, learned counsel for the petitioner, Dr. Krishna Singh, learned Standing Counsel for opposite party no. 1 and Ms. Shikha Sinha, learned counsel for opposite party no. 2/1.

2. The writ petition has been filed with the following main reliefs:-

"(a) issue a writ of certiorari quashing the order dated 20.05.1998 vide annexure no. 6 passed by the Deputy Director of Consolidation, Faizabad holding the Lok Adalat at Kuchera Bazar in District Faizabad illegally modifying the chak of the petitioner;

(b) issue any other appropriate writ, direction or order as may seem to be expedient in the ends of justice."

3. By the order dated 16.07.1998, notices were issued to the opposite party no. 2 and it was provided that in the meantime, the operation of the order dated 20.05.1998 passed by the Deputy Director of Consolidation, Faizabad shall remain stayed and the possession of the petitioner over half of the plot no. 555/1 shall not be disturbed in pursuance of the said order.

4. By the order dated 08.09.2021, the learned Standing Counsel was directed to inform the Court on the basis of record as to whether (i) the revision was heard on 17.05.1998 in Lok Adalat; (ii)What

happened on 17.05.1998; (iii) Whether 20.05.1998 was the date fixed in the revision and; (iv) if the petitioner was heard on 17.05.1998 and/or 20.05.1998.

5. Supplementary affidavit has been filed today in Court by the learned Standing Counsel on behalf of opposite party no. 1, copy of which has been served on the learned counsels for the petitioner as also for opposite party no. 2/1.

6. As copies of the orders dated 17.05.1998 & 20.05.1998 have been annexed with respect to which there is no dispute, any rejoinder affidavit is not called for nor has been asked for.

7. Sri Balram Yadav submits that the facts of the case are that one Hanuman Deen (opposite party no. 2), now deceased had filed an objection under Section 20 of the Uttar Pradesh Consolidation of Holdings Act, 1953 (in short 'the Act, 1953') along with a prayer for condonation of delay in filing the objection. The objection was rejected by the Consolidation Officer by order dated 21.03.1998 (Annexure no. 4) against which he filed revision under Section 48 of the Act, 1953. In the said revision, a notice was issued on 16.05.1998 by the Deputy Director of Consolidation, Faizabad for holding Lok Adalat on 17.05.1998. The notice dated 16.05.1998 could not be served on the petitioner as he was not present being posted at District Ganga Nagar in the State of Rajasthan. The Lok Adalat was held on 17.05.1998 in which the matter was heard by the Deputy Director of Consolidation on merits and the judgment was reserved for being pronounced on 20.05.1998, on which date the revision of the opposite party no. 2 was allowed.

8. Sri Balram Yadav submits that the order dated 20.05.1998 was passed without affording any opportunity of hearing to the petitioner. His further submission is that in Lok Adalat, the matter can be decided only with the compromise or settlement between the parties and in the absence of any compromise or settlement arrived at by the petitioner with the opposite party, the Deputy Director of Consolidation exceeded its jurisdiction in deciding the revision on merits. His further submission is that if no settlement takes place in Lok Adalat then the matter should be sent to the court concerned, for decision. He has placed reliance on Section 20 of the Legal Services Authorities Act, 1987 (in short 'the Act, 1987').

9. Ms. Shikha Sinha, learned counsel for opposite party no. 2/1 submits that after hearing the petitioner's counsel, the Deputy Director of Consolidation had passed the order dated 20.05.1998 on merits and in view thereof, the petitioner's contention that the notice was not served upon him and he was not heard, is no ground to challenge the order dated 20.05.1998. She further submits that the order does not suffer from any illegality and, therefore, it calls for no interference in exercise of writ jurisdiction. With respect to Section 20 of the Act, 1987, she submits that although sub-Section (1) provides for filing of joint application in the court or Tribunal where the matter is pending by the parties indicating their intention to compromise the matter or to arrive at a settlement, the matter shall be transferred to the Lok Adalat for arriving at a compromise or settlement, but in view of sub-Section (2) of Section 20 of the Act, 1987, the District Authority may on receipt of an application from any person that any dispute or matter pending for a compromise or settlement, needs to be determined by the Lok Adalat, refer such

dispute or matter to the Lok Adalat for determination.

10. I have considered the submissions advanced by learned counsels for the parties and perused the material on record.

11. The controversy involved in the writ petition mainly is as to whether the impugned order dated 20.05.1998 is an order passed by the Deputy Director of Consolidation in Lok Adalat held on 17.05.1998, and if the answer is in affirmative, whether the Deputy Director of Consolidation had jurisdiction to decide the revision on merits, which was a contested matter without there being any settlement or compromise between the parties.

12. From the facts on record, it is undisputed that the revision filed by the opposite party no. 2 was transferred to the Lok Adalat. Perusal of the notice issued on 02.05.1998 by the Deputy Director of Consolidation shows that the top of the notice mentions "Lok Adalat at Kuchera Bazar' fixing 17.05.1998 in the Lok Adalat. The order-sheet dated 17.05.1998 of the revision, Annexure no. SA-1 to the supplementary affidavit filed by opposite party no. 1 also shows that on 17.05.1998, the revision was heard in Lok Adalat, Kuchera Bazar and 20.05.1998 was fixed for orders. The order-sheet dated 17.05.1998 reads as under:-

"आज यह पत्रावली लोक अदालत कैम्प कुचेरा में सुनवाई हेतु प्रस्तुत हुई I पक्षकारों के तर्कों को सुना गया I

अतः आदेश हुआ कि पत्रावली दिनांक 20.05.98 को आदेशार्थ प्रस्तुत हो I"

13. From the aforesaid, it is evident that the revision was heard in Lok Adalat on 17.05.1998 and 20.05.1998 was fixed for orders, on which date, the order under challenge was passed. The order dated 20.05.1998 was not passed on the day the Lok Adalat was held but as the matter was heard in Lok Adalat on 17.05.1998 and 20.05.1998 was fixed for orders, the order dated 20.05.1998 is in effect, an order passed in Lok Adalat inasmuch as a court, tribunal or quasi-judicial authority may after hearing the matter pass orders then and there or may fix a future date, for delivery or dictation of order or judgment. Therefore, the order dated 20.05.1998 cannot be considered, ignoring the order dated 17.05.1998 passed in Lok Adalat.

14. Section 20 of the Act, 1987 reads as under:-

"***20. Cognizance of Cases by Lok Adalats***

(1) Where in any case referred to in clause (i) of sub-section (5) of Section 19-

(i)

(i) (a) The parties thereof agree or

(i) (b) One of the parties thereof makes an application to the court, for referring the case to the Lok Adalat for settlement and if such court is prima facie satisfied that there are chances of such settlement or

(ii) The court is satisfied that the matter is an appropriate one to be taken cognizance of by the Lok Adalat, the court shall refer the case to the Lok Adalat: Provided that no case shall be referred to the Lok Adalat under sub-clause (b) of clause (i) or clause (ii) by such court except after giving a reasonable opportunity of being heard to the parties.

(2) Notwithstanding anything contained in any other law for the time being in force, the Authority or Committee organising the Lok Adalat under sub-section (1) of Section 19 may, on receipt of an application from any, one of the parties to any matter referred to in clause (ii) of sub-section (5) of Section 19 that such matter needs to be determined by a Lok Adalat, refer such matter to the Lok Adalat, for determination; Provided that no matter shall be referred to the Lok Adalat except after giving a reasonable opportunity of being heard to the other party.

(3) Where any case is referred to a Lok Adalat under sub-section (1) or where a reference has been made to it under sub-section (2), the Lok Adalat shall proceed to dispose of the case or matter and arrive at a compromise or settlement between the parties.

(4) Every Lok Adalat shall, while determining any reference before it under this Act, act with utmost expedition to arrive at a compromise or settlement between the parties and shall be guided by the principles of justice equity, fair play and other legal principles.

(5) Where no award is made by the Lok Adalat on the ground that no compromise or settlement could be arrived at between the parties, the record of the case shall be returned by it to the court, from which the reference has been received under sub-section (1) for disposal in accordance with law.

(6) Where no award is made by the Lok Adalat on the ground that no compromise or settlement could be arrived at between the parties, in a matter referred to in sub-section (2), that Lok Adalat shall advice the parties to seek remedy in a court.

(7) Where the record of the case is returned under sub-section (5) to the court, such court shall proceed to deal such reference under sub-section (1)."

15. A bare reading of Section 20 (3) of the Act, 1987, makes it clear that where any case is transferred to a Lok Adalat under sub-Section (1) or where a reference has been made to it under sub-Section (2), the Lok Adalat shall proceed to dispose of the suit, proceeding, dispute or matter and arrive at a compromise or settlement between the parties. As per sub-Section (4), every Lok Adalat shall while determining any proceedings before it under the Act, 1987, act with utmost expedition to arrive at a compromise or settlement between the parties and shall be guided by legal principles and the principles of justice, equity and fair play. Sub-Section (5) clearly mentions that where no award is made in the Lok Adalat on the ground that no compromise or settlement can be arrived at between the parties, it shall be open to the parties to the suit or proceeding transferred from the court or Tribunal under sub-Section (1) but continue such suit or proceeding before such court or Tribunal or if it is a dispute or matter referred to the Lok Adalat under sub-Section (2), any of the person may institute a proceeding in an appropriate court. Sub-section (6) also provides very clearly that where under sub-Section (5), the parties to a suit or proceeding intend to continue the proceeding in such suit or proceeding before the court or Tribunal from which it was transferred, such court or Tribunal shall proceed to deal with such suit or proceeding from the stage at which it was,

before the suit or proceeding was transferred to the Lok Adalat.

16. Therefore, it is evident from the statutory provisions that in Lok Adalat, the proceedings can be decided only on compromise or settlement between the parties, if arrived, and if no award can be made by the Lok Adalat because no compromise or settlement could be arrived at between the parties, the matter shall be continued before the court or Tribunal from where it was transferred to the Lok Adalat, which court shall proceed to deal with the suit or proceeding from the stage where it was before that court before its transfer to the Lok Adalat.

17. ***In State of Punjab and Ors. vs. Mohinderjit Kaur [(2005) 2 SCC 743], in para 4,*** Hon'ble Supreme Court has held as under:-

"4. This Court held that the course adopted by the High Court was not proper. In State of Punjab and Ors. v. Phulan Rani and Anr. [(2004) 7 SCC 555] it was indicated as to which matters can be taken up by the Lok Adalat for disposal. It was inter alia held as follows:

"The matters which can be taken up by the Lok Adalat for disposal are enumerated in Section 20 of the Act which reads as follows:-

"Cognizance of cases by Lok Adalats:-

(1) Where in any case referred to in clause

(i) of sub-section (5) of section 19

(i)(a) the parties thereof agree; or

(b) one of the parties thereof makes an application to the court, for referring the case to the Lok Adalat for settlement and if such court is prima facie satisfied that there are chances of such settlement; or

(ii) the court is satisfied that the matter is an appropriate one to be taken cognizance of by the Lok Adalat,

The Court shall refer the case to the Lok Adalat.

Provided that no case shall be referred to the Lok Adalat under sub-clause (b) of clause (i) or clause (ii) by such court except after giving a reasonable opportunity of being heard to the parties.

(2) Notwithstanding anything contained in any other law for the time being in force, the Authority or Committee organizing the Lok Adalat under sub-section (1) of Section 19 may, on receipt of an application from any one of the parties to any matter referred to in clause (ii) of sub-section (5) of section 19 that such matter needs to be determined by a Lok Adalat, refer such matter to the Lok Adalat, for determination:

Provided that no matter shall be referred to the Lok Adalat except after giving a reasonable opportunity of being heard to the other party.

(3) Where any case is referred to a Lok Adalat under sub-section (1) or where a reference has been made to it under sub-section (2), the Lok Adalat shall proceed to dispose of the case or matter and arrive at a compromise or settlement between the parties.

(4) Every Lok Adalat shall, while determining any reference before it under this Act, act with utmost expedition to arrive at a compromise or settlement between the parties and shall be guided by the principles of justice, equity, fair play and other legal principles.

(5) Where no award is made by the Lok Adalat on the ground that no compromise or settlement could be arrived at between the parties, the record of the case shall be returned by it to the Court, from which the reference has been received under sub- section (1) for disposal in accordance with law.

(6) Where no award is made by the Lok Adalat on the ground that no compromise or settlement could be arrived at between the parties, in a matter referred to in sub-section (2), that Lok Adalat shall advice the parties to seek remedy in a Court.

(7) Where the record of the case is returned under sub-section (5) to the Court, such Court shall proceed to deal with such case from the stage which was reached before such reference under sub-section (1)."

The specific language used in sub-section (3) of Section 20 makes it clear that the Lok Adalat can dispose of a matter by way of a compromise or settlement between the parties. Two crucial terms in sub-sections (3) and (5) of Section 20 are "compromise" and "settlement". The former expression means settlement of differences by mutual concessions. It is an agreement reached by adjustment of conflicting or opposing claims by reciprocal modification of demands. As per Termes de la Ley, "compromise is a mutual promise of two or more parties that are at controversy. As per Bouvier it is "an agreement between two or more persons, who, to avoid a law suit, amicably settle theeir differences, on such terms as they can agree upon". The word "compromise" implies some element of accommodation on each side. It is not apt to describe total surrender."

18. In **Mohinderjit Kaur (supra),** it has clearly been held that the Lok Adalat can dispose of the matter by way of compromise or settlement between the parties.

19. The same principle has been reiterated in **Union of India vs. Ananto (Dead) and Another [(2007) 10 SCC 748].**

20. Neither the order dated 17.05.1998 nor 20.05.1998 mentions that any compromise or settlement was arrived at between the parties in Lok Adalat. It is also not a case of the opposite parties that any compromise or settlement taken place in Lok Adalat between the parties.

21. Reading of the judgment dated 20.05.1998 clearly shows that the contested matter was decided on merits accepting the submissions of the party and rejecting the submission of the other side.

22. As the impugned order deserves to be quashed on the aforesaid ground, the court has not entered into the controversy as to whether there was service of notice on the petitioner and as to whether the petitioner was heard in Lok Adalat or only his brother was heard, inasmuch as this Court is of the considered view that even if the order dated 20.05.1998 was passed after hearing the petitioner or his counsel on 17.05.1998, the impugned order could not

be passed on merits, in the absence of their being any settlement or compromise between the parties.

23. Submission of Ms. Shikha Sinha that the application for transfer to Lok Adalat can be filed by any of the parties does not require any consideration in the present case, as no such issue is involved, whether the transfer was made on the application of one party or the other, and as the fact remains undisputed that the case was transferred to the Lok Adalat. The transfer of case to the Lok Adalat from the court of Deputy Director of Consolidation is also not under challenge.

24. For the aforesaid reasons, the impugned order dated 20.05.1998 cannot be sustained and is hereby quashed.

25. The revision filed by opposite party no. 2 stands restored to its original number before the Deputy Director of Consolidation, Faizabad, which shall be proceeded with and decided in accordance with law after affording opportunity of hearing to all the parties concerned, expeditiously, as the matter pertains to the year 1998, preferably within a period of six months from the date of production of copy of this judgment before the said authority.

26. In the interest of justice, it is further provided that for a period of six months or till decision of the revision by the Deputy Director of Consolidation, whichever is earlier, the possession of the petitioner over half of the plot no. 555/1 shall not be disturbed.

27. The writ petition is **allowed** with the aforesaid observation/direction.

(2021)09ILR A1096

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.09.2021

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Consolidation No. 788 of 1986

Babu Ali & Anr. ...Petitioners
Versus
D.D.C. & Ors. ...Respondents

Counsel for the Petitioners:
R.K. Sharma, D.K. Trivedi, Dwijendra Mishra, U.K. Pandey

Counsel for the Respondents:
C.S.C., Ashish Jaiswal, D.C. Mukarjee, S. Mirza, Surendra Pal Singh

A. Adverse possession - Land Records Manual - Para-89-A, 89-B & 102-B - Form No. PA-10 - if any entry is made in Form No. PA-10, the same is to be communicated to the persons concerned, recorded in columns 3 and 4 or their heirs, by the Lekhpal and is required to obtain their signatures in the copy of the list retained by him - If PA-10 notice is not served on the main tenant, such entries are of no evidentiary value and would not confer any right - illegal entry does not confer title - even if the entry has been made, it does not confer right title or interest if it is not in accordance with law and the prescribed procedure - burden to prove that the entries is in accordance with the provisions of Land Record Manual is on the person who is asserting the possession on the basis of adverse possession (Para 12, 13, 14, 15)

B. Adverse possession - in case of adverse possession, communication to the owner and his hostility towards the possession is must - there shall not be presumption of continuous on the basis of adverse possession unless year to year entries is made, in accordance with law, in the

Khasra or Khatauni and is proved by cogent and trustworthy evidence - court should be slow to declare the right on the basis adverse possession otherwise it may become a weapon in the hands of mighty persons to acquire the property of the weaker sections of society (Para 16, 17)

Father of petitioner 'Kallu' was recorded tenure holder in basic year Khatauni - Petitioner filed objection for recording the name being legal heir - opposite party no.3 Rasool filed objection claiming the plots in dispute on the basis of adverse possession - Held - In case the entry was made in the name of the opposite party no.3 under clause-9 on the basis of PA-10 it was incumbent upon the opposite party no.3 to prove by adducing cogent evidence that the same was made in accordance with law and the PA-10 was served on the original tenure holder - Respondent failed to prove as to when the opposite party no.3 entered into the possession in the knowledge of the petitioner and continued his possession for the required period - Claim on the basis of adverse possession not sustainable. (Para 20)

Allowed. (E-5)

List of Cases cited :

1. Mohd. Raza Vs Deputy Director of Consolidation & anr. R.D. 1997 (R.D.) 276

2. Gurumukh Singh & ors. Vs Deputy Director of Consolidation, Nainital & ors. 1997 (80) RD 276

3. Sadhu Saran & anr. Vs Assistant Director of Consolidation, Gorakhpur & ors. 2003 (94) RD 535

4. Putti & ors. Vs Assistant Director of Consolidation, Bahraich & ors. (2007) 2 All ALJ 43

5. P.T. Munichikkanna Reddy & ors. Vs Revamma & ors. 2008 (26) LCD 15

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

1. Heard, Shri Dwijendra Mishra, learned counsel for the petitioners and Shri Ashish Jaiswal, learned counsel for the legal heirs of opposite party no.3 i.e. opposite parties no.3/1/1 to 3/4/7. Notice on behalf of opposite parties no.1 and 2 has been accepted by learned Chief Standing Counsel.

2. This petition has been filed challenging the orders dated 05.11.1981 and 22.05.1984 passed by Assistant Settlement Officer of Consolidation and order dated 28.11.1985 passed by the Deputy Director of Consolidation, Sitapur.

3. The dispute in the instant writ petition relates to Khata No.123, consisting of Plot Nos. 2100/2, 2101/1 measuring 0.70, 2113 measuring 0.5 and 244 measuring 0.46, which was recorded in the basic year Khatauni in the name of Kallu, the father of the petitioner Mohd. Hussain @ Ghamar, who has now been substituted by his legal heir after his death. Mohd. Hussain @ Ghamar had filed an objection during consolidation that he was the son of Kallu, therefore his name be recorded on the plots in dispute. One Sukai filed an objection claiming rights on the basis of adverse possession but later on he gave a statement and his objection was rejected by the Consolidation Officer. No appeal or revision was filed by him. The opposite party no.3 Rasool now deceased and substituted by his legal heirs in the present writ petition had filed an objection claiming the plots in dispute on the basis of adverse possession. The Consolidation Officer, after considering the oral and documentary evidence, rejected the objections of the opposite party no.3 holding that he has failed to prove his continuous adverse possession on the plots in dispute and directed to record the name of the petitioner being the son and legal heir of the deceased Kallu. The opposite

party no.3 filed an appeal which was allowed ex-parte by means of the order dated 05.11.1981 and the order passed by the Consolidation Officer was set-aside. It was recorded in the order that the notice of appeal has been returned with the refusal of the petitioner. The petitioner moved an application for recall of the order. The said application was rejected in absence of the petitioner on 19.03.1984. Therefore, the petitioner moved an application for restoration on 20.03.1984 on the ground that the train of the petitioner was delayed therefore he reached the court at about 05:00 P.M., when he came to know that his application has been rejected and his counsel had not come to court. The opposite party no.2 rejected the application for restoration filed by the petitioner by means of the order dated 22.05.1984. Thereafter the petitioner filed a revision before the Deputy Director of Consolidation i.e. opposite party no.1 challenging the order of rejection of the restoration application. Another revision was filed by the petitioner challenging the original order dated 05.11.1981 passed by the opposite party no.2 in appeal alongwith an application under Section 5 and 14 of the Limitation Act. The Consolidation Officer, after hearing the parties, dismissed the revisions by means of the order dated 28.11.1985. Hence the present writ petition has been filed.

4. Learned counsel for the petitioner had submitted that after death of father of the petitioner Mohd. Hussain @ Ghamar, the name of the petitioner was liable to be recorded in the revenue records. Therefore, he had filed the objection during consolidation proceedings which was allowed after considering the pleadings and evidence holding that the petitioner is the legal heir of deceased Kallu and the opposite party no.3 has failed to prove his adverse possession in accordance with law. The appeal filed by the opposite party no.3 was allowed ex-parte because he, in collision with the post man, had got the notice of the appeal returned as refused. On coming to know, the petitioner had filed an application for recall but the same was dismissed in absence of the petitioner because he could not reach in time and his counsel had not appeared in the court. But the application filed by the petitioner, on the very next date for recall of the order, was arbitrarily and illegally rejected. Therefore, the petitioner had filed the revisions against the order passed on the application for recall and the original order passed in appeal. The revisions have also been dismissed without considering the grounds raised by the petitioner in arbitrary and illegal manner recording perverse findings.

5. Learned counsel for the petitioner had further submitted that the name of the opposite party no.3 has been directed to be recorded on the basis of adverse possession under clause-9 on the basis of PA-10. While the same was not issued in accordance with law and served on the original tenure holder therefore it was without following the procedure prescribed under Land Records Manual and not tenable in the eyes of law. Therefore, the impugned orders are not sustainable and liable to be quashed and the writ petition is liable to be allowed.

6. Per contra, learned counsel for the opposite parties had submitted that the possession of the opposite party no.3 was found in the basic year Khatauni on the basis of adverse possession. The opposite party no.3 had given evidence that he had plowed the field treating his own but the

Consolidation Officer had allowed the objection without considering the evidence adduced by the opposite party no.3. The petitioner had not appeared before the appellate court despite sufficient service. Therefore, the appeal was rightly decided ex-parte in accordance with law. The Appellate Authority has held that the possession of the opposite party no.3 is recorded in accordance with PA-10. The application for recall filed by the petitioner was rightly rejected by opposite party no.3 as despite knowledge the opposite party no.3 had not appeared, the revision filed by the opposite party no.3 also has rightly been dismissed considering grounds/pleadings of the parties and evidence. There is no illegality or infirmity in the impugned orders. The writ petition is misconceived and it is liable to be dismissed.

7. I have considered the submissions of learned counsel for the parties and perused the record.

8. The father of the petitioner "Kallu' was the recorded tenure holder in the basic year Khatauni. The petitioner had filed an objection for recording the name being legal heir. The objection filed by Sukai claiming right on the basis of adverse possession was rejected on his statement. The opposite party no.3 Rasool (now deceased) had filed an objection claiming the plots in dispute on the basis of adverse possession. After considering the pleadings of the parties, two issues were framed. One; as to whether Rasool son of Badlu is Bhumidhar on the basis of adverse possession on the land in dispute, second; as to whether Ghamar @ Mohd Hussaun is heir of the deceased Kallu. The issue no.2 has been decided holding Ghamar @ Mohd. Hussain as legal heir of the deceased Kallu as it was accepted by the parties and no objection was raised. The issue no.1 was decided in favour of the petitioner holding that there is no reference of PA-10, though the possession of Rasool is recorded in Khana Kaifiyat of 12 years 1368 Fasli.

9. It has also been recorded that Rasool had not stated in his statement that he had got PA-10. The entry in favour of the opposite party no.3 in the copy of Khatauni from 1371-73 Fasli is without reference of date and year of PA-24. Therefore the recording has no relevance. It has also been recorded that the witness Sri Ram had stated that Rasool had forcibly plowed 25 years ago while the quarrel was about 10-12 years old and it used to happen daily, whereas Rasool had stated that the quarrel had happened one or two days. Accordingly, the Consolidation Officer found that the opposite party no.3 has failed to prove his adverse possession. Therefore, he directed to record the name of the petitioner namely Ghamar @ Mohd. Hussain in place of his father Kallu and directed to expunge the possession of the opposite party no.3 Rasool son of Badlu by means of the order dated 17.06.1981.

10. The opposite party no.3 had filed the appeal, which was decided ex-parte on a report of postal department that the petitioner has refused to receive the summon. The appeal was allowed on the ground that the name of the opposite party no.3 was recorded under clause-9 on the basis of PA-10 in Khasra 1368 Fasli and in the Khatauni 1371-73 Fasli in accordance with PA-24 and by the oral evidence it is also proved that the opposite party no.3 is in possession from a long time. He has matured his titled on the basis of adverse possession and since Ghamar is not present

it is apparent that he has no objection to the possession of Rasool. But without setting aside the findings recorded by the Consolidation Officer and considering as to whether the entry of the opposite party no.3, under clause-9, on the basis of PA-10 is in accordance with the Land Records Manual or not held that the order passed by the Consolidation Officer is not proper and just and set-aside the same. Therefore the findings recorded in the appellate order are not in accordance with law and not tenable.

11. The para-89-A, 89-B and 102-B of the Land Records Manual (here-in-after referred as 'the manual'), relevant for the purpose, are extracted below:-

*"**89-A. List of changes**.-After each Kharif and rabi portal of a village the Lekhpal shall prepare in triplicate a consolidated list of new and modified entries in the Khasra in the following form:*

Form No.P-10

Khasra No. of Plot	*Area*	*Details of entry in the last year*	*Details of entry made in the current year*	*Verification report by the Revenue Inspector*	*Ramarks*
1	*2*	*3*	*4*	*5*	*6*

(ii) The Lekhpal shall fill in the first four Columns and hand over a copy of the list to the Chairman of the Land Management Committee. He shall also prepare extract from the list and issue to the person or persons concerned recorded in Columns 3 and 4 to their heirs, if the person or persons concerned have died, obtaining their signature in the copy of the list retained by him. Another copy shall be sent to the Revenue Inspector.

(iii) The Revenue Inspector shall ensure at the time of his partial of the village the extract have been issued in all the cases and signatures obtained of the recipients.

***89-B. Report of changes**.- The copy of the list with the Lekhpal containing the signatures of the recipients of the extracts shall be attached to the Khasra concerned and filed with the Registrar (Revenue Inspector) alongwith it on or before 31st July, of the following year (sub-paragraph (iv) of the paragraph 60).*

***102-B. Entry of possession (Column 22) (Remarks column).-** (1) The Lekhpal shall while recording the fact of possession in the remarks Column of the Khasra, write on the same day the fact of possession with the name of the person in possession in his diary also, and the date and the serial number of the dairy in the remarks Column of the Khasra against the entry concerned.*

(2) As the list of changes in Form p-10 is prepared after the completion of the patal of village, the serial number of the list of changes shall be noted in red ink below the entry concerned in the remarks column of the Khasra in order to ensure that all such entries have been brought on the list.

(3) If the Lekhpal fails to comply with any of the provisions contained in paragraph 89-A, the entry in the remarks

Column of the Khasra will not be deemed to have been made in the discharge of his official duty."

12. Reading of the aforesaid provisions makes it clear that if any entry is made in PA-10, the same shall be communicated to the person or persons concerned recorded in columns 3 and 4 or their heirs and obtain their signatures. Records on being submitted to the Revenue Inspector, he shall ensure at the time of Padtal i.e. verification of the village that it has been issued in all the cases and the signatures obtained by the recipients. Therefore, in case,any entry made on the basis of adverse possession the same was to be communicated to the person concerned and the person claiming is required to prove that it was in accordance with the manual and as to what was nature of possession and when it started in the knowledge of the tenant and the possession was continuous and how long it continued.

13. This Court considered this issue in the case of ***Mohd. Raza Vs. Deputy Director of Consolidation and Another; R.D. 1997 (R.D.) 276*** and held that the entries in the revenue papers not prepared by following the procedure prescribed under the Uttar Pradesh Land Records Manual and PA-10 notice was not served on the main tenant, such entries are of no evidentiary value and would not confer any right.

14. This court, in the case of ***Gurumukh Singh and Others Vs. Deputy Director of Consolidation, Nainital and Others; 1997 (80) RD 276***, has also held that the entries will have no evidentiary value if they are not in accordance with the provisions of Land Records Manual and the burden to prove is on the person who is asserting the possession on the basis of adverse possession. Relevant paragraphs 6 and 7 are extracted below:-

"6. It is clear from Para A-102C of the Land Records Manual that the entries will have no evidentiary value if they are not made in accordance with the provisions of Land Records Manual. There is presumption of correctness of the entries provided it is made in accordance with the relevant provision of Land Records Manual and secondly, in case where a person is claiming adverse possession against the recorded tenure-holder and he denies that he had not received any P.A. 10 or he had no knowledge of the entries made in the revenue records, the burden of proof is further upon the person claiming adverse possession to prove that the tenure-holder was duly given notice in prescribed Form P.A. 10. Para A-81 itself provides that the notice will be given by the Lekhpal and he will obtain the signature of the Chairman, Land Management Committee as well as from the recorded tenure-holder. It is also otherwise necessary to be provided by the person claiming adverse possession. The law of adverse possession contemplates that there is not only continuity of possession as against the true owner but also that such person had full knowledge that the person in possession was claiming a title and possession hostile to the true owner. If a person comes in possession of the land of another person, he cannot establish his title by adverse possession unless it is further proved by him that the tenure-holder had knowledge of such adverse possession.

7. ***In Jamuna Prasad v. Deputy Director of Consolidation, Agra and Others,*** *this Court repelled the contention that the burden of proof was upon the*

person who challenges the correctness of the entries. It was observed:

"Learned counsel for the Petitioner argued that there was a presumption of correctness about the entries in the revenue records and the onus lay upon the Respondent to prove that the entries showing the Petitioner's possession had not been in accordance with law. This contention is untenable Firstly, it is not possible for a party to prove a negative fact. Secondly, the question as to whether the notice in Form P.A. 10 was issued and served upon the Petitioner also is a fact which was within his exclusive knowledge."

"Petitioner's contention that the burden lay on the Respondents to disprove the authenticity and destroy the probative value of the entry of possession cannot be accepted. In my opinion, where possession is asserted by a party who relies mainly on the entry of adverse possession in his favour and such possession is denied by the recorded tenure-holder, the burden is on the former to establish that the entries in regard to his possession was made in accordance with law."

15. This Court, in the case of ***Sadhu Saran and Another Vs. Assistant Director of Consolidation, Gorakhpur and Others; 2003 (94) RD 535***, has held that it is well settled in law that the illegal entry does not confer title. Therefore even if the entry has been made, it does not confer right title or interest if it is not in accordance with law and the prescribed procedure. This Court and the counsel for the parties also could not get the same in the Lekhpal diary. The provision of PA-24 has come vide notification dated 03.07.1965, therefore it is also of no assistance because entry could not have been made on the basis of PA-24 in Khatauni of 1373 fasli and it is also without number and year.

16. This Court, in the case of ***Putti and Others Vs. Assistant Director of Consolidation, Bahraich and Others; (2007) 2 All ALJ 43***, has held that the court should be slow to declare the right on the basis adverse possession otherwise it may become a weapon in the hands of mighty persons to acquire the property of the weaker sections of society. It has further held that there shall not be presumption of continuous possession to declare right and title on the basis of adverse possession unless year to year entries made in accordance with law in the Khasra or Khatauni and proved by cogent and trustworthy evidence, the burden to prove which is on the person who claims Sirdari or Bhumidhari rights on the basis of adverse possession. Relevant paragraph-41 is extracted below:-

"41. Right to claim title on the basis of adverse possession is a legacy of British law. Courts should be slow to declare right on the basis of adverse possession. In case liberal approach is adopted to extend right and title on the basis of adverse possession then it may become a weapon in the hands of mighty persons to acquire the property of the weaker sections of the society. Accordingly, it shall always be incumbent upon the Courts to do close scrutiny of the evidence and material on record within the four corners of law as settled by Apex Court, discussed herein above. Even little reasonable doubt on the evidence relied upon by a party to claim right and title on the basis of adverse possession may be sufficient to reject

such claim under a particular fact and circumstance.

There shall not be presumption on continuous possession to declare right and title on the basis of adverse possession unless year to year entries made in accordance to law in the Khasra or Khatauni are proved by cogent and trust worthy evidence. burden of proof of such entries shall lie, as discussed herein above, on the person who claims Sirdari or bhumidhari right on the basis of adverse possession. In the absence of any such proof, presumption shall be in favour of recorded tenure-holder whose name has been recorded in column-1 of the Khatauni."

17. The Hon'ble Apex Court, in the case of ***P.T. Munichikkanna Reddy and Others Vs. Revamma and Others; 2008 (26) LCD 15***, has held that in case of adverse possession, communication to the owner and his hostility towards the possession is must. The relevant paragraphs 19 to 23 are extracted below:-

"19. Thus, there must be intention to dispossess. And it needs to be open and hostile enough to bring the same to the knowledge and plaintiff has an opportunity to object. After all adverse possession right is not a substantive right but a result of the waiving (willful) or omission (negligent or otherwise) of right to defend or care for the integrity of property on the part of the paper owner of the land. Adverse possession statutes, like other statutes of limitation, rest on a public policy that do not promote litigation and aims at the repose of conditions that the parties have suffered to remain unquestioned long enough to indicate their acquiescence.

20. While dealing with the aspect of intention in the Adverse possession law, it is important to understand its nuances from varied angles.

21. Intention implies knowledge on the part of adverse possessor. The case of ***Saroop Singh v. Banto and Others; (2005) 8 SCC 330*** *in that context held:*

*"29. In terms of Article 65 the starting point of limitation does not commence from the date when the right of ownership arises to the plaintiff but commences from the date the defendants possession becomes adverse. (****See Vasantiben Prahladji Nayak v. Somnath Muljibhai Nayak, (2004) 3 SCC 376).***

30. Animus possidendi is one of the ingredients of adverse possession. Unless the person possessing the land has a requisite animus the period for prescription does not commence. As in the instant case, the appellant categorically states that his possession is not adverse as that of true owner, the logical corollary is that he did not have the requisite animus. (See ***Mohd Mohd. Ali v. Jagadish Kalita, SCC para 21)"***

22. A peaceful, open and continuous possession as engraved in the maxim nec vi, nec clam, nec precario has been noticed by this Court ***in Karnataka Board of Wakf v. Government of India and Other; (2004) 10 SCC 779*** *in the following terms:*

"Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims

adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession"

23. It is important to appreciate the question of intention as it would have appeared to the paper-owner. The issue is that intention of the adverse user gets communicated to the paper owner of the property. This is where the law gives importance to hostility and openness as pertinent qualities of manner of possession. It follows that the possession of the adverse possessor must be hostile enough to give rise to a reasonable notice and opportunity to the paper owner."

18. In view of above, the judgment passed by the Appellate Authority without considering the law of adverse possession is not sustainable. Application for recall of ex-parte order was moved, which was dismissed for non-prosecution. Therefore an application for recall was filed. The applications were rejected by means of the order dated 22.05.1984. The first application for recall of the main order was rejected on the ground that the petitioner had knowledge of summon and the registered notice was returned with the report that the petitioner had refused to receive. A plea was taken that the report of refusal has been got submitted by the opposite party no.3 in collusion with the post man. A counter affidavit was filed by the opposite party no.3; Rasool stating that the post man had gone to the place of the petitioner from 24.07.1982 to 27.07.1982 and he had submitted a report of refusal. But it has not been considered as to how the opposite party no.3 had knowledge that the post man had gone to the place of the petitioner from 24.07.1984 to 27.07.1984 and as to when the petitioner refused to receive the same. The second application for recall filed on 20.03.1984 has been rejected on the ground that the petitioner had knowledge of the order passed by the court, which has not been disputed by the petitioner, but the ground taken by him that his train had left from Mahmudabad therefore he reached Sitapur at 05:00 PM and his counsel had not appeared in the Court has not been considered. Therefore, this Court is of the view that the application for recall filed by the petitioner was dismissed without considering the grounds raised by the petitioner in accordance with law and correctly.

19. The revisions filed by the petitioner against the rejection of application for recall and the appellate order on merit have also been dismissed. The first revision has been dismissed on the ground that the petitioner used to file revision against the interim orders, therefore, the petitioner used to linger on the proceedings and the Appellate Authority had not committed any mistake by deciding the appeal on merit by means of the order dated 05.11.1981 and accordingly the application for recall has rightly been rejected. But failed to consider the grounds raised by the petitioner which were sufficient and the ground taken by the revisional authority is not tenable because an aggrieved person has a right to file revision in accordance with law.

20. The other revision filed against the original order dated 05.11.1981 has

been dismissed holding that the entry of the opposite party no.3 under clause-9 has rightly been made after issuance of the PA-10 in accordance with law, therefore the possession of the opposite party no.3 has rightly been found from 1368 Fasli and no evidence has been adduced by the petitioner which may indicate that the petitioner has ever evicted the opposite party no.3 from the land in dispute and the petitioner has failed to produce any constructive, oral and written evidence, accordingly held that the opposite party no.3 has matured his right on the basis of adverse possession and dismissed the revision. But the revisional court failed to consider the legal position in regard to the entry under clause-9 on the basis of PA-10 as discussed above. In case the entry was made in the name of the opposite party no.3 under clause-9 on the basis of PA-10 it was incumbent upon the opposite party no.3 to prove by adducing cogent evidence that the same was made in accordance with law and the PA-10 was served on the original tenure holder. It was also required to be proved as to when the opposite party no.3 entered into the possession in the knowledge of the petitioner and continued his possession for the required period. But it has not been proved by the opposite party no.3 and no finding has been recorded in this regard.

21. In the present case, as per the findings, recorded by the Consolidation Officer, there was contradiction in the evidence in regard to the possession of the petitioner and the entry, which finding has not been set aside by the appellate or revisional authority. None of the courts have recorded the finding in regard to adverse possession in accordance with law and Land Records Manual and the service of PA-10 on the original tenure holder, which was mandatory. Therefore this Court is of the view that the opposite party no.3 has failed to prove his adverse possession on the land in dispute, therefore his claim was not sustainable, so no fruitful purpose would be served by remanding the case and it will be a futile exercise.

22. In view of above and considering the overall facts and circumstances of the case, this Court is of the view that the impugned orders are not sustainable in the eyes of law and liable to be quashed and the writ petition is liable to be allowed.

23. The writ petition is, accordingly, **allowed**. The impugned orders dated 05.11.1981 and 22.05.1985 passed by Assistant Settlement Officer of Consolidation and order dated 28.11.1985 passed by the Deputy Director of Consolidation, Sitapur are hereby quashed. No order as to cost.

24. The Lekhpal diary be returned forthwith.

(2021)09ILR A1105
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 03.09.2021

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Consolidation No. 986 of 2005

Bharat Prasad & Ors. ...Petitioners
Versus
D.D.C., Sitapur & Ors. ...Respondents

Counsel for the Petitioners:
K.N. Srivastava, S.C. Sitapuri

Counsel for the Respondents:
C.S.C., Ashish Srivastava, Manoj Kumar Srivastava, Narendra Gupta, Sudhir Kumar Misra

A. Civil Law - U.P. Zamindari Abolition and Land Reforms Act,1950 - Sections 229-B & 331 - Sale Deed - Cancellation of Sale Deed - whether suit cognizable by the civil court or the revenue court - Held - suit for cancellation of sale deed, on the ground of impersonation, can be filed only before the civil court & the civil court has only jurisdiction to decide the suit for cancellation of sale deed - same can not be cancelled under Section 229-B - suit u/s 229-B can be filed for a declaration of rights against the State Government and Gaon Sabha, if the State Government or the Gaon Sabha disputes the title of the claimant as Bhumidhar or Sirdar - in case title is denied by a person other than State Government or Gaon Sabha the Revenue Court will have no jurisdiction and the jurisdiction will lie before the civil court - as the civil court has jurisdiction of all civil suits of civil nature except those which are ignored or barred under any law - a decree for declaration is not an effective or alternative relief which may be claimed in substitution of the relief for cancellation of sale deed (Para 13, 14)

B. Sale Deed - Cancellation of Sale Deed when required - if the sale deed is void on the face of it, it requires no cancellation or declaration as being void, the Revenue Court, in such a case, could proceed to determine the rights of the parties - But when a deed is not void and it becomes void only on proof of certain facts, the intervention of the civil court is necessary for a decision declaring it void (Para 15)

C. Sale Deed - Sale deed questioned on ground of impersonation before Consolidation Officer - unless sale deed is set aside by a competent civil court after evidence, the same cannot be treated to be ineffective - the right, title and interest cannot be denied - it cannot be set aside or ignored by the revenue or consolidation courts (Para 21)

Allowed. (E-5)

List of Cases cited:

1. Indra Pal & ors. Vs Jagannath & ors. 1993 (11) LCD 45

2. Sumesar & ors. Vs Smt. Mangla 1993 (11) LCD 533

3. Tej Bhan Singh & ors. Vs II A.D.J., Jaunpur ACJ 1994 P.911

4. Smt. Dularia Devi Vs Janardan Singh & ors. 1990 AIR 1173

5. Kamla Prasad & ors. Vs Sri Krishna Kant Pathak & ors. (2007) 4 SCC 213

6. Smt. Ramdei (Dead) through LRs & ors. Vs Rampati @ Rupa Devi & anr. 2005 (23) LCD 829

7. Indra Deo & ors. Vs Ram Pyari Manu/UP/1126/1982, 1982 (8) ALR 517

8. Smt. Rasheedan Vs Amar Singh & ors. 1997 (3) AWC 1695

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

1. Heard Shri S.C. Sitapuri, learned counsel for the petitioners and Shri Sudhir Kumar Mishra, learned counsel for the opposite parties.

2. This writ petition has been filed under Article 226 of the Constitution of India for a Writ of Certiorari for quashing the judgment and order dated 05.07.2005 passed by the Deputy Director of Consolidation, Sitapur (here-in-after referred as DDC, Sitapur) in Revision No.302/283/270/266/204/80//66, Cheddu and Others Vs. Bharat and Others, under Section 48 of the Consolidation of Holdings Act, 1953 and for a writ of mandamus to the opposite parties not to disturb the petitioners' possession over the disputed land i.e. Gata No.408 (Khata No.120).

3. The land in dispute was originally owned by late Aziz Khan S/o Pahelwan

Khan .He sold the land to the petitioners namely Bharat Prasad, Ram Pal, Bhagwan Deen, Ramhetu and Raja Ram through a registered sale deed on 03.09.1982. In pursuance thereof the petitioners filed a mutation case which was decided in their favour and the names of the petitioners were recorded. One Israr, claiming him to be nephew of late Aziz Khan, filed a suit bearing no.423 of 1982 for cancellation of sale deed dated 03.09.1982 before the Munsif, Sitapur. The suit was dismissed by means of the order dated 29.05.1984. Israr filed a Civil Appeal No.83 of 1984 against the said order which was dismissed by means of the order dated 13.03.1985 holding that the suit was not triable by the civil court and it could have only been instituted before the Revenue Court. It was also held that the findings drawn by the learned Munsif will have no effect on the right, title and interest of the parties of the suit as the same was without jurisdiction. It appears that Israr had not filed any suit thereafter before the Revenue Court. However, one late Cheddu filed an objection under Section-9A(2) of the U.P. Consolidation of Holdings Act, 1953 (here-in-after referred as the Act) before the Assistant Consolidation Officer in the year 1993 stating that the suit was filed under Section 229-B by him for declaration. The suit was abated on account of start of the consolidation proceedings. The objection was allowed by the Consolidation Officer, Sitapur by means of the order dated 26.11.1998. The petitioners filed an appeal under Section 11(1) of the Act before the Settlement Officer of Consolidation which was allowed by means of the order dated 06.02.1999. Hence the opposite parties no.2 to 5 filed a revision under Section-48 of the Act before the D.D.C., Sitapur. The revision was allowed by means of the order dated

4. Learned counsel for the petitioners had submitted that the petitioners are the recorded tenure holders of the land in dispute on the basis of registered sale deed executed by late Aziz Khan. In mutation proceedings, on the basis of said sale deed, no objection was filed by the opposite parties. Israr or anybody else had not filed any application for mutation on the basis of succession. The suit filed by Israr was dismissed by the civil court on merit after considering the pleadings and evidence adduced before it. The appeal was dismissed on the ground that the suit can be filed before the Revenue Court. The said order was not challenged. There is no evidence that any suit was filed before the Revenue Court. He further submitted that the sale deed in favour of the petitioners has been questioned on the ground of impersonation by some other person in place of late Aziz Khan, therefore the Revenue Court has no jurisdiction to cancel it or declare void. It can be cancelled or declared void only by the civil court.

5. He further submitted that the objection under the Act was filed during consolidation proceedings by late Cheddu, father of all the opposite parties no.2 to 6 but no objection was filed by Israr. There is no evidence that the father of the opposite parties no.2 to 6 was the nephew of late Aziz Khan, though he has been treated by the criminal court but that can not have been relied without any proof in view of the fact that Israr had claimed himself the only nephew of late Aziz Khan in the proceedings before the civil court. There is no finding on possession but the revision was allowed. He further submitted that Israr had claimed that his father has only two brothers, late Aziz Khan and Ali Sher Khan and he was son of Ali Sher Khan whereas in the proceedings before the

Consolidation Officer, five brothers have claimed but the pedigree was not proved.

6. On the basis of above, learned counsel for the petitioners had submitted that the impugned order has been passed without application of mind in an arbitrary and illegal manner. Therefore it is not sustainable in the eyes of law and liable to be quashed. Learned counsel for the petitioners relied on I***ndra Pal & Others Vs. Jagannath & Others; 1993 (11) LCD P.45, Sumesar & Others Vs. Smt. Mangla; 1993 (11) LCD P.533 and Tej Bhan Singh & Others Vs. II Additional District Judge, Jaunpur; ACJ 1994 P.911.***

7. Per contra, learned counsel for the opposite parties had submitted that the sale deed, on the basis of which the petitioners are claiming, was a void document as it was got executed by some other person in place of late Aziz Khan therefore it was a void document and the same could have been challenged and declared void by the Revenue Court. It is settled proposition of law that after publication of notification under Section-4 of the Act all the powers vest in the consolidation courts who can consider all the questions including the void document. Accordingly, considering the same the Consolidation Officer and the revisional court have rightly decided the case in favour of the opposite parties by concurrent finding. There is no illegality or error in the impugned orders.

8. On the basis of above, learned counsel for the opposite parties had submitted that the writ-petition is misconceived and lacks merit and is liable to the dismissed. Learned counsel for the opposite parties relied on ***Smt. Dularia Devi Vs. Janardan Singh & Others; 1990 AIR 1173, Kamla Prasad and Others Vs. Sri Krishna Kant Pathak and Others; (2007) 4 SCC 213 and Smt. Ramdei (Dead) through LRs & Others Vs. Rampati @ Rupa Devi and Another; 2005 (23) LCD 829.***

9. I have considered the submissions of learned counsel for the parties and perused the record.

10. The name of the petitioners was recorded on the basis of sale deed executed by late Aziz Khan by the order dated 17.01.1983 passed by the Naib Tehsildar. There is no evidence that any appeal was filed against the said order. One Israr had filed a suit for cancellation of sale deed dated 03.09.1982 executed in favour of the petitioners. Israr had given a pedigree in suit in which he had shown that the Pahelwan Khan had two sons namely Aziz Khan and Ali Sher Khan and Israr was the son of Ali Sher Khan. However, it appears that during evidence he had stated that Pahelwan Khan had three other successors but he could not prove that he was nephew of late Aziz Khan. The suit was dismissed on merit after evidence by means of the judgment and order dated 29.05.1984. The civil appeal filed by Israr was dismissed by the District Judge on the ground that the remedy lies before the Revenue Court. Israr had not filed any suit before the Revenue Court because no evidence was adduced at any stage in this regard or filing of suit by any body else. Only an assertion was made during consolidation proceedings in the objection filed on 15.03.1993 by the father of the opposite parties no.2 to 6 late Cheddu and one another showing a different pedigree but no objection was filed by Israr or any body else. The pedigree was also not proved. The Consolidation Officer allowed the objection by means of the order dated

26.11.1998. The said order has not been filed before this Court.

11. The petitioners filed an appeal before the Settlement Officer of Consolidation. The Appellate Authority recorded that the main issue in the case to be decided is as to whether the name of the petitioners, on the basis of sale deed, has rightly been recorded or not. The Appellate Authority held that unless the sale deed is cancelled by the competent court, the same can not be treated to be ineffective. No evidence has been filed which may prove that the sale deed has been cancelled by the competent court. The name of the petitioners has been mutated on the basis of sale deed. The sale deed was proved by the marginal witnesses therefore it could not be disbelieved. It has further been recorded that the order passed by the civil court will have no bearing on this case because it has been held by the Additional District Judge that the civil court has no jurisdiction to cancel the sale deed. Therefore, the expert opinion of thumb impression given therein has no relevance. The appeal was allowed and the order passed by the Consolidation Officer was set-aside and it was provided that the entries made in the revenue record in favour of the petitioners shall continue.

12. The Revisional Authorities, on the basis of evidence of late Cheddu Khan and Salik Ram, held that late Aziz Khan had put his thumb impression on Takabi Register while taking loan which was not tallied by the thumb impression of late Aziz Khan on Register No.8 of the Sub-Registrar's office by the finger print expert, who found that they are different and also on the basis of findings recorded by the Civil Court and Criminal Court held that the sale deed was got executed by impersonation therefore they are not entitled for title, right and interest on the basis of said sale deed. However it appears that the said registers were neither produced nor got proved by the person competent i.e. who keeps it and before whom the thumb impressions were put in due course of functioning. The revisional court recorded a finding that the Consolidation Officer has not committed any error or illegality in recording the name of the revisionist who are the nephew of late Aziz Khan without any evidence or proof that they are the nephew of late Aziz Khan. It is also apparent that the original file of civil court was summoned, perused and considered because after writing it, the same was deleted, while in view of order of Additional District Judge the same could not have been considered. Therefore the findings recorded by the revisional court are not sustainable.

13. The name of the petitioners was recorded on the basis of registered sale deed, which has been questioned by the opposite parties on the ground that it is void document because it was got executed by impersonation. But the sale deed was not challenged by late Aziz Khan and it was challenged only by Israr showing the pedigree in which his father had only two brothers, whereas before the consolidation court five brothers have been claimed but nothing could be shown before this Court that the pedigree was proved by the opposite parties in any manner and it was also not proved that the opposite parties were the nephew of late Aziz Khan. The objection was also filed by only late Cheddu and one another. The civil court had also in the suit for cancellation found that Israr had failed to prove that he was nephew of late Aziz Khan though the Additional District Judge in civil appeal held that the finding drawn by the learned

Munsif will have no effect on the title, right and interest of the parties to the suit as the findings are without jurisdiction. But in such situation it was required to be proved by cogent evidence that the objectors were the nephew and legal heirs of late Aziz Khan. The said order was not challenged whereas the suit for cancellation of sale deed, on the ground of impersonation, can be filed only before the civil court and the civil court has only jurisdiction to decide the suit for cancellation of sale deed. The same can not be cancelled under Section 229-B because the suit under Section 229-B can be filed for a declaration of his rights against the State Government and Gaon Sabha whereas the civil court has jurisdiction of all civil suits of civil nature except those which are ignored or barred under any law. Therefore if the State Government or the Gaon Sabha disputes the title of the claimant as Bhumidhar or Sirdar the suit under Section 229-B can be filed. But in case the title is denied by a person other than State Government or Gaon Sabha the Revenue Court will have no jurisdiction and the jurisdiction will lie before the civil court.

14. This Court considered the issues in the case of ***Indra Deo and Others Vs. Ram Pyari; Manu/UP/1126/1982, 1982 (8) ALR 517*** and held that a decree for declaration is not an effective or alternative relief which may be claimed in substitution of the relief for cancellation of sale deed because the suit under Section 229-B would be necessary only if the State Government or Gaon Sabha dispute the title of plaintiff but if some other person disputes, the remedy would be before the civil court. The paragraph-21 is extracted below:-

"21. From the above it is clear that Section 229-B(3) contemplates a suit for declaration by a Bhumidhar or Sirdar against the State Government and the Gaon Sabha. Such a suit would be necessary when the plaintiffs' title is not recognised either by the State Government or by the Gaon Sabha. The occasion for filing such a suit will not arise when the title of the plaintiff is denied by a person other than the State Government and the Gaon Sabha. Therefore, under the provisions of the Act itself, the jurisdiction of the Civil Court would not be barred when declaration is sought against a person who has transferred agricultural property which the plaintiff comes to be his. Section 229-B does not compete all / oil kinds of declaratory suits. It deals with declaratory suits of the specific type herein before mentioned. The section came up for interpretation before a Division Bench of this Court in Parsottam v. Narottam and Another MANU/UP/0255/1970; 1970 R.D. 2016. The Division Bench observed as follows:--

"Section 229-B of the U.P. Zamindari Abolition and Land Reforms Act is the only section which deals with declaratory suits relating to agricultural land. The question arises as to whether this section covers declaratory suits of all kinds or is limited only to suits of a particular category. Sub-Section (1) of Section 229-B provides for a suit for declaration by an Asami against the land holder and says in Sub-section (2) that in such a suit any other person claiming Asami rights in the land in suit shall be impleaded as a defendant, sub-section (3) of that section makes the provision of sub-sections (1) and (2) applicable mutatis mutandis to a suit by a Bhumidhar or Sirdar with the amendment that instead of the land holder "State Government and Gaon Sabha" shall be substitutes in other words a suit for the

declaration of Bhumidhari or Sirdari rights is to he filed against the State Government and the Gaon Sabha and any other person who claims Bhumidhari or Sirdari rights in such land has also to be impleaded as a party. The suit contemplate by the provisions of Section 229-B is directed primarily against the State Government and the Gaon Sabha. Now such a suit would be necessary only if the State Government of the Gaon sabha disputes the plaintiff's title as a Bhumidhar or Sirdar. If the State Government or the Gaon Sabha does not dispute the claim of the plaintiff such a suit would not lie under Section 229-B of the Act merely because some other person disputes the plaintiff's claim."

15. This Court, in the case of ***Smt. Rasheedan Vs. Amar Singh and Others; 1997 (3) AWC 1695,*** has held that if the deed is void on the face of it, it requires no cancellation or declaration as being void, the Revenue Court, in such a case, could proceed to determine the rights of the parties. But when a deed is not void and it becomes void only on proof of certain facts, the intervention of the civil court is necessary for a decision declaring it void because it can be made by the civil court only. In the present case the validity of the sale deed executed in favour of the petitioners has been questioned on the ground of impersonation which can be examined only by the civil court after evidence. In the case of impersonation, it is required to be proved by cogent evidence that the sale deed has not been executed by person, having right, title or interest and by any other person. In the present case the registered sale deed has been proved by the marginal witnesses in the mutation proceedings which was not challenged by anybody.

16. In the case of ***Indra Pal and Others Vs. Jagannath and Others (Supra)***, it has been held that the essence of matter in deciding whether the suit is cognizable by the civil court or the revenue court is whether Section 331 of U.P. Zamindari Abolition and Land Reforms Act is attracted to the facts of the case. If in substance, the main question involved relates to declaration of right or title, then the suit would lie in the revenue court and not in the civil court. But it is not the case in the present case.

17. This Court, in the case of ***Sumesar and Others Vs. Smt. Mangla (Supra)***, has held that a suit for cancellation of sale deed did lay in civil court. The relevant paragraph nos.16 to 18 are extracted below:-

"*16. Considering the provisions of Section 31 Specific Relief Act and Section 331 of U.P.Z.A. & L.R. Act, this court, in the cases of* ***Indra Deva V. Ram Pyari, reported in (1982 ALJ 1308)*** *and the case of* ***Ram Padarath v. II Additional. District Judge (1988 (6) LCD 565)*** *has laid down the law to the effect that the suit for cancellation of sale deed whether void or voidable is maintainable in the Civil Court. Their Lordships in Ram Padarath (Supra) have laid down the law to the following effect:*

"We are of the view that the case of ***Indra Deva v. Smt. Ram Pyari, 1982 ALJ 1308*** *has been correctly decided and said decision requires no consideration, while Division Bench Case in Dr. Ayodhya Prasad V. Gangotri is regarding the jurisdiction of consolidation authorities but so far as it holds that suit in respect of void documents will lie in Revenue Court it does not lay down a god law. Suit and Action for cancellation of void documents will generally lie in Civil Court and a party*

cannot be deprived of his right getting this relief permissible under law except when a declaration of right of status is necessarily needed in which even relief for cancellation will be surplusage and redundant . A recorded tenure holder having prima-facie title in his favour can hardly be directed to approach the Revenue Court in seeking relief for cancellation of void document which made him to approach the Court of law and in such case he can also claim ancillary relief even though the same can be granted by the Revenue Court."

17. In ***t****he case of* ***Mst. Bismillah v. Janeshwar Prasad reported in [1990 (11) LCD 536 (SC)]*** *the Supreme Court has followed with affirmance the view and law laid down in Ram Padarath's case.*

*18. In this view of the matter there is no substance in this contention of the learned counsel for the appellant, and I hold that the suit for cancellation of sale deed did lay in Civil court and that section 331 of U.P. Z.A. & L.R. Act did not bar it. Learned counsel further contended that the finding of the court below that the deed has been obtained by misrepresentation and fraud and that the plaintiff did not execute the sale-deed with full understanding is incorrect and is liable to be set aside and that learned court below wrongly held that the sale deeds were without consideration and further that they were not read over a*nd explained to the plaintiff vendor. This is a question of appreciation of evidence.

18. This Court, in the case of ***Tej Bhan Singh and Others Vs. II Additional District Judge, Jaunpur (Supra)***, has also passed order relying on the judgment of full Bench in the case of Ram Padarath and Others v. II Additional District Judge, Sultanpur; 1988 (6) LCD 565. Similar view has been taken by this Court in the case of ***Smt. Ramdei (dead) through Lrs and Others Vs. Rampati @ Rupa Devi and Others (Supra).*** The relevant paragraph 14 is extracted below:-

14. There are two kinds of deeds, whose validity is normally challenged, namely, void and voidable. Hon'ble Supreme Court in Dhurandhar Prasad Singh v. Jai Prakash University and Ors.2001 (Suppl) RD 342, has elaborately dealt with distinction in two types of deeds. In Paragraph 20 of the said judgment the expression 'void' has been said to have several facets, amongst which one type is of those void acts, transactions, decrees which are wholly without jurisdiction. Such acts and transactions etc are void ab initio and for avoiding them no declaration is necessary as it can be disregarded in collateral proceeding as the law does not take notice of it. Hon'ble Supreme Court has observed that there may be other type of void acts which may not be nullity but for avoiding the same a declaration has to be made. An example has also been cited. The relevant portion of Para 20 is extracted herebelow for ready reference:

"The expression "void" has several facets. One type of void acts, transactions, decrees are those which are wholly without jurisdiction, ab-initio void and for avoiding the same no declaration is necessary, law does not take any notice of the same and it can be disregarded in collateral proceeding or otherwise. The other type of void act, e.g., may be transaction against a minor without being represented by a next friend. Such a transaction is good transaction against the whole world. So far the minor is concerned, if he decides to avoid the same and succeeds in avoiding it by taking recourse

to appropriate proceeding the transaction becomes void from the very beginning. Another type of void act may be which is not nullity but for avoiding the same a declaration has to be made. Voidable act is that which is a good act unless avoidable, e.g., if a suit is filed for declaration that a document is fraudulent and/or forged and fabricated. It is voidable as apparent state of affairs is real state of affairs and a party who alleges otherwise is obliged to prove it. If it is proved that the document is forged and fabricated and a declaration to that effect is given a transaction becomes void from the very beginning. There may be a voidable transaction which is required to be set aside and the same is avoided from the day, it is so set aside and not any day prior to it. In cases, where legal effect of a document cannot be taken away without setting aside the same, it cannot be treated to be void but would be obviously voidable."

19. The Hon'ble Supreme Court, in the case of ***Kamla Prasad and Others Vs. Sri Krishna Kant Pathak and Others (Supra),*** has held in paragraph 14, 15 and 16 as under:-

"14. In this connection, the learned counsel for the appellant rightly relied upon a decision of this Court in Shri Ram & Anr. v. Ist Addl. Distt. Judge & Ors., (2001) 3 SCC 24. In Shri Ram, A, the original owner of the land sold it to B by a registered sale deed and also delivered possession and the name of the purchaser was entered into Revenue Records after mutation. According to the plaintiff, sale deed was forged and was liable to be cancelled. In the light of the above fact, this Court held that it was only a Civil Court which could entertain, try and decide such suit. The Court, after considering relevant case law on the point, held that where a recorded tenure holder having a title and in possession of property files a suit in Civil Court for cancellation of sale deed obtained by fraud or impersonation could not be directed to institute such suit for declaration in Revenue Court, the reason being that in such a case, prima facie, the title of the recorded tenure holder is not under cloud. He does not require declaration of his title to the land."

20. The Hon'ble Supreme Court in the case of ***Smt. Dulariya Devi Vs. Janardhan Singh and Others (Supra)*** has held that a voidable document is one which remains in force until set aside and such a document can be set aside only by a competent civil court. A suit for that purpose would, therefore, be maintainable. A claim that a transaction is void is, however, a matter which can be adjudicated upon by the consolidation court.

21. In view of above and considering the overall facts and circumstances of the case, this court is of the view that unless the sale deed is set aside by a competent civil court the right, title and interest can not be denied and it cannot be set aside or ignored by the revenue or consolidation courts. Therefore the impugned order is not sustainable and liable to be quashed with a direction to the revisional court to reconsider and pass a fresh order in accordance with law on the basis of pleadings and evidence adduced before it.

22. The writ petition is, accordingly, **partly allowed**. The judgment and order dated 05.07.2005 passed by the Deputy Director of Consolidation, Sitapur in Revision No.302/283/270/266/204/80//66 is quashed. The Deputy Director of Consolidation, Sitapur i.e. the opposite

party no.1 is directed to pass a fresh order in accordance with law and the observations made here-in-above in this order. No order as to costs.

(2021)09ILR A1114
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.09.2021

BEFORE

THE HON'BLE RAVI NATH TILHARI, J.

Consolidation No. 21059 of 2021

Surya Baksh Singh ...Petitioner
Versus
D.D.C., Ayodhya & Ors. ...Respondents

Counsel for the Petitioner:
Himanshu Kumar Bachhil, Anjani Nath Khare, Illegible, L.P. Singh

Counsel for the Respondents:
C.S.C., Mohiddin Khan

Civil Law - Uttar Pradesh Consolidation of Holdings Act, 1953 - Section 48(1) - Revision against interlocutory order is not maintainable - 'Interlocutory order' means such order deciding any matter arising in such case or proceeding or collateral thereto as does not have the effect to finally disposing of such case or proceeding

Consolidation Officer after hearing parties on 06.02.2021 fixed date for disposal on the point of limitation - against which opposite parties filed revision - D.D.C. admitted the revision and stayed further proceedings before Consolidation Officer - *Held* - by order dated 06.02.2021 nothing was decided by Consolidation Officer, only date was fixed for disposal on the matter of limitation - order dated 06.02.2021 does not decide any lis nor touches on any important right or liability of any of the parties - order dated 06.02.2021, being interlocutory revision against it was not maintainable under S. 48 (1) of the Act, 1953 (Para 13, 14)

Allowed.(E-5)

List of Cases cited :

1.Veeresh Singh Vs Deputy Director of Consolidation, Farrukhabad & ors. 2013 (3) ADJ 702

(Delivered by Hon'ble Ravi Nath Tilhari, J.)

1. Heard Sri Himanshu Kumar Bachhil, learned counsel for the petitioner, Dr. Krishna Singh, learned Standing Counsel for opposite party nos. 1, 2 & 6, Sri Mohiuddin Khan, learned counsel for the opposite party no. 4. Sri Mohan Singh has accepted notice on behalf of the Gram Sabha-opposite party no. 5.

2. For the order proposed to be passed, issuance of notice to opposite party no. 3 is dispensed with.

3. The petitioner filed an application under Rule 109-A (1) of the Uttar Pradesh Consolidation of Holdings Rules, 1954, which was time barred and, as such, an application under Section 5 of the Limitation Act was filed for condonation of delay.

4. The Consolidation Officer after hearing the learned counsels for both the sides on 06.02.2021, fixed 11.02.2021 for disposal on the point of limitation, against which the private opposite parties filed revision in which the Deputy Director of Consolidation by order dated 10.02.2021 admitted the revision and stayed the further proceedings before the Consolidation Officer.

5. Sri Himanshu Kumar Bachhil submits that the revision against the order

dated 10.02.2021, was not maintainable, the order dated 10.02.2021 being an interlocutory order, in view of Section 48 (1) of the Uttar Pradesh Consolidation of Holdings Act, 1953 (in short 'the Act, 1953'), and therefore the order dated 10.02.2021 is without jurisdiction.

6. Sri Mohiuddin Khan, submits that the order dated 10.02.2021 has been passed with due opportunity of hearing to the parties which does not call for any interference. He fairly submits that Revision under Section 48 of the Act, 1953 does not lie against interlocutory order.

7. In view of the questions involved upon which legal position is settled and as the Court is not entering into the factual dispute, if any, the counter affidavit is not being called.

8. I have considered the submissions advanced by the learned counsels for the parties and perused the material on record.

9. Section 48 of the Uttar Pradesh Consolidation of Holdings Act, 1953, reads as under:-

*"**Revision and reference**.- (1) The Director of Consolidation may call for and examine the record of any case decided or proceedings taken by any subordinate authority for the purpose of satisfying himself as to the regularity of the proceedings; or as to the correctness, legality or propriety of any order **[other than an interlocutory order]** passed by such authority in the case or proceedings, may, after allowing the parties concerned an opportunity of being heard, make such order in the case or proceedings as he thinks fit.*

(2) Powers under sub-section (1) may be exercised by the Director of Consolidation also on a reference under sub-section (3).

(3) Any authority subordinate to the Director of Consolidation may, after allowing the parties concerned an opportunity of being heard, refer the record of any case or proceedings to the Director of Consolidation for action under sub-section (1).

[Explanation- [(1)] For the purposes of this section, Settlement Officers, Consolidation, Consolidation Officers, Assistant Consolidation Officers, Consolidator and Consolidation Lekhpals shall be subordinate to the Director of Consolidation.]

Explanation (2) - For the purposes of this section the expression 'interlocutory order' in relation to a case or proceeding, means such order deciding any matter arising in such case or proceeding or collateral thereto as does not have the effect to finally disposing of such case or proceeding.

[Explanation (3). - The power under this section to examine the correctness, legality or propriety of any order includes the power to examine any finding, whether of fact or law, recorded by any subordinate authority, and also includes the power to re-appreciate any oral or documentary evidence.]?

10. A bare perusal of Section 48 (1) of the Act, 1953 shows that the revision is not competent against the interlocutory order.

11. In ***Veeresh Singh vs. Deputy Director of Consolidation, Farrukhabad and Ors. [2013 (3) ADJ 702],*** this Court, after considering the meaning of the word "interlocutory order" as also in Section 48(1) of the Uttar Pradesh Consolidation of Holdings Act, 1953 has held that the revision against the interlocutory order under Section 48 of the Act is not maintainable.

12. It is apt to reproduce paragraph nos. 7, 8 & 9 of the ***Veeresh Singh (supra)*** as under:-

"7. From the bare reading of the aforesaid Section it would transpire that the revision would be maintainable against any order except the interlocutory order. The interlocutory order has been explained in Explanation (2) of the aforesaid Section, where it is provided that for the purposes of this Section the expression interlocutory order in relation to a case or proceeding, means such order deciding any matter arising in such case or proceeding or collateral thereto as does not have the effect to finally disposing of such case or proceeding.

8. The literal meaning of the word interlocutory order has been defined in various dictionaries as under:

(1) Law Lexicon (P. Ramanath Ayer) 1997 Edition: Interlocutory order: An interlocutory order is one which is made pending the case and before a final hearing on the merits.

An interlocutory order is made to secure some end and purpose necessary and essential to the progress of the suit, and generally collateral to the issues formed by the pleadings and not connected with the final judgment.

(2) Halsburys Law of England, 4th Edition, Vol. 26, Paragraph 506:

Interlocutory order: An order which does not deal with the final rights of the parties, but either - (1) is made before judgment and gives no final decision on the matters in dispute, but is merely on a matter of procedure, or (2) is made after judgment, and merely directs how the declarations of right already given in the final judgment are to be worked out, is termed Interlocutory. An interlocutory order, even though not conclusive of the main dispute, may be conclusive as to the subordinates matter with which/ideals.

(3) Concise Oxford English Dictionary, 11th Edition:

Interlocutory: (of a decree or judgment) given provisionally during the course of a legal action.

On bare perusal of the meaning of the word interlocutory order, it would transpire that an order, which does not have the effect of finality of the proceedings and it is an order in a pending proceeding, which is made during the progress of an action and which does not finally dispose of the rights of the parties.

9. The word interlocutory order has also been used in Section 397 of Code of Criminal Procedure and the same came up for consideration before the Apex Court in the case of Amar Nath and Others Vs. State of Haryana and Another, , where the Apex Court has held that the term interlocutory order merely denotes orders of a purely interim or temporary nature which do not decide or touch the important rights or the liabilities of the parties. In the case of V.C. Shukla Vs. State through

C.B.I., , the Apex Court held that the interlocutory order has to be construed in contradiction to or in contrast with final order, it means not a final order, but an intermediate order. It is made between the commencement of an action and the entry of the judgment. Reverting back to the facts of this case, as would appear from the record that here, in this case, nothing has been decided. The order accepting or refusing the evidence, impugned in the revision, in my considered view, would not fall in the ambit of a final order, as the matter is still subjudice before the Consolidation Officer, if anything turns on the statements filed on affidavit, the petitioner is at liberty to challenge the same before the higher Court by way of filing appeal/revision."

13. From perusal of the order dated 06.02.2021 (annexure no. 14), it is evident that by this order, nothing was decided by the Consolidation Officer. Only the date 11.02.2021, was fixed for disposal on the matter of limitation. The order dated 06.02.2021 does not decide any lis nor touches on any important right or liability of any of the parties.

14. In view of the aforesaid, this Court is of the considered view that the order dated 06.02.2021, being interlocutory, the revision there-against was not maintainable under Section 48 (1) of the Act, 1953. The order dated 10.02.2021 impugned in the petition is without jurisdiction.

15. Consequently, the order dated 10.02.2021 is quashed. The order dated 06.02.2021 passed by the Consolidation Officer is revived.

16. The Consolidation Officer, Ayodhya, shall proceed to decide the matter pending before him, as per law, after affording opportunity of hearing to all the parties concerned, including opposite party no. 3, with due notice to them, if there is no other legal impediment.

17. Writ petition is allowed with the aforesaid observations and directions.

(2021)09ILR A1117
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.09.2021

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ C No. 19903 of 2021

Anil Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Manoj Yadav

Counsel for the Respondents:
C.S.C.

Civil Law -U.P. Panchayat Raj Act (26 of 1947) – Section 12(C) - Election petition - Pendency of - early decision or an expeditious conclusion of election petitions is imperative for the functioning of democracy - However in the anxiety to conclude the election proceedings, norms of fair justice and procedural fairness should not be given a go by - All parties to the lis should be duly noticed (Para 7,8)

Petitioner sought direction that his election petition pending before election tribunal be decided within a stipulated period of time - Direction issued to election tribunal to decide election petition within a period of six months. (Para 10)

Allowed. (E-5)

List of Cases cited:

1. Anita Devi & ors. Vs Prescribed Authority, Panchayat Raj & ors. 2016 (6) ADJ 27

2. Pukhrem Saratchandra Singh Vs Mairembam Prithviraj (2015) 16 SCC 149

3. Satya Narain Vs Dhuja Ram & ors. (1994) 4 SCC 247

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

1. Heard Shri Manoj Yadav, learned counsel for the petitioner and learned Standing Counsel for the State-respondent.

2. An election petition was instituted by the petitioner on 02.06.2021 which came to be registered as Case No. 03345 of 2021, Computerized Case No. T202115510103345 (Anil Kumar Vs. Kanhaiya Lal and others) which is pending before the election tribunal/respondent no.2, Prescribed Authority/Sub-Divisional Magistrate, Sadar, District Mau.

3. The only prayer made by Shri Manoj Yadav, learned counsel for the petitioner that the election petition be decided within a stipulated period of time. Reliance is placed on the law laid down in ***Anita Devi and others Vs. Prescribed Authority, Panchayat Raj and others1*.**

4. Learned Standing Counsel submits that the election petition can only be decided after all parties to the lis have been duly noticed.

5. This Court in **Anita Devi (supra)** set its face against an inordinate delay or unnecessary prolongation of election petitions. Further in the same judgement after a survey of various provisions of the U.P. Panchayat Raj Act, 1947, including Section 12C(5) of the U.P. Panchayat Raj Act, 1947, it was held:

"8. In exercise of powers for nominating the prescribed authority and regulating the method and procedure for presentation and hearing of election petition State of Uttar Pradesh has framed "Uttar Pradesh Panchayat Raj (Settlement of Election Disputes) Rules, 1994." The Rules provide that an application under Section 12-C Rule-3 has to be filed within ninety days from the date the result is declared. Rule-4 provides for the Sub-Divisional Magistrate being the competent authority to hear such election disputes. Rule-4 declare that while deciding such election petitions the Sub-Divisional Magistrate shall summarily follow the procedure applicable under the Code of Civil Procedure 1908 for trial of suits. Such applications can be dismissed, without giving notice to the opposite parties. It shall not be necessary to record the evidence in full and he may only maintain a memorandum of the evidence produced by the parties before him.

9. The Sub-Divisional Magistrate may only allow such evidence be produced as he may deem relevant for the purpose of deciding the election petitions. From the aforesaid rules regulating the procedures for hearing of the election petitions read with Section 12 C sub-rule (5) the intentions of the State Legislature is, that there must be early disposal of the election petitions and if required the rules may provide for summary hearing and disposal of the said election petition.

10. The election petitions must be heard in an expeditious manner and there should not be uncalled for adjournment of such petitions. This is more necessary

because of the fact that the elections are for a fixed term and every attempt must be made to settle the disputes pertaining to such elections within reasonable time and nobody should be permitted to linger the proceedings so as to frustrate the election petition or to create a situation where the relief to be granted to the election petitioner may be rendered illusionary.

11. We are of the considered opinion that the Sub-Divisional Magistrate who is appointed as the Election Tribunal under the provisions of Section 12 C of the Panchayat Raj Act must proceed with the election petitions in a business like manner. There should not be any uncalled adjournment on the mere asking of the parties. The time frame provided for in the matter of filing of the written statement must be strictly adhered to. For avoiding adjournment,of the election petitions on the ground that the Sub-Divisional Magistrate is busy with other work or has been assigned other duties, the State Government must issue directions to ensure that the Sub-Divisional Magistrate/Election Tribunal fix at least one particular day in a week on which they shall necessarily hear the election petitions. Adjournment of the election petition on the ground that the election officer is busy with other work has to be avoided except in extremely unavoidable circumstances.

12. In our opinion a general direction must be issued by the State Government to Sub-Divisional Magistrate to make all attempts to decide the election petition filed under Section 12 C preferably within six months of their institution and only in exceptional cases the time limit fixed be extended and that to for reasons to be recorded."

6. The importance of a timely decision of election petitions has been consistently made in judicial authorities of high standing. The Supreme Court in ***Pukhrem Saratchandra Singh v. Mairembam Prithviraj2*** propounded:

"20. A voter casts his vote as a responsible citizen to choose the masters for governing the country. That being the trust of the electorate in an elected candidate, when he faces an assail to his election, it should be his sanguine effort to become free from the assail in the election petition and work with attainment and not take shelter seeking adjournments with the elated hope that he can be triumphant in the contest by passage of time. This kind of attitude has to be curbed from all angles because law does not countenance it."

7. Similarly an early decision or an expeditious conclusion of election petitions was found to be imperative for the functioning of democracy in **Satya Narain Vs. Dhuja Ram and others3.**

8. There is also merit in the submission of learned Standing Counsel that in the anxiety to conclude the election proceedings, norms of fair justice and procedural fairness should not be given a go by. All parties to the lis should be duly noticed.

9. The respondent no. 7-newly elected Gram Pradhan is directed to cooperate in the said proceeding and will not seek any unnecessary adjournment before the election tribunal.

10. In wake of the preceding discussion, the writ petition is being disposed of with a direction to the election tribunal to decide the election petition within a period of six months stipulated in **Anita Devi (supra).**

11. The writ petition is disposed of finally.

(2021)09ILR A1120
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.09.2021

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ C No. 20493 of 2021

Govind Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Harish Chandra Mishra

Counsel for the Respondents:
C.S.C., Sri Deepak Gaur

A. Civil Law - U.P. Revenue Code, 2006 - Section 67 - Illegal Encroachment - Without proper demarcation of the boundaries of the disputed parcel of lands, finding of illegal encroachment cannot be returned (Para 8)

B. U.P. Revenue Code, 2006, S. 67, 67A - Illegal Encroachment - When defence of S. 67(A) is taken by the notice in proceedings of S. 67, proceedings u/s 67(A) should be registered separately but both cases u/s 67 as well under section 67(A) should be consolidated, heard & decided together as in such matters pleadings, defence, and evidence of the parties are same in both the proceedings - In case proceedings u/s 67 and 67(A) of the Code are conducted separately and in isolation to one another, it would lead to multiplicity of litigation and inconsistent judgments - Courts in proceedings under Section 67 of the Code are under obligation of law to decide the eligibility of the noticee for protection under Section 67(A) of the Code. (Para 14, 15)

Defence of Section 67A of the U.P. Revenue Code, 2006 taken by the petitioner was not adverted to by both the courts below - failure of the learned courts below to enquire into the validity of the defence of the petitioner under Section 67(A) of the Code has resulted into a miscarriage of justice – Impugned orders set side. (Para 18)

Allowed. (E-5)

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

1. Heard Shri Harish Chandra Mishra, learned counsel for the petitioner, learned Standing Counsel for the State-respondent and Shri Deepak Gaur, learned counsel for the Gaon Sabha.

2. The impugned order dated 30.11.2018 passed by the respondent No.3-Tehsildar/Assistant Collector 1st Class, Tehsil-Moth, District-Jhansi, rendered in proceedings registered as Case No.T201806370201602 (Gaon Sabha Vs. Govind Singh) under Section 67 of the Uttar Pradesh Revenue Code, 2006 (hereinafter referred to as the 'Code'), finds that the petitioner had illegally encroached over the disputed parcels of land, and accordingly it was directed that the petitioner be evicted from the disputed parcel of land. Damages and other charges were also imposed upon the petitioner.

3. The learned trial court in the impugned order dated 30.11.2018 has noticed that the Lekhpal in his cross examination had admitted that the disputed parcels of land were not demarcated and the house appeared to be of old vintage.

4. The learned appellate court/Additional Collector (Judicial), Jhansi by the impugned order dated 30.06.2021 agreed with the findings of the

learned trial court/Tehsildar/Assistant Collector 1st Class, Tehsil-Moth, District-Jhansi, and affirmed its judgement dated 30.11.2018.

5. Shri Harish Chandra Mishra, learned counsel for the petitioner contends that the defence of Section 67A of the U.P. Revenue Code, 2006 taken by the petitioner was not adverted to by both the courts below. Further without proper demarcation of the lands, a finding of illegal encroachment cannot be returned.

6. Learned Standing Counsel for the State-respondent as well as Shri Deepak Gaur, learned counsel for the Gaon Sabha could not satisfactorily dispute the aforesaid submissions on fact and law.

7. All relevant facts for just adjudication of the controversy can be prised out from the impugned orders. Exchange of affidavits shall unnecessarily delay the disposal of the controversy. With consent of parties the matter is being decided finally.

8. To make a finding of illegal encroachment upon any disputed parcel of land in proceedings taken out under Section 67 of the U.P. Revenue Code, 2006, the demarcation of the boundaries of the disputed parcel of land is an essential prerequisite. Admittedly, the same has not been done in this case. Infact the Lekhpal had admitted before the court below that the disputed plots were not demarcated. On this count alone the finding of illegal encroachment made by the learned court below is vitiated.

9. The petitioner claimed entitlement to the protection of Section 67A of the U.P. Revenue Code, 2006. It is noteworthy that the Lekhpal had also deposed that the house is of old vintage. The learned courts below have clearly neglected to consider the aforesaid issue. This reflects non application of mind.

10. Section 67 as well as Section 67(A) of the Code reflect the composite intent of legislature. The legislature by enacting the aforesaid provision has recognized the vulnerability of the State land to illegal encroachment and the need for urgent corrective measures. Simultaneously the legislature has also acknowledged the reality of a large number of persons who have erected dwelling units on lands which are not reserved for any public purposes. The legislature has protected their rights in the manner prescribed in the provision. For ease of reference the provisions are extracted hereunder:

"67 Power to prevent damage, misappropriation and wrongful occupation of Gram Panchayat property.- (1) Where any property entrusted or deemed to be entrusted under the provisions of this Code to a Gram Panchayat or other local authority is damaged or misappropriated, or where any Gram Panchayat or other authority is entitled to take possession of any land under the provisions of this Code and such land is occupied otherwise than in accordance with the said provisions, the Bhumi Prabandhak Samiti or other authority or the Lekhpal concerned, as the case may be, shall inform the Assistant Collector concerned in the manner prescribed.

(2) Where from the information received under sub-section (1) or otherwise, the Assistant Collector is satisfied that any property referred to in

sub-section (1) has been damaged or misappropriated, or any person is in occupation of any land referred to in that sub-section in contravention of the provisions of this Code, he shall issue notice to the person concerned to show cause why compensation for damage, misappropriation or wrongful occupation not exceeding the amount specified in the notice be not recovered from him and why he should not be evicted from such land.

(3) If the person to whom a notice has been issued under sub-section (2) fails to show cause within the time specified in the notice or within such extended time as the Assistant Collector may allow in this behalf, or if the cause shown is found to be insufficient, the Assistant Collector may direct that such person shall be evicted from the land, and may, for that purpose, use or cause to be used such force as may be necessary, and may direct that the amount of compensation for damage or 34 misappropriation of the property or for wrongful occupation, as the case may be, be recovered from such person as arrears of land revenue.

(4) If the Assistant Collector is of opinion that the person showing cause is not guilty of causing the damage or misappropriation or wrongful occupation referred to in the notice under sub-section (2), he shall discharge the notice.

(5) Any person aggrieved by an order of the Assistant Collector under sub-section (3) or sub-section (4), may within thirty days from the date of such order, prefer an appeal to the Collector.

(6) Notwithstanding anything contained in any other provision of this Code, and subject to the provisions of this section every order of the Assistant Collector under this section shall, subject to the provisions of sub-section (5) be final.

(7) The procedure to be followed in any action taken under this section shall be such as may be prescribed.

Explanation. - For the purposes of this section, the word 'land' shall include the trees and buildings standing thereon

11. 67-A Certain house sites to be settled with existing owners thereof.-

(1) If any person referred to in sub-section (1) of section 64 has built a house on any land referred to in section 63 of this Code, not being land reserved for any public purpose, and such house exits on the November 29, 2012, the site of such house shall be held by the owner of the house on such terms and conditions as may be prescribed.

(2) Where any person referred to in sub-section (1) of section 64, has built a house on any land held by a tenure holder (not being a government lessee) and such house exits on November 29, 2000, the site of such house, notwithstanding anything contained in this Code, be deemed to be settled with the owner of such house by the tenure holder on such terms and conditions as may be prescribed.

Explanation. - For the purpose of sub-section (2), a house existing on November 29, 2000, on any land held by a tenure holder, shall, unless the 35 contrary is proved, be presumed to have

been built by the occupant thereof and where the occupants are members of one family by the head of that family. "

12. Section 67(A) of the Code confers rights on certain people who have encroached upon public land. The conditions precedent for invoking the protection of Section 67(A) of the Code are these. The person against whom proceedings are taken out has built his house on any land referred to in Section 63 of the Code, the person who seeks protection of Section 67(A) of the Code should be in the category of persons referred to in Section 63 of the Code. The land should not be reserved for any public purpose. The date of the construction of the house should be prior to 29 November, 2012. The house of such persons should be existing on the disputed parcels of land on or before 29 November 2012.

13. In many instances, as in the present case, a noticee under Section 67 of the Code may invoke the protection of Section 67(A) of the Code to resist the proceedings under Section 67 of the Code.

14. The authority/ court having jurisdiction to decide the proceedings taken out under Section 67 of the Code or Section 67(A) of the Code is the same. When the defence of Section 67(A) of the Code is taken in proceedings of Section 67 of the Code, the same issues will be directly and substantially in issue in both the proceedings. Usually in such matters pleadings, defence, and evidence of the parties are same in both the proceedings. In case proceedings under Section 67 and 67(A) of the Code are conducted separately and in isolation to one another, it would lead to multiplicity of litigation and inconsistent judgments. There will also be an avoidable delay in decision of the controversy and may even result in miscarriage of justice.

15. The courts in proceedings under Section 67 of the Code are under obligation of law to decide the eligibility of the noticee for protection under Section 67(A) of the Code. In case defence under Section 67(A) of the Code is taken by the noticee, the said proceedings shall be registered separately. But both cases will be consolidated and heard and decided together.

16. This procedure would faithfully implement the legislative intent and also serve the interest of justice.

17. In the facts and circumstances of this case, the failure of the learned courts below to enquire into the validity of the defence of the petitioner under Section 67(A) of the Code has resulted into a miscarriage of justice.

18. In wake of preceding discussion, the impugned orders dated 30.06.2021 passed by the Additional Collector (Judicial), Jhansi and 30.11.2018 passed by the respondent No.3-Tehsildar/Assistant Collector 1st Class, Tehsil-Moth, District-Jhansi, are vitiated and contrary to law. The orders dated 30.06.2021 and 30.11.2018 are liable to be set aside and are set aside.

19. The matter is thus remitted to the respondent No.3-Tehsildar/Assistant Collector 1st Class, Tehsil-Moth, District-Jhansi, for a fresh determination consistent with the observation made in this judgment.

20. The following directions are being passed to serve the interest of justice in this case:

(1) The petitioner shall file a fresh application under Section 67(A) of the Code before the respondent No.3-Tehsildar/Assistant Collector 1st Class, Tehsil-Moth, District-Jhansi, within a period of one month from the date of production of a computer generated 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-Tehsildar/Assistant Collector 1st Class, Tehsil-Moth, District-Jhansi, shall register the proceedings under Section 67(A) of the Code upon submission of such application.

(3) Proceedings under Section 67(A) of the Code so instituted shall be consolidated and heard with proceedings under Section 67 of the Code registered as Case No.T201806370201602 (Gaon Sabha Vs. Govind Singh) and decided by a common order, consistent with the observations made in this judgement.

(4). Prior to entering a final judgement the court below shall ensure that demarcation of disputed parcels of lands is completed as per law.

21. The writ petition is allowed to the extent indicated above.

(2021)09ILR A1124
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.09.2021

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ C No. 23502 of 2012

Deo Prakash Maurya ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri K.S. Ojha

Counsel for the Respondents:
C.S.C.

Civil Law - Stamp Act (2 of 1899) – Sections 27, 75 & 47A - U.P. Stamp (Valuation of Property) Rules (1997) - R.7 - Stamp duty - determination of market value for the purpose of stamp duty - on the basis of ex-parte report of ADM (F/R) or other officer - Not proper

Intendment of such inspection report is only to assist the adjudicating authority to record a prima facie satisfaction on the correctness of the valuation of the property as disclosed in the instrument - Ex-parte inspection report merely becomes the basis of initiating proceedings under Section 47-A of the Indian Stamp Act, 1899 - Once the report is disputed by the noticee, the stamp authorities cannot place reliance on the same to determine stamp liability - Adjudicating authority is required to make an independent enquiry as prescribed in Rule 7 of the 1997 Rules to determine the valuation of the property and on that basis assess the stamp liability payable on the instrument (Para 10)

Allowed. (E-5)

List of Cases cited:

Ram Khelawan @ Bachcha Vs St. of u.p. and Prashant Shukla son of Sushil Chand Shukla, reported at 2005 (2) AWC 1087

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

1. Heard Sri Kamal Shankar Ojha, learned counsel for the petitioner and Sri Sanjay Goswami, learned Additional Chief Standing Counsel for the respondents-State.

2. The petitioner has assailed the order dated 21.06.2011 passed by the learned adjudicating authority/District Magistrate/Collector (Stamp), Sonebhadra, determining the stamp liability of the petitioner on the instrument in issue as well as the order dated 22.03.2012 passed by the learned appellate authority/Commissioner, Vindhyachal Mandal, Mirzapur, affirming the order of the learned adjudicating authority/District Magistrate/Collector (Stamp), Sonebhadra.

3. The learned adjudicating authority/ District Magistrate/Collector (Stamp), Sonebhadra in the impugned order dated 21.06.2011 has placed exclusive reliance on a report submitted by the Additional District Magistrate (Finance & Revenue), Sonebhadra, after the inspection of the disputed premises. The report dated 30.09.2009 was submitted in the aftermath of the sale-deed. The sale-deed was executed on 20.04.2009. The petitioner had tendered his objection to the aforesaid inspection report. While finding against the petitioner, the adjudicating authority held that insufficient evidence was adduced by the petitioner against the offending report. On this footing, the findings of the report dated 30.09.2009 of the learned Additional District Magistrate (Finance & Revenue), Sonebhadra in regard to the valuation of the property was upheld. The objection of the petitioner that the constructions were raised and the crushing operations begun subsequent to the date of purchase was accordingly invalidated.

4. The learned appellate authority/Commissioner, Vindhyachal Mandal, Mirzapur, agreed with the findings of the learned adjudicating authority/District Magistrate/ District Magistrate/Collector (Stamp), Sonebhadra, and affirmed its order by the impugned order dated 22.03.2012.

5. Sri Kamal Shankar Ojha, learned counsel for the petitioner contends that the learned authorities below erred in law by relying on the report submitted by the learned Additional District Magistrate (Finance & Revenue), Sonebhadra dated 30.09.2009. The learned authorities below illegally failed to make an enquiry under Rule 7 of the Uttar Pradesh Stamp (Valuation of Property) Rules, 1997. The reliance is placed on the law laid down by this Court in ***Ram Khelawan Alias Bachcha son of Ram Ratan Vs. State of Uttar Pradesh Through Collector and Prashant Shukla son of Sushil Chand Shukla***, reported at 2005 (2) AWC 1087.

6. The applicability of the law laid down by this Court in **Ram Khelawan (supra)** could not be disputed on behalf of the State.

7. Learned Standing Counsel could not dispute the applicability of **Ram Khelawan (supra)** to the facts of this case.

8. Heard learned counsel for the parties.

9. A perusal of the impugned orders passed by the learned courts below discloses that sole and exclusive reliance was placed on the report submitted by the learned Additional District Magistrate (Finance & Revenue), Sonebhadra on 30.09.2009 while finding against the petitioner.

10. The intendment of such inspection report is only to assist the adjudicating authority to record a prima facie satisfaction on the correctness of the

valuation of the property as disclosed in the instrument. The said report merely becomes the basis of initiating proceedings under Section 47-A of the Indian Stamp Act, 1899. Once the report is disputed by the noticee, the stamp authorities cannot place reliance on the same to determine stamp liability. The adjudicating authority will have to make an independent enquiry as prescribed in Rule 7 of the Uttar Pradesh Stamp (Valuation of Property) Rules, 1997 to determine the valuation of the property and on that basis assess the stamp liability payable on the instrument.

11. This narrative is supported by good authority in point. In **Ram Khelawan (supra),** this Court while construing the purpose of the inspection report [Such as one made by the learned Additional District Magistrate (Finance & Revenue) in this case], held as under:

"25. It has been found in several cases like the present one that the entire basis of determination of market value for the purpose of stamp duty is ex-parte report of Tehsildar or other officer. Ex-parte inspection report may be relevant for initiating the proceedings under Section 47-A of Stamp Act. However, for deciding the case no reliance can be placed upon the said report. After initiation of the case inspection is to be made by the Collector or authority hearing the case after due notice to the parties to the instrument as provided under Rule-7(3) (c) of the Rules of 1997. Moreover in the inspection report distance of the property from other residential or commercial properties and road must be shown and wherever possible sketch map must also be annexed alongwith the report so that correct valuation may be ascertained with reasonable certainity."

12. The proposition of law is squarely applicable to the facts of this case. On this footing alone, the orders passed by the learned authorities below are vitiated.

13. There is another aspect to the matter. Upon receipt of the report the District Magistrate/District Magistrate/Collector (Stamp), Sonebhadra, is under an obligation of law to carry out an independent enquiry to determine the valuation of the property and the property comprised in the instrument and then determine the stamp liability. A comprehensive procedure in that regard is set out in Rule 7 of the Uttar Pradesh Stamp (Valuation of Property) Rules, 1997. The said provision is being extracted hereunder for ease of reference:

"**7. Procedure on receipt of a reference or when suo motu action is proposed under Section 47-A.-**(1) On receipt of a reference or where action is proposed to be taken suo motu under Section 47-A, the Collector shall issue notice to parties to the instrument to show cause within thirty days of the receipt of such notice as to why the market value of the property set forth in the instrument and the duty payable thereon be not determined by him.

(2) The Collector may admit oral or documentary evidence, if any, produced by the parties to the instrument and call for and examine the original instrument to satisfy himself as to the correctness of the market value of the subject-matter of the instrument and for determining the duty payable thereon.

(3) The Collector may-

(a) Call for any information or record from any public office, officer or

authority under the Government or a local authority;

(b) Example and record the statement of any public officer or authority under the Government or the local authority; and

(c) Inspect the property after due notice to parties to the instrument.

(4) After considering the representation of the parties, if any and examining the records and other evidence, the Collector shall determine the market value of the subject-matter of the instrument and the duty payable thereon.

(5) If, as a result of such inquiry, the market value is found to be fully and truly set forth and the instrument duly stamped according to such value, it shall be returned to the person who made the reference with a certificate to that effect. A copy of such certificate shall also be sent to the Registering Officer concerned.

(6) If, as a result of inquiry, the instrument is found to be under valued and not duly stamped, necessary action shall be taken in respect of it according to relevant provisions of the Act."

14. The District Magistrate/Collector (Stamps), Sonebhadra has failed to cause an enquiry in the manner prescribed under Rule 7 of the Uttar Pradesh Stamp (Valuation of Property) Rules, 1997 to determine the valuation of the property. It is beyond the pale of dispute that the District Magistrate/Collector (Stamps), Sonebhadra has evidently fettered his jurisdiction for no good cause.

15. The learned appellate authority/Commissioner, Vindhyachal Mandal, Mirzapur in its order dated 22.03.2012 failed to redeem the error committed by the learned adjudicating authority/District Magistrate/Collector (Stamp), Sonebhadra.

16. In wake of the preceding narrative, the order dated 21.06.2011 passed by the learned adjudicating authority/District Magistrate/Collector (Stamps), Sonebhadra as well as the order dated 22.03.2012 passed by the learned appellate authority/Commissioner, Vindhyachal Mandal, Mirzapur, are liable to be set aside and are set aside.

17. The matter is remitted to the learned adjudicating authority/District Magistrate/Collector (Stamps), Sonebhadra, with the following directions:

I. The learned adjudicating authority/District Magistrate/Collector (Stamps), Sonebhadra, shall decide the matter afresh, consistent with the manner stated in this judgement.

II. The controversy shall be adjudicated by the learned adjudicating authority/District Magistrate/Collector (Stamps), Sonebhadra, within a period of three months from the date of production of a computer generated copy of this order, downloaded from the official website of the High Court Allahabad. The 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.

III. The petitioner undertakes to cooperate in the enquiries before the learned adjudicating authority/District Magistrate/Collector (Stamps),

Sonebhadra, and shall not seek any unnecessary adjournment.

IV. If necessary, the learned adjudicating authority/District Magistrate/Collector (Stamp), Sonebhadra, shall conduct the proceedings on day to day basis to ensure that the above stipulated timeline of three months is strictly adhered to.

V. The amount already deposited by the petitioner shall remain subject to the final adjudication by the learned adjudicating authority/District Magistrate/Collector (Stamps), Sonebhadra in accordance with the above directions.

18. Before parting, this Court deems it appropriate to highlight another important issue. The law laid down by this Court in **Ram Khelawan (supra)** is now well settled. This Court in several cases had noticed the stamp authorities had been erring by relying an ex parte inspection reports which are to be used solely for the purposes of initiation of proceedings under the Indian Stamp Act, 1899. The authorities are not any the wiser today. This Court also comes to the conclusion independently that the same error is being repeated by the authorities in several cases including the instant case. This aspect needs to be redressed.

19. The Principal Secretary, Stamp and Registration, Government of U.P., Lucknow, shall ensure that appropriate training programmes and workshops/seminars for the adjudicating authorities as well as appellate authorities are regularly held to enable them to acquire knowledge of the laws including the body of judicial precedents which govern the interpretation of the Indian Stamp Act, 1899. The distilled wisdom of the judgements handed down by constitutional courts should constantly guide the actions of the revenue authorities.

20. Sri Sanjay Goswami, learned Additional Chief Standing Counsel shall communicate this order to the Principal Secretary, Stamp and Registration, Government of U.P., Lucknow, along with his suggestions.

21. The Principal Secretary, Stamp and Registration, Government of U.P., Lucknow is expected to take appropriate measures in this regard within a period of four months from today.

22. Such regular workshops will help the authorities to remain abreast of the laws and empower them to faithfully implement the intendment of the Indian Stamp Act, 1899 and protect the interests of the Revenue while respecting the rights of common citizens. It will also prevent unnecessary litigation.

23. The writ petition is allowed to the extent indicated above.

(2021)09ILR A1128
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.08.2021

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ C No. 25136 of 2016

Shri Shanti Swaroop Krishi Inter College, Hapur & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:

Sri Shesh Kumar Srivastava

Counsel for the Respondents:
C.S.C., Sri Akshat Sinha, Saroj Kumar Yadav, Sri Yogesh Kumar Sinha

Civil Law - U.P. Industrial Disputes Act (28 of 1947) - Section 6H(1) - Jurisdiction of Labour Court in respect of class IV employee working in aided institution - *Held* - Special Act prevail over a General Act - U.P. Intermediate Education Act, 1921 and the Uttar Pradesh High Schools and Intermediate Colleges (Payment of Salaries of Teachers and Other employees) Act, 1971 are a complete code & being special legislations covering a specific field of law, ousted jurisdiction of the Labour Court, in matters covered by the former enactment.

Private respondent appointed as Class IV employee in the petitioner Institution - conditions of service governed exclusively by provisions of Act, 1921 and Act of 1971- *Held* - Labour court exceeded its jurisdiction by passing award and the consequential proceedings taken out under Section 6H(1) - Award set aside

Allowed. (E-5)

List of Cases cited :

1. Ghaziabad Zila Sahkari Bank Ltd. Vs Addl. Labour Commissioner & ors. 2007 (11)SCC 756

2. Sikta Mahoogarh Sadhan Sahkari Samiti Ltd. Vs Prescribed Authority (2014)4UPLBEC 3246

3. Co-operative Central Bank Ltd. & ors. Vs The Additional Industrial Tribunal, Andhra Pradesh & ors. 1969(2)SCC43

4. Sikta Mahoogarh Sadhan Sahkari Samiti Limited Vs Prescribed Authority under the Payement of Wages Act, 1936 & ors. (2014) 4UPLBEC 3246

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

1. The petitioner has assailed the award passed by the Lok Adalat in this writ petition.

2. Learned counsel for the petitioner Shri Shesh Kumar Srivastava submits that the award is beyond jurisdiction. The Utter Pradesh Industrial Disputes Act is not applicable to the facts of this case. He relies on the law laid down by the Supreme Court in ***Ghaziabad Zila Sahkari Bank Ltd. Vs. Addl. Labour Commissioner and others1,*** and the judgment of this Court rendered in ***Sikta Mahoogarh Sadhan Sahkari Samiti Ltd. Vs. Prescribed Authority under the Payment of Wages Act, 1936 and others2.***

3. Shri Saroj Kumar Yadav, learned counsel for the respondent contends that the respondent no.5 is a workman within the meaning of Uttar Pradesh Industrial Disputes Act, 1947.

4. The facts material to the adjudication of this case lie in a narrow compass and are undisputed.

5. The respondent no. 5 was appointed as Class IV employee in the petitioner Institution. The petitioner Institution is an intermediate college which is under the grant-in-aid of the Government of U.P. The conditions of service and payment of salary of all employees and staff of the Institution including the petitioner are governed and regulated by the U.P. Intermediate Education Act, 1921 as well as the Uttar Pradesh High Schools and Intermediate Colleges (Payment of Salaries of Teachers and Other employees) Act, 1971.

6. The aforesaid enactments are a complete code. The enactments are special legislations covering a specific field of law.

7. I see merit in the contention of Shri Shesh Kumar Srivastava, learned counsel for the petitioners that the labour court exceeded its jurisdiction by entertaining the industrial dispute even though its jurisdiction was ousted by the U.P. Intermediate Education Act, 1921 and the Uttar Pradesh High Schools and Intermediate Colleges (Payment of Salaries of Teachers and Other employees) Act, 1971.

8. The ouster of jurisdiction of the labour court and the Uttar Pradesh Industrial Disputes Act, 1947, in matters governed by special laws fell for consideration in ***Ghaziabad Zila Sahkari Bank (supra).***

9. The issue in Ghaziabad Zila Sahkari Bank (supra) was whether the U.P. Cooperative Societies Act, 1965, being a special enactment ousted the jurisdiction of Uttar Pradesh Industrial Disputes Act, 1947 in matters covered by the former enactment. Invoking the well settled principles of interpretation of statues which contemplate that a special Act shall prevail over a general Act was held:

"61. The general legal principle in interpretation of statutes is that "the general Act should lead to the special Act". Upon this general principle of law, the intention of the U.P. Legislature is clear, that the special enactment U.P. Cooperative Societies Act, 1965 alone should apply in the matter of employment by cooperative societies to the exclusion of all other labour laws. It is a complete code in itself as regards employment in cooperative societies and its machinery and provisions. The general Act, the U.P. Industrial Disputes Act, 1947 as a whole has and can have no applicability and stands excluded after the enforcement of the U.P. Cooperative Societies Act. This is also clear from necessary implication that the legislature could not have intended head-on conflict and collision between authorities under different Acts."

10. The narrative in ***Ghaziabad Zila Sahkari Bank (supra)*** placed reliance on the judgment rendered in ***Co-operative Central Bank Ltd. and others Vs. The Additional Industrial Tribunal, Andhra Pradesh and others3,*** wherein it was observed:

"7. Applying these tests, we have no doubt at all that the dispute covered by the first issue referred to the Industrial Tribunal in the present cases could not possibly be referred for decision to the Registrar under Section 61 of the Act. The dispute related to alteration of a number of conditions of service of the workmen which relief could only be granted by an Industrial Tribunal dealing with an industrial dispute. The Registrar, it is clear from the provisions of the Act, could not possibly have granted the reliefs claimed under this issue because of the limitations placed on his powers in the Act itself. It is true that Section 61 by itself does not contain any clear indication that the Registrar cannot entertain a dispute relating to alteration of conditions of service of the employees of a registered society; but the meaning given to the expression "touching the business of the society", in our opinion, makes it very doubtful whether a dispute in respect of alteration of conditions of service can be held to be covered by this expression. Since the word "business" is equated with the actual trading or commercial or other similar business activity of the society, and since it has been held that it would be difficult to subscribe

to the proposition that whatever the society does or is necessarily required to do for the purpose of carrying out its objects, such as laying down the conditions of service of its employees, can be said to be a part of its business, it would appear that a dispute relating to conditions of service of the workmen employed by the society cannot be held to be a dispute touching the business of the society. Further, the position is clarified by the provisions of sub-section (4) of Section 62 of the Act which limit the power to be exercised by the Registrar, when dealing with a dispute referred to him under Section 61, by a mandate that he shall decide the dispute in accordance with the provisions of the Act and the Rules and bye-laws. On the face of it, the provisions of the Act, the rules and the bye-laws could not possibly permit the Registrar to change conditions of service of the workmen employed by the society. For the purpose of bringing facts to our notice in the present appeals, the rules framed by the Andhra Pradesh Government under the Act, and the bye-laws of one of the appellant Banks have been placed on the Paper-books of the appeals before us. It appears from them that the conditions of service of the employees of the Bank have all been laid down by framing special bye-laws. Most of the conditions of service, which the workmen want to be altered to their benefit, have thus been laid down by the by-laws, so that any alteration in those conditions of service will necessarily require a change in the bye-laws. Such a change could not possibly be directed by the Registrar when, under Section 62(4) of the Act, he is specifically required to decide the dispute referred to him in accordance with the provisions of the bye-laws. It may also be noticed that a dispute referred to the Registrar under Section 61 of the Act can even be transferred for disposal to a person who may have been invested by the Government with powers in that behalf, or may be referred for disposal to an arbitrator by the Registrar. Such person or arbitrator, when deciding the dispute, will also be governed by the mandate in Section 62(4) of the Act, so that he will also be bound to reject the claims of the workmen which is nothing else than a request for alteration of conditions of service contained in the bye-laws. It is thus clear that, in respect of the dispute relating to alteration of various conditions of service, the Registrar or other person dealing with it under Section 62 of the Act is not competent to grant the relief claimed by the workmen at all. On the principle laid down by this Court in the case of Deccan Merchants Cooperative Bank Ltd., therefore, it must be held that this dispute is not a dispute covered by the provisions of Section 61 of the Act. Such a dispute is not contemplated to be dealt with under Section 62 of the Act and must, therefore, be held to be outside the scope of Section 61"

11. Elaborating further exclusion of the jurisdiction of a general Act in matters covered by the special Act in ***Ghaziabad Zila Sahkari Bank (supra),*** it was concluded:

"63. Also if we refer to the general principles of statutory interpretation as discussed by G.P. Singh, in his treatise on Principles of Statutory Interpretation, we can observe that, a prior general Act may be affected by a subsequent particular or special Act if the subject-matter of the particular Act prior to its enforcement was being governed by the general provisions of the earlier Act. In such a case the operation of the particular Act may have the effect of partially

repealing the general Act, or curtailing its operation, or adding conditions to its operation for the particular cases. The distinction may be important at times for determining the applicability of those provisions of the General Clauses Act, 1897, (the Interpretation Act, 1889 of UK, now the Interpretation Act, 1978) which apply only in case of repeals.

64. A general Act's operation may be curtailed by a later special Act even if the general Act will be more readily inferred when the later special Act also contains an overriding non obstante provision. Section 446(1) of the Companies Act, 1956 (Act 1 of 1956) provides that when the winding-up order is passed or the Official Liquidator is appointed as a provisional liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of winding-up order shall be proceeded with against the company except by leave of the court. Under Section 446(2), the Company Court, notwithstanding anything contained in any other law for the time being in force is given jurisdiction to entertain any suit, proceeding or claim by or against the company and decide any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in the course of the winding-up. The Life Insurance Corporation Act, 1956 (Act 31 of 1956) constituted a tribunal and Section 15 of the Act enabled Life Insurance Corporation to file a case before the tribunal for recovery of various amounts from the erstwhile Life Insurance Companies in certain respects. Section 41 of the LIC Act conferred exclusive jurisdiction on the tribunal in these matters. On examination of these Acts, it was held [Damji Valji Shah v. LIC of India, AIR 1966 SC 135] that the provisions conferring exclusive jurisdiction on the tribunal being provisions of the special Act i.e. the LIC Act prevailed over the aforesaid provisions of the general Act viz. the Companies Act which is an Act relating to companies in general and, therefore, the tribunal had jurisdiction to entertain and proceed with a claim of Life Insurance Corporation against a former insurer which had been ordered to be wound up by the Company Court. This case [Damji Valji Shah v. LIC of India, AIR 1966 SC 135] was followed [(2000) 4 SCC 406] in giving to the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (the RDB Act) overriding effect over the provisions of the Companies Act, 1956. The RDB Act constitutes a tribunal and by Sections 17 and 18 confers upon the tribunal exclusive jurisdiction to entertain and decide applications from the banks and financial institutions for recovery of debts (defined to mean any liability which is claimed as due). The Act also lays down the procedure for recovery of the debt as per the certificate issued by the tribunal. The provisions of the RDB Act, which is a special Act, were held [(2000) 4 SCC 406] to prevail over Sections 442, 446, 537 and other sections of the Companies Act which is a general Act, more so because Section 34 of the RDB Act gives overriding effect to that Act by providing that the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

65. We are therefore of the view that the Assistant Labour Commissioner's (ALC) jurisdiction was wrongly invoked and his order dated 15-3-2003 under Section 6-H, U.P. Industrial Disputes Act, 1947 is without jurisdiction and hence null and void and it can be observed that, in

view of the said general legal principle, it is immaterial whether or not the Government has enforced Section 135 (U.P. Cooperative Societies Act) because, in any case the said provision (Section 135) had been included in the Act only by way of clarification and abundant caution."

12. Similarly, the jurisdiction of the prescribed authority under the Payment of Wages Act, 1936, to entertain the claims of an employee of the Co-operative Society who is governed by the U.P. Co-operative Societies Act, 1965, was ousted in ***Sikta Mahoogarh Sadhan Sahkari Samiti Limited Vs. Prescribed Authority under the Payement of Wages Act, 1936 and others4***, in view of the law laid down in ***Ghaziabad Zila Sahkari Bank (supra)***, this Court opined as under:

"19. Be that as it may, I am clearly of the opinion that issue in question stands covered by judgment of Apex Court in Ghaziabad Zila Sahkari Bank (supra) and therefore, since no Labour Laws would be applicable in respect to service dispute of an employee and cooperative society inter se, Prescribed Authority, under Act, 1936, had no jurisdiction to entertain an application under Section 15 and therefore, impugned orders are patently illegal and without jurisdiction."

13. In this case the services and rights of the respondent no. 5 are governed exclusively by the provisions of U.P. Intermediate Education Act, 1921 and the Uttar Pradesh High Schools and Intermediate Colleges (Payment of Salaries of Teachers and Other employees) Act, 1971. Both the enactments are comprehensive in nature and squarely cover the dispute before the labour court. The law laid down in ***Ghaziabad Zila Sahkari Bank (supra)*** as well as ***Sikta Mahoogarh (supra)*** will be squarely applicable to the facts to this case. The jurisdiction of the labour court and the Uttar Pradesh Industrial Disputes Act, 1947 in the facts of this case was ousted by virtue of the operation of the UP Intermediate Education Act, 1921 and the Uttar Pradesh High Schools and Intermediate Colleges (Payment of Salaries of Teachers and Other employees) Act, 1971.

14. In wake of the preceding discussion, the labour court exceeded its jurisdiction by passing the impugned award dated 27.04.2015. The award dated 27.04.2015 and the consequential proceedings taken out under Section 6H(1) of the Uttar Pradesh Industrial Disputes Act, 1947, are liable to be set aside and are set aside.

15. The writ petition is allowed.

(2021)09ILR A1133
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.09.2021

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Writ C No. 27118 of 2018

C/M, Purvanchal Prachya Ved Vidyaly, Deoria ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Uma Nath Pandey, Sri Ashok Kumar Tripathi (Now Sri Ashok Tripathi)

Counsel for the Respondents:
C.S.C.

A. Sanskrit Institution - Application for taking institution in Grant in aid list - Deficiencies found in application - petitioner removed deficiencies within time - despite that Institution not included in list - Held- where application is invited fixing a last date for submission and after receiving the application, notices are issued to remove deficiencies, if any, within certain time - In case, deficiencies so pointed out, has been removed by the person/Institution concerned within the time given, application cannot be rejected on the ground that deficiencies are removed after last date of submission of form, otherwise purpose of issuance of notice for removing the deficiencies would be frustrated and it would be a futile exercise only. (Para 16)

B. Administrative Law - Once an application is rejected on one or more grounds by the Competent Authority, if after challenge, rejection order is set aside by the Appellate Authority/Court and matter is remanded back to pass fresh order - Competent Authority would have no right to reject the same again on a different ground/grounds which were available at the time of first rejection order - Competent Authority is required to take all such grounds of rejection in its rejection order available at the time of passing rejection order, otherwise it would be unending process resulting into the harassment of applicant (Para 17)

Allowed. (E-5)

List of Cases cited :

1. C/M Pt. Janardhan Mani Sri Krishnadeo Mani Sri Durga Maa Vs St. of U.P. & ors. Writ- C No. 13179

2. Shishu Vidya Mandir Koiripur, Block Pratappur Kamaicha, District Sultanpur through its Manager Vs St. of U.P. & ors. Writ Petition No. 5704 (M/S) of 2016

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard Sri Uma Nath Pandey and Sri Ashok Tripathi, learned counsel for the petitioner and Dr. D.K. Tiwari, learned Additional Chief Standing Counsel for the State-respondents.

2. Present petition has been filed for quashing the order dated 24.5.2018 passed by the respondent no.1 and further directing the respondent no.1 to take the petitioner Institution in grant-in-aid list in pursuance of the Government Orders dated 7.2.2014 and 11.2.2014.

3. Learned counsel for the petitioner submitted that there is society in the name of Purvanchal Prachya Shiksha Samiti duly registered under the Societies Registration Act, 1860 *(hereinafter referred to as Act, 1860)*. The said society is running an educational institution in the name of Purvanchal Prachya Ved Vidyalay, Bharauli, Lar Road *(hereinafter referred to as Institution*) established in the year 1991-1992 and having affiliation with Sampuranand Sanskrit University, Varanasi. The aforesaid Institution was granted permanent recognition in the year 1994.

4. He next submitted that Government Orders dated 7.2.2014 & 11.2.2014 have been issued inviting application from Sanskrit Institution having recognition upto December, 2000 for taking the Institution in grant-in-aid list. For the said purpose, two committees were constituted to make recommendation one is Regional Level Committee and another is State Level Committee. Accordingly, petitioner has submitted an application on 10.6.2014 for taking his Institution in grant-in-aid list as per aforesaid Government Orders. The Regional Level Committee recommended the name of petitioner's Institution at serial

no. 7 to State Level Committee on 25.11.2014 for being brought the Institution in grant-in-aid list. The State Level Committee consider the application of petitioner and found certain deficiencies for which through D.I.O.S., letter dated 9.2.2015 was issued to petitioner to remove deficiency. Deficiency mentioned against the petitioner's Institution is that endowment fund was not arranged. For removal of that, petitioner was granted three days time and accordingly petitioner has submitted reply on 24.2.2015 removing the deficiency so pointed out. After receiving the reply, State Level Committee made its recommendation. Recommendation was made into two parts, in the first part 84 institutions were recommended and in the second part, 71 institutions were recommended wherein the name of petitioner's Institution has been mentioned at serial no.23, but even after that, no decision was taken on the application of the petitioner. Therefore, petitioner filed Writ-C No. 20817 of 2016 before this Court, which was disposed of vide order dated 6.5.2016 with direction to respondents to take appropriate decision within three months. Even after order of the Court, no decision was taken and petitioner has no option, but to file contempt petition. Upon which, to show compliance of the order passed by the writ Court, order dated 5.8.2016 has been passed by Joint Director of Education, Gorakhpur Region, Gorakhpur on the ground that as per report dated 9.6.2016, State Level Committee has not recommended the petitioner's Institution to bring on grant-in-aid list. Thereafter, petitioner has again challenged the order dated 9.6.2016 by filing Writ-C No. 9603 of 2017 *(C/M Purvanchal Prachaya Ved Vidyalaya Thru' Its Manager Vs. State of U.P. & 4 others)*. After hearing the writ petition, Court has directed for personal appearance of Director of Education (Secondary) alongwith supplementary counter affidavit on the next date fixed. On the date fixed, in the presence of Director of Education (Secondary), supplementary counter affidavit was perused by the Court and Court is of the view that contention raised in the impugned order dated 9.6.2016 is not correct. There is nothing like not recommending the petitioner's Institution by the State Level Committee rather recommended the Institution.

5. This Court has set aside the order dated 5.8.2016 and remanded the matter back for passing fresh order. Petitioner has served the order and thereafter, impugned order has been passed. He next submitted that impugned order has been passed only on the ground that petitioner has not submitted the endowment fund within the time prescribed in Government Order. He also submitted that it is nothing but an attempt to frustrate the order of this Court. After submission of application very first time, very same deficiency was pointed out by the D.I.O.S. for the letter dated 9.2.2015 and same was also removed by the petitioner vide order letter 24.2.2015. After that, recommendation was made by the State Level Committee vide order dated 24.3.2015. Earlier, the very same issue as to whether the State Level Committee recommended the case of petitioner or not, was very well considered by this Court in Writ-C No. 9603 of 2017 and Court is of the view that it was a recommendation, which also includes the removal of deficiency so pointed out in present impugned order. Therefore, at this stage, once the time was granted to petitioner to remove the deficiency, he has removed the same and after considering the same matter was recommended, very same deficiency

cannot be raised again as it will be treated to be removed within the time otherwise it was required on the part of petitioner to reject the application instead of issuing the letter dated 9.2.2015 granting three days time to remove the same. He lastly submitted that under such facts and circumstances, order may be quashed and writ petition be allowed with heavy costs as petitioner is being harassed for no reason time and time again.

6. In support of his contention, learned counsel for the petitioner has placed reliance upon the judgment of this Court in the case of ***C/M Pt. Janardhan Mani Sri Krishnadeo Mani Sri Durga Maa vs. State of U.P. and 4*** others passed in Writ- C No. 13179 in which educational Institution for grant-in-aid was rejected on three grounds and one of the ground was endowment fund with the recognized University was not available. This Court after considering the facts allowed the petition with the observation that once the endowment fund is provided, proposal for taking the Institution in grant-in-aid list cannot be rejected.

7. He also placed reliance upon the judgment of this Court in the matter of ***Shishu Vidya Mandir Koiripur, Block Pratappur Kamaicha, District Sultanpur through its Manager Vs. State of U.P. And others in Writ Petition No. 5704 (M/S) of 2016***. In that case too, issue of grant-in-aid was involved and respondents are taking new grounds on every occasion. Ultimately, Court after taking note of this, allowed the petition.

8. Learned Standing Counsel though vehemently opposed, but could not dispute the facts raised as well as judgment relied by the learned counsel for the petitioner. He only submitted that petitioner has submitted the endowment fund only after issuance of letter dated 9.2.2015 and not alongwith application form before the cut off date i.e. 30.4.2014 provided in Government Order.

9. I have considered the rival submissions advanced by the learned counsel for the parties and perused the record as well as judgment relied by the learned counsel for the petitioner. The contention raised by learned counsel for the petitioner is getting full support from the record and could not be disputed by the learned standing counsel. It is apparent that on the first occasion, application of petitioner was not considered for which he has approached this Court by filing Writ- C No. 20817 of 2016 and in haste manner, an order dated 5.8.2016 has been passed on non existent ground as it was not found correct in second writ petition i.e. Writ- C No.9603 of 2017 filed by the petitioner challenging the order dated 5.8.2019. Relevant portions of said judgment are being quoted below:-

"A perusal of the letter/report dated 9th June, 2016 (Annexure-SCA'1' to the supplementary affidavit), which is at page 10, would reveal that there appears nothing specific in the report which may indicate that the Institution was not liable to be taken on grant-in-aid list although there is a statement that the teaching staff of the Institution up to the extent of Principal and five Assistant Teachers could be brought on grant-in-aid whereas the remaining staff would have to be paid salary from the management's own sources. But there appears no adverse comment which may enable the authority to conclude that there was a negative report against the

Institution in respect of its claim for being brought on grant-in-aid list.

That apart there is no consideration of the State Level Committee report dated 27th July, 2016, which finds mention in the document which has been appended at page 95 of the paper book.

In view of the above, this Court is of the view that the order dated 5th August, 2016 (Annexure-'13' to the petition) has been passed by the State Government in hurry without properly applying its mind to various reports which were there on record.

Accordingly, the order dated 5th August, 2016 is liable to be set aside and is accordingly set aside. The State Government shall shall accord fresh consideration to the request of the petitioner Institution for being brought on grant-in-aid list in accordance with law keeping in mind all the relevant reports including one that has been noticed here-in-above. Fresh exercise shall be completed preferably within a period of two months from the date of furnishing certified copy of this order upon the first respondent.

The petition stands allowed to the extent indicated above."

10. It is also undisputed that at the time of submission of application, petitioner was granted three days time to remove the deficiency of endowment fund, which was very well removed by the petitioner and after that State Level Committee recommended the petitioner's Institution for having in grant-in-aid list.

11. Therefore, at this stage, there is no occasion to reiterate ground of deficiency of endowment fund with intention to reject the petitioner application again, therefore, order is bad and liable to be set aside.

12. I have perused the judgment of this Court in the matter of ***C/M Pt. Janardhan Mani Sri Krishnadeo Mani Sri Durga Maa*** (supra) relied upon by the learned counsel for the petitioner. In that case too, the application of petitioner was rejected on three grounds: (i) the applicant Institution had to be a recognized Institution; (ii) it had to see that the endowment fund with the recognising University was there and (iii) the Committee of Management which was running the Institution had given its consent that the college be included in grant-in-aid. Relevant portions of the said judgment are being quoted hereinbelow:-

"So far as the defect with regard to the endowment fund was concerned, learned counsel for the petitioner submits that the College had submitted the endowment fund of Rs.3000/- and, therefore, the defect had very much been removed. Further the consent of the Committee of Management of the Institution was also very much there on record.

Under such circumstances, the order dated 4.3.2016 passed by the State of Uttar Pradesh is quashed and a writ of mandamus is being issued that petitioner-Institution be brought in grant-inaid list forthwith and the grant be provided to the College within three months from the date of presentation of a certified copy of this order.

The writ petition is, accordingly, allowed."

13. Court after returning the finding that deficiency of endowment fund was removed by the College concerned and allowed the writ petition with direction to

respondent-authority to take petitioner's Institution in grant-in-aid list forthwith.

14. I have also considered and perused the judgment of this Court in the matter of ***Shishu Vidya Mandir, Koiripur*** (supra). This matter was also related to the grant-in-aid and Court after considering the same allowed the petition. Relevant portion of the said judgment is being quoted hereinbelow:-

"I find that on every occasion new grounds have been taken which were only to be discarded and rejection after examination by this Hon'ble Court. Through present counter affidavit the opposite parties have not been able to stand the test of fairness and judicial scrutiny....."

15. In the present case too, situation is same for one reason or other, respondents are rejecting the application of petitioner for grant-in-aid, which is getting full support from this judgment. Therefore, in light of judicial pronouncements made by this Court, order impugned is bad and liable to be set aside.

16. In such matters, where application is invited fixing a last date for submission and after receiving the application, notices were issued to remove deficiencies, if any, within certain time. In case, deficiencies so pointed out, has been removed by the person/Institution concerned within the time given, application cannot be rejected on the ground that deficiencies are removed after last date of submission of form, otherwise purpose of issuance of notice for removing the deficiencies would be frustrated and it would be a futile exercise only.

17. Further, once an application is rejected on one or more grounds by the Competent Authority. After challenge, rejection order is set aside by the Appellate Authority/Court and matter is remanded back to pass fresh order. Competent Authority would have no right to reject the same again on a different ground/grounds which were available at the time of first rejection order. It is required on the part of Competent Authority to take all such grounds of rejection in its rejection order available at the time of passing rejection order, otherwise it would be unending process resulting into the harassment of applicant.

18. Therefore under such facts and circumstances of the case as well as legal position settled by this Court, the writ petition is **allowed** and order dated 24.5.2018 passed by the respondent no.1 is hereby quashed. In usual course, matter may be remanded back for passing fresh order, but considering this fact that it is fourth round of litigation as well as in light of judgment of this Court in the matter of **Shishu Vidya Mandir, Koiripur** *(supra)*, respondent no.1 is directed to bring the petitioner's Institution in grant-in-aid list forthwith and grant be provided within three months from the date of production of computer generated copy of this order after verifying the same from the official website of Allahabad High Court.

19. No order as to costs.

(2021)09ILR A1138
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.08.2021

BEFORE

THE HON'BLE ANIL KUMAR OJHA, J.

Criminal Appeal No. 2678 of 2021

Munnu & Ors. ...Appellants

Versus

State of U.P. ...Opposite Party

Counsel for the Appellants:

Sri Raj Kumar Khanna, Sri Amber Khanna, Sri Sandal Khanna

Counsel for the Opposite Party:
A.G.A., Sri Syed Ahmed Faizan

A. Criminal Law – Caste naming - Insult - SC/ST Act: Sections 3(1)(r), 3(1)(s), 3(2)(va), 3(1)(Da) & 3(1)(Dha) - Indian Penal Code,1860 - Sections 452, 149, 323& 506 - Code of Criminal Procedure, 1973 - Sections 156(3), 200 & 202 - If alleged offence has been committed inside a building then it cannot be said that offence was committed within public view. (Para 10)

Complainant Gajendra in his statement has specifically stated that on 30.5.20219 at 4:00 PM, appellants forcibly entered into his house and beaten him and uttered words naming his caste and also threatened to kill him. Accused Mahesh tried to strangulate him. But no injury report of the complainant is on record. (Para 12, 15)

Alleged offences under Section 3(1)(r) and 3(1)(s) of SC/ST Act have been committed inside the house of complainant. Therefore, it cannot be said that offences were committed within public view. Moreover, one more case relating to SC/ST Act has been admitted to be pending in the Court between the parties. (Para 14)

Appeal allowed. Matter remitted. (E-4)

Precedent followed:

1. Swaran Singh & ors. Vs State Through Standing Counsel & another (2009 All. C.J. 751) (Para 10, 14)

Present appeal is against order dated 09.02.2021, passed by Additional Sessions Judge/Special Judge (SC/ST) Amroha.

(Delivered by Hon'ble Anil Kumar Ojha, J.)

1. Heard learned counsel for the appellants, learned counsel for respondent no.2, learned A.G.A. for the State and perused the records.

2. Appellants have preferred this criminal appeal against the order dated 9.2.2021 passed by Additional Sessions Judge/Special Judge (SC/ST) Amroha in Complaint Case No. 45 of 2019 (Gajendra Vs. Munnu and others) whereby learned Special Judge (SC/ST Act) has summoned the appellants under Section 452 read with Section 149 I.P.C., 323 read with Section 149 I.P.C., 506 read with Section 149 I.P.C. and Sections 3(2)(va), 3(1)(Da), 3(1)(Dha) SC/ST Act, to face the trial.

3. Shorn of unnecessary details, the case of appellants is that respondent no.2 Gajendra filed an application under Section 156(3) Cr.P.C. before Special Judge, Amroha to register a case against appellants at P.S.-Naugawan Sadat, District- Amroha. It was alleged in the application under Section 156(3) Cr.P.C. that accused persons belong to his village and are 'Yadav' by caste. They are pressuring the complainant to entered into compromise in Crime No. 131 of 2019. When complainant refused to do so then Mannu, Gajendra, Ashok, Tejpal, Dinesh, Shekhar, Kaluwa, Priyanshu on 30.5.2019 at about 4:00 P.M. in the evening, armed with sticks, barged into the house of complainant and started insulting him by naming caste 'Chamar/Chamatte' and beaten him by kicks and fists. Accused Mahesh tried to strangulate him.

4. Learned Special Judge, SC/ST Act instead of registering the case, passed the order treating the application as complaint.

5. Statement of complainant Gajendra was recorded under Section 200 Cr.P.C. Statements of witnesses C.W.-1 Sompal

and C.W.2 Mahipal were recorded under Section 202 Cr.P.C.

6. After hearing the complainant, the learned Special Judge, SC/ST Act summoned the appellants to face the trial in the offences stated above.

7. Learned counsel for the appellants submitted that offences have been allegedly said to have been committed within the four walls of the house of complainant. Hence, offences under Section 3(1)(r) & 3(1)(s) of SC/ST Act are not made out. As offences have been committed within the house of complainant so it cannot be said that offences have been committed within public view. He further submitted that the case against appellants is malafide. One more case relating to SC/ST Act is already pending in the court. Appeal be allowed and summoning order dated 9.2.2021 be set aside.

8. Per contra, learned A.G.A. and learned counsel for respondent no.2 Gajendra opposed the above submission and contended that appellants are committing scuffle(marpeet) with complainant and insulting him again and again. Appeal has no merits and should be dismissed.

9. Learned counsel for the appellants drew attention of court towards Section 3(1(r) & 3(1)(s) of SC/ST Act which are as follows:

"3(1)(r): intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view;

3(1)(s): abuses any member of a Scheduled Caste or a Scheduled Tribe by caste name in any place within public view; "

10. In **Swaran Singh & Ors. Vs. State Through Standing Counsel & Anr. (2009 All. C.J. 751),** the Hon. Apex Court has held that if alleged offence has been committed inside a building then it cannot be said that offence was committed within public view.

11. Para 28 and 34 of the aforesaid Hon. Authority of the Apex Court is quoted below:

"28. It has been alleged in the FIR that Vinod Nagar, the first informant, was insulted by appellants 2 and 3 (by calling him a 'Chamer') when he stood near the car which was parked at the gate of the premises. In our opinion, this was certainly a place within public view, since the gate of a house is certainly a place within public view. It could not have been a different matter had the alleged offence been committed inside a building, and also was not in the public view. However, if the offence is committed outside the building e.g. in a lawn outside a house, and the lawn can be seen by someone from the road or lane outside the boundary wall, the lawn would certainly be a place within the public view. Also, even if the remark is made inside a building, but some members of the public are there (not merely relatives or friends) then also it would be an offence since it is in the public view. We must, therefore, not confuse the expression 'place within public view' with the expression 'public place'. A place can be a private place but yet within the public view. On the other hand, a public place would ordinarily mean a place which is owned or leased by the Government or the municipality (or other local body) or gaon sabha or an

instrumentality of the State, and not by private persons or private bodies.

34. However, a perusal of the F.I.R. shows that Swaran Singh did not not use these offensive words in the public view. There is noting in the F.I.R. to show that any member of the public was present when Swaran Singh uttered these words, or that the place where he uttered them was a place which ordinarily could be seen by the public. Hence in our opinion no prima facie is made out against appellant no.1."

12. Complainant Gajendra in his statement recorded under Section 200 Cr.P.C. has specifically stated that on 30.5.20219 at 4:00 PM, appellants forcibly entered into his house and beaten him and uttered words naming his caste and also threatened to kill him. Accused Mahesh tried to strangulate him.

13. Witnesses C.W.-1 Sompal and C.W.-2 Manipal have also deposed the same fact.

14. As in view of the authority of Hon. Apex Court in **Swaran Singh & Ors. Vs. State Through Standing Counsel & Anr. (2009 All. C.J. 751)** alleged offences under Section 3(1)(r) and 3(1)(s) of SC/ST Act have been committed inside the house of complainant. So, I am of the considered opinion that it cannot be said that offences were committed within public view.

15. So far as the allegation of strangulation is concerned, no injury report of the complainant is on record. It has also been admitted that one more case relating to SC/ST Act is pending in the court between the parties.

16. Learned counsel for respondent no.2 and learned A.G.A. for the State could not give satisfactory answer of the aforesaid argument relating to commission of offence within public view.

17. The upshot of the above discussion is that the impugned order dated 9.2.2021 passed by learned Special Judge, SC/ST Act, is not within the four-corners of law, therefore cannot be sustained.

18. Accordingly, appeal succeeds and is **allowed.**

19. Order dated 9.2.2021 passed by learned Special Judge, SC/ST Act is **set aside.**

20. Matter is remitted to the lower court concerned to pass orders afresh, after providing opportunity of hearing to both the parties, in the light of observations made in the body of judgment.

(2021)09ILR A1141
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 16.09.2021

BEFORE

THE HON'BLE CHANDRA DHARI SINGH, J.

Crl. Misc. Anticipatory Bail Application U/S 438 Cr.P.C. No. 6334 of 2021

Kapil Chanchal Gupta @ Lucky Gupta & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Surya Prakash Singh

Counsel for the Opposite Parties:
G.A., Om Prakash Nag, Sonu Shukla

A. Criminal Law – Anticipatory Bail – Code of Criminal Procedure,1973 - Section 438 - Dowry Prohibition Act – Section 3 & 4 - Indian Penal Code,1860 – Sections 498-A, 323, 504, 506, 313 & 377 – Charge sheet has been filed by the investigating officer in which offences levelled against the applicant no.

2 u/ss. 313 and 377 IPC have been dropped as no evidence has been gathered against the applicant in that regard. Applicant has no criminal history. Applicant no. 2 has been cooperating and has not been arrested during the investigation. (Para 12)

Accordingly, anticipatory bail application allowed. (E-4)

Precedent cited:

1. Ankit Bharti Vs State of U.P. & anr. – 2020 (3) ADJ 575 (F.B.) (Para 5)

Precedent followed:

1. Siddharth Vs The St. of U.P. & anr., 2021 SCC Online SC 615 and Aman Preet Singh Vs CBI through Director CBI (Criminal Appeal No. 929 of 2021) (Para 7)

(Delivered by Hon'ble Chandra Dhari Singh, J.)

1. Heard Sri S.P. Singh, learned counsel for the applicant no. 2, Sri Om Prakash Nag, learned counsel for the complainant and Sri Rajesh Kumar Singh, learned Additional Government Advocate for the State.

2. This anticipatory bail application has been moved seeking bail in Case Crime No. 326 of 2020, under section 498-A, 323, 504, 506, 313, 377 IPC and 3/4 D.P. Act, Police Station Choauk, District Lucknow, during the pendency of trial.

3. Learned counsel for the applicant no. 2 submitted that applicant no. 2 is father-in-law of the opposite party no. 2. It is submitted in the F.I.R. that general allegation has been levelled against the accused applicant no. 2. It is submitted that the entire story has been cooked up on the basis of false and fabricated facts. He has been falsely implicated in the said case. It is submitted that he has great apprehension of imminent arrest in the instant case by the police. Offences under Sections 498-A, 323, 504, 506, 313, 377 IPC and 3/4 D.P. Act are non-bailable offences. It is submitted that there is matrimonial dispute going on between the husband and wife i.e. Kapil Chanchal Gupta and Smt. Shalinin gupta and due to which, complainant/opposite party no. 2 has falsely implicated the entire family of the applicant no. 1 including the applicant no. 2. It is submitted that investigation has been completed and charge sheet has been filed by the investigating officer in which offences levelled against the applicant no. 2 under Sections 313 and 377 IPC have already been dropped as no evidence has been gathered against the applicant in that regard. Husband of the opposite party no. 2 has filed the divorce petition before the Family Court, Shahjahanpur in which notice had been issued to the opposite party no. 2 on 4.9.2020. Thereafter, opposite party no. 2 has lodged a false case against the applicant no. 1 and his entire family on 11.9.2020. It is further submitted that opposite party no. 2 has also filed a transfer petition i.e. Transfer Application No. 8 of 2021 in the High Court, Allahabad in which vide order dated 18.1.2021, the Hon'ble High Court has stayed the proceedings in the divorce petition pending before the Family Court, Shahjahanpur.

4. Learned counsel for the applicant submitted that instant case has been initiated against the applicant no. 2 is nothing but a gross misuse of process of law. The opposite party no. 2 has falsely implicated the applicant no. 2 as well as entire family of the applicant in this case for creating pressure to settle the entire matrimonial dispute.

5. It is submitted that applicant has approached this Court directly in

extraordinary circumstances that the present application has been filed before the court below when the learned court below was not functioning properly during Covid-19 pandemic. It is also submitted that applicant no. 2 is the resident of District Shahjahanpur, as such, he was under threat of arrest and in such circumstances he has approached this Court directly. It is vehemently submitted that there is no violation of conditions which has been made by the Full Bench of this Court in the case of ***Ankit Bharti v. State of U.P. & Anr. - 2020 (3) ADJ 575 (F.B.)*** for filing the anticipatory bail directly before this Court.

6. Learned counsel for the applicant submitted that vide order dated 9.8.2021 of this Court, applicant had been granted interim relief and since then he is cooperating in the investigation, therefore, charge sheet has been filed and during investigation, he has not been arrested.

7. Learned Senior Counsel has contended that during the course of investigation, the applicant was not arrested by the CBI and now the charge-sheet has been filed, therefore, the applicant is entitled for anticipatory bail in view of the law laid down by ***Hon'ble Supreme Court in the cases of Siddharth vs The State of Uttar Pradesh and another; 2021 SCC Online SC 615 and Aman Preet Singh vs. CBI through Director CBI (Criminal Appeal No.929 of 2021).***

8. Learned Additional Government Advocate has opposed the prayer for anticipatory bail but has not contradicted the aforesaid facts as stated by learned counsel for the applicant.

9. Learned counsel for the complainant has vehemently opposed the prayer for grant of anticipatory bail and has submitted that applicant no. 2 has committed grievous offence, therefore, anticipatory bail should not be granted.

10. Heard learned counsel for the parties and perused the record.

11. I have perused the F.I.R., contentions made in bail application, counter affidavit filed by the State & complainant as well as rejoinder affidavit filed by the applicant.

12. Considering the facts and circumstances of the case and without entering into the merits of the case and material available on record, It is admitted fact that charge sheet has been filed by the investigating officer in which offences levelled against the applicant no. 2 under Sections 313 and 377 IPC have been dropped as no evidence has been gathered against the applicant in that regard. Applicant has no criminal history. It is not disputed by the learned counsel for the complainant as well as learned A.G.A. that applicant no. 2 is cooperating in the investigation. Applicant no. 2 has not been arrested during the investigation.

13. Accordingly, the present anticipatory bail application is allowed.

14. In the event of arrest, the applicant no. 2- ***Vijay Gupta @ Vijay Kumar Gupta*** involved in the aforesaid case, shall be released on anticipatory bail

on furnishing a personal bond with two sureties each in the like amount to the satisfaction of the court concerned with the following conditions:-

(i) That the accused-applicant no. 2 shall not leave India during pendency of the investigation/trial without prior permission from the concerned Court and shall also surrender his passport, if any, before the concerned Court forthwith;

(ii) That the accused-applicant no. 2 shall not, directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to any police officer; and

(iii) The applicant no. 2 shall file an undertaking to the effect that he shall not seek any adjournment on the dates fixed for evidence and the witnesses are present in court. In case of default of this condition, it shall be open for the trial court to treat it as abuse of liberty of bail and pass orders in accordance with law.

(iv) The applicant no. 2 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.

(v) In case, the applicant no. 2 misuses the liberty of bail 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.

(vi) The applicant no. 2 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 default of this condition is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of his bail and proceed against him in accordance with law.

(2021)09ILR A1144
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.09.2021

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.

Arbitration Application No. 10 of 2019

F.C.I. & Ors. ...Applicants
Versus
M/s P. Roy & Co. & Anr. ...Opposite Parties

Counsel for the Applicants:
Anurag Verma, Apoorva Tewari, Brijesh Kumar

Counsel for the Applicants:
Dhirendra Kumar Srivastav, Rajnish Ojha, Rakesh Dwivedi, Rao Narendra Singh, Sormi Dutta, Vinay Kumar Yadav

A. Arbitration Law – Appointment of arbitrator - Arbitration and Conciliation Act, 1996 - Section 11(6) & 15(2) - Procedure after termination of mandate for appointment of the substitute arbitrator - The parties are free to choose and save the purpose of arbitration clause by their own conduct failing which the judicial forum for appointment of arbitrator once resorted to assumes certainty and the substitute arbitrator is to be appointed by the same forum so as to avoid adjudicatory delays and that is why the special mechanism is recognised by law. The Court may explore an opportunity of mutual consent at the very first opportunity which in the event of failure, as is the case at

hand, leads to the above interpretation. (Para 19)

The extinguishment of the right of parties as per agreement except for invoking the jurisdiction of the Court, recognising statutory waiver on principle, must be the rule for appointment of the substitute arbitrator. In the case at hand, the Court did offer an opportunity of mutual consent to the parties once again but was of no avail. The shortened course restricting the parties not to undergo the agreed independent procedure tending to delay, is the purpose of procedural brevity embodied u/s 15(2) of the Act. (Para 20)

In present case, mutual conduct of the parties by subscribing to the proceedings of arbitration under the judicial order passed by this Court on 12.7.2002 has attained certainty, therefore, the procedure under S. 15(2) would be referable to the same procedure as was involved to serve the purpose of arbitration clause at the initial stage. The option vested in the parties to constitute the arbitration tribunal through ICA stood exhausted and became obsolete after passing of the order by this Court on 12.7.2002, therefore, the record of pending proceedings deserves to be retrieved by this Court and transferred to the Tribunal of the sole arbitrator constituted as per law. (Para 17)

B. The failure of parties to constitute the Tribunal once experienced would extinguish the right embodied in the agreement and confer an exclusive jurisdiction upon the court to appoint substitute arbitrator as and when the situation arises. There may be a situation where the parties at the initial stage invoke the arbitration clause successfully and the same procedure may fail at the time of the appointment of substitute arbitrator. Even in such a situation, the jurisdiction u/s 11 of the Act, nevertheless, remains open. (Para 21)

Application allowed. (E-4)

Precedent followed:

1. Tirath Ram Sumer Kumar Vs Rakesh Kumar Mishra & ors., 2017 (2) ADJ 71 (Para 15)

2. Ramjee Power Construction Ltd. Vs Damodar Valley Corporation, (2009) 2 Arb LR 625 (Para 19)

Precedent cited:

1. Yashwith Constructions (P) Ltd. Vs Simplex Concrete Piles India Ltd., (2006) 6 SCC 204 (Para 16)

2. National Highway Authority of India & anr. Vs Bumihighway DDB Ltd. (JV) & ors., (2006) 10 SCC 763 (Para 16)

3. Antrix Corporation Ltd. Vs Devas Multimedia Pvt. Ltd., (2014) 11 SCC 560 (Para 16)

4. S.B.P. & Co. Vs Patel Engineering Ltd. & anr., (2005) 8 SCC 618 (Para 16)

5. San-A-Tradubg Company Ltd. Vs I.C. Textiles Ltd., (2012) 7 SCC 192 (Para 16)

(Delivered by Hon'ble Attau Rahman Masoodi, J.)

1. Heard Shri B.K. Saxena learned counsel and Sri O.P. Srivastava learned Senior Counsel assisted by Sri Anurag Verma learned counsel for the petitioners and Sri D.K. Srivastava learned counsel who has put in appearance on behalf of the respondent no. 1.

2. Attaching primacy to the domain of parties for constitution of the Arbitral Tribunal, this Court passed an order on 6.8.2021, which reads as under:

"Heard Sri.O.P. Srivastava, learned senior counsel and Sri B.K.Saxena, learned counsel assisted by Sri Anurag Verma learned counsel for the petitioners and Sri Dhirendra Kumar Srivastav, learned counsel for the opposite parties.

There is a hope of some mutual agreement insofar as the appointment of the arbitrator in the present case is concerned.

List this case on 11.08.2021 in terms of the order already passed."

3. The hope ultimately failed. The arbitration clause contained in the agreement giving rise to the dispute reads as under:

"All disputes or differences whatever arising between the parties out of or relating to the construction, meaning and operation or effect of this agreement or the breach thereof shall be settled by arbitration in accordance with the rules of arbitration of the Indian Council of Arbitration and the award in pursuance thereof shall be binding on the parties. The award will be speaking order."

4. At the time when dispute within the scope of agreement arose in the year 2002, the opposite party no. 1 approached this Court under Section 11 of the Arbitration and Conciliation Act, 1996 for appointment of the arbitrator. The application so filed registered as Arbitration Application No. 7 of 2002 was disposed of by order dated 12.7.2002 reproduced as under:

"Hon'ble Mr. M.M. Dutt, a retired Judge of the Supreme Court of India, is appointed sole Arbitrator under Section 11(5) of the Arbitration and Conciliation Act, 1996. The Arbitrator shall be paid Rupees 15,000/- per sitting to be borne by the parties equally."

5. It is pursuant to this order that both the parties subscribed to the arbitral proceedings before the Tribunal of sole Arbitrator until his demise on 15.7.2009.

6. Parties concede to the extent that a claim was raised before the Arbitral Tribunal by the opposite party no. 1 to which a written statement was also filed by the petitioners. It is also admitted to both the parties that as many as 104 sittings of the sole Arbitrator took place, however, the stage to which the proceedings progressed is not clearly stated in the present application or the objections filed by the opposite party. The proceedings before the Arbitral Tribunal of sole Arbitrator also remained unquestioned by either of the parties.

7. The present petition instituted in 2019 under Section 11(6) read with Section 15(2) of the Act has come up for hearing after about eleven years of the termination of mandate. An exhaustive exercise of correspondence prior to the filing of this application seems to have taken place between the parties but of no consequence.

8. The factual position that emerges from the averments made in the application and the counter affidavit filed in response thereto is that prior to filing of the present application, the petitioners seem to have constituted the Arbitral Tribunal of sole Arbitrator by appointing one Rajesh Saha, General Manager(F&A), FCI on 20.12.2017 but the opposite party no. 1 for the reasons best known did not subscribe to the proceedings.

9. The opposite party no. 1 instead chose to proceed in accordance with the agreement by making an application on 1.10.2017 to the Indian Council of Arbitration (ICA) pursuant to which the Arbitral Tribunal of three members was constituted notwithstanding the objection raised by the petitioners as to the procedure. According to the petitioners, the

appointment of substitute arbitrator would not be legitimate unless he is appointed in the same manner in which the Tribunal as a result of the conduct of the parties, was appointed at the initial stage. It is urged that the parties of their own volition rendered the mutually agreed procedure obsolete and the rights once waived would not revive contrary to the mandate of Section 15(2) of the Act.

10. Section 15(2) of the Arbitration and Conciliation Act is extracted below:

"15. Termination of mandate and substitution of arbitrator-.(1) .....

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced."

11. Admittedly the Arbitral Tribunal of sole arbitrator at the initial stage was constituted under Section 11 of the Act. The procedure for appointment of substitute arbitrator on termination of mandate is traceable to Section 15(2) of the Act. The mechanism for appointment of the arbitrator being replaced thus assumes significance for lawful adjudication of the pending proceeding.

12. The Arbitral Tribunal constituted by Indian Council of Arbitration in the meantime passed an order on 18.2.2019 and the same is reproduced below:

"This is an arbitration which has been pending for almost 18 years now. Late Justice M.M.Dutt Former Judge of the supreme Court of India was appointed as an arbitrator by the Hon'ble Allahabad High Court on 12th July 2002 in arbitration application no.7 of 2002. We are told that Justice Dutt commenced the arbitration proceedings after his aforesaid appointments and held 104 sittings till his demise. We are told he passed away long back. In the aforesaid background, as contended by the Ld. Counsel for the Claimant, there being an arbitration clause in the contract between the parties which clothes ICA with the jurisdiction to appoint the arbitrator, in exercise of the said jurisdiction the ICA has constituted the present Arbitral Tribunal. We are also told that in this case after the completion of the pleadings in all respects, framing of issues and filing of evidence affidavits of both the including the recording of depositions in the Tribunal of the witnesses whose evidence affidavits had been filed, arguments at the final stage of hearing were addressed by the Counsel for both the parties but unfortunately due to his failing health and ultimate demise, the proceedings could not be concluded and Award Could not be passed.

In the aforesaid background, this arbitration case has now been referred to this Tribunal.

Today, the Ld. Counsel for the Claimant has filed the copies of the following:

1. Statement of Claim;

2. Counter Claim of the Respondent, which includes the Statement of Defence as well as the Counter claim

3. Rejoinder of the Claimant

4. Evidence affidavit of the witness No. 1 of the Claimant;

5. Evidence affidavit of the witness No. 2 of the Claimant

6. Evidence affidavit of one witness of the Respondent;

7. Minutes of the meetings (Vol.1)

8. Minutes of the meetings (Vol.2)

Copies of the aforesaid 8 volumes have been handed over today to the three members of the arbitral tribunal as well as to Sh. M .L. Sharma, Ld. Counsel for the Respondent. Since Sh. M.L. Sharma contends that he has been engaged only today and is not at all aware about the facts of the case or its background, he would need reasonably sufficient time to check up with is clients and revert on the next date.

Copies of the aforesaid 8 volumes have been handed over today to the three members of the arbitral tribunal as well as to Sh. M.L. Sharma,Ld Counsel for the Respondent. Since Sh. M.L. Sharma contends that he has been engaged only today and is not at all aware about the facts of the case or its background, he would need reasonably sufficient time to check up with his clients and revert on the next date.

We expect the Respondent to sincerely and faithfully report to us on the next date about the following:

1. Whether the copies of the aforesaid 8 volumes filed today by the Claimant are correct;

2. Whether in addition to the aforesaid, the Respondent is in possession of any additional documents which have not been filed by the Claimant today and which are relevant for the disposal of this case. If Respondent indeed finds that there are such documents, it shall be filing the copies thereof on the next date;

3. We expect both the parties to cooperate with us in the expeditious disposal of this almost two decades old arbitration case. We also expect both the parties to inform us on the next date whether they would intend to lead any evidence in addition to what was already recorded and file any additional documents or pleadings.

Mr. Sharma submitted that this arbitration is not maintainable because according to him this Tribunal has not been properly constituted. The Tribunal advised Mr. Sharma that the Respondent is at liberty to move appropriate application under the relevant provisions of the Arbitration and Conciliation Act, 1996 questioning the jurisdiction of this Tribunal. If he intends to do so, he must file such an application within three weeks from today with an advance copy to the ICA. The Claimant may file reply thereto in two weeks thereafter.

*The ne*xt date of hearing is fixed for 18th April, 2019 at 12:00 noon at the same venue."

13. The present application under Section 11(6) read with Section 15(2) of the Act came to be filed after passing of the above order on 18.2.2019 by the three member Tribunal constituted by ICA. This Court at the very initial stage has passed an interim order on 31.5.2019, whereby the proceedings before the Tribunal constitute by ICA were stayed.

14. Sri Brijesh Kumar Saxena, learned counsel for the petitioners has argued that it is a case for appointment of substitute Arbitrator in the surviving proceedings, therefore, the procedure under Section 15(2) read with Section 11(6) of the Act would be the same as was applied for appointment of the Tribunal at the first instance. The procedure for constitution of the Tribunal in accordance with the rules of ICA as embodied in the arbitration clause became obsolete with the passing of judicial order on 12.7.2002 which has remained unchallenged througout. The principle of waiver incorporated statutorily has eclipsed the option of parties to constitute the Tribunal as per agreement which would not revive at this stage when the substitute arbitrator is liable to be appointed in accordance with the procedure provided under Section 15(2) of the Act.

15. Referring to sub-section (2) of Section 15 of the Act it has been argued that the position of law is well settled under various pronouncements including the judgement of a coordinate Bench of this Court in the case of ***Tirath Ram Sumer Kumar versus Rakesh Kumar Mishra and others reported in 2017(2) ADJ 71*** which has elaborately dealt with the relevant case law applicable in this behalf.

16. Per contra, Sri D.K. Srivastava appearing for opposite party no. 1 has argued that the application filed by the petitioner is not maintainable for the reason that the petitioner has an opportunity of filing objections before the Tribunal already constituted as per the terms of the arbitration clause. It is argued that parties are not bound by the principle underlying Section 11 CPC irrespective of the fact that it was a motion on behalf of the opposite party no. 1 itself that enabled the High Court to step in under Section 11 of the Arbitration and Conciliation Act, 1996. Hence, the initial constitution of the tribunal by order dated 12.7.2002 does not bind the parties on their mere participation to follow a procedure other than the one as provided in the arbitration clause extracted above. In support of the arguments putforth, learned counsel for the opposite party no. 1 has cited the case laws noted below.

Sl	Particulars	Citation
1.	Yashwith Constructions (P) Ltd v. Simplex Concrete Piles India Ltd.	(2006) 6 SCC 204
2.	National Highway Authority of India and another v. Bumihighway DDB Ltd. (JV) and others.	(2006) 10 SCC 763
3.	Antrix Corporation Ltd. v. Devas Multimedia Pvt. Ltd.	(2014) 11 SCC 560
4.	S.B.P. & Co. v. Patel Engineering Ltd. & anr.	(2005) 8 SCC 618
5.	San-A-Tradubg Company Ltd. v. I.C. Textiles	(2012) 7 SCC 192

	Limited	

17. Having regard to the rival submissions made by learned counsel for the parties and on a thoughtful consideration of judicial pronouncements cited by them, this Court is of the considered opinion that the mutual conduct of the parties by subscribing to the proceedings of arbitration under the judicial order passed by this Court on 12.7.2002 has attained certainity, therefore, the procedure under Section 15(2) would be referable to the same procedure as was involved to serve the purpose of arbitration clause at the initial stage. Enough time has already gone by to revive the proceedings as per law and the parties would not capitalise any gain by prolonging the proceedings. Any further delay would be against the very spirit of the arbitration clause and this Court is duty bound to honour the mandate of law to serve the purpose. The option vested in the parties to constitute the arbitration tribunal through ICA stood exhausted and became obsolete after passing of the order by this Court on 12.7.2002, therefore, the record of pending proceedings deserves to be retrieved by this Court and transferred to the Tribunal of the sole arbitrator constituted as per law.

18. The Court may, however, note that the parties have not raised any objection against any of the members of the Tribunal constituted by ICA.

19. As to what would be the procedure after termination of mandate for appointment of the substitute arbitrator, this Court is convincingly persuaded by a meaningful interpretation of Section 15(2) of the Act by Calcutta High Court in the case reported in **(2009) 2 Arb LR 625 (Ramjee Power Construction Ltd v. Damodar Valley Corporation)** for the reason that the provisions of law in this regard have not undergone any substantial legislative change. This Court may reiterate that the parties are free to choose and save the purpose of arbitration clause by their own conduct failing which the judicial forum for appointment of arbitrator once resorted to assumes certainty and the substitute arbitrator is to be appointed by the same forum so as to avoid adjucatory delays and that is why the special mechanism is recognised by law. The Court may explore an opportunity of mutual consent at the very first opportunity which in the event of failure, as is the case at hand, leads to no other interpretation except what has been held in the judgement cited above. It is for this reason Section 15(2) of the Act steps in to aid the parties strengthen the essence of arbitration for settlement of disputes. The insurmountable delays must be curtailed by applying a pragmatic approach as is the object of Section 15(2) of the Act to approach the forum straight.

20. In the case at hand, the Court did offer an opportunity of mutual consent to the parties once again but of no avail. These clinical tests are discretionary which invariably prove fruitless. Therefore, the extinguishment of the right of parties as per agreement except for invoking the jurisdiction of the Court, recognising statutory waiver on principle, must be the rule for appointment of the substitute arbitrator. The shortened course restricting the parties not to undergo the agreed independent procedure tending to delay, in my humble view, is the purpose of procedural brevity embodied under Section 15(2) of the Act.

21. There may be a situation where the parties at the initial stage invoke the

arbitration clause successfully and the same procedure may fail at the time of the appointment of substitute arbitrator. Even in such a situation, the jurisdiction under Section 11 of the Act, nevertheless, remains open. The failure of parties to constitute the Tribunal once experienced would extinguish the right embodied in the agreement and confer an exclusive jurisdiction upon the court to appoint substitute arbitrator as and when the situation arises.

22. In view of what has been recorded above, the present application is allowed and the Court proposes Hon'ble Mr. Justice V.K. Gupta (Retired CJ) resident of E-31, Jangpura Extension, New Delhi-110014 to be the sole arbitrator in the present case, subject to his consent in terms of Section 11(6) read with Section 12(1) of the Act on the terms and conditions of fee as per schedule. The Senior Registrar of this Court is directed to retrieve the record of the arbitration proceedings for being sent to the substitute arbitrator expeditiously and preferably within one month. The record already made available, if any, may be retained by the proposed arbitrator and apprised to the Court alongwith the consent letter. The order passed by this Court alone shall bind the parties to subscribe to the further arbitral proceedings in continuity of the arbitration commenced in furtherance of the order dated 12.7.2002 passed earlier.

23. List this case on 6.10.2021 for further orders.

(2021)09ILR A1151
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.07.2021

BEFORE

THE HON'BLE NAHEED ARA MOONIS, J.
THE HON'BLE SAUMITRA DAYAL SINGH, J.

Writ Tax No. 434 of 2021

M/s RM Dairy Products LLP, Sultanganj, Agra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Nishant Mishra, Ms. Yashonidhi Shukla

Counsel for the Respondents:
C.S.C., A.S.G.I., Sri Manu Ghildyal, Sri Ashok Singh

A. Tax Law – Input Tax Credit - UP GST Act, 2017 - Sections 74, 78 & 79 - State GST Rules, 2017 - Rules 142 & 161 - State/Central Goods and Services Tax Rules, 2017: Rule 86A(1) - The Rule does not contemplate any recovery of tax due from an assessee. It only provides, in certain situations and upon certain conditions being fulfilled, specified amount may be held back and be not allowed to be utilized by the assessee towards discharge of its liabilities on the outward tax or towards refund. **It creates a lien without actual recovery being made or attempted. (Para 12)**

B. Words & Phrases – 'input tax available' - The words 'input tax available' used in the first part of sub-rule (1) of Rule 86-A have to be read only in the context of the infringement being alleged by the revenue, i.e. fraudulent availment or availment *dehors* eligibility to the same. They cannot be read as actual input tax available on the date of the order passed under that Rule. (Para 13, 14)

'available', 'has been' - The word 'available' used in the first part of sub-Rules of Rule 86-A would always relate back in time when the assessee allegedly availed input tax credit either fraudulently or which he was not eligible to avail. It does not refer to and, therefore, it does not relate to the input tax credit available on the

date of Rule 86-A being invoked. The phrase "has been" used in Rule 86-A(1) leaves no manner of doubt in that regard. (Para 15)

'ineligible' - The word 'ineligible' has been clarified by means of Rule 86-A(1)(a)(i) to include a transaction performed with a registered dealer who may be found to be non-existent or to have not conducted any business etc. (Para 16)

Plain reading of the impugned order reveals that it is the revenue's allegation that M/s. Darsh Dairy & Food Products, Agra products was found to be non-existent at the disclosed place of business. (Para 16)

C. 'Reason to believe' - For a valid exercise of power, the authorized officer must have 'reasons to believe' that any credit of 'input tax available' (i.e. that was available in the electronic credit ledger of an assessee) had either been fraudulently availed or the assessee was not eligible to avail the same. (Para 13)

The correctness or otherwise or the sufficiency of the 'reason to believe' is not subject-matter of dispute in the instant proceedings. It is the relevancy of that reason to believe. Thus, at present, the 'reason to believe' is based on material with the competent authority indicating non-existence of the selling dealer. It is thus alleged the petitioner was not eligible to avail input tax credit as the seller M/s. Darsh Dairy & Food Products, Agra was a non-existent dealer. (Para 17, 18)

D. 'Not allow debit' - To 'not allow debit' and to appropriate the same are two different things in the context of the Statute. They lead to different consequences. While the first only creates a lien in favour of the revenue by blocking utilization of that amount, appropriation of an amount would necessarily involve transfer of title over the money with the revenue. Plainly, the Rule does not contemplate or speak of such a consequence. (Para 19, 22)

Adjustment or appropriation may arise only upon an adjudication order attaining finality or after lapse of three months from the date of it being passed if there is no stay granted in appeal etc. that too as a consequence of the recovery provisions but not under Rule 86-A of the Rules. (Para 23)

E. The provision of Rule 86-A is not a recovery provision but only a provision to secure the interest of revenue, to be exercised upon the fulfillment of the conditions. (Para 24)

Words 'such credit' do not refer only to any existing amount of positive credit in the electronic credit ledger or that it must be credit arising from the same seller. (Para 20)

If there is no positive credit standing in the electronic credit ledger on the date of the order passed u/Rule 86-A, that order would be read to create a lien upto limit specified in the order passed as per Rule 86-A of the Rules. As and when the credit entries arise, the lien would attach to those credit entries upto the limit set by the order passed u/Rule 86-A of the Rules. The debit entry recorded in the electronic credit ledger would be read accordingly. However, the same shall not be adjusted in favour of the revenue except in accordance with law. Any further credit that may arise over and above that amount would be allowed to be utilized without objection by the revenue. (Para 21, 25, 26)

Writ petition dismissed. (E-4)

Present petition assails order dated 25.06.2021.

(Delivered by Hon'ble Naheed Ara Moonis, J.
&
Hon'ble Saumitra Dayal Singh, J.)

1. Heard Mr. Nishant Mishra along with Ms. Yashonidhi Shukla, learned counsel for the petitioner, Mr. Manu Ghildyal, learned counsel representing respondent nos. 1 to 3 and Mr. Ashok Singh, learned counsel for respondent no.4.

2. The present writ petition has been filed against the order dated 25.06.2021 passed by respondent no.3 under Rule

86A(1)(a)(i) of the State/Central Goods and Services Tax Rules, 2017 (hereinafter referred as the *"Rules").*

3. Four fold submissions have been advanced by learned counsel for the petitioner. First, relying on Rule 86A (1) of the Rules, it has been submitted that the respondents had no jurisdiction or authority to block any input tax credit over and above any amount that may have been actually available on the date of the order (in this case 25.6.2021).

4. Second, it has been submitted that Rule 86A of the Rules obliges the respondents to record a positive 'reason to believe' that credit of input tax had been fraudulently availed by the petitioner or the petitioner was wholly ineligible to avail the same. Inasmuch as the petitioner had not committed any fraud and it was otherwise eligible to avail the input tax credit, the action taken by the respondents is wholly without jurisdiction.

5. Third, it has been submitted that the input tax credit in dispute arose on account of the purchases made by the petitioner from M/s Darsh Dairy & Food Products, Agra with respect to which, adjudication proceedings are underway against the petitioner in accordance with Section 74 of the UP GST Act, 2017 (hereinafter referred to as the Act). Till those proceedings are concluded, no amount would become recoverable from the petitioner and, therefore, the impugned order passed by respondent no.3 under Rule 86A is wholly premature. In that context, it has also been submitted that Section 78 of the Act provides the manner and mode of recovery. An amount may be recovered only after lapse of three months time from the date of service of the adjudication order. Since the adjudication proceedings are still pending, it has been submitted, the impugned order is wholly premature and without basis.

6. Last, it has been submitted the Act clearly provides for the manner in which an amount may be determined to be due and recoverable from the petitioner. No other procedure may be adopted, as it would violate the settled principle of law, if the legislature requires an act to be done in a particular manner, it must be done in that manner or not at all.

7. The writ petition has been vehemently opposed by learned counsel for the revenue.

8. Having heard the learned counsel for the parties and having perused the record, plainly, there can be no dispute that the Act prescribes the manner for determination of any tax not paid or short paid. Section 74 of the Act provides for determination of input tax credit wrongly availed or utilized by reason of fraudetc through the process of adjudication. Section 78 of the Act further mandates that any amount that may be determined under Section 74 of the Act may not be recovered for a period of three months from the date of service of the adjudication order.

9. Here, it may be seen that the recovery provision are contained in Section 79 and the enabling Rules. The recovery Rules fall under Chapter XVIII of the State GST Rules 2017 being Rules 142 to 161. On the other hand, Rule 86-A falls under the Chapter heading IX of the Rules regarding payment of tax.

10. Besides the Chapter heading being different, we may record that it is not that

difference that prevails in our mind. It is the ambit and purpose of the Rule 86A that appears to be inherently different and independent of the recovery provisions. For that reason we are not inclined to accept the contentions advanced by the learned counsel for the petitioner.

11. Rule 86-A of the Rules reads as below:

*"**86A.** (1) The Commissioner or an officer authorised by him in this behalf, not below the rank of an Assistant Commissioner, having reasons to believe that credit of input tax available in the electronic credit ledger has been fraudulently availed or is ineligible in as much as-*

a) the credit of input tax has been availed on the strength of tax invoices or debit notes or any other document prescribed under rule 36-

(i) issued by a registered person who has been found non-existent or not to be conducting any business from any place for which registration has been obtained; or

(ii) without receipt of goods or services or both; or

b) the credit of input tax has been availed on the strength of tax invoices or debit notes or any other document prescribed under rule 36 in respect of any supply, the tax charged in respect of which has not been paid to the Government; or

c) the registered person availing the credit of input tax has been found non-existent or not to be conducting any business from any place for which registration has been obtained; or

d) the registered person availing any credit of input tax is not in possession of a tax invoice or debit note or any other document prescribed under rule 36,

may, for reasons to be recorded in writing, not allow debit of an amount equivalent to such credit in electronic credit ledger for discharge of any liability under section 49 or for claim of any refund of any unutilised amount.

(2) The Commissioner, or the officer authorised by him under sub-rule (1) may, upon being satisfied that conditions for disallowing debit of electronic credit ledger as above, no longer exist, allow such debit.

(3) Such restriction shall cease to have effect after the expiry of a period of one year from the date of imposing such restriction."

12. Plainly, the Rule does not contemplate any recovery of tax due from an assessee. It only provides, in certain situations and upon certain conditions being fulfilled, specified amount may be held back and be not allowed to be utilized by the assessee towards discharge of its liabilities on the outward tax or towards refund. It creates a lien without actual recovery being made or attempted.

13. The words 'input tax available' used in the first part of sub-rule (1) of Rule 86-A cannot be read as actual input tax available on the date of the order passed under that Rule.Those words are relevant for the purpose of laying down the first condition for the exercise of power by the Commissioner or the authorized officer. Thus, for a valid exercise of power, the authorized officer must have 'reasons to believe' that any credit of 'input tax available' (i.e. that was available in the electronic credit ledger of an assessee) had either been fraudulently availed or the assessee was not eligible to avail the same.

14. The words 'input tax available' have to be read only in the context of the

infringement being alleged by the revenue. i.e. fraudulent availment or availment dehors eligibility to the same. Consequently, if an assessee is found to have either fraudulently availed or to have availed such 'input tax credit' that he was ineligible to avail, he may expose himself to action under the Rule, in future, when such an event may come to the knowledge of the authorized officer, subject of course to the rule of limitation.

15. Thus the word 'available' used in the first part of sub-Rules of Rule 86-A would always relate back in time when the assessee allegedly availed input tax credit either fraudulently or which he was not eligible to avail. It does not refer to and, therefore, it does not relate to the input tax credit available on the date of Rule 86-A being invoked. The word "has been" used in Rule 86-A (1) leave no manner of doubt in that regard.

16. *Prima facie*, in the facts of the present case, the revenue alleges fraudulent utilization of input tax credit.Even otherwise, what may fall within the ambit of the word 'ineligible' has been clarified by means of Rule 86-A (1)(a)(i) to include a transaction performed with a registered dealer who may be found to be non-existent or to have not conducted any business etc. Plain reading of the impugned order reveals that it is the revenue's allegation that M/s Darsh Dairy & Food Products, Agra products was found to be non-existent at the disclosed place of business.

17. The recital of that 'reason to believe', is contained in the impugned order. The correctness or otherwise or the sufficiency of the 'reason to believe' is not subject matter of dispute in the instant proceedings. It is the relevancy of that reason to believe with which we are in agreement with Mr. Ghildiyal. Thus, at present, the 'reason to believe' is based on material with the competent authority indicating non-existence of the selling dealer. It is thus alleged the petitioner was not eligible to avail input tax credit as the seller M/s Darsh Dairy & Food Products, Agra was a non-existent dealer.

18. In such facts, purely on a *prima facie* basis and leaving it open to the adjudicating authority to draw its own final conclusion in that regard, for the purpose of the present writ petition, it cannot be denied that, at present, their exist 'reason to believe' with the revenue authorities that the assessee had fraudulently availed or was ineligible to avail 'input tax credit' with respect to which the impugned order has been passed.

19. As to the third submission advanced by learned counsel for the petitioner, the provision of Rule 86-A is not a recovery provision. In fact, it does not allow the revenue to reverse or appropriate any part of the credit existing in the electronic credit ledger of an assessee or to adjust that credit againstany outstanding demand or likely demand. It is at most a provision to secure the interest of revenue, to be exercised in the presence of the relevant 'reasons to believe', as recorded.

20. The Rule only enables the authorized officer to not allow debit of an amount equivalent to 'such credit'. The submission of Shri Mishra that the words 'such credit' refers only to any existing amount of positive credit in the electronic credit ledger or that it must be credit arising from the same seller, cannot be accepted as that intent is clearly non-existing in the Rule.

21. The operative portion of sub-rule (1) of Rule 86-A limits the exercise of power (by the authorized officer), to the amount that would be sufficient to cover the input tax that, according to the revenue, had either been fraudulently availed or to which the assessee was not eligible. It is an amount equal to that amount which has to be kept unutilised.

22. To that effect, the legislature has chosen the words 'not allow debit'. To not allow debit and to appropriate the same are two different things in the context of the Statute. They lead to different consequences. While the first only creates a lien in favour of the revenue by blocking utilization of that amount, appropriation of an amount would necessarily involve transfer of title over the money with the revenue. Plainly, the Rule does not contemplate or speak of such a consequence.

23. Thus, if the petitioner was to earn any further input tax credit in its electronic credit ledger upto the tune of Rs.7,06,66,700.00/-, the same would be retained by way of a lien in favour of the revenue, so however, that the revenue may not appropriate it under that Rule. Adjustment or appropriation may arise only upon an adjudication order attaining finality or after lapse of three months from the date of it being passed if there is no stay granted in appeal etc. that too as a consequence of the recovery provisions but not under Rule 86-A of the Rules.

24. Since, according to us, the provision of Rule 86-A is not a recovery provision but only a provision to secure the interest of revenue and not a recovery provision, to be exercised upon the fulfillment of the conditions, as we have discussed above, we are not inclined to accept the further submission advanced by the learned counsel for the petitioner that there is any violation of the principle when a legislative enactment requires an act to be performed in a particular way it may be done in that manner or not at all.

25. It also stands to reason, if there is no positive credit standing in the electronic credit ledger on the date of the order, passed under Rule 86-A, that order would be read to create a lien upto limit specified in the order passed as per Rule 86-A of the Rules. As and when the credit entries arise, the lien would attach to those credit entries upto the limit set by the order passed under Rule 86-A of the Rules. The debit entry recorded in the electronic credit ledger would be read accordingly.

26. Therefore should the assessee earn further credit of 'input tax' the revenue would be entitled to a lien upto the limit of Rs.7,06,66,700.00/-. However, the same shall not be adjusted in favour of the revenue except in accordance with law, as discussed above. Any further credit that may arise over and above that amount would be allowed to be utilized without objection by the revenue.

27. Writ petition is **dismissed**. No order as to costs.

(2021)09ILR A1156
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.08.2021

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

WRIT A No. 5668 of 2021

Ankit Kumar ...Petitioner

Versus

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

Counsel for the Petitioner:
Sri Ram Sanehi Yadav

Counsel for the Respondents:
C.S.C.

A. Service Law – Recruitment - Uttar Pradesh Police Constable and Head Constable Service Rules, 2015 - Rule 15(g) - Scope of Interference - Unless and until the candidate demonstrates by placing genuine and authentic material that the opinion of the Medical Board or Review Medical Board is erroneous or capricious or vague and smacks of mala fide, the Court should refrain from interfering with the opinion of Medical Board and Review Medical Board which is a body constituted of experts to assess the fitness of candidate as per the norms and standards prescribed in respect of fitness of a candidate who is supposed to work in the police force. **Opinion of the Medical Board is to be given due weight, credence, and value.** (Para 26, 27, 33)

This Court has power u/Article 226 of the Constitution of India to interfere with the opinion of the Medical Board or Review Medical Board, but such power has to be exercised cautiously and sparingly in exceptional circumstances only in a given case where it is demonstrated that the opinion of the Medical Board or Review is palpably erroneous. (Para 34)

In the present case, it is not in dispute that the petitioner has been found medically unfit by the Medical Board constituted by the Appointing Authority. The petitioner, thereafter, submitted representation against his rejection by the Medical Board, and the petitioner was sent for the re-medical examination before the Review Medical Board. The Review Medical Board also concurred with the opinion of the Medical Board. (Para 28)

There is no pleading in the writ petition as to how the reports of two doctors procured by the petitioner are authentic and correct to create a doubt about the opinion of the Medical Board and Review Medical Board declaring the petitioner medically unfit. (Para 29, 35)

If the report of the private doctor or from any Government Hospital is relied upon to doubt the veracity of the opinion of the Medical Board, then that would derail the selection process, and if such process is allowed to be continued, it would be very difficult for the recruiting body to bring the selection process to the logical end. (Para 31, 32)

Writ petition dismissed. (E-4)

Precedent followed:

1. Vivek Kumar Vs St. of U.P. & ors., 2020 ADJ Online 0073 (Para 14, 25)

2. U.O.I. & ors. Vs Parul Punia, 2016 (2) ADJ 14 (Para 14, 24)

3. Md. Arshad Khan Vs The St. of U.P. Through Additional Chief Secretary, Principal Secretary, Home & ors., 2020 (9) ADJ 457 (Para 14, 26)

4. Diwakar Paswan Vs St. of U.P. & ors., (2021) ILR 2All 192 (Para 14, 27)

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

1. Heard learned counsel for the petitioner and Sri R.S. Umrao, learned Standing Counsel for the respondents.

2. The petitioner by means of the present writ petition has prayed for a writ of mandamus commanding respondents to conduct his re-medical examination for the post of Constable in Uttar Pradesh Police/Constable, Civil Police, and Constable P.A.C. Direct Recruitment-2018.

3. The brief facts of the case are that a notification dated 16.11.2018 was published by the U.P. Recruitment and Promotion Board, Lucknow inviting

applications for recruitment of 49,568 posts for U.P. Police/Constable, Civil Police and Constable, P.A.C. Direct Recruitment-2018.

4. Pursuant to the aforesaid advertisement, the petitioner submitted an online application for being considered for appointment on the post of Constable in U.P. Police. The petitioner was called to appear in the physical efficiency test for the post of Constable in U.P. Police at 8th Batallion P.A.C., Bareilly in which he was found fit.

5. Thereafter, the documents of the petitioner relating to his qualification were checked and verified by the Recruitment Board. Subsequently, the petitioner was called for medical examination on 12.03.2021 at Police Lines by Senior Superintendent of Police, Etah. The petitioner appeared before the Medical Board on 12.03.2021 and was found unfit due to impaired ears.

6. Against the report of the Medical Board, the petitioner submitted a representation for a re-medical examination. The petitioner presented himself for a re-medical examination in which he was again found unfit due to dysfunctional ears. After the result of the re-medical examination, the petitioner got his ears checked by one Dr. Ashwani Kumar ENT Specialist, and according to his report dated 21.03.2021, the ears of the petitioner are fine, copy of the said report is annexed as Annexure 9 to the writ petition.

7. The petitioner also filed a prescription issued by Government District Hospital, Etah to demonstrate that his ears are fine. The prescription issued by Government District Hospital, Etah states that there is no dysfunction in the petitioner's ear.

8. Relying upon the aforesaid two medical reports issued by Dr. Ashwani Kumar and Government District Hospital, Etah, the petitioner has stated that the Medical Board did not examine him properly and he was wrongly declared unfit.

9. In the aforesaid backdrop, he has prayed for a writ of mandamus commanding respondents to conduct the re-medical examination.

10. Learned counsel for the petitioner has contended that two medical reports issued by Dr. Ashwani Kumar ENT Specialist and medical report of Government District Hospital, Etah suggest that there is no dysfunction in the ears of the petitioner. Accordingly, he submits that the petitioner has been illegally declared medically unfit. The petitioner in support of his case has relied upon an interim order dated 23.07.2021 in Writ-A No.6681 of 2021. Accordingly, he prays for parity of the interim order dated 23.07.2021 in Writ-A No.6681 of 2021. Thus, he submits that action of the respondents in declaring the petitioner medically unfit is arbitrary and amounts to deny an opportunity of employment to the petitioner illegally.

11. Learned counsel for the petitioner has also placed reliance upon the judgment of this Court in Special Appeal Defective No.639 of 2020 to contend that in the said appeal, identical interim order which has been passed in Writ-A No.1680 of 2020 was assailed, and this Court dismissed the Special Appeal. Thus, he submits that it is a

fit case where the Court should command respondents to conduct the re-medical examination of the petitioner.

12. Per contra, learned Standing Counsel would contend that the Medical Board is a body consisting of experts, and keeping in view the need and requirement of the police force about the physical fitness of a candidate, certain parameters have been laid down within which doctors of the Medical Board conduct the medical examination of a candidate and determine as to whether the candidate is medically fit or not. He submits that unless it is pointed out that Medical Board has conducted the medical examination of the petitioner malafidely or capriciously with an intent that the candidate does not get selected, the Court should refrain from supplanting its opinion over the report of the Medical Board.

13. He contends that in the present case, the petitioner has been found medically unfit by the Medical Board and also on re-medical examination by the Review Medical Board, and there is nothing on record to demonstrate that medical examination, as well as review medical examination of the petitioner conducted by the Medical Board, smacks of malafide with a motive to keep the petitioner out of selection. Accordingly, he submits that the writ petition lacks merit and deserves to be dismissed.

14. He submits that the report of Dr. Ashwani Kumar, ENT Specialist and Government District Hospital, Etah cannot be relied upon in the absence of proof of its authenticity, and further perusal of the two medical reports do not disclose the procedure which had been adopted by the two doctors in examining the petitioner and concluding that the petitioner's ears are fine. In support of his aforesaid contentions, he has placed reliance upon the following judgments of this Court:-

(i). ***Vivek Kumar Vs. State of U.P. and Others 2020 ADJ Online 0073;***

(ii). ***Union of India and Others Vs. Parul Punia 2016 (2) ADJ 14;***

(iii). ***Md. Arshad Khan Vs. The State of U.P. Through Additional Chief Secretary, Principal Secretary, Home and Others 2020 (9) ADJ 457;***

iv. ***Diwakar Paswan Vs. State of U.P. and Others 2021 (0) Supreme (All) 47.***

15. I have considered the rival submissions of the parties and perused the record.

16. Before dealing with the contention advanced by the learned counsel for the petitioner, it would be apt to refer to Rule 15 (g) of Uttar Pradesh Police Constable and Head Constable Services Rules, 2015 (hereinafter referred to as 'Rules, 2015') and Appendix 3 which are being extracted herein-below:-

"15. ***Procedure for Direct Recruitment to the post of Constable.-***

(a).....

(b)...

(c)...

(d)...

(e)...

(f)...

(g) Medical Examination.-The candidates whose name are in the select list sent as per clause (e), will be required to appear for Medical Examination by the Appointing authority. Medical Examination will be conducted in the Police Line of the concerned District or at the place mentioned by the Appointing authority. Medical Examination will be conducted as per Appendix 3. The candidates found unsuccessful in Medical Examination shall be declared unfit by the Appointing authority and such vacancies shall be carried forward for next selection."

"APPENDIX 3

[See Rule 15g]

Medical Examination for direct recruitment

The Appointing authority will request the Chief Medical Officer of the concerned District to constitute Medical Board for conducting Medical Examination. The Medical Board will consist of three Doctors, who will conduct Medical Examination as per "Police Recruitment Medical Examination Forms" as prescribed and codified by Head of Department in consultation with Director General of Medical Health. This form will be available on U.P. Police website and also displayed at the place of Medical Examination. Medical Board may take services of any expert as per requirements.

(1) The doctors will examine the candidates in accordance with the Medical Manual, if any, and announce the result on the day of the Medical Examination.

(2) The result of the Medical Examination will be displayed on the notice board outside the premises at the end of the day.

(3) Any candidate not satisfied by his Medical Examination, may file an appeal on the day of examination itself. Any appeal in regard to Medical Examination will not be considered if the candidate fails to file appeal on the date of Medical Examination and declaration of its result itself. The appeal should be disposed of by the Medical Board, constituted for the same purpose within two weeks of the appeal being filed. The Medical Board constituted for appeal shall have expert regarding Medical deficiency of the applicant.

(4) The members of the Medical Board who are found to give wrong report wilfully will be liable for criminal proceedings.

(5) The Medical Examination is only qualifying in nature and it has no effect on the merit list.

Note.- The Medical Board will examine the candidates and their deficiencies such as knock knee, bow legs, flat feet, varicose veins, distant and near vision, colour blindness, hearing test comprising of Rinne's Test, Webber's Test and tests for vertigo etc. as notified by the government from time to time. The Medical Board may get conducted other examinations after obtaining opinion of experts.".

17. According to Rule 15(g) of the Rules, 2015, a candidate is required to undergo medical examination for ascertaining whether the candidate is medically fit for the post of Constable. The said rule provides that medical examination will be conducted as per Appendix 3.

18. A reading of Appendix 3, extracted above, discloses that the appointing authority will request the Chief Medical Officer of the concerned District to constitute Medical Board for conducting the medical examination. The Medical Board will consist of three doctors, who will conduct medical examination as per "Police Recruitment Medical Examination Forms" as prescribed and codified by the Head of Department in consultation with Director General of Medical Health.

19. Paragraph 1 of Appendix 3 further stipulates that doctors will examine the candidates in accordance with the Medical Manual, if any, and announce the result on the same day.

20. Paragraph 4 of Appendix 3 provides that members of the Medical Board who are found to give wrong report willfully will be liable for criminal proceedings.

21. A reading of Rule 15(g) of Rules, 2015 read with Appendix 3 discloses that the procedure for medical examination has been provided in Appendix 3 and according to which, Medical Board shall consist of three doctors constituted by the Chief Medical Officer of the concerned district. The medical examination of a candidate is to be conducted as per the medical manual, and if any member of the Medical Board is found to have given wrong report willfully, he/she will be liable for criminal proceedings.

22. Thus, it can be safely culled out that legislature has taken every care in constituting the Medical Board to conduct medical examination of a candidate fairly and without any bias. It is apt to notice that paragraph 4 of Appendix 3 provides that if members of the Medical Board give wrong report wilfully, they will be liable for criminal prosecution.

23. At this point, it would be apposite to consider when this court can interfere with the opinion of the Medical Board and Review Medical Board in the exercise of power under Article 226 of the Constitution of India.

24. In the case of ***Parul Punia (supra),*** this Court has set aside the judgment of Single Judge whereby learned Single Judge has allowed the writ petition of a candidate holding that respondent was wrongly disqualified in the medical examination by the appellant. In this respect, paragraphs 6, 9 & 10 of the said judgment are being extracted herein below:-

"6. The first reason which weighed with the learned Single Judge was that the representation had been rejected in a 'casual manner without assigning convincing reasons' in support of the order. This reading of the learned Single Judge of the order disposing of the representation is not correct. The Chief Security Commissioner in his order dated 8 June 2015 recorded that once the respondent had been found not to meet the prescribed norms in the course of the medical examination and was categorized in category B-1, her name could not be included in the select list. This cannot in our view be regarded as an order which has been passed in a casual manner and

without convincing reasons. The second reason which weighed with the learned Single Judge was that the respondent had produced a report of a Doctor from the All India Institute of Medical Sciences, Dr Rajendra Prasad. Without casting aspersions on the expertise of the Doctor whose report was produced by the respondent, we must emphasize the inherent danger in the Court following such a line of inquiry. In a number of such cases, candidates who have been invalidated on medical grounds produce expert opinions of their own to cast doubt on the credibility of the official medical report constituted by the recruiting body. In such cases, the Court may not have any means of verifying the actual identity of the person who was examined in the course of the medical examination by the Doctor whose report is relied upon by the candidate. Hence, even though the authority whose medical report was produced by the candidate may be an expert, the basic issue as to whether the identity of the candidate who was examined, matches the identity of the person who has applied for the post is a serious issue which cannot be ignored. The third reason which weighed with the learned Single Judge in passing the interim order was that in a judgment of a Division Bench dated 21 November 2007 (Arvind Kumar Sonkar vs. State of U.P. and Ors.)3, such a course of action had been followed of having the candidate examined by a substitute Board. What the learned Single Judge while passing the interim order failed to notice was the fact that the order dated 21 November 2007 of the Division Bench was passed by consent. In that case, a learned Single Judge had directed the authorities to get the petitioners examined by a special medical Board. The petitioners had challenged an order of termination which had been passed on the ground that they had failed to fulfill the minimum eligibility requirement for the post of constables. When the appeal filed by the constables came up for hearing before the Division Bench, the order of the learned Single Judge was modified by consent so as to provide for separate Boards, one for the purpose of an eye test and the other for a physical test. The Boards were to consist of a Doctor each from a Government Hospital, Sanjay Gandhi Post Graduate Institute and KGMC. This order which was passed by consent would therefore not be of precedential value. Hence, the considerations which weighed with the learned Single Judge in issuing an interim direction of 16 September 2015 would not sustain such an order being passed.

9. We also note that by the interim order of the learned Single Judge dated 16 September 2015, the Principal, KGMC was required to inform the Inspector General-cum-Chief Security Commissioner of the Railway Protection Force who could depute an officer to be present at the time of examination. The grievance of the appellants is that no such communication was issued by the Principal, KGMC to the Chief Security Commissioner and hence, no representative could be even deputed for the purpose of verifying the identity of the respondent. We are highlighting this aspect to emphasize the danger when the Court takes upon itself the process of reassessing findings which are contained in the medical examination conducted in the course of the recruitment process. Undoubtedly, in a suitable case, the powers of the Court under Article 226 are wide enough to comprehend the issuance of appropriate directions but such powers have to be wielded with caution and circumspection. Matters relating to the

medical evaluation of candidates in the recruitment process involve expert determination. The Court should be cautious in supplanting the process adopted by the recruiting agency and substituting it by a Court mandated medical evaluation. In the present case the proper course would have been to permit an evaluation of the medical fitness of the respondent by a review medical board provided by the appellants. Otherwise, the recruitment process can be derailed if such requests of candidates who are not found to be medically fit for reassessment on the basis of procedures other than those which are envisaged by the recruiting authority are allowed. This would ordinarily be impermissible.

10. For these reasons, we are of the view that the line of approach which was followed at the interlocutory stage by the learned Single Judge while passing the interim order dated 15 September 2015 and which ultimately merged in and formed the basis of the final direction dated 26 November 2015 is unsustainable.

25. This Court in the case of ***Vivek Kumar (supra)*** held that subsequent medical examination reports submitted by a candidate will not override or set at naught the opinion of the medical board. Paragraphs 7, 8, 11 & 12 of the said judgment are being extracted herein below:-

"7. The scope of interference in matters relating to assessment of fitness by a Medical Board constituted under the statutory rules in exercise of powers under writ jurisdiction, in our opinion, would be extremely limited.

8. The Courts have, time and again, emphasised the need for caution when candidates seek to assail the correctness of the findings of a Medical Board constituted under a recruitment process adopted by the State authorities, on the basis of some medical report obtained by them.

11. In a case where a recruitment process has been carried out as per prescribed statutory rules whereunder a procedure has been prescribed for testing the medical fitness of candidates by a duly constituted Medical Board, the report of the Medical Board is not to be normally interfered with, and that too, solely on the basis of a claim sought to be set up by a candidate on the basis of some subsequent report(s) procured by him from a private practitioner(s).

12. It is not the case of the petitioner that the decision of the Medical Board was arbitrary, capricious or not in accordance with the procedure under the relevant statutory recruitment rules."

26. In the case of ***Md. Arshad Khan (supra),*** this Court placing reliance upon the judgment of this Court in the case of Vivek Kumar (supra) dismissed the appeal holding that in the absence of any material on record to suggest that the opinion of the Medical Board or Appellate Medical Board in any manner is casual, inchoate, perfunctory or vague, the report of Medical Board and Appellate Medical Board are not to be interfered with. It is further held that the opinion of the Medical Board is to be given due weight, credence, and value.

27. In the case of ***Diwakar Paswan (supra)*** this Court held that the opinion of the Medical Board and experts should not be lightly interfered with unless it is shown to be contrary to the standards prescribed or

smacks of malafide. Paragraphs 8 & 9 of the said judgment are being extracted herein below:-

"8. It becomes pertinent to note that the opinions formed by the Medical and Review Boards have not been assailed by the petitioner on the ground of mala fides. A review of those decisions is sought solely on the basis of a contrary opinion rendered by a doctor of a government hospital. Permitting a reopening of a medical examination conducted by the respondents solely on that basis would set a dangerous precedent especially when the Court by virtue of its inherent limitations would be wholly unequipped to undertake a comparative analysis or evaluation of competing medical opinions. Medical fitness is a subject best left for determination by experts and should not be lightly interfered with unless it be shown to be contrary to the standards prescribed or otherwise be liable to be assailed on other judicially manageable parameters.

9. Quite apart from the consistent view taken by Courts on this question regard must also be had to the fact that the medical examination in the present case was undertaken in accordance with the provisions made in the statutory rules. Those Rules confer finality upon the opinions formed by the Medical Boards subject to an appeal against the same before a Review Medical Board. Those Rules do not envisage or contemplate a challenge to those reports based upon reports and opinions privately obtained by candidates. Permitting such a course of action would not only be contrary to the Rules which apply and bind the candidate but also result in derailing the recruitment process itself."

28. Now the case of the petitioner is analyzed in the light of Rule 15(g) of Rules, 2015 read with Appendix 3 and on the anvil of principles of law propounded by this Court in the aforesaid cases. In the present case, it is not in dispute that the petitioner has been found medically unfit by the Medical Board constituted by the Appointing Authority. The petitioner, thereafter, submitted representation against his rejection by the Medical Board, and the petitioner was sent for the re-medical examination before the Review Medical Board. The Review Medical Board also concurred with the opinion of the Medical Board.

29. The material which has been placed by the learned counsel for the petitioner is the report of Dr. Ashwani Kumar, ENT Specialist, and Government District Hospital, Etah to contend that the report of the Medical Board, as well as Review Medical Board, is not correct. There is no pleading in the writ petition as to how the reports of two doctors procured by the petitioner are authentic and correct to create a doubt about the opinion of the Medical Board and Review Medical Board declaring the petitioner medically unfit.

30. At this point, it is worth mentioning that legislature has taken due care that Medical Board should conduct the medical examination fairly without any bias. To ensure fairness in the medical examination, it is provided in paragraph 4 of Appendix 3 that members of the Medical Board, if found to have given wrong reports willfully, will be liable for criminal proceedings. As the legislature has taken due care that Medical Board should conduct the medical examination of a candidate fairly, it would be unjust to doubt the veracity and authenticity of the report

of the Medical Board as well as Review Medical Board declaring the petitioner medically unfit on the basis of prescription of an outside Doctor produced by the petitioner.

31 . Further, the law enunciated by this Court, as noted above, has consistently held that the opinion given by the Medical Board as well as Review Medical Board should not be taken lightly and should be given due credence and it should not be annulled or set aside on the basis of the report of some private doctor or by a government hospital obtained by a candidate from outside. If the report of the private doctor or from any Government Hospital is relied upon to doubt the veracity of the opinion of the Medical Board, that would derail the selection process, and if such process is allowed to be continued, it would be very difficult for the recruiting body to bring the selection process to the logical end.

32. Further, it is also pertinent to mention that in the absence of any material on record to substantiate that the private doctor or doctor of a government hospital who investigated the petitioner had adopted the correct process to conclude that the petitioner does not suffer any disability, it would be improper and unwarranted to doubt the report of the Medical Board and Review Medical Board by relying upon the report obtained by a candidate from outside. If such a process is adopted, that would not only derail the selection process but would also cast suspicion on the selection process.

33. Thus, in this view of the fact, this Court believes that unless and until the candidate demonstrates by placing genuine and authentic material that the opinion of the Medical Board or Review Medical Board is erroneous or capricious or vague and smacks of malafide, the Court should refrain from interfering with the opinion of Medical Board and Review Medical Board which is a body constituted of experts to assess the fitness of candidate as per the norms and standards prescribed in respect of fitness of a candidate who is supposed to work in the police force.

34. It is no doubt true that this Court has power under Article 226 of the Constitution of India to interfere with the opinion of the Medical Board or Review Medical Board, but such power has to be exercised cautiously and sparingly in exceptional circumstances only in a given case where it is demonstrated that the opinion of the Medical Board or Review is palpably erroneous.

35. In the case in hand, there is no such material placed by the learned counsel for the petitioner to doubt the correctness of the opinion of the Medical Board and Review Medical Board.

36. So far as the reliance placed by the learned counsel for the petitioner on an interim order passed by this Court, it is worth noticing that the interim order has not considered any of the aforesaid judgments on the said issue.

37. Further, the judgment of this Court in Special Appeal Defective No.639 of 2020 has also not noticed any of the aforesaid judgments dealing with the issue at hand. The perusal of the said judgment does not disclose that it has laid down any law. The said judgment has been rendered in the peculiar facts and circumstances, therefore, the judgment of this Court in Special Appeal Defective No.639 of 2020 does not come in aid to the petitioner.

38. Thus, for the reasons given above, the writ petition lacks merit and is accordingly, ***dismissed*** with no order as to costs.

(2021)09ILR A1166
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.07.2021

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

WRIT A No. 7755 of 2021

Sushil Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shantanu Khare, Sri Siddharth Khare, Sri Alok Khare

Counsel for the Respondents:
C.S.C., Sri Arun Kumar

A. Service Law – Appointment - U.P. Intermediate Education Act, 1921 - Chapter XII, Regulation 20 - Where the petitioner has filled in wrong marks to secure selection anyhow, his candidature deserves to be rejected. (Para 22)

Object of awarding grace marks - The award of grace marks is in the nature of a concession, and there can be no doubt that it does result in diluting academic standards. The object underlying the grant of grace marks is to remove the real hardship to a candidate who has otherwise shown good performance in the academic field but is losing one year of his scholastic career for the deficiency of a mark or so in one or two subjects, while on the basis of his overall performance in other subjects, he deserves to be declared successful. (Para 15)

However, **a rule for the award of grace marks must be construed strictly so as to ensure that the minimum standards are not allowed to be diluted beyond the limit specifically laid down by the appropriate authority.** It is only in a case where the language of the statute is absolutely clear that the claim for the award of grace marks can be sustained. (Para 15)

The grace marks are only notional and are not added in the aggregate to change the percentage - The contention of the petitioner that Regulation 20 of Chapter XII of the Act, 1921 does not put any bar of adding grace marks awarded to the petitioner in the actual marks obtained by him is misconceived as the purpose of awarding grace mark to a candidate is to give him the benefit of promotion in the next class. The grace marks have not been secured by the petitioner on merit and therefore, they cannot be included in the actual marks obtained by him in the subjects in which the grace mark has been awarded to him. Moreover, petitioner never objected the Board for not including the grace marks awarded to him, therefore, he cannot be allowed to raise this contention at this stage that the Board has committed an error. (Para 13, 14, 16)

Contention of the petitioner that the advertisement does not stipulate that grace marks are to be excluded while filling total marks secured by a candidate is misconceived for two reasons; there is no pleading in the writ petition w.r.t the said contention nor the advertisement has been enclosed by the petitioner with the writ petition to buttress the aforesaid submission. Secondly, the grace marks are notional and have been awarded with an object that a candidate should not lose one year. (Para 23)

The petitioner has not stated about the quality point marks secured by the last selected candidate. Strangely, **the petitioner without knowing the actual quality point marks secured by the last selected candidate has made the statement that the petitioner's aggregate is much more than the last selected candidate.** (Para 17 to 21)

Writ petition dismissed. (E-4)

Precedent followed:

1. Maharashtra State Board of Secondary & Higher Education Vs Amit (2002) 6 SCC 153 (Para 15)

2. Rahul Kumar Vs St. of U.P. & ors. in Writ Petition (Civil) No. 378 of 2021 (Para 22)

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

1. Heard Sri Siddharth Khare, learned counsel for the petitioner, learned Standing Counsel for respondent nos.1 & 2, and Sri Arun Kumar learned counsel for respondent no.3.

2. The petitioner by means of the present writ petition has prayed for the following relief:-

"(a). a writ, order or direction of a suitable nature commanding the respondents to forthwith grant appointment to the petitioner as an Assistant Teacher in a Junior Basic School in pursuance to his selection in Assistant Teacher Recruitment Examination-2019, within a period to be specified by this Hon'ble Court, in accordance with the district allotted to the petitioner;

(b). a writ, order or direction of a suitable nature commanding the respondents to permit the petitioner to function as an Assistant Teacher in a Junior Basic School under the respondents and to pay the petitioner his regular monthly salary on the said post regularly every month;

(c). any other writ, order or direction as this Hon'ble Court may deem fit and proper in the circumstances of the case;

(d). award cost of the petition to be paid to the petitioner."

3. The petitioner has appeared in the selection of Assistant Teacher Recruitment Examination-2019. The petitioner was selected in the written examination and was called for counseling. The petitioner appeared in the counseling. According to the petitioner, his candidature was rejected on the ground that he has given wrong marks of the High School in the application form. In the aforesaid backdrop, he has prayed for the aforesaid relief.

4. Learned counsel for the petitioner submits that in the marks sheet downloaded from the website of Madhyamik Shiksha Parishad, Uttar Pradesh, Prayagraj, it is evident that the grace marks which has been awarded to the petitioner in the subjects of Mathematics and Science have been included in the actual marks obtained by him in those subjects. Accordingly, he submits that if the grace marks are added in actual marks, he has secured 328 marks which have been correctly filled in by him in the application form. He submits that Regulation 20 of Chapter XII of the U.P. Intermediate Education Act, 1921 (hereinafter referred to as 'the Act, 1921') does not preclude the grace marks awarded to a candidate to be added in the marks secured by a candidate in a subject, therefore, in the original marks sheet issued by the Board of High School & Intermediate Education, U.P., the grace marks ought to have been added in the marks secured by petitioner in the subjects of Mathematics and Science.

5. He further submits that petitioner has correctly filled in the marks secured by him in the application form. He further contends that even if the quality point marks are calculated treating the petitioner to have secured 325 marks, the aggregate of the petitioner would be 67.30 which is

much more than the last selected candidate who is allotted district Sitapur. Thus, he submits that the authorities have acted illegally in rejecting the candidature of the petitioner.

6. He lastly contends that there is no stipulation in the advertisement that grace marks are not to be included while filling up the marks obtained in High School, and therefore, for this reason also, the respondents-authorities have acted illegally in rejecting the candidature of the petitioner.

7. Per contra, learned counsel for the respondents would contend that the marks sheet which has been relied upon by the petitioner, Annexure 8 to the writ petition, is a provisional marks sheet wherein, in paragraph 1 under the heading 'DISCLAIMER', it is mentioned that this is not the original marks sheet. He has further placed reliance upon paragraph 3 of the 'DISCLAIMER' clause to contend that it is clearly mentioned that neither Board of High School & Intermediate Education, Uttar Pradesh, Prayagraj nor service provider is responsible for any inadvertent error that may have crept into the scoreboard/result being published on the website of Uttar Pradesh Madhyamik Shiksha Parishad. He further submits that this is a provisional marks sheet and the marks recorded therein are not final and conclusive.

8. He submits that the marks recorded in the original marks sheet, Annexure 3 to the writ petition, are conclusive and final. He submits that there is no pleading in the writ petition that petitioner has ever objected that grace marks awarded to him in mathematics & science subjects be added in actual marks secured by him or has submitted an application for correction in the original marks sheet, therefore, the petitioner cannot contend now that there is discrepancy in the original marks sheet issued by the Board of High School & Intermediate Education, U.P. He further placed reliance upon paragraph 4 of the Government Order dated 04.12.2020 to contend that in the instant case, petitioner has filled in more marks than obtained i.e. 328 instead of 325 marks with a purpose to obtain selection anyhow; he submits that paragraph 4 of the Government Order dated 04.12.2020 is explicit and provides that in such a case, the candidature of a candidate shall be rejected.

9. He submits that in this view of the fact, this is not a fit case where this Court should exercise its power under Article 226 of the Constitution of India.

10. I have considered the rival submissions of the parties and perused the record.

11. Learned counsel for the petitioner has relied upon the marks sheet downloaded from the website of Madhyamik Shiksha Parishad, Uttar Pradesh, Prayagraj, Annexure 8 to the writ petition in support of his contention that petitioner has supplied correct marks of High School in the application form. At this point, it would be apt to refer to the 'DISCLAIMER' clause of the mark sheet which is being extracted hereinbelow:-

"DISCLAIMER

1. This is a Computer Generated Provisional Score Card. This result has been provisionally announced. The results published on website are not immediate information to the examinees. These cannot

be treated as original mark sheets. Original mark sheets are to be issued by the Board separately.

2. Date provided by Board of High School & Intermediate Education Uttar Pradesh, Prayagraj.

3. Neither Board of High School & Intermediate Education, Uttar Pradesh, Prayagraj nor service provider is responsible for any inadvertent error that may have crept in the score board/results being published on UTTAR PRADESH MADHYAMIK SHIKSHA PARISHAD (UPMSP) Website.

4. In case of any Clarification, Please contact UTTAR PRADESH MADHYAMIK SHIKSHA PARISHAD."

12. Paragraph 1 of the DISCLAIMER clause unequivocally declares that computer-generated provisional scorecard cannot be treated as original marks sheet. The original marks sheet is to be issued by the Board separately. Paragraph 3 of the DISCLAIMER clause provides that neither Board of High School & Intermediate Education, Uttar Pradesh, Prayagraj nor service provider is responsible for any inadvertent error that may have crept in the score board/result being published on the website of UTTAR PRADESH MADHYAMIK SHIKSHA PARISHAD (UPMSP).

13. A perusal of paragraph 3 of the DISCLAIMER clause clearly shows that the marks sheet, Annexure 8 to the writ petition, which has been uploaded from the website of Uttar Pradesh Madhyamik Shiksha Parishad, Prayagraj was not uploaded by the Board of High School and Intermediate Education, Uttar Pradesh, Prayagraj. It is also clear from paragraph 1 of the DISCLAIMER clause that the computer-generated marks sheet is provisional and not a final marks sheet. The marks which have been mentioned in the mark sheet issued by the Board of High School and Intermediate Education, Uttar Pradesh, Prayagraj in respect of Mathematics and Science subject do not include the grace marks. There is nothing on record to show that petitioner has ever objected the Board for not including the grace marks awarded to him in the subjects of Mathematics and Science, therefore, the petitioner cannot be allowed to raise this contention at this stage that the Board has committed error in not including the grace marks awarded to him in Mathematics and Science subjects.

14. So far as the contention of learned counsel for the petitioner to Regulation 20 of Chapter XII of Intermediate Education Act, 1921 is concerned, it is worth mentioning that the object of the grace marks is to give certain benefit to a candidate to promote him to the next class. The grace marks have not been secured by the petitioner and therefore, they cannot be included in the actual marks obtained by him in the subjects in which the grace mark has been awarded to him. The grace marks are only notional and are not added in the aggregate to change the percentage.

15. The Apex Court in the case of ***Maharashtra State Board of Secondary & Higher Secondary Education Vs. Amit (2002) 6 SCC 153*** has elaborated the object for awarding grace marks. The relevant extract of paragraph 6 of the said judgment is being reproduced hereinbelow:-

"6...However, before adverting to the provisions of the aforesaid Regulation,

we consider it appropriate to notice the principles which the court has to keep in mind while dealing with a case of this nature where grace marks are claimed under the relevant Regulations. It cannot be disputed that the academic standards are laid down by the appropriate authorities which postulate the minimum marks that a candidate has to secure before the candidate can be declared to have passed the examination. The award of grace marks is in the nature of a concession, and there can be no doubt that it does result in diluting academic standards. The object underlying the grant of grace marks is to remove the real hardship to a candidate who has otherwise shown good performance in the academic field but is losing one year of his scholastic career for the deficiency of a mark or so in one or two subjects, while on the basis of his overall performance in other subjects, he deserves to be declared successful. The appropriate authorities may also provide for grant of grace marks to a candidate who has taken part in sports events etc., considering the fact that such candidates who have obtained a level of proficiency in any particular game or event may have devoted considerable time in pursuit of excellence in such game or event. However, a rule for the award of grace marks must be construed strictly so as to ensure that the minimum standards are not allowed to be diluted beyond the limit specifically laid down by the appropriate authority. It is only in a case where the language of the statute is absolutely clear that the claim for the award of grace marks can be sustained. Normally the court shall be slow to extend the concession of grace marks and grant a benefit where none is intended to be given by the appropriate authority. (See Board of School Education, Haryana Vs. Arun Rathi 1994 (2) SCC 526).

16. Therefore, the contention of learned counsel for the petitioner that Regulation 20 of Chapter XII of the Act, 1921 does not put any bar of adding grace marks awarded to the petitioner in the actual marks obtained by him is misconceived for the reason that the purpose of awarding grace mark to a candidate is to give him the benefit of promotion in the next class. Accordingly, the aforesaid contention of learned counsel for the petitioner is misconceived.

17. So far as the contention of learned counsel for the petitioner that if the merit is calculated based on marks mentioned in the original High School marks sheet i.e. 325 even then, petitioner would qualify as his quality point marks would be 67.30, and therefore, it is wrong to say that petitioner has filled in wrong marks in the application form with an object to obtain selection by any means.

18. Learned counsel for the petitioner has invited the attention of the Court to paragraph 20 of the writ petition which is being extracted hereinbelow:-

"20. That even in case 3 marks are reduced from the total of the marks secured by the petitioner in High School Examination even then the quality point marks secured by the petitioner aggregate 67.30 which is much more than the last candidate selected and allotted district Sitapur as a district of his appointment."

19. A perusal of paragraph 20 of the writ petition shows that a bald averment has been made about the fact that even if three marks are reduced from the actual marks secured by the petitioner in the High School, the aggregate quality point marks

of the petitioner would be 67.30 which is more than the last selected candidate.

20. The petitioner has not stated in the writ petition about the quality point marks secured by the last selected candidate. Strangely, the petitioner without knowing the actual quality point marks secured by the last selected candidate has made the statement in paragraph 20 of the writ petition that the petitioner's aggregate is much more than the last selected candidate.

21. Since the averments made in paragraph 20 of the writ petition are bald and vague, therefore, no reliance can be placed upon it.

22. It is further relevant to mention that Apex Court in the case of ***Rahul Kumar Vs. State of Uttar Pradesh & Others in Writ Petition (Civil) No.378 of 2021*** while interpreting Government Order dated 04.12.2020 has held that where the petitioner has filled in wrong marks to secure selection anyhow, his candidature deserves to be rejected.

23. So far as the contention of learned counsel for the petitioner that the advertisement does not stipulate that grace marks are to be excluded while filling total marks secured by a candidate, the said contention is misconceived for two reasons; there is no pleading in the writ petition in respect of the said contention nor the advertisement has been enclosed by the petitioner with the writ petition to buttress the aforesaid submission. Secondly, the grace marks are notional and have been awarded with an object that a candidate should not lose one year and therefore, the concession given by the examination body to the candidate for promotion cannot be added to the actual marks obtained by the candidate as the grace marks are not secured by the petitioner on merit. It is worth pointing out that if the grace marks are allowed to be added to the actual marks obtained by a candidate, that would put other candidates at disadvantage, who have secured and maintained high educational standards by securing higher marks by their sheer hard work and determination.

24. Thus, for the reasons given above, the writ petition lacks merit and is accordingly, ***dismissed.*** There shall be no order as to costs.

(2021)09ILR A1171
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.08.2021

BEFORE

THE HON'BLE YASHWANT VARMA, J.

WRIT A No. 7806 of 2021

Sunita Kumari Patel ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Amit Dubey

Counsel for the Respondents:
C.S.C., Sri Rajesh Yadav

A. Service Law – Appointment – Benefits of reservation cannot be obtained by virtue of marriage - The recognition of a lady as a member of a backward community in view of her marriage would not be relevant for the purpose of entitlement to reservation under Article 16(4) of the Constitution for the reason that she as a member of the forward caste, had an advantageous start in life and a marriage with a male belonging to a backward class would not entitle her to

the facility of reservation given to a backward community. (Para 6)

Significance of requiring a caste certificate bearing the name of the parent of a candidate - There cannot be any dispute that the caste is determined by birth and the caste cannot be changed by marriage with a person of Scheduled Caste. (Para 6)

In present case, the petitioner had participated in a recruitment exercise initiated by the respondents for appointment of Assistant Teachers. The petitioner also sought the extension of the benefits of reservation by virtue of belonging to a backward class. However, in support of the aforesaid she submitted a caste certificate which bore the name of her husband. On 04 December 2020, the respondents had issued a clarification providing that all caste certificates must be issued and bear a date prior to the cutoff date namely 28 May 2020. Additionally, it was provided that it should be ensured that the caste certificate bears the name of the parent of the applicant. (Para 3)

When the petitioner initially appeared at the counselling session, she was apprised that the caste certificate submitted by her alongwith the online application would be treated as invalid since it bore the name of her husband and she was accordingly directed to obtain a fresh caste certificate. (Para 4)

B. Significance of cut-off date – The relevance of a cut-off date is not just to test the eligibility of all candidates but also ensures that a definitive date is fixed by which all prospective candidates may ensure compliance with the terms and conditions of the advertisement. The last date so prescribed cannot be one which may shift or be amended based on the requests of individual candidates: If that were permitted, it may not only derail the entire recruitment process but also raise the spectre of allegations being made of illegal exercise of discretion by the recruitment agency. (Para 8)

In any case the Court bears in mind the element of public interest and the imperatives bearing upon the respondents to ensure that a public examination and selection process is brought to an end within specified timelines. (Para 11)

Petitioner's caste certificate came to be issued in her name on 02 June 2020. The stipulation of last date as reiterated under GO dated 04 December 2020, that reemphasized that all candidates would have to furnish and obtain a caste certificate by 28 May 2020, was clearly breached with the petitioner submitting a caste certificate issued after the said date. The candidature of the petitioner could not be processed further as direction had been issued for according closure to the selection process initiated in 2019, (Para 4, 7)

Writ petition dismissed. (E-4)

Precedent followed:

1. Suman Vs St. of U.P. & ors. [Writ-A No. 8312 of 2021 decided on 03.08.2021] (Para 6)

2. Gaurav Sharma Vs St. of U.P. & ors. [2017 (5) ADJ 494] (Para 7)

Precedent distinguished:

1. Bindresh Singh Vs St. of U.P. & ors. [2021 (1) ADJ 269] (Para 5, 9)

2. Ram Kumar Gijoriya [(2016) 4 SCC 754] (Para 9)

Present petition assails order dated 28.04.2021, passed by District Basic Education Officer, Baghpat, District Baghpat.

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

1. Heard learned counsel for the petitioner, learned Standing Counsel and Sri Rajesh Yadav, learned counsel who appears for District Basic Education Officer.

2. This petition has been preferred seeking the following reliefs:-

"i. issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 28.04.2021 passed by respondent No.3 i.e. District Basic Education Officer Baghpat, District Baghpat regarding the appointment of the petitioner on the post of Assistant Teacher **(Annexure No.8 to the writ petition).**

ii. issue a writ, order or direction in the nature of mandamus directing the respondent No.3 i.e. District Basic Education Officer Baghpat, District Baghpat to appoint the petitioner on the post of Assistant Teacher on the basis of her eligibility.

....."

3. The petitioner had participated in a recruitment exercise initiated by the respondents for appointment of Assistant Teachers. The selection process was undertaken against 69,000 vacancies. The petitioner also sought the extension of the benefits of reservation by virtue of belonging to a backward class. However, in support of the aforesaid she submitted a caste certificate which bore the name of her husband. On 04 December 2020, the respondents had issued a clarification providing that all caste certificates must be issued and bear a date prior to the cut-off date namely 28 May 2020. Additionally, it was provided that it should be ensured that the caste certificate bears the name of the parent of the applicant. The relevant stipulations in the order of 04 December 2020 read thus:-

ष्1द्ध बेसिक शिक्षा परिषद द्वारा आवेदन पत्र प्रस्तुत करने की निर्धारित की गयी अन्तिम तिथि दिनांक 28–05–2020 तक निर्गत किये गये निवास प्रमाण पत्र एवं जाति प्रमाण पत्र को ही स्वीकार किया जाय।

;2द्ध मा0 उच्चतम न्यायालय ने वलसम्मा पाल बनाम कोचीन विश्व–विद्यालय 1996 ैण्ब्ण्ब्545 एवं रामेश भाई दभार नायका बनाम गुजरात राज्य एवं अन्य सिविल अपील नं0654/2012 में यह स्वीकार किया है कि किसी महिला का दूसरी जाति में शादी कर लेने मात्र से उसकी जाति का स्टेटस नहीं बदल जायेगा, बल्कि जिस जाति में उसने जन्म लिया है, वही मानी जायेगी। अतः ऐसी महिला अभ्यर्थी जिसके द्वारा प्रस्तुत जाति प्रमाण पत्र के आधार पर आरक्षण का लाभ प्राप्त करते हुए चयन प्राप्त किया गया है, उसका चयन निरस्त कर दिया जाय।

;3द्ध निवास प्रमाण पत्र अन्य प्रदेश का होने का प्रकरण माननीय उच्च न्यायालय के आदेश से अच्छादित है तथा इस सम्बन्ध में शासनादेश संख्या–588/68–5–2019, दिनांक 07–06–2019 निर्गत है। इस सम्बन्ध में उक्त शासनादेश के आलोक में कार्यवाही की जाय।ष

4. When the petitioner initially appeared at the counselling session, she was apprised that the caste certificate submitted by her along with the online application would be treated as invalid since it bore the name of her husband and she was accordingly directed to obtain a fresh caste certificate. That caste certificate came to be issued in her name on 02 June 2020. Upon noticing the aforesaid facts, the respondents taking into consideration the government orders of 31 March 2021 and 04 May 2021 have held that since the caste certificate had come to be issued after 28 May 2020 and a direction had been issued for according closure to the selection process initiated in 2019, the candidature of the petitioner could not be processed further.

5. Learned counsel for the petitioner contends that the original caste certificate

which was submitted by the petitioner as well as the caste certificate obtained now show that both her husband as well as her father belong to the same backward class. It was in this context submitted that the insistence of the respondents upon the petitioner obtaining a caste certificate in the name of her father was clearly superfluous and in any case could not have resulted in the denial of extension of reservation benefits to the petitioner. It was further submitted that the petitioner pursuant to the advice given by the respondents had applied for the grant of a fresh caste certificate bearing the name of her father on 19 May 2020. However, according to the petitioner, the respondents themselves delayed the issuance of that certificate which ultimately came to be issued on 02 June 2020. In view of the aforesaid it was submitted that the petitioner cannot be held liable for the delay on the part of the respondents. Learned counsel has lastly placed reliance upon a judgment rendered by a learned Judge in **Bindresh Singh vs. State of U.P. and others [2021(1) ADJ 269]** to submit that bearing in mind the social objectives underlying the grant of reservation, the respondents were obliged to consider the candidature of the petitioner and therefore prays for the impugned order being set-aside.

6. Dealing with the significance of requiring a caste certificate bearing the name of the parent of a candidate, this Court in **Suman vs. State of U.P. and others [Writ-A No.8312 of 2021 decided on 3.8.2021]** held thus:-

"Insofar as the OBC certificate bearing the name of the husband of the petitioner is concerned, the Court finds that the stipulation of the caste certificate bearing the name of a parent serves a salutary and significant purpose. Caste as is well settled is determined by birth. The identification of a person as belonging to a particular caste or social class has an unbroken and undeviating connect with the family of the individual. The candidate must therefore necessarily establish that he or she was born into a family which belongs to a backward class duly recognised as such by the appropriate government. A certificate bearing the name of the parent thus serves the purposes of enabling the respondents to ascertain and verify the actual caste of the holder thereof as existing at the time of birth.

While it is well settled that benefits of reservation cannot be obtained by virtue of marriage, the Court may only extract the following passage from the decision of the Supreme Court in **Sobha Hymavathi Devi v. Setti Gangadhara Swamy:-**

"10. What then remains is the fact that the appellant though assigned the caste of her father Murahari Rao, namely, the Sistu Karnam community, had married a tribal belonging to the Bhagatha community. On the basis of this marriage, it is argued that she must be taken to have acquired membership in the community of her husband and consequently treated as a member of that community. It is in that context that the decision in Horo [(1972) 1 SCC 771 : AIR 1972 SC 1840] was relied on. It is also contended that the decision in Horo [(1972) 1 SCC 771 : AIR 1972 SC 1840] related to an election dispute and consequently, the ratio of that decision should govern the present case. We have already indicated that there is nothing to show that the marriage of the appellant with Appala Raju was sanctioned or approved by the elders of the Bhagatha

community or the Panchayat concerned or was in tribal form or that the formalities attending such a tribal marriage were observed and the marriage was performed after obtaining the approval of the elders of the tribe. Even otherwise, we have difficulty in accepting the position that a non-tribal who marries a tribal could claim to contest a seat reserved for tribals. Article 332 of the Constitution speaks of reservation of seats for Scheduled Tribes in Legislative Assemblies. The object is clearly to give representation in the legislature to Scheduled Tribe candidates, considered to be deserving of such special protection. To permit a non-tribal under cover of a marriage to contest such a seat would tend to defeat the very object of such a reservation. The decision of this Court in Valsamma Paul v. Cochin University [(1996) 3 SCC 545 : 1996 SCC (L&S) 772 : (1996) 33 ATC 713] supports this view. Neither the fact that a non-backward female married a backward male nor the fact that she was recognised by the community thereafter as a member of the backward community, was held to enable a non-backward to claim reservation in terms of Article 15(4) or 16(4) of the Constitution. Their Lordships after noticing Bhoobum Moyee Debia v. Ram Kishore Acharj Chowdhry [(1865) 10 MIA 279] and Lulloobhoy Bappoobhoy Cassidass Moolchund v. Cassibai [(1879-80) 7 IA 212 : ILR 5 Bom 110] held that a woman on marriage becomes a member of the family of her husband and thereby she becomes a member of the caste to which she has moved. The caste rigidity breaks down and would stand as no impediment to her becoming a member of the family to which the husband belongs and to which she gets herself transplanted. Thereafter, this Court noticed that recognition by the community was also important. Even then, this Court categorically laid down that the recognition of a lady as a member of a backward community in view of her marriage would not be relevant for the purpose of entitlement to reservation under Article 16(4) of the Constitution for the reason that she as a member of the forward caste, had an advantageous start in life and a marriage with a male belonging to a backward class would not entitle her to the facility of reservation given to a backward community. The High Court has applied this decision to a seat reserved in an election in terms of Article 332 of the Constitution. We see no reason why the principle relating to reservation under Articles 15(4) and 16(4) laid down by this Court should not be extended to the constitutional reservation of a seat for a Scheduled Tribe in the House of the People or under Article 332 in the Legislative Assembly....."

Reiterating the aforesaid position in law in Sunita Singh v. State of U.P4., the Supreme Court succinctly observed:-

5. There cannot be any dispute that the caste is determined by birth and the caste cannot be changed by marriage with a person of Scheduled Caste. Undoubtedly, the appellant was born in "Agarwal" family, which falls in general category and not in Scheduled Caste. Merely because her husband is belonging to a Scheduled Caste category, the appellant should not have been issued with a caste certificate showing her caste as Scheduled Caste. In that regard, the orders of the authorities as well as the judgment of the High Court cannot be faulted.

Regard must be had to the fact that in Sunita Singh, the Supreme Court was dealing with a caste certificate which

came to be issued based on the caste of the husband. It was in the aforesaid backdrop that it held that the caste certificate was invalid. It is thus evident that it was to avoid such situations and claims that the respondents insisted upon the caste certificate bearing the name of the parent of the candidate. The aforesaid stipulation has neither been challenged by the petitioner nor can it be described as being arbitrary or superfluous.

` The Court additionally shudders to imagine the enormous burden that would stand placed upon a recruiting body before whom caste certificates such as the one produced by the petitioner here were placed in support of claims for extension of reservation benefits. In all such cases, the recruiting agency would then have to independently verify the family origins of each such candidate in order to ascertain whether the individual was born in a social class to which benefits under Article 16 of the Constitution stand conferred. Ms. Archana Singh, learned counsel, apprises the Court that the present recruitment was undertaken to fill up 69,000 posts of Assistant Teachers. Learned counsel informs the Court that 146060 candidates participated in the selection process. The facts as noticed above underscore the enormity of the avoidable and unnecessary obligation which would stand placed on the recruitment agency. In fact, placing such an onus on the recruiting body may also have a deleterious effect on the paramount requirement of completing a selection process connected with appointment to public posts within a defined timeline. The Court in view of the aforesaid facts is of the considered view that there is no justification for such an additional responsibility being legally foisted upon the respondents."

7. Having noticed the salutary and significant objective which underlies the requirement of a caste certificate bearing the name of a parent, the Court further takes note of the last date as reiterated under the Government Order dated 04 December 2020. That reemphasized that all candidates would have to furnish and obtain a caste certificate by 28 May 2020. That stipulation was clearly breached with the petitioner submitting a caste certificate issued after the said date. The significance of a cut-off date as fixed by respondents in a large scale public examination was duly emphasized and underlined by a Full Bench of the Court in **Gaurav Sharma vs. State of U.P. and others [2017 (5) ADJ 494]** in the following terms:-

"The second aspect which must necessarily be noted is the significance of a last date prescribed in an advertisement and its impact. A last date comes to be prescribed in an advertisement or recruitment notice to seek certain well established objectives. It firstly puts all prospective candidates on notice with regard to the eligibility qualifications that the employer desires a particular candidate to hold. The prescription of the last date also acts as information to the prospective candidates to test and ascertain whether they are eligible to participate in the selection process. There are therefore, upon the prescription of such a last date in the advertisement no shifting timelines or uncertainty. The prescription of such a condition in the advertisement also eschews any arbitrary action and denudes the authority from wielding a discretion which may be abused. One may in this connection usefully refer to the judgment of the Supreme Court in Rakesh Kumar Sharma Vs. State (NCT of Delhi) and others 7

which noticed the earlier precedents on the subject and observed as follows:....."

8. As is manifest from the aforesaid principles as enunciated in Gaurav Sharma, the relevance of a cut-off date is not just to test the eligibility of all candidates but also ensures that a definitive date is fixed by which all prospective candidates may ensure compliance with the terms and conditions of the advertisement. The last date so prescribed cannot be one which may shift or be amended based on the requests of individual candidates. If that were permitted, it may not only derail the entire recruitment process but also raise the spectre of allegations being made of illegal exercise of discretion by the recruitment agency.

9. Significantly the aforesaid observations do not appear to have been brought to the attention of the learned Judge who rendered judgment in **Bindresh Singh**. The decision of the Full Bench was brushed aside with the learned Judge simply observing that it did not apply to the facts of that case. In Bindresh, the learned Judge proceeded to draw sustenance from the decision in **Ram Kumar Gijoriya [(2016) 4 SCC 754**] a decision which was duly noticed by the Full Bench in **Gaurav Sharma** and explained as follows: -

19. We then proceed to address the second question framed for our consideration and which pertains to the correctness or otherwise of the judgment of the Division Bench in Arvind Kumar Yadav. As noted above, the sheet anchor of the case of the appellant and the writ petitioners was the judgment of the Supreme Court in Ram Kumar Gijroya. It becomes relevant to note that in the said case, the Supreme Court was called upon to consider the correctness of a judgment rendered by the Delhi High Court which had overturned a judgment rendered by a learned Single Judge of the said Court who had followed two earlier precedents to hold that the candidature of a Scheduled Castes/Scheduled Tribes candidate could not be turned down only on the ground that the caste certificate was submitted after the last date prescribed in the advertisement. The two prior precedents which the Delhi High Court considered were Pushpa v. Government (NCT of Delhi), 2009 SCC OnLine Del 281, and Tej Pal Singh v. Government (NCT of Delhi), 1999 SCC OnLine Del 1092. In the appeal of Ram Kumar Gijroya, the learned Single Judge of the Delhi High Court following the two precedents referred to above had directed the respondents therein to accept the OBC certificate of the appellant. One of the significant and distinguishing features of Ram Kumar Gijroya, which immediately springs to light is that the advertisement did not prescribe a cut off date at all. The requirement of submitting the OBC certificate was introduced only by a notice issued by the Delhi Subordinate Services Selection Board while declaring the final results.

24. We are therefore of the considered view that the Division Bench in Arvind Kumar Yadav rightly noted the distinct factual backdrop in which Ram Kumar Gijroya came to be rendered. The aspect of there being no consideration of the impact of a negative stipulation in an advertisement in the said judgment of the Supreme Court clearly escaped the Division Benches which pronounced judgments in Pravesh Kumar and Shubham Gupta."

10. In view of the aforesaid, this Court finds itself unable to tread the line as adopted in **Bindresh.**

11. In any case the Court bears in mind the element of public interest and the imperatives bearing upon the respondents to ensure that a public examination and selection process is brought to an end within specified timelines. It was these factors which were emphasized in the government orders of 31 March 2021 and 04 May 2021. For all the aforesaid reasons, the Court finds no ground to interfere with the impugned orders.

12. The writ petition fails and shall stand **dismissed.**

(2021)09ILR A1178
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.08.2021

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.

WRIT A No. 10634 of 2021

Mahendra Kumar, Constable ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Atiprita Gautam, Sri Vijay Gautam (Senior Adv.), Vinod Kumar Mishra

Counsel for the Respondents:
C.S.C.

A. Service Law – Cancellation of selection – Misrepresentation - Cancellation of appointment has been affirmed where it gets established that appointment had been obtained on the strength of misrepresentation. (Para 7)

B. No violation of principles of natural justice - It is only where facts are disputed that an enquiry in the manner contemplated in law would be necessary – No further enquiry is required on the admitted facts - Before passing the order impugned an opportunity of hearing has been given to petitioner. Petitioner has admitted that he claimed appointment as dependent of freedom fighter whereas he does not belong to such category. Grant of reservation as dependent of freedom fighter is thus admitted. There is no charge of misconduct against petitioner to be proved in disciplinary enquiry. The charge against petitioner is of obtaining appointment on the strength of misrepresentation and petitioner has admitted facts w.r.t. this. Holding of disciplinary enquiry in the circumstances of the present case is thus not warranted nor the cancellation of petitioner's selection/appointment would be illegal only because disciplinary enquiry was not held in the matter. (Para 8, 9)

C. No equity would arise in favour of the employee merely because he has worked for certain time. In the event petitioner's appointment is sustained it would cause grave injustice to thousands of those who have secured marks above the petitioner but have not been appointed. No equity is created in favour of the petitioner to continue in employment on account of his working for the last about 5 years since the appointment has been obtained by misrepresentation. (Para 7, 10)

D. Law is settled that fraud and justice do not dwell together. Petitioner having made misrepresentation in his application and having derived advantage not due to him in law would not be entitled to grant of protection u/Art. 226 of the Constitution of India. (Para 11)

Writ petition dismissed. (E-4)

Precedent followed:

1. U.O.I. Vs M. Bhaskaran, (1995) Suppl. (4) SCC 100 (Para 7)

Present petition assails order dated 01.06.2021, passed by Superintendent of Police, Unnao, whereby petitioner's selection has been cancelled.

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. This writ petition is directed against an order dated 1.6.2021, passed by Superintendent of Police, Unnao, whereby petitioner's selection on the post of Constable in U.P. Police has been cancelled on the ground of misrepresentation. It is observed in the order that petitioner secured appointment by claiming benefit of reservation meant for dependent of Freedom Fighter but upon verification it has transpired that he does not belong to such category. U.P. Police Recruitment and Promotion Board (hereinafter referred to as the 'Board') recommended cancellation of petitioner's appointment on the ground of misrepresentation. A notice accordingly was issued to petitioner in reply to which the petitioner admits that he is not a dependent of Freedom Fighter and that by mistake of Computer Operator, who had filled petitioner's application form, such reservation was claimed. Since petitioner has otherwise not secured marks above the cut off in the respective category therefore appointment obtained on the strength of misrepresentation has been cancelled. Thus aggrieved the petitioner is before this Court.

2. It is urged that petitioner has not made any misrepresentation and having worked for five years without any complaint his appointment cannot be cancelled without holding any disciplinary enquiry. Reliance is also placed upon interim orders passed by this Court in Writ Petition Nos.9937 of 2021 and 9928 of 2021.

3. While entertaining the writ petition time was granted to learned Standing Counsel to obtain instructions. Written instructions signed by the Additional Secretary of the Board are placed before the Court and are taken on record. This Court on 26.8.2021 directed learned Standing Counsel to furnish a copy of the instructions to the counsel for the petitioner also.

4. Appointment to the post of Constable has been offered to petitioner pursuant to his application made against the advertisement published on 14.5.2013. Petitioner was an applicant in the OBC category and his application has been placed before the Court alongwith instructions in which it is apparent that petitioner claimed benefit of reservation meant for dependent of Freedom Fighter. Petitioner in his reply to the show cause notice has also admitted the fact that reservation meant for dependent of Freedom Fighter was claimed in his application form. It is also admitted to petitioner that he is not a dependent of Freedom Fighter and such reservation is not admissible to him. The misrepresentation in falsely claiming reservation of dependent of Freedom Fighter, however, is sought to be explained by contending that petitioner was not aware of such incorrect disclosure and that it was due to mistake on part of the Computer Operator that such error occurred.

5. The appointment on the post of Constable was to be offered on the basis of merit secured by a candidate. The petitioner belongs to OBC category and has secured 290.2119 marks in the selection. The last selected candidate in OBC category has secured 310.6374 marks for appointment in Civil Police; 309.3608 marks for appointment as Constable in P.A.C. and 308.5096 marks for appointment as Fireman. It is, therefore, undisputed that

petitioner has not secured sufficient marks to secure appointment on the post of Constable. No appointment could have been offered to him on the basis of his merit. His marks could qualify him for selection only in the category of dependent of Freedom Fighter. His appointment is thus based only on false misrepresentation that he is a dependent of Freedom Fighter.

6. Petitioner's defence before the authority that he was unaware of the fact that in his application he had claimed reservation as dependent of Freedom Fighter is not liable to be accepted for two reasons. Firstly, in the absence of reservation claimed in sub-category of dependent of Freedom Fighter the petitioner could not be selected as his marks were below the cut off marks secured by the last selected OBC candidate. Secondly, petitioner having taken advantage of false disclosure in the application form cannot claim immunity by shifting the guilt upon the Computer Operator since the Computer Operator was his agent and the petitioner is responsible for his acts particularly as he himself is the beneficiary of such false disclosure.

7. In Union of India vs. M. Bhaskaran, (1995) Suppl. (4) SCC 100, the Supreme Court has affirmed cancellation of appointment where it was established that appointment had been obtained on the strength of misrepresentation. The Court further observed that no equity would arise in favour of the employee merely because he has worked for certain time. Para 6 of the aforesaid judgment is reproduced hereinafter:

"6. It is not necessary for us to express any opinion on the applicability of Rule 3(1)(i) and (iii) on the facts of the present cases for the simple reason that in our view the railway employees concerned, respondents herein, have admittedly snatched employment in railway service, maybe of a casual nature, by relying upon forged or bogus casual labourer service cards. The unauthenticity of the service cards on the basis of which they got employment is clearly established on record of the departmental enquiry held against the employees concerned. Consequently, it has to be held that the respondents were guilty of misrepresentation and fraud perpetrated on the appellant-employer while getting employed in railway service and had snatched such employment which would not have been made available to them if they were not armed with such bogus and forged labourer service cards. Learned counsel for the respondents submitted that for getting service in railway as casual labourers, it was strictly not necessary for the respondents to rely upon such casual service cards. If that was so there was no occasion for them to produce such bogus certificates/service cards for getting employed in railway service. Therefore, it is too late in the day for the respondents to submit that production of such bogus or forged service cards had not played its role in getting employed in railway service. It was clearly a case of fraud on the appellant-employer. If once such fraud is detected, the appointment orders themselves which were found to be tainted and vitiated by fraud and acts of cheating on the part of employees, were liable to be recalled and were at least voidable at the option of the employer concerned. This is precisely what has happened in the present case. Once the fraud of the respondents in getting such employment was detected, the respondents were proceeded against in departmental enquiries and were called

upon to have their say and thereafter have been removed from service. Such orders of removal would amount to recalling of fraudulently obtained erroneous appointment orders which were avoided by the employer-appellant after following the due procedure of law and complying with the principles of natural justice. Therefore, even independently of Rule 3(1)(i) and (iii) of the Rules, such fraudulently obtained appointment orders could be legitimately treated as voidable at the option of the employer and could be recalled by the employer and in such cases merely because the respondent-employees have continued in service for a number of years on the basis of such fraudulently obtained employment orders cannot create any equity in their favour or any estoppel against the employer. In this connection we may usefully refer to a decision of this Court in Distt. Collector & Chairman, Vizianagaram Social Welfare Residential School Society v. M. Tripura Sundari Devi [(1990) 3 SCC 655 : 1990 SCC (L&S) 520 : (1990) 14 ATC 766] . In that case Sawant, J. speaking for this Court held that when an advertisement mentions a particular qualification and an appointment is made in disregard of the same, it is not a matter only between the appointing authority and the concerned appointee. The aggrieved are all those who had similar or even better qualifications than the appointee or appointees but who had not applied for the post because they did not possess the qualifications mentioned in the advertisement. It amounts to a fraud on public to appoint persons with inferior qualifications in such circumstances unless it is clearly stated that the qualifications are relaxable. No court should be a party to the perpetuation of the fraudulent practice. It is of course true as noted by the Tribunal that the facts of the case in the aforesaid decision were different from the facts of the present case. And it is also true that in that case pending the service which was continued pursuant to the order of the Tribunal the candidate concerned acquired the requisite qualification and hence his appointment was not disturbed by this Court. But that is neither here nor there. As laid down in the aforesaid decision, if by committing fraud any employment is obtained, such a fraudulent practice cannot be permitted to be countenanced by a court of law. Consequently, it must be held that the Tribunal had committed a patent error of law in directing reinstatement of the respondent-workmen with all consequential benefits. The removal orders could not have been faulted by the Tribunal as they were the result of a sharp and fraudulent practice on the part of the respondents. Learned counsel for the respondents, however, submitted that these illiterate respondents were employed as casual labourers years back in 1983 and subsequently they have been given temporary status and, therefore, after passage of such a long time they should not be thrown out of employment. It is difficult to agree with this contention. By mere passage of time a fraudulent practice would not get any sanctity. The appellant authorities having come to know about the fraud of the respondents in obtaining employment as casual labourers, started departmental proceedings years back in 1987 and these proceedings have dragged on for a number of years. Earlier, removal orders of the respondents were set aside by the Central Administrative Tribunal, Madras Bench and proceedings were remanded and after remand, fresh removal orders were passed by the appellant which have been set aside by the Central Administrative Tribunal, Ernakulam Bench and which are the subject-matter of the

present proceedings. Therefore, it cannot be said that the appellants are estopped from recalling such fraudulently obtained employment orders of the respondents subject of course to following due procedure of law and in due compliance with the principles of natural justice, on which aspect there is no dispute between the parties. If any lenient view is taken on the facts of the present case in favour of the respondents, then it would amount to putting premium on dishonesty and sharp practice which on the facts of the present cases cannot be permitted."

8. Before passing the order impugned an opportunity of hearing has been given to petitioner. In his reply, the petitioner has admitted facts which clearly goes to show that appointment has been obtained by petitioner on the strength of misrepresentation. Petitioner has admitted that he claimed appointment as an dependent of freedom fighter whereas he admits that he does not belong to such category. Grant of reservation as dependent of freedom fighter is thus admitted. No further enquiry is required on the admitted facts since petitioner himself states that such benefit was wrongly claimed. It is only where facts are disputed that an enquiry in the manner contemplated in law would be necessary. Contention that principles of natural justice are violated, therefore, is not liable to be accepted.

9. Further argument that without holding disciplinary enquiry petitioner's appointment could not be cancelled also cannot be accepted. There is no charge of misconduct against petitioner to be proved in disciplinary enquiry. The charge against petitioner is of obtaining appointment on the strength of misrepresentation in respect of which facts are admitted to the petitioner. Opportunity to petitioner in this regard is given. Holding of disciplinary enquiry in the circumstances of the present case is thus not warranted nor the cancellation of petitioner's selection/appointment would be illegal only because disciplinary enquiry was not held in the matter.

10. In the event petitioner's appointment is sustained it would cause grave injustice to thousands of those who have secured marks above the petitioner but have not been appointed. No equity is created in favour of the petitioner to continue in employment on account of his working for the last about 5 years since the appointment has been obtained by misrepresentation. The interim orders relied upon by the petitioner do not appear to have any applicability on facts since no misrepresentation was admitted on record of those cases, unlike the fact here. Even otherwise those orders are on facts of those cases and do not constitute any binding precedent. In Writ Petition No.9928 of 2021 the Freedom Fighter Certificate was doubted as not being genuine, whereas in the facts of the present case petitioner admits that he is not a dependent of Freedom Fighter.

11. having made misrepresentation in his application and having derived advantage not due to him in law would not be entitled to grant of protection under Article 226 of the Constitution of India. Writ petition accordingly fails and is dismissed. Law is settled that fraud and justice do not dwell together. Petitioner having made misrepresentation in his application and having derived advantage not due to him in law would not be entitled to grant of protection under Article 226 of the Constitution of India. Writ petition accordingly fails and is dismissed.

(2021)09ILR A1183
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.09.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE SUBASH CHAND, J.

WRIT A No. 10910 of 2021

Rohit Kumar Sharma & Ors. ...Petitioners
Versus
The Union of India & Ors. ...Respondents

Counsel for the Petitioners:
Sri Sanjay Yadav, Sri Radha Kant Ojha (Senior Adv)

Counsel for the Respondents:
Vivek Kumar Rai

A. Service Law – Salary – The impugned order dated 11.08.2020 is in fact a notice and not an order of recovery as understood by the employees and the tribunal. The impugned orders dated 11.8.2020 and 25.8.2020 will be considered to be notices and salary shall not be deducted without hearing the parties. The respondents shall not re-fix the pay-scale of the petitioners till representations are decided and matter is considered on merits. (Para 3, 4)

Writ petition disposed off. (E-4)

Precedent distinguished:

1. Ramesh Chandra Raikwar & 14 ors. Vs Central Administrative Tribunal & 3 ors., Writ- A No. 6083 of 2021, (Para 7)

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

1. Heard learned counsel for the parties.

2. In the morning, we have been conveyed by Shri Vivek Kumar Rai, learned counsel for respondents that Central Administrative Tribunal order rather judgment is under challenge and petitioners are directed to approach the authorities as per the impugned order and have also directed him to seek instructions as we are convinced that the issue can be resolved by the present petitioner who are before this Court to approach

3. From the authorities concerned that the impugned order dated 11.8.2020 as indicated is fact in notice though it is understood by employees and the tribunal order of recovery. We, at this juncture, substitute the order of the Central Administrative Tribunal, Allahabad Branch, Allahabad dated 2nd March, 2021 that this writ petition would be considered by the authorities concerned as a reply/representation quo. The order/notice dated 11.8.2020 and 25.8.2020, the copy of which is annexed as Annexure-2 to the writ petition.

4. We are not going into the factual matrix nor discussing the details but we are pained to note that the Central Administrative Tribunal have gone much beyond the scope and, therefore, we are required to set aside all the reasoning given by it more particularly in paras '26'-'131'. The tribunal had directed the petitioners to approach the authorities and observed against the petitioners which has made them approach this Court. The order dated 23.2.2021 is quashed. The impugned orders dated 11.8.2020 and 25.8.2020 will be considered to be noticed and not deduction of salary without hearing the parties. There

cannot be any deductions, The tribunal could have simply remanded the matter as the Loco-pilot who were before it were already relegated to the concerned authority by its order. The respondents shall not re-fix the pay scale of the petitioners till decide the representations and also considered the matter on merits.

5. May that as it may be as a model Government, the respondent No.1, Union of India through the General Manager, North Central Railway will direct the respondent No.2, Divisional Railway Manager, North Central Railway, Jhansi-U.P. will in term directed respondent No.3, Divisional Railway Manager (Personnel), North Central Railway Manager, Jhansi to look into the grievance of the petitioners herein and till they decide the representation, if it is shown that there was not fraud committed cannot be deducted. May that as it may be, we substitute the tribunals order by this order.

6. This petition and O.A. will be considered to be reply of the petitioners and other affected parties may also file their representations within four weeks from today. The petitioners may supplement the same also with additional material if they so chose.

7. The judgment in WRIT - A No. - 6083 of 2021, **Ramesh Chandra Raikwar And 14 Others v. Central Administrative Tribunal And 3 Others** is not countenanced at present by us practical view and, therefore, we do not place reliance on the same. There are factual data also which are different from the judgment of Ramesh Chandra (Supra) for which we are not delving at the present.

8. We hope that the authorities concerned will go through the judicial pronouncements of the Apex Court regarding recovery from salary.

9. With these observations, this petition is **disposed of.**

10. We are thankful to counsels for ably assisting us and in case of difficulty, the parties to seek revival of this petition

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(2021)09ILR A1184
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.09.2021

BEFORE

THE HON'BLE SUNEET KUMAR, J.

WRIT A No. 12102 of 2020
With
WRIT A No. 6940 of 2021

Robins Kumar Singh ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Sriprakash Rai, Sri Mujib Ahmad Siddiqui, Sri Rishi Kant Rai, Sri K.S. Kushwaha

Counsel for the Respondents:
C.S.C., Sri Siddharth Singhal

A. Service Law – Appointment - Uttar Pradesh Subordinate Services Selection Commission Act, 2014 - Sections 15, 17 & 18(2); Uttar Pradesh Direct Recruitment To Group 'C' Posts (Mode And Procedure) Rules, 2015 - Rule 5, 7 & 8; Guidelines adopted by the Commission in exercise of powers under Section 15 - Guideline 16, 22, 23, 24.

The withheld result is not a separate exercise undertaken by the Commission

but a part of the same selection process. Merely for the reason that verification was pending would not mean that the withheld candidates were not in the select list declared by the Commission on 18 July 2018. There is no such prohibition restraining the Commission from issuing select list in respect of the post in first instance alone and thereafter, the Commission, is denuded of its power to process the withheld result of otherwise selected candidates pending verification. (Para 17)

In the facts of the instant case, 3133 post of Village Development Officer (Group 'C') was sent by the Government to the Commission for initiating the process of selection. The Commission after following the selection procedure recommended 2947 candidates, the result of 116 candidates was withheld pending verification of the documents. Thereafter, 98 were sent to the Government, finally, the list of remaining 18 candidates were duly recommended and notified by the Commission on 26 June 2020. Prior to that it is informed that 70 candidates under the ex-serviceman quota were notified. The total recommended candidates, thus, were equivalent to the notified post 3133 (2947+116+70). (Para 15)

The State Government has declined to accept the select list of the candidates notified by the Commission on 26 June 2020, for the reason that the Commission lacks power and authority to issue any supplementary select list. According to the State Government, selection process came to an end after the Commission had notified the select list of 2947 candidates. (Para 15)

B. The State cannot discriminate against the petitioners by taking a plea that the Commission has no power to declare a supplementary select list. The final supplementary list of 18 candidates is a part of the list of 116 withheld candidates to have been cleared by the Commission subsequently. The 18 candidates are part of the same select list and not beyond the notified vacancy. Their results were notified after verification as was the case of other withheld candidates and were otherwise found fit on merit. (Para 16, 20)

The Commission has a right to withhold the result pending verification of the original certificate relating to qualification. It is not the case of State Government that candidates recommended by the Commission exceed the total number of vacancies notified i.e. 3133. It is also not a case of exhaustion of the select list of recommended candidates but preparation and declaration of the complete select list by the Commission of the notified vacancy pursuant to the same advertisement. (Para 19)

C. Words & Phrases – 'withheld', 'supplementary' – As per Webster Dictionary the expression, 'withheld', would mean, 'refuse to give (something that is due or desired by another)'; 'to hold back; to keep back,' and, 'supplementary' would mean 'the result has not been revealed or published', 'Once certain criteria are fulfilled or certain investigation/enquiry are completed.' (Para 18)

Writ petitions allowed. (E-4)

<u>Precedent distinguished</u>:

1. Secretary Kerala Public Service Commission Vs Sheeja P.R. & anr., (2013) 2 SCC 56 (Para 8)

2. Ajay Prakash Mishra & ors. Vs St. of U.P. & ors., W-A-26813/2018 decided on 21.06.2021 (Para 8)

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

1. Heard Shri K.S. Kushwaha, along with Sri Mujib Ahmad, learned counsels appearing for the petitioner, Shri Siddharth Singhal, learned counsel appearing for the second respondent and learned standing counsel appearing for the State-respondent.

2. For the sake of convenience, the facts set out in Writ-A No. 12102 of 2020 is being referred to for deciding both the petitions.

3. The facts, inter se, parties are not in dispute. The second respondent, Uttar

Pradesh Subordinate Service Selection Board, Lucknow1, issued an advertisement No. 03/2016, inviting application from eligible candidates for the post of Village Development Officer, 3133 posts were advertised. As per advertisement, eligible candidates were to appear for written examination, physical efficiency test, followed by interview. The candidates in ratio of 3:1 were to be called for interview i.e. three candidates per post. Petitioner qualified the written examination, physical efficiency test and appeared for interview. The Selection Board declared the final result for the post on 18 July 2018. The select list comprised of 2947 candidates, as against the notified 3133 vacancies. The Commission withheld the result of 116 candidates for several reasons, including, verification of their educational qualification and other documents. It appears that some of the candidates approached this Court in two petitions bearing Writ-A No. 18049 of 2019 (Vivek Kumar Srivastava and 4 others vs. State of U.P. and another) and Writ-A No. 18798 of 2019 (Avesh Kumar and 5 others vs. State of U.P. and another), which came to be disposed of on 26 November 2019, directing the Commission to consider the representation to prepare a revised list on account of 29 posts of the candidate securing marks next to the final cut off marks. It appears that the Commission declared a supplementary select list for 18 post on 26 June 2020. The petitioners found their names in the supplementary select list of the 18 candidates. It appears that Commission did not send the list of selected candidates to the concerned department for issuing appointment letters.

4. Aggrieved, by the conduct of the second respondent, Commission, petitioners have filed the instant writ petition seeking a direction in the nature of mandamus directing the second respondent, Commission to send the select list of the supplementary result, published on 26 June 2020, for the post of Village Development Officer (General Selection) Examination/2016, to the first respondent, Principal Secretary, Rural Development U.P., at Lucknow. It is further prayed that the first respondent be directed to issue appointment letter to the petitioners, pursuant to the recommendation of the Commission.

5. The Commission is supporting the case of the petitioners. Learned counsel for the second respondent, submits that against 3133 vacancies, select list in the first instance was declared for 2947 candidates, results of 116 candidates were withheld due to the pending verification pertaining to their documents and qualification. Thereafter, Commission cleared 98 candidates. In respect of 18 candidates, after enquiry and verification, their names was cleared by the Commission in its meeting dated 23 June 2020, and duly notified on the official website of the Commission. In other words, the select list of 18 candidates are as per merit and are eligible for appointment. The second respondent undertakes to forward their names to the Government.

6. The first respondent has filed counter affidavit sworn by the Joint Secretary, Rural Development, U.P., wherein, the facts have not been disputed but a stand has been taken that after declaration of the final result by the Commission on 6 August 2018, the Commission had no power or authority to have issued the supplementary select list as the process of selection came to an end. There is no provision for

declaration/publication of supplementary result or waiting list, hence, supplementary list of 18 candidates, including that of the petitioners declared by the Commission on 26 June 2020 is legally not acceptable.

7. Para-6 of the counter affidavit is extracted:

"That, it is further respectfully submitted that in compliance of order dated 13.07.2021, passed by this Hon'ble Court the Addl. Chief Secretary, Rural Development, U.P. Sashan filed his personal affidavit, stating therein that after publication of final select list of 2943 candidates, dated 06.08.2018 by the U.P. Subordinate Service Selection Commission said selection process came to an end and as such there is no such provision of declaration/publication of Supplementary result or waiting list hence the supplementary list of 18 candidates, declared by the U.P. Subordinate Service Selection Commission on 26.06.2020 is legally not acceptable. In this regard the answering deponent is also filing the copy of Office Memorandum No. 28/5/80-Ka-04-1999, Lucknow dated 15 November, 1999 issued by Personnel Department of State Government, whereby the State Government has banned on publication of waiting list and in view thereof the Supplementary result declared by the Commission legally not acceptable. For kind perusal of this Hon'ble Court a photo copy of Office Memorandum No. 28/5/80-Ka-04-1999, Lucknow dated 15 November, 1999 issued by Personnel Department of State Government is being filed herewith and marked as Annexure No. C.A.-1 to this affidavit."

8. In this backdrop, learned Additional Chief Standing Counsel submits that the petitioners are not entitled to seek appointment on the strength of the supplementary select list. There is no provision for preparation of waiting list. In other words, it is sought to be urged that the selection process culminated after the declaration of the select list by the Commission on 6 August 2018. Reliance has been placed on the decisions rendered in ***Secretary, Kerala Public Service Commission v. Sheeja P.R. and another2*** ***and Ajay Prakash Mishra and others v. State of U.P. and others3.***

9. Submissions fall for consideration.

10. The Commission has been constituted under the Uttar Pradesh Subordinate Services Selection Commission Act, 20144. Chapter-II of the Act provides for establishment of the Commission. Chapter-III provides for power and duties of the Commission and allocation of business. Section-15 confers upon the Commission powers and duties to prepare guidelines on the matter relating to the method of recruitment; to conduct examinations, hold interview and make selection of candidates; to select and invite experts and to appoint examiners for the purposes of selection; to perform such other duties and exercise such other powers as may be prescribed. Sub-section (2) of Section-15 mandates that the Commission in exercising the powers or performing the duties referred to in Sub section-(1), Commission shall be guided by such rules or regulations as may be made in this behalf. Section-15 reads thus:

15.(1) The Commission shall have the powers and duties -

(a) To prepare guidelines on mattes relating to the method of recruitment;

(b) To conduct examinations, hold interview and make selection of candidates;

(c) To select and invite experts and to appoint examiners for the purposes specified in clause (b);

(d) To perform such other duties and exercise such other powers as may be prescribed.

(2) In exercising the powers or performing the duties referred to in sub-section (1) the Commission shall be guided by such rules or regulations as may be made in this behalf.

11. Chapter -IV of Selection Commission Act provides for notification of vacancies and appointment. Section-17 mandates that the appointing authority shall determine and intimate to the Commission the number of vacancies to be filled through the Commission during the course of the year of recruitment; the vacancies shall be notified to the Commission in such manner as may be prescribed. Sub section-(2) of Section-18 provides that the Commission shall forward to the appointing authority a list of candidates who are found suitable and the appointing authority shall make appointments from the list so forwarded to it in the order mentioned therein. Section-17 and 18 are extracted:

17. (1) The appointing authority shall determine and intimate to the Commission the number of vacancies to be filled through the Commission during the course of the year of recruitment as also the number of the vacancies to be reserved for the candidates belonging to the Scheduled Castes and the Scheduled Tribes and other categories in accordance with the law for the time being in force in this behalf.

(2) The vacancies shall be notified to the Commission in such manner as may be prescribed.

18. (1) The Commission shall, as soon as possible after the intimation of vacancies under section 17, hold examination or interview or both and prepare in such manner as may be prescribed a list of the candidates who are found suitable.

(2) The list referred to in sub-section (1) shall be forwarded to the appointing authority and the appointing authority shall make appointments from the list so forwarded to it in the order mentioned therein.

12. The Government in exercise of the powers conferred by the proviso to Article-309 of the Constitution of India, framed the Uttar Pradesh Direct Recruitment To Group "C' Posts (Mode And Procedure) Rules, 2015. Rule-5 provides the mode of direct recruitment to Group "C' posts to be made through Commission. Rule-7 mandates the appointing authority to determine and intimate to the Commission in the prescribed Form, the number of vacancies to be filled during the course of the year of recruitment, as also the number of vacancies to be reserved for the various class of candidates. Rule-8 provides the procedure for direct recruitment, the syllabus, marks of written examination/interview and the rules relating thereof shall be such as prescribed by the Commission from time to time with the approval of the Government. Sub rule-(2) of Rule-8 provides the procedure for

direct recruitment to be made on the basis of written examination and interview. Clause-(iv) of sub rule-(2) of Rule-8 mandates that the Commission shall prepare a list of candidates in order of their proficiency as disclosed by the aggregate of marks obtained by each candidate at the written examination and interview and recommend such number of candidates as they consider fit for appointment. Rule 7 and 8 are extracted:

"7. The appointing authority shall determine and intimate to the Commission, in the prescribed Requisition Form, the number of vacancies to be filled during the course of the year of recruitment, as also the number of vacancies to be reserved for the candidates belonging to the Scheduled Castes, Scheduled Tribes and other categories under rule 6.

8.(1) The procedure for direct recruitment, the syllabus, marks of written examination/interview and the rules relating thereof shall be such as prescribed by the Commission from time to time with the approval of the Government.

(2) When, in accordance with the provisions of sub-rule (1) direct recruitment is to made on the basis of written examination and interview, the following procedure shall be followed:-

(i) Application for permission to appear in the competitiveexamination shall be invited by the Commission in the form published in the advertisement issued by the Commission.

(ii) No candidate shall be admitted to the examination unless he holds a certificate of admission, issued by the Commission.

(iii) After the results of the written examination have been received and tabulated, the Commission shall, having regard to the need for securing due representation of the candidates belonging to the Scheduled Castes, Scheduled Tribes and others under rule 6, summon for interview such number of candidates as, on the result of the written examination, have come up to the standard fixed by the Commission in this respect. The marks awarded to each candidate at the interview shall be added to the marks obtained by him in the written examination.

(iv) The Commission shall prepare a list of candidates in order of their proficiency as disclosed by the aggregate of mark obtained by each candidate at the written examination and interview and recommend such number of candidates as they consider fit for appointment. If two or more candidates obtain equal marks in the aggregate, the name of the candidate obtaining higher marks in the written examination shall be placed higher in the list. If two or more candidates obtain equal marks in the written examination also, the name of the candidate senior in age shall be placed higher in the list. The Commission shall forward the list to the appointing authority.

13. The Guidelines adopted by the Commission in exercise of powers under Section 15 of the Selection Commission Act, for the purposes of the examination, written test, proficiency/physical test and interview that govern the selection process of the posts. Guideline-16 provides for selection procedure. The candidates in ratio of 3:1 are to be invited for interview on qualifying written examination. Guideline-21 provides for preparing the merit list on the strength of the marks obtained in the

written examination and proficiency test. Guideline-22 provides for interview. Guideline-23 mandates that after verification of the document and upon satisfying itself, the Commission, thereafter, would declare the select list. Guideline-24 mandates that the select list shall be notified by the Commission and the Secretary of the Commission shall pursue/monitor as to whether the appointment letter to all the candidates notified in the select list has been issued. Paragraphs 16 (1), 21, 22, 23 & 24 of the Guidelines are extracted:

16- **चयन प्रक्रिया के सम्बन्ध में कुछ विशिष्ट मामलों के बारे में मार्गदर्शक सिद्धान्त :–**

(1) सामान्य रूप से लिखित परीक्षा के परिणाम के आधार पर साक्षात्कार में बुलाये जाने वाले अभ्यर्थियों की संख्या उपलब्ध रिक्त पदों की संख्या का तीन गुना होगी। लेकिन यदि रिक्त पदों की संख्या अत्यधिक है, तो आयोग में विचार विमर्श के उपरान्त साक्षात्कार में बुलाये जाने वाले अभ्यर्थियों की संख्या में परिवर्तन किया जा सकता है।

21. **ऐसे मामलों में जब चयन लिखित परीक्षा तथा साक्षात्कार दोनों के आाधार पर किया जाना है:–**

प्रत्येक दिन साक्षात्कार के पश्चात प्रत्येक साक्षातकार बोर्ड के अध्यक्ष द्वारा अंकतालिका की सूची (जिसकी केवल एक ही प्रति बनायी जायेगी) सचिव को सील्ड लिफाफे में उपलब्ध करायी जायेगी। गोपन अनुभाग में इन सूचियों तथा लिखित परीक्षा के परिणाम के आधार पर सेवा नियमावली के प्राविधानों के अनुसार श्रेष्ठता सूची तैयार कर यथा सम्भव उसी कार्यदिवस को आयोग की बैठक आयोजित कर अन्तिम परिणाम पर यथानियम/विनियम, अध्यक्ष/आयोग का अनुमोदन प्राप्त किया जायेगा।

22. साक्षात्कार के पूर्व यदि कोई अथ्यर्थी शैक्षिक योग्यता अथवा अनुभव से सम्बन्धित मूल प्रमाण्–पत्र, परीक्षण हेतु प्रस्तुत नहीं कर पाते हैं तो ऐसे अभ्यर्थियों का साक्षात्कार औपबन्धिक रूप से लिया जा सकता है, परन्तु इससे पूर्व सम्बन्धित साक्षात्कार बोर्ड के अध्यक्ष का अनुमोदन प्राप्त करना आवश्यक होगा। ऐसे अभ्यथियों से यह लिखित रूप में लिया जाना चाहिए कि वह अपेक्षित मूल प्रमाण–पत्र साक्षात्कार की तिथि से निर्धारित अवधि (यथासम्भव 15 दिन) में प्रस्तुत कर देंगे अन्यथा उनका अभ्यर्थन स्वतः समाप्त समझा जायेगा।

23. प्रत्येक मामले में परीक्षा परिणाम घोषित करने हेतु आयोग की संस्तुति प्राप्त करने से पूर्व सफल अभ्यर्थियों के अभ्यर्थन के सम्बन्ध में कार्यालय द्वारा पुनः सूक्ष्मता से जांच की जायेगी।

24. चयन सम्बन्धी संस्तुतियां संबंधित विभाग/विभागों को प्रेषित करने के पश्चात कार्यालय/सचिव का यह कर्तव्य होगा कि वे प्रकरण का अनुश्रवण तब तक करते रहें जब तक संस्तुत किये गये अभ्यर्थियों द्वारा संबंधित पद पर कार्यभार ग्रहण न कर लिया जाये। इस संबंध में द्विवार्षिक मूल्यांकन रिपोर्ट भी प्राप्त की जायेगी। 5

14. I have perused and carefully gone through the provisions of the Act, Rules framed thereunder, and the Guidelines, with the assistance of the learned counsel for the parties.

15. The Rules and Guidelines nowhere provide for preparation of wait list. The Commission under the Rules and Guidelines is mandated to recommend a select list for the posts notified by the Government to the Commission. In other words, in the facts of the instant case, 3133 post of Village Development Officer (Group "C') was sent by the Government to the Commission for initiating the process of selection. The Commission after following the selection procedure recommended 2947 candidates, the result of 116 candidates was withhold pending verification of the documents. Thereafter, 98 were sent to the Government, finally,

the list of remaining 18 candidates were duly recommended and notified by the Commission on 26 June 2020. Prior to that it is informed that 70 candidates under the ex-serviceman quota were notified. The total recommended candidates, thus, were equivalent to the notified post 3133 (2947+116+70). The State Government has declined to accept the select list of the candidates notified by the Commission on 26 June 2020, for the reason that the Commission lacks power and authority to issue any supplementary select list. According to the State Government, selection process came to an end after the Commission had notified the select list of 2947 candidates. Reliance has also been placed on the notification dated 15 November 1999 (Annexure CA-1), wherein, it has been provided that there is no provision for preparation of waiting list. The notification pertains to the Public Service Commission, U.P. On specific query, learned counsel appearing for the State fairly submits that the said notification would not apply to the Commission, which is governed under a separate statute.

16. In any case, it is not in dispute between the parties that there is no provision under the Rules/Guidelines for preparation of waiting list. In other words, the Commission is required to prepare a select list of candidates against the vacancies notified by the State Government to the Commission. In the instant case, 3133 vacancies were notified, though the select list was declared/notified intermittently on three occasions pending verification of the credentials of the withheld candidates. It is not the case of the State that they have declined appointment to all such candidates notified by the Commission after declaration of the select list of 2947 candidates. To put it in other words that the subsequent supplementary select list of withheld candidates was honoured. The final supplementary list of 18 candidates is a part of the withheld candidates to have been cleared by the Commission subsequently. The 18 candidates are part of the same select list and not beyond the notified vacancy. Their result were notified after verification as was the case of other withheld candidates. The State cannot discriminate against the petitioners by taking a plea that the Commission has no power to declare a supplementary select list.

17. Learned counsel appearing for the State is unable to show either from the Rules or Guidelines that there is any such prohibition restraining the Commission from issuing select list in respect of the post in first instance alone. Thereafter, the Commission, is denuded of its power to process the withheld result of otherwise selected candidates pending verification. The withheld result is not a separate exercise undertaken by the Commission but a part of the same selection process. Merely for the reason that verification was pending would not mean that the withheld candidates were not in the select list declared by the Commission on 18 July 2018.

18. The expression, "**withheld**', would mean, "refuse to give (something that is due or desired by another)'; "to hold back; to keep back,' and, "**supplementary**' -- "the result has not been revealed or published.' "Once certain criteria are fulfilled or certain investigation/enquiry are completed.'6

19. The objection of the State lacks merit for the reasons that it is not the case of

the State Government that the candidates recommended for the post are otherwise not qualified or lack merit. It is admitted that the Commission had withheld result of 116 candidates as their credentials pertaining to their qualification and other documents were under verification. As and when the verification was concluded to the satisfaction of the Commission the supplementary result was declared. Guideline 23 clearly mandates that the office shall minutely re-examine the candidature of each successful candidates before obtaining the approval of the Commission. Guideline 22 confers right upon the Commission to take interview of such candidates "provisionally' if a candidate is unable to produce original certificates relating to qualification. To put it differently the Commission has a right to withhold the result pending verification of the original certificate relating to qualification. It is also not the case of the State Government that the candidates recommended by the Commission exceed the total number of vacancies notified i.e. 3133. It is also not a case of exhaustion of the select list of recommended candidates but preparation and declaration of the complete select list by the Commission of the notified vacancy pursuant to the same advertisement. The authorities relied upon by the State counsel would not apply to the facts of the instant case. In **Sheeja P.R.** (supra), the respondent/petitioner, therein, was seeking appointment as his name featured in the supplementary list of reserved candidates prepared by the Commission after exhaustion of the main select list. The Supreme Court held that when the main (select) list exhausted or expired, supplementary list cannot be allowed to operate. In the case of **Ajay Prakash Mishra** (supra), the petitioners, therein, were seeking appointment on vacant posts that could not be filled as some of the aspirant candidates were found unfit in proficiency physical test or on verification of their documents. The court was of the view that since in the rules there was no provision of wait list, the petitioners cannot claim as a matter of right on the vacant post.

20. In the case at hand, the proposition of law noted in the cited decisions by the State counsel would not apply. It is not the case of the petitioners and/or the Commission that a wait list was prepared. It is further not the case of the Commission and/or the State that the petitioners are seeking appointment upon exhaustion of the select list of 3133 posts. As per the Commission, 18 candidates are the remaining candidates of the 116 withheld result. Their results were declared after verification of their documents and were otherwise found fit on merit.

21. Learned counsel for the second respondent informs that the names of the petitioners have been duly forwarded by the Commission on 18 December 2020, it is urged that it is for the concerned department of the State Government to issue appointment letter to the petitioners.

22. Having due regard to the facts and circumstances of the case, writ petitions are allowed directing the first respondent, Principal Secretary, Rural Development U.P., at Lucknow, to issue appointment letter to the petitioners pursuant to the recommendation dated 26 June 2020 of the Commission for the post of Village Development Officer. It is expected that the appointment letters shall be duly issued within four weeks from the date of filing of this order.

23. No costs.

(2021)09ILR A1193
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.09.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Single No. 17450 of of 2020

Dr. Bharat Sah ...Petitioner
Versus
S.G.P.G.I. of Medical Sciences, Lko & Ors. ...Respondents

Counsel for the Petitioner:
Sunil Sharma, Kusharga Sah

Counsel for the Respondents:
A N Trivedi

A. Service Law – Grant and extension of lien - Voluntary retirement - SGPGIMS Act, 1983- Section 11; Schedule I of First Regulations 2011 read with the Order dated 02.07.2019; General Rules of SGPGI: Regulation 95; Rule 7 of 1999 Rules; Constitution of India: Article 14, 16, 21 - The petitioner was granted extension of service for three years w.e.f. 16.1.2019 for holding post of Campus Director, NIFT by the President, SGPGI subject to the approval of the Governing Body. However, the Governing Body has refused such extension. The petitioner in a bonafide manner continued on the post of Campus Director, NIFT, Raebareli legitimately expecting that since the President of SGPGI is also President / Chairman of the Governing Body of SGPGI, therefore, the said decision of the President would be upheld by the Governing Body. **There is no doubt that the decision of the Governing Body would be binding over the opinion or permission of an individual member including the Chairman / President of the statutory body but at the same time it may not be said to be any lapse on the part of the petitioner to continue on the post of Campus Director, NIFT pursuant to the permission being granted by the President for holding the post for further three years w.e.f. 16.1.2019.** Therefore, the conduct of the petitioner continuing on the post of Campus Director, NIFT, Raebareli is bona fide conduct in view of the facts and circumstances of the present case. (Para 41)

B. The proceedings of departmental inquiry start when the charge-sheet is provided to the incumbent seeking his explanation / defense reply. The rationale behind it is very clear that the disciplinary authority can take any decision on the conduct of an employee or can absolve him considering his / her bona fide, or could pass any alternative or substitute order instead of issuing charge-sheet for conducting full fledged disciplinary inquiry. However, as soon as the charge-sheet is provided to the incumbent indicating the charges then it would be the very first stage of initiation of departmental inquiry. (Para 44)

Therefore, the impugned order dated 23.4.2020 could not be treated as if the departmental inquiry has been initiated against the petitioner. It was, at the best, a warning to the effect that if the petitioner does not obey the direction of the competent authority the departmental inquiry against the petitioner for awarding major punishment may likely to be initiated. (Para 45)

The letter dated 9.10.2020 provides that the departmental inquiry has been initiated against the petitioner and inquiry officer has been appointed with the direction to conclude the departmental inquiry within a period of two months. However, by that time no charge-sheet was provided to the petitioner and before this, the petitioner had already submitted his application dated 05.05.2020 for seeking voluntary retirement. (Para 46)

C. Voluntary retirement - General Rules of SGPGI: Regulation 95 - The petitioner submitted an application for voluntary retirement on 5.5.2020 when no departmental inquiry was pending against him. Therefore, the petitioner was fulfilling both the conditions of concerning general rule for accepting voluntary retirement inasmuch as the petitioner has already attained the required age and has completed the requisite period of service and no

disciplinary inquiry was initiated or pending against the petitioner at that point of time. (Para 42)

The departmental inquiry can be said to have been initiated or pending w.e.f. the date when the charge-sheet is issued against an employee and there is no doubt that on 5.5.2020 no departmental inquiry / disciplinary proceedings was initiated or pending against the petitioner. The petitioner was being forced to submit his joining on such post which has been declared as 'Dying Cadre' and none was posted on such post after 15.1.2014 when the petitioner submitted his joining at NIFT, Raebareli nor any person would be holding such post after 3.11.2023, the date of superannuation of the petitioner. (Para 48)

Writ petition allowed. (E-4)

Precedent cited:

1. CCE Vs Rajasthan State Chemical Work, (1991) 4 SCC 473 (Para 32)

2. Aditya Swarup Pandey Vs Srawasthi Gramin Bank & ors., (2019) (37) LCD 2327 (Para 34)

Precedent followed:

1. UCO Bank & anr. Vs Rajinder Lal Capoor reported in (2007) 6 SCC 694 (Para 48)

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Sunil Sharma assisted by Sri Kushagra Sah, learned counsel for the petitioner and Sri Abhinav Trivedi, learned counsel for the S.G.P.G.I.

By means of this petition the petitioner has prayed following relief :

"(i) Issue a writ of certiorari setting aside the impugned order dated 04.07.2020 and 23.04.2020 passed by respondent No.2, and the order dated 17.04.2020 passed by the respondent No.4. [as contained in annexure no. 1 to 3]

(ii) Issue a writ order or direction in the nature of Mandamus to the Respondents commanding them to consider the Petitioner's application dated 05.05.2020 for voluntary retirement afresh as per SGPGI Regulations, within the stipulated time and after its acceptance, the consequential service benefits admissible to the petitioner under rules be also released thereafter expeditiously.

(iii) Issue a writ order or direction in the nature of Mandamus restraining the respondents from compelling the petitioner to join back in SGPGI, and to take any disciplinary proceedings against the petitioner.

(iv) Issue any other suitable writ, order or direction as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case in favour of the petitioner alongwith the cost of the petition."

2. The brief facts of the case are that the petitioner was appointed on the post of Assistant Superintendent (House Keeping) at Sanjay Gandhi Post Graduate Institute of Medical Science, Lucknow (hereinafter referred to as S.G.P.G.I.) on 28.7.1988. The petitioner was subsequently promoted on the post of Associate Superintendent (Non-Medical) in S.G.P.G.I. in 2013.

3. The petitioner applied for the post of Campus Director, National Institute of Fashion Technology, Raebareli, Ministry of Textile, Government of India (hereinafter referred to as NIFT) through proper channel for an open selection. No objection certificate has been issued by the competent authority of S.G.P.G.I. on 29.8.2013 in favour of the petitioner to apply on the post of Director, NIFT.

4. The petitioner thereafter appeared in interview and was subsequently selected and was offered appointment on the post of Campus Director, NIFT on contract basis vide letter dated 25.11.2013 for an initial period of one year from the date of assuming charge with the condition that on satisfactory performance during the period of probation, the period of contract for a further period of four years may be extended. Therefore, it was a contract appointment of five years.

5. On receipt of the aforesaid order dated 25.11.2013 the petitioner applied for grant of lien to his post of Associate Superintendent (Non-Medical) S.G.P.G.I. and the Chief Administrative Officer with the approval of President, S.G.P.G.I., Lucknow issued office order dated 13.1.2014 allowing the petitioner to maintain lien on his post for a period of two years.

6. Thereafter, the petitioner joined at NIFT as Campus Director on 15.1.2014.

7. However, the petitioner was informed by the Chief Administrative Officer, S.G.P.G.I. vide letter dated 25.1.2016 that on the petitioner's request of extension of lien of his post of Associate Superintendent (Non-Medical), S.G.P.G.I. such lien has been granted for a period of three years w.e.f. 16.1.2016 by the President, S.G.P.G.I.. Therefore, the tenure of the petitioner as Campus Director, NIFT was expiring on 14.1.2019. The Board of Governors, NIFT in its 44th meeting took a decision to extend the term of the petitioner for a further period of three years w.e.f. 15.1.2019 and the said extension was conveyed to the petitioner vide order dated 10.12.2018.

8. The petitioner thereafter moved an application on 12.12.2018 to the Director, S.G.P.G.I. requesting for further extension of his lien on the post of Associate Superintendent (Non-Medical) for a period of three years w.e.f. 16.1.2019. The petitioner was informed by the Chief Administrative Officer vide letter dated 3.5.2019 that the President, S.G.P.G.I. has granted permission to the petitioner for extension of service on his post of Associate Superintendent (Non-Medical), S.G.P.G.I. for three years w.e.f. 16.1.2019 for holding the post of Campus Director, NIFT. However, in this order it has been indicated that this order is being issued subject to the approval of the Governing Body.

9. Thereafter, the petitioner was informed on 2.7.2019 that the office order dated 3.5.2019 is being amended to the extent that the extension of lien period of the petitioner for a further period of three years under the special circumstances will be put up before the forthcoming Governing Body Meeting for decision. It was further informed that if the approval is granted by the Governing Body then this case will not be treated as precedent. Pursuant to the extension of lien by the opposite parties the petitioner continued with NIFT.

10. On 17.4.2020 the 91th Governing Body Meeting took place wherein at Agenda No. 91.17 was ' *Extension of lien of Mr. Bharat Sah, Associate Superintendent for another three years'* wherein it was categorically mentioned that the Agenda is for appraisal and post facto approval. The Governing Body in the same meeting decided that lien cannot be granted to the petitioner and passed the impugned decision.

11. On 23.4.2020 the respondent no. 3, the Director, S.G.P.G.I. issued a letter to the petitioner on his official e-mail ID of

Director, NIFT whereby the petitioner was informed that his case for extension of lien was put up before the Governing Body i.e. opposite party no. 4 at its meeting dated 17.4.2020 and after due deliberation it has been decided that the lien cannot be granted to the petitioner and he should immediately join at S.G.P.G.I. latest by 30.4.2020 otherwise disciplinary proceedings will be initiated against him.

12. As per learned counsel for the petitioner since the petitioner was discharging his duties of Campus Director at NIFT, therefore, he could have, all of sudden, not given up his duties at NIFT for submitting his joining at S.G.P.G.I. The petitioner has, however, replied the aforesaid letter on 28.4.2020 to the respondent no. 3 informing his inability to join at S.G.P.G.I. in such a short notice, therefore, requested some time to rejoin at S.G.P.G.I. by 15.6.2020. When the petitioner did not receive any response of his letter dated 28.4.2020, under the compelling circumstances he submitted a letter dated 5.5.2020 before the respondent no. 3 seeking his voluntary retirement from service w.e.f. 5.5.2020. When the petitioner did not receive any response he again preferred letter dated 9.6.2020 pressing his application for voluntary retirement and for making payment of his post retiral dues.

13. On 7.7.2020 the petitioner received a letter dated 4.7.2020 wherein he was informed that his request dated 5.5.2020 of voluntary retirement from service has been rejected by the President, S.G.P.G.I. and the direction has been issued to submit his joining at S.G.P.G.I. forthwith.

14. Learned counsel for the petitioner has submitted that though the petitioner fulfills all requisite conditions for grant of voluntary retirement but no reason has been assigned while rejecting his request.

15. Therefore, the petitioner has prayed that this Court may kindly be pleased to quash the order dated 17.4.2020 passed by the respondent no. 4 (Annexure no. 3 to the writ petition), 23.4.2020 and 4.7.2020 both passed by respondent no. 2 & annexed as Annexure nos. 2 & 1 respectively. He has also prayed that the opposite parties be directed to consider the petitioner's application dated 5.5.2020 as fresh as per S.G.P.G.I. Regulations and the petitioner be paid all consequential service benefits. It has also been prayed that the authorities of S.G.P.G.I. be directed not to compel the petitioner to join back at S.G.P.G.I. and no disciplinary proceedings be initiated / conducted / concluded against him.

16. Per contra, Sri A.N. Trivedi, learned counsel for the S.G.P.G.I. has submitted that when a statutorily constituted body is entrusted with the power to take a decision in respect of a particular matter then a collective decision of statutory body is binding over the opinion or permission of an individual member, which is included even the Chairman / President of the statutory body who is required to chair the meeting.

17. Sri Trivedi has submitted that in terms of Section 11 of SGPGIMS Act of 1983 the Chief Secretary of the Government of U.P, is an ex officio President of the Institute who has been bestowed with certain specified functions. Section 11 of the Act of 1983 is extracted here under:

11(1) The Chief Secretary to the Government of UP shall be President of the Institute and shall also be Chairman of the Governing Body.

(2) The President shall, when present, preside at the Meetings of the Institute and shall have the following powers and duties, namely:

a) to ensure that the administration of the affairs of the Institute are conducted in accordance with this Act and the Rules and Regulations made there under and to take such steps: as he deems fit for the achievement of this object.

(b) to call for such information or records relating to the

administration of the affairs of the Institute as he thinks fit.

(c) to exercise such other powers and perform such other duties as are assigned to him by this Act or as may be prescribed by Rules or laid down in the Regulations."

18. From perusal of the provision, it is apparent that the President is entitled to discharge certain statutory functions. However, in terms of provisions contained under Sl. No.5 in Schedule I of First Regulations 2011, the sole domain of considering the extension of lien beyond Two Years has been vested with the Governing Body of SGPGI.

19. In terms of the communication dated 02.07.2019, the Petitioner's request was placed before the Governing Body in its Meeting dated 16/17.04.2020 and vide, Agenda Item No.91.17, the Petitioner's request for extending his lien was rejected with direction to join by 30.04.2020 otherwise Disciplinary Proceedings shall be initiated. The decision of the Governing Body was communicated to the Petitioner, vide Letter dated 23.04.2020. The Resolution of the Governing Body dated 16/17.04.2020 against Agenda Item No.91.17 is extracted here under:

Agenda Item No.	Particulars	Deliberations & Resolutions
91.17	*Extension of lien of Mr. Bharat Shah, Associate Superintendent for another 3 years*	*"The Governing Body was apprised that Mr. Bharat Shah Associate Superintendent had been relieved wef 15.01. 2014 (forenoon) to join on the post of Campus Director at National Institute of Fashion Technology (NIFT), Ministry of Textiles, Government of India Rae-bareli on contract for which lien for the period of 02 years had been allowed after approval of President and 81" Governing Body dated 27.06.2014*

		After completion of 02 years of lien period Mr. Bharat Shah had again requested to extend the lien for another 03 years w.ef. 16.01.2016.The matter was placed before the 85 Governing Body dated 10.03.2016 and after due deliberation Governing Body had approved the extension of lien of Mr. Bharat Shah for another 03 years i.e. upto 15.01.2019. Thus he had been given the lien of 05 years in totality. *Mr Bharat Shah had again requested for extension of lien for another period of 03 years on expiry on 15.01.2019 which the President had directed that the proposal should be placed before the Governing Body for approval.* *The Governing Body deliberated on the matter and decided this lien cannot be granted and he should join back latest by 30th April 2020 otherwise disciplinary proceeding will be initiated against him for termination"* *Action: Chief Medical Superintendent*

20. The Petitioner, vide Letter dated 28.04.2020 requested for extending the joining time uptil 15.06.2020 and in response thereof, the Petitioner was required to join back with immediate effect vide letter dated 08.05.2020. However, vide another Letter dated 05.05.2020 the

Petitioner requested for Voluntary Retirement.

21. The Institute, vide letter dated 08.05.2020 directed the petitioner to join at SGPGI with immediate effect otherwise the disciplinary proceedings would be initiated in terms of the Resolution of the Governing Body dated 16/17.04.2020. Eventually, vide Order dated 04.07.2020 the Petitioner was communicated with the decision of the Competent Authority with regard to rejection of his request for Voluntary Retirement as the 'process' of initiating disciplinary proceedings have already begun.

22. Feeling aggrieved with the decision of the Governing Body dated 16/17.04.2020, its communicated dated 23.04.2020 and the rejection of his request for Voluntary Retirement dated 04.07.2020, the aforesaid Writ Petition has been filed with a further request for commanding the Respondents to consider the Petitioner's request dated 05.05.2020 with regard to Voluntary Retirement which has already been rejected.

23. The petitioner has not challenged the Office Order dated 09.10.2020, vide which the disciplinary proceedings have been initiated by suitably amending the Writ Petition. However, an Application for Interim Relief dated 09.11.2020 has been filed inter-alia praying for staying the impugned orders dated 04.07.2020 and 23.04.2020 passed by respondent No.2.

24. Sri Trivedi has further submitted that provisions contained at Sl. No. 5 of Schedule I of First Regulations 2011 empowers Governing Body of SGPGI to consider the extension of lien of an Employee beyond Two years. Section 11 of the SGPGI Act of 1983 provides for limited power of the President of Governing Body. The alleged extension of Three Years with effect from 16.01.2019, vide Office Order dated 03.05.2019 issued by the Chief Administrative Officer of SGPGI as recorded by the Petitioner is misconceived in terms of its amendment of the clarification, vide Order dated 02.07.2019 whereby the Office Order dated 03.05.2019 has been amended to the effect that instead of granting permission for extension of service of the Petitioner for Three Years with effect from 16.01.2019 is substituted with "**Placing the Petitioner's request before the Competent Authority i.e. the Governing Body".**

25. In terms of Schedule I of First Regulations 2011 read with the Order dated 02.07.2019, the Governing Body having resolved not to extend the Petitioner's lien and rather directed him to join the Institute by 30.04.2020 failing which the disciplinary proceedings would be initiated, the Petitioner was under obligation to comply the directions of his Employer.

26. The Petitioner has failed to substantiate as to how the Resolution of the Governing Body dated 16/17.04.2020 is allegedly erroneous or arbitrary, either a perusal thereof would indicate that the issue of the Petitioner's request for extending his lien for Three Years beyond 16.01.2019 was deliberated after considering the President's Note and consequently a conscious decision was taken for not extending the Petitioner's lien.

27. The continuation of Petitioner's lien with effect from 16.01.2019 up till 30.04.2020 i.e. when he was required to submit his joining, the Petitioner has neither been penalized nor any adverse

decision has been taken for the period when his lien had expired i.e. 16.01.2019 up till the date when he was required to submit his joining at SGPGI i.e. 30.04.2020.

28. The Resolution of the Governing Body dated 16/17.04.2020 against Agenda Item No.91.17 with regard to initiation of disciplinary proceedings of termination of his service in case he fails to join his services on 30.04.2020 are not conclusive as the same is dependent upon the Enquiry Report and the decision of the Disciplinary Authority. Even otherwise, the disciplinary proceedings initiated, vide Office Order dated 09.04.2020 having not been challenged in the main Writ Petition, the same could not be the subject matter of the dispute raised by means of the instant Writ Petition. Accordingly, it is apparent that the Resolution of Respondent No.4 1.e. the Governing Body of SGPGI is neither arbitrary nor mechanical but the same have been passed with total application of mind strictly in accordance with Rules and Regulations of the SGPGI.

29. The General Rule for accepting the Voluntary Retirement is basically in two folds viz. (a) the incumbent having attained a particular age or have completed the requisite period of service; AND (b) no disciplinary proceedings having been initiated or pending.

30. The General Rule of Law would not be applicable on the Petitioner who is governed by Service Regulations of SGPGI namely First Regulations of 2011 and Regulation 95 whereof, categorically provides that the request for Voluntary Retirement can be rejected if **disciplinary proceeding is pending or <u>in process</u> against the employee.** Regulation 95 reads as under :

95(1) *"A faculty member, officer or employee may seek voluntary retirement by giving notice of three months to the appointing authority after attaining the age of fifty years or after completing a qualifying service of twenty years;*

Provided that the appointing authority may refuse such request for voluntary retirement within the period of notice ***if a disciplinary proceeding is pending or in process against the employee.***

31. According to Oxford Dictionary, the word "Process" has been defined as "a continuous and regular action or succession of actions taking place or carried on in a definite manner and leaving to accomplishment of some results". The synonym of the word "succession" is "sequence".

32. The Hon'ble Supreme Court, although in case involving the question of process of manufacturing pertaining the revenue of the Government (Excise) in the case CCE Vs Rajasthan State Chemical Work, reported (1991) 4 SCC 473; has held that the "*Process" include any activity or operation which is an essential requirement and is so related to the further operation for the end result would also be a process....."*

33. The Petitioner's reliance on the decision of the SGPGI with regard to accepting the resignation of various Doctors in the recent past, itself cannot be a ground to maintain the instant Writ Petition as request of Voluntary Retirement of every Employee/ Officer is to be considered on its peculiar facts and circumstances.

34. There is a conscious decision of the Statutory Authority i.e. the Governing Body of SGPGI for rejecting the Petitioner's request for extension of his lien ***after due deliberations*** and after considering the entire facts and circumstances including the note of then President of the Governing Body, the Petitioner's contention that the same is non speaking is patently misconceived as in terms of the Judgment of this Hon'ble Court in the case of ***Aditya Swarup Pandey Vs Srawasthi Gramin Bank and Others reported in (2019) (37) LCD 232***7 the reasoning of every individual member is not to be necessarily reproduced in the decision of a Statutory Body Corporate.

35. It is further no more res-integra that when a decision has to be taken by a Statutory Body consisting of various Members, any opinion/ approval/permission of an individual member which includes the Chairman/ President of the Statutory Body without approval of the Statutory Body i.e. the Governing Body of S.G.P.G.I. as a whole Body Corporate would not vest any right on an employee. Further, the notings are mere expression of opinion of an individual and shall not vest any right on the incumbent.

36. While replying the aforesaid contention of Sri A.N. Trivedi, Sri Sunil Sharma has reiterated his earlier submissions and further submitted that, however, the disciplinary proceedings against the petitioner has been initiated but no charge-sheet has been issued and the disciplinary proceedings can only be said to be pending on the service of charge-sheet. Therefore, in the present case it may not be presumed that any departmental proceeding is pending against the petitioner. Therefore, Sri Sunil Sharma has submitted that the impugned orders are patently illegal, arbitrary and uncalled for and the same are liable to be set aside.

37. Having heard the learned counsel for the parties and perused the material on record.

38. One of the questions before the Court is that as to whether if any decision is taken by the Chairman / President of the Statutory Body as an individual capacity and pursuant to that decision if the employee acts upon further and later on if such decision is not accepted by the statutory body the conduct of an employee acting upon the decision of an individual authority would be a mis-conduct or a bona fide act?

39. Further, as to whether the information provided to the employee that if he would not follow the direction of the superior authority the departmental inquiry for awarding major punishment would be initiated may be treated as initiation of departmental inquiry or the departmental inquiry is said to have been initiated after service of charge-sheet upon the incumbent?

40. Further more, as to whether the initiating the departmental inquiry and appointing the inquiry officer directing him to conclude the departmental inquiry within stipulated time, however, without issuing the charge-sheet, after the application of the petitioner seeking voluntary retirement may be treated as bar in view of the Regulation 95 of the General Rules of the SGPGI for accepting the voluntary retirement in the light of twin conditions of such Regulation viz.

(a) the incumbent having attained the particular age or having completed the

requisite period of service i.e. 20 years; and

(b) no disciplinary proceedings having been initiated or pending.

41. There is no quarrel on the point that the petitioner was granted extension of service for three years w.e.f. 16.1.2019 for holding post of Campus Director, NIFT by the President, SGPGI subject to the approval of the Governing Body. However, the Governing Body has refused such extension. The petitioner in a bonafide manner continued on the post of Campus Director, NIFT, Raebareli legitimately expecting that since the President of SGPGI is also President / Chairman of the Governing Body of SGPGI, therefore, the said decision of the President would be upheld by the Governing Body. There is no doubt that the decision of the Governing Body would be binding over the opinion or permission of an individual member including the Chairman / President of the statutory body but at the same time it may not be said to be any lapse on the part of the petitioner to continue on the post of Campus Director, NIFT pursuant to the permission being granted by the President for holding the post for further three years w.e.f. 16.1.2019. Therefore, the conduct of the petitioner continuing on the post of Campus Director, NIFT, Raebareli is bona fide conduct in view of the facts and circumstances of the present case.

42. Admittedly, the petitioner submitted an application for voluntary retirement on 5.5.2020 when no departmental inquiry was pending against him. Therefore, the petitioner was fulfilling both the conditions of concerning general rule for accepting voluntary retirement inasmuch as the petitioner has already attained the required age and has completed the requisite period of service and no disciplinary inquiry was initiated or pending against the petitioner at that point of time.

43. As a matter of fact, the departmental inquiry can be said to have been initiated against the petitioner vide office order dated 9.10.2020 (Annexure C.A.-1 to the counter affidavit dated 11.11.2020) which provides that the departmental inquiry is being initiated against the petitioner under Rule 7 of 1999 Rules appointing the inquiry officer with the direction that the said inquiry be concluded within a period of two months. The impugned order dated 23.4.2020 (Annexure no. 2 to the writ petition) is a sort of warning to the effect that if the petitioner does not submit his joining at SGPGI on or before 30.4.2020 the departmental inquiry for awarding major punishment would be initiated against him.

44. The law is trite on the point that the proceedings of departmental inquiry starts when the charge-sheet is provided to the incumbent seeking his explanation / defense reply. The rationale behind it is very clear that the disciplinary authority can take any decision on the conduct of an employee or can absolve him considering his / her bona fide, or could pass any alternative or substitute order in stead of issuing charge-sheet for conducting full fledged disciplinary inquiry. However, as soon as the charge-sheet is provided to the incumbent indicating the charges then it would be the very first stage of initiation of departmental inquiry.

45. Therefore, the impugned order dated 23.4.2020 (Annexure no. 2) could not be treated as if the departmental inquiry has

been initiated against the petitioner. It was, at the best, a warning to the effect that if the petitioner does not obey the direction of the competent authority the departmental inquiry against the petitioner for awarding major punishment may likely to be initiated. Therefore, the said letter may not be treated that the departmental inquiry was initiated against the petitioner and in the meantime the petitioner had submitted his application dated 5.5.2020 for seeking voluntary retirement. Therefore, his case was fit to accept the voluntary retirement in terms of Regulation 95 of General Rules of SGPGI.

46. Besides, the letter dated 9.10.2020 (Annexure no. C.A.-1 to the counter affidavit dated 11.11.2020) is providing that the departmental inquiry has been initiated against the petitioner and inquiry officer has been appointed with the direction to conclude the departmental inquiry within a period of two months. However, by that time no charge-sheet was provided to the petitioner. The said office order may also not to be treated as initiation of departmental inquiry but if the intention of the competent authority is considered to the effect that the authority has made up its mind to initiate the departmental inquiry against the petitioner appointing inquiry officer, even then the petitioner had already submitted his application dated 05.05.2020 for seeking voluntary retirement. Therefore, there was no legal impediment with the disciplinary authority not to accept the application of the petitioner dated 5.5.2020 seeking voluntary retirement in terms of Regulation 95 of General Rules of SGPGI and rejecting the said request of the petitioner on the pretext that the departmental inquiry against the petitioner was initiated, is per se illegal.

47. During the course of the arguments, I have considered one relevant aspect which has been indicated in para 33 of the writ petition whereby it has been categorically indicated that the post of the petitioner i.e. Associate Superintendent (Non-Medical) has been declared as 'Dying Cadre' and after his joining at NIFT, Raebareli on 15.1.2014 none has been posted on that post and that post will not exist after the retirement of the petitioner on 3.11.2023, the date of superannuation of the petitioner. By means of para 35 of the counter affidavit dated 11.11.2020, the opposite party replied the contents of para 33 of the writ petition submitting that merely because the petitioner's post at SGPGI has been declared as 'Dying Cadre', it does not give a right to the petitioner to disobey the direction of the superior. However, it is also clear from para 35 of the counter affidavit that neither anyone has been posted on the post of Associate Director (Non-Medial) at SGPGI after 15.1.2014 when the petitioner submitted his joining at NIFT, Raebareli nor any person would be appointed on such post after the superannuation of the petitioner and admittedly such post has been declared as 'Dying Cadre'.

48. Considering the facts and circumstances of the issue in question in entirety, I do not find any cogent reason for not accepting the application of the petitioner dated 5.5.2000 whereby the petitioner has sought voluntary retirement when he was fulfilling the twin conditions of Regulation 95 of General Rules of SGPGI i.e. he has already completed the required age and completed the requisite period of service and no disciplinary inquiry was initiated or pending against him at that point of time. For the repetition sake I again say that the departmental

inquiry can be said to have been initiated or pending w.e.f. the date when the charge-sheet is issued against an employee and there is no doubt that on 5.5.2020 no departmental inquiry / disciplinary proceedings was initiated or pending against the petitioner. I also fail to understand as to why the petitioner was being forced to submit his joining on such post which has been declared as 'Dying Cadre' and none was posted on such post after 15.1.2014 when the petitioner submitted his joining at NIFT, Raebareli nor any person would be holding such post after 3.11.2023, the date of superannuation of the petitioner.

Apex Court in re: ***Uco Bank & Another vs. Rajinder Lal Capoor reported in (2007) 6 SCC 694*** has held as under :

"The aforementioned Regulation, however, could be invoked only when the Disciplinary Proceedings had clearly been initiated prior to the respondent's ceases to be in service. The terminologies used therein are of seminal importance. Only when a disciplinary proceeding has been initiated against an officer of the bank despite his attaining the age of superannuation, can the disciplinary proceeding be allowed on the basis of the legal fiction created thereunder, i.e., continue "as if he was in service. Thus, only when a valid departmental proceeding is initiated by reason of the legal fiction raised in terms of the said provision, the delinquent officer would be deemed to be in service although he has reached his age of superannuation. The departmental proceeding, it is trite law, is not initiated merely by issuance of a show cause notice. It is initiated only when a chargesheet is issued (See Union of India etc. etc. v. K.V. Jankiraman, etc. etc. reported in AIR 1991 SC 2010). This aspect of the matter has also been considered by this Court recently in Coal India Limited & others v. Saroj Kumar Mishra [2007 (5) SCALE 724] wherein it was held that date of application of mind on the allegations levelled against an officer by the Competent Authority as a result whereof a chargesheet is issued would be the date on which the disciplinary proceedings said to have been initiated and not prior thereto. Pendency of a preliminary enquiry, therefore, by itself cannot be a ground for invoking Clause 20 of the Regulations. Albeit in a different fact situation but involving a similar question of law in Coal India Ltd. (supra) this Court held :

"13. It is not the case of the appellants that pursuant to or in furtherance of the complaint received by the vigilance department, the competent authority had arrived at a satisfaction as is required in terms of the said circulars that a chargesheet was likely to be issued on the basis of a preliminary enquiry held in that behalf or otherwise.

14. The circular letters issued by the appellants put restrictions on a valuable right of an employee. They, therefore, are required to be construed strictly. So construed there cannot be any doubt. whatsoever that the conditions precedent contained therein must be satisfied before any action can be taken in that regard."

It was further more observed that:

"20. A departmental proceeding is ordinarily said to be initiated only when a chargesheet is issued."

49. In view of what has been considered above the impugned orders

dated 4.7.2020 whereby the request of the petitioner for voluntary retirement from service has been turned down, the decision of opposite party no. 4 dated 17.4.2020 communicated to the petitioner on 23.4.2020, whereby the petitioner has been informed that if the petitioner does not submit his joining pursuant to the impugned resolution taken in 91st meeting of the Board of Governors, SGPGI by 30.4.2020 the disciplinary proceedings shall be initiated against the petitioner for terminating his services, which are contained as Annexure nos. 1, 2 and 3 to the writ petition are patently illegal, arbitrary, discriminatory and violative of Article 14,16 and 21 of the Constitution of India so those are not sustainable in the eyes of law.

50. Accordingly the writ petition is ***allowed.***

51. The order dated 4.7.2020, 23.4.2020 passed by the opposite party no. 2 and the resolution of 91st Governing Body meeting of SGPGI, Lucknow dated 17.4.2020 as contained in Annexure nos. 1 to 3, so far as it relates to the petitioner are hereby ***set aside / quashed.***

52. A writ in the nature of mandamus is issued commanding the opposite parties to reconsider the application of the petitioner dated 5.5.2020 whereby the petitioner has sought voluntary retirement within a period of two months ignoring the earlier impugned orders, as aforesaid, and intimate the petitioner such decision forthwith.

53. The petitioner shall also be entitled for all consequential service benefits admissible as per law.

54. Till the appropriate decision is taken the petitioner shall neither be compelled to submit his joining at S.G.P.G.I. nor any coercive action shall be taken against him.

55. Before parting with, I put a note of appreciation for Ms. Shama Parveen, Law Clerk of this Court, for her useful assistance.

(2021)09ILR A1205
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.08.2021

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

WRIT A No. 20277 of 2019

Sushil Kumar Gautam & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri B.S.Pandey

Counsel for the Respondents:
C.S.C.

A. Service Law – Upgrade and arrears of grade pay – Government order dated 16.11.2011 - Where all things are equal i.e. where all relevant considerations are the same, persons holding identical posts may not be treated differentially in the matter of their pay merely because they belong to different departments. (Para 17)

Constitution of India: Article 14, 39B - It is the bounden duty of the State to treat similarly situated employees equally, and if it discriminates similarly situated employees then that will frustrate the object of equality that is enshrined in Article 14 of the Constitution of India. (Para 13, 20)

The Apex Court also has recognized that though Article 39B is not part of Chapter III of the Constitution of India which deals with fundamental rights, the principles enshrined under Article 39B which is directive principle has assumed the status of the fundamental right, and hence are enforceable by the courts. (Para 21)

The action of respondents in not granting the benefit of grade pay of Rs. 1900/- to the petitioners is violative of Art. 14 of the Constitution since such benefit has been extended to Mate of PWD by GO dated 16.11.2011 and also employees of Irrigation Department working in Meerut, Ghazipur and Lucknow divisions. (Para 22)

B. Scope of Judicial Review - It is settled in law that pay fixation is purely executive function and should be left to the expert to decide on it, but in a case where it emanates from the record that the action of the State is arbitrary and discriminatory to its employees in denying their rightful claim, this Court is not denuded of the power to issue a command to the State under Article 226 of the Constitution of India to treat all similarly situated employees equally. (Para 23, 24)

The nature and duty performed by Mate of Irrigation Department are similar to Mate of PWD and, therefore, they are also entitled to benefit of grade pay of Rs. 1900/-. (Para 14, 25)

Writ petition allowed. (E-4)

<u>Precedent followed</u>:

1. Randhir Singh Vs U.O.I. & ors., 1982 (1) SCC 618 (Para 17)

2. State of Kerala Vs B. Renjith Kumar & ors., (2008) 12 SCC 219 (Para 18)

3. F.C.I. & ors. Vs Ashis Kumar Ganguly & ors., 2009 (7) SCC 734 (Para 19)

4. K.T. Veerappa & ors. Vs State of Karnataka & ors., (2006) 9 SCC 406 (Para 23, 26)

5. Haryana State Minor Irrigation Tubewells Corporation & ors. Vs G.S. Uppal & ors., 2008 (7) SCC 375 (Para 24, 26)

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

1. The petitioners by means of present writ petition have prayed for the following relief:-

"(i) Issue writ, order or direction the nature of mandamus directing the respondents to grant sanction upgrading the petitioners' grade pay from Rs.1800/- to Rs.1900/- w.e.f. 16.11.2011 when the Mates of P.W.D. and other departments were extended the benefits of grade pay Rs.1900/-.

(ii) Issue writ, order, or direction in the nature of mandamus directing the respondents to pay the arrears of upgraded grade pay since 16.11.2011 with interest till date of its actual payment and revise their pay/pension accordingly."

2. The case of the petitioners is that petitioner no.1 was appointed as Beldar on compassionate ground in January 1993 and was promoted on the post of Mate in the year 1999 and since then he is continuing in Muzafar Nagar Division Ganga Canal, Muzaffar Nagar. Petitioner no.2 was appointed as Mate on compassionate ground on 04.06.1990 in Tubewell Division. The petitioners no.3 to 13 were appointed as Mate on 21.02.2009, 20.01.1990, 09.05.1989, 10.02.2009, 22.01.2006, 05.02.2009, 30.07.2003, 20.02.2009, 11.02.2009, 09.06.2003 and 19.06.1995 respectively in Muzaffar Nagar. The petitioners no.14 and 15 were appointed on 01.08.2003 and 26.11.1999 in Muzaffar Nagar while petitioners no.16 and 17 were appointed in Etah on 06.02.1980

and 08.01.1981. Petitioner no.17 has retired on 31.01.2019 from Irrigation Division, Etah and he is getting the pension on grade pay of Rs.1800/-. Thus, all the petitioners are working in Irrigation Department in the State of U.P.

3. It is stated that a Government Order dated 16.11.2011 was issued by Special Secretary, UP Government, Lucknow in respect of class IV employees of Public Works Department (hereinafter referred to as 'PWD') of State of U.P. providing grade pay of Rs.1900/- with amended pay scale of Rs.5200-20200/- on the basis of the report of 6th Pay Commission and recommendation of Pay Committee (2008) under G.O. dated 08.09.2010.

4. The State of U.P. issued another Government Order dated 30.03.2016 based on the Pay Committee recommendation with an amendment in the pay scale for the post of Daftari, Jamadar (Orderly), Cyclostyle Operator, Photostat Operator, and Head Gardner, etc. granting them grade pay of Rs.1900/-.

5. Further, the case of petitioners is that on 26.07.2016, Pramukh Abhiyanta (Engineer-in-Chief), Irrigation Department, U.P., Lucknow sent a letter to Deputy Secretary, Irrigation and Water Resources, UP, Lucknow requesting him to approve upgrading the grade pay from Rs.1800/- to Rs.1900/- on the basis of Government Order dated 30.06.2016 which has provided the benefit of grade pay of Rs.1900/- to class IV employees.

6. It is also stated that the State Government issued another Government Order dated 29.05.2017 providing grade pay of Rs.1900/- to class IV employees working in Drainage & Tubewell Divisions at Meerut, Ghazipur, and Lucknow and in various other districts which are part of irrigation department and accordingly, grade pay of Rs.1900/- to class IV employees working in aforesaid divisions has been fixed.

7. It is also stated that Executive Engineer wrote a letter to Finance Controller in the office of Engineer-in-Chief, Irrigation, and Water Resources, UP, Lucknow requesting him to clarify as to whether class IV employees of Muzaffar Nagar Division be also extended the benefit of grade pay of Rs.1900/-. The State Government on 29.05.2018 sought a report from the office of Engineer-in-Chief and Head of Department, Irrigation and Water Resources, UP, Lucknow for extending the benefit of grade pay of Rs.1900/-.

8. Pursuant to the said letter, Senior Staff Officer on behalf of Engineer-in-Chief, Irrigation, and Water Resources, UP, Lucknow sent a report on 09.07.2018 recommending for grant of grade pay of Rs.1900/- to the petitioners. Similar, recommendations have been made by Senior Staff Officer to Deputy Secretary, Irrigation and Water Resources, UP, Lucknow on 02.11.2018, 10.12.2018, and 18.12.2018 but the State Government did not pay any heed to the recommendations of Engineer in Chief for extending the benefit of grade pay to the petitioners.

9. In the aforesaid backdrop, the petitioners have prayed for the above relief.

10. In the counter affidavit, respondents have not denied the fact that by Government Order dated 16.11.2011, the benefit of grade pay has been extended to the employees of PWD for the post of Mate and other posts like Carpenter, Mistri,

Plumber, Painter, Pump Operator, Welder, Fitter and Turner, and other employees. The respondents have also not denied the averments made in paragraph 9 of the writ petition that the benefit of grade pay of Rs.1900/- has been extended to the employees of the Irrigation Department in respect to Meerut, Ghazipur, and Lucknow divisions. Paragraphs 5 and 6 of the counter affidavit are extracted herein-below:-

"5. That in reply to the contents of paragraphs nos.6 and 7 of the writ petition it is stated that the Government Order dated 16.11.2011 was issued by the State Government for Public Works Department by which the pay band has been fixed for the post of Mate and other posts like Carpenter, Mistri, Plumber, Painter, Pump Operator, Welder, Fitter, Turner, etc. The aforesaid Government Order does not apply to the petitioners because the petitioners are working in Irrigation Department and governed by separate rules. Similarly, the Government Order dated 30.03.20169 is also not applicable in the case of the petitioners.

6. That in reply to the contents of paragraphs nos.8 and 9 of the writ petition it is stated that the Senior Staff Officer of the Department has recommended the case of the petitioners to provide the pay scale of Rs.1900 but the same is still pending before the State Government and on the mere recommendation the petitioners have no right to claim the aforesaid pay scale. It is further stated that the Government Order dated 29.05.2017 is only applicable to Class-IV employees of the Irrigation Department particularly holding the post of Daftari, Zildsaaj, Machine Operator, Jamadar, and Pradhan Mali."

11. Learned counsel for the petitioners has submitted that the benefit of grade pay has been extended to Mate of PWD who are employees of State Government by order dated 16.11.2011 on the basis of the report of 6th Pay Commission and recommendation of Pay Committee (2008) under G.O. dated 08.09.2010. The action of the respondents in not extending the same benefit to the petitioners is illegal and arbitrary.

12. He further submits that the benefit of grade pay of Rs.1900/- has been extended to employees of Irrigation Department for Meerut, Ghazipur, and Lucknow divisions, and the petitioners are identically situated as they are also employees of Irrigation Department, posted at Muzaffar Nagar, therefore, they cannot be denied the benefit of grade pay of Rs.1900/- which has been extended to the employees of the same department. He further submits that several recommendations have been made by Engineer in Chief to Deputy Secretary, Irrigation Department recommending for grant of grade pay of Rs.1900/- to the petitioners but respondents are sleeping over the matter and have not yet extended the benefit of grade pay of Rs.1900/- which the petitioners are entitled to w.e.f. 16.11.2011 i.e. from the date such benefit has been extended to class IV employees of PWD.

13. Thus, the submission in nutshell is that the action of respondents in not extending grade pay of Rs.1900/- to the petitioners is arbitrary and discriminatory and defeats the very object of the right to equality enshrined in Article 14 of the Constitution of India.

14. Learned Standing Counsel has contended that the Government Order dated 16.11.2011 has been issued in respect of Mate of PWD, and since the petitioners are employees of Irrigation Department which is different from PWD, therefore, the petitioners cannot claim parity with employees of PWD. He further submits that recommendation made in favour of petitioners by Engineer-in-Chief for grant of benefit of grade pay of Rs.1900/- is pending with State Government. He further submits that fixation of pay is the domain of State Government and, various considerations are involved for extending the benefit of grade pay, therefore, this Court should refrain from issuing any direction for granting the benefit of grade pay to the petitioners.

15. I have heard learned counsel for the petitioners and learned Standing Counsel for respondents no.1 to 3.

16. The facts as emanates from the record is that the petitioners are employees of the Irrigation Department which is a department of State of UP. The benefit of grade pay of Rs.1900/- has been extended to employees of PWD w.e.f. 16.11.2011. Similarly, the benefit of grade pay of Rs.1900/- has been extended to Mate working in Drainage & Tubewell Divisions of Meerut, Ghazipur, and Lucknow by Government Order dated 29.05.2017. The petitioners are identically situated of their counterparts working at Meerut, Ghazipur, and Lucknow Division in Irrigation Department. The Government Order dated 29.05.2017 extending the benefit of grade pay to the irrigation department is extracted herein-below:-

"संख्या-1030/17-27-सिं0-7-19(7)/
प्रेषक

शम्भू नाथ,
सचिव,
उत्तर प्रदेश शासन।

सेवा में,
प्रमुख अभियन्ता एवं विभागाध्यक्ष,
सिंचाई एवं जल संसाधन विभाग,
उ0प्र0 लखनऊ

सिंचाई एवं जल संसाधन अनुभाग-7
लखनऊः दिनांक 29 मई, 2017

विषयः- उत्तर प्रदेश सचिवालय की भाँति सचिवालय से इतर राजकीय विभागों के चतुर्थ श्रेणी कर्मचारियों को ग्रेड वेतन रु0 1900/- दिये जाने से सम्बन्धित मुख्य सचिव समिति को सन्दर्भित प्रकरण पर दी गयी संस्तुतियों पर लिये गये निर्णय के कार्यान्वयन के सम्बन्ध में।

महोदय,

उपर्युक्त विषयक वरिष्ठ स्टाफ अधिकारी (अधि0-5) कार्यालय प्रमुख अभियन्ता, सिंचाई विभाग, उ0प्र0 लखनऊ के पत्र संख्या 964/अधि0-5/चतुर्थ श्रेणी, दिनांक 20-07-20-07-2016 एवं पत्र संख्या-जी-109/अधि0-5/लखनऊ, दिनांक 27-03-2017 का कृपया सन्दर्भ ग्रहण करने का कष्ट करें।

2- इस सम्बन्ध में मुझे यह कहने का निदेश हुआ है कि सिंचाई विभाग में चतुर्थ श्रेणी के दफ्तरी, जिल्दसाज/साइक्लोस्टाइल आपरेटर (डुप्लीकेटिंग मशीन आपरेटर), जमादार तथा प्रधान माली के पदों, जिन पर चतुर्थ श्रेणी के निम्नतम पद से पदोन्नति किये जाने की व्यवस्था वर्तमान में विद्यामन है। ऐसे चतुर्थ श्रेणी के उक्त पदों पर, वित्त विभाग के शासनादेश संख्या-21/2016/वे0आ0-2-397/दस-2016-8(मु0स0स0)/2011 टी0सी0 दिनांक 30 मार्च, 2016 द्वारा की गयी व्यवस्था के क्रम में वर्तमान

में अनुमन्य वेतन बैण्ड-1 रु0-5200-20200 एवं ग्रेड वेतन रु0 1800/- के स्थान पर उच्चीकृत/संशोधित वेतन बैण्ड-1 रु0- 5200-20200 एवं ग्रेड वेतन रु0 1900/- इस आदेश के निर्गत किये जाने की तिथि से, अनुमन्य किये जाने की श्री राज्यपाल महोदय सहर्ष स्वीकृत प्रदान करते हैं।

3- यह आदेश वित्त विभाग के अशासकीय संख्या-वे0आ0-2-528/दस-2017, दिनांक 24-05-2017, में प्राप्त उनकी सहमति से निर्गत किये जा रहे हैं।

भवदीय
ह0अप0
(शम्भू नाथ)
सचिव।"

17. At this point, it would be apt to refer few judgments of the Apex Court wherein the Apex Court has held that where all things are equal i.e. where all relevant considerations are the same, persons holding identical posts may not be treated differentially in the matter of their pay merely because they belong to different departments. In the case ***of Randhir Singh Versus Union of India and Others 1982 (1) SCC 618,*** the Apex Court allowed the writ petition under Article 32 of the Constitution of India filed by Driver-Constable in Delhi Police Force under Delhi Administration who demanded that his pay scale should at least be the same as the scale of pay of other drivers in the service of the Delhi Administration. Paragraphs 6 and 8 of the said judgment are extracted herein-below:-

"6. The counter-affidavit does not explain how the case of the drivers in the Police Force is different from that of the drivers in other departments and what special factors weighed in fixing a lower scale of pay for them. Apparently in the view of the respondents, the circumstance that persons belong to different departments of the Government is itself a sufficient circumstance to justify different scales of pay irrespective of the identity of their powers duties and responsibilities. We cannot accept this view. If this view is to be stretched to its logical conclusion, the scales of pay of officers of the same rank in the Government of India may vary from department to department notwithstanding that their powers, duties and responsibilities are identical. We concede that equation of posts and equation of pay are matters primarily for the Executive Government and expert bodies like the Pay Commission and not for Courts but we must hasten to say that where all things are equal that is, where all relevant considerations are the same, persons holding identical posts may not be treated differentially in the matter of their pay merely because they belong to different departments. Of course, if officers of the same rank perform dissimilar functions and the powers, duties and responsibilities of the posts held by them vary, such officers may not be heard to complain of dissimilar pay merely because the posts are of the same rank and the nomenclature is the same.

8. It is true that the principle of 'equal pay for equal work' is not expressly declared by our Constitution to be a fundamental right. But it certainly is a Constitutional goal. Article 39(d) of the Constitution proclaims "equal pay for equal work for both men and women" as a Directive Principle of State Policy. 'Equal pay for equal work for both men and women' means equal pay for equal work for everyone and as between the sexes.

Directive principles, as has been pointed out in some of the judgments of this Court have to be read into the fundamental rights as a matter of interpretation. Article 14 of the Constitution enjoins the State not to deny any person equality before the law or the equal protection of the laws and Article 16 declares that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. These equality clauses of the Constitution must mean some thing to everyone. To the vast majority of the people the equality clauses of the Constitution would mean nothing if they are unconcerned with the work they do and the pay they get. To them the equality clauses will have some substance if equal work means equal pay. Whether the special procedure prescribed by a statute for trying alleged robber-barons and smuggler kings or for dealing with tax evaders is discriminatory, whether a particular Governmental policy in the matter of grant of licences or permits confers unfettered discretion on the Executive, whether the take-over of the empires of industrial tycoons is arbitrary and unconstitutional and other questions of like nature, leave the millions of people of this country untouched. Questions concerning wages and the like, mundane they may be, are yet matters of vital concern to them and it is there, if at all that the equality clauses of the Constitution have any significance to them. The Preamble to the Constitution declares the solemn resolution of the people of India to constitute India into a Sovereign Socialist Democratic Republic. Again the word 'Socialist' must mean something. Even if it does not mean 'To each according to his need', it must at least mean 'equal pay for equal work'. "The principle of 'equal pay for equal work' is expressly recognized by all socialist systems of law, e.g, Section 59 of the Hungarian Labour. Code, para 2 of Section 111 of the Czechoslovak Code, Section 67 of the Bulgarian Code, Section 40 of the Code of the German Democratic Republic, para 2 of Section 33 of the Rumanian Code. Indeed this principle has been incorporated in several western labour codes too. Under provisions in Section 31 (g. No. 2d) of Book I of the French Code du Travail, and according to Argentinian law, this principle must be applied to female workers in all collective bargaining agreements. In accordance with Section 3 of the Grundgesetz of the German Federal Republic, and clause 7, Section 123 of the Mexican Constitution, the principle is given universal significance" (vide: International Labour Law by Istvan Szaszy p. 265). The preamble to the Constitution of the International Labour Organisation recognises the principle of 'equal remuneration for work of equal value' as constituting one of the means of achieving the improvement of conditions "involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperiled". Construing Articles 14 and 16 in the light of the Preamble and Article 39(d), we are of the view that the principle 'Equal pay for Equal work' is deducible from those Articles and may be properly applied to cases of unequal scales of pay based on no classification or irrational classification though these drawing the different scales of pay do identical work under the same employer."

18. In the case of ***State of Kerala Versus B. Renjith Kumar and Others (2008) 12 SCC 219***, the Apex Court dismissed the Civil Appeal filed by the State of Kerala and affirmed the judgment

of Kerala High Court who has allowed the writ petition filed by Presiding Officer, Industrial Tribunals claiming pay parity with District Judges. Paragraphs 21 and 22 of the said judgment is reproduced herein-below:-

"21. The principle of "equal pay for equal work" has been considered, explained and applied in a catena of decisions of this Court. The doctrine of "equal pay for equal work" was originally propounded as part of the Directive Principles of State policy in Article 39(d) of the Constitution. Thus, having regard to the Constitutional mandate of equality and inhibition against discrimination in Articles 14 and 16, in service jurisprudence, the doctrine of "equal pay for equal work" has assumed the status of fundamental right. (see Randhir Singh v. Union of India (1982) 1 SCC 618 and D.S. Nakara v. Union of India (1983) 1 SCC 305].

22. In the latest judgment, a two-Judge Bench this Court in the case of Union of India v. Dineshan K.K. (2008) 1 SCC 586 held that if the necessary material on the basis whereof the claim for parity of pay scale is made is available on record with necessary proof and that there is equal work of equal quality and all other relevant factors are fulfilled the decision of the Central Government denying the benefits of same rank and pay structure to a Radio Mechanic in Assam Rifles as was given to other Central Paramilitary Forces was held to be clearly irrational and arbitrary and thus, violative of Article 14 of the Constitution."

19. In the case of **Food Corporation of India and Ors. Versus Ashis Kumar Ganguly and Others 2009 (7) SCC 734**, the Apex Court dismissed the Civil Appeal filed by Food Corporation of India and affirmed the judgement of Calcutta High Court whereby he directed to grant advance increment to 57 deputationist employees. Paragraph 36 and 37 of the said judgment is reproduced herein-below:-

"36. Submission of the learned Additional Solicitor General that Article 14 of the Constitution of India postulates a valid classification cannot be said to have any application in the instant case. The High Court, in our opinion, has rightly found that in the matter of grant of benefits under the proviso appended to Regulation 81, all the employees were similarly situated.

37. In a case of this nature, legal right of the respondents emanated from violation of the equality clause contained in Article 14. If they were otherwise similarly situated, there was absolutely no reason why having regard to the provisions contained in Article 39-A of the Constitution of India, the respondents should be treated differently. It is, therefore, not a case where persons differently situated are being treated differently as was submitted by Mr. Sharan."

20. Thus, from the aforesaid judgments, it can be safely culled out that the Apex Court has held that it is the bounden duty of the State to treat similarly situated employees equally, and if it discriminates similarly situated employees that will frustrate the object of equality that is enshrined in Article 14 of the Constitution of India.

21. The Apex Court also has recognized that though Article 39B is not part of Chapter III of the Constitution of

India which deals with fundamental rights, the principles enshrined under Article 39B which is directive principle has assumed the status of the fundamental right, and hence are enforceable by the courts.

22. Applying the principles enunciated by the Apex Court in the aforesaid judgments, this Court is of the opinion that the action of respondents in not granting the benefit of grade pay of Rs.1900/- to the petitioners is violative of Article 14 of the Constitution since such benefit has been extended to Mate of PWD by Government Order dated 16.11.2011 and also employees of Irrigation Department working in Meerut, Ghazipur and Lucknow divisions.

23. So far as the argument of learned Standing Counsel that fixation of pay is purely the domain of the executive, as various considerations are involved in the fixation of pay, therefore, the Court should refrain from issuing any direction to the State and leave it open to the State to take the appropriate decision. It is settled in law that pay fixation is purely executive function and should be left to the expert to decide on it, but in a case where it emanates from the record that the action of the State is arbitrary and discriminatory to its employees in denying their rightful claim, this Court is not denuded of the power to issue a command to the State under Article 226 of the Constitution of India to treat all similarly situated employees equally. It would be apt to refer to the judgement of the Apex Court in the case of ***K.T. Veerappa and Others Versus State of Karnataka and Others (2006) 9 SCC 406***. Paragraph 13 the said judgment is reproduced herein-below:-

"13. He next contended that fixation of pay and parity in duties is the function of the Executive and financial capacity of the Government and the priority given to different types of posts under the prevailing policies of the Government are also relevant factors. In support of this contention, he has placed reliance in the case of State of Haryana v. Haryana Civil Secretariat Personal Staff Assn. (2002) 6 SCC 72 and Union of India v. S.B. Vohra (2004) 2 SCC 150. There is no dispute nor can there be any to the principles as settled in the case of State of Haryana v. Haryana Civil Secretariat Personal Staff Assn. (2002) 6 SCC 72 that fixation of pay and determination of parity in duties is the function of the Executive and the scope of judicial review of administrative decision in this regard is very limited. However, it is also equally well-settled that the courts should interfere with administrative decisions pertaining to pay fixation and pay parity when they find such a decision to be unreasonable, unjust and prejudicial to a section of employees and taken in ignorance of material and relevant factors."

24. Similarly, in the case of **Haryana State Minor Irrigation Tubewells Corporation and Others Versus G.S. Uppal and Others 2008 (7) SCC 375**, the Apex Court has held that when the decision of the administrative authority of pay fixation and pay parity is unreasonable, unjust and prejudicial to a section of employees, the Court can interfere with the said decision. Paragraph 21 of the said judgment is reproduced herein-below:-

"21. There is no dispute nor can there be any to the principle as settled in the above-cited decisions of this Court that fixation of pay and determination of parity in duties is the function of the Executive and the scope of judicial review of administrative decision in this regard is

very limited. However, it is also equally well-settled that the courts should interfere with the administrative decisions pertaining to pay fixation and pay parity when they find such a decision to be unreasonable, unjust and prejudicial to a section of employees and taken in ignorance of material and relevant factors. [see K.T. Veerappa v. State of Karnataka (2006) 9 SCC 406]"

25. In the case in hand, the benefit of grade pay of Rs.1900/- has been extended to Mate of PWD w.e.f. 16.11.2011. The petitioners are also employees of State. Though the departments are different, but the nature of the job performed by them is similar to the nature of the job performed by Mate working in PWD. This fact is discernible from the record as the benefit of grade pay has been extended by the State of U.P. to Mate working in Irrigation Department in Meerut, Ghazipur and Lucknow Divisions, and also from several recommendations which have been made by Engineer-in-Chief to Deputy Secretary, Irrigation Department by placing reliance upon Government Order dated 16.11.2011 extending the benefit of grade pay of Rs.1900/- to Mate of PWD. Thus, from the facts detailed above, the only conclusion which can be drawn is that the nature and duty performed by Mate of Irrigation Department are similar to Mate of PWD and, therefore, they are also entitled to benefit of grade pay of Rs.1900/- to the petitioners.

26. Since the State Government is sleeping over the matter since 20 July 2016 when the recommendation was made by Engineer-in-Chief to Deputy Secretary, Irrigation Department, and petitioners are facing financial loss on account of the inaction of the State Government, therefore, applying the principles laid down by the Apex Court in the cases of **G.S. Uppal (supra)** and ***K.T. Veerappa (supra),*** this Court is of the opinion that it is a fit case where the Court should intervene and exercise its power under Article 226 of the Constitution of India commanding the respondents to extend the benefit of grade pay of Rs.1900/- to the petitioners.

27. For the reasons given above, the writ petition is allowed and a writ of mandamus is issued commanding respondents no.1 & 2 to extend the benefit of grade pay of Rs.1900/- to the petitioners w.e.f. 16.11.2011 when such benefit has been extended to Mate of PWD. It is further directed to the respondents to fix the pay of petitioners on the basis of grade pay of Rs.1900/- and also calculate arrears of salary w.e.f. 16.11.2011 and pay the same to the petitioners within three months from the date of production of the copy of this order before them.

(2021)09ILR A1214
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.09.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Single No. 21036 of 2021

Avnesh Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Jayashanker Shukla

Counsel for the Respondents:
C.S.C.

Service Law – Transfer - Grievance of the petitioner that by means of impugned

order dated 27.7.2021 and 28.7.2021, the earlier transfer orders of the petitioner have been cancelled is misconceived. The said transfer order has been suspended for the time being till any appropriate order is passed by the competent authority, no final decision has yet been taken. (Para 8)

By means of impugned order dated 27.7.2021, all the transfer orders issued for the transfer session 2021-22 have been suspended until further orders. Appropriate orders would be passed by the competent authority, depending upon the report of fact finding enquiry. In case the competent authority finds that the earlier transfer orders issued in favour of the petitioner and other employees are appropriate orders, such employees would be permitted to discharge their respective duties at the transferred place and if it is found that such transfer orders were not passed strictly as per policy or law, those transfer orders would be cancelled and the employees would have to submit their joining at the earlier places. (Para 8)

B. Place of posting remains unchanged – Hon'ble Supreme Court has observed that the employee may not insist for particular place of posting. The present petitioner shall remain posted at Farrukhabad in any eventuality i.e., whether the transfer order prevails or is cancelled. Therefore, challenge to the present transfer order is untenable. (Para 9)

Writ petition dismissed. (E-4)

Precedent followed:

1. Namrata Verma Vs The State of U.P. & ors., Special Leave to Appeal (C) No(s). 36717/2017 (Para 6)

Precedent cited:

1. Vishnu Traders Vs St. of Har. & ors., reported in 1995 Supp. (1) SCC 461 (Para 4)

Present petition assails order dated 27.07.2021, passed by Special Secretary, Finance (Services) Anubhag-1, Government of U.P. and order dated 28.07.2021, passed by Director, Internal Accounts and Audit Examination, U.P., Lucknow.

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Jay Shanker Shukla, learned counsel for the petitioner and Ms. Jyoti Sikka, learned Additional Advocate General of U.P. for the State-respondents.

2. By means of this petition, the petitioner has assailed the order dated 27.7.2021 passed by the Special Secretary, Finance (Services) Anubhag-1, Government of U.P. addressing to the Director, Internal Accounts and Audit Examination, Lucknow suspending the operation of all transfer orders of the employees made for the session 2021-22 until further orders. The petitioner has also assailed the office order dated 28.7.2021 passed by the Director, Internal Accounts and Audit Examination, U.P., Lucknow in compliance of the order dated 27.7.2021 staying the transfer orders issued from 22.6.2021 to 15.7.2021.

3. Contention of learned counsel for the petitioner is that the petitioner, who is serving on the post of Accountant in the office of Superintendent, Central Jail, Fatehgarh, Farrukhabad, has been transferred vide order dated 15.7.2021 (Annexure No.8) in the public interest to the office of Finance Controller (Vittiya Paramarshdata), Zila Panchayat, Farrukhabad. Learned counsel for the petitioner has contended that as soon as the transfer order dated 15.7.2021 was passed, the petitioner submitted his joining at the transferred place, therefore, after submitting his joining at the transferred place, his transfer order may not be suspended by means of impugned order

dated 27.7.2021. Further, the consequential order dated 28.7.2021 passed by the Director concerned staying all transfer orders is illegal.

4. Learned counsel for the petitioner has further submitted that some identical writ petitions are pending and in some of identical writ petitions, interim orders have been granted. Learned counsel for the petitioner has drawn attention of this Court towards an order dated 17.9.2021 passed by the Division Bench of this Court in Special Appeal No.339 of 2021 whereby the Division Bench of this Court has stayed the order dated 27/28.7.2021 on the basis of principles of parity observing that since the interim order has been passed in favour of some employees, therefore, the appellant before the Division Bench is also entitled for the same benefit in view of the dictum of the Hon'ble Apex Court in re; V**ishnu Traders vs. State of Haryana and others,** reported in 1**995 Supp. (1) SCC 461**. For the convenience, the order dated 17.9.2021 passed by the Division Bench in Special Appeal No.339 of 2021 is being reproduced herein below:-

"This intra-court appeal has been filed against the judgment and order dated 07.09.2021 passed by learned Single Judge in Writ Petition No.19887 (SS) of 2021 in re: Satya Narayan Gautam vs. State of U.P. and others, whereby the writ petition preferred by the petitioner/appellant has been dismissed.

Heard.

Admit.

Issue notice.

Since the respondents are represented by learned Standing Counsel no steps are required to be taken for issuance of notice.

Learned counsel for the appellant submits that vide order dated 15.07.2021 several persons were transferred on their own request. The petitioner/appellant was also transferred on his request on the post of Accountant. The said transfer order was subsequently suspended by the State Government vide order dated 27.07.2021 after joining of the transferred persons including the appellant on the transferred place. The competent authority through his order dated 28.07.2021 directed to join back at the earlier place of posting. The aforesaid orders were challenged by several persons by filing separate writ petitions namely Writ Petition No.17278 (SS) of 2021 in re: Akansha Tripathi vs. State of U.P. and others, Writ Petition No.9907 (SS) of 2021 in re: Munish Kumar Srivastava vs. State of U.P. and others, Writ Petition No.18115 (SS) of 2021 in re: Gyanendra Kumar vs. State of U.P. and others, and Writ Petition No.19103 (SS) of 2021 in re: Shankar Lal Agrawal vs. State of U.P. and others, wherein the Court had granted indulgence and stayed the impugned order dated 27/28.07.2021. The submission of learned counsel for the appellant is that the appellant/petitioner is also entitled to get parity of the aforesaid orders as he is similarly situated like the others. However, learned Single Judge dismissed the writ petition on the first day itself. In support of his submission, learned counsel for the appellant/petitioner has relief on the case of Vishnu Traders vs. State of Haryana and others reported in 1995 Supp. (1) SCC 461, to emphasize that there should be parity in grant of the interim orders.

We have considered the submissions of learned counsel for the parties and gone through the records.

Once the interim order has been passed in the cases of similarly situated persons, the appellant/petitioner was entitled to get parity. As such, we stay the operation of the impugned judgment and order dated 07.09.2021 as well as the order dated 27/28.07.2021 till further orders of this Court.

However, it would be open for the respondents to pass fresh orders."

5. I have also granted interim order in favour of the employee, who had sought transfer at particular district apprising his grievance and said transfer order was passed on his request and thereafter, such employee submitted his joining at the transferred place, therefore, I was of the opinion that when any transfer order is passed considering the request of an employee and such employee has submitted his joining at the transferred place, such transfer order should not be suspended by way of general order staying all transfer orders.

6. However, I had also an occasion to decide an identical writ petition bearing Writ Petition No.19965 (S/S) of 2021, whereby the transfer of such employee was made in public interest and he submitted his joining pursuant to the earlier transfer order. When his transfer order was suspended by a general orders dated 27.7.2021 and 28.7.2021, he assailed such order placing same analogy that once an employee has submitted his joining at the transferred place, his/ her transfer order may not be suspended or withdrawn. Dismissing that writ petition considering the fact that place of said petitioner was unchanged, therefore, no legal prejudice is being caused to him and even his place of posting is unchanged, no interference was made in that transfer order in terms of order dated 6.9.2021 passed by the Hon'ble Apex Court in re; **Namrata Verma v. The State of Uttar Pradesh & Ors., Special Leave to Appeal (C) No(s).36717/2017.** For the convenience, the order dated 6.9.2021 reads herein below:-

"Heard Mr. Parvez Bashista, learned counsel appearing for the petitioner and Mr. Sanjay Kumar Tyagi, learned counsel appearing for the respondent-State of U.P.

It is not for the employee to insist to transfer him/her and/or not to transfer him/her at a particular place. It is for the employer to transfer an employee considering the requirement.

The Special Leave Petition is dismissed.

Pending applications stand disposed of."

7. Ms. Jyoti Sikka, learned Additional Advocate General has submitted that the decision of the Hon'ble Apex Court in re; **Namrata Verma** (supra) might have not been placed for consideration before the Division Bench of this Court and difference of the facts being considered by this Court might have not been apprised properly, therefore, the order dated 17.9.2021 would have been passed. However, she has submitted that the State is willing to file counter affidavit in the said special appeal apprising each facts and circumstances in detail including the order of the Hon'ble Apex Court in re; **Namrata Verma** (supra).

8. By means of impugned order dated 27.7.2021 (Annexure No.1), all the transfer

orders issued for the transfer session 2021-22 have been suspended until further orders and as per Ms. Sikka, the fact finding enquiry is going on and as soon as the report of fact finding enquiry is received to the competent authority, appropriate orders would be passed. In case the competent authority finds that the earlier transfer orders issued in favour of the petitioner and other employees are appropriate orders, such employees would be permitted to discharge their respective duties at the transferred place and if it is found that such transfer orders were not passed strictly as per policy or law, those transfer orders would be cancelled and the employees would have to submit their joining at the earlier places. In any case, since no final decision has yet been taken, therefore, grievance of the petitioner that by means of impugned order dated 27.7.2021 and 28.7.2021 (Annexure Nos.1 & 2), the earlier transfer orders of the petitioner have been cancelled is misconceived. The said transfer order has been suspended for the time being till any appropriate order is passed by the competent authority.

9. Besides, if the transfer order of the petitioner is permitted to be existed, in that case he shall remain be posted at Farrukhabad and in case his transfer order is cancelled, even in that case he shall remain be posted at Farrukhabad. The present petitioner shall remain be posted at Farrukhabad in any eventuality. Therefore, I wonder as to why the present transfer order has been challenged by the petitioner when his place of posting is unchanged in any circumstance. The Hon'ble Apex Court has time and again and also in re; **Namrata Verma** (supra) has categorically observed that the employee may not insist for particular place of posting.

10. In view of the above, I do not find any infirmity or illegality in the impugned orders dated 27.7.2021 passed by opposite party no.2 and 28.7.2021 passed by opposite party no.3 (Annexure Nos.1 & 2).

11. Therefore, the writ petition is dismissed being misconceived.

(2021)09ILR A1218
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 11.08.2021

BEFORE

THE HON'BLE IRSHAD ALI, J.

Service Single No. 29948 of 2018

Saghirul Hasan & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Pradeep Kumar Srivastava, Renu Misra

Counsel for the Respondents:
C.S.C.

A. Service Law – Qualifying service for the grant of pension, gratuity and other retiral benefits - While calculating the qualifying service, ad hoc service rendered shall be taken into consideration in grant of pension and other retiral dues. (Para 4, 15, 16)

The petitioners are entitled for calculation of their ad hoc service for reckoning the qualifying service. It is evident that the petitioners were granted ad hoc appointment by following the procedure prescribed under the applicable rules. They continued for a long spell of time and taking into consideration their ad hoc service, they have been regularized in service. (Para 9, 17)

Writ petition allowed. (E-4)

Precedent followed:

1. Hari Shankar Asopa Vs St. of U.P. & anr. [1990 LAB I.C. 292] (Para 5)

2. Yashwant Hari Katakkar Vs U.O.I. & ors. [1995 LAB I.C. 718] (Para 5)

3. St. of U.P. & anr. Vs Dr. Sri Kant Chaturvedi & ors. [Service Bench No. 1896 of 2015] (Para 5)

4. St. of U.P. & ors. Vs Vimal Kumar Shukla [Special Appeal Defective No. 1084 of 2020] (Para 5)

5. Bhanu Pratap Singh Vs St. of U.P. & ors. [Writ Petition No. 6518 (S/S) of 2012] (Para 5)

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

1: Heard Sri Pradip Kumar Srivastava, learned counsel for the petitioners and Sri Shatrughan Chaudhary, learned Additional Chief Standing Counsel for State-respondent.

2: By means of the present writ petition, the petitioners have prayed for issuance of writ of mandamus commanding the respondents to count the ad hoc service rendered by the petitioners prior to their regularization towards qualifying service for the grant of pension, gratuity and other retiral benefits and to grant third time pay scale on completion of 26 years of service taking into consideration the ad hoc service, which was made basis of grant of regularization to the petitioners.

3: Facts in brief are that the petitioners were granted appointment following the procedure of selection on the post of Vice Principal, I.T.I. vide order dated 5.10.1988 (petitioner Nos.1 and 2) and 17.12.1988 (petitioner No.3) and on completion of satisfactory service, pay scales were provided to them and ultimately, petitioner Nos.1 and 2 were regularized vide order dated 20.12.2013 and petitioner No.3 was regularized vide order dated 30.12.2014 w.e.f. 14.2.2010. On completion of satisfactory service, benefits of second time bound pay scale was granted to the petitioners w.e.f. 14.10.2010 and thereafter, on attaining the age of superannuation, the petitioners retired from service on 31.12.2019, 30.9.2019 and 30.6.2019 respectively. After retirement of the petitioners, they were not paid the retiral dues and pension, on the ground that they have not completed ten years of service to their credit for consideration of claim for the payment of retiral dues as well as pension. It has also been the ground for non payment of third A.C.P. that the petitioners have not completed regular 26 years of service, thus, they are not entitled for the grant of third A.C.P.

4: Learned counsel for the petitioners submits that the law in this regard is settled by this Court as well as by the Hon'ble Apex Court that while calculating the qualifying service, ad hoc service rendered shall be taken into consideration in grant of pension and other retiral dues.

5: In support of his submission, he placed reliance upon the following judgments :-

(i) Hari Shankar Asopa Vs. State of U.P. & Another [1990 LAB I.C. 292]

(ii) Yashwant Hari Katakkar Vs. Union of India & Others [1995 LAB I.C. 718]

(iii) State of U.P. & Another Vs. Dr. Sri Kant Chaturvedi & Others [Service Bench No. 1896 of 2015]

(iv) State of U.P. & Others Vs. Vimal Kumar Shukla [Special Appeal Defective No.1084 of 2020]

(v) Bhanu Pratap Singh Vs. State of U.P. & Others [Writ Petition No.6518 (S/S) of 2012]

6: On the basis of the aforesaid, his submission is that the petitioners are entitled for calculation of their service rendered on ad hoc basis for reckoning the qualifying service for the grant of pension and other benefits. Next submission is that the respondents are acting arbitrarily and for no valid justification, they have ignored the ad hoc service of the petitioners and have not released the post retiral dues and pension in favour of the petitioners. Last submission is that the claim setup by the petitioners is fully covered by the judgment relied upon, which are part of the writ petition as Annexure-7 to the writ petition.

7: On the other hand, Sri Chaudhary, learned Additional Chief Standing Counsel submits that for the payment of pension and other retiral dues, service rendered on ad hoc basis cannot be made a ground for reckoning as a qualifying service. The petitioners have not completed ten years of service, therefore, they are not entitled for pension and other benefits admissible to the post. He next submits that the present petition was filed prior to retirement from the post, therefore, there may not be a prayer to release the post retiral dues and pension in favour of the petitioners. Last submission is that there is no illegality on the part of the respondents in not releasing the said benefit.

Submission advanced by learned Additional Chief Standing Counsel is that the amendment was incorporated under the pension rules, which has not been considered in the judgments relied upon by the learned counsel for the petitioners, therefore, the ratio of the judgment are not attracted to the facts and circumstances of the present case.

8: I have considered the submission advanced by learned counsel for the parties and perused the material on record.

9: On perusal, it is evident that the petitioners were granted ad hoc appointment by following the procedure prescribed under the applicable rules. They continued for a long spell of time and taking into consideration their ad hoc service, they have been regularized in service.

10: I have also gone through the judgment relied upon by learned counsel for the petitioners in the case of **Hari Shankar Asopa** (Supra). Relevant paragraph Nos.17 and 18 are quoted below :-

"17. Clause (e) of Rule 56 unequivocally recognises, declares and guarantees retiring pension to every Government servant who retires on attaining the age of superannuation or who is prematurely retired or who retires voluntarily. To be precise, every Government servant (whether permanent or temporary), who retires under Cl. (a) or Cl. (b), or who is required to retire, or who is allowed to retire under Cl. (e) of R.56, becomes entitled for a retiring pension, provided, of course, the first and third conditions stipulated in Art. 361 of the Regulations are satisfied.

18. In the instant case, indisputably, Dr. Asopa, who (was) allowed to retire under Cl. (e) of R. 56 and the first and third conditions envisaged in Art. 361 of the Regulations were satisfied. He, therefore, became qualified for a

retiring pension notwithstanding the fact that he was not permanent or any of the posts held by him during the tenure of his continuous services of State Medical Colleges of Uttar Pradesh Government. Denial of retiring pension to Dr. Asopa on the ground of his not being permanent on any post of the Government service was clearly violative of Cl. (e) of R.56 of the Rules. Condition contained in para 2 of the order dt. 21st Feb., 1983 (Annexure 10 to the writ petition), depriving Dr. Asopa of retiring pension cannot, therefore, be sustained. The contention of learned Standing Counsel for the State of Uttar Pradesh that Dr. Asopa was not entitled to any pension lacks merit and has got to rejected."

11: In the aforesaid judgment, Dr. Asopa, whose case was under consideration, was ad hoc employee and continued for several years and retired from service. The Hon'ble Supreme Court after considering the submission of Standing Counsel in the matter that Dr. Asopa was not entitled to any pension, held that the contention of learned Standing Counsel lacks merit and thereafter, direction was issued to release the pension in his favour.

12: Relevant paragraph-3 of the judgment in the case of **Yashwant Hari Katakkar** (Supra) is quoted below :-

"Dr. Anand Prakash, learned senior Advocate appearing for the Union of India, has contended that on March 7, 1980 when the appellant was pre-maturely retired he had put in 18½ years of quasi-permanent service. According, to him to earn pension it was necessary to have minimum of 10 years of permanent service. It is contended that since the total service of the appellant was in quasi-permanent capacity he was not entitled to the pensionary benefit. There is nothing on the record to show as to why the appellant was not made permanent even when he had served the Government for 18½ years It would be travesty of justice if the appellant is denied the pensionary benefits simply on the ground that he was not a permanent employee of the Government. The appellant having served the Government for almost two decades it would be unfair to treat him temporary/quasi-permanent. Keeping in view the facts and circumstances of this case we hold that the appellant shall be deemed to have become permanent after he served the Government for such a long period. The services of the appellant shall be treated to be in permanent capacity and he shall be entitled to the pensionary benefits. We allow the appeal, set aside the judgment of the Tribunal and direct the respondents to treat the appellant as having been retired from service on' March 7, 1980 after serving the Government for 18½ years (more than 10 years as permanent service) and as such his case for grant of pension be finalised within six months from the receipt of this order. The appellant shall be entitled to all the arrears of pension from the date of retirement. No costs."

13: In the case of **State of U.P. & Another Vs. Dr. Sri Kant Chaturvedi & Others**, the order passed by the State Public Services Tribunal, Lucknow was under challenge, whereby the ad hoc service rendered by respondent Nos.1 and 2 has been directed to be counted towards pensionary benefits and also for allowing the pension to respondent Nos.1 and 2. The Division Bench of this Court, taking into consideration entire facts and circumstances of the case, affirmed the judgment passed by the Tribunal and the

petition has been dismissed, which was challenged in Special Leave to Appeal (C) No.18622/2016 (State of U.P. & Another Vs. Dr. Srikant Chaturvedi & Another), which has also been dismissed, affirming the order passed by the Tribunal, Lucknow.

14: In the case of **State of U.P. & Others Vs. Vimal Kumar Shukla**, the relevant paragraph is quoted below :-

*"The issue aforesaid is now not open for debate after the judgment of Apex court in P**rem Singh vs. State of Uttar Pradesh and others, 2019 (10) SCC 516. Para 36** of the said judgment covers the issue and for ready reference, is quoted hereunder :*

*"There are some of the employees who have not been regularized in spite of having rendered the services for 30-40 or more years whereas they have been superannuated. As they have worked in the work-charged establishment, not against any particular project, their services ought to have been regularized under the Government instructions and even as per the decision of this Court in Secretary, S**tate of Karnataka and Ors. v. Umadevi, (2006) 4 SCC 1.** This Court in the said decision has laid down that in case services have been rendered for more than ten years without the cover of the Court's order, as one time measure, the services be regularized of such employees. In the facts of the case, those employees who have worked for ten years or more should have been regularized. It would not be proper to regulate them for consideration of regularisation as others have been regularised, we direct that their services be treated as a regular one. However, it is made clear that they shall not be entitled to claiming any dues of difference in wages had they been continued in service regularly before attaining the age of superannuation. They shall be entitled to receive the pension as if they have retired from the regular establishment and the services rendered by them right from the day they entered the work-charged establishment shall be counted as qualifying service for purpose of pension."*

The para, quoted above, has otherwise been referred by the learned Single Judge in his judgment. It was found that petitioner was appointed on the post of Assistant Store Keeper in the year 1978 in regular pay scale thus was against substantive vacancy. He continued in service with all due benefits, as are made available to regular employees.

*In the circumstances aforesaid, the petitioner's case is covered by para 36 of the judgment of the Apex Court in **Prem Singh (supra)**, as quoted above. Learned Single Judge accordingly allowed the writ petition after noticing that the petitioner/non-appellant was even allowed the revised pay scale from time to time as and when revised pursuant to the recommendation of Pay Commission.*

*Taking into consideration the facts aforesaid, we do not find any error in the judgment of learned Single Judge rather the matter is squarely covered by the judgment of Apex court in the case of **Prem Singh (supra).** We therefore, find no merit in the appeal and even no reason to accept the application for condonation of delay.*

Accordingly application for condonation of delay as well as appeal are dismissed."

15: In the case of **Bhanu Pratap Singh** (Supra) passed by the learned Single

Judge, the relevant paragraph is quoted under :-

"It is not in dispute between the parties that the petitioner was appointed on ad hoc basis on the post of Principal in the College in question pending availability of a duly selected candidate from the Board of Secondary Education. When the provisions of sub-section 2 of section 18 of the Act, 1982 specifically provide that the senior most lecturer would be appointed as ad hoc principal and he would be entitled to the salary payable to the Principal, the said benefit cannot be denied to the petitioner. It is not in dispute between the parties that the salary of the Principal is Rs. 29,500/- and in case of the petitioner the same has been reduced to Rs. 27,870/- which is wholly illegal and arbitrary being in violation of statutory Rules and therefore the impugned orders dated 07.01.2011 and 31.05.2012, Annexure-2 and Annexure-5 to the writpetition respectively cannot survive.

The order dated 07.01.2011 to the extent it relates to the reduction of salary of the petitioner and the order dated 31.08.2012, Annexure-2 and Annexure-5 are therefore quashed.

The writ petition is allowed. At the time of admission, this Court had been pleased to stay the operation of the impugned order dated 31.05.2012, Annexure-5 to the writ petition and had directed the opposite parties to pay the petitioner's salary which he was being paid on his initial appointment prior to the passing of the impugned order.

A direction is, therefore, issued to the respondent no.2 to ensure thatthe petitioner is paid the salary of a Principal i.e. at the basic pay of Rs.29,500 from the date he was appointed as ad hoc principal i.e. 01.08.2010 alongwith arrears thereof."

15: I have gone through the law report relied upon by learned counsel for the petitioners and came to the conclusion that the issue in regard to the inclusion of ad hoc service rendered by the employee and subsequently regularized, the service is countable for reckoning the qualifying service for the payment of pension.

16: On consideration of the same, the Court is of the opinion that there is no res-integra to consider the submission as advanced by learned Additional Chief Standing Counsel. Once it is settled that the ad hoc service, which has been made basis of regularization, has been considered in catena of judgments and it has been held that the same is countable for reckoning the qualifying service for the payment of pension.

17: In view of the above, I am of the opinion that the petitioners are entitled for calculation of their ad hoc service for reckoning the qualifying service. In view of the reasons recorded above, the writ petition succeeds and is **allowed.**

18. In view of the reasons recorded above, the respondents are directed to calculate the ad hoc service rendered by the petitioners for reckoning qualifying service and in case the petitioners fulfill the required qualifying service, it is directed to pay them the pension and other benefits admissible to them and release the same within a period of six weeks from the date of production of certified copy of this order.

19: The parties shall bear their own costs.

(2021)09ILR A1224
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 15.09.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Single No. 33755 of 2019

Mohd. Naseem Uddin ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Shivam Sharma

Counsel for the Respondents:
C.S.C.

A. Service Law – Departmental Enquiry - The departmental enquiry should be conducted and concluded within time frame so provided by this Court vide specific order and if such enquiry is not concluded within time stipulated, the disciplinary authority/inquiry officer may file appropriate application before the Court concerned seeking further time to conclude the departmental enquiry. Even this Court may suo moto extend the time to conduct the departmental enquiry, if the charges are so serious. (Para 10)

In the present case an application for grant of time has been filed by the Standing Counsel on 25.1.2020, however, the time was expiring on 26.8.2019. Since this Court at Allahabad had granted time to conclude the departmental enquiry within time frame and the Division Bench of this Court had not extended any further time to conclude the departmental enquiry, therefore, such application could have been filed before this Court at Allahabad in the same writ petition. Even if the opposite parties were serious to conduct departmental enquiry seeking further time the appropriate application could have been filed here at Lucknow in the month of August, 2019 itself. (Para 11)

Moreover, even the charge-sheet has been issued after about two months from expiry of the period so fixed by this Court inasmuch as the period to conclude the departmental enquiry was expiring on 26.8.2019 whereas the charge-sheet has been prepared on 18.10.2019. (Para 11)

B. Suo-moto extension - The suo moto extension can be granted if Court finds that the disciplinary authority/inquiry officer was serious, they responded promptly after the order of the Court, issued the charge-sheet and started departmental enquiry but anyhow the same could not be concluded within time frame. **In present case exercise and intent to obey the direction of this Court is absolutely missing.** Even the departmental enquiry did not start within time frame so there is no question to extend the time to conduct the departmental enquiry against the petitioner. (Para 13)

C. Post- retirement enquiry - The departmental enquiry against the petitioner after his retirement particularly in view of the present facts and circumstances, cannot be permitted. Petitioner has retired from service on 29.2.2020, therefore, opposite party no. 1 is not permitted to conduct the departmental enquiry against the petitioner pursuant to the charge-sheet dated 18.10.2019 as the aforesaid charge-sheet has been issued beyond the stipulated period so fixed by this Court vide order dated 11.7.2019. (Para 14, 15)

Writ petition allowed. (E-4)

Precedent followed:

1. Abhishek Prabhakar Awasthi Vs New India Assurance Company Ltd. passed in W.P. No. (S/S) 7179 of 2009 (Para 7)

Present petition assails charge-sheet dated 18.10.2019, issued by Secretary Vocational Education and Skill Development.

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Shivam Sharma, learned counsel for the petitioner and Sri Shailendra Kuamr Singh, C.S.C.-III assisted by Sri Shashank Bhasin, learned Standing Counsel for the State respondents.

2. By means of this petition the petitioner has prayed following relief:

"(i) issue a writ, order or direction in the nature of Certiorari quashing the Charge-sheet dated 18.10.2019, issued by opposite party No. 1, contained in Annexure No.1 to this writ petition.

(ii) issue a writ, order or direction in the nature of Mandamus commanding the respondents not to proceed in furtherance of the Charge-sheet dated 18.10.2019, issued by opposite party No. 1, contained in Annexure No.1 to this writ petition.

(iii) issue a writ, order or direction in the nature of Mandamus commanding the respondents to forthwith grant all consequential benefits such as release of salary, upon quashing of the Charge-sheet dated 18.10.2019, and completion of formalities towards settlement of the post-retiral dues of the petitioner."

3. Learned Standing Counsel has opposed the prayers made in the writ petition by submitting that the charge-sheet cannot be assailed before the writ Court and the petitioner should participate in the departmental enquiry.

4. On that Sri Shivam Sharma, learned counsel for the petitioner has submitted that he is assailing the charge-sheet on the ground that no definite charges have been leveled against the petitioner by means of impugned charge sheet dated 18.10.2019 and the relied upon letter dated 16.10.2018 does not disclose any involvement of the petitioner in the issue in question, if any. As a matter of fact, as per Sri Shivam Sharma it cannot be understood as to which exam the petitioner was allegedly involved in committing irregularities, as to who are the persons who were in collusion with the petitioner and as to when the mass copying for particular examination has been detected and who were involved in mass copying at that point of time. He has also drawn attention of this Court towards charge no. 5 which says that after getting the stay order from the Court the petitioner submitted his joining at the place in contravention of the guidelines of government orders.

5. Sri Shivam Sharma has further drawn attention of this Court towards the order dated 18.12.2019 which was passed on the first date of admission which reads as under :

"*Heard learned counsel for the parties.*

By means of this petition, the petitioner has assailed the charge sheet on the ground that the charges levelled in the charge sheet are vague and the authority concerned has issued charge sheet just to harass the petitioner.

Learned counsel for the petitioner has submitted that the suspension order dated 30.5.2019 was assailed before this Court at Allahabad in Writ-A No.9584 of 2019 and the said writ petition was disposed of on 11.7.2019 directing the opposite parties to expedite the enquiry proceedings and conclude the same within

a period of six weeks from 11.7.2019. However, the suspension order was not stayed. The petitioner filed Special Appeal before this Court at Allahabad bearing Special Appeal No.827 of 2019 and the Division Bench of this Court was pleased to admit the said special appeal staying the operation of suspension order dated 30.5.2019 with the further direction that the enguiry against the petitioner may go on and the petitioner shall fully cooperate. It has been clarified in the order dated 28.9.2019 passed by the Division Bench in special appeal that the enquiry may be concluded within the time allowed by the learned Single Judge vide order dated 11.7.2019.

Submission of learned counsel for the petitioner is that six weeks' period w.e.f. 11.7.2019, the date of order of the Single Judge, has already been expired but the departmental enquiry has not been completed. Sri Shivam Sharma has submitted that what to say about conclusion of departmental enquiry, even the charge sheet has been served upon the petitioner on 20.11.2019 much after expiry of the stipulated time, therefore, in view of the Full Bench judgment of this Court in re; Abhishek Prabhakar Awasthi Vs. The New India Assurance Company Limited and others, Service Single No.7179 of 2009, the departmental enquiry may not go on against an employee without seeking leave from the court concerned to that effect.

Sri Shivam Sharma has submitted that till date, no such application has been filed before the Single Judge or before the Division Bench, therefore, departmental enquiry against the petitioner may not be conducted. Sri Sharma has further submitted that as per the Full Bench of this Court, this Court may suo moto grant permission to conduct and conclude departmental enquiry after stipulated period but no such order has yet been passed by this Court.

Matter requires consideration.

Let counter affidavit be filed within a period of two weeks. Rejoinder affidavit, if any, may be filed within a period of one week.

List this petition in the week commencing 13th January, 2020.

If the enquiry officer/ disciplinary authority has not sought leave from the Court to conduct and conclude the departmental enquiry beyond the stipulated time stipulated by the Court vide order dated 11.7.2019, such departmental enquiry against the petitioner may not go on till the next date of listing."

6. Sri Sharma has submitted that on the first date of admission the relevant facts of the issue in question and the law supporting such averments has been indicated in the said order.

7. For the repetition sake Sri Shivam has submitted that this Court at Allahabad in re: Writ A No. 9584 of 2019 while disposing of the writ petition of petitioner vide order dated 11.7.2019 granted six weeks time to conclude the inquiry. The period of six weeks was expiring on 26.8.2019. Sri Sharma has further submitted that law is trite on the point that the departmental inquiries started from the date when the charge-sheet is served upon the employee and in the present case the charge-sheet was prepared on 18.10.2019 and served upon the petitioner later on.

Therefore, the date of initiation of departmental enquiry would be treated on or after 18.10.2019 when the charge-sheet is served upon the petitioner. Before such date no departmental enquiry can be said to have been initiated. Whereas the departmental enquiry should be concluded within a period of six weeks w.e.f. 11.7.2019. Therefore, for all practical purposes the authority concerned has not initiated the departmental enquiry against the petitioner within time so stipulated by this Court vide order dated 11.7.2019. Therefore, in view of the decision of Full Bench of this Court in the case of ***Abhishek Prabhakar Awasthi vs. New India Assurance Company Ltd. passed in W.P. No. (S/S) 7179 of 2009*** after expiry of stipulated period the departmental enquiry may not be conducted and concluded against the employee.

8. Two questions were referred before the Full Bench of this Court in re: Abhishek Prabhakar Awasthi (supra), reads as under :

"(a) Whether it an inquiry proceeding is not concluded within a time frame fixed by a Court and concluded thereafter, without seeking extension from the Court then on the said ground the entire inquiry proceeding as well as punishment order passed, is vitiated in view of the judgment in the case of P.N. Srivastava; and

(b) Whether the law as laid down by a Division Bench of this Court in the case of P.N. Srivastava that if an inquiry proceeding is not concluded within a time frame as fixed by a Court, it stands vitiated is still a good law in view of the judgment rendered by the Supreme Court in the case of Suresh Chandra as well as a judgment dated 27.7.2009 of a Division Bench of this Court in Writ Petition No. 1056(SB) of 2009 (Union of India and others v. Satendra Kumar Sahal and another)."

9. The Full Bench has answered the aforesaid question vide para 18 of the judgment, which reads as under :

"18. In view of the above discussion, we now proceed to answer the questions which have been referred to the Full Bench.

(A) Question No. (a): We hold that if an enquiry is not concluded within the time which has been fixed by the Court, it is open to the employer to seek on extension of time by making an appropriate application to the Court setting out the reasons for the delay in the conclusion of the enquiry, in such an event, it is for the Court to consider whether time should be extended, based on the facts and circumstances of the case. However, where there is a stipulation of time by the Court, it will not be open to the employer to disregard that stipulation and an extension of time must be sought;

(B) Question No. (b): The judgment of the Supreme Court in the case of Suresh Chandra (supra) as well as the judgment of the Division Bench of this Court in the case of Satyendra Kumar Sahai (supra) clearly indicate that a mere delay on the part of the employer in concluding a disciplinary inquiry will not ipso facto nullify the entire proceedings in every which has fixed a stipulation of time has jurisdiction to extend the time and it is open to the Court, while exercising that jurisdiction, to that a enquiry Court the time the delay has been satisfactorily explained. The Court can suitably extend

time for conclusion of the enquiry either in a proceeding instituted by the employee challenging the enquiry on the ground that it was not within the stipulated period or even upon an independent application moved by the employer. The Court has the inherent jurisdiction to grant an extension of time, the original stipulation of time having been fixed by the Court itself. Such an extension of time has to be considered in the interests of justice balancing both the need for expeditious conclusion of the enquiry in the interests of fairness and an honest administration. In an appropriate case, it would be open to the Court to extend time suo motu in order to ensure that a serious charge of misconduct does not go unpunished leading to a serious detriment to the public interest. The Court has sufficient powers to grant an extension of time both before and after the period stipulated by the Court has come to an end.

We, accordingly, dispose of the reference in the aforesaid terms The petition sh now be placed before the regular Court for disposal in light of the observations ma hereinabove."

10. In view of the decision of this Court in Full Bench in ***Abhishek Prabhakar Awasthi (supra)*** the departmental enquiry should be conducted and concluded within time frame so provided by this Court vide specific order and if such enquiry is not concluded within time stipulated, the disciplinary authority / inquiry officer may file appropriate application before the Court concerned seeking further time to conclude the departmental enquriy. Even this Court may suo moto extend the time to conduct the departmental enquiry, if the charges are so serious.

11. In the present case an application for grant of time has been filed by the Standing Counsel on 25.1.2020, however, the time was expiring on 26.8.2019. Since this Court at Allahabad had granted time to conclude the departmental enquiry within time frame and the Division Bench of this Court had not extended any further time to conclude the departmental enquiry, therefore, such application could have been filed before this Court at Allahabad in the same writ petition. Even if the opposite parties were serious to conduct departmental enquiry seeking further time the appropriate application could have been filed here at Lucknow in the month of August, 2019 itself. Not only the above at least some seriousness and carefulness must have been shown by the disciplinary authority / inquiry officer in compliance of order dated 11.7.2019 issuing charge-sheet against the petitioner with promptness and the departmental enquiry should be concluded within stipulated time. In the present case even the charge-sheet has been issued after about two months from expiry of the period so fixed by this Court inasmuch as the period to conclude the departmental enquiry was expiring on 26.8.2019 whereas the charge-sheet has been prepared on 18.10.2019.

12. Therefore, I do not find any good ground to extend further time to conduct the departmental enquiry against the petitioner in view of the decision of Full Bench of this Court in re: ***Abhishek Prabhakar Awasthi (supra).***

13. The suo moto extension can be granted if this Court finds that the disciplinary authority / inqiry officer was so serious, they responded promptly after the order of this Court, issued the charge-sheet and started departmental enquiry but anyhow the same could not be concluded within time frame. I wonder the aforesaid

exercise and intent to obey the direction of this Court is absolutely missing in this case. For the repetition sake I hereby observe that even departmental enquiry against the petitioner has not been started within time frame so there is no question to extend the time to conduct the departmental enquiry against the petitioner.

14. I have also noted one fact that petitioner has already retired from service on 29.2.2020, therefore, the departmental enquiry against the petitioner after his retirement particularly in view of the facts and circumstances of the issue in question as considered above, cannot be permitted.

15. Considering the facts and circumstances of the issue in question and also considering the decision of Full Bench in re: ***Abhishek Prabhakar Awasthi (supra)*** I do not permit the opposite party no. 1 to conduct the departmental enquiry against the petitioner pursuant to the charge-sheet dated 18.10.2019 as the aforesaid charge-sheet has been issued beyond the stipulated period so fixed by this Court vide order dated 11.7.2019.

16. Accordingly the writ petition is ***allowed***.

17. A writ in the nature of certiorari is issued quashing the charge-sheet dated 18.10.2019 issued by the opposite party no. 1, as contained in Annexure no. 1 to the writ petition.

18. Consequences to follow.

(2021)09ILR A1229
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.07.2021

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ C No. 15231 of 2021

Smt. Nirmala Devi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Kamal Kumar Singh

Counsel for the Respondents:
C.S.C.

A. U.P. Zamindari Abolition and Land Reforms Act, 1950 - Section 161 - U.P. Revenue Code, 2006 - Section 101 - Exchange - proceedings for exchange are judicial proceeding - Assistant Collector should pass complete and self contained order u/s 161 approving the exchange of land - such order must record compliance of Rules 144 to 146 of the U.P.Z.A.&L.R. Rules, 1952 – i.e. rental value of the lands which are sought to be exchanged and the basis of calculation of such rental value has to be disclosed in the order approving the exchange - without notice to the Gaon Sabha and in absence of a resolution recording consent of the Land Management Committee the permission to make an exchange suo moto by the Assistant Collector on a mere report of the Halka Lekhpal would be void - proper resolution of the Gaon Sabha & not mere personal consent of the Lekhpal or Pradhan is required - report or consent of the Secretary of Land Management Committee /Lekhpal is not the consent of the Gram Panchayat - Assistant Collector cannot accord permission merely at the instance of an individual seeking exchange of his land - willingness of both the parties, to exchange their respective land is condition precedent - exchange of land is not unilateral transaction of a willing party to exchange, there must be consent of the person with whom exchange has been sought - also order u/s 161 must discuss the nature and utility of lands to be exchanged (Para 5, 13, 14)

B. U.P. Zamindari Abolition and Land Reforms Act, 1950 - Section 161 - U.P. Revenue Code, 2006 – Section 101 - Court directed that the State of U.P. through the District Magistrate shall be made necessary parties in all disputes pertaining to the Gaon Sabha's lands and in particular in proceedings under Section 161 - It shall be mandatory for the State through the District Magistrate to file their affidavits in all such disputes (Para 22)

C. Constitution of India Art. 226 - Writ of mandamus - When cannot be issued - A mandamus cannot be issued to enforce an illegal order - Before exercising the discretion in favour of any petitioner court would be well advised to examine if an illegal order is sought to be implemented, or advantage is being taken of callous attitude or apathy of officials to the detriment of the State and larger public interests in a manner contrary to law - court in such matters can mould the relief and pass appropriate orders to ensure faithful implementation of the law and to serve the interests of justice (Para 16)

D. Practice & Procedure - Affidavit - No affidavit can improve the content of the impugned order - order has to stand the test of legality on the basis of the recitals contained therein (Para 18)

Dismissed. (E-5)

List of Cases cited :

1. Shiv Murat Vs Board of Revenue, U.P. at Allahabad 2017 (7)ADJ 252

2. Rambali & ors. Vs St. of U.P. & ors. (2013) 118 RD 451

3. Smt. Badi Dulaiya Vs Gaon Sabha 1987 RD 246

4. Narain Singh Vs Gaon Sabha 1975 ALJ(Revenue) 73

5. Gulshan Rai Vs Mitra Sen 1994 RD 125

6. Harihar Prasad Vs Jagdish 2001 RD 163

7. Mansukhlal Vithaldas Chauhan Vs St. of Guj. 1997 (7) SCC 622

8. Chandrika Prasad & ors. Vs Settlement Officer Consolidation & ors. 2009 (8) ADJ 1619

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

1. By means of this writ petition, a direction has been sought upon the respondent no.2-Commissioner, Gorakhpur Division, Gorakhpur to decide the Revision No. 1440 of 2015, computerized Case No. C-20150500001440 (Ram Narain Vs. Smt. Nirmala Devi), under Section 333 of the U.P.Z.A.&LR.Act1.

2. The revision arises out of proceedings for exchange of private land with land of Gaon Sabha taken out under Section 161 of the U.P.Z.A.&L.R. Act. The provision is extracted hereinunder:

"161. Exchange. - [(1) A bhumidhar [* * *] may exchange with-

(a) any other bhumidhar [* * *] land held by him; or

(b) any [Gaon Sabha] or local authority, lands for the time being vested in it under Section 117 [* * *] :

Provided that no exchange shall be made except with the permission of an Assistant Collector who shall refuse permission if the difference between the rental value of land given in exchange and of land received in exchange calculated at hereditary rates is more than 10 per cent of the lower rental value.

(1-A) Where the Assistant Collector permits exchange he shall also order the relevant annual registers to be corrected accordingly.

(2) On exchange made in accordance with sub-section (1) they shall have the same rights in the land so received in exchange as they had in the land given exchange."

3. The provision has to be read with Rules 144 to 146 of the U.P.Z.A.&LR. Rules, 19522 to understand its working. The Rules are extracted hereinbelow:

"144. An application [for permission to make an]exchange shall contain the following particulars and be accompanied by the following documents:-

(1) The khasra number of the plots-

(a) [* * *] which the applicant wishes to receive and of the plots which he offers in exchange of,

(b) [* * *]

(2) certified copies of the khataunis relating'to the khatas in which all such plots are included;

(3) [* * *]

(4) a statement showing the details of any valid deeds mortgage or other encumbrances with which the lands to be exchanged may be burdened, together with the names and addresses of lessees, mortgagees or holders of other encumbrances.

145. On receipt of an application for [permission to make an]exchange of land the Assistant Collector [shall cause to be calculated the rental value of the land proposed to be given in exchange and of the land proposed to be received in exchange at hereditary rates and] if he is satisfied that the exchange is not invalid according to the proviso to sub-section (1) of Section 161, call upon the parties, the lessees, mortgagees or holders of other encumbrances, if any, to show cause why the exchange should not be made. Every such notice shall be accompanied by a copy of the application which shall be supplied by the applicant.

146. The Assistant Collector shall thereupon decide the objections, if any, and pass suitable orders. If he decides that the exchange should be allowed, he shall also make an order for the delivery of possession, if necessary, and for the correction of papers."

4. Section 161 of the U.P.Z.A. & L.R. Act, 1950 read with Rules 144, 145 and 146 of the U.P.Z.A. & L.R. Rules, 1952 together comprise the legislative scheme for exchange of private lands with Gaon Sabha.

5. While interpreting the aforesaid provision, a learned Single Judge of this Court in **Shiv Murat Vs. Board of Revenue, U.P. at Allahabad3,** held as under:

"8. Section 161 of the Act provides for exchange. A bhumidhar may exchange with (a) any other bhumidhar land held by him or (b) land vesting in any Gaon Sabha or local authority under Section 117. The proviso to Section 161 requires prior permission of the Assistant Collector upon being satisfied that conditions of rental value of the respective land calculated at hereditary rates is not more than 10 percent of the lower rental value. On exchange being made in

accordance with sub-section (1) shall confer same rights in the land received in exchange as the bhumidhar had in the land given in exchange.

9. Rule 144 requires that an application for permission to make an exchange shall contain the detail of khasra number of the plots which the applicant wishes to receive and of the plots which he offers in exchange.

Upon receiving such an application, Rule 145 requires that the Assistant Collector shall cause calculation of the rental value of the land proposed to be given in exchange and the land proposed to be received in exchange at hereditary rates and if he is satisfied that the exchange is not invalid according to the proviso to sub-section (1) of Section 161 the Assistant Collector shall call upon the parties, if any, to show-cause why the exchange should not be made. Every such notice shall be accompanied by a copy of the application. If the Assistant Collector decides that the exchange should be allowed, he shall also make an order for delivery of possession, if necessary, and for the correction of papers.

11. On plain reading of Sub-clause (i) of Section 161 and Rule 145, it is apparent that the Assistant Collector upon being satisfied with the conditions of exchange, as a consequence of the Rule he is required to call upon the parties to show-cause why the exchange should not be made and thereafter under Rule 146 the Assistant Collector is to decide the objections, if any, and pass suitable orders. It is, therefore, clear that without notice to the Gaon Sabha and in absence of a resolution recording consent of the Land Management Committee the permission to make an exchange suo moto by the Assistant Collector on a report of the Halka Lekhpal would be void not being mandated under Section 161 of the Act.

14. Section 28B enumerates the functions of the Land Management Committee which, amongest other, is charged with the general management, preservation and control of all property referred to in Section 28-A which includes settling and management of land but does not include transfer of any property for the time being, vested in the Gram Panchayat under Section 117 of the U.P.Z.A. & L.R. Act or under any other provisions of the Act.

15. On a plain reading of the provisions of the U.P. Panchayat Raj Act, it is clear that the report or consent of the Secretary of Land Management Committee (Lekhpal) is certainly not the consent of the Gram Panchayat which is conferred the right and duty to the protection and supervision of management and up-keep of the property belonging to or vesting or held by the Gram Panchayat. Lekhpal in the capacity of a revenue officer submitting a report sought by the Assistant Collector would not reflect the consent of the Land Management Committee for the reason that the Lekhpal performs his duty in two different capacity: (i) Secretary of Land Management Committee and (ii) Officer of the revenue, therefore, the plea of the learned counsel for the petitioner that the consent of the Lekhpal would be the consent of the Gram Panchayat cannot be accepted.

16. From the conjoint reading of Section 161, as well as, the Rules relating thereto, it transpires that the legislature has extended facility upon a bhumidhar to

exchange his bhumidhari land from land of another bhumidhar for their convenience upon satisfying the conditions for exchange. Such exchange cannot be valid unless permission of the Assistant Collector has been obtained. An exchange involves the transfer of property by one person to another and reciprocally the transfer of property by that other to the first person. There must be a mutual transfer of ownership of one thing for the ownership of another.

17. On the bare reading of the meaning of the word "exchange" it would transpire that it is not unilateral transaction and is mutual one and it depends on the readiness and willingness of both the parties, i.e., the party which wants to exchange and the party which accepts the exchange proposed by the other party. Therefore, I am of the considered opinion that unless both the parties agree for exchange, the Assistant Collector cannot accord permission merely at the instance of an individual seeking exchange of his land with another individual unless he is willing to exchange. The willingness of the parties to exchange their respective land is condition precedent under Section 161 of the Act. The exchange of the land is not unilateral transaction of a willing party to exchange, there must be consent of the person with whom exchange has been sought and unless there is agreement of exchange between the parties, there is no such power vested with the Assistant Collector under the statute to compel the bhumidhar to exchange land with another bhumidhar/Gaon Sabha against its will."

6. Experience shows that Section 161 of the U.P.Z.A.&L.R. Act are often prone to abuse, lands are often exchanged under political considerations much to the detriment of the Gaon Sabha and public interests at large.

7. In ***Rambali and others v. State of U.P. and others4,*** this Court declined to mandamus the Assistant Collector to decide the application under Section 161 without finding due compliance of all relevant provisions comprising the scheme of exchange by holding as under:

"12....As I have noticed that the exchange of land belonging to a bhumidhar to another bhumidhar is not unilateral transaction by a willing party to exchange, there must be consent of the person with whom exchange has been sought and unless there is an agreement of exchange between the parties, there is no such power, vested with the Assistant Collector, under the statute, to compel a bhumidhar for exchange of his land with another bhumidhar against his will. I am of the view that conferment of right of exchange of the land under Section 161 of the Act read with relevant rules as detailed is subject to convenience of both the parties to the exchange and in the eventuality the willingness of both the sides to exchange, the Section 161 imposes duty upon the Assistant Collector either to grant permission or to refuse the same if the same is not inconformity with the Section 161 of the Act and the rules 144 to 147 of the Rules."

8. Adherence to the procedure under Rules 144 to 146 of the U.P.Z.A.&L.R.Rules,1952, were held to be mandatory in S***mt. Badi Dulaiya v. Gaon Sabha5.***

9. It is noteworthy that the importance of adherence to Rule 144 to 146 was also

emphasized in ***Shiv Murat (supra***) by setting forth as under:

"23. Before disposing of the application for exchange, a duty is cast upon the Assistant Collector to ensure that the provisions of Rule 144 to 146 are literally followed. (Refer-Ashok Kumar v. Mahavir Singh, 1994 RD 136; State of U.P. v. M/s Techno Tower Ltd., 1986 RD 397). The proceedings for exchange are judicial proceeding and therefore, the Assistant Collector should pass complete and self contained order. Where the Assistant Collector finds that parties involved in the exchange have not consented, therefor, or if any of them has withdrawn such consent, he has no option but to reject the application. (Fakir Chand v. Naib Johra Zaidi, 1995 RD 405)." (Emphasis supplied)

10. An exchange without noticing the resolution of the Gaon Sabha regarding full consent and the rational of such exchange cannot be countenanced in law. Reference may be had in this regard to the law laid down in ***Narain Singh v. Gaon Sabha6***, and ***Gulshan Rai v. Mitra Sen7.***

11. The importance of a proper resolution of the Gaon Sabha and not a personal consent of the Lekhpal or Pradhan for purposes of such exchange was stated in ***Harihar Prasad v. Jagdish8.***

12. The manner of application of mind by the Assistant Collector in proceedings under Section 161 U.P.Z.A.&L.R. Act was discussed by this Court in ***Shiv Murat (supra) :***

"26. The disputed land of the Gaon Sabha is recorded as manure pit being a public utility land and covered under Section 132 of the Act, no right or interest of a bhumidhar can be acquired in respect thereof, in view of sub-section C (vi) of Section 132. On fulfilling the conditions of exchange the Assistant Collector is not required to mechanically recommend exchange on mere asking of the parties, in particular, Gram Panchayat Land. The Assistant Collector is duty bound to consider whether the land sought for in exchange is a public utility land; or whether the land is being exchanged for a Gram Panchayat land which is situated on the proposed four lane road, thus, having commercial value, etc."

13. In summation an order under Section 161 of the U.P.Z.A. & L.R. Act, 1950 has to be self contained and should duly reflect compliance with all relevant provisions of law as stated in judicial authorities in point discussed above.

14. In the case at hand the order dated 18.05.2011 has been passed by Sub Divisional Officer, Bhatpar Rani, Deoria approving the exchange of land in purported exercise of powers under Section 161 of the U.P.Z.A.&L.R. Act, 1950. The said order dated 18.05.2011 does not record compliance of Rules 144 to 146 of the U.P.Z.A.&L.R. Rules, 1952. Further rental value of the lands which are sought to be exchanged and the basis of calculation of such rental value has not been disclosed in the order approving the exchange. This is an imperative requirement of law. Resolution of Gaon Sabha and contents thereof have also not been noticed. The order dated 18.05.2011 is also silent on the nature and utility of lands to be exchanged. These infirmities vitiate the order dated 18.05.2011.

15. The order dated 18.05.2011 fails to carry out the mandate of Section 161 of the U.P.Z.A. & L.R. Act read with Rules

141 to 146 of the U.P.Z.A. & L.R. Rules, 1952 and contrary to the law laid down by this Court in the body of judicial precedents discussed earlier.

16. Mandamus is a discretionary remedy under Article 226 of the Constitution of India (**Ref:Mansukhlal Vithaldas Chauhan Vs State of Gujrat, 1997 (7) SCC 622)**. Before exercising the discretion in favour of any petitioner the court would be well advised to examine if an illegal order is sought to be implemented, or advantage is being taken of callous attitude of the land management committees or apathy of officials or collection of parties to the detriment of the State and larger public interests in a manner contrary to law. A mandamus cannot be issued to enforce an illegal order **(Ref: Chandrika Prasad and others Vs Settlement Officer Consolidation and others, 2009 (8) ADJ 1619**). The court in such matters can mould the relief and pass appropriate orders to ensure faithful implementation of the law and to serve the interests of justice.

17. In fact this Court does not have any hesitation to hold that the aforesaid order dated 08.05.2011 is contrary to law and cannot be executed. Though the order dated 18.05.2011 is not under challenge, the rights conferred by such order are subject matter of this writ petition. In this wake no rights flow to the petitioner from the order dated 18.05.2011. A mandamus cannot be issued to compel the implementation of the order dated 18.05.2011.

18. The preceding findings have been made on the footing of the recitals contained in the order dated 18.05.2011. No affidavit can improve the content of the order dated 18.05.2011. The order has to stand the test of legality on the basis of the recitals contained therein. The above findings could not be disputed by the learned counsel for the petitioner nor by the learned Standing Counsel.

19. It is, however, open to the petitioner to seek fresh proceedings for exchange of land as per law.

20. While sitting in this jurisdiction I have noticed the callous attitude of the land management committees towards litigation in regard to the Gaon Sabha lands. In a sense Gaon Sabha lands are ultimately State lands. The State Government entrusts such lands to the Gaon Sabha. The State Government by adopting the procedure prescribed by law can also resume such lands. Higher public interest demands that the State Government should exercise vigilance over exchange of such lands by the Gaon Sabha with private lands.

21. These observations do not dilute the rights of the Gaon Sabha accruing from entrustment made by the State Government to the Gaon Sabha.

22. Considering the fact that in a large number of cases under Section 161 of the U.P.Z.A.&L.R. Act, the interests of the Gaon Sabha and the State lands are compromised, it is directed that the State of U.P. through the District Magistrate shall be made necessary parties in all disputes pertaining to the Gaon Sabha's lands and in particular in proceedings under Section 161. It shall be mandatory for the State through the District Magistrate to file their affidavits in all such disputes.

23. In light of this discussion and subject to the directions to the District

Magistrate and the State Government in the immediately preceding paragraph, the writ petition is liable to be dismissed and is dismissed.

Copy of this order shall be communicated by the Chief Standing Counsel to:

(1) Principal Secretary Panchayat Raj, Government of U.P., Lucknow.

(2) Commissioner Gorakhpur Division, Gorakhpur.

(3) District Magistrate, Deoria.

(4) Sub Divisional Magistrate, Bhatpar Rani, Deoria.

(2021)09ILR A1236
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.08.2021

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ C No. 16780 of 2021

Mangala Prasad ...Petitioner
Versus
The Principal Secretary through its Forest Dept. Lko & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sanjay Kumar Yadav, Sri Jai Prakash Prasad

Counsel for the Respondents:
C.S.C.

Forest Act (16 of 1927) (as Amended By U.P. Amendment Act 2000) - Sections 5, 26 & 52(A) (1), Section 69 - Confiscation of the seized vehicle - Form M.M.-11 recorded total permissible weight as 5 cubic meters - but petitioner illegally carrying 7.5 cubic meters of sand after excavating it from the prohibited forest area, which was not accounted for by him - Held - chronic offenders of law and persons, who recklessly destroy the environment without any care for the future generations have to be dissuaded by the deterrence of lawful penalties - act of petitioner is an offence under the Indian Forest Act, 1927 - petitioner a repeat offender - other aggravating circumstance was the brutal physical assault & injuries on forest officials, by the petitioner - vehicle was liable to be confiscated - order of confiscation proportionate to the offence committed by the petitioner - Confiscation, proper (17, 18, 19,20)

Dismissed. (E-5)

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

1. The proceedings under Section 52 of the Indian Forest Act, 1927 (Uttar Pradesh Amendment Act, 2000) read with Section 5/26 and Section 69 of the Indian Forest Act, 1927 were instituted against the petitioner. By the impugned order dated 15.07.2020, the prescribed authority/Divisional Forest Officer, Obra, Forest Division, Obra, Sonebhadra in proceedings by exercise of powers under Section 52(A)(1) of the Indian Forest Act, 1927 has directed the confiscation of the seized vehicle called 'Tipper' in popular parlance having registration No.UP64AT6465.

2. The cause of action under the aforesaid proceedings against the petitioner arose upon registration of a complaint as Range Case No.52/Dala/2019-20 by a forest official. The complaint was registered by one Sudarshan Prasad, Forest Guard.

3. The case in brief of the forest authority as set out in the said complaint is this. On 02.03.2020, information was received from an informer that a vehicle/Tipper having registration No.UP64AT6465 was illegally transporting sand which was excavated from the forest area. The vehicle was intercepted at Markundi. The driver of the vehicle produced documents which authorized carriage of 5 cubic meter of sand. However, the offending vehicle was loaded with a far excess quantity of the sand. The driver on being asked to accompany the officials to the Chopan Range declined to do so and instead called his adherents, namely, Mangala Prasad Maurya, Ajay Kumar Pathak and others. Ajay Kumar Pathak and Mangala Prasad Maurya are hardened criminals, who brutally assaulted the forest officials. Under physical assault the officials sent a request for reinforcement. The police reinforcement promptly arrived. In the presence of the police force, the complainant/Sudarshan Kumar and his associate/Shiv Kumar proceeded to seize the vehicle. After the inspection, an additional police force was called and with their assistance the offending vehicle was taken to the police station. The quantity of the sand loaded on the vehicle was found to be 12.5 cubic meters after measurements were made. The vehicle was illegally carrying 7.5 cubic meters of sand after excavating it from the prohibited forest area. The recovery memo was created on 03.03.2020. On the aforesaid complaint, the criminal prosecution as well as the proceedings under the Indian Forest Act, 1927 (which are the subject matter of controversy in this writ petition) were set on foot.

4. A show cause notice was issued repeatedly to the petitioner on 13.04.2020, 22.05.2020, 08.06.2020 and 15.07.2020. The petitioner appeared before the noticing authority on 29.06.2020 and submitted his explanation.

5. Principally, the following defence was taken by the noticee/petitioner. The petitioner had a valid lease and had deposited over weight charges. The petitioner was falsely implicated. Simultaneous continuance of criminal prosecution as well as the proceedings under the Act simultaneously is contrary to law.

6. The same arguments are reiterated before this Court by the learned counsel for the petitioner.

7. In response the forest officials refuted the defence of the petitioner. Form M.M.-11 recorded total permissible weight as 5 cubic meters. The form/permit was taken out at 9.38 a.m. at Tehsil-Nagawa, Duddhi. However, the receipt depicting payment of vehicle charges was issued at 6.45 a.m. as per the case of the petitioner. This rendered defence contradictory. The source of 7.50 cubic meters of additional and illegal sand was not disclosed. The sand was illegally excavated on 02.03.2020 from Arazi Gata No.1767Kha/10 in the reserved forest area. The depression created by the excavation of the sand was duly inspected by the forest officials. The credibility of the recovery memo has not been disputed even by the petitioner, and its recitals are consistent with the case of the petitioner. The petitioner was given an opportunity of hearing.

8. On the foot of the preceding discussion, the prescribed authority made these findings. The petitioner was carrying an excess and illegal quantity of 7.50 cubic

meters which was not accounted for by him. No documents to justify the aforesaid sand quantity produced by him. The sand was excavated on 02.03.2020 from the reserved forest area. Excess sand of 7.50 cubic meter sand, which was loaded on the offending vehicle is the property of the State. The said quantity of the sand was being transported in the vehicle/Tipper having registration No.UP64AT6465 in the offending vehicle. This act is an offence under the Indian Forest Act, 1927 (hereinafter referred to as the Act).

9. The authority has also found that the petitioner is a repeat offender. He has been constantly deploying his vehicle for illegal excavation from the forest areas. The other aggravating circumstance was the brutal physical assault and consequent injuries on the person of the forest officials, by the petitioner and his adherents. The vehicle was liable to be confiscated.

10. The authority specifically finds on the back of the preceding narrative that a lighter sentence will not subserve the interest of justice and will subvert the legislative intent and would also encourage the petitioner and demoralize the forest officials who perform their duties in most difficult circumstances.

11. Finally, the authority in the impugned order concluded that the vehicle in view of the aforesaid reasons was liable to be confiscated and directed its confiscation under Section 52(A)(1) of the Act.

12. Humanity has long been alerted to the dangerous and reckless destruction of natural wealth including fragile ecology of the forests. Natural resources are the biggest assets of any nation and indeed whole of humanity. However, ecological assets like forests and forest produce are most vulnerable to reckless exploitation by unscrupulous persons. The depletion of such resources is causing irreversible damage to the ecology and the future of all life on earth. Seized with the aforesaid danger the national forest policy was created in the year 1998. Some of the relevant extracts of the national forest policy will guide the interpretation of the statutory provision and also a decision on this controversy.

13. Section 5/26 of the Act create offences and the provisions which are relevant and same are reproduced as under:

"5. Bar of accrual of forest-rights.-After the issue of a notification under section 4, no right shall be acquired in or over the land comprised in such notification, except by succession or under a grant or contract in writing made or entered into by or on behalf of the Government or some person in whom such right was vested when the notification was issued; and no fresh clearings for cultivation or for any other purpose shall be made in such land except in accordance with such rules as may be made by the State Government in this behalf."

26. Acts prohibited in such forests.-(1) Any person who-

(a) makes any fresh clearing prohibited by section 5, or

(b) sets fire to a reserved forest, or, in contravention of any rules made by the State Government in this behalf, kindles any fire, or leaves any fire burning, in such manner as to endanger such a forest; or who, in a reserved forest-

(c) kindles, keeps or carries any fire except at such seasons as the Forest-officer may notify in this behalf,

(d) trespasses or pastures cattle, or permits cattle to trespass;

(e) causes any damage by negligence in felling any tree or cutting or dragging any timber;

(f) fells, girdles, lops, or bums any tree or strips off the bark or leaves from, or otherwise damages, the same;

(g) quarries stone, bums lime or charcoal, or collects, subjects to any manufacturing process, or removes, any forest-produce;

(h) clears or breaks up any land for cultivation or any other purpose;

(i) in contravention of any rules made in this behalf by the State Government hunts, shoots, fishes, poisons water or sets traps or snares; or

(j) in any area in which the Elephants' Preservation Act, 1879 (6 of 1879), is not in force, kills or catches elephants in contravention of any rules so made, shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both, in addition to such compensation for damage done to the forest as the convicting Court may direct to be paid.

(2) Nothing in this section shall be deemed to prohibit

(a) any act done by permission in writing of the Forest-officer, or under any rule made by the state Government; or

(b) the exercise of any right continued under clause (c) of sub-section (2) of section 15, or created by grant or contract in writing made by or on behalf of the Government under section 23.

(3) Whenever fire is caused wilfully or by gross negligence in a reserved forest, the State Government may (notwithstanding that any penalty has been inflicted under this section) direct that in such forest or any portion there of the exercise of all rights of pasture or to forest produce shall be suspended for such period as it thinks fit."

14. Section 69 of the Act creates a presumption in his favour of the ownership of the government of all forest produce. For ease of reference, Section 69 of the Act is extracted hereunder:

"69. Presumption that forest-produce belongs to Government.-When in any proceedings taken under this Act, or in consequence of anything done under this Act, a question arises as to whether any forest-produce is the property of the Government, such produce shall be presumed to be the property of the Government until the contrary is proved."

15. The legislature equipped the forest authorities with various powers to effectively check the menace of illegal activities, including poaching and excavation of sand and other activities that deplete and destroy the forest resources without due authority of law.

16. For ease of reference, the provision of Section 52-A of the Act is extracted hereunder:

"**52-A. Procedure on seizure.-** (1) Notwithstanding anything contained in this Act or any other law for the time being in force where a forest offence is believed to have been committed in respect of any forest produce, which is the property of the State Government, the officer seizing the property under sub-section (1) of Section 52 shall, without unreasonable delay, produce it together with all the tools, boats, vehicles, cattle, ropes, chains and other articles used in committing the offence, before an officer, not below the rank of a Divisional Forest Officer, authorised by the State Government in this behalf, who may, for reasons to be recorded, make an order in writing with regard to custody, possession, delivery, disposal or distribution of such property, and in case of tools, boats, vehicles, cattle, ropes, chains and other articles, may also confiscate them."

17. The order impugned has been passed while observing full procedural propriety. The petitioner was given ample opportunity of hearing to tender his defence. The impugned order has also considered the defence of the petitioner in detail. The recovery memo has been found to be credible. Sand was far in excess of the permissible quantity. There was excavation of sand from a prohibited area are of the forest. The defence of the petitioner was considered and disbelieved. The guilt of the petitioner is established on the applicable standard of evidence. The conclusions of the impugned order in the facts of the case are reasonable. No perversity in the order has been shown by the pleadings or any other material in the record nor made out from the arguments.

18. The prerequisites for exercise of the powers under confiscation have been duly established. There are aggravating circumstances which are also undisputed from the records. The petitioner had physically resisted and had grievously assaulted the government servants who were performing their lawful duties from the petitioner and his adherents.

19. The petitioner has not disputed the finding that he is a repeat offender against forest laws.

20. In the wake of this discussion, I find that the order of confiscation of the vehicle was just and proper. Such chronic offenders of law and persons, who recklessly destroy the environment without any care for the future generations have to be dissuaded by the deterrence of lawful penalties. The order of confiscation was proportionate to the offence committed by the petitioner and duly established by law.

21. The writ petition is dismissed.

22. In the facts of this case, it will not be in the interest of justice to compound the aforesaid offence. The deterrent effect of the punishment has to take its course in this case.

(2021)09ILR A1240
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.09.2021

BEFORE

THE HON'BLE MANOJ MISRA , J.
THE HON'BLE JAYANT BANERJI, J.

Writ C No. 18969 of 2021

M/s Logix Infomedia (P) Ltd. Hapur ...Petitioner

Versus

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

Counsel for the Petitioner:
Ms. Himadari Batra, Sri Anurag Khanna (Senior Adv.)

Counsel for the Respondents:
C.S.C., Sri Kaushalendra Nath Singh

U.P. Industrial Area Development Act, (6 of 1976) - U.P. Industrial Area Development (Amendment) Act, 2020 - (U.P. Act No. 25 of 2020) w.e.f. 28.07.2020 - Section 7 Proviso – Cancellation of allotment, if the land not used for the purpose for which it was allotted within a period of one year - inter play of the two parts of the proviso to Section 7 - under the first part of the proviso the lease deed stands cancelled where the land allotted is not utilized for the purpose for which it was allotted within the period of five years from the date of possession or within the period fixed for such utilisation in the conditions of allotment, whichever is longer - But where that period has already expired before the commencement of the amending Act i.e. before 28.07.2020, the second part of the proviso comes into play, under which, the Authority is to give a notice to the allottee, to use the land, for the purpose for which it was allotted, within a period of one year - if within the above period of one year the allottee does not use the land, then the allotment and lease deed stand automatically cancelled - Period of one year, as envisaged in the second part of the proviso, has to be reckoned from the date of service of the notice & not from the date of enforcement of the U.P. Act No. 25 of 2020 i.e. 28.7.2020 (Para 14, 15)

Petitioner could not complete project within time over plot of land allotted by NOIDA - petitioner sought extension of time from 18.04.2019 to 07.04.2020, for construction, on payment of extension charges - NOIDA Authority approved the same - Petitioner again sought extension of time from 08.04.2020 to 07.04.2021 - On 27.5.2021 NOIDA declined the request as NOIDA counted the period of one year for utilization of the land, for which it has been allotted, as envisaged in the second part of the proviso to Section 7, from the date of enforcement of the U.P. Act No. 25 of 2020 i.e. 28.7.2020 & directed that petitioner has time only till 28.7.2021 to complete the construction - Held, impugned notice which refers to the period of one year to be reckoned from 28.7.2020, being the date of commencement of the U.P. Act No. 25 of 2020, is erroneous - Period of one year, has to be reckoned from the date of service of the notice - Impugned notice quashed (Para 4, 15)

Allowed. (E-5)

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

1. Heard Shri Anurag Khanna assisted by Ms. Himadari Batra for the petitioner; the learned Standing Counsel for the respondent no. 1 and Shri Kaushalendra Nath Singh for the respondent nos. 2 to 5.

2. Considering the nature of the order that we propose to pass as also the ground on which the order is proposed, Shri Kaushalendra Nath Singh, who appears for the contesting respondent nos. 2 to 5 and the learned Standing Counsel who represents the first respondent do not propose to file a counter affidavit and are agreeable for final disposal of the petition at this stage itself.

3. At the outset, Shri Anurag Khanna, learned counsel for the petitioner states that he does not wish to press relief (b) in the writ petition. He, therefore, confines his prayer to relief (a), which is to quash the order dated 27.5.2021 passed by the

Assistant General Manager (Institutional), NOIDA (respondent no. 5).

4. According to the petitioner, on 24.1.2006, pursuant to an invitation by the New Okhla Industrial Development Authority (for short NOIDA) for setting up Educational/Training/Research and Development Institutions/Software IT Units/IT enabled Services and other allied Services etc. the petitioner submitted an application for allotment of a plot of land. In response thereto, a reservation-cum-allotment letter dated 7.3.2006 was issued to the petitioner allotting an area of 8000 sq. meter land on lease for 90 years. However, the lease deed, dated 28.12.2007, executed by NOIDA was with respect to an area of 5184 sq. meter. Certain clauses of the lease deed required the petitioner to complete the constructions; obtain occupancy certificate from the competent authority of NOIDA within the validity period of approved building plan; and ensure functioning of the unit on the allotted plot, within five years from the actual date of possession. Though, in case of exceptional circumstances, an extension could be allowed by the lessor subject to extension charges at the rate of 4% of the premium for each year on pro-rata monthly basis. Following the execution of lease, on 7.1.2008, a possession certificate was issued to the petitioner in respect of 5184 sq. meter of land. Thereafter, vide letter dated 11.10.2012, the petitioner was informed that though the area allotted was 8000 sq. meters but in measurement it came out to be 8100 sq. meters. Consequently, for additional 100 sq. meters of land additional amount was demanded. Whereafter, on 7.1.2013, a supplementary lease deed was executed by NOIDA in favour of the petitioner for the balance area of 2916 sq. meters of land, which was followed by a possession certificate dated 8.1.2013 in respect of the additional demised land ad-measuring 2196 sq. meters. It is submitted that due to late transfer of possession of the total allotted land, the project could not be completed within time, consequently, on an application made by the petitioner, the NOIDA Authority by its letter dated 1.5.2017 accepted the request of the petitioner for extension of time for construction, on payment of extension charges, from 8.1.2015 to 7.4.2018. Thereafter, on 20.3.2018, an application was moved by the petitioner before the NOIDA Authority for purchasing additional Floor Area Ratio (FAR) and approval of a building plan. It is submitted that the NOIDA Authority approved the request for allocation of additional FAR on 18.6.2018. Whereafter the petitioner obtained no objection certificate from the Fire Department on 17.7.2018 and from the Pollution Control Board on 27.8.2018. The petitioner then, again, applied to the NOIDA Authority for extension of time for construction, which was approved on 2.8.2019. On 12.3.2020, the building plans of the petitioner were approved by the NOIDA Authority and it also issued a no dues certificate dated 29.7.2020. It is submitted that in view of the disruption on account of Covid-19 pandemic, the petitioner again, by means of letter dated 4.8.2020, sought an extension of time from 8.4.2020 to 7.4.2021 for which the due amount was also deposited. However, on 27.5.2021, the NOIDA Authority passed the impugned order declining the request for extension on the basis of the proviso to Section 7 of the U.P. Industrial Area Development Act, 1976 (for short 1976 Act), which was inserted by means of the U.P. Industrial Area Development (Amendment) Ordinance, 2020 (Ordinance

No.16 of 2020). It was stated therein that the time extension application of the petitioner cannot be allowed in terms of the newly inserted proviso to Section 7 of the 1976 Act and that the petitioner has time only till 28.7.2021 to complete the construction, failing which, the Authority shall take further steps.

5. It be noticed that by means of the U.P. Industrial Area Development (Amendment) Act, 2020 (U.P. Act No. 25 of 2020), the aforesaid Ordinance of 2020 was replaced and the proviso came to be inserted in Section 7 of the 1976 Act with effect from 28.07.2020.

6. It has been contended by the learned counsel for the petitioner that the impugned order is absolutely arbitrary inasmuch as adequate and proper notice as contemplated in the aforesaid U.P. Act No. 25 of 2020 has not been given.

7. Shri Kaushalendra Nath Singh, learned counsel for the NOIDA Authority, on the basis of instructions received by him has stated that as per the letter dated 30.7.2021 sent by the State Government to the NOIDA Authority, the period of one year as envisaged in the second part of the proviso to Section 7 of the 1976 Act, inserted by U.P. Act No. 25 of 2020, is to be counted from the date of service of notice and, therefore, the period of one year for utilization of the land, for which it has been allotted, is to be counted from 27.5.2021 i.e. the date of the notice/order.

8. Countering this, the learned counsel for the petitioner has urged that in the impugned notice, dated 27.5.2021, given by the respondent-Authority, the time period of one year has been counted from 28.7.2020, that is from the date on which the U.P. Act No. 25 of 2020 came into force. It is contended that that action of the NOIDA Authority is patently arbitrary and is in the teeth of the second part of the proviso to Section 7 of the 1976 Act. He contends that the second part of the proviso to Section 7 clearly provides that where the period provided in first part for utilization of the land has already lapsed before the commencement of the amending Act, the Authority is to give a notice to the allottee to use the land for the purpose it was allotted within a period of one year and if within the above period of one year the allottee does not use the land, it is then that the allotment and lease deed would stand automatically cancelled. In support of the above contention, the petitioner has relied upon a judgement of this Court dated 2.2.2021 passed in Writ-C No. 2238 of 2021 (M/s. J.M. Housing Limited Vs. State of U.P. and others), copy of which has been enclosed as Annexure- 37 to this petition.

9. Another argument raised by the learned counsel for the petitioner is that the supplementary lease deed was executed on 7.1.2013 and, only thereafter, that the petitioner got possession of the entire area of 8100 sq. meters of land therefore, the petitioner cannot be saddled with the burden imposed by the proviso to Section 7 of the 1976 Act, particularly, when, after receiving the possession of the entire area of 8100 sq. meters of land, the petitioner applied for additional FAR, as also no objection certificate from various authorities, and for sanction of the building plans.

10. Dealing with the second submission of the learned counsel for the petitioner first, which is based on the so-called supplementary lease deed dated 7.1.2013, it is observed that it is not a

supplementary lease deed but a correction deed that corrects the area of the plot mentioned in the original lease deed so as to be read as 8100 sq. meters in place of 5184 sq. meters. Similarly, it incorporates necessary corrections regarding the premium, lease rent, etc.. In this correction deed of 7.1.2013 it is specifically mentioned that all other terms and conditions of the original lease deed and allotment letter shall remain unchanged and applicable as well as binding upon the lessee. Therefore, no further benefit in respect of extension of time can enure to the petitioner on the basis of the deed executed on 7.1.2013.

11. As regards the first submission of the learned counsel for the petitioner regarding the impugned notice/order dated 27.5.2021 being arbitrary and in the teeth of the true import of the second part of the proviso to Section 7 of the 1976 Act, on perusal of the record and consideration of the submissions of the respective parties, it appears to us that this contention of the learned counsel for the petitioner has force. It be noticed that to Section 7 of the 1976 Act a proviso was inserted by U.P. Act No. 25 of 2020. The published Statement of Objects and Reasons of U.P. Act No.25 of 2020 is extracted below:

"The Uttar Pradesh Industrial Area Development Act, 1976 (U.P. Act No.6 of 1976) has been enacted to provide for the constitution of an Authority for the development of certain areas in the State into industrial and urban township and for the matters connected therewith. In order to accelerate industrialisation in the State, it was felt necessary to increase the land bank. Hence it was decided that if the industrial unit is not established within a period of five years from the date of possession, or within the period fixed for such utilisation, whichever is longer, the lease deed will stand automatically canceled and the land shall vest with the Industrial Development Authority. Where the aforesaid period has lapsed before the commencement of this Act, the Authority shall give notice to the allottee and if the allottee does not use the land within the period of one year mentioned above, the allotment and lease deed shall be deemed to have been automatically cancelled. In view of the above, it had been decided to amend aforesaid Act.

Since the State legislature was not in session and immediate legislative action was necessary to implement the aforesaid decision, the Uttar Pradesh Industrial Area Development (Amendment) Ordinance, 2020 (U.P. Ordinance No.16 of 2020) was promulgated by the Governor on July 28, 2020.

The Bill is introduced to replace the aforesaid Ordinance."

12. The amended Section 7 of 1976 Act, after insertion of the proviso by U.P. Act No.25 of 2020, reads as follows:

"**7. Power to the Authority in respect of transfer of land. -** The Authority may sell, lease or otherwise transfer whether by auction, allotment or otherwise any land or building belonging to the Authority in the industrial development area, on such terms and conditions as it may, subject to any rules that may be made under this Act, think fit to impose.

Provided that where any land so allotted is not utilised for the purpose for which it was allotted within the period of five years from the date of possession or

within the period fixed for such utilisation in the conditions of allotment, whichever is longer, the lease deed will stand cancelled and the land shall vest with the Authority. Provided further where the aforesaid period has already lapsed before the commencement of this Act, the Authority shall give a notice to the allottee to use the land for the purpose for which it was allotted within a period of one year and if within the above period of one year the allottee does not use the land, then the allotment and lease deed shall stand automatically cancelled.".

13. A coordinate Bench of this Court in its judgment dated 2.2.2021 in M/s. J.M. Housing Limited (supra) has observed as follows:

"5. The 1st part of the proviso provides that where any land so allotted is not utilized for the purpose for which it was allotted within a period of 5 years from the date of possession or within the period fixed for such utilization in the conditions of allotment, whichever is longer, the lease deed will stand cancelled and the land shall vest with the Authority. The 2nd part of the proviso provides that where the aforesaid period has already lapsed i.e. where the allotted land is not utilized within 5 years from the date of possession or within the specified period in the terms of allotment and the said period has expired before the commencement of the Amending Act, the authority is obliged to give a notice to use the land for the purpose for which it was allotted within a period of one year and if within the above period of one year the allottee does not use the land, then the allotment and lease deed shall stand automatically cancelled.

6. Thus, the condition precedent for applicability of the 2nd part of the proviso is that the period for utilization should have expired before the commencement of the Amending Act i.e. 28.7.2020 and the Authority before cancelling the allotment / lease had given a notice to the allottee to utilize the land within a year. Sri Singh, on instructions, does not dispute that no notice as contemplated in the 2nd part of the proviso to Section 7 of the Act was ever issued to the petitioner which is also authenticated in the impugned order as the same does not refer to issuance of any such notice, rendering the order dated 7.1.2021 vulnerable in law."

14. The inter play of the two parts of the proviso inserted to Section 7 of the 1976 Act by the amending Act (U.P. Act No.25 of 2020), as interpreted by a coordinate Bench of this Court (noticed above), is in sync with the statement of objects and reasons of the amending Act and, therefore, we are in respectful agreement with the view taken therein. To put it simply, under the first part of the proviso the lease deed stands cancelled where the land allotted is not utilized for the purpose for which it was allotted within the period of five years from the date of possession or within the period fixed for such utilisation in the conditions of allotment, whichever is longer. But where that period has expired before the commencement of the amending Act, that is before 28.07.2020, the second part of the proviso comes into play. Under which, the Authority is to give a notice to the allottee to use the land for the purpose for which it was allotted within a period of one year and if within the above period of one year the allottee does not use the land, then the allotment and lease deed stand automatically cancelled.

15. A perusal of the notice/order impugned dated 27.5.2021 reveals that the period of one year, as envisaged in the second part of the proviso to Section 7 of

the 1976 Act, has been reckoned from 28.7.2020, which is the date of enforcement of the U.P. Act No. 25 of 2020, and not the date of service of the notice. It is the case of the petitioner that the NOIDA Authority approved the time extension sought from the petitioner from 18.4.2019 to 7.4.2020. This period had already lapsed before 28.7.2020 i.e. the commencement of the U.P. Act No. 25 of 2020. Therefore, in our view, the second part of the proviso to Section 7 of the 1976 Act became applicable as per which the Authority (in this case NOIDA) had to give notice to the allottee to use the land for the purpose for which it is allotted within a period of one year. Thus, in our considered view, the impugned notice dated 27.5.2021, which refers to the period of one year to be reckoned from 28.7.2020, being the date of commencement of the U.P. Act No. 25 of 2020, is erroneous.

16. Consequently, the order/notice impugned dated 27.5.2021 passed by the respondent no. 5 is quashed. This petition is **disposed of** by leaving it open to the NOIDA Authority to take steps for issuance of notice to the petitioner as contemplated in the second part of the proviso to Section 7 of the 1976 Act.

(2021)09ILR A1246
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.09.2021

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE DEEPAK VERMA, J.

Writ C No. 19783 of 2021

AB (2021) ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Manoj Kumar Srivastava

Counsel for the Respondents:
C.S.C.

Medical Termination of Pregnancy Act, 1971 – Sections 3 & 5 - Medical Termination of Pregnancy (Amendment) Act, 2021, dated 25.03.2021 - Outer limit for abortion has been enhanced to 24 weeks - pregnancy could be terminated by a registered medical practitioner, if he is of opinion, formed in good faith, that continuance of the pregnancy would involve a risk to the life of pregnant woman, or grave injury to her physical or mental health, or there is a substantial risk of child suffering from physical or mental abnormalities, if born - Explanation-I to sub-section (2) of Section 3 - legal presumption - *legal presumption that pregnancy caused by rape would result in anguish to the pregnant woman and would constitute a grave injury to her mental health* - *'best interests' test* and *the 'substituted judgment' test* for determining whether the pregnancy should be permitted to be continued or not - *'best interest'* test requires the court to ascertain the course of action which would serve the best interest of the person in question - *'substituted judgment' test* requires the court to step into the shoes of a person who is considered to be mentally incapable and attempt to make the decision which the said person would have made, if she was competent to do so (Para 9, 10)

Permission sought for termination of pregnancy of victim of rape - victim major - Court constituted a Board of 4 experts one each in the field of Gynecology, Psychiatry, Radiology or Sonology and Pediatrics - As per medical report length of pregnancy less than 24 weeks - Board opined that since the petitioner does not want to continue her pregnancy, compelling her to do so, may pose a risk to her mental health and consequent physical and mental health problems to the child - Medical Board unequivocally in favour of fetus being aborted to

prevent risk to the life of the petitioner - *'best interest'* test applied - Court permitted termination of the pregnancy (Para 8, 11, 12)

Allowed. (E-5)

List of Cases cited :

1. Suchita Srivastava & ors. Vs Chandigarh Administration AIR 2010 SC 235

(Delivered by Hon'ble Manoj Kumar Gupta, J.
&
Hon'ble Deepak Verma, J.)

1. Heard learned counsel for the petitioner and learned Standing Counsel for the State.

2. The petitioner is a victim of rape. She has prayed for a mandamus commanding the respondent authorities to permit her to terminate her undesirable pregnancy.

3. In brief, the case set up in the writ petition is that an FIR was lodged by the brother of the petitioner on 1.5.2021, under Section 363, 366, 506 IPC, alleging that she had been abducted by three named accused and two unknown persons. The police after investigation had submitted a charge sheet on 19.6.2021 against accused persons under Section 366, 376 IPC. The trial is stated to be pending. The petitioner has alleged that she is suffering from extreme mental agony caused by unwanted pregnancy. Reliance has been placed upon Section 3 of the Medical Termination of Pregnancy Act, 1971 (hereinafter referred to as the 'Act'), in contending that the pregnancy had resulted in great anguish to her and thus involves grave risk to her mental and physical health.

4. On 27.8.2021, after hearing counsel for the petitioner and learned Standing Counsel, we passed the following order: -

"On oral mention made by learned counsel for the petitioner that the matter is extremely urgent and shall be rendered infructuous, if not taken immediately, the file was called for.

Heard Sri Manoj Kumar Srivastava, learned counsel for the petitioner and Sri Mohan Srivastava, learned Standing Counsel and Sri Sandeep Kumar Singh (State Law Officer) on behalf of respondents.

The petitioner claims to be a rape victim. She has approached this Court for a mandamus directing the respondents to permit her to terminate her undesirable pregnancy.

Reliance has been placed on Explanation-I to sub-section (2) of Section 3 of the Medical Termination of Pregnancy Act, 1971 (hereinafter referred to as 'the Act') in contending that the pregnancy has resulted in such extreme anguish to her that it constitutes grave injury to her mental health.

As per High School mark-sheet, the date of birth is 01.07.1997 and thus, she is a major. Reliance has also been placed on the amendment made to the 'Act' by the Medical Termination of Pregnancy (Amendment) Act, 2021, dated 25.03.2021 whereby the outer limit for abortion has been enhanced to twenty four weeks.

It is submitted that as per report of medical examination held on 20.05.2021 at District Women Hospital, Rampur, the age of fetus was eight weeks and one day at that time and as of date, the age of fetus is around twenty two weeks, two days i.e. less than twenty four weeks.

Section 3 of the 'Act' permitted termination of pregnancy in accordance with the provisions of the said Act. The outer limit prescribed for termination of pregnancy was twenty weeks. The same has been increased to twenty four weeks by the Amendment, Act of 2021. The Explanation-I to Section 3 of the Act, permits termination of pregnancy of a victim of rape by raising a presumption that the anguish caused by pregnancy in such cases constitute a grave injury to her mental health.

Learned counsel for the petitioner states that it would be convenient for the petitioner to get her pregnancy terminated at Aligarh which is near Rampur.

Accordingly, we request the Vice Chancellor, Aligarh Muslim University, Aligarh to constitute a Board of four experts one each in the field of Gynecology, Psychiatry, Radiology or Sonology and Pediatrics.

The first Additional District Judge, Aligarh shall act as a member cum co-ordinator of the medical Board.

The petitioner shall present herself before the Medical Board for medical examination day after tomorrow i.e. 29.08.2021 at 11 am. The Board after carrying out medical examination of petitioner, shall submit its opinion/recommendation in sealed cover to the First Additional District Judge, Aligarh, who shall forthwith transmit the same to this Court. The opinion/recommendation of the Board shall inter-alia be on the following aspects:

a) Length of pregnancy;

b) Whether continuance of pregnancy would involve any risk to the life of the petitioner;

c) Whether continuance of pregnancy would otherwise result in any grave injury to the petitioner;

d) Whether there is substantial risk that if the child were born, it would suffer from any serious physical or mental abnormality.

The report/recommendation of the Board shall positively be transmitted to this Court by 01.09.2021.

Sri Mohan Srivastava, learned Standing Counsel shall communicate this order to the Senior Superintendent of Police, Rampur, who shall provide full security to the petitioner and person accompanying her to medical college, Aligarh for medical examination. Sri Shashank Shekher Singh, learned counsel for Aligarh Muslim University, Aligarh, who on our request is present, has undertaken to communicate the instant order to the Vice Chancellor, Aligarh Muslim University, Aligarh within 24 hours so that it is duly complied with.

Office is directed to provide a free copy of this order to Sri Mohan Srivastava, learned Standing Counsel and Sri Shashank Shekher Singh, learned counsel for the Aligarh Muslim University, Aligarh for due communication to the authorities. The Registrar (Compliance) shall communicate the instant order to Additional District Judge, Aligarh.

Put up as fresh on 01.09.2021.

Office is directed to substitute the name of the petitioner with AB (2021) in the writ petition, in computer database and in certified copy or any other documents that is issued or put in public domain so that the identity of the petitioner does not get disclosed."

5. Pursuant to our above order, the petitioner presented herself for medical examination on 29.8.2021 at Jawahar Lal Nehru Medical College Hospital, AMU, Aligarh, before a Medical Board constituted for such purpose by the Vice Chancellor. The report of the Medical Board has been submitted in a sealed cover through 1st Additional District Judge, Aligarh. The report of the Medical Board is as follows: -

A. Length of pregnancy?

Ans: As per last menstrual period - 20 weeks 4 days

As per USG parameters - 21 weeks 02 days

B. Whether continuance of pregnancy would involve any risk to the life of the petitioner?

Ans. Based on history and examination there are no apparent risk factors that may pose significant risk to her life at present. However, her urine examination shows persistent ketone bodies which is likely to be due to poor oral intake (since she travelled from Rampur to Aligarh and had motion sickness as told by her). For this abnormal lab report she is advised for observation and management.

C. Whether continuance of pregnancy would otherwise result in any grave injury to the petitioner?

Ans: As per history and mental status examination, she had a traumatic experience and is under stress but she doesn't have any diagnosable mental health problem at present.

6. However, she may be at high risk to develop mental health problems (like Depression, Anxiety Disorders) as she does not want to continue her pregnancy. This may lead to mental disorder necessitating medicines with potential harmful effect on her growing fetus and after delivery to her new born child as well.

D. Whether there is a substantial risk that if the child were born it would suffer from any serious physical or mental abnormality?

Ans: Based on the examination and USG report there is no physical abnormality in the fetus at present.

7. As per the evidence in medical literature, children born out of rape are more likely to suffer from physical and mental health problems (like Low Birth Weight Failure to thrive, Depression, Personality Disorders) due to poor mother-child relationship, abusive parenting or neglect by the mother. Also children born out of rape face great social stigma and are other ostracized by families and communities.

Impression: The member of the board concluded that at present there is no risk to the life of the victim or physical abnormality in the fetus. As told to the board, the victim does not want to continue her pregnancy and compelling her to do so may pose a risk for developing mental health problems in her and consequent

physical and mental health problems to the child.

(Dr. Seema Hakim)
(Mr.ShahidRaza)
Professor 1st Additional Distt Judge
(Chairman of the Board) (Member-cum-Coordinator of the Board)
Dept. of Obst. & Gynaecology Aligarh
J.N. Medical College

(Dr. Shagufta Wahab)
(Dr. Uzma Firdaus)
Professor
Dept. of Paediatrics
Dept. of Radiodiagnosis
J.N. Medical College Hospital
J.N. Medical College

(Dr. Mohd. Reqazuddin)
Dept. of Phychaitry
J.N. Medical College

8. It is clear from the above report that the length of pregnancy as per last menstrual period was 20 weeks 4 days and as per ultrasonography parameters, 21 weeks 02 days, thus, less than 24 weeks (the outer limit prescribed under Section 3(2) of the Act). The report also clearly states that in case of continuance of pregnancy, the petitioner will be at higher risk of developing mental health problems as she does not want to continue her pregnancy. The child, if born, is likely to suffer from physical and mental health problems due to various reasons mentioned in the report. The report also clearly opines that since the petitioner does not want to continue her pregnancy, compelling her to do so, may pose a risk to her mental health and consequent physical and mental health problems to the child.

9. Section 3 of the Act provides that a pregnancy could be terminated by a registered medical practitioner, if he is of opinion, formed in good faith, that continuance of the pregnancy would involve a risk to the life of pregnant woman, or grave injury to her physical or mental health, or there is a substantial risk of child suffering from physical or mental abnormalities, if born. The first explanation to sub-section 2 of Section 3 creates a legal presumption that pregnancy caused by rape would result in anguish to the pregnant woman and would constitute a grave injury to her mental health.

10. In **Suchita Srivastava & Others vs. Chandigarh Administration, AIR 2010 SC 235,** the Supreme Court laid down two tests, namely the 'best interests' test and the 'substituted judgment' test for determining whether the pregnancy should be permitted to be continued or not. The 'best interest' test requires the court to ascertain the course of action which would serve the best interest of the person in question. The 'substituted judgment' test requires the court to step into the shoes of a person who is considered to be mentally incapable and attempt to make the decision which the said person would have made, if she was competent to do so.

11. In the instant case, concededly the victim as per high school mark sheet is major and thus the 'best interest' test has to be applied to the facts of the instant case.

12. Applying the said test, we find that apart from the presumption that is engrafted under the first *Explanation* to sub-section 2 of Section 3 of the Act, the report of Medical Board is unequivocally in favour of fetus being aborted to prevent risk to the life of the petitioner. We

accordingly allow and permit termination of the pregnancy.

13. The pregnancy shall be terminated by a registered medical practitioner at a hospital established or maintained by Government or a place for the time being approved for the purpose of this Act by Government, as contemplated under Section 4 of the Act. The hospital where the pregnancy is terminated shall maintain confidentiality, as required under Section 5-A of the Act.

14. We further direct that in terms of the request made by the petitioner by filing supplementary affidavit, the tissues and blood samples of the fetus shall be preserved by the hospital where pregnancy is terminated. It shall be forwarded to the nearest Government approved forensic laboratory for preservation and testing, as may be directed by the trial court seized of the matter.. The permission given hereinabove for termination of pregnancy shall last only until the fetus attains age of 24 weeks and consequently, the petitioner is directed to present herself for termination of pregnancy at recognized medical centre, as stipulated under Section 4 of the Act, well before expiry of 24 weeks, failing which the instant order shall automatically lapse.

15. The Registrar General is directed to preserve the report of Medical Board in sealed cover for future reference, if needed.

16. The petition stands disposed of accordingly.

(2021)09ILR A1251
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.08.2021

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ C No. 19804 of 2021

Babu Ram ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ram Kishore Pandey, Sri Priyanshu Pandey

Counsel for the Respondents:
C.S.C., Sri Hari Narayan Singh

Civil Law - U.P. Revenue Code, 2006 - Sections 67 & 67A - Illegal Encroachment - If defence of S. 67(A) is taken by the notice in proceedings under S. 67, then proceedings u/s 67(A) should be registered separately but both cases i.e. case u/s 67 as well u/s 67(A) should be consolidated, heard & decided together - courts in proceedings u/s 67 of the Code are under obligation of law to decide the eligibility of the noticee for protection u/s 67(A) of the Code (Para 12)

Petitioner invoked protection of s. 67(A) of the Code on the footing that his residential house was erected 35 years ago on the disputed parcel of land & that a residential patta was granted to his predecessors - courts below held petitioner to be illegal encroacher & regarding petitioner's defence held that it was open to the petitioner to take out separate proceedings u/s 67(A) of the Code for grant of appropriate relief as claimed by him - Held - courts below erred in law by failing to consider that the petitioner is entitled to the protection of Section 67(A) of the Code.

Allowed. (E-5)

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

1. Heard Sri Ram Kishore Pandey, learned counsel for the petitioner, learned

Standing Counsel for the respondents No.1 to 3-State and Sri Hari Narayan Singh, learned counsel for the respondent No.4-Gaon Sabha.

2. By the impugned order dated 22.01.2021 passed by the respondent No.3-Tehsildar (Judicial)/Assistant Collector 1st Class, Tehsil-Narwal, District-Kanpur Nagar rendered in proceedings registered as Suit No.03064 of 2019, Computerized Suit No.T201903410403064 (State of U.P. Vs. Baburam) under Section 67 of the Uttar Pradesh Revenue Code, 2006 (hereinafter referred to as the 'Code'), the petitioner was found to be illegal encroachment over the disputed parcels of land. The learned appellate court/Additional District Magistrate (Judicial), Kanpur Nagar by the impugned order dated 20.07.2021 agreed with the findings of the learned trial court/Tehsildar (Judicial)/Assistant Collector 1st Class, Tehsil-Narwal, District-Kanpur Nagar, and affirmed its judgement dated 22.01.2021.

3. Sri Ram Kishore Pandey, learned counsel for the petitioner contends that the ancestors of the petitioner were allotted a residential patta over the disputed parcels of land. The predecessors in interest of the petitioner had erected a residential house on the disputed parcels of land almost 35 years ago. This fact was confirmed in the report submitted by the Lekhpal which is appended as annexure 4 to the writ petition. The learned courts below erred in law and entered perverse findings by failing to consider the aforesaid defence as well as corroborative evidence in that regard. The petitioner is entitled to the protection of Section 67(A) of the Code.

4. A perusal of the impugned order dated 22.01.2021 and the order dated 20.07.2021 corroborates the submission of Sri Ram Kishore Pandey, learned counsel for the petitioner.

5. The aforesaid facts could not be disputed by the learned Standing Counsel for the respondents No.1 to 3-State and Sri Hari Narayan Singh, learned counsel for the respondent No.4-Gaon Sabha

6. The petitioner had clearly invoked the protection of 67(A) of the Code on the footing that his residential house was erected 35 years ago and that a residential patta was granted to his predecessors. The learned courts below neglected to consider the aforesaid facts and defences raised by the petitioner. This reflects non application of mind.

7. Adverting to the eligibility of the petitioner for protection under Section 67(A) of the Code and the rights purportedly accruing to him thereunder, the appellate court held that it was open to the petitioner to take out proceedings under Section 67(A) of the Code for grant of appropriate relief as claimed by him. After noticing the aforesaid facts, the appellate court agreed with the judgment of the trial court and dismissed the appeal. The trial court did not return any finding on this issue.

8. Section 67 as well as Section 67(A) of the Code reflect the composite intent of legislature. The legislature by enacting the aforesaid provision has recognized the vulnerability of the State land to illegal encroachment and the need for urgent corrective measures. Simultaneously the legislature has also acknowledged the reality of a large number of persons who have erected dwelling units on lands which are not reserved for any public purposes.

The legislature has protected their rights in the manner prescribed in the provision. For ease of reference the provisions are extracted hereunder:

"67 Power to prevent damage, misappropriation and wrongful occupation of Gram Panchayat property.- (1) Where any property entrusted or deemed to be entrusted under the provisions of this Code to a **Gram Panchayat** or other local authority is damaged or misappropriated, or where any **Gram Panchayat** or other authority is entitled to take possession of any land under the provisions of this Code and such land is occupied otherwise than in accordance with the said provisions, the Bhumi Prabandhak Samiti or other authority or the Lekhpal concerned, as the case may be, shall inform the Assistant Collector concerned in the manner prescribed.

(2) Where from the information received under sub-section (1) or otherwise, the Assistant Collector is satisfied that any property referred to in sub-section (1) has been damaged or misappropriated, or any person is in occupation of any land referred to in that sub-section in contravention of the provisions of this Code, he shall issue notice to the person concerned to show cause why compensation for damage, misappropriation or wrongful occupation not exceeding the amount specified in the notice be not recovered from him and why he should not be evicted from such land.

(3) If the person to whom a notice has been issued under sub-section (2) fails to show cause within the time specified in the notice or within such extended time as the **Assistant Collector** may allow in this behalf, or if the cause shown is found to be insufficient, the **Assistant Collector** may direct that such person shall be evicted from the land, and may, for that purpose, use or cause to be used such force as may be necessary, and may direct that the amount of compensation for damage or 34 misappropriation of the property or for wrongful occupation, as the case may be, be recovered from such person as arrears of land revenue.

(4) If the **Assistant Collector** is of opinion that the person showing cause is not guilty of causing the damage or misappropriation or wrongful occupation referred to in the notice under sub-section (2), he shall discharge the notice.

(5) Any person aggrieved by an order of the **Assistant Collector** under sub-section (3) or sub-section (4), may within thirty days from the date of such order, prefer an appeal to the Collector.

(6) Notwithstanding anything contained in any other provision of this Code, and subject to the provisions of this section every order of the **Assistant Collecto**r under this section shall, subject to the provisions of sub-section (5) be final.

(7) The procedure to be followed in any action taken under this section shall be such as may be prescribed.

Explanation. - For the purposes of this section, the word 'land' shall include the trees and buildings standing thereon

67-A Certain house sites to be settled with existing owners thereof.- (1) If any person referred to in sub-section (1) of section 64 has built a house on any

land referred to in section 63 of this Code, not being land reserved for any public purpose, and such house exits on the November 29, 2012, the site of such house shall be held by the owner of the house on such terms and conditions as may be prescribed.

(2) Where any person referred to in sub-section (1) of section 64, has built a house on any land held by a tenure holder (not being a government lessee) and such house exits on November 29, 2000, the site of such house, notwithstanding anything contained in this Code, be deemed to be settled with the owner of such house by the tenure holder on such terms and conditions as may be prescribed.

Explanation. - For the purpose of sub-section (2), a house existing on November 29, 2000, on any land held by a tenure holder, shall, unless the 35 contrary is proved, be presumed to have been built by the occupant thereof and where the occupants are members of one family by the head of that family. "

9. Section 67(A) of the Code confers rights on certain people who have encroached upon public land. The prerequisite conditions for invoking the protection of Section 67(A) of the Code are these. The person against whom proceedings are taken out has built his house on any land referred to in Section 63 of the Code, the person who seeks protection of Section 67(A) of the Code should be in the category of persons referred to in Section 63 of the Code. The land should not be reserved for any public purpose. The date of the construction of the house should be prior to 29 November, 2012. The house of such persons should be existing in the disputed parcels of land on or before 29 November 2012.

10. In many instances, as indeed in the present case, the noticee under Section 67 of the Code may invoke the protection of Section 67(A) of the Code to resist the proceedings under Section 67 of the Code.

11. The authority/ court having jurisdiction to decide the proceedings taken out under Section 67 of the Code or Section 67(A) of the Code is the same. When the defence of Section 67(A) of the Code is taken in proceedings of Section 67 of the Code, the same issues will be directly and substantially in issue in both the proceedings. Usually in such matters pleadings, defence, and evidence of the parties are same in both the proceedings. In case proceedings under Section 67 and 67(A) of the Code are conducted separately and in isolation to one another, it would lead to multiplicity of litigation and inconsistent judgments. There will also be an avoidable delay in decision of the controversy and may even result in miscarriage of justice.

12. The courts in proceedings under Section 67 of the Code are under obligation of law to decide the eligibility of the noticee for protection under Section 67(A) of the Code. In case defence under Section 67(A) of the Code is taken by the noticee, the said proceedings shall be registered separately. But both cases will be consolidated and heard and decided together.

13. This procedure would faithfully implement the legislative intent and also serve the interest of justice.

14. In the facts and circumstances of this case, the failure of the learned courts below to enquire into the validity of the

defence of the petitioner under Section 67(A) of the Code has resulted into a miscarriage of justice.

15. In the wake of preceding discussion, the impugned order dated 22.01.2021 and the order dated 20.07.2021 are vitiated and contrary to law.

16. The order dated 22.01.2021 passed by the respondent No.3-Tehsildar (Judicial)/Assistant Collector 1st Class, Tehsil-Narwal, District-Kanpur Nagar and the order dated 20.07.2021 passed by the learned appellate court/Additional District Magistrate (Judicial), Kanpur Nagar, are liable to be set aside and are set aside.

17. The matter is thus remitted to the respondent No.3-Tehsildar (Judicial)/ Assistant Collector 1st Class, Tehsil-Narwal, District-Kanpur Nagar for a fresh determination consistent with the observation made in this judgment.

18. The following directions are being passed to serve the interest of justice in this case:

(1) The petitioner shall file a fresh application under Section 67(A) of the Code before the respondent No.3-Tehsildar (Judicial)/Assistant Collector 1st Class, Tehsil-Narwal, District-Kanpur Nagar within a period of one month from the date of production of a computer generated 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-Tehsildar (Judicial)/Assistant Collector 1st Class, Tehsil-Narwal, District-Kanpur Nagar, shall register the proceedings under Section 67(A) of the Code upon submission of such application.

(3) Proceedings under Section 67(A) of the Code so instituted shall be consolidated and heard with proceedings under Section 67 of the Code registered as Suit No.03064 of 2019, Computerized Suit No.T201903410403064 (State of U.P. Vs. Baburam) and decided by a common judgment.

19. The writ petition is allowed to the extent indicated above.

(2021)09ILR A1255
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.09.2021

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE DEEPAK VERMA, J.

Writ C No. 19983 of 2021

CD (2021) & Anr. ...Petitioners
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioners:
Sri Nipun Singh, Sri Rishi Upadhyay

Counsel for the Respondents:
C.S.C.

Medical Termination of Pregnancy Act,1971 – Sections 3 & 5 - Medical Termination of Pregnancy (Amendment) Act, 2021, dated 25.03.2021 - Outer limit for abortion has been enhanced to 24 weeks - pregnancy could be terminated by a registered medical practitioner, if he is

of opinion, formed in good faith, that continuance of the pregnancy would involve a risk to the life of pregnant woman, or grave injury to her physical or mental health, or there is a substantial risk of child suffering from physical or mental abnormalities, if born - Explanation-I to sub-section (2) of Section 3 - legal presumption - *legal presumption that pregnancy caused by rape would result in anguish to the pregnant woman and would constitute a grave injury to her mental health* - *'best interests' test* and *the 'substituted judgment' test* for determining whether the pregnancy should be permitted to be continued or not - *'best interest'* test requires the court to ascertain the course of action which would serve the best interest of the person in question - *'substituted judgment' test* requires the court to step into the shoes of a person who is considered to be mentally incapable and attempt to make the decision which the said person would have made, if she was competent to do so (Para 8, 9)

Permission sought for termination of pregnancy of victim of gang rape - petitioner who is only sixteen years of age, does not want to continue with her pregnancy - Court constituted a Board of 4 experts one each in the field of Gynecology, Psychiatry, Radiology or Sonology and Pediatrics - As per medical report length of pregnancy less than 24 weeks - report clearly opines that in case the pregnancy is permitted to continue, there is risk to the life of the petitioner and that the unwanted pregnancy had resulted in grave injury to the mental health of the petitioner - *petitioner being minor, court applied 'substituted judgment test* - Court permitted termination of the pregnancy (Para 10, 11)

Allowed. (E-5)

List of Cases cited :

1. Suchita Srivastava & ors. Vs Chandigarh Administration AIR 2010 SC 235

(Delivered by Hon'ble Manoj Kumar Gupta, J.

&

Hon'ble Deepak Verma, J.)

1. Heard Sri Nipun Singh, learned counsel for the petitioners and Sri Manish Goel, learned Additional Advocate General, Sri Suresh Singh, learned Additional Chief Standing Counsel, assisted by Sri Hari Keshav, learned Standing Counsel, for the respondents.

2. The first petitioner is a victim of gang rape. She has prayed for a mandamus commanding respondent 2 to permit her to terminate her unwanted pregnancy.

3. In brief, the case set up in the writ petition is that petitioner no. 1 while on her way to school, was kidnapped. Petitioner 2, who is father and natural guardian of petitioner no. 1, got registered a FIR (Case Crime No. 0036 of 2021) on 29.1.2021, under Section 363 IPC, against one Manjit. When even after expiry of five months, the police failed to trace out petitioner no. 1, a writ petition bearing number 4571 of 2021 was filed before this Court, wherein direction was given to the police authorities to ensure recovery of the victim girl. On 22.7.2021, petitioner no. 1 was recovered from the custody of named accused. She was produced before Child Welfare Officer, Bulandshahr and after completing legal formalities, her custody was handed over to her parents. It has transpired during investigation that she was ravaged by named accused Manjit and two others. On 24.7.2021, petitioner no. 1 got herself examined at B.B.D. Government Hospital, Bulandshahr and according to ultrasonography report, her pregnancy was of 14 weeks at that time. Her age has been determined to be sixteen years by CMO, Bulandshahr, as is evident from a certificate issued in that regard dated

13.7.2021. The investigating officer upon discovery of evidence regarding rape added Sections 376, 507 IPC and Section 3/4 of the Protection of Children from Sexual Offences Act 2012. The matter is still under investigation. The petitioner is stated to be suffering from extreme mental agony caused by unwanted pregnancy. Reliance has been placed upon Section 3 of the Medical Termination of Pregnancy Act, 1971 (hereinafter referred to as the 'Act'), in contending that the pregnancy had resulted in great anguish to her and thus involves grave risk to her mental and physical health.

4. On 27.8.2021, this Court after hearing counsel for the petitioners and learned Standing Counsel, passed the following order: -

"On oral mention made by learned counsel for the petitioners that the matter is extremely urgent and shall be rendered infructuous, if not taken immediately, the file was called for.

Heard Sri Nipun Singh, learned counsel for the petitioners and Sri Manish Goel, learned Additional Advocate General assisted by Sri Mohan Srivastava, learned Standing Counsel and Sri Sandeep Kumar Singh (State Law Officer) on behalf of respondents.

The petitioner no. 1 claims to be a rape victim. She has approached this Court, through her guardian-petitioner no. 2 (father) for a mandamus directing the respondents to permit her to terminate her undesirable pregnancy.

Reliance has been placed on Explanation-I to sub-section (2) of Section 3 of the Medical Termination of Pregnancy Act, 1971 (hereinafter referred to as 'the Act') in contending that the pregnancy has resulted in such extreme anguish to her that it constitutes grave injury to her mental health.

As per radiological report of Chief Medical Officer, Bulandshahr, the date of birth of victim is around 16-17 years and thus, she is a minor. Reliance has also been placed on the amendment made to the 'Act' by the Medical Termination of Pregnancy (Amendment) Act, 2021, dated 25.03.2021 whereby the outer limit for abortion permissibility has been enhanced to twenty four weeks.

It is submitted that as per report of medical examination held on 24.7.2021 at B.B.D. Government Hospital, Bulandshahr, the age of fetus at that time was 14.6 weeks meaning thereby that as of date the pregnancy is of about nineteen weeks.

Section 3 of the Act permitted termination of pregnancy in accordance with the provisions of the said Act. The outer limit prescribed for termination of pregnancy was twenty weeks. The same has been increased to twenty four weeks by the Amendment, Act of 2021. The Explanation-I to Section 3 of the Act, permits termination of pregnancy of a victim of rape by raising a presumption that the anguish caused by pregnancy in such cases constitute a grave injury to her mental health.

Learned counsel for the petitioner states that it would be convenient for the petitioner to get her pregnancy terminated at Lala Lajpat Rai Memorial Medical College, Meerut.

Accordingly, we direct the Principal, Lala Lajpat Rai Memorial Medical College, Meerut to constitute a

Board of four experts one each in the field of Gynecology, Psychiatry, Radiology or Sonology and Pediatrics.

The first Additional District Judge, Meerut shall act as a member cum co-ordinator of the medical Board.

The petitioner shall present herself before the Medical Board for medical examination on 31.08.2021 at 11 am. The Board after carrying out medical examination of petitioner, shall submit its opinion/recommendation in sealed cover to the First Additional District Judge, Meerut, who shall forthwith transmit the same to this Court. The opinion/recommendation of the Board shall inter-alia be on the following aspects:

a) Length of pregnancy;

b) Whether continuance of pregnancy would involve any risk to the life of the petitioner no. 1;

c) Whether continuance of pregnancy would otherwise result in any grave injury to the petitioner no.1;

d) Whether there is substantial risk that if the child were born, it would suffer from any serious physical or mental abnormality.

The report/recommendation of the Board shall positively be transmitted to this Court by 02.09.2021.

Sri Mohan Srivastava, learned Standing Counsel shall communicate this order to the Senior Superintendent of Police, Bulandshahr, who shall provide full security to the petitioner and person accompanying her to medical college, Meerut for medical examination. Sri Manish Goel, learned Additional Advocate General, who on our request is present, has undertaken to communicate to the instant order to the Principal, Lala Lajpat Rai Memorial Medical College, Meerut within 24 hours so that it is duly complied with.

Office is directed to provide a free copy of this order to Sri Mohan Srivastava, learned Standing Counsel for due communication to the authorities. Registrar (Compliance) shall communicate the instant order to Additional District Judge, Meerut.

Put up as fresh on 03.09.2021.

Office is directed to substitute the name of the petitioner with CD (2021) in the writ petition, in computer database and in certified copy or any other documents that is issued or put in public domain so that the identity of the petitioner does not get disclosed."

5. Pursuant to our above order, the petitioner presented herself for medical examination on 31.8.2021 at Lala Lajpat Rai Medical College, Meerut, before a Medical Board constituted for such purpose. The report of the Medical Board has been submitted in a sealed cover through 1st Additional District Judge, Meerut. The report of the Medical Board is as follows: -

A. Length of pregnancy:- on the basis of last menstrual period, examination and ultrasonography period of gestation seems to be 20.3 weeks.

B. Whether continuance of pregnancy would involve any risk to life of the petitioner no. 1: -

As such petitioner is not suffering from any organic disease but indirectly there are risks to life because: -

i. Teenager pregnancies have higher risk of complications like anemia, hypertension, haemorrhage, malnutrition, sexually transmitted infections (STI), cervical cancers, etc.

ii. More prone for depression, psychosis and suicidal tendencies.

C. Whether continuance of pregnancy would otherwise result in any grave injury to petitioner no. 1.

YES, Anguish caused by sexual assault would result in grave injury to her mental health.

D. Whether there is a substantial risk that if the child were born, it would suffer from any serious physical or mental abnormality.

Couldn't be commented.

6. The Medical Board recommends medical termination of pregnancy of petitioner no. 1 CD (2021).

Dr. Tarun Pal
Dr. Yasmeen Usmani
Asst. Professor and Head
Assoc. Prof. And Head
Dept. of Psychiatry
Dept. of Radiodiagnosis
LLRM Medical College, Meerut
LLRM Medical College, Meerut
Member, Medical Board
Member, Medical Board

Dr. Vijay Jaiswal
Dr. Urmila Karya
Professor and Head
Professor and Head
Dept. of Paediatrics
Dept. of Obst. & Gynae.
LLRM Medical College, Meerut
LLRM Medical College, Meerut
Member, Medical Board
Member, Medical Board

7. It is clear from the above report that the length of pregnancy as per last menstrual period, examination and ultrasonography period of gestation has been reported to be 20.3 weeks, thus, less than 24 weeks (the outer limit prescribed under Section 3(2) of the Act). The report also clearly states that in case of continuance of pregnancy, the petitioner will be at higher risk of developing mental health problems. The report clearly opines that in case the pregnancy is permitted to continue, there is risk to the life of the petitioner and that the unwanted pregnancy had resulted in grave injury to the mental health of the petitioner.

8. Section 3 of the Act provides that a pregnancy could be terminated by a registered medical practitioner, if he is of opinion, formed in good faith, that continuance of the pregnancy would involve a risk to the life of pregnant woman, or grave injury to her physical or mental health, or there is a substantial risk of child suffering from physical or mental abnormalities, if born. The first explanation to sub-section 2 of Section 3 creates a legal presumption that pregnancy caused by rape would result in anguish to the pregnant woman and would constitute a grave injury to her mental health.

9. **In Suchita Srivastava & Others vs. Chandigarh Administration, AIR 2010 SC 235,** the Supreme Court laid down two tests, namely the 'best interests' test and the 'substituted judgment' test for determining whether the pregnancy should be permitted to be continued or not. The 'best interest' test requires the court to ascertain the course of action which would serve the best interest of the person in question. The 'substituted judgment' test requires the court to step into the shoes of a person who is considered to be mentally incapable and attempt to make the decision which the said person would have made, if she was competent to do so.

10. In the instant case, the petitioner being a minor, the 'substituted judgment' test would apply. As noted above, the petitioner who is only sixteen years of age, does not want to continue with her pregnancy. The medical opinion is unequivocally in favour of fetus being aborted to prevent risk to the life of the petitioner. First Explanation to sub-section 2 of Section 3 of the Act engrafts a presumption that where a pregnancy has resulted on account of rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman. The second petitioner who is father and natural guardian of the first petitioner, has consented to the termination of pregnancy, having joined the instant petition as a co-petitioner.

11. In totality of the facts and circumstances of the instant case, we are of considered opinion that petitioner no. 1 should be permitted to terminate the unwanted pregnancy. We accordingly allow and permit the termination of the pregnancy.

12. The pregnancy shall be terminated by a registered medical practitioner at a hospital established or maintained by Government or a place for the time being approved for the purpose of this Act by Government, as contemplated under Section 4 of the Act. The hospital where the pregnancy is terminated shall maintain confidentiality, as required under Section 5-A of the Act.

13. The permission given hereinabove for termination of pregnancy shall last only until the fetus attains age of 24 weeks and consequently, the petitioner is directed to present herself for termination of pregnancy at recognized medical centre, as stipulated under Section 4 of the Act, well before expiry of 24 weeks, failing which the instant order shall automatically lapse.

14. The Registrar General is directed to preserve the report of Medical Board in sealed cover for future reference, if needed.

15. The petition stands disposed of accordingly.

(2021)09ILR A1260
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.03.2021

BEFORE

THE HON'BLE SUBHASH CHAND, J.

Criminal Appeal No. 2018 of 2019

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

Counsel for the Appellant:
Sri Amit Kumar Srivastava, Sri Anil Pathak, Sri Raj Kumar Singh, Sri Ramesh Kumar Mishra, Sri Saghir Ahmad (Senior Adv.)

Counsel for the Opposite Party:
A.G.A., Sri Dinesh Kumar Yadav, Sri Mahesh Prasad Yadav

A. Criminal Law – Murder – Right of private defence - Code of Criminal Procedure, 1973 - Sections 374(2), 313 & 437-A - Indian Penal Code,1860 -Sections 304 & 103 - Indian Evidence Act, 1872 - Section 105- Arms Act,1959 - Section 25/27 - Accused need not raise specific plea of self defence, court can consider its availability even in absence of the plea raised by the accused. (Para 26)

Indian Evidence Act, 1872: Section 105 - S.105 of Evidence Act does not prevent the Court from giving benefit of doubt altogether to an accused under general exceptions. It makes possible both kinds of acquittal (i) by proving his plea fully and another (ii) by raising genuine doubt in the case. The doubt which the law contemplates is certainly not that of a weak or unduly vacillating, capricious, indolent, drowsy, or confused mind. It must be the doubt of the prudent man who is assumed to possess the capacity to "separate the chaff from the grain". (Para 28, 29, 30, 32)

In the present case certainly on behalf of appellant/convict this plea of self defence in general exceptions of IPC is neither raised in the statement u/s 313 of Cr.P.C. of the accused, nor the same has been elucidated to the prosecution witnesses during cross-examination on behalf of accused by the defence counsel. Even no evidence has been adduced on behalf of accused to prove the plea of self defence of general exceptions of IPC. (Para 31)

Hon'ble Apex Court has held that if from the evidence on record as a whole a reasonable consequential doubt is created in the mind of the court whether the accused is really guilty of the offence; the plea of self defence in general exceptions of IPC can be considered. (Para 32)

B. Indian Penal Code,1860 - Section 103 - provides when the right of private defence of property extends to causing death, if the theft, mischief, or house-trespass, under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised. (Para 33)

The trial court held guilty to the appellant for culpable homicide not amounting to murder u/s 304 of IPC with the finding that the appellant/convict exceeded the right of private defence. (Para 24)

In the present case, from the prosecution evidence on record, it is found that the deceased Indersen had intruded in the house of accused at 1.30 O'clock in the intervening night of 14/15.07.2007 (Amavasaya), the entry at the wee hours is certainly **criminal house-trespass,** which caused reasonable apprehension in the mind of inmates of the house that some miscreant had intruded in their house. Consequently the inmates of the house of accused raised alarm. P.W. 1-Kallu Ram (informant of this case) and P.W. 2-Surya Pal also attracted immediately at the place of occurrence. The so called miscreant had hidden himself in the Attari of the house and despite raising alarm even in presence of prosecution witnesses P.W. 1 and P.W. 2, he did not appear to disclose his identity. The appellant Amar Singh who was armed with licensee gun of his father, also raised alarm, when so called miscreant did not come out from the Attari, he under the misconception opened fire to avoid any mishap. (Para 32, 34)

Certainly the deceased Indersen was not armed with any weapon, he had not made any threatening and had not made any assault but by hiding himself in the Attari raised **reasonable apprehension in the mind of the appellant which seems to be the reasonable consequential apprehension of a prudent man, that his presence inside the house may cause any mishap to any inmate of the house or property as well.** A prudent man in the similar circumstances would take such a decision more so; if he had any licensee gun in his house to protect his person and property as well. (Para 34, 35)

Criminal appeal allowed. (E-4)

Precedent followed:

1. Rishikesh Singh Vs. St.of U.P., AIR 1970 Alld. 51 (FB) (Para 10)

2. Sampath Kumar Vs. Inspector of Police, 2012 (77) ACC 251 (SC) (Para 18)

3. Darshan Singh V.s St. of Punjab & anr., 2010 (2) SCC 333 (Para 25)

4. Satya Narayan Yadav Vs. Gajanand, AIR 2008 SC 2384 (Para 26)

5. Laxman Singh Vs. Poonam Singh & ors., 2004 (10) SCC 94 (Para 28)

6. Rishikesh Singh Vs. State, AIR 1970 Alld 51 (Para 29)

7. Parbhoo Vs. Emperor, AIR 1941 All 402 (FB) (Para 29)

Present appeal assails the judgment and orders dated 01.03.2019, passed by 3rd Additional Sessions Judge, Chitrakoot.

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

The instant appeal on behalf of accused-appellants under Section 374(2) Cr.P.C. is preferred against the judgment and orders dated 01.03.2019 passed by 3rd Additional Sessions Judge, Chitrakoot, in Sessions Trial No. 2 of 2008, State vs. Amar Singh and another & Sessions Trial No. 3 of 2008 (State Vs. Amar Singh), whereby the appellants have been convicted and sentenced as follows:

Sessions Trial No. 2 of 2008
Appellant -Amar Singh

304 IPC :	Ten years rigorous imprisonment with fine of Rs.20,000/- and in default of payment of fine six months additional simple imprisonment.

Sessions Trial No. 3 of 2008
Appellant -Amar Singh

25/27 Arms Act :	Two years rigorous imprisonment with fine of Rs.5,000/- and in default of payment of fine two months' additional simple imprisonment.

1. In the present appeal facts of the prosecution case may be summarized as under :-

Brief facts giving rise to the present Criminal Appeal are that the informant Kallu Ram son of Chunkoo, resident of village and post Chillimal, P.S. Rajapur, District Chitrakoot moved written information on 15.07.2007 with these allegations that in the intervening night at 1.30 O'clock, he heard the noise from the house of Gaya Prasad son of Jhurai that some miscreant has intruded in his house. He and the people of the village attracted to the house of Gaya Prasad and it was told that the miscreant had entered in the Attari having crossed the courtyard of the house. Despite alarming, the miscreant did not come out, Amar Singh (appellant herein) the son of Gaya Prasad opened fire with the licensee gun of his father on the miscreant presuming him to be miscreant and that person died on the spot. Thereafter he was brought down from the Attari and it was found that the person was Indersen son of Ram Milan Yadav of their family. Therefore, the murder of cousin brother was committed under misconception that he was miscreant. His dead body is lying on the spot. This written information was given with the police station Rajapur, on which case crime no.80 of 2007, under Section 304 IPC and case crime no.81 of 2007, under Section 25/27 of Arms Act, were registered against the appellant-Amar Singh; while case crime no.82 of 2007,

under Section 30 of the Arms Act, was registered against Gaya Prasad. The Investigating Officer after having concluded the investigation filed charge-sheet against acused Amar Singh in case crime no.80 of 2007, under Section 304 IPC, case crime no. 81 of 2007, under Section 25/27 of Arms Act and in case crime no.82 of 2007, under Section 30 of Arms Act filed charge-sheet against accused Gaya Prasad Yadav. The magistrate concerned took cognizance on the charge-sheet of case crime nos.80 of 2007 & 81 of 2007 against Amar Singh and the case being triable by the court of Sessions committed the file to the Court of Sessions for trial.

2. The trial court registered the Sessions Trial No.2 of 2008 (State Vs. Amar Singh) arising out of case crime no. 80 of 2007, under Section 304 IPC, P.S. Rajapur, District Chitrakoot and S.T. No. 3 of 2008 (State Vs. State), arising out of case crime no. 81 of 2007, under Section 25/27 of Arms Act, P.S. Rajapur, District Chitrakoot. The trial court framed the charge against the accused-Amar Singh under Section 304 IPC and 25/27 of Arms Act in the respective Sessions Trial Nos. 2 of 2008 and 3 of 2008. The charge was read over and explained to the accused Amar Singh, who denied the charge and claimed to be tried.

3. On behalf of prosecution to prove the charge against the accused Amar Singh in documentary evidence filed written information Ext. Ka-1, application dated 25.07.2007 Ext. K-2, inquest report Ext. Ka-6, recovery memo of the blood stained and plain clay Ext. Ka-7, recovery memo of one bullet and two spent cartridges 12 bore Ext. Ka-8, Postmortem report of the deceased Ext. Ka-9, police form no.33 Ext. Ka-10, letter to R.I. Ext. Ka-11, letter to CMO Ext. Ka-12, police form no.13 Ext. Ka-13, photocopy of blood stained and plain clay Ext. Ka-14, photocopy of taking in possession of one bullet and two spent cartridges 12 bore Ext. Ka-15, site plan of the occurrence Ext. Ka-16, recovery memo in regard to the DBBL Gun no.8722 along with four live cartridges 12 bore and arrest memo of the accused Ext. Ka-19, charge-sheet against accused-appellant in case crime no.80 of 2007, under Section 304 IPC Ext. Ka-17, charge-sheet against accused Amar Singh in case crime no.81 of 2007, under Section 25/27 Arms Act Ext. Ka-20, check FIR Ext. Ka-21.

4. On behalf of prosecution in oral evidence examined P.W.1-Kallu Ram, P.W.2-Surya Pal, P.W.3-Bhola Nath, P.W.4-Dr. A.K. Mohan, and P.W.5-Sub Inspector Jagjeevan Ram.

5. The statement of accused under Section 313 of the Code of Criminal Procedure was recorded, in which he denied the incriminating circumstances against him and stated that he has been falsely implicated in this case and he is innocent.

6. On behalf of accused in defence evidence adduced D.W.1-Nankoo.

7. The trial court after hearing the counsel for rival parties, passed the judgment and order dated 1.3.2019 convicting the accused-appellant under Sections 304 IPC and 25/27 of Arms Act and sentenced him as above.

8. Aggrieved from the impugned judgment the instant criminal appeal has been preferred on behalf of the appellant on the ground that impugned judgment of conviction and sentence passed by the court

below is perverse and illegal. The trial court has not appreciated the evidence available on record in proper perspective. The contents of the FIR itself transpires that the appellant opened fire under the impression that the miscreant had entered in his house in late hours of night. There are major contradictions and improvement in the statement of witnesses. No independent witness of the occurrence was examined by the prosecution. Defence version has not been considered by the trial court while convicting the appellant. The impugned judgment of conviction is based on surmises and conjectures.

9. I have heard Sri Saghir Ahmad, Senior Advocate, assisted by Sri Anil Pathak, learned counsel for the appellant, learned AGA for the State-respondent and perused the lower court record.

10. Learned counsel for the appellant has submitted that from the evidence on record it is established that there is no *mens rea* to commit the alleged offence. The appellant had exercised the right of private defence of person and property and the trial court did not consider the reasonable doubt for acquittal of the appellant in view of Section 105 of the Indian Evidence Act, 1872. The informant for the first time took the new plea in the application dated 25.07.2007 Ext. Ka-2 in regard to the illicit relation of deceased with the wife of accused Amar Singh and source of the same is alleged by P.W.1-Kallu Ram to be known from the ladies of his family and the fact of source of light at the place of occurrence also for the first time was raised in the application dated 25.07.2007. This application was not handed over by the informant P.W.1- Kallu Ram to the Investigating Officer during investigation and the same was not made part of the case diary. Even in the statement under Section 161 of Cr.P.C. Kallu Ram did not disclose this new fact to the Investigating Officer. This improvement was raised for the first time on behalf of prosecution at the stage of trial while the prosecution case is not based on the same. As such, the same cannot be read in evidence. The appellant did not exceed the right of private defence consequently no offence under Section 304 IPC is made out against the appellant. It is further submitted by the learned counsel for appellant; if the plea of self defence under general exceptions of Indian Penal Code is not proved on behalf of appellant, the trial court was bound to consider the same in view of Section 105 of the Indian Evidence Act, 1872. Whether the appellant was entitled to benefit of doubt in view of evidence adduced on behalf of prosecution itself. In support of this contention learned counsel for the appellant relied upon case law ***Rishikesh Singh Vs. State of U.P., AIR 1970 Alld. 51 (FB).***

11. Learned AGA opposed the contentions made by learned counsel for the appellant and contended that the prosecution has proved its case beyond reasonable doubt. There is no infirmity in the judgment of conviction and sentence passed by the court below. The plea of self defence under general exceptions of Indian Penal Code was neither raised on behalf of the appellant in the statement under Section 313 of Cr.P.C. nor the same was elucidated on behalf of accused to the prosecution witnesses during cross-examination. Not only this in defence evidence on behalf of accused D.W.1-Nankoo was examined. This witness also did not adduce any evidence in regard to this plea of self defence under general exceptions of Indian Penal Code rather the D.W.1 was examined to prove the plea of alibi in regard to the

accused Gaya Prasad, who is alleged to be at the house of D.W.1-Nankoo, the brother-in-law of accused Gaya Prasad and the licensee gun was also with him, therefore, the appellant is not entitled to get benefit of doubt in view of Section 105 of Indian Evidence Act, 1872.

12. For disposal of this criminal appeal the only question before the Court is; **whether the appellant is entitled to take the benefit of general exceptions of self defence of person and property in view of Section 105 of Indian Evidence Act, 1982** ?

13. Here the provisions of Sections relating the self defence under Indian Penal Code and also under the provisions of Section 105 of Indian Evidence Act are relevant, which are reproduced as under:

96. Things done in private defence.--Nothing is an offence which is done in the exercise of the right of private defence.

97. Right of private defence of the body and of property.--Every person has a right, subject to the restrictions contained in section 99, to defend--

(First) -- His own body, and the body of any other person, against any offence affecting the human body;

(Secondly) --The property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass.

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;

(Thirdly) -- An assault with the intention of committing rape;

(Fourthly) --An assault with the intention of gratifying unnatural lust;

(Fifthly) -- An assault with the intention of kidnapping or abducting;

(Sixthly) -- An assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.

102. Commencement and continuance of the right of private defence of the body.--The right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed; and it continues as long as such apprehension of danger to the body continues.

103. When the right of private defence of property extends to causing death.--The right of private defence of property extends, under the restrictions mentioned in section 99, to the voluntary causing of death or of any other harm to the wrong-doer, if the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right,

be an offence of any of the descriptions hereinafter enumerated, namely:-

(First) – Robbery;

(Secondly) --House-breaking by night;

(Thirdly) -- Mischief by fire committed on any building, tent or vessel, which building, tent or vessel is used as a human dwelling, or as a place for the custody of property;

(Fourthly) --Theft, mischief, or house-trespass, under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised.

105. Commencement and continuance of the right of private defence of property.--The right of private defence of property commences when a reasonable apprehension of danger to the property commences. The right of private defence of property against theft continues till the offender has effected his retreat with the property or either the assistance of the public authorities is obtained, or the property has been recovered. The right of private defence of property against robbery continues as long as the offender causes or attempts to cause to any person death or hurt or wrongful restraint or as long as the fear of instant death or of instant hurt or of instant personal resstraint continues. The right of private defence of property against criminal trespass or mischief continues as long as the offender continues in the commission of criminal trespass or mischief. The right of private defence of property against house-breaking by night continues as long as the house-trespass which has been begun by such house-breaking continues.

Section 105 of Indian Evidence Act reads as under:

105. Burden of proving that case of accused comes within exceptions.--When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, (45 of 1860), or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.

14. On behalf of prosecution in ocular evidence, examined P.W.1-Kallu Ram, P.W.2-Surya Pal, P.W.3-Bhola Nath, as a witness of fact.

P.W.1-Kallu Ram in his examination-in-chief stated that Jhurai is cousin brother and Amar Singh (Accused) is the real grandson of Jhurai. The deceased Indersen is the real grandson of him. On the date of occurrence after hearing the noise when he reached to the house of accused-Amar Singh, he saw Amar Singh was standing in the courtyard armed with licensee gun of his father. His younger brother was also there. Amar Singh was also bearing torch. Amar Singh told him that a miscreant had hidden himself in the Attari. Amar Singh opened two shots after having seen the miscreant in the light of torch and when deceased was brought down on the ground floor, who was grandson of Indersen. He had lodged the FIR on 15.07.2007 having relied what the Amar Singh told him. Written information is in his hand writing and signature, he verified he same Ext. Ka-1. He had also moved the application to the Superintendent of Police through registered post Ext. Ka-2 on 25.07.2007.

In cross-examination P.W.1-Kallu Ram stated that on the date of

occurrence it was dark night of Amavashya. He has no enmity with accused person. Between the house of accused and the house of him, there are 6 to 7 houses. He had come to know from the ladies of his house that deceased Indersen had illicit relations with the wife of accused Amar Singh and he cannot tell the name of ladies, who told him in this regard. He did not get the acknowledgment of the application sent to Superintendent of Police Ext. Ka-2 dated 25.07.2007. **He did not tell in regard to illicit relations of deceased with the wife of Amar Singh to the Investigating Officer. In regard to the fact that Amar Singh was bearing torch he had mentioned in the second application but nothing was mentioned in the first application. He did not tell to Darogaji that Amar Singh was bearing torch in his hand at the time of occurrence.** He was in the courtyard of house of Amar Singh when he heard the sound opening fire. It is wrong to say that on the date of occurrence Amar Singh and his father Gaya Prasad both were not at their house. It is further wrong to say that in absence of accused Amar Singh and his father Gaya Prasad, deceased had intruded in the house in the night and the ladies of he house of Amar Singh made noise of the same and some neighbour had opened fire causing death of Indersen.

15. **P.W.2-Surya Pal** also corroborates the prosecution story and deposed that he had seen Amar Singh opening fire from his own eyes. He came to know in regard to illicit relations of deceased with the wife of Amar Singh, with the wife of Ram Milan. He has no personal knowledge of the same. P.W.1-Kallu Ram had lodged the FIR about the occurrence told to him by Amar Singh and his father. **He did not tell to the Investigating Officer in regard to the illicit relation of deceased with the wife of accused Amar Singh and also in regard to torch that was borne by the accused at the time of occurrence.**

16. **P.W.3-Bhola Nath** proved the recovery in regard to blood stained and plain clay Ext. Ka-7 and also the recovery memo of two cartridges and one bullet Ext. Ka-8 and also two spent cartridge material Ext.1 and 2 and one bullet Ext.3. P.W.3 in his cross-examination by the court deposed that **he had no personal knowledge in regard to the illicit relations of the deceased with the wife of accused Amar Singh. He is deposing in this regard only on the basis of rumour spread in the village. The occurrence is of 1.30 O'clock in the night.**

17. From the statement of **P.W.1-Kallu Ram and P.W.2-Surya Pal** it is established that both the witnesses for the first time told in regard to the illicit relations of deceased with the wife of accused Amar Singh and source of knowledge of the same is hearsay. **Both the witnesses admit that during investigation they did not depose in this regard to the Investigating Officer and for the first time they are giving statement in this regard before the trial court. Likewise both the witnesses also admit that they did not depose to the Investigating Officer that Amar Singh was bearing torch in his hand at the time of opening fire at the deceased.**

18. **As such improvement made by the prosecution witnesses during trial court in regard to the illicit relations of deceased with the wife of accused Amar Singh and also that Amar Singh was bearing torch in his hand at the time of**

opening fire and the same was never told by these witnesses in their statement recorded under Section 161 Cr.P.C. to the Investigating Officer; to that extent the testimony of this witnesses cannot be relied upon.

The Hon'ble Apex Court in ***Sampath Kumar Vs. Inspector of Police, 2012(77) ACC 251 (SC)*** held that in criminal trial testimony of a witness in the court that when he woke up, he saw the appellant standing near the head of the deceased - no such statement was given by the witness to the police under Section 161 of Cr.P.C. is wholly unsafe to base the conviction on such testimony in absence of independent witness.

19. From the statement of witness of fact, it is established that the accused Amar Singh opened fire with the licensee gun of his father to the deceased under misconception that the deceased was the miscreant, who had intruded in his house at 1.30 O'clock in dark hours of night and hidden himself in the Attari of the house.

20. This ocular evidence is also corroborated with the medical evidence. **P.W.4 Dr. A.K. Mohan** deposed that on 15.07.2007 he conducted the postmortem of the deceased Indersen and during examination, there were following ante mortem injuries.

1. Gunshot entry wound present inferior bordering of right Axilla at lateral aspect size 3 cm in diameter. Gunshot tattooing mark present inferior size 15 cm x 6 cm. Margin of wound inverted. Direction downward & towards left side of chest at 6-7 interverted space was fracture of 3rd and 4th ribs of lt. Side. Margin burned and bloodish.

2. Gunshot exit wound present on left side of chest at lateral aspect at 6-7 interverted space. Margin excluded. Soft tissue extruded. Size of wound is 2 ½ cm x 2 cm.

This witness opined that the **cause of death was shock and haemorrhage as a result of gunshot injuries.** He proved the **postmortem report** of the deceased as **Ext. Ka-9.**

21. **P.W.5 Sub Inspector Jagjeevan Ram** deposed that he took over the investigation of the case and during investigation he recorded the statement of witnesses of fact and also the witness of panchayatnama. He prepared the site plan of the occurrence. He collected the blood stained and plain clay of the place of occurrence. He also took in his possession the licensee DBBL Gun used in the offence and the recovery memo of the same was also prepared by him. He also prepared the site plan, recovery memo of bullet and spent cartridges recovered from the place of occurrence and the witness told him that accused Amar Singh opened fire resulting death of deceased Indersen under misconception that he was miscreant.

22. The Forensic Science Laboratory (in short FSL) report is also on record as paper no.123Ka/6. This FSL report is admissible in evidence under **Section 293 of Cr.P.C.** As per FSL report, the disputed cartridge was found to be opened with the right barrel of the DBBL Gun No. 8722.

23. Therefore, from the ocular evidence as well as medical and the FSL report this fact is proved that gunshot injury was caused by the licensed DBBL Gun of Gaya Prasad by his son Amar Singh.

24. The trial court held guilty to the appellant for culpable homicide not

amounting to murder under Section 304 of IPC with the finding that the appellant/convict exceeded the right of private defence.

25. The Hon'ble Apex Court in ***Darshan Singh Vs. State of Punjab and another, 2010 (2) SCC 333*** held in para-15 that the following principles emerge on scrutiny in regard to private defence of person and property :

"(i) Self-preservation is the basic human instinct and is duly recognized by the criminal jurisprudence of all civilized countries. All free, democratic and civilized countries recognize the right of private defence within certain reasonable limits.

(ii) The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger and not of self-creation.

(iii) A mere reasonable apprehension is enough to put the right of self-defence into operation. In other words, it is not necessary that there should be an actual commission of the offence in order to give rise to the right of private defence is contemplated and it is likely to be committed if the right of private defence is not exercised.

(iv) The right of private defence commences as soon as a reasonable apprehension arises and it is co-terminus with the duration of such apprehension.

(v) It is unrealistic to expect a person under assault to modulate his defence step by step with any arithmetical exactitude.

(vi) In private defence the force used by the accused ought not to be wholly disproportionate or much greater than necessary for protection of the person or property.

(vii) It is well settled that even if the accused does not plead self-defence, it is open to consider such a plea if the same arises from the material on record.

(viii) The accused need not prove the existence of the right of private defence beyond reasonable doubt.

(ix) The Penal Code confers the right of private defence only when that unlawful or wrongful act is an offence.

(x) A person who is in imminent and reasonable danger of losing his life or limb may in exercise of self-defence inflict any harm even extending to death on his assailant either when the assault is attempted or directly threatened."

26. The Hon'ble Apex Court held in ***Satya Narayan Yadav Vs. Gajanand, AIR 2008 SC 2384***, right of private defence-accused need not raise specific plea, court can consider its availability even in absence of the plea raised by the accused.

27. Here it would be relevant to produce the following case law on **Section 105 of the Evidence Act** while dealing with the contentions made by learned counsel for rival parties.

28. The Hon'ble Apex Court in ***Laxman Singh Vs. Poonam Singh and others, 2004(10) SCC 94*** in para-6 held as under:

"The burden of proof is on the accused, who sets off the plea of self-defence, and, in the absence of proof, it is not possible for the Court to presume the truth of the plea of self-defence. The Court shall presume the absence of such circumstances. It is for the accused to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution. An accused taking the plea of the right of private

defence is not required to call evidence; he can establish his plea by reference to circumstances transpiring from the prosecution evidence itself. The question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden. Where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the Court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused."

29. The Hon'ble Full Bench of Nine Judges of Allahabad High Court in ***Rishikesh Singh Vs. State, AIR 1970 Alld 51,*** the dictum of the majority of learned Judges of this Court in ***Parbhoo v. Emperor, AIR 1941 All 402 (FB)*** is still good law. But, it may be elucidated that in a case in which any general Exception in the Indian Penal Code is pleaded by an accused and evidence is adduced to support such a plea, but such evidence fails to satisfy the Court affirmatively that the accused has fully established his plea of the claimed Exception, he will still be entitled to an acquittal, if, upon a consideration of the evidence as a whole (including the evidence given in support of the plea of the said general Exception), a reasonable consequential doubt is created in the mind of the Court as to whether the accused is really guilty of the offence with which he is charged.

30. The Hon'ble Full Bench of Allahabad High Court held in ***Parbhoo Vs. Emperor, AIR 1941 All 402 (FB),*** Section 105 of Evidence Act does not prevent the Court from giving benefit of doubt altogether to an accused under general exceptions. It makes possible both kinds of acquittal (i) by proving his plea fully and another by raising genuine doubt in the case. The doubt which the law contemplates is certainly not that of a weak or unduly vacillating, capricious, indolent, drowsy,, or confused mind. It must be the doubt of the prudent man who is assumed to possess the capacity to "separate the chaff from the grain.

31. In the present case certainly on behalf of appellant/convict this plea of self defence in general exceptions of IPC is neither raised in the statement under Section 313 of Cr.P.C. of the accused, nor the same has been elucidated to the prosecution witnesses during cross-examination on behalf of accused by the defence counsel. Even no evidence has been adduced on behalf of accused to prove the plea of self defence of general exceptions of IPC.

32. In view of case law ***Laxman Singh (Supra)*** and also the full Bench judgment of this Court in ***Rishi Kesh Singh (Supra),*** if from the evidence on record as a whole a reasonable consequential doubt is created in the mind of the court whether the accused is really guilty of the offence; the plea of self defence in general exceptions of IPC can be considered. Certainly **this reasonable doubt must be genuine and a doubt of prudent man.**

From the prosecution evidence on record, it is found that the deceased Indersen had intruded in the house of accused at 1.30 O'clock in the intervening night of 14/15.07.2007 (Amavashya), the entry at the wee hours is certainly criminal house-trespass.

33. **Section 103 of IPC, 1860** provides when the right of private defence

of property extends to causing death if the theft, mischief, or house-trespass, under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised.

34. In the present case from the evidence on record, it is proved that the deceased Indersen had intruded in the house of accused at 1.30 O'clock in wee hours of Amavashya night which caused reasonable apprehension in the mind of inmates of the house that some miscreant had intruded in their house. Consequently the inmates of the house of accused raised alarm. P.W.1-Kallu Ram (informant of this case) and P.W.2-Surya Pal also attracted immediately at the place of occurrence. The so called miscreant had hidden himself in the Attari of the house and despite raising alarm even in presence of prosecution witnesses P.W.1 and P.W.2, he did not appear to disclose his identity. The appellant Amar Singh who was armed with licensee gun of his father, also raised alarm, when so called miscreant did not come out from the Attari, he under the misconception opened fire to avoid any mishappening.

This reasonable apprehension in the mind of the appellant seems to be the reasonable consequential apprehension of a prudent man, who in the similar circumstances would take such a decision more so; if he had any licensee gun in his house to protect his person and property as well.

35. **Certainly the deceased Indersen was not armed with any weapon, he had not made any threatening and had not made any assault but by hiding himself in the Attari would raise apprehension in the mind of a prudent man that his presence inside the house may cause any mishappening to any inmate of the house or property as well.**

36. In view of the evidence on record a genuine doubt is created in the mind of the Court to hold whether the appellant is guilty of the offence of culpable homicide not amounting to murder.

37. On behalf of prosecution during trial for the first time this plea was raised by the prosecution witness that accused was bearing torch in his hand and in the light of torch he had verified the identity of the deceased to be Indersen and he opened fire with the licensee gun on account of illicit relations of deceased with the wife of accused Amar Singh. This plea was never raised by P.W.1-Kallu Ram, who is the informant of the case and P.W.2-Surya Pal, during investigation. But for the first time the informant stated during cross-examination in trial that he had given an application to that effect to the Superintendent of Police concerned; but the same was never made part of the case diary. Even there is no entry in this regard made by the Investigating Officer in the case diary. Not only this even none of the witnesses, who were interrogated by the Investigating Officer under Section 161 of Cr.P.C. did not tell to the Investigating Officer that accused Amar Singh was bearing torch in his hand and he after having verified the identity of the deceased in the light of torch opened fire with intention to cause death of Indersen. This story was developed later on and same cannot be relied upon more so when the prosecution case is not based upon the same.

38. In view of re-appreciation of evidence on record, this Court finds that the

finding recorded by the trial court holding appellant Amar Singh guilty for the offence under Section 304-I of IPC and Section 25/27 of Arms Act deserves to be set aside and this appeal deserves to be allowed.

39. Accordingly, the present criminal appeal is allowed. The judgment and order dated 01.03.2019 passed by 3rd Additional Sessions Judge, Chitrakoot, in Sessions Trial No. 2 of 2008, State vs. Amar Singh and another & Sessions Trial No. 3 of 2008 (State Vs. Amar Singh), under Sections 304 IPC and 25/27 Arms Act, respectively, P.S. Rajapur, District Chitrakoot is set aside. The appellant is acquitted from the charges leveled against him. The appellant is in jail. He be released forthwith, in case, he is not wanted in any other case provided the appellant files a personal bond and two sureties each in the like amount to the satisfaction of the court concerned in compliance of section 437-A of Code of Criminal Procedure.

40. Office is directed to communicate this order to the court concerned forthwith to ensure compliance and further send back the lower court record.

(2021)09ILR A1272
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.08.2021

BEFORE

THE HON'BLE SANJAY KUMAR SINGH, J.

Crl. Misc. Bail Application No. 1623 of 2021

Smt. Aysha Khatoon ...Applicant (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Applicant:
Sri Yogendra Pal Singh, Sri Avnish Kumar Srivastava

Counsel for the Respondent:
A.G.A.

A. Criminal Law – Bail application - Indian Penal Code, 1860 - Sections 364, 302, 201-B & 34 - Code of Criminal Procedure,1973 - Section 161 - A criminal conspiracy is generally hatched in secrecy and it is difficult to obtain direct evidence. It is well settled that a man may tell a lie, but circumstances do not. The circumstances of this case are conclusive in nature, which is in proximity to the time and situation. Therefore, the innocence of the applicant cannot be adjudged at pre trial stage. (Para 10)

In present case, nature of offence, the gravity involved therein and the manner in which the crime has been committed, no case for bail is made out. (Para 11)

It is a brutal and heinous double murder case, in which a helpless mother, who blindly trusted upon the co-accused, Shamshad and living with him for the last five years, and her little daughter have been flagitiously killed and their dead bodies had been hid by the co-accused Shamshad with the help of his brother-in-law Dilshad (Sala) in the floor of the room, which were recovered on the pointing out of the co-accused, Shamshad in a decomposed condition.

From the Call Detail Report of the accused persons it is clear that in the intervening night of 28/29.3.2020 (when crime took place) and in day time on 29.3.2021 there were continuous telephonic conversation amongst the accused persons and they also sent messages to each other and the location of their phones were traced at the place of occurrence, therefore, the involvement of the applicant in the crime cannot be ruled out. (Para 10)

Application rejected. (E-4)

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

1. Heard learned counsel for the applicant and Mr. Rabindra Kumar Singh, learned Additional Government Advocate representing the State and perused the record of the case.

2. The instant bail application has been filed on behalf of the applicant, Smt. Aysha Khatoon, with a prayer to release her on bail in Case Crime No. 454 of 2020, under Sections 302, 201, 120-B and 34 IPC, police station Partapur, district Meerut, during the pendency of trial.

3. In short compass the facts of the case as unfolded by the prosecution in the first information report are that the complainant, Chanchal Chaudhry, who is friend of one of the deceased-Priya has lodged the first information report on 14.7.2020 at about 10.10 A.M. against the co-accused, Shamshad (husband of the present applicant, Smt. Aysha Khatoon) for the offence under Section 364 IPC, which was registered as Case Crime No. 454 of 2020 at police station Partapur, district M eerut to the effect that the co-accused Shamshad, who is Muslim by caste and was already married with the present applicant had lured and masquerade the deceased-Priya five years ago and had solemnized his second marriage with her. Thereafter, deceased-Priya and her daughter, Kashish (second deceased of this case) were residing with him. After the marriage, the deceased-Priya has telephonically informed the complainant that as she (deceased-Priya) came to know about the first marriage of the co-accused Shamshad, he used to torture and harass and threatened the deceased and her daughter of dire consequence. The Report further mentions that for the last time i.e. on 28.3.2020, the complainant had a conversation with the deceased Priya on phone, and thereafter no telephonic conversation was made between the complainant and deceased. Thereafter, when the accused, Shamshad sold the flat, which was in the name of deceased-Priya and also withdrew the amount from the bank account of the deceased by cheque, then the complainant raised a suspicion that something wrong has happened with both the deceased. The complainant also came to know that scooty of the victim bearing No. UP 14 CY-840 was also lying in the Partapur police station unclaimed. In such a situation, having no option left, the complainant had given a written report (Tehreer) in the Partapur police station, in which no action was taken by the police and on the pressure of the police personnel she had given an application that she does not want to take any action. Thereupon, the complainant has lodged the present first information report raising suspicion that something untoward has happened with her friend-Priya and her daughter-Kashish.

4. After lodging of the instant F.I.R. the statement of complainant was recorded under Section 161 Cr.P.C. On the basis of aforesaid statement of the complainant, the co-accused, Shamshad was arrested by the police. On interrogation, the co-accused confessed to his guilt before the police and thereafter his confessional statement was recorded, in which he disclosed that complainant Chanchal Chaudhrey had brought the deceased-Priya to him to get the job and he provided her job, and thereafter, the deceased-Priya resided with him (co-accused, Shamshad) under live-in relationship and he used to bear all the expenses of both the deceased. He also stated that in the meantime, some altercation took place between the deceased and him, and the deceased also implicated him (Shamshad) in her rape case, in which

settlement has taken place between them, and he has given Rs. 3,00,000/- to deceased Priya for compromising in the said case. Co-accused-Shamshad also stated that the deceased was a very high ambitious lady and also spend much money and was leading luxurious life and when he tried to stop her from doing so, she started squabbling with him. In the intervening night of 28/29.3.2020 when the deceased started quarreling with him and demanded money, then he strangulated the victim to death and also killed her daughter (second deceased) by putting the pillow on her face. The co-accused Shamshad also confessed that the dead bodies of Priya and Vanshika were hid by him in the floor of the L.E.D. room of his house. The official of the police after completing necessary formalities exhumed the dead bodies from the floor of the house, as pointed out by the applicant in his confessional statement, and recovered the skeleton and other parts of the bodies in a decomposed condition. After investigation, the case has been converted to one under Sections 302, 201-B and 34 IPC and charge sheet has been submitted by the Investigating Officer against the co-accused, Shamshad, his wife, Ayesha Khatoon (present applicant) and her brother-Dilawar.

5. Learned counsel for the applicant submitted that initially the case was registered for the offence under Section 364 IPC and after investigation the same has been converted to one under Sections 302, 201-B and 34 IPC against the three accused including the present applicant. Learned counsel for the applicant also submitted that being the wife of accused-Shamshad, she has falsely been dragged in this case. The applicant is not named in the F.I.R. The name of the applicant has surfaced in the statement of the co-accused-Shamshad and except the said statement of the co-accused there is no evidence against the applicant. Learned counsel for the applicant further submitted that the co-accused, Shamshad on account of his extra marital relation with the deceased-Priya, ousted the applicant (wife) from his house. The applicant has no concern with the offence in question and in fact the applicant was living in Bihar with her minor son and in the month of February, 2020 the applicant came to Meerut. She has a small boy of four years, who at present is living with his maternal uncle (Mama). There is no direct evidence against the applicant. Nothing has been recovered from the possession or at the pointing out of the applicant. In the present case there is not even an iota of evidence with the prosecution to show that there was any conspiracy between the applicant and co-accused, Shamshad for commission of an offence under Section 302 IPC nor there is any evidence to suggest that they shared any common intention for the murder. There is inconsistency in the statement of the complainant and version of the F.I.R. The complainant in the F.I.R. has not named the applicant. Learned counsel for the applicant also submitted that the co-accused, namely, Kapil and Nakul Sharma have already been enlarged on bail by the court below and by the Coordinate Bench of this Court vide orders dated 25.5.2021 and 17.12.2020 passed in Bail Application No. 2514 of 2021 and Criminal Misc. Bail Application No. 47216 of 2020 respectively. The applicant has no criminal history to her credit and is languishing in jail since 20.8.2020 and in case she is enlarged on bail she will not misuse the liberty of bail.

6. On the other hand, Mr. Rabindra Kumar Singh, learned Additional

Government Advocate vehemently opposed the prayer for bail and contended that it is a double murder case and the applicant along with his brother, Dilshad and husband-Shamshad hatched a criminal conspiracy, in which a young lady and her small daughter have lost their lives. From perusal of the Call Detail Records of the applicant, her husband Shamshad and her brother Dilawar, it is apparently clear that in the whole night of 28.3.2020 and in a day time on 29.8.2020, they had continuous conversation and sending messages to each other. Learned A.G.A. also submitted that at the behest of the accused, Shamshad, one Krishna Gopal Sharma kept the applicant, Ayesha Khatoon along with her brother-Dilawar in his house on rent.

7. So far as co-accused, Nakul Sharma and Kapil are concerned, it is submitted by learned A.G.A. that they have been enlarged on bail by the Coordinate Bench of this Court and the court below on the ground that in the offence in question the only role assigned to them that they mislead the complainant and police about the whereabouts of both the deceased and in the second statement of the complainant recorded on 24.7.2020 the name of co-accused, Nakul Sharma came into light. The case of the present applicant is distinguishable from them.

8. In strong opposition, learned Additional Government Advocate has drawn the attention of the Court towards the statement of the co-accused, Shamshad, recorded before the police, in which he disclosed that on account of the high expenses of the deceased Priya, he was financially bothered and unable to fulfill her expensive and luxurious hobbies. The co-accused, Shamshad in his statement clearly stated that my wife Ayesha @ Soni has told me that if you don't get rid of deceased Priya, you will not see my face. Thereafter, he made a plan along with the applicant and her brother Dilawar to kill both the deceased and in the intervening night of 28/29.3.2021 he killed both the deceased by strangulating their throat and with the help of his brother-in-law (Sala-Dilawar) he buried the dead bodies of both the deceased in the room of the house.

9. Mr. Singh, learned A.G.A. also submitted that the present applicant has pressurized the co-accused for killing the deceased and in this case she is the main apple of discord and played an active role in hatching a conspiracy. Each conspirator plays his separate part in one integrated and united effort to achieve the common purpose. Each one is aware that he has a part to play in the general conspiracy, to accomplish the common object. In this case the applicant had the knowledge or the reason to believe that the offence had been committed, she has caused disappearance of evidence and such act of disappearance has been done with the intention of screening the offender from legal punishment. Learned A.G.A. lastly submitted that the necessary ingredients to constitute the offence are present in the case, therefore, the applicant does not deserve any indulgence. In case, the applicant is released on bail he will misuse the liberty of bail.

10. I have considered the submissions of learned counsel for the applicant and learned Additional Government Advocate and the fact that it is a brutal and heinous double murder case, in which a helpless mother, who blindly trusted upon the co-accused, Shamshad and living with him for the last five years, and her little daughter have been flagitiously killed and their dead

bodies had been hid by the co-accused Shamshad with the help of his brother-in-law Dilshad (Sala) in the floor of the room, which were recovered on the pointing out of the co-accused, Shamshad in a decomposed condition. The deceased would never have imagined that the place where they lived would become their graveyard. From the Call Detail Report of the accused persons it is clear that in the intervening night of 28/29.3.2020 and in day time on 29.3.2021 there were continuous telephonic conversation amongst the accused persons and they also sent messages to each others and the location of their phones were traced at the place of occurrence, therefore, the involvement of the applicant in the crime cannot be ruled out. The dead bodies of the both the deceased have been buried by the co-accused to destroy the evidence. A criminal conspiracy is generally hatched in secrecy and it is difficult to obtain direct evidence. It is well settled that a man may tell a lie, but circumstances do not. The circumstances of this case as mentioned above are conclusive in nature, which is in proximity to the time and situation. In view of above, the innocence of the applicant cannot be adjudged at pre trial stage.

11. Having considered the facts and circumstances of the case, nature of offence, the gravity involved therein and the manner in which the crime has been committed, no case for bail is made out.

12. The application for bail is hereby **rejected**.

13. The observation made herein above is only limited for the purpose of disposal of this bail application and will in no way be construed as an expression on the merits of the case. The trial court shall be absolutely free to arrive at its independent conclusions on the basis of evidence led uninfluenced by anything expressed in this order.

14. Office is directed to communicate the facsimile of this order to District Judge, Meerut and the complainant of this case at the earliest.

(2021)09ILR A1276
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.08.2021

BEFORE

THE HON'BLE YASHWANT VARMA, J.

WRIT A No. 9396 of 2021
with
WRIT A No. 22070 of 2018
with
WRIT A No. 9744 of 2021

Dr. Sushma Chandel ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shanshank Shekhar Mishra

Counsel for the Respondents:
C.S.C.

A. Service Law – Addition of adhoc services for the computation of pensionary benefits - Civil Service Regulations - Regulations 368 & 370 - Uttar Pradesh Retirement Benefit Rules, 1961 - Rules 2(3) & 3(8) - U.P. Regularization of Ad hoc Appointments (On Post Within the Purview of the Public Service Commission) (Third Amendment) Rules, 2001- Uttar Pradesh Qualifying Service for Pension and Validation Ordinance 2020 (U.P. Ordinance No. 19 of 2020).

The right to claim pensionary benefits is now and by virtue of the provisions

introduced retroactively by the Validating Act made dependent upon it being found that the employee was appointed in accordance with the applicable service rules and held a permanent or temporary post. (Para 31)

Impact of Validating Act - The right of an employee to seek addition of continuous, temporary or officiating service followed by confirmation or regularisation would remain preserved notwithstanding the deletion of Regulation 370. The period prior to regularisation cannot be ignored as long as it is established that it was service rendered against a particular post be it temporary or permanent. The only fetter which now remains in place for the purposes of computing qualifying service is of the service rendered being shown to have been discharged against a permanent or temporary post and the appointment having been made in accordance with the service rules. (Para 33, 34, 35)

Notwithstanding the above, the question of whether the engagement of the officer or employee shown against a work charged establishment was merely an "exploitative measure" [an expression which the Court borrows from Prem Singh itself] and designed to deny benefits of long service would still be open to canvassed. (Para 34)

B. A claim for pensionary benefits cannot be negatived solely on the basis of a mere reiteration of the Validating Act having been introduced. The respondents would have to necessarily evaluate such claims bearing in mind the following questions which would arise:-

1. Whether the service rendered in temporary, ad hoc, or officiating capacity was one which was discharged against a permanent or temporary post;

2. Whether the appointment was made in accordance with the provisions made in the prevalent service rules;

3. Whether such service can be excluded notwithstanding the provisions made in the proviso to Rule 3(8) of the 1961 Rules;

4. Whether the service rendered in a work-charged establishment followed by regularisation can be legally excluded while computing qualifying service;

5. Whether such service was performed in connection with work which was regular and perennial and the engagement in a work charged establishment was a mere ruse to deny benefits of long service. (Para 36)

C. It is a settled position of law that the objective of a proviso is to carve out from the main section a class or category to which the main section does not apply. A proviso must prima facie be read and considered in relation to the principal matter to which it is a proviso. It is not a separate or independent enactment.

Provisions similar to those enshrined in Regulation 370 remain preserved and untouched in the proviso to Rule 3(8). That proviso has neither been amended nor deleted. (Para 29)

D. 'Qualifying service' - The expression "qualifying service" would now have to be interpreted in accordance with the provisions made in the Validating Act notwithstanding anything to the contrary that may be contained in any other act, rule or regulation.

The Validating Act introduces provisions with retrospective effect from 1 April 1961. Consequently, the provisions of the 1961 Rules which came to be promulgated from that date would have to be construed accordingly. (Para 30)

Matters remitted. Writ petitions disposed off. (E-4)

<u>Precedent followed</u>:

1. Dr. Dhirendra Prakash Tiwari Vs St. of U.P. & ors., Writ-A No. 26637 of 2012 (Para 5)

2. Dr. Yogendra Singh & ors. Vs St.of U.P. & ors., Writ Petition No. 3201 of 1992 (Para 5)

3. Prem Singh Vs St. of U.P. & ors., (2019) 10 SCC 516 (Para 14)

4. St. of U.P. & ors. Vs Mahendra Singh, Special Appeal Defective No. 1003 of 2020 (Para 18)

5. St. of U.P. & ors. Vs Bhanu Pratap Sharma, Special Appeal no. 97 of 2021 (Para 19)

6. St. of U.P. & 4 ors. Vs Narayan Singh Sharma, Special Appeal Defective No. 156 of 2021 (Para 20)

7. Durgabai Deshmukh Memorial Sr. Sec. School Vs J.A.J. Vasu Sena, (2019) 17 SCC 157 (Para 29)

Precedent distinguished:

1. Brahmanand Singh & ors. Vs St. of U.P. & ors., 2018 (3) ALJ 546 (Para 21)

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

1. Heard Sri Shashank Shekhar Mishra, Sri Siddharth Khare and Sri Jamil Ahamad Azmi learned counsel for the petitioners, Sri Govind Krishna who appears for the Nagar Palika Parishad Azamgarh and Sri Ajit Kumar Singh learned Additional Advocate General assisted by Sri Chandan Kumar learned Standing Counsel for the State respondents.

2. These three petitions which raise a common question have with the consent of parties been taken up for disposal together.

3. All the petitioners essentially seek the addition of services rendered in an ad hoc or temporary capacity for the purposes of computation of pensionary benefits. It may at the outset be stated that these petitions were taken up for disposal together since the Court was faced with similar writ petitions coming up before it daily. It was thus thought expedient that the basic issues which would need to be borne in mind by the respondents while dealing with such claims would warrant articulation. On the aforesaid view being expressed, Sri Ajit Kumar Singh the learned Additional Advocate General, in his usual fairness, suggested that since the petitions are proposed to be disposed of without the State being invited to file formal replies, issues such as the statutory regimen which would govern and the essential factors which would merit consideration may be enunciated leaving it to the respondents to reevaluate the claims as raised by the petitioners here. The sound counsel of the learned Additional Advocate General was duly accepted and it is on those lines and to the aforesaid extent alone that the Court proceeds to frame its present decision.

4. Before proceeding forth, it would be relevant to advert to the individual facts of the three writ petitions which are proposed to be disposed of by means of this common judgment.

A. FACTS OF THE INDIVIDUAL WRIT PETITIONS

1. Sushma Chandel Vs. State of U.P. and others [Writ A NO. 9396 OF 2021]

5. The petitioner here was initially appointed in May 1990 on daily wage basis. That appointment was brought to an end in November 1990. The order of termination was challenged by way of a writ petition in which an interim order was granted providing that the respondents would not interfere with the working of the petitioner as a Medical Officer. Pursuant to that interim order, she is stated to have continued to function as Medical Officer till 27 November 1998 when she was appointed on ad hoc basis. Various other Medical Officers who were continuing on ad hoc terms under the respondents agitated their claims for regularisation before the respondents. In the litigation which ensued,

one writ petition preferred by Dr. Smt. Sudha Tripathi came to be disposed of by a Division Bench calling upon the State to consider her claim for regularisation. Pursuant to the directions issued by the Division Bench on that writ petition and the dismissal of the Special Leave Petition of the State, the services of Dr. Smt. Sudha Tripathi came to be confirmed. In the meanwhile, various other Medical Officers like the petitioner who had initially been engaged on ad hoc basis and had continued to serve under the respondents for years together without being regularized, petitioned the Lucknow Bench of this Court aggrieved by the denial of their claims. The lead matter of the batch which came to be instituted was of **Dr. Dhirendra Prakash Tiwari v. State of U.P. And Others1**. The Division Bench while rendering judgment on that batch firstly took note of the judgment rendered by the Court in **Dr. Yogendra Singh And Others v. State of U.P. And Others2** and the directions issued therein for the claim of regularisation being considered in accordance with the policy decision of the State Government which extended the benefit of regularisation to all ad hoc Medical Officers who had been appointed on or before 17 July 1991. The aforesaid decision in **Dr. Yogendra Singh** was unsuccessfully assailed by the respondents before the Supreme Court which dismissed the Special Leave Petitions on 02 April 1998. The Division Bench also noticed the provisions made in respect of regularisation in the **U.P. Regularisation of Ad hoc Appointments (On Post Within the Purview of the Public Service Commission) (Third Amendment) Rules (2001)3. The Court in Dr. Dhirendra Prakash Tiwari** ultimately proceeded to allow the writ petitions in the following terms: -

"We are of the considered opinion that all the petitioners are entitled to be treated as ad hoc medical officers from a date prior to 30.6.1998, leaving it open for the respondents to determine the exact date in the light of pronouncement of this Court dated 21.11.1996 in the earlier proceedings. To this extent the government order dated 27.11.1998 will not come in the way of the petitioners for consideration of their regularisation. Respondent No.1 is directed to reconsider the case of petitioners, including those who have retired from service, for regularisation of their services under the Regularisation Rules of 1979 strictly in accordance with the observations made hereinabove, treating them as ad hoc medical officers, from a date prior to 30.6.1998. Respondent no.1 shall pass requisite orders accordingly, within a period of two months from the date a certified copy of this order is produced before him. While considering the case of the petitioners for regularisation, the date of regularisation of their seniors and juniors shall also be kept in mind by the respondents. It is made clear that the case of the petitioners shall not be rejected on the ground that they were not ad hoc medical officers prior to 30.6.1998.

So far as the claim of the petitioners for regularisation of their services with effect from the date of their initial appointment is concerned, we do not find any merit in the same."

6. Following the aforesaid decision, the writ petition preferred by the petitioner here being Writ-A No. 21307 of 2012 was allowed on similar terms on 07 August 2014. The challenge to the judgment rendered on the aforesaid writ petition by the State came to be negatived with the Supreme Court dismissing the Special

Leave Petitions on 27 March 2015. The petitioner was ultimately regularised in service by an order of 24 September 2015. That order provided that she would be deemed to have been regularised in service with effect from 16 March 2005. Before this Court it is not disputed that the regularisation of the petitioner with effect from the aforesaid date was in light of the directions framed by the Division Bench in **Dr. Dhirendra Prakash Tiwari** which required the respondents to regularise individual ad hoc Medical Officers bearing in mind the date from which their seniors and juniors had been accorded that facility. The respondents while preparing the pension papers of the petitioner here have taken note of her entry into government service as being on 22 December 1998. That admittedly is the date on which the petitioner joined service pursuant to the order of appointment dated 27 November 1998. However, the total length of qualifying service has been computed to be 13 years 4 months and 15 days. The aforesaid computation has essentially been made with the period of service rendered post 16 March 2005 along being liable to be included in qualifying service. The service rendered by the petitioner between December 1998 till 16 March 2005 has not been considered. It is in the aforesaid backdrop that the present writ petition has come to be preferred.

2. Chiraunjilal and 7 others Vs. State of U.P. and others [Writ A NO. 22070 OF 2018]

7. The petitioners here were appointed as part time/ad hoc Tubewell Operators on different dates. All of them were confirmed and regularised in terms of the details which have been set forth in paragraphs 10 to 15 of the writ petition. They have approached this Court aggrieved by the fact that while computing qualifying service, the respondents have only accounted for service rendered by the petitioners post their regularisation. It is in the aforesaid backdrop that they contend that the services rendered by them on part time and ad hoc basis is also liable to be included for the purposes of computation of pensionary benefits.

8. The respondents in the counter which has been filed have referred to the fact that the petitioners were initially engaged as short term Tubewell Operators on consolidated pay. They also allege that their initial appointment was not made in accordance with the relevant rules and regulations framed nor were they appointed against substantive posts. In paragraph-20 it is contended by the respondents that the provisions of Articles 368 and 370 of the Civil Service Regulations can only apply to those who worked on the regular establishment of the State and in view of the aforesaid, the period of service rendered by the petitioners prior to their date of regularisation is not liable to be included for the purposes of pensionary benefits.

3. Ram Chandra Yadav and other Vs. State of U.P. and others [Writ A NO. 9744 OF 2021]

9. The petitioners here were initially appointed on a temporary basis as Pump Attendants on 01 April 1988 and 05 January 1990 respectively. Their services were ultimately regularized with effect from 14 February 2005 and 05 January 2001. Both the petitioners are stated to have retired in June and September 2018. They are essentially aggrieved by the fixation of their pensionary benefits with the respondents excluding the period which

was rendered by them prior to their regularisation. It is in the aforesaid factual backdrop that the issues raised are liable to be considered.

B. THE STATUTORY BACKGROUND

10. The Court firstly deems it necessary to advert to the relevant provisions as made in the Civil Service Regulations4. Article 361 reads thus: -

"361. The service of an officer does not qualify for pension unless it conforms to the following three conditions-

First- The service must be under Government.

Second- The employment must be substantive and permanent.

Third- The service must be paid by Government. "

11. Regulations 368 provides that service does not qualify unless the officer holds a "*substantive office*" on a "*permanent establishment*" of the Government.

12. Regulation 370 makes the following additional provisions in respect of pension:-

"370. Continuous temporary or officiating service under the Government of Uttar Pradesh followed without interruption by confirmation in the same or any other post shall qualify except-

(i) periods of temporary or officiating service in non-pensionable establishment;

(ii) periods of service in work-charged establishment, and

(iii) periods of service in a post paid from contingencies."

13. On 01 April 1961 the State Government framed and promulgated the **Uttar Pradesh Retirement Benefit Rules 19615** by virtue of the powers conferred by the proviso to Article 309 of the Constitution. The 1961 Rules define the expression "qualifying service" in Rule 3(8) as under:-

"3.

...

(8) "Qualifying service" means service which qualifies for pension in accordance with the provisions of Article 368 of the Civil Service Regulations:

Provided that continuous temporary or officiating service under the Government of Uttar Pradesh followed without interruption by confirmation in the same or any other post except-

(i) periods of temporary or officiating service in a non-pensionable establishment;

(ii) periods of service in work-charged establishment, and

(iii) periods of service in a post, paid from contingencies shall also count as qualifying service.

Note-If service rendered in a non-pensionable establishment, work-charged establishment or in a post paid from contingencies falls between two periods of

temporary service in a pensionable establishment or between a period of temporary service and permanent service in a pensionable establishment, it will not constitute an interruption of service.

... "

14. The provisions as made in the CSR as well as in the 1961 Rules fell for consideration before the Supreme Court in the matter of **Prem Singh v. State of Uttar Pradesh and Others6. Prem Singh** was essentially considering the claim of work-charged employees who had been continued in that capacity for decades and ultimately denied pensionary benefits with the respondents taking the position that service rendered in such an establishment is not liable to be included while calculating qualifying service in accordance with the provisions made in the CSR and the 1961 Rules. The Supreme Court in **Prem Singh** ultimately came to hold:-

"30. We are not impressed by the aforesaid submissions. The appointment of the work-charged employee in question had been made on monthly salary and they were required to cross the efficiency bar also. How their services are qualitatively different from regular employees? No material indicating qualitative difference has been pointed out except making bald statement. The appointment was not made for a particular project which is the basic concept of the work-- charged employees. Rather, the very concept of work-charged employment has been misused by offering the employment on exploitative terms for the work which is regular and perennial in nature. The work-charged employees had been subjected to transfer from one place to another like regular employees as apparent from documents placed on record. In Narain Dutt Sharma & Ors. v. State of Uttar Pradesh & Ors. (CA No._____2019 @ SLP (C) No.5775 of 2018) the appellants were allowed to cross efficiency bar, after "8' years of continuous service, even during the period of work-charged services. Narain Dutt Sharma, the appellant, was appointed as a work-charged employee as Gej Mapak w.e.f 15.9.1978. Payment used to be made monthly but the appointment was made in the pay scale of Rs.200-320. Initially, he was appointed in the year 1978 on a fixed monthly salary of Rs.205 per month. They were allowed to cross efficiency bar also as the benefit of pay scale was granted to them during the period they served as work-charged employees they served for three to four decades and later on services have been regularized time to time by different orders. However, the services of some of the appellants in few petitions/ appeals have not been regularized even though they had served for several decades and ultimately reached the age of superannuation.

31. In the aforesaid facts and circumstances, it was unfair on the part of the State Government and its officials to take work from the employees on the work-charged basis. They ought to have resorted to an appointment on regular basis. The taking of work on the work- charged basis for long amounts to adopting the exploitative device. Later on, though their services have been regularized. However, the period spent by them in the work-charged establishment has not been counted towards the qualifying service. Thus, they have not only been deprived of their due emoluments during the period they served on less salary in work charged establishment but have also been deprived of counting of the period for pensionary benefits as if no services had been rendered

by them. The State has been benefitted by the services rendered by them in the heydays of their life on less salary in work-charged establishment.

32. In view of the Note appended to Rule 3(8) of the 1961 Rules, there is a provision to count service spent on work-charged, contingencies or non pensionable service, in case, a person has rendered such service in a given between period of two temporary appointments in the pensionable establishment or has rendered such service in the interregnum two periods of temporary and permanent employment. The work-charged service can be counted as qualifying service for pension in the aforesaid exigencies.

33. The question arises whether the imposition of rider that such service to be counted has to be rendered in-between two spells of temporary or temporary and permanent service is legal and proper. We find that once regularisation had been made on vacant posts, though the employee had not served prior to that on temporary basis, considering the nature of appointment, though it was not a regular appointment it was made on monthly salary and thereafter in the pay scale of work-charged establishment the efficiency bar was permitted to be crossed. It would be highly discriminatory and irrational because of the rider contained in Note to Rule 3(8) of 1961 Rules, not to count such service particularly, when it can be counted, in case such service is sandwiched between two temporary or in-between temporary and permanent services. There is no rhyme or reason not to count the service of work-charged period in case it has been rendered before regularisation. In our opinion, an impermissible classification has been made under Rule 3(8). It would be highly unjust, impermissible and irrational to deprive such employees benefit of the qualifying service. Service of work-charged period remains the same for all the employees, once it is to be counted for one class, it has to be counted for all to prevent discrimination. The classification cannot be done on the irrational basis and when respondents are themselves counting period spent in such service, it would be highly discriminatory not to count the service on the basis of flimsy classification. The rider put on that work-charged service should have preceded by temporary capacity is discriminatory and irrational and creates an impermissible classification.

34. As it would be unjust, illegal and impermissible to make aforesaid classification to make the Rule 3(8) valid and non-discriminatory, we have to read down the provisions of Rule 3(8) and hold that services rendered even prior to regularisation in the capacity of work-charged employees, contingency paid fund employees or non- pensionable establishment shall also be counted towards the qualifying service even if such service is not preceded by temporary or regular appointment in a pensionable establishment.

35. In view of the Note appended to Rule 3(8), which we have read down, the provision contained in Regulation 370 of the Civil Services Regulations has to be struck down as also the instructions contained in Para 669 of the Financial Handbook."

15. The Court firstly held that the continued engagement of the petitioners and showing them as working in a work-charged establishment was clearly exploitative since their continued

engagement itself established that the work performed by them was regular and permanent in character. The Court held that the action of the State of continuing to take work from such employees on a work-charged basis was thus unfair and illegal. Turning its attention then to the Note appended to Rule 3(8) of the 1961 Rules, the Supreme Court noted and held that there appeared to be no logical basis for the stipulation of service rendered as work charged followed by regularisation being recognised as qualifying for pension only if such service had fallen between two spells of temporary or in between spells of temporary and permanent service. The Court accordingly read down the Note to hold that services rendered even prior to regularisation albeit in the capacity of a work-charged employee or contingency paid fund employee shall also be counted towards qualifying service even if such service were not sandwiched between spells of service as provided for. In light of the reading down of the Note to Rule 3(8) of the 1961 Rules, the Supreme Court proceeded to strike down Regulation 370 of the CSR.

16. Post the decision rendered in **Prem Singh** the State promulgated an Ordinance titled the **Uttar Pradesh Qualifying Service for Pension and Validation Ordinance 2020 (U.P. Ordinance No. 19 of 2020).** That Ordinance introduced the following measures for the purposes of computation of qualifying service: -

"1. (1) This Ordinance may be called the Uttar Pradesh Qualifying Service for Pension and Validation Ordinance, 2020.

(2) It shall extend to the whole of the State of Uttar Pradesh.

(3) It shall be deemed to have come into force on April 1, 1961.

2. Notwithstanding anything contained in any rule, regulation or Government order for the purposes of entitlement of pension to an officer, "Qualifying Service" means the services rendered by an officer appointed on a temporary or permanent post in accordance with the provisions of the service rules prescribed by the Government for the post.

3. Notwithstanding any Judgement, decree or order of any Court, anything done or purporting to have been done and may action taken or purporting to have been taken under or in relation to sub-rule (8) of rule 3 of the Uttar Pradesh Retirement Benefit Rules, 1961 before the commencement of this Ordinance, shall be deemed to be and always to have been done or taken under the provisions of this Ordinance and to be and always to have been valid as if the provisions of this Ordinance were in force at all material times with effect from April 1, 1961.

4. Save as otherwise provided, the provisions of this Ordinance shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law for the time being in force other than this Ordinance."

17. The Ordinance was thereafter replaced by an Act7 [U.P. Act No. 01 of 2021] which was notified on 05 March 2021. It becomes relevant to note that both the Ordinance as well as the Validating Act introduced provisions with retrospective effect providing that it shall be deemed to have come into force with effect from 01

April 1961. The aforesaid date as noticed hereinabove is the date when the 1961 Rules were enforced. The Validating Act provides that qualifying service for the purposes of considering the entitlement to pension would mean services rendered by an officer appointed on a temporary or permanent post in accordance with the provisions of the service rules prescribed for the post. The introduction of this definition with retrospective effect from 01 April 1961 bids us to view Rule 3(8) contained in the 1961 Rules accordingly. Article 368 as noticed above had provided that service would not qualify unless it be found that the officer held a substantive office on a permanent establishment. The Validating Act thus lays in place a test which stands retrospectively introduced with only such service liable to be considered when rendered on a temporary or permanent post and with the added qualification of the appointment having been made in accordance with the relevant rules. It essentially lays in place the following twin preconditions for the purposes of computing qualifying service

(a) The officer having rendered service on a temporary or permanent post, and

(b) The appointment being one which was made in accordance with the provisions of the service rules prescribed.

C. DIVISION BENCH JUDGMENTS POST ORDINANCE AND THE VALIDATING ACT

18. The effect of the Ordinance on a claim for pensionary benefits was considered by a Division Bench of the Court firstly in the matter of **State of U.P. And Others v. Mahendra Singh8.** Noticing the provisions made therein the Division Bench observed: -

"It is clear from perusal of Section 2 of the Ordinance that it would have effect notwithstanding anything contained in U.P. Retirement Benefit Rules, 1961 or Regulation 361 and 370 of the Civil Service Regulation. Though it has been informed at the bar that in certain writ petitions, validity of the aforesaid U.P. Ordinance has been challenged, however, even if for purpose of adjudicating the present appeal the Ordinance is accepted as it is, section 2 thereof would inure to the benefit to the opposite party-petitioner and not to the benefit of appellants. The word "Qualifying Service" has been defined in Section 2 of the aforesaid U.P. Ordinance to mean the services rendered by an officer appointed on a temporary or permanent post in accordance with the provisions of the service rules prescribed by the Government for the post.

As discussed aforesaid, the appellants have admitted the appointment of the opposite party-petitioner on temporary post of Godown Chaukidar from 04.09.1981 till the date of his appointment on a regular post in 1997. Therefore, under this very U.P. Ordinance, the petitioner is entitled to his claim for counting the period of his service from the date of his appointment on 04.09.1981 on a temporary post till his regularisation on the permanent post in the year 1997."

19. In **State of U.P. And 4 Others v. Bhanu Pratap Sharma9,** the Court was called upon to consider the question whether the period spent by an employee prior to regularisation was liable to be taken into consideration for the purposes of pension. That claim was challenged in light

of the provisions made in the Ordinance with the appellants there contending that in light of Sections 2, 3 and 4 thereof, the period spent prior to regularisation would stand excluded. Dealing with the aforesaid contention, the Division Bench held: -

"It is clear from the perusal of section 2 of the Act of 2021 that it would have effect notwithstanding anything contained in U.P. Retirement Benefit Rules, 1961 or Regulation 361 and 370 of the Civil Service Regulation. Careful reading thereof, however, revels that "Qualifying Service" has been defined to mean the services rendered by an officer appointed on a temporary or permanent post in accordance with the provisions of the service rules prescribed by the Government for the post. In the counter affidavit filed by present appellant in the writ petition it was categorically admitted by the appellant that the petitioner was appointed in the office of Executive Engineer, Nalkoop Nirman Khand I, Bareilly on the post of Rig Assistant on work charge basis on 25.04.1979. Subsequently, the petitioner was regularized from work charge basis to regular establishment on the post of helper on 18.03.2006.

Thus admittedly, the petitioner was appointed on a post in work charge establishment. The record reveals that the initial appointment of the petitioner was as helper. Thus the post which is referred to in the counter affidavit is that of Helper on which he was regularized. The post of Helper thus permanently existed. Further more, it is not the case of the appellant that the respondent was not appointed in accordance with the provisions of Service Rules. Thus having been initially appointed on the post of Helper, the appellant were not justified in denying the service benefit."

20. It would also be pertinent to notice yet another decision handed down by a Division Bench of the Court in **State of U.P. And 4 Others v. Narayan Singh Sharma10**. Dealing with an identical question, the Division Bench there held:-

"...

7. In the case in hand the petitioner/ non-appellant was appointed on ad hoc basis but was against the sanctioned post. Thus, approval as per rules was given to his appointment by the District Inspector of Schools. The regularisation of service may be subsequently by an order issued in the year 2016 but then as per the Ordinance of 2020, the period of service rendered after appointment on temporary basis as per rules could not have been ignored. For that purpose Ordinance of 2020 is quoted hereunder:

...

8. A perusal of Section 2 of the Ordinance of 2020 reveals that service rendered by an officer appointed on a temporary or permanent post in accordance with the provisions of service rules would be counted towards qualifying service.

9. In view of the above, even the Ordinance of 2020 would not affect the claim of the petitioner/non-appellant having been appointed against the sanctioned post, may be initially on ad hoc but as per rules and subsequently his service was regularized. It is not the case of the respondents that initial appointment of the petitioner was against the rules. It is

more so when the writ petition was filed with clear statement of fact that petitioner/non- appellant was appointed against the sanctioned post and in accordance with rules. Therefore, even approval to his appointment was given by the District Inspector of Schools.

10. In the light of the discussion made above, we do not find any reason to cause interference in the judgment impugned herein. However, we have given additional reason to allow pensionary benefits to the petitioner/non-appellant by counting his length of service."

D. SUBMISSIONS OF THE STATE

21. Sri Ajit Kumar Singh, the learned Additional Advocate General, has contended that the Validating Act has introduced seminal changes relating to computation of qualifying service. According to the learned Additional Advocate General since the provisions of the Act have come to be introduced with retrospective effect and are to operate notwithstanding anything to the contrary contained in any rule, regulation or Government Order, it has now become incumbent upon an officer to establish that the service of which inclusion is sought for the purposes of pensionary benefits was one which was rendered on a temporary or permanent post. Additionally, it is also incumbent upon such an officer or employee to establish that his induction into service was in accordance with the provisions made in the relevant service rules. The learned Additional Advocate General also contended that the petitioners here having accepted the terms of their regularisation as set forth in the orders issued in that regard, cannot turn around now and seek inclusion of service rendered prior thereto for the purposes of pension. According to the learned Additional Advocate General, service rendered prior to the date from which the petitioners came to be regularized is neither liable to be included nor can any benefits in respect of that service be claimed. The learned Additional Advocate General has placed reliance upon a decision rendered by a learned Judge in **Brahamanand Singh and others v. State of U.P. and others11** to contend that the aforesaid submission finds sustenance from the principles propounded in that decision. Reliance in this regard was placed upon the following passages of the aforesaid decision: -

"9. Though petitioners contended that they are entitled to be regularised from the date of their temporary appointment in the year 1986 to 1989, but no provision in law has been shown whereunder such a right could be claimed..... Even under the Rules of 2001, petitioners could not have been considered for regularisation prior to 7.11.2006. This Court while allowing the petition had not directed consideration of petitioners' claim from any date prior to passing of order itself. Petitioners' have otherwise accepted the order of regularisation passed in the year 2007 and the same was never challenged while they remained in service....."

E. EVALUATION OF THE SUBMISSIONS OF THE STATE

22. Before proceeding to deal with the submissions addressed by the learned Additional Advocate General relating to the terms of the Validating Act and the 1961 Rules, it would be appropriate to firstly deal with the submission advanced based on **Brahamanand Singh**. The Court in

Brahamanand Singh was essentially called upon to consider a situation where an employee came to be regularized post 01 April 2005 and, in that context, whether he would be entitled to claim pensionary benefits. It becomes pertinent to note that Rule 2(3) of the 1961 Rules had come to be amended with effect from 07 April 2005 and provided that they shall not apply to employees entering service on or after 01 April 2005. The Court took into consideration the admitted fact that the services of the petitioner in that case had come to be terminated. The order of termination was ultimately set aside with the writ petition being allowed on 07 November 2006. It was in the aforesaid background that it was held that any period of service falling prior to 7 November 2006 was not liable to be countenanced. It then took into consideration that fact that the order of regularisation which came to be passed in 2007 was never assailed. The Court held that the effective date of regularisation which stands mentioned in that order cannot be questioned after retirement. The aforesaid decision, strictly speaking, does not deal with the questions which arise and fall for our consideration in this batch for more than one reason.

23. Undisputedly, in **Brahmanand Singh** the employee sought inclusion of a period during which an order of termination operated. It was in the aforesaid context that the learned Judge held that such a claim would not sustain and that the period prior to the order of termination coming to be set aside cannot be included. Secondly, the learned Judge held that it would not be open for the employee to seek modification of the date of his regularisation after attaining the age of superannuation. It was essentially held that once the terms of regularisation come to be accepted, the employee cannot turn around and contend that he should be regularised with effect from a date prior to that mentioned in the order itself. It may only be noted in this respect that none of the petitioners here seek modification of their date of regularisation. The date of regularisation is accepted even in the matter of Sushma Chandel with learned counsel stating at the Bar that the petitioner does not assail her regularisation granted with effect from 16 March 2005. In the considered opinion of this Court the claim for inclusion of services rendered prior to regularisation is not an assertion which can be said to be akin or corresponding to an employee seeking a reopening or review of the effective date of regularisation. The date from which an employee comes to be regularized may have a bearing on myriad service related issues. While not to be understood as seeking to exhaustively record or chronicle such matters, claims relating to calculation of increments or seniority are illustrative facets of service which may be impacted by the date of regularisation. However, the claim for inclusion of service rendered prior to confirmation or regularisation is one which is liable to be considered in light of the provisions of Regulation 370 of the CSR as it stood as well as the Proviso to Rule 3 (8) of the 1961 Rules. These provisions did and even presently envisage the inclusion of period of service spent prior to confirmation or regularisation subject to that service meeting the conditions prescribed therein. In view of the aforesaid conclusion, the Court is of the considered view that the claim of the petitioners here cannot be denied on grounds urged by the learned Additional Advocate General. Having ruled on the validity of the submissions addressed by the learned Additional Advocate General, the Court

now proceeds to deal with the merits of the question which has fallen for consideration.

F. DISCUSSION ON THE GOVERNING LEGAL REGIME

(I). THE CSR PROVISIONS

24. It would be beneficial to advert to the provisions made in the CSR insofar as the issue of pensionary benefits is concerned. Regulation 361, as was noted above, puts in place the three primordial conditions which must be satisfied for a government servant to be held entitled to the payment of pension. It postulates that the service rendered by an officer would qualify for pension only if it is established that the same was discharged under the Government, the employment was substantive and permanent and was paid for by the Government. Regulation 368, as it originally stood, provided that service would not qualify for pension unless the officer held a substantive office in a permanent establishment. This statutory position which held the field has now been amended originally by virtue of the Ordinance that was promulgated and thereafter by the Validating Act. The Validating Act provides that qualifying service would mean service rendered by an officer appointed on a temporary or a permanent post in accordance with the provisions of the service rules prescribed. Thus, the concept of "*substantive office"* has been replaced with the requirement of the employee establishing that he had been appointed on a *"permanent or temporary post*". The Ordinance and the Validating Act introduce the further requirement of it being established that the appointment had been made in accordance with the prevalent rules as an additional condition for the purposes of evaluating a claim for pensionary benefits. What the Validating Act essentially does is to erase the connect between the concept of qualifying service and the officer holding a substantive office under the Government. The test for determining qualifying service has undoubtedly been fundamentally altered in terms of the Validating Act. A period of service in order to be included in qualifying service now must necessarily be one which was rendered on a permanent or temporary post and it being additionally found that such service was discharged consequent to an appointment made in accordance with the prevalent rules. Since the Ordinance as well as the Validating Act are to operate retroactively with effect from 01 April 1961, it is this definition of "qualifying service" which would be liable to viewed as existing on the statute book from that date. The provisions made in the 1961 Rules which came into force on the same date, consequently, would also have to be understood in the aforesaid light.

25. Of equal significance are the provisions made in Section 3 of the Validating Act which seeks to validate any action taken by the State thus far which would be liable to be adjudged on the anvil of "qualifying service" as introduced as well as Section 4 which confers an overriding and overarching effect on the provisions of the Validating Act notwithstanding anything to the contrary contained in any other act, rule or regulation.

26. The CSR applicable in the State further and in accordance with the provisions made in Regulation 370 prescribed that an officer could count temporary or officiating service under the Government followed by confirmation or regularisation in the same or any other post.

The only exception to the aforesaid rule was the exclusion of periods of temporary or officiating service rendered either in a non-pensionable establishment or a work-charged establishment as well as the period of service against a post which was paid from contingencies. Although Regulation 370 was amended in 1977, the position remained essentially the same with the period of temporary or officiating service followed by confirmation or regularisation being entitled to be counted subject to the exceptions noticed above. It is also pertinent to bear in mind that Regulation 370 was ultimately struck down by the Supreme Court in **Prem Singh** consequent to the Note to Rule 3(8) of the 1961 Rules being read down. The Court shall deal with the significance of Regulation 370 being struck down in the subsequent parts of this decision.

(II). THE 1961 RULES

27. The Court then turns to Rule 3(8) of the 1961 Rules. The 1961 Rules while defining qualifying service in Rule 3(8) and as it stood prior to the promulgation of the Ordinance and the Validating Act bid one to revert to the provisions made in Article 368 of the CSR. As a consequence of the introduction of the Validating Act with retrospective effect, the expression "qualifying service" would have to necessarily be understood as services rendered against a temporary or permanent post and with the additional rider of the appointment being one which was made in accordance with the relevant service rules. Further it is of seminal importance to bear in mind that the proviso to Rule 3(8) makes provisions identical to those contained in Regulation 370 of the CSR. Rule 3(8) of the 1961 Rules directly fell for consideration of the Supreme Court in **Prem Singh**. While the Court in **Prem Singh** read down the provisions of the Note appended to that rule and also struck down Regulation 370, the proviso was not touched. The reason is neither obscure nor far to seek. The proviso was essentially a statutory measure which reinforced the foundation of **Prem Singh** namely, that the denial of the fruits of considerable period of service rendered by an employee performing work which was permanent and regular by employing the subterfuge of engagement in a work charged establishment would be wholly arbitrary.

28. Turning then to the Note appended to Rule 3(8), the same was read down by the Supreme Court in **Prem Singh** with their Lordships holding that service rendered even prior to regularisation would be liable to be counted for the purposes of computing qualifying service. In **Prem Singh**, the Supreme Court essentially found no justification for discounting the service rendered in a work-charged establishment prior to regularisation or for the aforesaid service being restricted only to a situation where it was found that such service was rendered between two spells of temporary or temporary and permanent service.

(III). JUDICIAL ANNULMENT OF REGULATION 370

29. Having dealt with the substantive parts of Rule 3(8) and how they were interpreted and explained by **Prem Singh**, it would be appropriate to deal with the inmpact, if any, of Regulation 370 being struck down. **Prem Singh** essentially held that once an employee is ultimately confirmed or regularized, the long length of service rendered purportedly in a work charged establishment is liable to be included for the purposes of pensionary

benefits. The Supreme Court arrived at this conclusion as a consequence of the facts that were noticed in paragraph 30 of the report. Their Lordships noticed that the concept of work charged engagement had been *"misused*" and persons engaged for decades on "*exploitative terms*". It was further noted that those employees had been engaged for work which was *"perennial" and "regular"*. Significantly once the learned Judges in **Prem Singh** found no justification to exclude long periods of service rendered ostensibly in a work charged establishment followed by confirmation or regularisation for the purposes of pension and read down the further restrictions placed by the Note appended to Rule 3(8), the only provision which stood in the way of inclusion of service rendered in a work charged establishment was Regulation 370. It was this aspect which clearly appears to have informed the decision to strike down Regulation 370. However and as was noticed hereinabove, provisions similar to those enshrined in Regulation 370 remain preserved and untouched in the proviso to Rule 3(8). That proviso has neither been amended nor deleted. Regard must be had to the well settled and recognised function of a proviso namely of carving out an exception to what otherwise would stand governed in the principal provision. The Court bears in mind the functionality of a proviso as was explained by the Supreme Court in **Durgabai Deshmukh Memorial Sr. Sec. School v. J.A.J. Vasu Sena12:-**

"35. It is a settled position of law that the objective of a proviso is to carve out from the main section a class or category to which the main section does not apply. A proviso must prima facie be read and considered in relation to the principal matter to which it is a proviso. It is not a separate or independent enactment."

G. SUMMATION

30. In light of the aforesaid discussion the Court comes to the conclusion that the expression "*qualifying service"* would now have to be interpreted in accordance with the provisions made in the Validating Act notwithstanding anything to the contrary that may be contained in any other act, rule or regulation. The Validating Act introduces provisions with retrospective effect from 1 April 1961. Consequently, the provisions of the 1961 Rules which came to be promulgated from that date would have to be construed accordingly.

31. The right to claim pensionary benefits is now and by virtue of the provisions introduced retroactively by the Validating Act made dependent upon it being found that the employee was appointed in accordance with the applicable service rules and held a permanent or temporary post. Since the legislative enactment bids us to proceed on the basis that the aforesaid definition of qualifying service existed and held the field since 1 April 1961, all claims would have to be necessarily evaluated and examined accordingly. This conclusion would necessarily be subject to any challenge that may be laid to the provisions of the Validating Act.

32. While the Validating Act fundamentally alters the concept of qualifying service, the right to claim addition of service rendered in a temporary or ad hoc basis is one which is still available to be asserted in light of the proviso to Rule 3(8) of the 1961 Rules.

While Regulation 370 of the CSR may have been annulled by virtue of the declaration in **Prem Singh**, the proviso to the aforesaid rule enshrines measures which are akin to those which were contemplated in Regulation 370 when it existed. Regard must also be had to the fact that while the provisions of the aforesaid rule directly fell for consideration in **Prem Singh**, it was the Note to that rule alone which was read down. The proviso remained untouched and continues to exist in the statute whole, unmutilated and effective. In fact and was noticed hereinabove, the Supreme Court in **Prem Singh** appears to have consciously left the proviso standing since once it had struck down Regulation 370, that was the only statutory provision which reinforced the central beam of **Prem Singh** of service discharged for decades together was liable to be taken notice of for the purposes of pension once it be found that the attachment of an officer or employee in a work charged establishment was a mere ruse and camouflage to deny benefits.

33. From the above recordal of the statutory scheme which now remains in place, it is manifest that the right of an employee to seek addition of continuous, temporary or officiating service followed by confirmation or regularisation would remain preserved notwithstanding the deletion of Regulation 370. Additionally, and as was explained by the Division Benches in **Mahendra Singh, Bhanu Pratap Sharma and Narayan Singh Sharma**, the right as inhering in a government servant to seek inclusion of services rendered on a temporary or officiating basis provided the appointment was ultimately regularized has not been impacted by the Validating Act. The three decisions afore noted unambiguously hold that the period prior to regularisation cannot be ignored as long as it is established that it was service rendered against a particular post be it temporary or permanent. This aspect was highlighted with the Court holding that the only fetter which now remains in place for the purposes of computing qualifying service is of the service rendered being shown to have been discharged against a permanent or temporary post and the appointment having been made in accordance with the service rules. It was in the aforesaid background that it was held that there was no imperative to assail the validity of the U.P. Act No. 01 of 2021 in such situations.

34. It may further be noted that the Validating Act makes the right to claim pension dependent upon it being found that service was rendered against a "permanent or temporary post" coupled with it being established that the appointment was made in accordance with the service rules. Notwithstanding the above, the question of whether the engagement of the officer or employee shown against a work charged establishment was merely an "*exploitative measure*" [an expression which the Court borrows from **Prem Singh** itself] and designed to deny benefits of long service would still be open to canvassed. As was noted by the Supreme Court in **Prem Singh** such conduct of the State would clearly fall foul of the constitutional guarantees enshrined in Part III of our Constitution.

35. The question of service discharged in a temporary or ad hoc capacity followed by regularisation and whether such periods are liable to be included would also have to be necessarily examined in the backdrop of whether the engagement had been made against a permanent or temporary post that was

available as also whether the procedure as prescribed under the relevant service rules had been adhered to.

36. Ultimately all the issues which are noticed and enunciated above would merit consideration before the respondents evaluate the claims of the individual petitioners here. The Court is of the firm opinion that a claim for pensionary benefits cannot be negatived solely on the basis of a mere reiteration of the Validating Act having been introduced. The respondents would have to necessarily evaluate such claims bearing in mind the following questions which would arise:-

A. Whether the service rendered in temporary, ad hoc, or officiating capacity was one which was discharged against a permanent or temporary post;

B. Whether the appointment was made in accordance with the provisions made in the prevalent service rules;

C. Whether such service can be excluded notwithstanding the provisions made in the proviso to Rule 3(8) of the 1961 Rules;

D. Whether the service rendered in a work-charged establishment followed by regularisation can be legally excluded while computing qualifying service;

E. Whether such service was performed in connection with work which was regular and perennial and the engagement in a work charged establishment was a mere ruse to deny benefits of long service.

37. All these and other aspects would merit further examination by the respondents before ruling upon the claims of the petitioners here for grant of pensionary benefits. For the aforesaid purpose, the matters shall stand remitted to the competent authority under the respondents to reevaluate the claim of the petitioners here in accordance with the observations made hereinabove. The exercise of reconsideration may be concluded with expedition and preferably within a period of 3 months of the date of presentation of a duly authenticated copy of this order.

38. The writ petitions shall stand **disposed of** in the above terms.

(2021)09ILR A1293
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.08.2021

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE MRS. SADHNA RANI (THAKUR), J.

WRIT A No. 13967 of 2020

Gaurav Mishra & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:s
Sri Rishab Srivastava, Sri Hari Narain Singh (Senior Adv.)

Counsel for the Respondents:
C.S.C., Sri A. K.S. Parihar.

A. Service Law – Education – Appointment - Uttar Pradesh Secondary Education Services Selection Board Rules, 1998 - Rule 5 - Uttar Pradesh Intermediate Education Act, 1921 - Sections 15 & 16 - National Council of Teacher Education Act, 1993 - Sections 12-A & 2(ka)- Right of

Children to Free and Compulsory Act, 2009 - Section 23(1) - National Council for Teacher Education Regulations, 2014.

The controversy revolves around the prescribed qualification for selection to the post of the Assistant Teachers (T.G.T.) in the subjects Mathematics and Science in the State of U.P. (Para 6)

A comparison of the minimum qualification prescribed for Secondary/High School in Item No. '4' of the table to NCTE Regulations, 2014 and the Appendix-A in Chapter-II of the Regulations framed under the Act, 1921 shows that for being appointed as Assistant Teacher to teach subjects Mathematics and Science for classes IX & X, a candidate has to study upto Graduate or Post-Graduate with Bachelor of Education (B.Ed.) as the training qualification. This reveals that a subject teacher has to be a graduate in the relevant subject, i.e. he or she must have studied the relevant subject (Mathematics or Science) at least upto Graduation. **The B.A. or B.Sc. in the relevant subjects Mathematics and Science, as prescribed qualification in the Appendix-A of Chapter II of the Regulations framed under the Act, 1921,** therefore, **cannot be said to be inconsistent with the qualification prescribed in the NCTE Regulations, 2014.** (Para 11)

B. Uttar Pradesh Intermediate Education Act, 1921 - National Council of Teacher Education Act, 1993 - The repugnancy between two legislations, if is an irreconcilable conflict, only then the State law must yield in favour of the Central law - The NCTE Act, 1993 is a law relatable to Entry '66' of List-I of Schedule-VII of the Constitution of India which empowers the Parliament to legislate for coordination and determination of standards in the institutions for higher education. Whereas the Intermediate Education Act is a legislation which is referable to Entry '25' of List-III-Concurrent List. In respect to the field "education", the State, thus, has power to legislate, subject to the provisions of Entry '66' of List-I. (Para 12)

There is no repugnancy as the subject "Education" falling within the legislative competence of the State is unquestionable. The attempt of the State Legislature is to provide complete measures and methodology to regulate and supervise the system of High School and Intermediate Education in the State. As is seen from the legislative scheme, the Regulations framed under the NCTE Act provide the minimum standards to the extent that a candidate for being appointed to the post of Assistant Teacher at Secondary School level must be at least a Graduate and possess training qualification for teaching. Whereas, the Intermediate Education Act ensures that a candidate to be appointed as Assistant Teacher in a subject must be well versed in the relevant subject/discipline, in which he/she is appointed to teach. (Para 13)

Thus, Keeping in mind the doctrine of pith and substance, having gone through the legislative scheme of the Intermediate Education Act, 1921 (a State legislature), suffice it to note that **the State Act is a self-contained code enacted with a distinct and predominant purpose of regulating and supervising the system of High School and Intermediate Education in the State of Uttar Pradesh. There is no overlapping between two legislations resulting in any repugnancy.** (Para 16)

Therefore, qualifications prescribed in Entry '3' and '33' of Appendix 'A' for the post of Assistant Teachers (T.G.T.) in subjects Mathematics and Science are not inconsistent with the qualifications prescribed in Item No. 4 of the Table in the First Schedule of the NCTE Regulations, 2014 and **the said entries are not ultra vires to S. 12-A of the NCTE Act read with NCTE Regulations, 2014.** (Para 16)

C. Every candidate aspiring to become a teacher has to be possess the qualification needed to teach the subject - As per the NCTE Regulations, 2014, a person who is not a "graduate" cannot be treated as qualified for recruitment to the post of Assistant Teacher in a Secondary School. (Para 18)

Words & Phrases – 'Graduate' – The word "Graduate" incorporated as qualification in the NCTE Regulations is the prescribed minimum

standard educational qualification to be possessed by a person for recruitment as Education Teacher in a Secondary School. The word "Graduate" mentioned in the First Schedule of NCTE Regulations being the prescribed qualification cannot be given such a wide meaning to include "all Graduates" including those who possessed B.Tech degree. (Para 18)

D. The comparison of syllabus and determination of equivalence to the two qualifications is within the domain of the subject experts. It is not possible for the Court to hold that the B.Tech degree is equivalent to the "Graduation" "(B.A. or B.Sc. course)" in the subjects Mathematics and Science and that the "Graduates in various disciplines of B.Tech course" which is a technical course, are qualified for appointment to the posts of Assistant Teacher in the subjects Mathematics and Science. (Para 18, 19)

E. Doctrine of *pith and substance* discussed - One of the settled principles to examine the repugnancy or conflict between the provisions of a law enacted by one legislative constituent and the law enacted by the other under the concurrent list, is to apply the doctrine of pith and substance. The purpose of applying this principle is to examine, as a matter of fact, the nature and character of the legislation in question. (Para 14)

F. With respect to the challenge to the advertisement petitioners cannot be permitted provisionally to participate in the selection in question as the Apex Court has taken strong exceptions to the state of affairs in the matter of appointment of teachers in the state of U.P. The Apex Court had disapproved the practice of making ad hoc appointments for a long time and noted that this had created a mess in the education system. (Para 20)

G. Equivalence of B.Tech course with B.A. or B.Sc. (Mathematics and Science) - An equivalence Committee of experts has been constituted by the State Government and it can examine the said issue. The State Government is directed to place the matter of equivalence before the Expert Committee which has been constituted for the purpose to take an expeditious decision, in accordance with law. (Para 21, 22)

H. Proposal of the Board of High School and Intermediate, Uttar Pradesh forwarded by the letter dated 26.11.2020 - The Column-IV of the said proposal in Parishisth 'Ga' appended as Annexure S.C.A. '1' to the short counter-affidavit filed by the State, **refers to three alternative qualifications, prescribed in the First Schedule of the NCTE Regulations, 2014. The qualification in clause 'Ga' of "four years B.A. Ed./B.Sc.Ed. degree" from the institutions recognised by NCTE refers to the degree of an integrated course of "B.A. with B.Ed." or "B.Sc. with B.Ed."** and cannot be confused as referring to the four years B.Ed, degree. Moreover, being an alternative qualification, if there is no institution in the State of U.P. imparting integrated course of B.A. Ed./B.Sc.Ed., it is open for the State Government to modify the proposal of the Board of High School and Intermediate Education, Prayagraj while making amendments in Appendix 'A' of Chapter II of the Regulations framed under the Intermediate Education Act, 1921, to bring it in line with the NCTE Regulations, 2014. (Para 23)

Writ petition disposed off. (E-4)

<u>Precedent followed</u>:

1. Offshore Holdings Pvt. Ltd. Vs Bangalore Development Authority & ors., (2011) 3 SCC 139 (Para 14)

2. Deep Chand Vs St. of U.P., AIR 1959 SC 648 (Para 15)

3. Sanjay Singh & ors. Vs St. of U.P. & ors., Civil Appeal No. 8300 of 2016 (Para 20)

Present petition challenges vires of Rule 5 of the Uttar Pradesh Secondary Education Services Selection Board Rules, 1998 and Appendix 'A' as contained in Chapter II of the Regulations frames under the Uttar Pradesh Intermediate Education Act, 1921. It also challenges the Advertisement No. 01/2021 dated

15.03.2021 publishes by U.P. Secondary Education Service Selection Board, Prayagraj.

(Delivered by Hon'ble Mrs. Sunita Agarwal, J. &
Hon'ble Mrs. Sadhna Rani (Thakur), J.)

1. Heard Sri Hari Narain Singh learned Senior Advocate assisted by Sri Rishabh Srivastava learned counsel for the petitioners, Sri A.K.S. Parihar learned Advocate for the respondent no. 3 and Sri Sudhanshu Srivastava learned Additional Chief Standing Counsel appearing for the State respondents.

2. The petitioners herein have obtained Bachelors Degree in various disciplines of B.Tech (Bachelor of Technical Education) from the technical institutions recognized by All India Council of Technical Education (In short "AICTE"), affiliated with the Technical Universities. They claim of having studied Mathematics and Science as the subjects in the B.Tech course. They also claim to have obtained B.Ed (Bachelor of Education) degree from the institutions recognized by the National Council of Teacher Education (In short "NCTE").

3. The contention is that the petitioners are eligible for appointment to the post of Assistant Teacher (Trained Graduate Teachers) (In short "T.G.T") in Mathematics and Science, to teach students upto the Secondary level, i.e. Classes IX & X, being qualified as per the regulations framed by NCTE providing minimum qualification for appointment to the said post.

The vires of the Rule 5 of the Uttar Pradesh Secondary Education Services Selection Board, Rules, 1998 (hereinafter referred to as "the Rules, 1998") and Appendix 'A' as contained in Chapter II of the regulations framed under the Uttar Pradesh Intermediate Education Act, 1921 (hereinafter referred to as "the Act, 1921") is sought to be challenged on the ground that the qualifications prescribed therein for selection/appointment of Trained Graduate Teachers in Mathematics and Science is inconsistent with Section 12-A of the National Council of Teacher Education Act, 1993 (In short "NCTE Act") readwith the National Council for Teacher Education (Determination of Minimum Qualifications for persons to be recruited as Education Teachers and Physical Education Teachers in Pre-primary, Primary, Upper Primary, Secondary, Senior Secondary or Intermediate Schools or Colleges) Regulations, 2014 (hereinafter referred to as "the NCTE Regulations, 2014).

Further prayer in the writ petition is to quash the qualification prescribed in Appendix 'A' of Chapter II of the Regulations framed under the Act, 1921 for Trained Graduate Teachers in subjects Mathematics and Science and further to incorporate qualifications as provided in Regulations, 2014 framed by NCTE.

4. By means of the amendment application, the petitioners also challenge the Advertisement No. 01/2021 dated 15.3.2021 published by the U.P. Secondary Education Service Selection Board, Prayagraj for the posts of Assistant Teacher (Trained Graduate Grade) in the subjects Mathematics and Science.

5. It is argued by Sri Hari Narain Singh learned Senior Advocate for the petitioners that the challenge raised herein is

substantiated from the bare perusal of the statement in the short counter affidavit filed on behalf of respondent no. 1. In the said affidavit, respondent no. 1 had admitted that the qualification prescribed in Appendix 'A' of Chapter II of the Regulations framed under the Intermediate Education Act is not in conformity with the prescribed qualifications for the post of Assistant Teachers in the NCTE Regulations 2014. As per the disclosure made therein, the proposal of the Board of High School and Intermediate Education, Prayagraj dated 26.11.2020 has been returned back with certain objections and the State requires time (preferably six months) to complete the process to bring the Rule 5 of the Rules, 1998 and Appendix 'A' of Chapter II of the Regulations framed under the Act, 1921 in conformity with the NCTE Act, 1993 and NCTE Regulations, 2014.

It is argued that in view of the admission of the State respondents that the prescribed minimum qualifications in Appendix 'A' of Chapter II of the Regulations framed under the Act, 1921 is not in conformity with the NCTE Regulations, 2014, the Selection Board cannot proceed for the selection of the Assistant Teachers in various subjects pursuant to the advertisement dated 15.3.2021.

The submission, thus, is that the qualifications prescribed in the Appendix 'A' of Chapter II of the Regulations framed under the Intermediate Education Act be quashed and the State be directed to withhold the selection of the Assistant Teachers (Trained Graduate Grade) till the amendments are made in the existing provision.

The alternative prayer is that all the petitioners herein being qualified as per the minimum qualifications prescribed by the NCTE be permitted to participate in the selection process on provisional basis or else the writ petition would be rendered infructuous.

The supplementary affidavit dated 15.7.2021 has been filed to bring on record the syllabus of B.Tech, B.A./B.Sc. course in the subjects Mathematics and Science to assert that the petitioners are graduates in the relevant disciplines and are eligible for appointment.

6. At the outset, we may note that the complete syllabus of the course concerned for making comparison of the papers of study in Mathematics and Science of B.A./B.Sc. courses has not been brought on record.

The controversy, thus, revolves around the prescribed qualification for selection to the post of the Assistant Teachers (T.G.T.) in the subjects Mathematics and Science in the State of U.P.

7. Sri Sudhanshu Srivastava, learned Additional Chief Standing Counsel for the State respondents, in rebuttal, submits that there is no inconsistency in the prescribed qualification as published in the advertisement dated 15.3.2021. The State is under obligation to complete the selection to the post of Assistant Teacher (T.G.T.) against all the current and future vacancies reported as per the Rules, in view of the directions of the Apex Court in the judgment and order dated 26th August, 2020 in Civil Appeal No. 8300 of 2016 (Sanjay Singh and others vs. State of Uttar Pradesh & others) read as under:-

"12. We end with the hope that we will never be faced with the aforesaid situation again and the State Government and the Commission will also make every

endeavour to ensure that the order is complied in its true intent and spirit and specially the aspect of holding examinations for the future taking into consideration all current and future vacancies reported as per rules is followed in times to come. We need not emphasize that education in a very important role performed by a State apart from the area of medical assistance to citizens and thus it is necessary that the full benefit is extended to the students which can only take place if the full strength of teachers is available at the requisite time. This in turn requires compliance with the aforesaid directions for the future.

13. Since there is always hope, we hope for a better future.

14. The aforesaid exercise by the Commission in consultation with the State Government should be completed well in time to ensure that at least in the session commencing in July, 2021 all teachers up to date are in place."

As regards the process of amendment in the Appendix 'A', Chapter II of the Regulations framed under the Intermediate Education Act, it is contended that the proposal of the Board of High School and Intermediate had been considered and it was sent back for clarification in view of the inconsistency in the qualification proposed by the Board. The specific anomaly mentioned in the 'Note' forwarded to the Board has been pointed out from the Annexure "S.C.A.-1" to the short counter affidavit filed on behalf of the State.

It is then argued that the petitioners being B.Tech Graduate cannot seek selection to the post of Assistant Teacher (T.G.T.) in the subjects Mathematics and Science as they are not eligible/qualified. The advertisement dated 15.3.2021 published by the Selection Board, hence, cannot be quashed at the instance of the petitioners.

8. To deal with the controversy at hands, it would be appropriate to first note the relevant provisions pertaining to the field.

The Right of Children to Free and Compulsory Act, 2009 (in short "R.T.E. Act, 2009") has been enacted to provide compulsory elementary education to all children of the age of 6 to 14 years. Section 23(1) of the R.T.E. Act, 2009 provides that for being eligible for appointment as a teacher, any person must possess such minimum qualifications as laid down by an Academic Authority, authorised by the Central Government, by notification. After coming into operation of the R.T.E. Act, 2009, by the notification dated 23.8.2010, the Central Government had appointed NCTE (National Council of Teacher Education) as the Academic Authority to determine the qualification for appointment of teachers so as to maintain the norms and standards in the teaching education system. The NCTE Amendment Act, 2011 was enacted by the Parliament on 12th October, 2011 and was promulgated in the Official Gazette on 12th November, 2014. The expression "School" was inserted by Clause (ka) in Section 2 of the Principal Act which reads as under:-

*"**Section 2 (ka)** "school" means any recognised school imparting pre-primary, primary, upper primary, secondary or senior secondary education, or a college imparting senior secondary education and includes-*

(i) a school established, owned and controlled by the Central Government, or the State Government or a local authority;

(ii) a school receiving aid or grants to meet whole or part of its expenses from the Central Government, the State Government or a local authority;

(iii) a school not receiving any aid or grants to meet whole or part of its expenses from the Central Government, the State Government or a local authority;"

Section 12-A inserted by Amendment Act 18 of 2011 (w.e.f. 1.6.2012) reads:-

"12-A. Power of Council to determine minimum standards of education of school teachers.- For the purpose of maintaining standards of education in schools, the Council may, by regulations, determine the qualifications of persons for being recruited as teachers in any pre-primary, primary, upper primary, secondary, senior secondary or intermediate school or college, by whatever name called, established, run, aided or recognised by the Central Government or a State Government or a local or other authority:"

Pursuant to the NCTE Amendment Act, 2011, the Regulations had been published in the Official Gazette on 12th November, 2014, known as the "Regulations of National Council for Teacher Education (determination of the qualifications for persons to be recruited as education teachers and physical education teachers in pre-primary, primary, upper primary, secondary, senior secondary or intermediate school or college) Regulations 2014".

Clause (2) of the said Regulations says that these regulations shall be applicable for recruitment of teachers in any recognised school imparting pre-primary, primary, upper primary, secondary, senior secondary or intermediate school or college established and controlled by the Central Government or a State Government or a local or other authority as also the schools which are recognised but not receiving any grant or aid to meet out their expenses.

Clause (4) of the Regulations says that the qualifications for recruitment of teachers in any recognised school (noted above) shall be as given in the First and Second Schedule(s) annexed to these Regulations.

First Schedule provides minimum academic and professional qualifications for Secondary/High School (For Classes IX-X) in Item No. (4) of the table given therein, which provides as under:-

"(a) Graduate/Post Graduate from recognized University with at least 50% marks in either Graduation or Post Graduation (or its equivalent) and Bachelor of Education (B.Ed.) from National Council for Teacher Education recognized institution.

Or

(b) Graduate/Post Graduate from recognized University with at least 45% marks in either Graduation or Post Graduation (or its equivalent and Bachelor

of Education (B.Ed.) from National Council for Teacher Education recognized institution [in accordance with the National Council for Teacher Education (From of application for recognition, the time limit of submission of application, determination of norms and standards for recognition of teacher education programmes and permission to start new course or training) Regulations, 2002 notified on 13.11.2002 and National Council for Teacher Education (Recognition Norms and Procedure) Regulations, 2007 notified on 10.12.2007}

Or

(c) 4-years degree of B.A.Ed./B.Sc.Ed. from any National Council for Teacher Education recognized institution".

9. Placing qualifications in Item No. 4(a) of the table in the First Schedule of the Regulations 2014, it is argued by the learned Senior Advocate for the petitioners that the NCTE being the Apex Academic body appointed by the Central Government had determined the qualification for appointment to the post of Assistant Teacher (T.G.T.) for Secondary/High School (Classes IX & X) as "Graduate from a recognized University with at least 50% of the marks in Graduation alongwith B.Ed. (Bachelor of Education) degree from the institution recognized by NCTE". The petitioners having Graduate degree in B.Tech and training qualification B.Ed. are, thus, qualified. The Selection Board, however, illegally excluded them from consideration by mentioning specific eligibility qualifications as B.A./B.Sc. in the subjects Mathematics and Science in the advertisement, which is provided in Appendix 'A' of Chapter II of the Regulations framed under the Intermediate Education Act, 1921.

Further submission is that the Appendix 'A' of Chapter II of the Regulations has to be appropriately amended by the State Government to bring it in conformity with the NCTE Regulations, 2014 as NCTE Regulations will have an overriding effect over the provisions of Appendix 'A' of Chapter II of the Regulation framed under the Act, 1921.

10. To deal with the said submissions, we may note that the appointment of teachers in High School and Intermediate institutions in the State of U.P. is governed by the U.P. Intermediate Education Act which has been enacted for the establishment of a "Board of High School and Intermediate Education" to regulate and supervise the system of the High School and Intermediate Education in the State of U.P. and prescribe courses therefor. Section 15 of the said Act empowers the Board of High School and Intermediate Education to frame Regulations for the purpose of carrying into the effect the provisions of the Act, 1921. Section 16 provides that the Regulations framed by the Board under Section 15 of the Act, 1921 shall be made by the Board only with the previous sanction of the State Government and shall be published in the Gazette. The regulations, under the Act, 1921, framed by the Board as contained in Chapter II provide for appointment of teachers and Heads of Institutions. Regulation 1 of Chapter II states that the minimum qualifications for appointment as teachers in any recognized institution, whether by direct recruitment or

otherwise, shall be as given in Appendix 'A'.

Appendix 'A' contains the minimum qualifications for appointment of Assistant Teachers for Classes IX & X and Classes XI & XII. Entry '3' of Appendix 'A' provides the minimum qualification for Mathematics teacher for High School (Classes IX-X). The educational training experience prescribed therein is B.A. or B.Sc. (Mathematics) and the desirable qualification is 'Trained'. Similarly Entry '33' provides minimum qualification for Science teacher for High School (Classes IX-X) as B.Sc. in Chemistry and Physics (Educational Training Experience) and trained (desirable qualification).

11. A comparison of the minimum qualification prescribed for Secondary/High School in Item No. '4' of the table to NCTE Regulations, 2014 and the Appendix-A in Chapter-II of the Regulations framed under the Act, 1921 shows that for being appointed as Assistant Teacher to teach subjects Mathematics and Science for classes IX & X, a candidate has to study upto Graduate or Post-Graduate with Bachelor of Education (B.Ed.) as the training qualification. This reveals that a subject teacher has to be a graduate in the relevant subject, i.e. he or she must have studied the relevant subject (Mathematics or Science) at least upto Graduation. The B.A. or B.Sc. in the relevant subjects Mathematics and Science, as prescribed qualification in the Appendix-A of Chapter II of the Regulations framed under the Act, 1921, therefore, cannot be said to be inconsistent with the qualification prescribed in the NCTE Regulations, 2014.

12. The NCTE Act, 1993 is a law relatable to Entry '66' of List-I of Schedule-VII of the Constitution of India which empowers the Parliament to legislate for coordination and determination of standards in the institutions for higher education. Whereas the Intermediate Education Act is a legislation which is referable to Entry '25' of List-III-Concurrent List, to be noted as under:-

"25. Education, including technical education, medical education and universities subject to the provisions of entries 63, 64, 65 and 66 of List I; vocational and technical training of labour."

In respect to the field "education", the State, thus, has power to legislate, subject to the provisions of Entry '66' of List-I.

13. First contention of the petitioners is that since both the above legislations operate in the same field, the field being covered by the Central law, the qualifications prescribed in the State Act being not in conformity with the Parliamentary Act is void.

Having examined both the provisions, we have noted that there is no repugnancy as the subject "Education" falling within the legislative competence of the State is unquestionable. The attempt of the State Legislature is to provide complete measures and methodology to regulate and supervise the system of High School and Intermediate Education in the State. As is seen from the legislative scheme, the Regulations framed under the NCTE Act provide the minimum standards to the extent that a candidate for being appointed to the post of Assistant Teacher at Secondary School level must be at least a Graduate and possess training qualification

for teaching. Whereas, the Intermediate Education Act ensures that a candidate to be appointed as Assistant Teacher in a subject must be well versed in the relevant subject/discipline, in which he/she is appointed to teach.

14. One of the settled principles to examine the repugnancy or conflict between the provisions of a law enacted by one legislative constituent and the law enacted by the other under the concurrent list, is to apply the doctrine of pith and substance. The purpose of applying this principle is to examine, as a matter of fact, the nature and character of the legislation in question. To examine the 'pith and substance' of the legislation, it is required for the Court to examine the legislative scheme, object and purpose of the Act and practical effect of its provisions. After examining the statute and its provisions as a whole, the Court has to determine whether the field is already covered. While examining these aspects, it should be kept in mind that the legislative constituent enacting the law has a legislative competence with respect to Article 246 readwith the lists contained in Schedule-VII to the Constitution. It is the result of this collective analysis which will demonstrate the pith and substance of the legislation and its consequential effects upon the validity of that law. [Reference **Offshore Holdings Private Limited vs. Bangalore Development Authority and others1]**

15. T he Apex Court in **Offshore Holdings Private Limited** (supra) has noted its previous decision in **Deep Chand v. State of U.P.2**, wherein the principles to examine the repugnancy between the two statutes were enunciated as under:-

"101. While examining the repugnancy between the two statutes, the following principles were enunciated in the case of Deep Chand v. State of U.P. [AIR 1959 SC 648]:

29. (1) There may be inconsistency in the actual terms of the competing statutes;

(2) Though there may be no direct conflict, a State law may be inoperative because the Commonwealth law, or the award of the Commonwealth Court, is intended to be a complete exhaustive code; and

(3) Even in the absence of intention, a conflict may arise when both State and Commonwealth seek to exercise their powers over the same subject matter."

It has further been held therein:-

"102. The repugnancy would arise in the cases where both the pieces of legislation deal with the same matter but not where they deal with separate and distinct matters, though of a cognate and allied character. Where the State legislature has enacted a law with reference to a particular Entry with respect to which, the Parliament has also enacted a law and there is an irreconcilable conflict between the two laws so enacted, the State law will be a stillborn law and it must yield in favour of the Central law. To the doctrine of occupied/overlapping field, resulting in repugnancy, the principle of incidental encroachment would be an exception".

16. Thus, the repugnancy between two legislations, if is an irreconcilable conflict, only then the Sate law must yield in favour of the Central law. Keeping in mind the doctrine of pith and substance,

having gone through the legislative scheme of the Intermediate Education Act, 1921 (a State legislature), suffice it to note that the State Act is a self-contained code enacted with a distinct and predominant purpose of regulating and supervising the system of High School and Intermediate Education in the State of Uttar Pradesh. There is no overlapping between two legislations resulting in any repugnancy.

For the above discussion, we are also unable to persuade ourselves to accept the submissions of the learned counsel for the petitioners that the qualifications prescribed in Entry '3' and '33' of Appendix 'A' for the post of Assistant Teachers (T.G.T.) in subjects Mathematics and Science are inconsistent with the qualifications prescribed in Item No. 4 of the Table in the First Schedule of the NCTE Regulations, 2014. The challenge to the said entries in Appendix 'A' of Chapter II of the Regulations framed under the Intermediate Education Act being ultra vires to Section 12-A of the NCTE Act readwith NCTE Regulations, 2014 is, therefore, turned down.

17. Furthermore, we may note that the Board of High School and Intermediate Education, U.P. had forwarded a proposal to the State Government for bringing the qualifications prescribed in Appendix 'A' of Chapter-II of the Regulations framed under the Act, 1921 in line with the qualifications prescribed in the First Schedule of the NCTE Regulations, 2014, for appointment to the post of Assistant Teachers in T.G.T. grade. The qualifications prescribed in NCTE Regulations, 2014, once incorporated in Appendix 'A' of Chapter-II of the Regulations framed under the Act, 1921 would result in addition of more qualifications for appointment to the post of Assistant Teacher. The qualifications prescribed in Appendix 'A' at present would remain as they are included in the proposed amendment and they can neither be said to be inconsistent nor irrelevant for the appointment to the post of Assistant Teacher in Secondary/High School institutions in the State of Uttar Pradesh.

It would be relevant to note at this juncture that we are not faced with any of such candidate in the present petition who can claim that he has been excluded from consideration though he possessed the qualifications prescribed in the NCTE Regulations, 2014.

18. The prayer of the petitioners herein is to treat the qualifications possessed by them as equivalent to the qualifications prescribed in the NCTE Regulations, 2014. The assertions of the learned Senior Advocate for the petitioners is that the word "Graduate" mentioned in the First Schedule of NCTE Regulations being the prescribed qualification would include "all Graduates" including those who possessed B.Tech degree. We are afraid to give such a wide meaning to the word "Graduate". The reason being that "the Graduate" incorporated as qualification in the NCTE Regulations is the prescribed minimum standard educational qualification to be possessed by a person for recruitment as Education Teacher in a Secondary School. As per the NCTE Regulations, 2014, a person who is not a "graduate" cannot be treated as qualified for recruitment to the post of Assistant Teacher in a Secondary School. For the subject teacher, however, there cannot be a dispute that a person to be recruited as a subject teacher at the secondary school level must be well versed with the subject which he/she is supposed

to teach to the students of classes IX & X. A teacher who does not have good knowledge of the subject cannot clear all doubts of his/her students or create interest in his/her pupils about the subject. A teacher's role in the lives of his/her adolescent students cannot be underestimated. He not only teach but also influences the choices of his/her pupils about their career and goal in life. The certification of academic and training qualification of a candidate is to test the attributes of the teacher in him. Every candidate aspiring to become a teacher has to be possess the qualification needed to teach the subject.

As regards Mathematics and Science, the subjects in question in the present writ petition, a candidate having studied B.A. & B.Sc. in the relevant subject cannot but be treated to be qualified to teach the said subjects to the students of classes IX & X level, as per the scheme of the Regulations framed under the Intermediate Education Act, 1921 (Appendix 'A' in Chapter-II) as also the NCTE Regulations, 2014.

As regards the B.Tech Course, the petitioners who had completed graduation in various disciplines of Engineering may have studied Mathematics and Science as one or two study papers in the Five years course, but it is not possible for the Court to hold that the B.Tech degree is equivalent to the "Graduation" "(B.A. or B.Sc. course)" in the subjects Mathematics and Science.

19. As noted above, such a comparison is not possible to be made by the Court for the additional reason that the complete syllabus of two courses is not before us. Even otherwise, the comparison of syllabus and determination of equivalence to the two qualifications is within the domain of the subject experts. It is not possible for the Court to hold that the "Graduates in various disciplines of B.Tech course" which is a technical course, are qualified for appointment to the posts of Assistant Teacher in the subjects Mathematics and Science.

We, therefore, cannot grant the prayer in the writ petition to permit the petitioners to participate in the selection in question.

20. We may further note that taking strong exceptions to the State of affairs in the matter of appointment of teachers in the state of Uttar Pradesh, the Apex Court in **Civil Appeal No. 8300 of 2016 (Sanjay Singh and others vs. State of Uttar Pradesh & others)** had issued directions to the State Government to complete the process of selection of teachers/lectures at T.G.T. and lecture level against all current and future vacancies reported as per the Rules, at least in the session commencing in July, 2021 so that the full strength of teachers is available to extend benefits to the students. The Apex Court had disapproved the practice of making adhoc appointments for a long time and noted that this had created a mess in the education system starting from primary level to the highest education level, causing adverse effect for the students who are in the need to benefit from the best education process.

Consequently, as regards the challenge to the advertisement in question and the alternative prayer of the petitioners to permit them provisionally to participate in the selection in question, we do not find any merit in the contentions of the petitioners.

21. Now on the question of equivalence of B.Tech course with B.A. or B.Sc. (Mathematics and Science), we may note the submissions of the learned Additional Chief Standing Counsel for the State that an equivalence Committee of experts has been constituted by the State Government and it can examine the said issue. We may further note that this issue has come up to this Court from time and again and in order to put the controversy at rest, it is necessary that the question of equivalence of B.Tech course with B.A. and B.Sc. in the subjects Mathematics and Science and also other relevant subjects shall be placed before the Equivalence Committee for necessary decision at their end. The said decision would also rule out any kind of confusion in the minds of the youth of the State who aspire to become teacher. We are reminding ourselves that every year whenever selection to the post of Assistant Teachers in Science and Mathematics subjects is initiated, the issue of equivalence crops up and in our considered opinion, the above directed action on the part of the State by getting an expert opinion would bring the controversy to its logical conclusion.

22. In view of the above, we direct the State Government to place the matter of equivalence before the Expert Committee which has been constituted for the purpose to take an expeditious decision, in accordance with law.

23. Now lastly, with regard to the proposal of the Board of High School and Intermediate, Uttar Pradesh forwarded by the letter dated 26.11.2020 and the inaction of the State in keeping it pending for approximately a period of about one year, we may note that the Column-IV of the said proposal in Parishisth 'Ga' appended as Annexure S.C.A. '1' to the short counter affidavit filed by the State, refers to three alternative qualifications, prescribed in the First Schedule of the NCTE Regulations, 2014.

The qualification in clause 'Ga' of "four years B.A.Ed./B.Sc.Ed. degree" from the institutions recognised by NCTE refers to the degree of an integrated course of "B.A. with B.Ed." or "B.Sc. with B.Ed." and cannot be confused as referring to the four years B.Ed. degree. Moreover, being an alternative qualification, if there is no institution in the State of U.P. imparting integrated course of B.A.Ed./B.Sc.Ed., it is open for the State Government to modify the proposal of the Board of High School and Intermediate Education, Prayagraj while making amendments in Appendix 'A' of Chapter II of the Regulations framed under the Intermediate Education Act, 1921, to bring it in line with the NCTE Regulations, 2014.

24. We are surprised and at pain to note that in the affidavit of the Special Secretary Secondary Education, U.P., Lucknow filed on behalf of the State of U.P., such a minor issue has been highlighted to give an impression that the State needed much deliberations to remove the discrepancy in the recommendations of the Board of High School and Intermediate in its proposal dated 26.11.2020. We may remind the State of its power to make necessary amendments/suggestions in the proposal of the Board while making amendment in the Regulations, provided under Section 16 of the Intermediate Education Act. For the reasons best known to the officers of the State, the issue has been prolonged unreasonably and unnecessary for a period of approximately one year. The officers sitting at the helm of

the affairs are expected to be well versed with the Statutes and their duties and responsibilities in the State matters.

The Court, thus, taking exception to the assertions in the paragraphs '5' and '6' of the short counter affidavit of the Special Secretary, Secondary Education, U.P., Lucknow, is constrained to record that the State could not offer any reasonable explanation for not moving in the matter of amendment of minimum qualifications, for incorporation in the Appendix 'A' in Chapter-II of the regulation framed under the Act, 1921, to bring it in line with the qualifications prescribed under the NCTE Regulations, 2014.

25. Even in the short counter affidavit, six months time sought by the State to complete the process has not been adhered to. More than five months have passed but no concrete action of the State or the Board of High School and Intermediate could be brought before the Court.

In the written instructions provided by the Special Secretary, Government of U.P. in the Court, it is sought to be explained that the process of amendment in the Regulations could not be completed due to the onset of pandemic Covid-19.

26. We are unable to accept the explanation for the delay on the part of the State as it cannot be said or imagined that the State Machinery (specifically the Education Department of the State) was paralyzed during the pandemic.

More so, when the Court has noticed that the proposal of the Board dated 26.11.2020 has been kept pending only because of the confusion in the own minds of the officers of the concerned department.

27. Being the welfare State, it has to keep in mind that any kind of confusion or doubt in the minds of youth of the State created on account of any inaction on its part or uncertainty in the process of selection and appointment not only hampers the progress of the State but also burden this Court with unnecessary load of litigation consuming precious time of the Court proceedings and, thus, add to the mounting pendency in the Court. The State cannot act as an ordinary litigant whenever it presents its stand before the highest Court of the State. It was more appropriate on the part of the officers of the State to remove all discrepancies/confusions and take necessary corrective steps before bringing their stand in this Court. The approach of the officers of the department concerned in filing short counter affidavit in a casual manner without even application of their minds addressing the issue at their own end, is deprecated in the strongest terms.

28. Taking exception to the attitude and casual approach of the State in the present matter, while turning down the prayers of the petitioners herein, we dispose of the present writ petition with the hope and trust that the State will take necessary speedy action to bring the controversy to its logical end by notifying the necessary amendments in the Appendix 'A' in Chapter-II of the Regulations framed under the Intermediate Education Act, 1921 and by referring the issue of equivalence before the Expert Committee for its expeditious decision.

(2021)09ILR A1307
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.09.2021

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ C No. 11113 of 2021

Rajesh Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sandeep Srivastava

Counsel for the Respondents:
C.S.C., Sri Azad Rai, Priyadarshi Tripathi, Sri Shrawan Kumar Pandey

Civil Law - Civil Procedure Code,1908 - Order XLI Rule 27 - Additional evidence at the appellate stage - Proceedings under Order XLI Rule 27 CPC are not intended to enable the parties to supply evidentiary defects at the appellate stage as an after thought - Allowance for time to tutor or incentivise a reluctant witness is not a good reason for failure to introduce the witness at the trial stage (Para 5, 6)

Petitioner wants to introduce attesting witness of Will - Petitioner had full liberty to produce witness and get him examined before trial court but petitioner failed to do so - as the said witness was unwilling to depose during trial Court proceedings - However petitioner over a period of time been able to persuade said witness to appear in proceedings - *Held* - prerequisites for exercise of power in favour of the petitioner not satisfied in the case- Rejection of application, proper (Para 3, 4, 5)

Dismissed. (E-5)

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

1. Heard Sri Sandeep Srivastava, learned counsel for the petitioner and learned Standing Counsel for the State respondents.

2. By the impugned order dated 19.02.2021 the application under Order XLI Rule 27 tendered by the petitioner for adducing additional evidence at the appellate stage has been declined.

3. The petitioner by means of the aforesaid application wants to introduce an attesting witness of the Will. The petitioner had full liberty to produce the witness and get him examined before the trial court. The petitioner failed to do so.

4. It is contended by Sri Sandeep Srivastava, learned counsel for the petitioner that the aforesaid witness one Jang Bahadur was unwilling to depose during the trial court proceedings. However he has over a period of time been able to persuade the said Jang Bahadur to appear as witness.

5. Proceedings under Order XLI Rule 27 CPC are not intended to enable the parties to supply evidentiary defects at the appellate stage as an after thought. The prerequisites for exercise of power in favour of the petitioner are not satisfied in the case. In this case it is evident that the petitioner had been working on the witness over a long period at times to depose in his favour.

6. Allowance for time to tutor or incentivise a reluctant witnesses is not a good reason for failure to introduce the witness at the trial stage. Attempts to invoke Order XLI Rule 27 CPC for such purpose have to be thwarted.

7. There is no infirmity in the impugned order dated 19.02.2021.

8. The writ petition is dismissed.

(2021)09ILR A1308
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.08.2021

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE RAVI NATH TILHARI, J.

Writ C No. 4812 of 2021

Malti Devi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Babloo Pant

Counsel for the Respondents:
C.S.C.

Constitution of India - Public employment on the basis of forged certificate - Recovery of salary - recovery of salary can be made where the order of appointment is cancelled on the ground that the appointment itself was obtained by forged eligibility educational certificate - retention of public money received by such employee as salary is against the fundamental principles of justice, equity and good conscience - It is an unjust retention of public money by the petitioner which amounts to unjust enrichment - recovery notice cannot be interfered under Article 226 of the Constitution of India (Para 25)

Petitioner obtained appointment as Assistant Teacher on the basis of a forged TET marksheet – Petitioner obtained public employment by misrepresentation and fraud and thus unauthorisedly and fraudulently received payment of public money - No material placed to indicate extreme hardship on recovery of the amount - Equitable and discretionary jurisdiction under Article 226 of the Constitution of India cannot be invoked by the petitioner - Recovery Notice neither iniquitous nor arbitrary (Para 24)

Dismissed .(E-5)

List of Cases cited :

1 . United India Insurance Company Ltd. Vs B. Rajendra Singh & ors. JT 2000 (3) SC 151

2. Vice Chairman, Kendriya Vidyalaya Sangathan & anr. Vs. Girdhari Lal Yadav, 2004 (6) SCC 325

3. Ram Chandra Singh Vs Savitri Devi & ors. 2003(8) SCC 319

4. S.P. Chengal Varaya Naidu (dead) by L.Rs Vs Jagannath (dead) by L.Rs & ors. AIR 1994 SC 853

5. Jainendra Singh Vs St. of U.P., 2012 (8) SCC 748

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri Babloo Pant, learned counsel for the petitioner and Sri Alok Singh, learned Standing Counsel for the State-Respondents.

2. This writ petition has been filed praying for the following reliefs :-

"i) issue a writ, order or direction in the nature of certiorari quashing the impugned order titled as "Recovery Notice" dated 10.07.20020 issued by the District Basic Education Officer, Kaushambi (i.e. Respondent No.3) to the writ petition.

ii) issue a writ, order or direction in the nature of mandamus directing the District Basic Education Officer, Kaushambi (i.e. respondent No.3) to forthwith, release the salary of the

petitioner with effect from April, 2017 till today as and when it falls due and not to cause any interference in the working of the petitioner on the post of Assistant Teacher in Mehewaghat Sarsawan Primary School, Kaushambi."

Facts

3. Briefly stated facts of the present case are that the petitioner obtained appointment as Assistant Teacher in an institution run by U.P. Basic Education Board, vide order of appointment issued by the District Basic Education Officer, Kaushambi. By order dated 14.08.2018, the appointment of the petitioner was cancelled on the ground that the petitioner had obtained public employment on the post of Assistant Teacher on the basis of forged T.E.T. Certificate/marksheet 2011. It appears that against the aforesaid order of cancellation of appointment dated 14.08.2018, the petitioner filed Writ A No. 5185 of 2019 (Malti Devi and another Vs. State of U.P. and others) in which an interim order dated 08.07.2019 was passed staying the effect and operation of the order dated 14.08.2018.

4. It appears that the petitioner has obtained salary from the State-exchequer. Consequently, the impugned recovery notice dated 10.07.2020 was issued by the respondent no.3 to the petitioner, which is reproduced below :-

"कार्यालय जिला बेसिक शिक्षा अधिकारी- कौशाम्बी

पत्रांक : अनु0-01/1717-22 /2020-21 दिनांक- 10.07.2020

रिकवरी नोटिस

श्रीमती मालती देवी पुत्री श्री हरि शंकर वर्मा

(सेवा से निष्कासित) सहायक अध्यापक,

प्राथमिक विद्यालय- बहादुरपुर, मंझनपुर

निवासी-ग्राम पुरखीपुर पोस्ट-खरगापुर

थाना-सोरांव जनपद-प्रयागराज।

कार्यालय आदेश संख्या-519/2018-19 दिनांक- 14.08.2018 के द्वारा आपको शिक्षक पात्रता परीक्षा 2011 का फर्जी प्रमाण पत्र प्रस्तुत किये जाने के कारण सेवा से पृथक करते हुए आपके विरुद्ध स्थानीय थाना में प्रथम सूचना रिपोर्ट दर्ज करा दी गयी है। वित्त एवं लेखाधिकारी बेसिक शिक्षा कौशाम्बी के पत्र संख्या-ले0सं0/348-53/2020-21 दिनांक-07.07.2020 के अनुसार विभाग में की गयी सेवा के सापेक्ष आप द्वारा वेतनादि मद में प्राप्त किये गये वेतन की रिकवरी का आगणन तैयार कर अधोहस्ताक्षरी कार्यालय को प्रेषित किया गया है।

उक्तानुसार प्राप्त आगणन के अनुसार सम्पूर्ण सेवा अवधि में आपने सभी परिलब्धियों के सापेक्ष रु0, 2185920.00 (रुपया इक्कीस लाख पचासी हजार नौ सौ बीस मात्र) का भुगतान वेतन के रुप में प्राप्त किया गया है, चुंकि आपके द्वारा कूटरचित/फर्जी अभिलेख के आधार पर नियुक्ति प्राप्त कर वेतन स्वरुप रु0, 2185920.00 (रुपया इक्कीस लाख पचासी हजार नौ सौ बीस मात्र) का भुगतान प्राप्त किया गया है। अस्तु आपको निर्देशित किया जाता है कि आप द्वारा प्राप्त किये गये वेतन को नियमानुसार राजकोष में 07 दिवसों के अन्दर जमा किये गये धन से सम्बंधित अभिलेख अधोहस्ताक्षरी कार्यालय में उपबल्ध कराना

सुनिश्चित करें। अन्यथा की स्थित में आप द्वारा वेतन एवं अन्य भत्तों के साथ में की गयी कुल धनराशि रु0, 2185920.00 (इक्कीस लाख पचासी हजार नौ सौ बीस मात्र) की वसूली भू-राजस्व की भांति की जायेगी, जिसका सम्पूर्ण दायित्व आपका होगा।

ह0 अपठनीय
(राजकुमार पंडित)
जिला बेसिक शिक्षा अधिकारी
कौशाम्बी

पृ0सं0 : अनु0-01/ /2020-21 तद्दिनांक

प्रतिलिपि-निम्नलिखित को सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषित-

1- जिलाधिकारी महोदय, कौशाम्बी।

2- शिक्षा निदेशक (बेसिक) उ0प्र0 लखनऊ।

3- सचिव, उ0प्र0 बेसिक शिक्षा परिषद् प्रयागराज।

4- वित्त एवं लेखाधिकारी (बेसिक शिक्षा) कौशाम्बी।

5- सम्बंधित खण्ड शिक्षा अधिकारी जनपद-कौशाम्बी को इस निर्देश के साथ के उक्त अध्यापक के पते का मिलान सेवा पंजिका से करते हुए सही पते पर पत्र की प्रति रजिस्टर्ड डाक से प्रेषित करते हुए रजिस्ट्री की छाया प्रति आधोहस्ताक्षरी को उपलब्ध कराना सुनिश्चित करें।

ह0 अपठनीय
जिला बेसिक शिक्षा अधिकारी
कौशाम्बी "

5. Aggrieved with the aforequoted recovery notice, the petitioner has filed the present writ petition.

Submissions of the Petitioner

6. Learned counsel for the petitioner submits as under :-

i) Against the order of cancellation of her appointment as Assistant Teacher, the petitioner has filed Writ A No. 5185 of 2019 (Malti Devi and another Vs. State of U.P. and others) in which an interim order dated 08.07.2019, staying the effect and operation of the order dated 14.08.2018, was passed. Therefore, no salary can be recovered from the petitioner.

ii) Similar writ petitions were decided by the Hon'ble Single Judge against which a Special Appeal Defective 240 of 2020 (Kiran Lata Singh Vs. State Of U.P. Through Secretary, Department of Basic Education And 5 others) was filed in which an interim order dated 31.07.2020 has been passed, therefore, salary cannot be recovered from the petitioner.

Submissions on behalf of the State

7. Learned standing counsel submits as under:-

i) The Special Appeal Defective No.240 of 2020 has been finally decided by the Division Bench and the said Special Appeal alongwith all connected Special Appeals have been dismissed. Therefore, the submission of the petitioner on the basis of interim order in Special Appeal Defective 240 of 2020 is wholly misconceived.

ii) The dispute involved in Special Appeal Defective No. 240 of 2020 was with regard to forged B.Ed. Degree

and not the forged T.E.T. Certificate. Therefore, in any circumstances, the case of the petitioner being different on the facts, the petitioner is not entitled for any relief.

iii) When salary to the petitioner was not paid after cancellation of appointment, the petitioner filed Writ A No.1148 of 2020 (Malti Devi and another Vs. State of U.P. And 2 others) which was disposed of by order dated 23.01.2020, directing authority concerned to decide claim of the petitioner in regard to payment of salary and the representation was disposed of by order dated 24.04.2020.

iv) The petitioner is not entitled to any relief inasmuch as a direction issued by this Court by order dated 18.03.2021 to obtain verification report of T.E.T. Certificate of the petitioner, the same was verified and it was found that alleged T.E.T. Certificate year 2011 in favour of the petitioner bearing Roll No.15054567 was never issued by the office of the Board of High School and Intermediate Education, Uttar Pradesh, Prayagraj.

v) Referring to paragraphs 3 & 4 of the short counter affidavit dated 24.03.2021, it is submitted that the alleged T.E.T. Certificate is forged and manufactured and it has not been issued by the Board of High School and Intermediate Education and in support, a copy of verification report has been filed as an Annexure S.C.A.-1. **The verification report filed alongwith the short counter affidavit has not been disputed by the petitioner.** Therefore, the petitioner is not entitled for any relief inasmuch as, after undisputed facts have been brought on record by means of the verification report of the Secretary, Board of High School and Intermediate Education, Uttar Pradesh, Prayagraj, dated 23.03.2021, the fact of obtaining public employment by the petitioner on the basis of forged T.E.T. Certificate 2011, is undisputed and, therefore, the petitioner cannot take advantage of her own fraud.

Questions

8 . With the consent of learned counsel for the parties following questions were framed for determination in this writ petition by order dated 24.03.2021 :-

(i) Whether under the facts and circumstances of the case the impugned recovery notice dated 10.7.2020 is valid?

(ii) Whether recovery of salary can be made where the order of appointment is cancelled on the ground that the appointment itself was obtained by forged eligibility educational certificate?

Discussion and Findings

9. Since both the questions are interlinked and, therefore, both the aforementioned questions are taken up together for decision.

Whether TET Certificate Filed by the Petitioner is Forged

10. The sole point of dispute between the parties is as to whether the T.E.T. Certificate 2011 bearing Roll No.15054567, is forged or genuine. Therefore, by order dated 18.03.2021, this Court directed the learned standing counsel to obtain instructions and verification report of the alleged T.E.T. Certificate from the respondent no.2 i.e. the Board of High School and Intermediate Education Uttar Pradesh, Prayagraj, which allegedly issued the aforesaid T.E.T. Certificate. Pursuant to the aforesaid direction, Sri Divyakant Shukla,

Secretary, Board of High School and Intermediate Education, Uttar Pradesh, Prayagraj, has filed a short counter affidavit dated 24.03.2021. **In paragraphs 3, 4 & 5 of his short counter affidavit he (respondent no.2) stated as under :-**

"3. That it is submitted before this Hon'ble Court that TET Certificate-year 2011 in favour of the petitioner namely Malti Devi Roll No.15054567 ***never issued by the office of the answering respondent.***

4. That it appears the ***aforesaid TET Certificate is forged and manufactured*** *because of it has not been issued by the office of the answering respondent.*

5. That in this regard the ***enquiry has been conducted and record has been verified*** *to assist this Hon'ble Court. For the kind perusal of this Hon'ble Court copy of the verification* ***report is being filed herewith and marked as Annexure No.S.C.A.1*** *to this affidavit."*

11. The **verification report dated 23.03.2021**, filed alongwith the aforesaid short counter affidavit is reproduced below:

"परिषदीय अभिलेखानुसार शिक्षक पात्रता परीक्षा वर्ष-2011 अनुक्रमांक-15054567 की सत्यापन आख्या

TET /EXAM-2011 (प्राथमिक स्तर)
ROLL NUMBER- 15054567
NAME- MALTI DEVI
FATHER'S NAME-HARI SHANKAR PATEL
CATEGORY-OBC
RESULTS-024/150 FAIL

अनुत्तीर्ण परीक्षार्थियों के प्रमाण पत्र निर्गत नहीं किया जाता है। **याचिका के साथ संलग्नक 1 ए (पृष्ठ-28 पर) के रुप में संलग्न प्रमाण पत्र सह अंकपत्र परिषद कार्यालय द्वारा जारी नहीं किया गया है।**

ह0 अपठनीय
23.03.2021
उप सचिव अभिलेख
माध्यमिक शिक्षा परिषद
उ0प्र0, प्रयागराज
ह0अपठनीय"

12. Thus, it is proved on record that the alleged T.E.T. Certificate 2011 bearing Roll No.15054567 in the name of the petitioner and allegedly issued by the Board of High School and Intermediate Education, Uttar Pradesh, Prayagraj, is forged and manufactured. The Board of High School and Intermediate Education has, after due inquiry and verification stated in the short counter affidavit that the **aforesaid alleged T.E.T. Certificate is forged and manufactured and it was not issued by the office of the Board.** The verification report and relevant paragraphs of the short counter affidavit have been quoted above. **Thus, the facts as aforenoted, leave no manner of doubt that the aforesaid alleged T.E.T. Certificate 2011 on the basis of which the petitioner obtained public employment on the post of Assistant Teacher, is forged and manufactured.**

Fraud and its consequences

13. Since the public employment was obtained by the petitioner on the basis of forged and manufactured T.E.T. Certificate, therefore, the appointment so obtained was *void ab initio*. **Faced with this situation, this Court cannot consciously follow a wrong path by interfering with the impugned recovery**

notice and protect the petitioner from the consequences of fraud committed by her or to enable her to take advantage of her own fraud. It is well settled that fraud and justice never dwell together and no one can take advantage of his/her own fraud.

14. In the case of **United India Insurance Company Ltd. Vs. B. Rajendra Singh and others, JT 2000 (3) SC 151**, considering the fact of fraud, Hon'ble Supreme Court held in paragraph 3 as under:

"Fraud and justice never dwell together." (Frans et jus nunquam cohabitant) is a pristine maxim which has never lost its temper overall these centuries. Lord Denning observed in a language without equivocation that" no judgement of a Court, no order of a Minister can be allowed to stand if it has been obrtained by fraud, for fraud unravels everythin " (Lazarus Estate Ltd. V. Beasley 1956 (1) QB 702).

15. In the case of **Vice Chairman, Kendriya Vidyalaya Sangathan and Another Vs. Girdhari Lal Yadav, 2004 (6) SCC 325**, Hon'ble Supreme Court considered the applicability of principles of natural justice in cases involving fraud and held in paragraph 12 as under :

"12. Furthermore, the respondent herein has been found guilty of an act of fraud. In opinion, no further opportunity of hearing is necessary to be afforded to him. It is not necessary to dwell into the matter any further as recently in the case of Ram chandra Singh v. Savitri devi this Court has noticed :

"15. Commission of fraud on court and suppression of material facts are the core issues involved in these matters. Fraud as is well-known vitiates every solemn act. Fraud and justice never dwells together.

16. Fraud is a conduct either by letter or words, which induces the other person, or authority to take a definite determinative stand as a response to the conduct of former either by word or letter.

It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud.

18.A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad."

19. In Derry V. Peek (1889) 14 AC 337 it was held: "In an action of deceit the plaintiff must prove actual fraud. Fraud is proved when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false.

A false statement, made through carelessness and without reasonable ground for believing it to be true, may be evidence of fraud but does not necessarily amount to fraud. Such a statement, if made in the honest belief that it is true, is not fraudulent and does not render the person make it liable to an action of deceit."

16. In the case of **Ram Chandra Singh Vs. Savitri Devi and others,**

2003(8) SCC 319, Hon'ble Supreme Court held in paragraphs 15, 16, 17, 18, 25 and 37 as under :

"15. Commission of fraud on court and suppression of material facts are the core issues involved in these matters. Fraud as is well-known vitiates every solemn act. Fraud and justice never dwells together.

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25. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res-judicata.

37. It will bear repetition to state that any order obtained by practising fraud on court is also non-est in the eyes of law."

17. In the case of **S.P. ChengalVaraya Naidu (dead) by L.Rs Vs. Jagannath (dead) by L.Rs and others, AIR 1994 SC 853**, the Hon'ble Supreme Court held in para 7 as under :

"7. The High Court, in our view, fell into patent error. The short question before the High Court was whether in the facts and circumstances of this case, Jagannath obtained the preliminary decree by playing fraud on the court. The High Court, however, went haywire and made observations which are wholly perverse. We do not agree with the High Court that "there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence". The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation."

18. In the case of **Jainendra Singh Vs. State of U.P., 2012 (8) SCC 748**, Hon'ble Supreme Court considered the fact of appointment obtained by fraud and held in para 29.1 to 29.10 as under :

"29.1 ***Fraudulently obtained orders of appointment could be***

legitimately treated as voidable at the option of the employer or could be recalled by the employer and in such cases merely because the respondent employee has continued in service for a number of years, on the basis of such fraudulently obtained employment, cannot get any equity in his favour or any estoppel against the employer.

29.2 Verification of the character and antecedents is one of the important criteria to test whether the selected candidate is suitable to the post under the State and on account of his antecedents the appointing authority if find not desirable to appoint a person to a disciplined force can it be said to be unwarranted.

29.3 ***When appointment was procured by a person on the basis of forged documents, it would amount to misrepresentation and fraud on the employer and, therefore, it would create no equity in his favour or any estoppel against the employer while resorting to termination without holding any inquiry.***

29.4 A candidate having suppressed material information and/or giving false information cannot claim right to continue in service and the employer, having regard to the nature of employment as well as other aspects, has the discretion to terminate his services.

29.5 Purpose of calling for information regarding involvement in any criminal case or detention or conviction is for the purpose of verification of the character/antecedents at the time of recruitment and suppression of such material information will have clear bearing on the character and antecedents of the candidate in relation to his continuity in service.

29.6 ***The person who suppressed the material information and/or gives false information cannot claim any right for appointment or continuity in service.***

29.7 The standard expected of a person intended to serve in uniformed service is quite distinct from other services and, therefore, any deliberate statement or omission regarding a vital information can be seriously viewed and the ultimate decision of the appointing authority cannot be faulted.

29.8 An employee on probation can be discharged from service or may be refused employment on the ground of suppression of material information or making false statement relating to his involvement in the criminal case, conviction or detention, even if ultimately he was acquitted of the said case, inasmuch as such a situation would make a person undesirable or unsuitable for the post.

29.9 An employee in the uniformed service pre-supposes a higher level of integrity as such a person is expected to uphold the law and on the contrary such a service born in deceit and subterfuge cannot be tolerated.

29.10 The authorities entrusted with the responsibility of appointing Constables, are under duty to verify the antecedents of a candidate to find out whether he is suitable for the post of a Constable and so long as the candidate has not been acquitted in the criminal case, he cannot be held to be suitable for appointment to the post of Constable."

(Emphasis supplied by us)

Equitable Jurisdiction

19. Public employment has been procured by the petitioner on the basis of a forged TET Certificate. This amounts to misrepresentation and fraud on the employer. Fraud vitiates every solemn act. Therefore, it would not create equity in

favour of the petitioner so as to get protection from recovery of the amount under the impugned recovery certificate.

20. The writ jurisdiction under Article 226 of the Constitution of India is an equitable jurisdiction. Facts of the present case reveal that petitioner has no equity in his favour. Therefore, the equitable and discretionary jurisdiction under Article 226 of the Constitution of India can not be exercised in favour of the petitioner on the facts of the present case

Recovery

21. Since public employment on the post of Assistant Teacher was obtained by the petitioner on the basis of a forged and manufactured T.E.T. marksheet 2011 which resulted in cancellation of her appointment, therefore, the **amount received by the petitioner as salary and other benefits relating to her employment is a fraudulently received amount from the State-exchequer. Therefore, the salary so drawn by the petitioner is liable to be recovered from her**. Recovery of excess payment from an employee is refused only where the excess payment is made by the employer by applying a wrong method or principle for calculating the pay/allowance or on a particular interpretation of the applicable rules, which is subsequently found to be erroneous**. But where the payment from State-exchequer is made as a result of any misrepresentation, fraud or collusion, courts will not use their discretion to deny the right to recover the excess payment**. The view being taken by us is fortified by the law laid down by Hon'ble Supreme Court in **Registrar, Cooperative Societies, Haryana and others Vs. Israil Khan and others (2010) 1 SCC 440 (para 9). In Chandi Prasad Uniyal Vs. State of Uttarkhand and Ors (2012) 8 SCC 417** (paras 13 & 14) Hon'ble Supreme Court held that **any amount paid/received without authority of law can always be recovered barring few exceptions of extreme hardships but not as a matter of right, in such situations law implies an obligation on the payee to repay the money, otherwise it would amount to unjust enrichment.**

22. In the case of **State of Punjab and others Vs. Rafiq Masih (White washer) 2015 4 SCC 334 (para 15)** Hon'ble Supreme Court held as under :

".....the right to recover would be sustainable so long as the same was not iniquitous or arbitrary."

23. It is settled principle of law that **no one can take advantage of his own wrong or fraud. The amount fraudulently obtained by a person, if allowed to be retained, shall result in unjust enrichment. In the case of Indian Council for Enviro-legal Action Vs. Union of India 2011 8 SCC 161 (para 151, 152, 153, 154, 159, 160, 161 and 197),** Hon'ble Supreme Court explained meaning of the word "unjust enrichment" as under :-

*"151**. Unjust enrichment has been defined as**:*

"A benefit obtained from another, not intended as a gift and not legally justifiable, for which the beneficiary must make restitution or recompense."

See Black's Law Dictionary, Eighth Edition (Bryan A. Garner) at page 1573. A claim for unjust enrichment arises

where there has been an "unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience."

*152. "**Unjust enrichment' has been defined by the court as the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience. A person is enriched if he has received a benefit, and he is unjustly enriched if retention of the benefit would be unjust. Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another.***

153. Unjust enrichment is "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience." A defendant may be liable "even when the defendant retaining the benefit is not a wrongdoer" and "even though he may have received [it] honestly in the first instance." (Schock v. Nash, 732 A.2d 217, 232-33 (Delaware.1999). USA)

154. Unjust enrichment occurs when the defendant wrongfully secures a benefit or passively receives a benefit which would be unconscionable to retain. In the leading case of Fibrosa v. Fairbairn, [1942] 2 All ER 122, Lord Wright stated the principle thus :

"....(A)ny civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution."

159. Unjust enrichment is basic to the subject of restitution, and is indeed approached as a fundamental principle thereof. They are usually linked together, and restitution is frequently based upon the theory of unjust enrichment. However, although unjust enrichment is often referred to or regarded as a ground for restitution, it is perhaps more accurate to regard it as a prerequisite, for usually there can be no restitution without unjust enrichment. It is defined as the unjust retention of a benefit to the loss of another or the retention of money or property of another against the fundamental principles of justice or equity and good conscience. A person is enriched if he has received a benefit, and he is unjustly enriched if retention of the benefit would be unjust. Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another.

160. While the term "restitution' was considered by the Supreme Court in South-Eastern Coalfields 2003 (8) SCC 648 and other cases excerpted later, the term "unjust

enrichment' came to be considered in Sahakari Khand Udyog Mandal Ltd vs Commissioner of Central Excise & Customs ((2005) 3 SCC 738). This Court said: (Sahakari Khand case SCC p.748, para 31)

"31.....'Unjust enrichment' means retention of a benefit by a person that is

unjust or inequitable. "Unjust enrichment' occurs when a person retains money or benefits which in justice, equity and good conscience, belong to someone else."

161. The terms "unjust enrichment' and "restitution' are like the two shades of green - one leaning towards yellow and the other towards blue. With restitution, so long as the

deprivation of the other has not been fully compensated for, injustice to that extent remains. Which label is appropriate under which circumstances would depend on the facts of the particular case before the court. The courts have wide powers to grant restitution, and more so where it relates to misuse or non-compliance with court orders.

197. The other aspect which has been dealt with in great details is to neutralize any unjust enrichment and undeserved gain made by the litigants. While adjudicating, the courts must keep the following principles in view.

1. It is the bounden duty and obligation of the court to neutralize any unjust enrichment and undeserved gain made by any party by invoking the jurisdiction of the court.

2. When a party applies and gets a stay or injunction from the court, it is always at the risk and responsibility of the party applying. An order of stay cannot be presumed to be conferment of additional right upon the litigating party.

3. ***Unscrupulous litigants be prevented from taking undue advantage by invoking jurisdiction of the Court.***

4. A person in wrongful possession should not only be removed from that place as early as possible but be compelled to pay for wrongful use of that premises fine, penalty and costs. Any leniency would seriously affect the credibility of the judicial system.

5. No litigant can derive benefit from the mere pendency of a case in a court of law.

6. ***A party cannot be allowed to take any benefit of his own wrongs.***

7. Litigation should not be permitted to turn into a fruitful industry so that the unscrupulous litigants are encouraged to invoke the jurisdiction of the court.

8. The institution of litigation cannot be permitted to confer any advantage on a party by delayed action of courts."

24. The petitioner has obtained employment by misrepresentation and fraud and thus unauthorisedly and fraudulently received payment of public money. Neither extreme hardship in recovery has been argued before us nor any material has been placed to indicate extreme hardship on recovery of the amount. That apart, the equitable and discretionary jurisdiction under Article 226 of the Constitution of India can not be invoked by the petitioner under the facts and circumstances of the present case. The principle laid down in the case of Chandi Prasad Uniyal (supra) have been reiterated by Hon'ble Supreme Court in the case of State of Punjab and others Vs. Rafiq Masih (White washer) (2014) 8 SCC 883. In the case of Chandi Prasad Uniyal (supra) vide para 16, Hon'ble Supreme Court held that "in such circumstances, we find no reason

to interfere with the judgment of the High Court. However, we order the excess payment made be recovered from the appellant's salary in twelve equal monthly installments."

25. Under the facts and circumstances of the present case, the recovery under the impugned order/Recovery Notice is neither iniquitous nor arbitrary. The petitioner has received public money by obtaining appointment on the basis of a forged TET marksheet. Therefore, retention of the public money received by the petitioner as salary is against the fundamental principles of justice, equity and good conscience. It is an unjust retention of public money by the petitioner which amounts to unjust enrichment. Therefore, the impugned recovery notice can not be interfered under Article 226 of the Constitution of India.

26. Thus, for all the reasons aforestated, we do not find any good reason to invoke on the facts of the present case, the extraordinary, discretionary and equitable jurisdiction under Article 226 of the Constitution of India.

27. For all the reasons aforestated, the writ petition is **dismissed**. However, there shall be no order as to costs.

(2021)09ILR A1319
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.08.2021

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ C No. 6180 of 2021

Kanhaiya Lal ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vinod Kumar, Sri Kapil Kumar Soni

Counsel for the Respondents:
C.S.C., Sri Deepak Gaur

Civil Law - Uttar Pradesh Revenue Code, 2006 - Appeal u/s 67 (5) - Limitation Act, S.5 - Condonation of delay - Delay in filing appeal -*Held*- in matters before revenue courts, litigants are mostly poor uneducated agriculturists, rarely alerted to their rights & technicalities of law, therefore courts and authorities should adopt a liberal, pragmatic and a justice oriented approach in matters of condonation of delay & a pedantic view should be avoided - unless want of bona fides of such inaction or negligence is proved, delay cannot be refused to be condoned - courts have to be mindful of the consequences of refusal to condone the delay leading to miscarriage of justice - it should be the constant endeavour of the courts and authorities to adjudicate issues on merits and dispense justice on a substantive basis(Para 10, 14, 15, 19)

Delay condonation application dismissed in a cryptic manner with a simplicitor finding that delay was not explained on a day to day basis - Held - Delay occasioned as petitioner was not informed about the order passed by the court by his counsel - petitioner otherwise also have knowledge of the same - Conduct of petitioner was bonafide as after getting knowledge of award, appeal was filed with promptitude - delay liable to be condoned - substantive rights of the petitioner engaged in the controversy which need adjudication on merits in the interest of justice (Para 22)

Allowed. (E-5)

List of Cases cited :

1. Collector, Land Acquisition Vs Mst. Kati Ji & ors. 1987(13) ALR 306 (SC)

2. N. Balakrishnan Vs M. Krishnamurthy 1998(7) SCC 123

3. Shakuntala Devi Jain Vs Kuntal Kumari AIR 1969 SC 575

4. New India Insurance Co. Ltd. Vs Smt. Shanti Misra AIR 1976 SC 237

5. O.P. Kathpalia Vs Lakhmir Singh AIR 1984 SC 1744

6. Smt. Prabha Vs Ram Prakash Kalra 1987 (Suppl.) SCC 338

7. Vedabai @ Vaijayanatabai Baburao Patil Vs Shantaram Baburao Patil & ors. 2001 (44) ALR 577 (SC)

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

1. By the impugned order dated 27.01.2021, the learned appellate court/Additional District Magistrate (Judicial), Jhansi has rejected the application under Section 5 of the Limitation Act filed along with the memo of appeal and has accordingly found that the appeal was not maintainable. The appeal was filed under Section 67 (5) of the Uttar Pradesh Revenue Code, 2006.

2. Sri Vinod Kumar, learned counsel for the petitioner contends that the appeal of the petitioner has been rejected on grounds of delay. It is submitted that the delay was due to bonafide reasons. The learned appellate authority took a highly technical view of the matter. It is further contended that the impugned order dated 27.01.2021 shows non application of mind.

3. Per contra, learned Standing Counsel for the State - respondents submits that the delay in filing the appeal was not liable to be condoned and the learned appellate authority rightly rejected the appeal.

4. Heard learned counsel for the parties.

5. The facts relevant from the adjudication of the controversy can be prised out from the impugned order.

6. The complete record is thus before this Court and no useful purpose will be served by exchange of pleadings and keeping this writ petition pending.

7. With consent of learned counsels for the parties, this writ petition is being decided finally.

8. The petitioner has meticulously explained the cause of delay in the delay condonation application. It has also been asserted that substantive rights of the petitioner are engaged in this controversy. The aforesaid facts have not been adverted to in the impugned order passed by the learned appellate court.

9. The Courts have consistently set their face against a pedantic approach in matters pertaining to condonation of delay, and insist on a justice oriented approach.

10. It would be apposite to predicate the narrative with good authority in point. The purpose of laws of limitation is to ensure that the parties remain vigilant to their causes and institute their claims in good time. The mandate of laws of limitation is not to shut the doors of justice to the parties or decline adjudication on merits. On the contrary it should be the constant endeavour of the courts and authorities to adjudicate issues on merits and dispense justice on a substantive basis.

11. There is good authority to hold that the courts and authorities should adopt a liberal, pragmatic and a justice oriented approach matters of condonation of delay. Equally a pedantic view should be avoided

and servitude to procedure in such matters should be eschewed.

12. In ***Collector, Land Acquisition V. Mst. Kati Ji and others1***, the Supreme Court took a liberal view of the phrase "sufficient cause" and held as follows:

"The legislature has conferred the power to condone delay by enacting section 5 of the Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on "merits". The expression "sufficient cause" employed by the Legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner which subserves the ends of justice that being the life-purpose of the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy."

And such a liberal approach is adopted on principle as it is realized that:

1. Ordinarily, a litigant does not stand to benefit by lodging an appeal late.

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this; when delay is condoned, the highest that can happen is that a cause would he decided on merit after hearing the parties.

3. "Every" day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay ? The doctrine must be applied in a rational, common sense and pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred, for the other side can not claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by restoring to delay. In fact, he runs a serious risk.

6. It must be grapped that the judiciary is respected not on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so."

13. This view was fortified in ***N. Balakrishnan Vs M. Krishnamurthy2***:-

"The primary function of a court is to adjudicate the dispute between the parties and to advance substantial justice. Time limit fixed for approaching the court in different situations is not because on the expiry of such time a bad cause would transform into a good cause. Rules of limitation are not meant to destroy the right of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. Law of limitation fixes a life-span for such legal remedy for the redress of the legal injury so suffered. Time is precious and the wasted time would never revisit. During

efflux of time newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a life span must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. Law of limitation is thus founded on public policy."

14. Conduct and vigilance shown by a party are relevant criteria for consideration in an application seeking condonation of delay. In ***Shakuntala Devi Jain V. Kuntal Kumari3,*** it was held that unless want of bona fides of such inaction or negligence as would deprive a party of the protection of section 5 is proved, the application must not be thrown out or any delay cannot be refused to be condoned.

15. The expression "sufficient cause" was liberally construed in ***New India Insurance Co. Ltd. V. Smt. Shanti Misra4,*** by holding that discretion given by section 5 should not be defined so as to convert a discretionary matter into a rigid rule of law.

16. The courts have to be mindful of the consequences of refusal to condone the delay leading to miscarriage of justice as held in **O.P. Kathpalia V. Lakhmir Singh5**.

17. The law set its face against an injustice-oriented approach while considering the applications for condonation of delay in

18. A distinction between delay and inordinate delay was made in ***Vedabai @ Vaijayanatabai Baburao Patil V. Shantaram Baburao Patil and others7:***

"In exercising discretion under section 5 of the Limitation Act, the Courts should adopt a pragmatic approach. A distinction must be made between a case where the delay is inordinate and a case where the delay is of a few days. Whereas in the former case the consideration of prejudice to the otherwise will be a relevant factor so the case calls for a more cautious approach...."

19. These holdings are particularly applicable in matters before revenue courts, where the litigants are mostly poor agriculturists, often uneducated and rarely alerted to their rights and technicalities of law.

20. The authorities in the preceding paragraphs are applicable to the facts of this case and shall also govern the fate of the decision.

21. The learned appellate court while passing the impugned order did not advert to the grounds for delay as pleaded in the delay condonation application. The appeal was dismissed in a cryptic manner with a simplicitor finding that the delay was not explained on a day to day basis.

22. The petitioner had stated the cause for the delay in the delay condonation application. The delay was occasioned due to the fact that the petitioner was not informed about the order passed by the learned trial court by his counsel nor did he otherwise have knowledge of the same. The delay was not intentional as after getting knowledge of the award, the appeal was filed with promptitude. The petitioner has shown good and sufficient cause for condonation of delay. The conduct of the petitioner was bonafide. The delay was liable to be condoned.

23. The impugned order shows non application of mind to the facts of the case

in the record. The cases in point discussed in the preceding paragraphs are applicable to the facts of the case. The learned appellate court while rejecting the delay condonation application has acted contrary to the aforesaid settled authorities of law.

24. The learned appellate authority overlooked the fact that substantive rights of the petitioner are engaged in this controversy which need adjudication on merits in the interest of justice.

25. I find that the court below has taken a pedantic view of the matter which has led to a miscarriage of justice.

26. The order dated 27.01.2021 passed by the respondent No.2 as well as the order dated 25.10.2018 passed by the respondent No.3 are arbitrary and illegal.

27. The order dated 27.01.2021 passed by the respondent No.2-Additional District Magistrate (Judicial), Jhansi as well as the order dated 25.10.2018 passed by the respondent No.3/Assistant Collector, First Class/Tehsildar-Moth, District-Jhansi are liable to be set aside and are set aside.

28. The delay condonation application is liable to be allowed and is allowed.

29. The matter is remitted to respondent No.2 / appellate authority.

30. A writ in the nature of mandamus commanding the respondent No.2 / appellate authority to execute the following directions:

I. The respondent No.2- / appellate authority shall decide the appeal on merits preferably in accordance with law within a period of four months from the date of production of a computer generated copy of this order, downloaded from the official website of the High Court Allahabad. The 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.

31. This order is being passed when the threat of Covid-19 pandemic still exists. In case the court proceedings are held up due to Covid-19 outbreak, the lost working days shall be adjusted and the stipulated period of one year shall accordingly be enhanced.

32. The writ petition is allowed to the extent indicated above.

(2021)09ILR A1323

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 15.09.2021

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ C No. 9218 of 2016

Pachchu ...Petitioner

Versus

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

Counsel for the Petitioner:

Sri Ajay Kumar Srivastava, Sri Sanjay Kr. Srivastava

Counsel for the Respondents:

C.S.C., Sri Brij Kumar Yadav, Sri Saurabh Srivastava, Sri Sharad Chand Rai

Civil Law - U.P. Z.A.&L.R. Act,1950 - Sections 176 & 202 - Ejectment of asami - Illegal encroachment over pond (Talab) - disputed parcel of land a pond area -

Petitioner an Asami pattedar - term of the Asami Patta granted to the petitioner/predecessor-in-interest of the petitioner long expired - after expiration of the period of Patta and its non renewal, the petitioner does not have any right to retain possession over the land - Petitioner found to be in illegal occupation and his eviction was rightly ordered from the disputed parcel of land recorded under category 3 in the Khatauni i.e., land belonging to the Gaon Sabha - District Magistrate directed to forthwith resume possession over the disputed parcels of land and restore the pond to its original pristine stage (Para 12, 20)

Dismissed. (E-5)

List of Cases cited :

1. Hinch Lal Tiwari Vs Kamla Devi & ors. (2001) 6 SCC 496

2. Jagpal Singh Vs St. of Punj. (2011) 11 SCC 396

3. Prem Singh Vs St. of U.P. & ors. 2012 (11) ADJ 404

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

1. Heard Shri Ajay Kumar Srivastava, learned counsel for the petitioner, Shri Sharad Chand Rai, learned counsel for the respondent no. 6 and the learned Standing Counsel for the State.

2. By the impugned order dated 04.03.2014 passed by the trial court in proceedings taken out under Section 202 of the U.P. Z.A.&L.R. Act,1950, directions to evict the petitioner from the disputed parcel of land have been issued with a further direction to make the necessary mutations in the revenue records. The appellate court in the impugned judgement dated 24.07.2015 rendered under Section 331(3) of the U.P.Z.A. & L.R. Act, 1950 has agreed with the findings of the trial court and affirmed its judgement.

3. Both the courts below in the impugned orders have returned the following concurrent findings of fact.

4. The disputed parcel of land was recorded under category 3 in the Khatauni. Category 3 is an arrangement of holdings described in the U.P. Land Records Manual as land held by Asamis.

5. The aforesaid entry was examined and upheld in the consolidation proceedings. CH Form 45 issued at the conclusion of the consolidation proceedings testifies that entries which are consistent with the earlier records. Clause 3 category lands, as the provision discloses, belong to the Gaon Sabha. The disputed parcel of land is a pond area.

6. Rights of the petitioner are at best those of an Asami pattedar and no more. The rights of Asami pattedar are described and limited under Section 176 of the U.P.Z.A.&L.R. Act, 1950. The term of the Asami Patta granted to the petitioner/predecessor-in-interest of the petitioner has long expired. The courts below have found that after expiration of the period of Patta and its non renewal, the petitioner does not have any right to retain possession over the land. These findings of fact could not be successfully disputed before the courts below.

7. In this manner the petitioner was found to be in illegal occupation and his eviction was ordered under the relevant provisions of law by the impugned order dated 04.03.2014 passed by the learned trial court and the order dated 24.07.2015 passed by the learned appellate court.

8. For ease of reference relevant provisions of the Land Records Manual are extracted as under:

"A-124. Arrangement of holdings- The arrangement of land within each village in the khatuni shall be follows:

Part-I

(1) Land cultivated by Government of Gaon Samaj or any other local authority entrusted with management of land under Section 117-A of the U.P. Zamindari Abolition and Land Reforms Act, 1950.

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(3) Land held by asamis who occupied or held land-

(a) as non-occupancy tenants of pasture land, or of land covered by water and used for the purpose of growing singhara and other produce, or land in the bed of river and used for casual or occasional cultivation, on the date immediately preceding the date of vesting;

(b) as non-occupancy tenants of land which the State government had, before the date of vesting, declared by the notification in the Gazette as part of a tract of shifting and unstable cultivation;

(c) as non-occupancy tenants of land which the State Government had, before the date of vesting, declared by notification in the Gazette to be intended or set apart for taungia plantation or community orchard or village farm or trenching grounds belonging as such to a local authority;

(d) on being admitted, on or after the date of vesting by the Gaon Samaj, as a lessee of land mentioned in sub-classes (a) to (c) above;

(e) as thekedars who become asamis under the proviso to sub-section (3) of Section 13 of the U.P. Zamindari Abolition and Land Reforms Act, 1950."

9. The procedure for eviction of illegal occupants is laid out in Section 202 of the U.P.Z.A. & L.R. Act, 1950. The provision is extracted hereunder for ease of reference:

"202. Procedure of ejectment of asami. - Without prejudice to the provisions of Section 338, an asami shall be liable to ejectment from his holding on the [suit of the[Gaon Sabha] or the land-holder as the case may be] on the ground or grounds-

(a) mentioned in Section[* * *]; 191 or 206,

[(b) that he-

(i) belongs to any of the classes mentioned in Clauses (a), (b), (c), (e), (g) or (i) of sub-section (1) of Section 21 or sub-section (2) of the said section or in Clause (c) or (d) of Section 133; or

(ii) has acquired the rights of an asami under the Uttar Pradesh Land Reforms (Supplementary) Act, 1952;

and that he holds the land from year to year or for a period which has expired or will expire before the end of the current agricultural year,]

(c) that he belongs to the class mentioned in[Clause (d) of sub-section (1) of Section 21]and the mortgage has been satisfied or the amount owing under the mortgage has, whether or not it has become payable thereunder, been deposited in Court,

(d) that he[is an asami under Section 11]and the right to maintenance allowance does not any longer subsist;

(e) that he belongs to the class mentioned in clause (j) of sub-section (1) of Section 21 and that the cultivation of agricultural crops has become impossible.

(f) that he belongs to the class mentioned in Clause (h) of[sub-section (1) of Section 21]or Clause (b) of Section 133 and that-

(i) the land-holder wishes to bring the land under his personal cultivation and in cases where the lease is for a fixed term such term as expired; or

(ii) the disability has determined,

(g) that he[is an asami under Section 13]and the period mentioned in Clause (a) of sub-section (2) of[the said section]has expired;

(h) that there is an unsatisfied decree of arrears of rent outstanding against him and such decree can be executed by ejectment."

10. First ground of challenge is that the petitioner has been in possession since the year 1950. The argument has been made to be rejected. The factum of possession of the petitioner since 1950 over the disputed parcel of land was apparently not raised before the consolidation authorities. In any case, the consolidation courts have not found in favour of the possession of the petitioner. Form CH 45 is not in any manner incompatible with the judgement of the consolidation authorities. The consolidation proceedings have been attained finality. Moreover, this is a disputed question of fact which cannot be examined in writ jurisdiction by this Court at this stage, since no perversity has been established in the findings of the courts below.

11. The second fault line in the impugned orders, according to the learned counsel for the petitioner is that the patta is not in the record. In the revenue records asami patta entry has been existing since long. Long standing revenue entries have a presumption of correctness in their favour. Of course, this is a rebuttable presumption, but the petitioner has failed to adduce any credible evidence to refute such presumption. The finding that the disputed parcel was land comprised in an asami patta is thus upheld.

12. Before this Court no perversity in the findings has been pointed out from the records. The learned courts below have observed full procedural propriety. Conclusions reached by the learned courts below are reasonable and achieve the applicable standards of evidence. In fact all relevant facts on the foot of which the impugned orders were passed are admitted by the petitioner. The process for holding the petitioner to be an illegal occupant cannot be faulted. The procedure for directing eviction of the petitioner being an illegal occupant has been strictly followed.

13. Before parting, this Court would like to examine the importance of ponds as

part of ecological heritage of an area. Water bodies like ponds are natural resources that comprise the collective wealth of the local population as well as the nation at large. These natural bodies and environmental assets are being subjected to degradation and encroachment. Such encroachment and degradation most often causes irreversible damage to the ecology.

14. The authorities are under an obligation of law to scrupulously maintain the records and measurements of natural assets of the community. It is also the statutory duty of authorities to ensure that any eviction upon such natural assets is vacated promptly in accordance with law.

15. At this stage, it would be apposite to fortify the narrative with judicial authorities in point.

16. In the case of **Hinch Lal Tiwari Vs. Kamla Devi and others,** reported at **(2001) 6 SCC 496, a**n issue relating to an encroachment over the public lands and official apathy in vacating such encroachment was posed to the Supreme Court. The Supreme Court considering the importance of public ponds and other natural resources and the onerous duty of the state authorities to bestow unbroken vigilance and restore such natural resources to their original state held thus:

"13. It is important to notice that the material resources of the community like forests, tanks, ponds, hillock, mountain etc. are nature's bounty. They maintain delicate ecological balance. They need to be protected for a proper and healthy environment which enables people to enjoy a quality life which is the essence of the guaranteed right under Article 21 of the Constitution. The Government, including the Revenue Authorities i.e. Respondents 11 to 13, having noticed that a pond is falling in disuse, should have bestowed their attention to develop the same which would, on one hand, have prevented ecological disaster and on the other provided better environment for the benefit of the public at large. Such vigil is the best protection against knavish attempts to seek allotment in non-abadi sites.

14. For the aforementioned reasons, we set aside the order of the High Court, restore the order of the Additional Collector dated 25-2-1999 confirmed by the Commissioner on 12-3-1999. Consequently, Respondents 1 to 10 shall vacate the land, which was allotted to them, within six months from today. They will, however, be permitted to take away the material of the houses which they have constructed on the said land. If Respondents 1 to 10 do not vacate the land within the said period the official respondents i.e. Respondents 11 to 13 shall demolish the construction and get possession of the said land in accordance with law. The State including Respondents 11 to 13 shall restore the pond, develop and maintain the same as a recreational spot which will undoubtedly be in the best interest of the villagers. Further it will also help in maintaining ecological balance and protecting the environment in regard to which this Court has repeatedly expressed its concern. Such measures must begin at the grass-root level if they were to become the nation's pride."

17. Concerns over degradation of natural resources and aggressive attempts encroach upon such natural resources in collusion with the state officials was noticed by the Supreme Court in **Jagpal Singh v. State of Punjab**, reported at

(2011) 11 SCC 396. In the case of **Jagpal Singh (supra)** the Supreme Court deprecating such conduct of the encroachers as well as the state authorities directed the State Government authorities to take efficacious steps to vacate such encroachments and restore the natural resources by setting forth the following holdings:

"19. In this connection we wish to say that our ancestors were not fools. They knew that in certain years there may be droughts or water shortages for some other reason, and water was also required for cattle to drink and bathe in, etc. Hence they built a pond attached to every village, a tank attached to every temple, etc. These were their traditional rainwater harvesting methods, which served them for thousands of years.

20. Over the last few decades, however, most of these ponds in our country have been filled with earth and built upon by greedy people, thus destroying their original character. This has contributed to the water shortages in the country. Also, many ponds are auctioned off at throw away prices to businessmen for fisheries in collusion with authorities/Gram Panchayat officials, and even this money collected from these so-called auctions is not used for the common benefit of the villagers but misappropriated by certain individuals. The time has come when these malpractices must stop.

21. In Uttar Pradesh the U.P. Consolidation of Holdings Act, 1954 was widely misused to usurp the Gram Sabha lands either with connivance of the Consolidation Authorities, or by forging orders purported to have been passed by Consolidation Officers in the long past so that they may not be compared with the original revenue record showing the land as Gram Sabha land, as these revenue records had been weeded out. Similar may have been the practice in other States. The time has now come to review all these orders by which the common village land has been grabbed by such fraudulent practices.

22. For the reasons given above there is no merit in this appeal and it is dismissed.

23. Before parting with this case we give directions to all the State Governments in the country that they should prepare schemes for eviction of illegal/unauthorised occupants of the Gram Sabha/Gram Panchayat/poramboke/shamlat land and these must be restored to the Gram Sabha/Gram Panchayat for the common use of villagers of the village. For this purpose the Chief Secretaries of all State Governments/Union Territories in India are directed to do the needful, taking the help of other senior officers of the Governments. The said scheme should provide for the speedy eviction of such illegal occupant, after giving him a show-cause notice and a brief hearing. Long duration of such illegal occupation or huge expenditure in making constructions thereon or political connections must not be treated as a justification for condoning this illegal act or for regularising the illegal possession. Regularisation should only be permitted in exceptional cases e.g. where lease has been granted under some government notification to landless labourers or members of the Scheduled Castes/Scheduled Tribes, or where there is already a school, dispensary or other public utility on the land."

18. Similarly, the Division Bench of this Court in the case of **Prem Singh v.**

State of U.P. and others, reported at **2012 (11) ADJ 404** issued peremptory orders to state authorities to take all necessary action in law and and clear such encroachments expeditiously:

"5.In view of direction noticed in the aforesaid circular, we are of the considered view that if complaints regarding unauthorized occupation over the public ponds or other similar public lands are received by the District Magistrate of a District, he should take all the required actions in view of law already settled in the case of Jagpal Singh and others.

6. In case, the District Magistrate finds some good reasons to seek guidance from the Members Committee indicated in Para-2 of the aforesaid circular, then he may refer the matter and seek guidance in appropriate cases.

7. So far as the present writ petition is concerned, we grant liberty to the petitioner to approach respondents no. 2 and 3 again with a certified copy of this order. The concerned respondents shall get appropriate inquiry made and take required action to protect public ponds as per law laid down by the Apex Court, expeditiously.

8. Let a copy of this order be furnished to the learned Standing Counsel for the State for communication to the Principal Secretary, Revenue, Government of Uttar Pradesh, who shall circulate a copy of this order to all the Divisional Commissioners as well as the District Magistrates so that number of such types of cases coming to this Court may be checked."

19. In wake of the preceding discussion, no interference is called for in the impugned order. The writ petition is liable to be dismissed and is dismissed.

20. The District Magistrate is ordered to forthwith resume possession over the disputed parcels of land and restore the pond to its original pristine stage, within a period of six months from today.

21. Learned Standing Counsel to serve a copy of this order upon the District Magistrate, Kanpur Dehat, for compliance.

(2021)09ILR A1329
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:
Gaurav Singh Chauhan, R.P.S. Chauhan

Counsel for the Respondents:
C.S.C., Tarun Agarwal

A. U.P. Kshetra Panchayats and Zila Panchayats (Election of Members) Rules, 1994 - Rule 54 - Minor correction in totaling of the votes - Jurisdiction of the Returning Officer to make correction in the election result after victory certificate is issued - Procedural review - functus Officio - Held - Returning Officer has jurisdiction to correct minor errors of clerical/arithmetical nature - Returning Officer on discovering mistake in calculation/totaling of the votes must

correct the same at the earliest possible opportunity - 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 (Para 10, 21)

B. U.P. Kshetra Panchayats and Zila Panchayats (Election of Members) Rules, 1994 - Rules 53, 54 & 56 - Guide Book for Panchayat General Elections-2021, Chapter IX - Form 54, 56 - Returning Officer before declaration of the result of the election would enter all details in the prescribed "Election Result Register" in Form-56, get the signature of the elected candidate and also sign it by himself - 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 - Issuance of the certificate of elected candidate in Form-54 can only be after the declaration of the result in Form-56 - 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 (Para 16, 17)

C. Constitution of India, Article 226 - while exercising equitable discretionary jurisdiction substantial justice should be done in the matter - High Court would not issue a writ which would revive any illegality - quashing of the certificate issued in favour of the opposite party would result in cancellation of the election of a candidate having attained highest number of votes - no reason to upset the election result & relegate the candidate having highest number of votes to approach the Election Tribunal for removal of a minor defect (Para 22)

Assistant Returning Officer 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 victory certificate to the petitioner on 3.5.2021 - on 4.5.2021, private respondent raised objection - As soon as the said mistake was brought to the knowledge of the Returning Officer, he found that the votes of the polling booth no. 180 were not added in the result declared by the Assistant Returning Officer - mistake committed by the Assistant Returning Officer was corrected by the Returning Officer on 04.05.2021 - by means of the memo dated 6.5.2021, the Returning Officer cancelled the certificate of the petitioner & declared respondent no. 7 as the elected candidate by adding votes of both the polling booths i.e. booth nos. 180 and 181 - after correction of the clerical/arithmetical mistake, election result uploaded on the portal of State Election Commission on 7.5.2021 - Held - Returning Officer committed no illegality - 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* (Para 12)

Dismissed. (E-5)

List of Cases cited :

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 SubDivisional 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 S. 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
मुहर का नाम ...

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)09ILR A1344
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.08.2021

BEFORE

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

Writ C No. 40301 of 2013

State of U.P. & Anr. ...Petitioners
Versus
Presiding Officer, Labour Court, Lucknow & Anr. ...Respondents

Counsel for the Petitioners:
Sri Suman Sirohi S.C.

Counsel for the Respondents:
C.S.C., Sri Diptiman Singh, S.C.

Civil Law - U.P. Industrial Disputes Act,1947 - Sections 2-A & 4-K - Limitation Act, S.5 - Stale claim seeking re-engagement - stale claims that are dead do not give rise to an industrial dispute - though there is no limitation prescribed under the Act, during which the industrial dispute may be raised, but it does not mean that a stale claim must be entertained by the Government or adjudicated by the Court - principle on which stale claims are said to be not valid for adjudication is the extinguishment of the industrial dispute with passage of time - An industrial dispute is something that threatens industrial peace - However, if the dispute is still alive on the date of reference, even after passage of a considerable period of time, in the sense that it is still a potent peril to industrial peace, the reference cannot be thrown out as a State claim - there has to be evidence aliunde to show that the industrial dispute was alive between parties (Para 19, 21, 25)

Workman terminated in the year 1989 - He belatedly raised Industrial dispute in the year 2004 i.e. after about 15 years - Held - there was no evidence to show that during the period of 15 years workman pursued his claim as there was no evidence about workman applications, seeking re-engagement, being actually delivered to the employer - there was not a solitary document to show that during this long period of 12 years & more, there was anything said by way of an assurance by the employer, on the basis of which the workman might reasonably be held to have thought that some kind of a negotiation about the industrial dispute is underway - difficult to hold that the industrial dispute was alive in all these years - Industrial dispute that was referred for adjudication to the Labour Court was stale and a dead dispute - impugned award quashed (Para 22, 35, 36, 37)

Allowed. (E-5)

List of Cases cited :

1. Nedungadi Bank Ltd. Vs K.P. Madhavan Kutti (2002) 2 SCC 455

2. Haryana State Corp. Bank Ltd. Vs Neelam (2005) 5 SCC 91

3. State of U.P. & anr. Vs Rajesh Kumar Awasthi & Anr Writ - C No. 39723 of 2017, decided on 13.01.2020

4. Kuldeep Singh Vs General Manager, Instrument Design Development and Facilities Centre & anr. (2010) 14 SCC 176

5. Prabhakar Vs Joint Director, Sericulture Department & anr. (2015) 15 SCC 1

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

Heard Mr. Shreeprakash Singh, learned Standing Counsel appearing for the petitioners and Mr. Diptiman Singh, learned Counsel appearing for the respondent-workman.

2. This writ petition is directed against an award of the Presiding Officer, Labour Court, Lucknow dated 27.01.2012 (published on 12.04.2012) passed in Adjudication Case no.252 of 2005. Also impugned is an order of the Presiding Officer, Labour Court, U.P., Lucknow dated 07.03.2013 passed in Misc. Case no.51 of 2012, rejecting an application by the petitioners, seeking a review of the award.

3. It appears that an application dated 25.09.2003 was made by the second respondent, Ram Chandra1 to the Conciliation Officer, Bareilly, under Section 2-A of the Uttar Pradesh Industrial Disputes Act, 19472. The application aforesaid was made with an acknowledged delay of 12 years, 3 months and 25 days. It was accompanied by an application under Section 5 of the Indian Limitation Act, 1963, seeking condonation of the delay in making it.

4. It was said in the application for conciliation that the workman was employed in the establishment of the Assistant Engineer, Second Head Works Division, Sharda Canal Bifurcation, Pilibhit as a daily-wager, since the month of August, 1987. He was retained by an oral order made by the Assistant Engineer, last mentioned. The Superintending Engineer, 5th Division, Irrigation Works, Bareilly, the Executive Engineer, Head Works Division, Sharda Canal, Bareilly, and the Assistant Engineer, Second Head Works Division, Sharda Canal Bifurcation, Pilibhit, were arrayed as opposite parties to the application under reference. The said opposite parties are represented before this Court by the two petitioners, that is to say, the State of Uttar Pradesh through the Chief Engineer, Irrigation Division, Government of U.P., Lucknow and the Executive Engineer, Head Works Division, Sharda Canal, Bareilly. Be it the three opposite parties arrayed in the conciliation proceedings at Bareilly, or the petitioners here, they shall hereinafter be referred to as the 'employers'.

5. Shorn of unnecessary details, it was said in the application seeking conciliation that the workman discharged his duties with utmost devotion and never gave cause for complaint to the employers. The employers deputed him to do work in the office that was ministerial in nature. He was given an assurance that after some time, his services would be regularized and made permanent as a Clerk. It is also said that believing the said representation by the employers to be true, the workman continued to discharge the duties of a Clerk, in addition to his duties. He did not

demand any additional wages. It is the workman's case that he repeated his request orally to the employers, asking them to regularize his services on a permanent post, but the employers would ward off the request. In the month of April, 1991, the workman claims to have forcefully asserted his claim to regularize and to be made permanent, which led the employers to orally terminate his service in the month of May, 1991. He was not served with any notice or paid notice pay or retrenchment allowance. It was also said in the application for conciliation that the workman met the employers time over again and orally requested them to take him back in their employ. However, no heed was paid to his requests. The workman claims that left with no alternative, he got a notice dated 04.07.2003 served by his learned counsel through registered post. There, it was demanded that the workman be taken back in service and his case be considered for regularization with confinement of the status of a permanent employee.

6. There is an assertion in the application seeking conciliation that the workman worked with the employers from the month of August, 1987 to May, 1991 continuously. He functioned for more than 240 days in each calendar year during the aforesaid period of time. On the basis of the aforesaid assertion, the workman said that he was entitled to be regularized in service and declared a permanent employee. It is said in paragraph no.7 of the application that a period of 12 years, 3 months and 25 days had elapsed since his services were dispensed with by the employers. This delay was sought to be explained on the basis that during this period of time, the workman had made repeat requests orally and through written applications to the employers to remit the wrong, but to no avail. It was said that the delay was not intentional or the outcome of laches. The workman requested that for resolution of the industrial dispute between parties, a Conciliation Committee be constituted. The Committee so constituted may ensure that the workman's illegal termination from service, with effect from the month of May, 1991, be declared inoperative and void, and that he may be reinstated with continuity in service together with all consequential benefits. The workman's application seeking conciliation was registered on the file of the Conciliation Officer-cum-Assistant Labour Commissioner, Bareilly as C.P. Case no.1 of 2004.

7. Notice of the said application was issued to the employers, requiring them to attend before the Conciliation Officer-cum-Assistant Labour Commissioner, Bareilly on 13.01.2004 at 11.00 o'clock in the morning hours. The employers filed a reply to the said conciliation application, wherein it was pleaded in paragraph no.1 that the workman was retained as a daily-wager to do the work of a Beldar. He worked from the month of August, 1987 to the month of May, 1991, as per details furnished in a statement accompanying the employers' reply dated 06.02.2004 before the Conciliation Officer, Bareilly. The attached schedule of details about the number of days in each calendar year, month-wise that the workman discharged his duties with the employers, is detailed below:

"श्री राम चन्द्र गंगवार पुत्र श्री दयाराम गंगवार,निवासी ग्राम कनमन बहेडी जिला बरेली से विपक्षी सं0-3 के अधीन के दैनिक वेतनभोगी बेलदार के रूप में किये गये कार्य का वर्ष /माह वार विवरण।

क्रमांक माह कार्य दिवस
क्रमांक माह कार्य दिवस

1. 8/87 शून्य
1/90 शून्य
2. 9/87 शून्य
2/90 शून्य
3. 10/87 शून्य
3/90 शून्य
4. 11/87 शून्य
4/90 शून्य
5. 12/87 शून्य
5/90 शून्य
कुल-शून्य
शून्य
1. 1/88 शून्य
7/90 शून्य
2. 2/88 शून्य
8/90 शून्य
3. 3/88 शून्य
9/90 शून्य
4. 4/88 शून्य
10/90 शून्य
5. 5/88 शून्य
11/90 शून्य
6. 6/88 26 दिन
12. 12/90 शून्य

कुल - शून्य

7. 7/88 19 दिन
1/91 शून्य
8. 8/88 26 दिन
2/91 शून्य
9. 9/88 शून्य
3/91 शून्य
10. 10/88 शून्य
4. 4/91 शून्य
11. 11/88 26 दिन
5/91 शून्य
12. 12/88 शून्य

कुल - 97 दिवस

1. - शून्य
2. 1. 1/89 26 दिन
2. 2/89 28 दिन
3. 3/89 शून्य
4. 4/89 शून्य
5. 5/89 14 दिन
6. 6/89 30 दिन
7. 7/89 27 दिन
8. 8/89 शून्य
6. 6/90 9. 9/89 30 दिन
10. 10/89 शून्य
7. 11. 11/89 शून्य
12. 12/89 शून्य
8. कुल - 155 दिन
9.
भवदीय
10.
वी0के0श्रीवास्तव
11.
सहायक अभियन्ता द्वितीय
वाइफरकेशन पीलीभीत
प्रतिवादीगण सं0 1 से 3 की ओर से।"

8. The workman made an application in C.P. Case no.1 of 2004 before the Conciliation Officer, Bareilly dated 12.03.2004 seeking to withdraw/ not press the conciliation application on ground that it had some technical flaws, which the workman wanted to rectify and present a fresh application. The withdrawal application was allowed by the Conciliation

Officer vide order dated 12.03.2004 and the conciliation case together with the delay condonation application were directed to be consigned to records.

9. A month later on 12.04.2004, the workman moved a fresh application under Section 2-A of the Act of 1947, on occasion before the Conciliation Officer, Lucknow, again accompanied by an application seeking condonation of delay. Here, it was said that the employers had retained the workman with effect from 01.11.1986 on a monthly/ daily salary of Rs.450/- per month to work as a Beldar. His services were illegally terminated with effect from 01.06.1991. No reason was assigned for dispensing with the workman's service. It was also said that the workman went time over again to the employers asking to be re-engaged, but to no avail. It was also said that the employers' establishment had a work force of about 15000 strong. The workman, time over again, made oral requests and also wrote applications, requesting the employers that the dispute may be amicably resolved, which the employers did not do. It was, therefore, prayed that proceedings under Section 2-A may be drawn and concluded early, ensuring that the workman is reinstated in service with continuity and back wages. The application was registered before the Conciliation Officer-cum-Assistant Labour Commissioner, Lucknow as Application no.141 of 2004.

10. Upon notice of the said application being issued to the employers, they filed a reply dated 06.08.2004. It was pointed on behalf of the employers that the workman had earlier approached the Conciliation Officer-cum-Assistant Labour Commissioner, Bareilly vide C.P. Case no.1 of 2004. There also, he had sought condonation of delay. After the employers had filed the reply in the said case, the workman had withdrawn the conciliation proceedings citing technical flaws in the application, attended with the assertion that after removal of defects, a fresh application would be presented. A copy of the earlier application was appended by the employers to their reply. An objection was raised to the effect that the workman was a resident of Bareilly and was employed with the employers' establishment, comprising the Second Division Bifurcation at Pilibhit. As such, the cause of action did not arise within the territorial jurisdiction of the Conciliation Officer at Lucknow, but was cognizable by the Conciliation Officer, Bareilly. About the other matters, it was said that their stand as the one taken before the Conciliation Officer, Bareilly, remains unchanged.

11. The Conciliation Officer/ Deputy Labour Commissioner, Lucknow vide his order dated 15.12.2005, proceeded to make a reference under Section 4-K of the Act of 1947 to the Labour Court n the following terms (translated into English from Hindi vernacular):

"Whether termination of services of their workman, Sri Ram Chandra son of Daya Ram, a Beldar by the employers with effect from 01.10.1989 is lawful and proper? If not, to what relief the concerned workman is entitled and what are the particulars of his lawful dues?"

12. The aforesaid case was registered on the file of the Presiding Officer, Labour Court, U.P., Lucknow as Adjudication Case no.252 of 2005. Both parties were put under notice and called upon to file their written statements. The workman filed his written statement dated 27.01.2006,

whereas the employers filed their written statement dated 11.05.2006. The employers in written statement said that their stand remains the same as that carried in their reply in C.P. Case no.141 of 2004 before the Conciliation Officer-cum-Assistant Labour Commissioner, Lucknow Region, Lucknow. The reply dated 23.03.2005 submitted in the conciliation proceedings was enclosed with the written statement filed on behalf of the employers. It may be emphasized that in the reply dated 23.03.2005 submitted in the conciliation proceedings on behalf of the employers, a schedule about the period of engagement of the workman with the employers was detailed. It was furnished for the years 1988 and 1989, indicating month-wise break-up of days that the workman had worked with the employers. The total number of days during each of the two calendar years was also detailed. The said figures, detailed with the reply dated 23.03.2005, filed before the Conciliation Officer is relevant. These read:

"**वर्ष 1988**

क्रमांक	माह	कार्य दिवस
1.	6/88	26 दिवस
2.	7/88	19 दिवस
3.	8/88	26 दिवस
4.	9/88	शून्य
5.	10/88	शून्य
6.	11/88	26 दिवस
7.	12/88	23 दिवस
कुल-		120 दिवस

वर्ष 1989

1.	1/89	शून्य
2.	2/89	28 दिवस
3.	3/89	7 दिवस
4.	4/89	शून्य
5.	5/89	14 दिवस
6.	6/89	30 दिवस
7.	7/89	27 दिवस
8.	8/89	शून्य
9.	9/89	30 दिवस
कुल-		136 दिवस

(एन0सी0 उपाध्याय)

सहायक अभियन्ता, द्वितीय

बाईफरकेशन"

13. Rejoinder statements were filed by the employers and the workman. At the hearing before the Labour Court, the workman led both oral and documentary evidence. However, the employers, who sought time on 24.02.2011, 04.05.2011, 01.09.2011 and 15.10.2011 to lead evidence, did not do so. This fact is recorded in the impugned award. It is also recorded there that on 15.10.2011, the employers' opportunity to lead evidence was closed. Both parties were then heard through their various representatives by the Labour Court, which, by its award impugned, held that the workman had worked for more than 240 days and his services had been terminated in breach of Sections 6-N, 6-P and 6-Q of the Act of 1947. The reference was answered in the manner that termination of the workman's services was not lawful or proper, and that he is entitled to reinstatement. It was further awarded that the workman was entitled to reinstatement with effect from 01.10.1989 with continuity in service. However, towards back-wages, 25% was awarded.

14. Aggrieved, the present writ petition has been instituted by the employers.

15. I have heard the learned Counsel for parties and perused the record.

16. The foremost objection that has been raised by Mr. Shreeprakash Singh, the learned Standing Counsel appearing for the petitioners, is that the claim has been raised belatedly, after the passage of about 15 years. It is submitted that it is a stale claim, where, on the own showing of the workman, the first time that he initiated proceedings for conciliation before the Conciliation Officer-cum-Assistant Labour Commissioner, Bareilly, it was with a delay of 12 years, 4 months and 25 days. It is for the said reason that the workman-employee applied for condonation of delay before the Conciliation Officer at Bareilly. The conciliation proceedings initiated at Bareilly were withdrawn on 12.03.2004 and a month later, on 12.04.2004, the Conciliation Officer at Lucknow was moved. It is submitted that according to the reference, the services of the petitioner were terminated w.e.f. 01.10.1989. Therefore, it was about 15 years after the employer removed him, that the workman raised an industrial dispute. It is emphasized that during this period of time, there is no dependable evidence to show that the workman pursued his claim, or the industrial dispute remained alive. It is urged that according to the employers' case, after 30.09.1989, the workman ceased to turn up for work. He was a daily-wager and free to do so. The evidence regarding applications submitted by the workman to the employers, seeking reinstatement in service, that have been brought on record, are dubbed as self-serving documents. It is urged that there is no proof of dispatch or tender of these applications. It is particularly emphasized by Mr. Shreeprakash Singh that the only evidence about postal dispatch of these applications are UPC Certificates, that are no evidence about postal dispatch. The only admissible evidence about postal dispatch is the receipt of dispatch by registered post.

17. For the principle that stale claims that are dead do not give rise to an industrial dispute, the learned Standing Counsel appearing for the petitioner has placed reliance on the decision of Supreme Court in **Nedungadi Bank Ltd. v. K.P. Madhavan Kutti3**. To the same end, reliance has been placed on another decision of the Supreme Court in Haryana State Corporation Bank Ltd. v. Neelam4. It is submitted on the strength of these decisions that though there is no limitation prescribed under the Act, during which the industrial dispute may be raised, but it does not mean that irrespective of facts and circumstances of the case, a stale claim must be entertained by the Government or adjudicated by the Court. Mr. Shreeprakash Singh emphasizes that going by the principle laid down in the two Authorities under reference, the workman ought to have approached the Court at the earliest as in case of delay, the aim and object of raising an industrial dispute stands defeated. The learned Standing Counsel has further placed reliance upon a decision of this Court in **State of U.P. and Another v. Rajesh Kumar Awasthi and Another5.** In the said decision, a delay of about 19 years was considered fatal.

18. Mr. Diptiman Singh, the learned Counsel for the workman, on the other hand, submits that a delay condonation application was filed by the workman, giving sufficient explanation for the delay

in the initiation of conciliation proceedings. The delay was condoned by an order dated 09.03.2005. It is pointed out by Mr. Singh that a copy of the said order is annexed as Annexure CA-1 to the counter affidavit. This order was never challenged by the petitioner, and has become final. He submits that once reasons for the delay have been explained and the Conciliation Officer has passed a specific order condoning the delay, no objection can be taken to the impugned award on ground of the dispute being raised after a number of years. Mr. Singh submits that there is no limitation prescribed under the Act of 1947 and if it is an industrial dispute that is still alive on the date the reference is made, mere passage of time cannot vitiate the reference or the resultant adjudication. Reliance in this connection has been placed by Mr. Diptiman Singh on the decision of the Supreme Court in **Kuldeep Singh v. General Manager, Instrument Design Development and Facilities Centre and Another6** and also on another decision of their Lordships in **Prabhakar v. Joint Director, Sericulture Department and Another7.**

19. There is no quarrel between parties that there is no limitation prescribed under the Act of 1947, where the passage of a specific time period from a determinate event would act as a temporal bar to the raising of an industrial dispute. The principle on which stale claims are said to be not valid for adjudication is the extinguishment of the industrial dispute with passage of time. While passage of time is in itself no ground to apply the principle of laches to the adjudication of an industrial dispute in the manner it is applied to equitable jurisdictions, where no rule of limitation is applicable, passage of a considerable period of time is in itself a pointer to the industrial dispute having subsided. But again, since claims subject matter of industrial disputes are not to be discarded because of the mere passage of a long period of time, delay cannot be the sole index to infer a bar to the industrial dispute. An industrial dispute that is raised after a long passage of time, but with events in the interregnum to show by tangible evidence that issues had remained alive, about which there was either strife or attempts at settlement, the industrial dispute would still be alive. If the dispute is alive after passage of a considerable period of time in the sense that it is still a potent peril to industrial peace, the reference cannot be thrown out as a State claim. It is here that the principle may be regarded differently from laches where long inaction in the commencement of proceedings by itself would attract disentitlement, unless the delay is satisfactorily explained.

20. Here, the parties have come up with slightly varying dates about the workman's engagement and the time that he was retrenched. But, on the evidence available and that found by the Labour Court, there is no issue that the workman claims to have been removed or retrenched illegally w.e.f. 01.10.1989. During this period of time, the earliest that the workman raised the industrial dispute by moving the Conciliation Officer at Bareilly was through an application under Section 2-A of the Act of 1947, dated 25.09.2003. The said application was accompanied by a delay condonation application. In Paragraph No. 7 of the application seeking conciliation moved at Bareilly, the workman has acknowledged that it was being made 12 years, 3 months and 25 days after the event, that is his retrenchment. This application was later on withdrawn under an order of the Conciliation Officer

at Bareilly dated 12.03.2004 with liberty to represent. A second application was moved at Lucknow on 12.04.2004. That may not be of much relevance to the issue about the claim being stale, and, therefore, not worth adjudication. But, it does show that before 25.09.2003, there was no evidence by way of any step taken by the workman under the law, that may evidence the industrial dispute.

21. Again, merely because steps under the law are not taken to raise an industrial dispute or towards it, it cannot be evidence about the industrial dispute being smothered. In the world of industrial relations, it is a potent probability that the workman may be negotiating with the employers individually or bargaining through a union. If there be evidence about a negotiation with the employer in any manner going on, where there is some kind of an assurance to the workman, that his grievance might be redressed, the industrial dispute cannot be taken to be effaced. Nevertheless, there has to be evidence aliunde to show that the industrial dispute was alive between parties, though no steps available under the law were taken or the remedies availed by the workman. If evidence of that kind is there, certainly, the process of resolution of an industrial dispute under the Act of 1947 can be initiated, notwithstanding whatever time has passed.

22. To show that the dispute was alive between parties, Mr. Diptiman Singh has drawn attention of this Court to a list of documents annexed as Annexure CA-3 to the counter affidavit. A perusal of the said list shows that there are some 13 applications dated 30.07.1991 to 10.02.2003, said to be addressed by the workman to the employer regarding his re-engagement. Although, those applications have been filed before the Labour Court and bear Exhibit W3, W4 - W15, there is no dependable evidence about these applications being actually delivered to the employer. There are certificates of posting that have been filed before the Labour Court, relative to these applications. Certificates of posting are highly suspect evidence about dispatch, given the reputed unworthiness of these documents, of which the Court can take judicial notice. Even assuming that the various applications seeking re-engagement from the year 1991 to the year 2003 were made by the workman, there is not a solitary document to show that during this long period of 12 years and more, there was anything said by way of an assurance by the employer, on the basis of which the workman might reasonably be held to have thought that some kind of a negotiation about the industrial dispute is underway or that he must wait for the outcome of some bargain. At best, these applications show unilateral efforts by the workman across a decade and two years and may be more, to seek re-engagement, with the employers consistently turning a deaf ear. This being the best inference that can be drawn from the evidence comprising these applications made to the employer, it is difficult to hold that the industrial dispute was alive in all these years. Mr. Diptiman Singh has then drawn the attention of this Court to the evidence of the workman's witnesses, which includes him. He has testified as D.W.1. On the issue of delay, D.W.2, Narendra Babu Saxena, who was employed with the employers from 26.02.1975 to 30.06.2008 as a Clerk and Senior Assistant, has testified to the fact that after being removed from service, the workman came back to the employers time over again and made applications, but the employer did not

re-engage him. This evidence is expressed by D.W. 2 in the following words :

Naukri se nikale jane ke baad yeh baar-2 aate rahe aur prarthna patra dete rahe, lekin unko sahab se nahi rakha.

23. Likewise, D.W.3, Daya Ram, who is said to have been posted with the employers from 15.01.1959 to 31.01.1993 on some post described as a *"patrol"*, has said in his testimony :

Kshramik nikaale jaane ke baad division office me sahab se naukri par rakhne ke liye bar-bar aate rahe, aur prarthna patra aadi bhi naukri par rakhne ka dete rahe.

24. Accepting the said evidence to be true and unrebutted, for the employers have not led any, all that could be inferred is that the workman unilaterally approached the employer during all this period of twelve years and more, endeavouring to be re-engaged. While this evidence may show efforts made by the workman to secure his employment back and denial by the employer, the absence of any further action by the workman, with there being no negotiation underway between him and the employer, cannot lead to an inference about an industrial dispute being alive in all this while. The torpidity of the workman in the face of denial by the employers over a very long period of time is, in fact, a clear evidence of his inaction. It does not show any kind of strife or dispute.

25. An industrial dispute is something that threatens industrial peace. A workman, who, across a period of 12 years and more, is content to visit the employers premises, requesting the latter to re-engage him, without doing anything more, cannot be said to be a party to an industrial dispute. The workman, who does not agitate his rights during this long passage of time, must be held to have accepted his fate and submitted to the retrenchment. The ex-employers' premises, being nothing more than a frequent rendezvous to the workman, with no further action to redress his unlawful retrenchment, shows an industrial dispute, if at all, that has withered away with time. That is precisely the case here. In this connection, reference may be made to the decision of the Supreme Court in **Prabhakar** *(supra).* After a survey of authority on the point, their Lordships have summarised the principles thus :

42. On the basis of the aforesaid discussion, we summarise the legal position as under:

42.1. An industrial dispute has to be referred by the appropriate Government for adjudication and the workman cannot approach the Labour Court or Industrial Tribunal directly, except in those cases which are covered by Section 2-A of the Act. Reference is made under Section 10 of the Act in those cases where the appropriate Government forms an opinion that "any industrial dispute exists or is apprehended". The words "industrial dispute exists" are of paramount importance, unless there is an existence of an industrial dispute (or the dispute is apprehended or it is apprehended such a dispute may arise in near future), no reference is to be made. Thus, existence or apprehension of an industrial dispute is a sine qua non for making the reference. No doubt, at the time of taking a decision whether a reference is to be made or not, the appropriate Government is not to go into the merits of the dispute. Making of reference is only an administrative

function. At the same time, on the basis of material on record, satisfaction of the existence of the industrial dispute or the apprehension of an industrial dispute is necessary. Such existence/apprehension of industrial dispute, thus, becomes a condition precedent, though it will be only subjective satisfaction based on material on record. Since, we are not concerned with the satisfaction dealing with cases where there is apprehended industrial dispute, discussion that follows would confine to existence of an industrial dispute.

42.2. Dispute or difference arises when one party makes a demand and the other party rejects the same. It is held by this Court in a number of cases that before raising the industrial dispute making of demand is a necessary precondition. In such a scenario, if the services of a workman are terminated and he does not make the demand and/or raise the issue alleging wrongful termination immediately thereafter or within reasonable time and raises the same after considerable lapse of period, whether it can be said that industrial dispute still exists.

42.3. Since there is no period of limitation, it gives right to the workman to raise the dispute even belatedly. However, if the dispute is raised after a long period, it has to be seen as to whether such a dispute still exists**? Thus, notwithstanding the fact that law of limitation does not apply, it is to be shown by the workman that there is a dispute in praesent**i. For this purpose, he has to demonstrate that even if considerable period has lapsed and there are laches and delays, such delay has not resulted into making the industrial dispute cease to exist. Therefore, if the workman is able to give satisfactory explanation for these laches and delays and demonstrate that the circumstances disclose that issue is still alive, delay would not come in his way because of the reason that law of limitation has no application. On the other hand, if because of such delay dispute no longer remains alive and is to be treated as "dead", then it would be non-existent dispute which cannot be referred.

42.4. **Take, for example, a case where the workman issues notice after his termination, questioning the termination and demanding reinstatement. He is able to show that there were discussions from time to time and the parties were trying to sort out the matter amicably. Or he is able to show that there were assurances by the Management to the effect that he would be taken back in service and because of these reasons, he did not immediately raise the dispute by approaching the Labour Authorities seeking reference or did not invoke the remedy under Section 2-A of the Act. In such a scenario, it can be treated that the dispute was live and existing as the workman never abandoned his right. However, in this very example, even if the notice of demand was sent but it did not evoke any positive response or there was specific rejection by the Management of his demand contained in the notice and thereafter he sleeps over the matter for a number of years, it can be treated that he accepted the factum of his termination and rejection thereof by the Management and acquiesced into the said rejection.**

42.5. Take another example. A workman approaches the civil court by filing a suit against his termination which was pending for a number of years and was ultimately dismissed on the ground that the

civil court did not have jurisdiction to enforce the contract of personal service and does not grant any reinstatement. At that stage, when the suit is dismissed or he withdraws that suit and then involves the machinery under the Act, it can lead to the conclusion that the dispute is still alive as the workman had not accepted the termination but was agitating the same; albeit in a wrong forum.

42.6. In contrast, in those cases where there was no agitation by the workman against his termination and the dispute is raised belatedly and the delay or laches remain unexplained, it would be presumed that he had waived his right or acquiesced into the act of termination and, therefore, at the time when the dispute is raised it had become stale and was not an "existing dispute". In such circumstances, the appropriate Government can refuse to make reference. In the alternative, the Labour Court/Industrial Court can also hold that there is no "industrial dispute" within the meaning of Section 2(k) of the Act and, therefore, no relief can be granted.

43. We may hasten to clarify that in those cases where the court finds that dispute still existed, though raised belatedly, it is always permissible for the court to take the aspect of delay into consideration and mould the relief. In such cases, it is still open for the court to either grant reinstatement without back wages or lesser back wages or grant compensation instead of reinstatement. We are of the opinion that the law on this issue has to be applied in the aforesaid perspective in such matters.

44. To summarise, although there is no limitation prescribed under the Act for making a reference under Section 10(1) of the ID Act, yet it is for the "appropriate Government" to consider whether it is expedient or not to make the reference. The words "at any time" used in Section 10(1) do not admit of any limitation in making an order of reference and laws of limitation are not applicable to proceedings under the ID Act. However, the policy of industrial adjudication is that very stale claims should not be generally encouraged or allowed inasmuch as unless there is satisfactory explanation for delay as, apart from the obvious risk to industrial peace from the entertainment of claims after long lapse of time, it is necessary also to take into account the unsettling effect which it is likely to have on the employers' financial arrangement and to avoid dislocation of an industry." **(Emphasis by Court)**

26. Incidentally, in **Prabhakar**, reference against the order of termination made after 14 years was held not to give rise to an industrial dispute, that was alive and worth adjudicating.

27. The other decision relied upon by Mr. Diptiman Singh does not lay down any principle that may come to the workman's rescue on the facts and evidence obtaining in this case. In **Kuldeep Singh**, it was held by their Lordships :

28. The view expressed in Sapan Kumar Pandit [(2001) 6 SCC 222 : 2001 SCC (L&S) 946] which is identical to our case has been considered and followed in the subsequent decision, namely, S.M. Nilajkar v. Telecom District Manager [(2003) 4 SCC 27 : 2003 SCC (L&S) 380] . In both the decisions, the principles laid down in Nedungadi Bank [(2000) 2 SCC 455 : 2000 SCC (L&S) 283] have been considered and distinguished. We have already mentioned that in Sapan Kumar

Pandit [(2001) 6 SCC 222 : 2001 SCC (L&S) 946] , this Court followed the principles enunciated in a three-Judge Bench decision of Western India Match Co. [(1970) 1 SCC 225 : AIR 1970 SC 1205]

29. At this juncture, it is useful to remind and reiterate the finding rendered by the Labour Court on Issues 1, 5 and 6 holding that the termination of the services of the workman/the appellant herein without complying with the provisions of Section 25-F is illegal, null and void and deserves to be set aside. Undoubtedly, the management has to follow the provisions of the Act while effecting termination, in fact, which was accepted by the Labour Court and the management has not challenged the same before any forum.

30. In view of the above, law can be summarised that there is no prescribed time-limit for the appropriate Government to exercise its powers under Section 10 of the Act. It is more so in view of the language used, namely, if any industrial dispute exists or is apprehended, the appropriate Government "at any time" refer the dispute to a board or court for enquiry. The reference sought for by the workman cannot be said to be delayed or suffering from a lapse when law does not prescribe any period of limitation for raising a dispute under Section 10 of the Act. The real test for making a reference is whether at the time of the reference dispute exists or not and when it is made it is presumed that the State Government is satisfied with the ingredients of the provision, hence the Labour Court cannot go behind the reference.

31. It is not open to the Government to go into the merit of the dispute concerned and once it is found that an industrial dispute exists then it is incumbent on the part of the Government to make reference. It cannot itself decide the merit of the dispute and it is for the appropriate court or forum to decide the same. The satisfaction of the appropriate authority in the matter of making reference under Section 10(1) of the Act is a subjective satisfaction. Normally, the Government cannot decline to make reference for laches committed by the workman. If adequate reasons are shown, the Government is bound to refer the dispute to the appropriate court or forum for adjudication.

32. Even though, there is no limitation prescribed for reference of dispute to the Labour Court/Industrial Tribunal, even so, it is only reasonable that the disputes should be referred as soon as possible after they have arisen and after conciliation proceedings have failed, particularly, when disputes relate to discharge of workman. If sufficient materials are not put forth for the enormous delay, it would certainly be fatal. However, in view of the explanation offered by the workman, in the case on hand, as stated and discussed by us in the earlier paragraphs, we do not think that the delay in the case on hand has been so culpable as to disentitle him any relief. We are also satisfied that in view of the details furnished and the explanation offered, the workman cannot be blamed for the delay and he was all along hoping that one day his grievance would be considered by the management or by the State Government.

28. Now, the facts in Kuldeep Singh show that the services of the workman in that case were terminated w.e.f. 26.05.1992. He claimed that he had worked as Data Entry Operator with the employers

from 08.10.1990 to 28.11.1991 and thereafter on ad hoc basis from 28.11.1991 to 26.05.1992. It was his case that he had worked for more than 240 days in the twelve preceding months of the calendar. His juniors had been retained in service and fresh hands hired, after termination of his services. The employers were claimed to have violated Section 25-F to 25-H of the Industrial Disputes Act, 19478 (for short, "Central Act'). It appears from the report of the decision in Kuldeep Singh that after prolonged correspondence, the Government made a reference to the Labour Court on 22.11.1999. There was, thus, a period of more than five and a half years that elapsed between the workman's termination from service and the reference under Section 10(1)(c) of the Central Act. The Labour Court appears to have found the termination of services of the workman in violation of the Central Act, but answered the reference against him on the ground of delay alone. The Labour Court held that there was a delay of more than five and a half years between the termination of services of the workman, subject matter of the reference, and the time when demand for reference was raised. This delay was held to be fatal. The High Court affirmed the Labour Court.

29. It has also figured in the decision of their Lordships that the finding of the Labour Court on merits of the adjudication by the Labour Court were not impugned in the writ petition preferred by the employers. The decision in Kuldeep Singh further shows that the representations made by the workman during the period of five and a half years of delay, that were held to have kept the industrial dispute alive, were made in the context and circumstances best detailed in paragraph no. 13 of the report in Kuldeep Singh, which reads:

"16. The appellant workman has furnished the following information to show that after termination, he made several representations to various authorities. They are:

(i) Representation dated 10-6-1992 to the Hon'ble Minister of the respondents' Department.

(ii) Representation dated 11-5-1993 to the Chief Secretary of Haryana State.

(iii) Representation dated 7-12-1994 to the General Manager, IDDC, Ambala.

(iv) Representation dated 4-10-1995 to the General Manager, IDDC, Ambala.

(v) Representation dated 16-7-1996 to the Manager, Harton, Chandigarh.

Besides that, he attempted for the same job twice as under:

(i) Applied and interviewed for the same post out of 4 vacancies advertised in The Tribune dated 19-9-1992.

(ii) Applied and interviewed for the same post out of 60 vacancies in The Sunday Tribune dated 14-5-1995.

The factual details have not been seriously denied by the management."

(Emphasis by Court)

30. The decision in Kuldeep Singh, holding the workman to have explained the delay of five and a half years by representing his cause to the employers and

the other Authorities, including the Hon'ble Minister in the appropriate Department, has clear distinguishing features with the present case. For one, the period of five and a half years involved in **Kuldeep Singh** though in itself not relevant and decisive about the industrial dispute being alive, the period of time, given a man's short life, and that too, the working part of it, where representations were made by the workman to the Authorities and the Government may still be inferred to have kept the industrial dispute alive.

31. In the present case, by contrast, the period of time stretches to 15 years or at least more than 12 years, during which nothing more than representations to the employers and oral requests were made. During this period of 12 or 15 years, there is no case of the workman representing his grievance to the Government or any Authority, unlike in **Kuldeep Singh**. If a workman, given the limitation and the short time of a man's working life, rests content with unilaterally representing his cause just to the employers with no reasonable expectation of a possible relief or settlement, an inference about the industrial dispute being eclipsed with time has to be drawn. In the present case, decidedly, the workman has waited too long before he made the first move before the Conciliation Officer.

32. That apart, the evidence about the workman actually representing his case during all these 12 plus or 15 years is in grave doubt. About that issue, this Court has remarked in the earlier part of this judgment. By contrast in **Kuldeep Singh**, the factum of representations to various Authorities of the employers and the Hon'ble Minister was not seriously denied by the employers. The said feature also distinguishes the workman's case from that in **Kuldeep Singh**.

33. By contrast, the facts in Prabhakar show that the services of the workman were terminated on 1st April, 1985 and the industrial dispute was raised in the year 1999. It was raised after a period of more than 14 years. The workman there was appointed as a Clerk in the Sericulture Department of the Government on 1st April, 1984 and his services were terminated on 1st April, 1986. The relevant facts are succinctly set out in paragraph no.4 of the report in **Prabhakar**, which read:

4. The petitioner was appointed as a Clerk in the Sericulture Department, Government of Karnataka, Belgaum on 1-4-1984. His services were terminated on 1-4-1985. During the period 1-4-1985 till 1999, the petitioner did not approach any judicial/quasi-judicial authority challenging the said termination. In fact, not even a notice or legal notice was served upon the Management questioning the validity of the said termination. However, some time in the year 1999, the petitioner approached the appropriate Government alleging that his services were terminated illegally and in violation of the provisions of Section 25-F of the Act. Insofar as delay is concerned, in the claim made by the petitioner, the only explanation given was that he had approached the Management on several occasions with request to reinstate him in service and pay back wages and other consequential benefits. He also alleged that though the Management initially assured that they would reinstate him, but dragged on the matter on one pretext or the other and when they ultimately told him that they would not reinstate him into service, he had no alternative but to raise the industrial

dispute. The conciliation proceedings had started, which ended in failure. Thereafter, the appropriate Government referred the matter regarding validity of termination of the petitioner for adjudication.

34. The principles enunciated in **Prabhakar** show that contextually, it was a case with striking similarity to the case in hand. The workman commenced conciliation proceedings after a period of 14 years and for the delay, the only explanation given by him was a repeat approach to the Management on several occasions with a request to reinstate him in service. The Labour Court had answered the reference in favour of the workman, ordering his reinstatement in service without back-wages. The learned Single Judge of the High Court had upheld the award. The Division Bench of the High Court thought that it was a case where there was no industrial dispute alive worth adjudication, and quashed the award. Their Lordships of the Supreme Court upheld the view taken by the Division Bench, considering the period of time elapsed and the action of the workman in merely representing his case with the employers to explain his delayed approach for conciliation under the Act of 1947.

35. In the present case also, this Court finds that the workman spent too long a period of time, if at all he is to be believed, in going back to the employers time over again, where it was apparent that the same would elicit no meaningful response. At best, the workman was flogging a dead horse, from which the only inference that can be drawn is one of a dead industrial dispute. That apart, this Court reiterates, at the cost of some repetition, that the evidence in the case does not inspire confidence about the workman actually representing his case with the employers through all the applications that he has placed on record.

36. In view of all, that has been noticed hereinabove, this Court is of opinion that the industrial dispute that was referred for adjudication to the Labour Court, was indeed stale and a dead dispute.

37. In the result, this writ petition succeeds and is **allowed**. The impugned award dated 27.01.2012, published on 12.04.2012 passed by the Presiding Officer, Labour Court, Lucknow in Adjudication Case no.252 of 2005 is hereby **quashed.**

38. There shall be no order as to costs.

(2021)09ILR A1359
ORIGINAI JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.08.2021

BEFORE

THE HON'BLE NAHEED ARA MOONIS, J.
THE HON'BLE SAUMITRA DAYAL SINGH, J.

Writ Tax No. 220 of 2020

M/s Fashion Dezire & Anr. ...Petitioners
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Nishant Mishra, Sri Tanmay Sadh

Counsel for the Respondents:
A.S.G.I., Sri Krishna Kant Shukla, Sri Ramesh Chandra Shukla

A. Tax Law – Central Excise Duty - Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 - Sections 121(c), 121(c)(i), 123, 123(a)(i), 124, 127(5), 127(3).

127(4), 127(8) & 129(1)(a); Sabka Vishwas (Legacy Dispute Resolution) Scheme Rules, 2019: Rule 6(2).

Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 - Sections 121(c), 123 & 124 – There is a complete absence of any statutory intent to allow for change of case category from 'Litigation' or 'Arrears' or to redetermine of the 'tax dues' and EAP upon an adjudication order coming into existence during the pendency of proceedings under the Scheme. (Para 14, 16)

The computation of the 'tax dues' and consequently determination of the EAP would depend on the case category 'Litigation' or 'Arrears'. The computation of the EAP under 'Litigation' i.e. pending adjudication case category, would be substantially lower than that computed under the 'Arrears' category. Therefore, once the petitioner had (rightly) filed the (first) declaration on 10.10.2019 under the case category 'Litigation', determination of the EAP amount would be governed accordingly. It cannot be changed, thereafter. (Para 14)

B. The proceedings under the Scheme must necessarily take precedence over the regular adjudication proceedings under the Act. If the adjudication proceedings is allowed to continue and be concluded during the pendency of a Discharge Certificate proceeding, arising from a valid declaration filed under the Scheme, it would defeat the declaration made and, therefore, defeat the object of reform i.e. to end 'legacy disputes'. (Para 16)

Any interpretation given to the Scheme as may defeat its purpose and object of the reform, must be rejected. A purposive interpretation must be adopted. (Para 17)

The statute having prescribed the manner to raise the demand of EAP and to pay that amount by a particular method, it could not have been demanded or paid otherwise. (Para 18)

C. In absence of any statutory risk to the adjudication proceedings being hit by any rule of limitation, those proceedings should necessarily have been kept in abeyance till the conclusion of the proceedings under the Scheme. The order dated 30.12.2019 was tainted with impropriety, to the extent that order was passed during thirty (30) days from issuance of the SVLDRS-2 on 4.12.2019. Therefore, in the first place, it could not have been enforced till 03.01.2020, in view of the language of S.127(2) and Section 127(5) of the Scheme. (Para 19, 20)

Till 03.01.2020, the Order-in-Original dated 30.12.2019 remained in a state of suspended animation. Thereafter, it has continued in that state, till date. It is so, since, the petitioner disputed the computation of 'tax dues' and filed written objections/arguments to the EAP demanded on the (first) SVLDRS-2 dated 04.12.2019. In view of those objections filed and by virtue of Sections 127(3) and 127(4) of the Scheme, the Designated Committee was obligated to deal with the same and necessarily raise an appropriate final demand of EAP, on SVLDRS-3, preferably on or before 29.12.2019. (Para 21, 24)

D. In absence of consequences being provided, the time limit/provisions would remain directory. In absence of any consequence of abatement etc. being prescribed either by the Scheme or the Rules, the time limit of sixty (60) days under Section 127(4) of the Scheme is purely directory. The statutory authority/Designated Committee having failed to act within time contemplated under the Scheme, it cannot escape its obligation - to issue the appropriate final demand of EAP on form SVLDRS-3. (Para 23)

E. The principle "competence of a Court to try a case goes to the very root of the jurisdiction, and where it is lacking, it is a case of inherent lack of jurisdiction". Either the appeal from such order must have been filed on or before 30.06.2019 or the limitation to file that appeal must have expired (at the time of filing the declaration). In the present case, neither condition was fulfilled on 31.12.2019. Therefore the (second) declaration filed by the petitioners arising from the adjudication order dated 30.12.2019 was non-est. It was not maintainable in law. It was entertained and a

demand of EAP dated 17.01.2020 was raised thereon, without any jurisdiction. (Para 25)

Writ petition partly allowed, with direction upon the Designated Committee. Challenge to adjudication order dated 30.12.2019 not entertained. (Para 27, 28)

Writ petition partly allowed. (E-4)

Precedent followed:

1. M/s Jay Shree Industries Vs U.O.I. & anr., Writ Tax No. 832 of 2020, decided on 06.08.2021 (Para 17)

2. R.E.M.S. Abdul Hameed Vs Govindaraju & ors., (1999) 4 SCC 663 (Para 17)

3. Patna Improvement Trust Vs Smt.Lakshmi Devi, AIR 1963 SC 1077 (Para 18)

4. Sharif-Ud-din Vs AbduL Gani Lone, (1980) SCC 403 (Para 23)

5. Hiralal Patni Vs Sri Kali Nath, AIR 1962 SC 199 (Para 25)

Present petition assails estimate on the Form SVLDRS-2 dated 04.12.2019 and adjudication order dated 30.12.2019.

(Delivered by Hon'ble Naheed Ara Moonis, J.
&
Hon'ble Saumitra Dayal Singh, J.)

1. Heard Shri Nishant Mishra, learned counsel for the petitioners and Shri Ramesh Chandra Shukla, learned counsel for the Revenue. Shri Shukla has placed on record the written instructions received by him. The same has been marked as "X' and retained on record.

2. Present petition has been filed to challenge the estimate furnished to the petitioners on the Form SVLDRS-2 dated 04.12.2019, under the Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 (hereinafter referred to as 'the Scheme'), to the extent, the Estimate Amount Payable ('EAP' in short) has been determined at Rs. 70,11,055.50 against total disputed "tax dues' taken at Rs. 1,40,22,111/-. According to the petitioners, the net EAP amount should have been computed at Rs. 15,37,816.00 against the total disputed "tax dues' Rs. 80,75,626/- only, after adjusting the amount of Rs. 25,00,000/- pre-deposited by the petitioners to maintain their appeals, filed earlier. A further consequential mandamus has been sought, effectively to issue the final SVLDRS-3, etc. Last, challenge has been raised to the adjudication order dated 30.12.2019 passed, pending the proceedings under the Scheme.

3. Undisputedly, the petitioners were earlier issued a Show Cause Notice dated 05.06.2015 proposing a demand of central excise duty, Rs. 1,40,22,111/-, under the Central Excise Act, 1944 (hereinafter referred to as 'the Act'). That proceeding culminated in the Order-in-Original dated 26.09.2016. Thereby, the central excise duty demand was confirmed at Rs. 80,75,626/- only. Thus, the central excise demand, Rs. 59,46,648/-, as proposed by the Show Cause Notice dated 5.6.2015 was not confirmed by the Adjudicating Authority under the Act. Against the order dated 26.09.2016, the two petitioners filed their individual appeals before the Customs, Excise and Service Tax Appellate Tribunal (in short 'CESTAT'). Those two appeals came to be allowed vide order dated 15.05.2019. The order dated 26.09.2016 was set aside and the adjudication proceedings remitted to the Adjudicating Authority. That order attained finality and the adjudication proceedings became pending (in remand).

4. In that fact background, on 01.09.2019, the Central Government introduced the Scheme by Finance (No.2) Act, 2019. The petitioner no.1 filed its (first) declaration under the Scheme, on 30.10.2019, disclosing disputed "tax dues' Rs. 80,75,626/-, under the case category 'Litigation'.

5. It is the case of the petitioners that in the proceeding before the Designated Committee (under the Scheme), respondent no.3 was a member and simultaneously, he was the Adjudicating Authority under the Act - with respect to the Show Cause Notice dated 05.06.2015 (upon remand). Further, despite the order of the CESTAT dated 15.05.2019, the Designated Committee, at the insistence of respondent no.3 sought to treat the entire proposed demand (under Show Cause Notice dated 05.06.2015) Rs.1,40,22,111/- as the 'tax dues' under the Scheme. This prompted the petitioner no. 1 to file a Clarification Application before the CESTAT, on 1.11.2019, with respect to its final order dated 15.05.2019.

6. While that Clarification Application filed by the petitioners was pending, on 4.12.2019 itself, the Designated Committee (under the Scheme) disagreed with the computation of 'tax dues' and EAP disclosed by the petitioners on the (first) SVLDRS-1. It issued an estimate of 'tax dues' to the petitioners on the (first) Form SVLDRS-2 computing the EAP at Rs. 70,11,055.50, based on the excise duty liability Rs. 1,40,22,111/-, as proposed vide the Show Cause Notice dated 05.06.2015. The petitioners did not agree to the demand of EAP thus made. Thereupon, undeniably, the Designated Committee issued a notice dated 05.12.2019, fixing the date 06.12.2019, for final hearing. Accordingly, the petitioners filed their written objections/arguments dated 09.12.2019 and 26.12.2019. These facts and documents are on record. They have not been denied by the revenue. Some hearing also appears to have taken place. However, no final demand of EAP on SVLDRS-3, was issued by the Designated Committee.

7. While that proceeding remained thus pending, the Clarification Application filed by petitioner no. 1 came to be allowed by the Tribunal, on 7.1.2020. The Tribunal clarified that the subject matter of adjudication proceedings (in remand), pending before the Adjudicating Authority, was only with respect to the proposed demand Rs.80,75,626/-, as no appeal had been filed by the revenue against the Order-in-Original dated 26.09.2016.

8. On 30.12.2019, respondent no.3 passed the Order-in-Original, ostensibly in compliance of the Tribunal's order dated 15.5.2019 and adjudicated the Show Cause Notice dated 5.6.2015, on merits. It confirmed the disputed duty liability of the petitioner at Rs. 80,75,626/- and dropped the duty liability to the extent Rs. 59,46,648/-.

9. The Scheme that was to originally expire on 31.12.2019, was extended by the Central Government up to 15.01.2020. On 31.12.2019, the petitioner no.1 filed a (second) declaration disclosing the "tax dues' Rs.80,75,626/-, under the case category 'Arrears'. The (second) declaration filed was also processed by the Designated Committee and accordingly, on 17.01.2020, a second estimate of EAP was issued to the petitioner on form SVLDRS-2, computing that demand at Rs. 58,45,379.20. Admittedly, the petitioner no.1 did not deposit the amount of EAP

estimated on (first) form SVLDRS-2 issued on 4.12.2019 [against the (first) declaration], or on 17.01.2020 [against the (second) declaration].

10. Submission of learned counsel for the petitioner is: (i) in view of the Order-in-Original dated 29.06.2016 read with the order of the Tribunal dated 15.05.2019 and the further order dated 07.01.2020, the 'tax dues' pending adjudication were only Rs.80,75,626/-. Therefore, the EAP could be computed on that amount alone, under the case category 'Litigation'; (ii) since the (first) SVLDRS-2 was issued on 04.12.2019, respondent no.3 could not have passed the adjudication order on 30.12.2019; (iii) last, it has been submitted, the fact that petitioner no.1 filed its (second) declaration would be of no consequence and, in any case, it did not prejudice the rights of the petitioners arising under the (first) declaration, that had to be considered on its own merits.

11. The petition has been vehemently opposed by learned counsel for the revenue. He would contend, there is no error in the issuance of either of the two forms SVLDRS-2 and that the rights of the petitioners would be determined and governed by the proceedings on the second declaration filed by the petitioner no.1. The proceeding arising from the (first) declaration stood withdrawn or not pressed upon the petitioner no.1 filing and pursuing the (second) declaration. Since, the petitioners have not complied with either of the SVLDRS-2 issued to them, the writ petition lacks merit.

12. Having heard learned counsel for the parties and having perused the record, we proceed to consider the second submission advanced by learned counsel for the petitioner, first. The Scheme does not contain any express provision to stay a pending adjudication proceeding, by way of a legal effect/fiction arising from any declaration filed thereunder. Second, neither the petitioners nor the revenue challenged the earlier order of the Tribunal dated 15.05.2019 and there was no specific stay order operating against the same, in any proceeding.

13. Therefore, the proceedings in remand, arising under that order did not suffer from any inherent lack of jurisdiction or authority. At the same time, by necessary implication, springing from section 127(5)1 of the Scheme, the petitioner no. 1 had time till 03.01.2020 to deposit the net EAP amount communicated to it vide the (first) SVLDRS-2, issued on 04.12.2019, or to object to the same under section 127(3)2 read with section 127(4)3 of the Scheme. If deposited, it would foreclose the decision in the pending adjudication proceeding. It is so, because, under section 127(6)4 of the Scheme, upon that deposit made in compliance of the EAP demand, the reply filed by the petitioner no. 1 to the Show Cause Notice dated 05.06.2015 would stand withdrawn, on deemed basis.

14. Then, under section 1235 read with section 1246 and section 121(c)7 of the Scheme, the computation of the "tax dues' and consequently determination of the EAP would depend on the case category "Litigation' or "Arrears'. The computation of the EAP under "Litigation' i.e. pending adjudication case category, would be substantially lower than that computed under the "Arrears' category. There is a complete absence of any statutory intent to allow for change of case category from "Litigation' to "Arrears' or to redetermine of

the "tax dues' and EAP upon an adjudication order coming into existence during the pendency of proceedings under the Scheme. Therefore, once the petitioner had (rightly) filed the (first) declaration on 10.10.2019 under the case category "Litigation', determination of the EAP amount would be governed accordingly. It cannot be changed, thereafter.

15. Also, by virtue of section 127(8)8 read with Section 129(1)(a)9 of the Scheme, any demand of duty, even if created in the meanwhile, would not survive the issue of the Discharge Certificate. Again, issue of that certificate is a mandatory consequence of, deposit of the EAP amount.

16. Therefore, if the adjudication proceedings is allowed to continue and be concluded during the pendency of a Discharge Certificate proceeding, arising from a valid declaration filed under the Scheme, it would defeat the declaration made and, therefore, defeat the object of reform i.e. to end "legacy disputes'. Therefore, the proceedings under the Scheme must necessarily take precedence over the regular adjudication proceedings under the Act.

17. In view of that implied overriding effect arising to the Discharge Certificate (issued under section 127(8)8 of the Scheme), over the duty, interest and penalty, determined under the Act and; the limited time of ninety (90) days (from the date of filing of the declaration), contemplated under the Scheme, to conclude the proceedings - to issue that Discharge Certificate, there is inherent logic and purpose in the nature of things arising under the Scheme, as may commend to the Adjudicating Authority and or the Appeal Authority, as the case maybe to not conclude such proceeding before expiry of the time granted to deposit the EAP, under the relevant SVLDRS-2. In Writ Tax No. 832 of 2020, M/s Jay Shree Industries Vs. Union of India & Anr, decided on 06.08.2021, we have opined that the Scheme is a piece of reform legislation. In that case, relying on **R.E.M.S. Abdul Hameed v. Govindaraju & Ors. (1999) 4 SCC 663**, we have looked at the intention of the legislature to interpret the meaning of the word "penalty' appearing in Section 129(1)(a)9 of the Scheme. Here also, if we allow the Adjudicating Authority to conclude an adjudication proceeding during the pendency of a Discharge Certificate proceeding, it would run contrary to the intention of the Scheme to bring an end to the disputes under the Act. Any interpretation given to the Scheme as may defeat its purpose and object of the reform, must therefore be rejected. A purposive interpretation must therefore be adopted.

18. Then, under section 127(5)1 read with Rule 6(2)10 of the Sabka Vishwas (Legacy Dispute Resolution) Scheme Rules, 2019 (hereinafter referred to as the Rules), only that amount could be paid by the petitioner, electronically, as may be first communicated to it by the Designated Committee, on form SVLDRS-3. Here, under the (first) SVLDRS-2 form dated 04.12.2019, that time existed till 03.01.2020. Moreover, upon notice for hearing issued on 05.12.2019 and upon the objections filed by the petitioner on 09.12.2019 and 26.12.2019 and in view of the date of hearing fixed for 06.12.2019, that time did not run out since the Designated Committee failed to issue the mandatory final demand of EAP on SVLDRS-3 under section 127 (4)3 of the

Scheme read with Rule 6(2)10 of the Rules, on or before 29.12.2019 or thereafter. The statute having prescribed the manner to raise the demand of EAP and to pay that amount by a particular method, it could not have been demanded or paid otherwise. That rule stands long settled since a four Judge Supreme Court decision in **Patna Improvement Trust Vs. Smt. Lakshmi Devi, AIR 1963 SC 1077.**

19. For the above reasons and in absence of any statutory risk to the adjudication proceedings being hit by any rule of limitation, those proceedings should necessarily have been kept in abeyance till the conclusion of the proceedings under the Scheme. We cannot contemplate, what useful purpose could be served by continuing and concluding the adjudication proceeding during the pendency of the proceedings arising upon filing of the (first) declaration on SVLDRS-1, under the Scheme, on 30.10.2019. In fact, by their conduct the authorities under the Act could not have defeated the object of an otherwise valid proceedings under the Scheme.

20. That said, we are unable to reach a conclusion that the respondent no. 3 lacked inherent jurisdiction to pass the Order-in-Original dated 30.12.2019. As discussed above, we conclude that the said order was tainted with impropriety, to the extent that order was passed during thirty (30) days from issuance of the SVLDRS-2 on 04.12.2019. Therefore, in the first place, it could not have been enforced till 03.01.2020, in view of the language of section 127(2)11 and section 127(5)1 of the Scheme.

21. Thus, till 03.01.2020, the Order-in-Original dated 30.12.2019 remained in a state of suspended animation. Thereafter, it has continued in that state, till date. It is so, since, as noted above, the petitioner disputed the computation of "tax dues' and filed written objections/arguments to the EAP demanded on the (first) SVLDRS-2 dated 04.12.2019. In view of those objections filed and by virtue of sections 127(3)2 and 127(4)3 of the Scheme, the Designated Committee was obligated to deal with the same and necessarily raise an appropriate final demand of EAP, on SVLDRS-3, preferably on or before 29.12.2019.

22. That is so, since the Designated Committee fixed the date of post-decisional hearing on 06.12.2019 and entertained written objections dated 09.12.2019 and 26.12.2019, yet, it did not pass any order on those written objections/arguments filed by the petitioner. It also did not issue the revised/final statement in electronic form, being SVLDRS-3 under section 127(4)3 of the Scheme read with Rule 6(2)10 of the Rules. Since no communication was made to the petitioners on SVLDRS-3, the time provided under section 127(5)1 of the Scheme has not started running, yet. Therefore, the proceedings arising from the (first) declaration filed by the petitioner dated 30.10.2019 are still pending under the Scheme.

23. In absence of any consequence of abatement etc. being prescribed either by the Scheme or the Rules, the time limit of sixty (60) days under section 127(4)3 of the Scheme is purely directory. The statutory authority/Designated Committee having failed to act within time contemplated under the Scheme, it cannot escape its obligation - to issue the appropriate final demand of EAP on form SVLDRS-3. This conclusion we base on the principle

enunciated by the Supreme Court in **Sharif-Ud-din Vs. Abdul Gani Lone, (1980) SCC 403** that in absence of consequences being provided, the time limit/provisions would remain directory.

24. Therefore, the Designated Committee continues to be obliged to issue the final demand of EAP on form SVLDRS-3. That not done, the Order-in-Original, though it exists, continues in a state of animated suspension. It has not come to life. It cannot be given effect to. It confers no enforceable rights or obligations, at present. Only, if the petitioners fail to deposit the final EAP amount that may be demanded within thirty (30) days of issue of the demand on form SVLDRS-3, by the Designated Committee, the said order may come to life (in future) and become enforceable with rights of recovery and appeal etc., at that stage, in that contingency, only. Therefore, at present, EAP may be computed only on the basis of the (first) declaration on SVLDRS-1 dated 30.10.2019.

25. Coming to the third submission advanced by learned counsel for the petitioner, the (second) declaration filed by the petitioner, arising from the Order-in-Original dated 30.12.2019 first, as discussed above, even today, that order continues in a state of animated suspension, on account of the continued pendency of the(first) declaration filed on SVLDRS-1 dated 30.10.2019 filed by the petitioners. It serves no practical or legal purpose, at present. Therefore, it could not have given rise to the (second) declaration on form SVLDRS-1, filed on 31.12.2019. Even otherwise, by virtue of the section 121(c)(i)7 read with section 123(a)(i)5 of the Scheme, the cut-off date 30.06.2019 exists - to file a declaration with respect to any order that may have been passed upon conclusion of adjudication proceedings under the Act. Either the appeal from such order must have been filed on or before 30.06.2019 or the limitation to file that appeal must have expired (at the time of filing the declaration). In the present case, neither condition was fulfilled on 31.12.2019. Therefore the (second) declaration filed by the petitioners arising from the adjudication order dated 30.12.2019 was non-est. It was not maintainable in law. Thus, the (second) declaration, though filed by the petitioners, causes no legal effect. It was entertained and a demand of EAP dated 17.01.2020 was raised thereon, without any jurisdiction. It must therefore be ignored, notwithstanding the contention of the petitioners that it was filed by way of abundant caution. The principle "competence of a court to try a case goes to the very root of the jurisdiction, and where it is lacking, it is a case of inherent lack of jurisdiction", laid down by a Constitutional Bench of the Supreme Court in **Hiralal Patni Vs. Sri Kali Nath, AIR 1962 SC 199**, in the context of regular civil proceedings applies with equal force to the present quasi-judicial proceeding.

26. As to the first submission advanced by learned counsel for the petitioner, in view of the discussion made above, first, we are of the view, once a valid (first) declaration dated 30.10.2019 had been filed on SVLDRS-1, it had to be processed by the Designated Committee. In fact, that Committee did not accept the petitioner's disclosure thus made. Accordingly, it issued demand of EAP on SVLDRS-2 on 04.12.2019 and fixed 06.12.2019 as the date for the post-decisional hearing, in terms of section 127(3)2 of the Scheme. The Designated

Committee also took on record written objections/arguments filed by the petitioners dated 09.12.2019 and 26.12.2019 and it also appears to have heard the matter at some length. However, it did not discharge its statutory obligation and it did not respond to the same as mandated under section 127(4)3 of the Scheme. Having failed to issue the revised EAP demand on form SVLDRS-3, the (first) declaration of SVLDRS-1 (filed by the petitioners on 30.10.2019) is still pending. Since, the matter is still pending before the Designated Committee, we are not required to answer the question of determination of the EAP, at this stage.

27. In view of the above, we allow the writ petition, in part, with a direction upon the Designated Committee to necessarily consider the written objections/arguments filed by the petitioners dated 09.12.2019 and 26.12.2019, in response to the SVLDRS-2 dated 04.12.2019 and to issue the appropriate final demand of net EAP on form SVLDRS-3 to the petitioners within a period of thirty (30) days from the date of communication of this order, after hearing the parties and considering their respective contentions as to computation of the correct EAP amount. All further rights and liabilities will arise and be governed accordingly.

28. For reasons, given above, there is no occasion to entertain the writ petition with respect to the challenge raised to the adjudication order dated 30.12.2019, at this stage. To that extent, interference is declined.

29. Accordingly, the writ petition is **allowed in part**. No order as to costs.

(2021)09ILR A1367

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.08.2021

BEFORE

THE HON'BLE MAHESH CHANDRA TRIPATHI, J.

Writ Tax No. 309 of 2021

M/s North End Food Marketing Pvt. Ltd. ...Petitioner

Versus

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

Counsel for the Petitioner:
Sri Nishant Mishra, Sri Tanmay Sadh, Sri Rahul Agarwal, Sri Navin Sinha (Senior Adv.)

Counsel for the Respondents:
C.S.C.

A. Tax Law – Input tax credit - Warehouse (Development and Regulation) Act, 2007 - Erstwhile Central Excise Rules, 2002 - Rule 10 - GST Act, 2017 - Section 35 - Central Goods and Services Tax Rules, 2017 - Rules 56 & 57 - SGST Act, 2017 - Sections 17 & 108 - Uttar Pradesh Goods and Services Tax Rules, 2017 - U.P. Krishi Utpadan Mandi Niyamawali, 1965 - Rule 50A - CGST Act - Section 49(4) - Central Excise Rules, 1944 - Rule 57-F - Bombay Municipal Corporation Act, 1888 - Section 314.

SGST Rules, 2017 - Rule 86A - The rule is based on "reason to believe". "Reason to believe" must have a rational connection with or relevant bearing on the formation of the belief. It is a subjective term and can be interpreted differently by different individuals. (Para 33)

The powers, as conferred u/Rule 86A, could not have been exercised merely on the ground that an inquiry has been initiated as there is a suspicion that the transactions were sham. (Para 30, 57)

Rule 109 of the SGST Rules, 2017 provides for service of notice in Form GST RVN-01 before an order u/s 108 is passed and exhaustive procedure is given therein, which requires documents to be enclosed specifying the grounds on the basis of which the revisional jurisdiction is sought to be exercised. Contrarily, the notice dated 07.05.2021 was in fact issued without any ground on the basis of which it could be said that there was no material or record available before the respondent No. 3 (Commissioner, Commercial Tax) for exercising jurisdiction u/s 108. **Respondent No. 3 has assumed the jurisdiction u/s 108 merely on the basis of letter sent by the respondent No. 4, without calling for and examining the record of the Appeal filed by the petitioner company.** (Para 57)

Once the supervisory power is being exercised in absence of relevant record merely on the basis of certain noting, which is forwarded to the revisional authority for exercising the powers it is sheer misuse of the power. In the present matter, admittedly without summoning the record the notice was prepared by the subordinate officers in which two options were indicated to the revisional authority with an observation that in case second option is approved, accordingly stay order may be prepared. This may not be intention of the legislature while incorporating the said feature. The said practice cannot be accepted by this Court. (Para 60)

The order impugned has been passed in absence of record and the revenue authority has proceeded to endorse on the dotted line, which has been submitted by the subordinate officer. Even though, the appellate order was appealable, which clearly reflects that said action is contrary to the procedures contained therein. (Para 61)

B. SGST Act, 2017 - Section 108 – Jurisdiction – The jurisdiction u/s 108 can be exercised by the revisional authority on his own motion and upon information received by him or on request of Commissioner of Central Tax. **The pre-conditions to the exercise of this powers were two folds, namely, error in the order passed by an officer subordinate to the revisional authority and prejudicial to the interest of revenue.** The revisional authority had to call for the records, he had to examine such records, he had to be satisfied regarding fulfillment of the above two conditions and thereafter give opportunity to the assessee of being heard and on making appropriate inquiry the revisional authority is empowered to pass appropriate orders. **In the present matter, admittedly the respondent No. 3 has neither served any notice nor granted opportunity of hearing to the petitioner before passing the impugned order.** (Para 35, 36)

C. Natural Justice and jurisdiction u/s 108 - Rules of "natural justice" are not embodied rules. The phrase "natural justice" is also not capable of a precise definition. The underlying principle of natural justice, evolved under the common law, is to check arbitrary exercise of power by the State or its functionaries. Therefore, the principle implies a duty to act fairly, i.e. fair play in action. These rules can operate only in areas not covered by any law validly made. They do not supplant the law but supplement it. (Para 47)

An administrative order or decision in matters involving civil consequences, has to be made consistently with the rules of natural justice. The concept of natural justice is invariably read into administrative actions involving civil consequences, unless the statute, conferring power, excludes its application by express language. (Para 49)

Every quasi-judicial order must be supported by reasons. The rule requiring reasons to be given in support of an order is, like the principle of audi alteram partem, a basic principle of natural justice which must inform every quasi-judicial process and this rule must be observed in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law. (Para 55)

The order must be supported by reasons but unfortunately the revisional authority/ Commissioner did not choose to give reasons in support of order passed by him. This was in plain disregard to the requirement of law. The

said order does not satisfy the requirement of law. Therefore, the said action cannot be accepted. (Para 61)

Writ petition allowed. (E-4)

Precedent followed:

1. Sahara India (Firm) (1) Vs CIT, (2008) 14 SCC 151 (Para 22, 54)

2. A.K. Kraipak & ors. Vs U.O.I. & ors., AIR 1970 SC 150 (Para 47)

3. Income Tax Officer Vs M/s Madnani Engineering Works Ltd., Calcutta, (1979) 2 SCC 455 (Para 47)

4. Swadeshi Cotton Mills Vs U.O.I., AIR 1981 SC 818 (Para 48)

5. St. of Orissa Vs Binapani Dei & ors., AIR 1967 SC 1269 (Para 49)

6. Canara Bank Vs V.K. Awasthy, AIR 2005 SC 2090 (Para 50)

7. Mohinder Singh Gill & anr. Vs The Chief Election Commissioner, New Delhi & ors., (1978) 1 SCC 405 (Para 51)

8. Olga Tellis & ors. Vs Bombay Municipal Corporation & ors., [1985] 2 Supp SCR 51 (Para 52, 53)

9. C.B. Gautam Vs U.O.I. & ors., (1993) 1 SCC 78 (Para 53)

10. U.O.I. Vs Col. J.N. Sinha, [1971] 1 SCR 791 (Para 53)

11. Siemens Engg. & Manufacturing. Co. of India Ltd. Vs U.O.I., (1976) 2 SCC 981 (Para 55)

12. N. Ranga Rao & sons Vs St. of Karn. & ors., (2007) 9 SCC 691 (Para 56)

Precedent cited:

1. Anwar Hasan Khan Vs Mohd. Shafi, (2001) 8 SCC 540 (Para 18)

2. Malabar Industrial Co. Ltd. Vs CIT, (2000) 2 SCC 718 (Para 19)

3. CIT Vs Max India Ltd., (2007) 15 SCC 401 (Para 20)

4. Parul Mathew & Sons Vs CIT, 263 ITR 101 (Ker.) (Para 21)

5. CIT Vs Gabriel India Ltd., 203 ITR (Bom.) (Para 21)

6. CIT Vs Arvind Jewellers, 259 ITR 502 (Guj.) (Para 21)

7. Sun Beam Auto Ltd., (2009) TOIL-552-HC-Del-IT (Para 21)

8. CIT Vs Ratlam Coal Ash Co., 171 ITR 141 (MP) (Para 21)

9. CIT Vs Ganpat Ram Bishnoi, 151 Taxman (2008) 296 ITR 0292 (Para 21)

10. CIT Vs Mehrotra Brors., 270 ITR 157 (MP) (Para 21)

11. CIT Vs Associated Food Products (P) Ltd., 280 ITR 377 (MP) (Para 21)

12. Osram Surya Pvt. Ltd. Vs Commissioner of Central Excise, Indore, (2002) 9 SCC 20 (Para 27)

13. ALD Automative (P) Ltd. Vs CTO, (2019) 13 SCC 225 (Para 27)

14. Jayam & Co. Vs Commr., (2016) 15 SCC 125 (Para 27)

15. Bhikhubhai Vithlbhai Patel & ors. Vs St. of Guj., AIR 2008 SCC 1771 (Para 40)

16. Eicher Motors Ltd. Vs U.O.I., 1999 (106) ELT 3 (SC) (Para 37)

17. C.C.E. Vs Dai Ichi Karkaria Ltd., 1999 (112) ELT 353 (SC) (Para 38)

Present petition assails order dated 26.03.2021, passed by Commissioner, Commercial Tax, U.P. Lucknow.

(Delivered by Hon'ble Mahesh Chandra Tripathi, J.)

1. Heard Shri Navin Sinha, learned Senior Advocate assisted by Shri Nishant Mishra and Shri Rahul Agarwal for the petitioner company and Shri Bipin Kumar Pandey, learned Additional Chief Standing Counsel for the respondents.

2. This writ petition has been filed by M/s North End Food Marketing Pvt. Ltd. against the order dated 26.3.2021 passed by the respondent no.3/Commissioner, Commercial Tax, U.P. Lucknow by which he has accepted the proposal for revision submitted by the Additional Commissioner, Grade-1, Commercial Tax, Moradabad Zone, Moradabad and stayed the effect and operation of the order dated 10.3.2021 passed by the Additional Commissioner, Grade-II (Appeal)-1st, Commercial Tax, Moradabad, wherein, the appeal filed by the assessee/petitioner company was allowed and decision of the respondent no.5/Deputy Commissioner, Sector-1, State Tax, Chandausi, Sambhal (Assessing Officer), communicated to the petitioner vide e-mails dated 23.7.2020 & 06.8.2020 for blocking of credit, was set aside.

3. The petitioner is a company incorporated under the provisions of the erstwhile Companies Act, 1956 having its unit at Shaktinagar, Chandausi, District Sambhal, U.P.. It is a subsidiary company of M/s Sohanlal Commodity Management Pvt. Ltd1 dealing in the business of procuring commodities on behalf of its customers on Pan India basis, storing such commodities in the warehouses owned and operated by SCMPL and thereafter supplying such commodities to different persons on the instructions of the customers. The SCMPL is primarily engaged in providing warehousing services for which it is registered under the provisions of the Warehouse (Development and Regulation) Act, 2007. On account of multiplicity of operations, the petitioner company maintains its books of account electronically in a centralized system prescribed under Rule 10 of the erstwhile Central Excise Rules, 2002 and Section 35 of the GST Act read with Rules 56 & 57 of the Central Goods and Services Tax Rules, 20172.

4. The petitioner is mainly dealing in "Mentha" oil in the State of Uttar Pradesh and is dul y registered under the provisions of U.P. Value Added Tax Act, 20083. The petitioner availed the credit of input tax paid on the purchases made from the dealers registered in the State of Uttar Pradesh in accordance with the provisions of UPVAT Act and after deducting the same from the output tax payable, discharged the net tax liability as per provisions contained in UPVAT Act. After enactment of Central Goods and Services Tax Act, 20174 and U.P. Goods and Services Tax Act, 20175 the petitioner was allotted GSTIN No.09AABCN9927F1Z6 on 23.6.2018.

5. Section 16 in Chapter-V of SGST Act provides for eligibility and condition for taking input tax credit. The expressions "input tax", "input tax credit" and "output tax" have been defined in clauses (62) & (63) of Section 2 of the SGST Act, which read as under:-

"Sec. 2 (62) "Input Tax" in relation to a registered person, means the central tax, State tax, integrated tax or union territory tax charged on any supply of goods or services or both made to him and includes;-

a) the integrated goods and service tax charged on import of goods;

b) the tax payable under the provision of sub-section (3) & (4) of Section 9;

c) the tax payable under the provision of sub-section (3) & (4) of Section 5 of Integrated Goods and Service Tax Act (13 of 2017); or

(d) the tax payable under the provision of sub-sections (3) & (4) of Section 9 of Central Goods and Services Tax Act, 2017 but does not include tax paid under the composition levy;

Sec. 2(63) "Input Tax Credit" mean the credit of input tax;

Sec.2 (82) "output tax" in relation to a taxable person, means the tax chargeable under this Act on taxable supply of goods or services or both made by him or by his agent but excludes tax payable by him on reverse charge basis."

6. Section 16 (1) provides that every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in Section 49, be entitled to take credit of input tax charged on any supply of goods or services or both to him, which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person. Sub-section (2) provides that no registered person shall be entitled to take input tax credit unless he is in possession of a tax invoice, debit note or any other prescribed duty paying documents and he has received the goods or services or both. Section 17 of SGST Act provides for apportionment of credit and blocked credits. Sub-sections (1), (2), (3) & (4) provide for restricted credit, whereas sub-section (5) provides for circumstances in which credit is not admissible. Sub-section (6) confers powers on Government to prescribe the manner in which credits referred to in sub-section (1) and (2) may be attributed. Section 49 provides that every deposit made towards tax, interest, penalty, fee etc. shall be credited to the electronic cash ledger, whereas input tax credit as self-assessed in the return of registered person shall be credited to his electronic credit ledger. Section 49 also provides that the amount available in the electronic cash ledger may be used for making any payment towards output tax in such manner and subject to such conditions and within such time, as may be prescribed.

7. Section 164 confers power on the State Government to make rules for carrying out the provisions of the Act and in exercise of such powers, 'Uttar Pradesh Goods & Services Tax Rules, 20176 were notified by the State Government. Chapter-V of the UPGST Rules provides for 'Input Tax Credit'. Rule 36 (1) provides for the documents on the basis of which input tax credit shall be availed, whereas Rule 36 (3) provides that no input tax credit shall be availed in respect of any tax that has been paid in pursuance of any order where demand has been confirmed on account of any fraud, willful misstatement or suppression of facts. Rule 37 provides for reversal of input tax credit in case of non-payment of consideration by recipient to supplier. Rule 86 provides that electronic credit ledger shall be maintained in Form G.S.T.P.M.T.-02 for each registered person eligible for input tax credit on the common portal and every claim of input tax credit

shall be credited to the said ledger. The SGST Act and SGST Rules contain a complete code regarding eligibility conditions to take credit of input tax, manner in which such credit can be taken and also the manner in which such credit can be utilised for making payment towards output tax.

8. The Mentha oil, in which the petitioner company is trading, is extracted from Mentha herbs, which is grown in different districts of Uttar Pradesh. When the crop is ripened the farmers take the herbs to the distillation plants where Mentha oil is extracted. Then such farmers sell this oil to different registered dealers, who in turn supply the same to the petitioner company after issuing the tax invoice and E-way bill. The Mentha oil is an agricultural produce as defined under the U.P. Krishi Utpadan Mandi Adhiniyam, 1964 and hence, exit of specified agricultural produce from market area requires issuance of gate pass in Form V-A by the Market Committee under Rule 50A of U.P. Krishi Utpadan Mandi Niyamawali, 1965 as well as issuance of bill in Form IXR by the seller to the purchaser. Thus, the supply of Mentha oil is permissible only after issuance of gate pass by the Market Committee in Form V-A and bill in Form-9R by the supplier.

9. The petitioner company purchased Mentha oil from various suppliers on the strength of tax invoice issued by such suppliers. Since the petitioner is using warehousing services provided by SCMPL at different locations, hence e-way bills were also generated for movement of goods from the supplier's place to the warehouses operated by SCMPL. Such supply was also supported with gate pass in Form V-A issued by the Market Committee and bill in Form 9R by the supplier. Upon receipt of Mentha oil at warehouses of SCMPL, three samples are drawn for testing quality/properties of Mentha oil. After receipt of test reports, Mentha oil is warehoused, after making appropriate entry in stock register maintained at warehouses. The Mentha oil are not brought to the branches of petitioner situated within the State of U.P. The petitioner company maintains books of accounts electronically online and details of goods purchased and sold by the petitioner are also available at the warehouses operated by SCMPL.

10. During the period of 2018-19 the petitioner purchased Mentha oil from different suppliers including M/s Jai Balaji Trading Company. The purchases made from M/s Jai Balaji Trading Company during the period 2018-19 were to the tune of Rs.20188.39 lacs (inclusive of SGST & CGST). The Mentha oil so purchased was later on sold by the petitioner to different purchasers. The petitioner disclosed the input tax credit of Rs.1211.30 lakhs each of CGST & SGST in its returns as self-assessed and the same was credited to the electronic credit ledger of the petitioner in accordance with provisions of Section 49 of SGST/CGST Act. M/s Jai Balaji Trading Company made a cash payment of Rs.5,83,15,039/- to the Government exchequer from September, 2017 to March, 2019. The petitioner also made a cash payment of Rs.11,86,94,500/- apart from the adjustment of input tax credit against his output tax liability.

11. On 13.09.2019 the warehouses of SCMPL situated at Chandausi and Barabanki were searched by the officers of State tax, wherein 133 drums of Mentha oil kept at Chandausi warehouses were seized. On the same day, 1397 drums of Mentha

oil at Barabanki Warehouse of SCMPL belonging to six firms were also detained and prohibited for disposal after issuance of an order in Form GST INS-03. 161 drums of Mentha oil belonging to the petitioner were seized by the Deputy Commissioner (Special Investigation Branch), Unit-B, Ayodhya on 28.2.2020. It is pertinent to mention here that 1236 drums belonging to five firms had been released prior to the said seizure without realizing any tax or penalty. Various electronic devices alongwith 15 loose papers and various other documents were seized from the warehouse at Barabanki on 13.9.2019 and nothing adverse has been communicated to the petitioner from these seized materials. Hence, these documents should have been returned to the petitioner within 30 days as per provision of sub-section (3) of Section 67 of the SGST Act. Except a few electronic devices, which were returned in July 2020, no other documents have been returned to the petitioner despite repeated requests. Out of the seized documents, a regular book in the Form of 9R (Exhibit No.2) was seized which reflected all the regular and daily inward supplies of the petitioner. Stock register of warehouse (Exhibit No.3) was seized, wherein details of stock was recorded. After investigation, no discrepancy was found by the concerned officer. All the entries were verified from the arrival stock register of Mandi Samiti and nothing adverse has been communicated to the petitioner. The department was informed on 05.9.2019 that 133 drums of Mentha oil of the petitioner were lying at the Chandausi warehouse and as such, the said stock was not suppressed and the same was seized on 13.9.2019 treating it as out of books or undisclosed.

12. The warehouse of SCMPL at Barabanki informed to the Commercial Tax Department at Ayodhya on 05.9.2019 that 161 drums of the petitioner were lying at the warehouse and despite this disclosure the same stock was seized on 28.2.2020. The petitioner through its authorized representative appeared on every occasion, whenever he was summoned either at Moradabad or at Ayodhya. The search was conducted on 13.9.2019 at all the places and the petitioner submitted its detailed explanation on 21.9.2019. On 04.12.2019 the entire details relating to outward supplies of Mentha oil made by the petitioner including the ledger account, e-way bills, 9R Forms, gate passes, invoices, bank transactions, were made available to the officers of State tax and after submission of these details, out of 1397 drums of Mentha oil detained from the Barabanki warehouse, 1236 drums relating to other parties, were released by the officers of State tax. The summons dated 09.12.2019 under Section 70 of the SGST Act were issued to the officers of the petitioner company requiring their attendance for the purposes of furnishing various documents mentioned in the summon. Adequate responses were furnished by the petitioner on 27.12.2019 and 05.2.2020. Even after furnishing the required details, neither the officers of the State tax were disclosing the 'reason to believe' nor released the seized goods.

13. Aggrieved with the said proceeding, SCMPL alongwith the petitioner earlier approached this Court by preferring Writ Tax No.304 of 2020 **(M/s Sohan Lal Commodity Management Pvt. Ltd. and another vs. State of UP and ors)** for quashing the proceedings pursuant to the search and seizure operation carried out at the warehouses of M/s Sohan Lal Commodity Management Pvt. Ltd. at Chandausi on 13.09.2019 and on 13.9.2020

and 28.02.2020 at Barabanki. The writ jurisdiction was invoked on the ground that jurisdiction under Section 67 of SGST can be exercised only on the basis of 'reason to believe'. It had been pressed that neither there was evasion of tax or stock nor it was reflected in the books of accounts. Even though repeated requests were made to the officers of the State tax but neither 'reasons to believe' were disclosed nor released the seized good items. The aforesaid writ petition was disposed of by a Division Bench of this Court by an order dated 02.6.2020. Relevant portion of the order is extracted hereinafter:-

"During course of arguments, learned counsel for the petitioners confined his prayer only with respect to prayer no. (b) in the writ petition.

At the very outset, Shri Manish Goyal, learned Additional Advocate General appearing on behalf of the State has placed before us the judgment and order dated 22nd November, 2019 passed by the Hon'ble Apex Court in the Case of The State of Uttar Pradesh & Others Versus M/S Kay Pan Fragrance Pvt. Ltd in Civil Appeal No. 8941 of 2019 wherein the Apex Court has interalia observed as follows:-

"There is no reason why any other indulgence need be shown to the assessees, who happen to be the owners of the seized goods. They must take recourse to the mechanism already provided for in the Act and the Rules for release, on a provisional basis, upon execution of a bond and furnishing of a security, in such manner and of such quantum (even upto the total value of goods involved), respectively, as may be prescribed or on payment of applicable taxes, interest and penalty payable, as the case may be, as predicated in Section 67 (6) of the Act. In the interim orders passed by the High Court which are subject matter of assail before this Court, the High Court has erroneously extricated the assessees concerned from paying the applicable tax amount in cash, which is contrary to the said provision.

In our opinion, therefore, the orders passed by the High Court which are contrary to the stated provisions shall not be given effect to by the authorities. Instead, the authorities shall process the claims of the concerned assessee afresh as per the express stipulations in Section 67 of the Act read with the relevant rules in that regard. In terms of this order, the competent authority shall call upon every assessee to complete the formality strictly as per the requirements of the stated provisions disregarding the order passed by the High Court in his case, if the same deviates from the statutory compliances. That be done within four weeks without any exception.

We reiterate that any order passed by the High Court which is contrary to the stated provisions need not be given effect to in respect of all the cases referred in the affidavit by the State Government before this Court and fresh cases which may have been filed or likely to be filed before the High Court in connection with the subject matter of these appeals, by all concerned and are deemed to have been set aside/modified in terms of this order.

In view of this order, all the Writ Petitions pending before the High Court, list whereof has been furnished in the affidavit are deemed to have been disposed of accordingly. We have passed this common order to cover all cases of seizure during the relevant period, to obviate

inconsistency in application of Law and also to do away with multiple appeals required to be filed by the State/ assessee to assail the unstatable orders/directions passed by the High Court in subject writ petition(s) referred to in the affidavit filed by the State before this Court.

Accordingly, the appeals are disposed of in the afore stated terms. All pending applications are also disposed of."

Shri Manish Goyal, learned Addl. Advocate General has submitted that the Central Goods and Services Tax Act, 2017 provides a complete procedure for release of such goods, as contained in Section 67 of the Act read with Rule 141 of the relevant Rules. It has been further submitted by him that the petitioners should have approached the appropriate authority under Uttar Pradesh Goods and Services Tax Act, 2017 (in short "the Act") to ventilate their grievance.

Per contra, learned counsel for the petitioners has submitted that "Mentha Oil" has been seized in the matter which is perishable in nature but the concerned authority has not yet exercised its power under Section 67 of the Act (in short "the Act, 2017").

While rebutting the contention made by the learned counsel for the petitioners, learned Standing Counsel has stated that "Mentha Oil" is not perishable in nature and it has not been included in the schedule contained in the Notification dated 13th June, 2018 issued by Government of India.

Considering the facts and circumstances of the case, without expressing any opinion on the merits of the case, this writ petition is finally disposed of with a direction to the petitioners to make an appropriate application/representation before the concerned authority under the relevant provision of the Act, 2017 ventilating their grievances along with a certified copy of this order enclosing therewith a copy of the writ petition and its Annexures and, if any such application/representation is filed, the concerned authority shall make all endeavour to consider and decide the same by a reasoned and speaking order, after affording opportunity of personal hearing to the petitioners, in accordance with law expeditiously preferably within two weeks from the date of receipt of the said application."

14. The petitioner company was contesting with the respondents in respect of the drums seized from the warehouses of SCMPL by email dated 23.7.2020 sent by Goods and Services Tax network. For the first time, it was transpired to the petitioner through e-mail communication dated 23.7.2020 that the input tax credit available in the electronic credit ledger of the petitioner has been blocked and upon further enquiry, copy of the decision taken by the respondent no.5 was provided to the petitioner on 06.8.2020 informing that input tax credit of Rs.47,40,767/- under the CGST Act and Rs.*47,40,767/-* under the SGST Act (cumulative Rs.95,11,774/-) was blocked under Rule 86-A of the SGST Rules.

15. Aggrieved with the said decision/order dated 06.8.2020 the petitioner preferred statutory appeal before the Additional Commissioner, Grade-2 (Appeal)-I, State Tax, Moradabad/Appellate Authority and the same was registered as Appeal No.95/20

2019-20. Finally, the appeal was allowed by the Appellate Authority on 10.3.2021 with the following reasoning/findings:-

"(i) For invoking Rule 86A, there must exist reasons to believe that credit available in the electronic credit ledger was fraudulently availed or is ineligible;

(ii) The order dated 23.7.2020 does not disclose any reasons to believe, on the basis of which respondent no.5 has formed opinion that input tax credit was fraudulently availed or was ineligible;

(iii) From the documents submitted by petitioner relating to inward and outward supply, it is factually established that the same contains tax invoice no., date, description of goods, quantity, value, charged SGST & CGST, e-way bill no., no. of 6R & 9R, gate pass no. and vehicle no.. Before treating petitioner as a bogus entity, it was required on the part of respondent no.5 to verify the correctness of such details and reasons to believe that credit was fraudulently availed or was ineligible, could exist only if such details were found to be incorrect;

(iv) However, the decision dated 6.8.2020 does not disclose that the details furnished by petitioner were ever verified. The same was also pointed out to respondent no.5, but no explanation regarding the same was furnished.

(v) On the basis of material on record, it is clear that there was no reason to believe available with respondent no.5 that M/s Jai Balaji Trading Company has not received consideration in respect of outward supply or that the input tax credit availed by petitioner on inward supply was ineligible. The petitioner had disclosed the details of payment worth Rs.226.98 crores made against the outward supplies by Jai Balaji Trading Co. worth Rs.225.89 Crores (including the amount of S.G.S.T. and C.G.S.T after the price settlement). This factual aspect was not rebutted by the respondents.

(vi) On the basis of material available on record, it cannot be said that the inward supply of the petitioner was on the basis of fake invoices;

(vii) Unless and until the details submitted by petitioner are examined and verified after giving opportunity of cross examination, the same cannot be rejected;

(viii) Before blocking input tax credit, concerned authorities have not conducted any enquiry and the decision dated 6.8.2020 has been passed by respondent no.5 in a routine manner only on the basis of letter issued by Deputy Commissioner (SIB), Ayodhya, without verifying the same himself;

(ix) Principle of natural justice also requires that a speaking and reasoned order is passed, but respondent no.5 has passed a non-speaking and non-reasoned order;

(x) There is no requirement under the SGST Act that purchased goods must necessarily be first brought to the business premises and thereafter transported to the warehouse. Such practice is time saving, commercially expedient as warehouse has sophisticated infrastructure to store mentha oil, saves money and quality of mentha oil.

(xi) Adverse inference cannot be drawn if the business premises is found closed during inspection and the registered

person cannot be treated as bogus on the said ground."

16. The Appellate Authority, on the basis of aforesaid reasoning/findings, decided the appeal with the findings that before blocking the credit, there was no 'reason to believe' with respondent no.5 that the credit available in the ledger was fraudulently availed or was ineligible. The appeal was allowed and the directions were issued for unblocking of credit of Rs.47,71,007/- of SGST & CGST. However, the order was rectified under Section 161 on the same day i.e. 10.3.2021, wherein the amount of credit was corrected. Although the first appellate order dated 10.3.2021 is an appealable order and the appeal lies against the same before the Appellate Tribunal under Section 112 of the SGST Act but for the reason best known to the respondents, they have not preferred any appeal against the same. Inspite of repeated requests made by the petitioner-company the respondent no.5 had not complied with the directions of the Appellate Authority. Meanwhile, the respondent no.4/Additional Commissioner, Grade-I, Commercial Tax, Moradabad vide letter dated 16.3.2021 informed to the respondent no.3/Commissioner, Commercial Tax, U.P. Lucknow that the order dated 10.3.2021 passed by the Appellate Authority is legally and factually erroneous and as such, the same is required to be revised in the interest of the revenue. The respondent no.4 also requested the respondent no.3 to stay the effect and operation of the order dated 10.3.2021.

17. In this backdrop, Shri Navin Sinha, learned Senior Advocate appearing for the petitioner submitted that the respondent no.3, in most arbitrary manner and without application of mind, has passed the impugned order dated 26.3.2021 in complete violation of principles of natural justice. More so, the jurisdiction under Section 108 of the SGST Act can be exercised by the revisional authority on his own motion and upon information received by him or on request of Commissioner of Central Tax, if he considers that any decision or order passed by any officer subordinate to him is erroneous insofar as it is prejudicial to the interest of revenue and illegal or improper or has not taken into account any material facts, he may stay the operation of such decision or order and after giving the person concerned an opportunity of being heard, pass such order, as he thinks just and proper including enhancing or modifying or annulling the decision or order. He submitted that sub-section (2) of Section 108 of SGST Act prohibits exercise of powers under sub-section (1) with an exception contained in the proviso. Sub-section (2) prohibits exercise of revisional powers, if (a) the order has been subjected to an appeal under Section 107 or Section 112 or Section 117 or Section 118; or (b) the period specified under sub-section (2) of Section 107 has not yet expired or more than three years have expired after the passing of the decision or order sought to be revised; or (c) the order has already been taken for revision under this Section at an earlier stage; or (d) the order has been passed in exercise of the powers under sub-section (1). The proviso carves out an exception and provides that the revisional authority may pass an order on any point which has not been raised and decided in an appeal referred to in clause (a) of sub-section (2), before the expiry of period of one year from the date of order in such appeal or before the expiry of period of three years, whichever is later.

18. Shri Sinha would argue that once the word 'order' used in clause (a) refers to 'adjudication order' then such order can be passed by 'Adjudicating Authority'. Thus, the order passed in appeal by the Appellate Authority is not an 'Adjudication Order' and consequently, the same cannot be revised, in view of specific bar under clause (a) of sub-section (2) of Section 108 of SGST Act. It is submitted that under sub-sections (3) and (4) of Section 112 of SGST Act, the Commissioner may call for and examine the record of any appellate authority and may direct any officer subordinate to him to apply to the Appellate Tribunal for determination of such points as may be specified by the Commissioner. In terms of sub-section (4) if the authorised officer makes such application, then such application shall be treated as an appeal against the order passed by the Appellate Authority. Once there is a remedy of appeal provided under the statute against the order under Section 107 then Section 108 cannot be interpreted in a manner so as to confer power of revision against the same order. In this regard, he has placed reliance on the judgment of Supreme Court in **Anwar Hasan Khan vs. Mohd. Shafi7,** wherein, it was held that statute should be read as a whole and one provision should be read with another provision to make the provision consistent with the object sought to be achieved. The revisional powers can be exercised in respect of orders passed by authorities lower to appellate authority, whereas the order passed in appeal under Section 107 of SGST Act can be challenged before the Appellate Tribunal under Section 112 of SGST Act.

19. Shri Sinha pointed out that the revisional authority has exercised powers under Section 108 (1) and sought to revise the order dated 10.3.2021 passed by the Appellate Authority without calling for and examining the record of Appeal No.GST-95/2020 Year 2019-20. The respondent no.3 had not called for and examined the record of the aforesaid appeal as well as order dated 10.3.2021. The jurisdiction under Section 108 can be exercised only if the twin conditions specified in sub-section (1) of Section 108 are satisfied. The words 'erroneous insofar as it is prejudicial to revenue' have been used in other statutes like Income Tax Act, 1961 and the same has been considered by the Supreme Court in **Malabar Industrial Co. Ltd. vs. CIT8**, wherein it has been held that twin conditions are required to be satisfied i.e. (i) the order sought to be revised must be erroneous; & (ii) it is prejudicial to the interest of revenue. It is submitted that the impugned order does not record any finding to the effect that the order dated 10.3.2021 passed by the Appellate Authority is erroneous insofar as it is prejudicial to the interest of revenue. On the contrary, in the impugned order the respondent no.3 has only observed that prima facie, there is reason to believe that the order dated 10.3.2021 is improper and prejudiced to the interest of revenue. In absence of any finding to the effect, that the order dated 10.3.2021 is erroneous, the exercise of powers under Section 108 by the respondent no.3 is wholly without jurisdiction. The defect in the said order while invoking revisional powers under Section 108 cannot be cured at a later stage, inasmuch as Section 108 can be invoked only if the circumstances specified in Section 108 exist and once it is invoked, the respondent no.3 is free to pass such order as he thinks just and proper and thus the impugned order suffers from inherent lack of jurisdiction.

20. Shri Sinha further pointed out that every loss of the revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interest of revenue. An order can be erroneous only when it is based on incorrect assumption of facts and incorrect assumption of law or without applying principles of natural justice or without applying mind. In the present case the Appellate Authority has concluded that there were no reasons to believe with respondent no.5 that credit was fraudulently availed or ineligible. This conclusion is based on findings recorded in the order dated 10.3.2021 to the effect that the reasons to believe must exist for exercise of power under Rule 86-A. Moreover, the order dated 23.7.2020 does not disclose any reasons to believe; before examining documents furnished by the petitioner company, credit was blocked in a routine manner without application of independent mind and statement of third person cannot be relied upon without granting opportunity of cross-examination. The order dated 10.3.2021 passed by the Appellate Authority is neither based on incorrect assumption of facts or law, inasmuch as the entire material facts and relevant law in relation to exercise of power under rule 86A by the respondent no.5 have been considered by the Appellate Authority and adequate opportunities were given to respondent no.5 alongwith senior officers including respondent no.4 to justify his action under Rule 86-A. The observation, that the order dated 10.3.2021 is prejudiced to revenue, is also irrelevant, inasmuch as the requirement of Statute is 'prejudicial to the interest of revenue' and not 'prejudiced to the interest of revenue'. He has placed reliance on the judgments in **Malabar Industrial Co. Ltd. vs. CIT9 and CIT v. Max India Ltd.10**, in which it was held by the Apex Court that if the Appellate Authority has taken a view to which the respondent no.3 does not agree, the same does not make the order dated 10.3.2021 prejudicial to the interest of revenue unless the order dated 10.3.2021 is, otherwise, sustainable in law.

21. Shri Sinha would argue that in the present case, there is no finding as to show that the order dated 10.3.2021 is unsustainable in law and therefore, the observation of respondent no.3 regarding 'prejudiced to the interest of revenue' is wholly misplaced. The impugned order, being a quasi-judicial order, affects the rights of the petitioner, and it could not be passed on the prima facie opinion. After conducting due enquiry once the Appellate Authority has passed a detailed and reasoned order then the respondent no.3 cannot assume jurisdiction to revise such order simply on the ground that the revenue is not happy with the order and under the garb of revision, the respondent no.3 cannot be allowed to conduct a fishing and roving enquiry in the matter. In this regard, he has placed reliance on the judgments in **Paul Mathew & Sons v. CIT11, CIT v. Gabriel India Ltd12; CIT v. Arvind Jewellers13; Sun Beam Auto Limited14, CIT v. Ratlam Coal Ash Co.15, CIT v. Ganpat Ram Bishnoi 152 Taxman16, CIT v. Mehrotra Brothers17 and CIT v. Associated Food Products (P) Ltd.18.**

22. He further submitted that the respondent no.3 has neither served any notice nor granted opportunity of hearing to the petitioner before passing the order impugned. Rule 86A could not have been invoked by the respondents during the investigation or inquiry. Rule 86A has prescribed a mandatory procedure to be followed for the purpose of invoking the same. The Rule provides for "reasons to be

recorded in writing" for blocking or not allowing the utilization of the ITC. It is argued that the procedure, as prescribed under Rule 86A of the rules, requires two conditions to be satisfied; namely, recording of the reasons in writing by the officer ordering blocking of the ITC and secondly, communication of such reasons to the affected person. It is argued that the bare minimal requirement of the principles of natural justice is recording of reasons and communicating such reasons to the affected party. The impugned action of the respondent no.3 clearly entails civil consequences inasmuch as input tax credit of the petitioner has been blocked. He has also placed reliance on the judgment in **Sahara India (Firm) (1) v. CIT19.** He has also placed reliance on the RTI reply dated 28.7.2021 issued by the Deputy Commissioner (Administration) and Public Information Officer, Commercial Tax, Moradabad, wherein, it has been informed that the records of the Appellate Authority were neither called for by the office of respondent no.3 nor the same were ever dispatched by the office of the Appellate Authority to the office of the respondent no.3.

23. In such circumstances, referred to above, Shri Sinha prays that there being merit in the writ petition, the same be allowed and the reliefs prayed for in the writ petition may be granted.

24. Per contra, Shri B.K. Pandey, learned Additional Chief Standing Counsel appearing for the respondents has vehemently opposed the writ petition. Shri Pandey submitted that on the basis of Red Flag Data Analysis, Local Information and Reiki of this, it was found that in the business done by the petitioner company the actual value of the goods being displayed 'exchange' is not taking place. There was strong reason to believe that actual supply of goods by the merchant by creating a network can be obtained in large quantities without actual supply of goods. The search of the petitioner company was made on 13.9.2019, wherein, it was found that the company was not found doing business anywhere nor trading books of account were found at the site. From the initial analysis itself, it came to light that certain other firms are selling in huge quantities to the petitioner company. Six firms were also investigated on 22.10.2019 and out of these firms, M/s Jai Balaji Trading Company, Barabanki was not found in existence at its declared business place, whereas, supply of Rs.248.85 crores has been made by the said firm to the petitioner firm. Upon making further investigation it was found that the owner of the said firm is residing in Delhi. On analysis of the information available online, it was found that the rules of SEBI and MCX have been violated and fraud has been done in the guise of online trading by the firm in question.

25. Shri Pandey argued that ITC has been used by showing the purchase of about Rs.250 crores from non-existent firm M/s Jai Balaji Trading Company, whereas, it is clear from the money trail of the bank statement that only Rs.5 crore has been paid against it. In this way, ITC has been obtained through bogus invoices. On analysis of bank account it was also found that the petitioner company paid a fixed amount of Rs.22,500/- per month to the proprietor of M/s Jai Balaji Trading Company, Barabanki. From the money trail of the petitioner's bank statement it was revealed that huge money has been transacted with some suspicious names/firms but on perusal of returns, no

purchase/sale was declared from these dealers and most of these firms have been paid a fixed amount every month. The fixed monthly payment to the aforesaid persons makes it clear that these persons are employees of the firm and are on the payrolls, in whose names the trading is done indirectly through MCX online. Moreover, it was also found that Mentha oil was bought and sold by these employees and some other proxy firms indirectly through funding on MCX. The billing to a non-existent firm opened in the name of any of its own employees/persons generated a huge amount of ITC by showing purchases from the same firm in its own name without making actual payment and receiving fake/bogus invoices.

26. It has been submitted that as per SEBI guidelines, only 40 metric tonnes of Mentha were allowed to be bought and sold to any individual in a month and 400 tonnes to a member of MCX. Due to this compulsion the stock positioning was done by the petitioner company by raising a group of persons on the platform of MCX at different time intervals and maximum stock of the future market, which led to a huge jump in the rates of Mentha oil. After initiation of the investigation against the trader in question, the rate of Mentha oil has not reached more than Rs.1300 per kg. The physical delivery of the purchase and sale of online platforms by C Group firms has been shown to Mrs. Abhishek Agarwal, Neetu Gupta and Yash Gupta. In the GST tax regime, these firms are neither registered to act as agents nor are they registered to deal with Mentha oil. On the aforesaid basis, out of the amount available in the credit ledger of the petitioner company, SGST amounting to Rs.4740767.00 and CGST amounting to Rs.4771007.00 i.e. total ITC of Rs.9511774.00 was blocked. As per arrangements made in the Circular dated 03.7.2020, the information regarding blocking of credit was duly sent to the petitioner company by e-mail, wherein the reasons for blocking the credit were mentioned. The said order was assailed by the petitioner company before the First Appellate Officer by preferring Appeal No.GST-95/20/Year 2019-Appeal and the same was allowed by the First Appellate Officer. Against the aforesaid order, the Additional Commissioner Grade-1, Moradabad vide his letter dated 16.3.2021 moved an application for restoration. In compliance thereof, the Commissioner, Commercial Tax vide its order dated 26.3.2021 stayed the effect and operation of the order having found factual wrong and prejudicial to the interest of revenue.

27. Shri Pandey further argued that Section 49 (4) of CGST Act empowers the State Government to determine the conditions for the use of funds available in the credit ledger for payment of any output tax. Section 49 (4) provides that the amount available in the electronic credit ledger may be used for making any payment towards output tax under this Act or under the Integrated Goods and Services Tax Act in such manner and subject to such conditions and within such time, as may be prescribed. Section 16 of the Act determines the eligibility and conditions for claiming input credit and empowers the Government to impose conditions and restrictions through rules. Section 16 (2) of the Act prescribes the entitlement of input credit. It is clear from Section 16 (2) (b) of the Act that there is no entitlement of input credit without receipt of goods or services. In view of the increasing cases of loss to the exchequer through bogus ITC claims on the basis of bogus forms, it was recommended by the

GST Council to bring Rule 86A of GST Rules. There is no provision in Rule 86-A to provide an opportunity of being heard before blocking the credit. The restrictions prescribed by Rule-86A are for a limited period and are not in any way contrary to Section 73/74 or any other provisions of the Act. In fact, the ban was imposed for a limited period under Rule 86A. With regard to credit, proceedings are done naturally in due course and there is a legal arrangement to provide proper opportunity of being heard to the registered person concerned at the time of proceeding under Section 73/74. In the investigation, it was found that only paper invoice has been received by the petitioner without receiving the goods. Rule 86A (1) empowers the Commissioner, Commercial Tax, U.P. to authorize the officer subordinate to him to take action under Rule 86A. The Commissioner, Commercial Tax, Uttar Pradesh as the revisional authority vide Circular dated 24.12.2019 has the right to review the decision or order passed under the Act on the grounds mentioned in Section 108 (1). In support of his submission, he has placed reliance on the judgment of Supreme Court in **Osram Surya Pvt. Ltd vs. Commissioner of Central Excise, Indore20,** wherein it was held that a rule fixing time limit for exercise of a right does not take away any vested right. He has also placed reliance on the judgment in **ALD Automative (P) Ltd. vs. CTO21**; in which it was held that input credit is in the nature of benefit/concession extended to the dealer under the statutory scheme. The concession can be received by the beneficiary only as per the scheme of the Statute. The same view has been reiterated by the Supreme Court **in Jayam & Co. v. Commr.22.**

28. Shri Pandey argued that the newly inserted Rule 86A (w.e.f. 26.12.2019) confers power upon the authority concerned to block the ITC, if it is prima facie found that the transactions are fraudulent. He submitted that over a period of time the Government has unearthed many cases of fake input tax credit due to issuance of fake invoices, issuance of invoices without supply and other fraudulent activities which has led to decline in the revenue's exchequer. According to Shri Pandey, to meet with such situations, the Central Government introduced the concept of blocking of input tax credit by way of Rule 86A of the CGST Rules, 2017. In other words, according to Shri Pandey, the object behind the introduction of Rule 86A of the Rules is to curb such fraudulent activities. The supplier of the petitioner company has neither done business from any of his declared place of business nor books of account have been kept at any declared place of business. Therefore, there is sufficient ground to believe that no goods have actually been received by the petitioner company from its supplier M/s Jai Balaji Trading Company Barabanki and only invoices have been received. As per provisions contained in Section 16 (2) (b) the petitioner is not eligible to claim input credit on the basis of the invoices received by the petitioner company. The action in respect of bogus invoices received before implementation of Rule 86A is completely in accordance with the law. The notice has been issued to the petitioner company on 07.5.2021 to appear in the office of Commissioner, Commercial Tax, U.P. on 02.6.2021 for hearing. The order passed by the Appellate Authority under Section 108 of UPGST Act is in consonance with the order of the revisional authority passed by the Appellate Tribunal under Section 113 and the order passed by the High court under Section 117 as well as the order of

Hon'ble Apex Court under Section 118. The stay order has been passed by the revisional authority under Section 108 (1) of UPGST.

29. In such circumstances, referred to above, Shri Pandey prays that the present writ petition does not merit any consideration and the same be dismissed.

30. Having heard the learned counsel appearing for the parties and having gone through the materials available on record, the question that falls for consideration is whether pending inquiry or investigation into the allegations of fraudulent transactions with respect to fake/bogus invoices for the purpose of availing the ITC, the respondents could have blocked/debited the input tax credit in the electronic credit ledger of the petitioner company by virtue of the power under Rule 86A of the SGST Rules, which came into force vide Notification dated 05.2.2020 and further the revisional authority has rightly invoked/exercised power under Section 108 and sought to revise order passed by the Appellate Authority without adhering the procedure and especially without calling for and examining the record of the Appeal No.GST-95/2020 Year 2019.

31. Before adverting to the rival submissions made on either side, the Court may first look into the provisions of Rule 86A of the Rules. Rule 86A reads thus;

"86A**. Conditions of use of amount available in electronic credit ledger.-**

(1) The Commissioner or an officer authorised by him in this behalf, not below the rank of an Assistant Commissioner, having reasons to believe that credit of input tax available in the electronic credit ledger has been fraudulently availed or is ineligible in as much as-

a) the credit of input tax has been availed on the strength of tax invoices or debit notes or any other document prescribed under rule 36-

i. issued by a registered person who has been found non- existent or not to be conducting any business from any place for which registration has been obtained; or

ii. without receipt of goods or services or both; or

b) the credit of input tax has been availed on the strength of tax invoices or debit notes or any other document prescribed under rule 36 in respect of any supply, the tax charged in respect of which has not been paid to the Government; or

c) the registered person availing the credit of input tax has been found non-existent or not to be conducting any business from any place for which registration has been obtained; or

d) the registered person availing any credit of input tax is not in possession of a tax invoice or debit note or any other document prescribed under rule 36,

may, for reasons to be recorded in writing, not allow debit of an amount equivalent to such credit in electronic credit ledger for discharge of any liability under section 49 or for claim of any refund of any unutilised amount.

(2) The Commissioner, or the officer authorised by him under sub-rule

(1) may, upon being satisfied that conditions for disallowing debit of electronic credit ledger as above, no longer exist, allow such debit.

(3) Such restriction shall cease to have effect after the expiry of a period of one year from the date of imposing such restriction.".

32. Having referred to Rule 86A above, the Court may now look into Sections 16 and 108 (1) and (2) of the CGST Act. The same read thus;

"Section 16 - **Eligibility and conditions for taking input tax credit**

(1) Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person.

(2) Notwithstanding anything contained in this section, no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless,--

(a) he is in possession of a tax invoice or debit note issued by a supplier registered under this Act, or such other tax paying documents as may be prescribed;

(b) he has received the goods or services or both.

Explanation.--For the purposes of this clause, it shall be deemed that the registered person has received the goods or, as the case may be, services-

(i) where the goods are delivered by the supplier to a recipient or any other person on the direction of such registered person, whether acting as an agent or otherwise, before or during movement of goods, either by way of transfer of documents of title to goods or otherwise;

(ii) where the services are provided by the supplier to any person on the direction of and on account of such registered person.;

(c) subject to the provisions of section 41 or section 43A, the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilisation of input tax credit admissible in respect of the said supply; and

(d) he has furnished the return under section 39:

Provided that where the goods against an invoice are received in lots or installments, the registered person shall be entitled to take credit upon receipt of the last lot or installment:

Provided further that where a recipient fails to pay to the supplier of goods or services or both, other than the supplies on which tax is payable on reverse charge basis, the amount towards the value of supply along with tax payable thereon within a period of one hundred and eighty days from the date of issue of invoice by the supplier, an amount equal to the input tax credit availed by the recipient shall be added to his output tax liability, along with

interest thereon, in such manner as may be prescribed:

Provided also that the recipient shall be entitled to avail of the credit of input tax on payment made by him of the amount towards the value of supply of goods or services or both along with tax payable thereon.

(3) Where the registered person has claimed depreciation on the tax component of the cost of capital goods and plant and machinery under the provisions of the Income-tax Act, 1961, the input tax credit on the said tax component shall not be allowed.

(4) A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or invoice relating to such debit note pertains or furnishing of the relevant annual return, whichever is earlier.

Provided that the registered person shall be entitled to take input tax credit after the due date of furnishing of the return under section 39 for the month of September, 2018 till the due date of furnishing of the return under the said section for the month of March, 2019 in respect of any invoice or invoice relating to such debit note for supply of goods or services or both made during the financial year 2017-18, the details of which have been uploaded by the supplier under sub-section (1) of section 37 till the due date for furnishing the details under sub- section (1) of said section for the month of March, 2019.

Section 108 - **Powers of Revisional Authority –**

(1) Subject to the provisions of section 121 and any rules made thereunder, the Revisional Authority may, on his own motion, or upon information received by him or on request from the Commissioner of central tax, call for and examine the record of any proceedings, and if he considers that any decision or order passed under this Act or under the central Goods and Services Tax Act, 2017 by any officer subordinate to him is erroneous in so far as it is prejudicial to the interest of revenue and is illegal or improper or has not taken into account certain material facts, whether available at the time of issuance of the said order or not or in consequence of an observation by the Comptroller and Auditor General of India, he may, if necessary, stay the operation of such decision or order for such period as he deems fit and after giving the person concerned an opportunity of being heard and after making such further inquiry as may be necessary, pass such order, as he thinks just and proper, including enhancing or modifying or annulling the said decision or order.

(2) The Revisional Authority shall not exercise any power under sub-section (1), if (a) the order has been subject to an appeal under section 107 or section 112 or section 117 or section 118; or (b) the period specified under sub-section (2) of section 107 has not yet expired or more than three years have expired after the passing of the decision or order sought to be revised; or (c) the order has already been taken for revision under this section at an earlier stage; or (d) the order has been

passed in exercise of the powers under sub-section (1):

Provided that the Revisional Authority may pass an order under sub-section (1) on any point which has not been raised and decided in an appeal referred to in clause (a) of sub-section (2), before the expiry of a period of one year from the date of the order in such appeal or before the expiry of a period of three years referred to in clause (b) of that sub-section, whichever is later."

33. Rule 86A undoubtedly could be said to have conferred drastic powers upon the proper officers if they have reason to believe that the activities or invoices are suspicious. The Rule 86A is based on "reason to believe". "Reason to believe" must have a rational connection with or relevant bearing on the formation of the belief. It is a subjective term and can be interpreted differently by different individuals. The Constitutional validity of Rule 86A of the Rules is not under challenge in the present case and the Court does not intend to test its validity in the absence of any specific challenge to the same. In such circumstances, the Court would confine its adjudication in the present litigation only to the question, whether the respondents could be said to be justified in invoking Rule 86A of the Rules for the purpose of blocking the input tax credit of the petitioner company pending the inquiry as regards the fraudulent transactions.

34. The Rule 86A is in respect of the power and procedure for blocking the input tax credit (ITC) in the electronic credit ledger of a registered person. A bare reading of Section 86A indicates that the Commissioner or an officer authorised by him in this behalf, not below the rank of an Assistant Commissioner, having reasons to believe that credit of input tax available in the electronic credit ledger has been fraudulently availed or is ineligible, may, for reasons to be recorded in writing, not allow debit of an amount equivalent to such credit in electronic credit ledger for discharge of any liability under section 49 or for claim of any refund of any unutilised amount. The invocation of Rule 86A of the Rules for the purpose of blocking the input tax credit may be justified, if the concerned authority or any other authority, empowered in law, is of the prima facie opinion based on some cogent materials that the ITC is sought to be availed based on fraudulent transactions like fake/bogus invoices etc. However, the subjective satisfaction should be based on some credible materials or information and also should be supported by supervening factor. It is not any and every material, howsoever vague and indefinite or distant remote or far-fetching, which would warrant the formation of the belief. The power conferred upon the authority under Rule 86A of the Rules for blocking the ITC could be termed as a very drastic and far-reaching power. Such power should be used sparingly and only on subjective weighty grounds and reasons. The power under Rule 86A of the Rules should neither be used as a tool to harass the assessee nor should it be used in a manner, which may have an irreversible detrimental effect on the business of the assessee. The aspect of availing the credit and utilization of credit are two different stages. The utilization of credit is a vested right. No vested right accrues before taking credit. There needs to be some guidelines or procedure for the purpose of invoking Rule 86A of the Rules. In the absence of the same, Rule 86A could be misused and may have an irreversible

and detrimental effect on the business of the person concerned.

35. The jurisdiction under Section 108 of the SGST Act can be exercised by the revisional authority on his own motion and upon information received by him or on request of Commissioner of Central Tax, if he considers that any decision or order passed by any officer subordinate to him is erroneous insofar as it is prejudicial to the interest of revenue and illegal or improper or has not taken into account any material facts, he may stay the operation of such decision or order and after giving the person concerned an opportunity of being heard, pass such order, as he thinks just and proper including enhancing or modifying or annulling the decision or order. In the present matter, admittedly the respondent no.3 has neither served any notice nor granted opportunity of hearing to the petitioner before passing the impugned order.

36. The pre-conditions to the exercise of this powers were two folds, namely, error in the order passed by an officer subordinate to the revisional authority and prejudicial to the interest of revenue. Once these two conditions stood fulfilled, the revisional authority was authorized to give an opportunity to the assessee of being heard and after making such inquiry as he thought fit he could pass appropriate orders as the circumstances of the case would justify. This power was essentially a supervisory power. However, in order to ascertain whether the officer subordinate to him had passed an erroneous order, which was also prejudicial to revenue, the Commissioner was required to call for and examine the record of such proceedings. Therefore, the revisional authority had to call for the records, he had to examine such records, he had to be satisfied regarding fulfilment of the above two conditions and thereafter give opportunity to the assessee of being heard and on making appropriate inquiry the revisional authority is empowered to pass appropriate orders.

37. In **Eicher Motors Ltd. vs. Union of India23**, the validity and application of the scheme as modified by introduction to Rule 57F (read as 57F (4-A) of the Central Excise Rules, 1944 under which the credit which was lying unutilised on 16th March, 1995 with the manufacturers, stood lapsed in the manner set out therein, was questioned. Paras 4 and 5 of the judgment are quoted hereinafter:-

"4.....As pointed out by us that when on the strength of the rules available certain acts have been done by the parties concerned, incidents following thereto must take place in accordance with the scheme under which the duty had been paid on the manufactured products and if such a situation is sought to be altered, necessarily it follows that right, which had accrued to a party such as availability of a scheme, is affected and, in particular, it loses sight of the fact that provision for facility of credit is as good as tax paid till tax is adjusted on future goods on the basis of the several commitments which would have been made by the assessees concerned. Therefore, the scheme sought to be introduced cannot be made applicable to the goods which had already come into existence in respect of which the earlier scheme was applied under which the assessees had availed of the credit facility for payment of taxes. It is on the earlier scheme necessarily the taxes have to be adjusted and payment made complete. Any manner or mode of application of the said rule would result in affecting the rights of the assessees.

5. We may look at the matter from another angle. If on the inputs the assessee had already paid the taxes on the basis that when the goods are utilised in the manufacture of further products as inputs thereto then the tax on these goods gets adjusted which are finished subsequently. Thus, a right accrued to the assessee on the date when they paid the tax on the raw materials or the inputs and that right would continue until the facility available thereto gets worked out or until those goods existed. Therefore, it becomes clear that Section 37 of the Act does not enable the authorities concerned to make a rule which is impugned herein and, therefore, we may have no hesitation to hold that the rule cannot be applied to the goods manufactured prior to 16.3.1995 on which duty had been paid and credit facility thereto has been availed of for the purpose of manufacture of further goods."

38. As significant reliance has been placed on Eicher Motors Ltd. (supra), the Court may also look into the decision of the Supreme Court in the case of **C.C.E vs. Dai Ichi Karkaria Ltd.24**. In the said case, the manufacturers purchased raw material and used the same in the manufacture of an intermediate product and, in turn, used the intermediate product in the manufacture of the final product. The raw material and the intermediate product were liable to excise duty and they were specified goods for the purposes of the Modvat Scheme. The assessable value of the intermediate product for the purposes of excise duty in the instant case was admittedly to be determined on the basis of its cost which necessitated the taking into account of the cost of the raw material. The Revenue contended that the excise duty paid by the seller on the raw material was also to be included in the cost of the excisable goods (the intermediate product) in this case. On the other hand, the manufacturers contended otherwise. The Supreme Court rejected the contentions of the Revenue and held in Paras-18 and 19 as under;

"18. It is clear from these rules, as we read them, that a manufacturer obtains credit for the excise duty paid on raw material to be used by him in the production of an excisable product immediately it makes the requisite declaration and obtains an acknowledgment thereof. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product. There is no provisions in the rules which provides for a reversal of the credit by the Excise Authorities except where it has been illegally or irregularly taken, in which event it stands cancelled or, if utilised, has to be paid for. We are here really concerned with credit that has been vaildly taken, and its benefit is available to the manufacturer without any limitation in time or otherwise unless the manufacturer itself chooses not to use the raw material in its excisable product. The credit is, therefore, indefeasible. It should also be noted that there is no correlation of the raw material and the final product; that is to say, it is not as if credit can be taken only on a final product that is manufactured out of the particular raw material to which the credit is related. The credit may be taken against the excise duty on a final product manufactured on the very day that it becomes available.

19. It is, therefore, that in the case of Eicher Motors Ltd. v. Union of India, this Court said that a credit under the Modvat Scheme was "as good as tax paid."

39. With the above principles, it is the claim of the petitioner company that Rule 86A of the Rules extinguishes a vested right which the petitioner had for claiming credit of duty paid on inputs.

40. In the case in hand, Shri Pandey, appearing for the respondents submitted that there is no such requirement that a specific order should be passed assigning, prima facie, reasons to block the input tax credit and communicate the same to the person concerned. Shri Pandey would submit that ordinarily, the reasons are found in the form of notings in the original file, on the basis of which, the Court may be in a position to ascertain the genuineness of the belief formed by the authority. The formation of the opinion by the authority undoubtedly should reflect intense application of mind with reference to the materials available on record that it had become necessary to order blocking of the input tax credit pending the inquiry. (See **Bhikhubhai Vithlabhai Patel & Ors. vs. State of Gujarat25).**

41. On 12.5.2021, learned counsel appearing for the respondents was asked to get instructions on certain aspects. For ready reference, order passed by this Court on 12.5.2021 is reproduced below:

"Mr. Nimai Das, learned Additional Chief Standing Counsel is granted a week's time to seek instruction in the matter.

It is argued by Mr. Navin Sinha, learned Senior Advocate assisted by Mr. Nishant Mishra, learned counsel for the petitioner that operation of the appellate order, by which the Adjudicating Authority's order locking the Input Tax Credit had been reversed, has now been stayed. The submission is that the Revisional Authority has passed the order impugned without application of mind, merely paraphrasing the words of the statute with no reference to the facts of the case, or other material on record to reach his conclusion in favour of passing an interim order of stay.

The State shall clarify in its instruction the aforesaid fallacy urged on behalf of the petitioner.

Lay this matter as fresh again on 20.05.2021 before the appropriate Bench."

42. Thereafter, the matter was taken up on 20.5.2021 and on the said date, the Court had proceeded to pass following order:-

"In response to the aforesaid order, Shri Nimai Das, learned Addl. Chief Standing Counsel assisted by Shri Devesh Vikram, learned Standing Counsel, on the basis of instructions, has informed the Court that 2.6.2021 is the next date fixed in the revision in question for final disposal of the matter.

Put up this matter as fresh."

43. Again the matter was taken up on 16.7.2021 and learned Additional Chief Standing Counsel was directed to produce the entire original records. In compliance thereof, the original record was produced by Shri Jagidsh Mishra, learned Standing Counsel before this Court on 26.7.2021 and the same was taken on record.

44. Perusal of original record reflects that the Joint Commissioner (GST), Commercial Tax Headquarters, U.P. Lucknow forwarded the matter to

Additional Commissioner (G.S.T.) with specific noting dated 24.3.2021, **wherein in paragraph-5, he has also suggested two options namely (i) either to prefer a writ petition before this Court for stay or (ii) exercise powers under Section 108 of UPSGST Act and stay the execution of the Appellate Order till the revision is decided.** The noting is reproduced herein below:-

ष्एडीशनल कमिश्नर (जी.एस.टी)

महोदय,

कृपया पत्रावली पर संलग्न एडीशनल कमिश्नर ग्रेड–1, वाणिज्य कर, मुरादाबाद जोन–मुरादाबाद के पत्र संख्या–3937 दिनांक 16.03.2021 का सन्दर्भ ग्रहण करने का कष्ट करें, जिसके द्वारा सूचित किया गया है कि एडीशनल कमिश्नर ग्रेड–2 (अपील), प्रथम, वाणिज्य कर, मुरादाबाद के द्वारा सर्वश्री नॉर्थ एण्ड फूड मार्केटिंग प्रा0 लि0 547 शक्ति नगर, चन्दौली की अपील संख्या जी.एस.टी.–95/20/वर्ष 2019–20 उत्तर प्रदेश वस्तु एवं सेवा कर नियमावली के नियम 86ए के अन्तर्गत व्यापारी द्वारा योजित वाद का दिनांक 10.03.2021 को निस्तारण करते हुए रू0 4771007.00 की एस.जी.एस.टी व रू0 4771007.00 की सी0जी.एस.टी कुल रू0 9511774.00 की आई.टी.सी. जो कर निर्धारण अधिकारी द्वारा ब्लॉक की गयी थी, उसको अनब्लॉक करने के आदेश दिये गए हैं, जो विधिक एवं तथ्यात्मक रूप से त्रुटिपूर्ण है, जिसके सम्बन्ध में राजस्व हित में उक्त न्यायिक आदेश का पुनरीक्षण/ रिट याचिका दायर किया जाना समीचीन है। उक्त संदर्भित पत्र के द्वारा एडीशनल कमिश्नर ग्रेड–1, वाणिज्य कर, मुरादाबाद ने पत्र में अंकित तथ्यां के दृष्टिगत प्रथम अपीलीय आदेश दिनांक 1.03.2021 के विरूद्ध पुनरीक्षण/ रिट याचिका दायर करने की संस्तुति के साथ ही प्रथम अपील आदेश दिनांक 10.03.2021 के क्रियान्वयन को स्थगित कराने की संस्तुति भी की गयी है।

2. नॉर्थ एण्ड फूड एवं सोहन लाल नेटवर्क से सम्बंधित प्रकरण में अब तक कृत कार्यवाही का संक्षिप्त विवरण निम्नवत् है–

नेटवर्क से सम्बंधित डाटा विश्लेषण एवं फील्ड इनपुट्स के आधार पर नेटवर्क की जॉच।

नेटवर्क का विस्तार– मुरादाबाद, सम्भल, चन्दौसी, बदायूँ, बाराबंकी

नेटवर्क की कार्य प्रणाली– बिना माल के केवल इनवॉइसेज का आदान–प्रदान, बोगस इनवॉइसेज के माध्यम से बोगस आई0टी0सी0 का लाभ।

अधिकांश घोषित व्यापार स्थल पर कोई व्यापारिक गतिविधि नही।

जॉच के दौरान रू0 6.88 करोड का माल अभिग्रहीत।

विभागीय अधिकारियों की टीम द्वारा मुम्बई भ्रमण कर ैम्ठप् एवं डब से सूचनाओं का संकलन।

अब तक की जॉच में लगभग य0 200 करोड की फर्जी इनवाईसिंग प्रकाश में।

व्यापारी द्वारा जारी इनवाईसेज के लाभार्थी व्यापारियों की य0 10 करोड की आई0टी0सी0 ब्लॉक।

माल के अभिग्रहण के विरूद्ध मा0 उच्च न्यायालय में दायर व्यापारी रिट याचिका पर विभाग की सबल पैरवी के कारण व्यापारी को राहत नही।

अभिग्रहीत माल की जब्ती की कार्यवाही के दौरान रू0 4.4 करोड का इन्डेबिटी बॉण्ड एवं टैक्स, पेनाल्टी एवं फाइन के मद में 2.47 करोड की बैंक गारन्टी जमा।

(तत्समय तैयार किया गया एक प्रस्तुतीकरण पताका –क– पर संलग्न है)

सर्वश्री नॉर्थ एण्ड फूड मार्केटिंग के नेटवर्क की कार्य प्रणाली की जॉच डब द्वारा की गयी है। MCX द्वारा पारित आदेश दिनांक 27 जनवरी, 2020 (प्रति संलग्न पृष्ठ सं0 12 प्रस्तर सं0 ह – ।) के निम्न अंश उल्लेखनीय हैं–

(g) Subsequent to the personal hearing in the matter, you vide email dated July 19,2019 had submitted six invoices (with GST) of transactions carried out between M/S Jai Balaji Trading Company (C & F agent of ISRPL as informed) and NEFM amounting to Rs. 13.82 crores. However, the corresponding funds received from/ commission paid to C& F Agent, M/S Jai Balaji Trading Company, could not be traced to the Bank account of ISRPL. Also, no relevant documentary evidences like agreement between ISRPL and M/S Jai Balaji Trading Company, terms of appointment, terms of payment/ commission, etc. were provided by you in support of the above.

(k) There are no justifiable reasons/relevant documentary evidences provided by you for the following:

Funds received from NEFM by ISRPL, whereas delivery of Mentha Oil taken by ISRPL on the exchange were transferred off-market to retain related entities without any corresponding settlement of funds with these entities.

Invoices of purchase by NEFM from ISRPL were without GST.

No documentary evidence including agreement between ISRPL and M/S Jai Balaji Trading Company i.e. (C&F agent), terms of appointment, terms of payment/ commission, actual payment/ commission to M/S Jai Balaji Trading Company, etc.

इस नेटवर्क की जॉच ैम्ठप् द्वारा की गयी है । ैम्ठप् द्वारा पारित आदेश दिनांक 06.12.2019 (प्रति संलग्न पृष्ठ सं0 11 प्रस्तर सं0 11) के निम्न अंश उल्लेखनीय हैं–

11- In addition to the above, it is observed from the submission advanced by the notices, that except for NEFM none of the other Notices was registered with any mandi for Mentha Oil and majority of them have appointed Jai Balaji Trading Company as their C&F Agent for off-market/physical market transactions in the Mentha Oil. Incidentally, the proprietor of this C&F agent is the father of Yash Guptaa, A Group 'A' entity in the interim order. The above facts submitted by the Notices raises further suspicion that the trades executed by these entities through the said C&F agent appears to have been executed at the behest of or under instructions from NEFM. While perusing the submissions of NEFM and of other Notices, I notice certain glaring inconsistencies in the stands taken by them which need to be highlighted here. AS an illustration, I note that NEFM has initially in its reply had admitted that it had procured stock of Mentha Oil from 5 entities viz. Invictus, Gaurav Gupta, Saurabh Kumar Vaish, Vimuk and Yash Gupta. However, in its written submission filed before me after the personal hearing, is has stated that Mentha Oil was procured by it from Invictus, Gaurav Gupta and Yash Gupta and thereby has preferred to remain silent about its transactions with Saurabh Kumr Vaish and Vimuk. Further, NEFM has claimed that is was not aware about the trading activities of entities of Group 'A' and Group 'B' especially with respect to their holding of Mentha Oil stock and trading in Mentha Oil futures, which have been highlighted in detail in interim order. However, on the contrary to such a claim, NEFM has not rebutted the fact that apart from giving funds to various entities directly ad indirectly for procurement of Mentha Oil, it had also given funds for bearing the rental charges for storage of Mentha Oil stock in the MCX approved warehouses NEFM has also not disputed to the facts that it was paying fixed monthly payments to certain entities during the relevant period who were holding on to the stock of Mentha Oil. NEFM's claim that it was not aware about the clubbing of position limits by MCX with respect to the positions in Mentha Oil futures held by various entities of Group 'A' and Group'B' remains highly questionable, since these entities were trading in Mentha Oil apparently with the funds provided by it to them and the same funds support from the fact that the warehouse rent for storing Mentha Oil by Group' A' entities as well as monthly payment to certain entities was being paid by none other than NEFM. Moreover, as discussed in the interim order, MCX had reported that as soon as

the positions of certain entities were clubbed, fresh positions in Mentha Oil futures were being taken by a new set of entities who were also found to be funded directly or indirectly through proxy entities by NEFM. Another instance of inconsistency is noticed in the submission of Group 'A' entities who have claimed-that they were only providing handling and transportation services to NEFM whereas in reality, the stock of Mentha Oil in exchange approved warehouses were held in their names as owners, hence the claim made by them about providing only handling and transportation services does not conform to their actual transactions.

3. प्रश्नगत नेटवर्क में beneficiary के रूप में शामिल 26 पंजीकृत व्यापारियों द्वारा Fraudulently क्लेम की 37.80 करोड आई.टी.सी. ब्लॉक किया जाना अपेक्षित था। किन्तु सम्बंधित व्यापारियों के क्रेडिट लेजर में कुल मिलाकर केवल रू0 9.48 करोड आई.टी.सी. उपलब्ध थी, जो ब्लॉक की गयी।

4. इसी नेटवर्क में beneficiary के रूप में शामिल एक इकाई सर्वश्री हर्बोकेम इण्डस्ट्रीज द्वारा मा0 उच्च न्यायालय के समक्ष रिट याचिका सं0 553/ 2020 दाखिल की गयी है, जिसमें नियम– 86ए तथा Credit Blocking के सम्बंध में मुख्यालय द्वारा जारी परिपत्र ;व्द्ध को चुनौती दी गयी है। नियम 86ए की वैधता को मा0 उच्च न्यायालय, इलाहाबाद के समक्ष कुछ अन्य रिट याचिकाओं के माध्यम से भी चुनौती दी गयी है, जो मा0 उच्च न्यायालय के समक्ष विचाराधीन है।

4.1 जी.एस.टी.एन. की रिपोर्ट के अनुसार उत्तर प्रदेश राज्य में केन्द्र एवं राज्य द्वारा कुल 3739 मामलों में रू0 2859735606891.00 आई.टी.सी. ब्लॉक की गयी है।

प्रस्तर सं0 3, 4 एवं 4.1 में अंकित तथ्यों/ ऑकडों से यह स्पष्ट है कि, यह प्रकरण राजस्व की दृष्टि से अत्यन्त महत्वपूर्ण है।

In accordance with the provisions of Section 108(1), the Revisional Authority may

(i) on his own motion, or

(ii) upon information received by him, or

(iii) on request from the Commissioner of Central/ State Tax, or

(iv) in consequence of an observation by the Comptroller and Auditor General of India

call for and examine the record of any proceedings and if he considers that any decision or order passed by any officer subordinate to him is erroneous in so far as it is prejudicial to the interest of revenue and is

(i) illegal or

(ii) improper or

(iii) has not taken into account certain material facts, whether available at the time of issuance of the said order or not

he may, if necessary, stay the operation of such decision or order for such period as he deems fir and pass and order

(i) enhancing or

(ii) modifying or

(iii) annulling

the said decision or order.

2. However, the power of the Revisional Authority as above is subject to the restrictions imposed in terms of sub-section (1) and (2) of Section 108 which is summarized in the following table:

Power of a Revisional Authority upon conjoint reading of Section 107(12), 107 (16), 108(1) & 108(2)-

Sl. No.	Order passed by	Action on order	Whether Revision is permissible
1.	A Proper Officer Or An Appellate Authority	• Order appealed against • Six months from the date of communication of the order has not expired. • three years after the date of passing of order sought to be revised has expired. • order already taken for revision at an earlier stage or revision order has been passed. • Order is non-appealable u/s 121	**No**
2.			**No**
3.			**No**
4.			**No**
5.	A Proper Officer or An Appellate Authority	<u>Following four conditions are required to be satisfied</u> (i) Order is not appealed against (ii) Three years after the date of passing of order sought to be revised has not expired but six months from the date of communication of the order has expired. (iii) Order not taken for revision at an earlier stage or revision order has not been passed (iv) Order is not non-appealable u/s 121	YES

उक्त के आधार पर प्रथम दृष्टया यह प्रतीत होता है कि, षRevisional Authority के स्तर से Appellate Authority under Section 107 द्वारा पारित आदेश के संदर्भ में धारा– 108 के तहत प्रदत्त शक्तियों का प्रयोग किया जा सकता है।

5- विभाग के समक्ष विकल्प हैं–

(i) मा0उच्च न्यायालय, इलाहाबाद के समक्ष रिट याचिका योजित करते हुए स्थगित हेतु अनुरोध करना।

;ii) पुनरीक्षण प्राधिकारी के उत्तर प्रदेश एस.जी. एस.टी अधिनियम की धारा 108 में प्रदत्त शक्तियों का प्रयोग करते हुए अपीलीय निर्णय को पुनरीक्षित किया जाना तथा पुनरीक्षण की प्रकिया पूरी होन तक अपीलीय आदेश का कियान्वयन स्थगित किया जाना।

6. समसंदर्भ में यह तथ्य भी संज्ञान में लाना है कि, अधिनियम की धारा 109 के अन्तर्गत जी.एस.टी. अपीलेट ट्रिब्यूनल का गठन अभी नही हुआ है। जी.एस.टी अपीलेट ट्रिब्यूनल का गठन होने की तिथि के 6 माह के अन्दर जी.एस. टी. अपीलेट ट्रिब्यूनल के समक्ष अपील दायर करने का विकल्प भी विभाग के पास है।

7. अभी तक मुख्यालय स्तर से त्मअपेपवदंस च्वूमतेष का प्रयोग नही किया गया है।

उक्त वर्णित परिस्थितियों में प्रस्तर–5 ;पपद्ध के सम्बन्ध में निर्णय की स्थिति में नोटिस/ आदेशों का प्रारूप निर्धारित किये जाने की आवश्यकता भी होगी।

कृपया उक्त तथ्यों के आलोक में प्रस्तर सं0 5 के सम्बंध में निर्णय लेना चाहें।

ह0
(अनिल कुमार कनौजिया)
डिप्टी कमिश्नर (जी.एस.टी)
वाणिज्य कर मुख्यालय, लखनऊ
ह0
(संजय कुमार पाठक)
ज्वाइन्ट कमिश्नर (जी.एस.टी)
वाणिज्य कर मुख्यालय,उ0प्र0 लखनऊ
एडी0कमि0 (जी.एस.टी)

वरिष्ठ विभागीय अधिकारियों से विचार विमर्श के उपरान्त प्रस्तर सं0 5 ;पपद्ध पर अंकित विकल्प औचित्यपूर्ण प्रतीत होता है।

कृपया सहमत होना चाहें तथा स्थगन आदेश का प्रारूप प्रस्तुत किये जाने की अनुमति प्रदान करना चाहें।

कमिश्नर महोदय
ह0
(बृजेश कुमार त्रिपाठी)
एडीशनल कमिश्नर (जी.एस.टी)
वाणिज्य कर मुख्यालय,लखनऊ

Stay करना राज्य हित में बहुत महत्वपूर्ण है।

कृ0 Put up
Sd/
24-3-2021
(Ministhy S)
Commissioner Commercial Tax, U.P."

(emphasis supplied)

45. The Court has also occasion to peruse the impugned order dated 26.3.2021, wherein the Commissioner, Commercial Tax, U.P. Lucknow has accepted the proposal for revision and stayed the effect and operation of the order dated 10.3.2021. The operative portion of the order is reproduced herein below:-

आदेश

1. एडीशनल कमिश्नर ग्रेड–1, वाणिज्य कर, मुरादाबाद जोन के पत्र संख्या 3937/ एडी0कमि0 ग्रेड–1/वा0क0मुद0 दिनांक 16.03.2021 से प्रेषित पुनरीक्षण प्रस्ताव स्वीकार किया जाता है।

2. एडीशनल कमिश्नर ग्रेड–2 (अपील) प्रथम वाणिज्य कर, मुरादाबाद द्वारा अपील संख्या जी.एस.टी. –95/20/वर्ष 2019–20 दिनांक 10.03.2021 में पारित अपीलीय आदेश संख्या 194 दिनांक 10.03.2021 तथा अधिनियम की धारा 161 के अन्तर्गत पारित आदेश संख्या 203/ 10.03.2021 का कियान्वयन तत्काल प्रभाव से पुनरीक्षण प्रकिया पूर्ण होने तक स्थगित किया जाता है।

3. सम्बंधित पक्षों को सुनवाई हेतु नोटिस जारी की जाए।

संशोधिति आदेश आलेख की स्वच्छ प्रतियॉ पताका–क–पर संलग्न हैं। कृपया स्व–स्तर से उक्त का परीक्षण करते हुए स्थगत आदेश निर्गत करने हेतु पत्रावली कमिश्नर महोदया के समक्ष प्रस्तुत करना चाहें।

ह0
26.03.2021
(संजय कुमार पाठक)

ज्वाइन्ट कमिश्नर (जी.एस.टी.)
वाणिज्य कर मुख्यालय उ0प्र0 लखनऊ।

परीक्षणोपरान्त संशाधित स्थगन आदेश आलेख पताका–क– पर संलग्न है।

कृपया सहमति की दशा में हस्ताक्षर करना चाहें।

ह0
(बृजेश कुमार त्रिपाठी)
एडीशनल कमिश्नर (जी.एस.टी.)
वाणिज्य कर मुख्यालय, लखनऊ।
कमिश्नर महोदया

Sec.108: Power of Revisional Authority के तहत यह stay order राज्यहित में जरूरी है।

ह0
26-03-2021
(मिनिस्ती एस0)
कमिश्नर
वाणिज्य कर, उ0प्र0।

कृपया संबधित से आदेश की प्रतियॉ उक्तानुसार प्रेषित करायें

ह0
26-03-2021
(संजय कुमार पाठक)
ज्वाइन्ट कमिश्नर (जी.एस.टी.)
वाणिज्य कर मुख्यालय उ0प्र0 लखनऊ।"

46. Before dealing with the rival submissions to determine whether the principles of natural justice demand that an opportunity of hearing should be afforded to an assessee before an order under Section 108 of the SGST Act is made, the Court may appreciate the concept of "natural justice" and the principles governing its application.

47. Rules of "natural justice" are not embodied rules. The phrase "natural justice" is also not capable of a precise definition. The underlying principle of natural justice, evolved under the common law, is to check arbitrary exercise of power by the State or its functionaries. Therefore, the principle implies a duty to act fairly, i.e. fair play in action. As observed by this Court in **A.K. Kraipak & Ors. Vs. Union of India & Ors.26,** the aim of rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. They do not supplant the law but supplement it. (Also see: Income Tax Officer & Ors. Vs. M/s Madnani Engineering Works Ltd., Calcutta27).

48. In **Swadeshi Cotton Mills Vs. Union of India28,** R.S. Sarkaria, J., speaking for the majority in a three-Judge Bench, lucidly explained the meaning and scope of the concept of "natural justice". Referring to several decisions, his Lordship observed as under:-

"Rules of natural justice are not embodied rules. Being means to an end and not an end in themselves, it is not possible to make an exhaustive catalogue of such rules. But there are two fundamental maxims of natural justice viz. (i) audi alteram partem and (ii) nemo judex in re sua. The audi alteram partem rule has many facets, two of them being (a) notice of the case to be met; and (b) opportunity to explain. This rule cannot be sacrificed at the altar of administrative convenience or celerity. The general principle as distinguished from an absolute rule of uniform application seems to be that where a statute does not, in terms, exclude this rule of prior hearing but contemplates a post-decisional hearing amounting to a full review of the original order on merits, then such a statute would be construed as excluding the audi alteram partem rule at

the pre-decisional stage. Conversely if the statute conferring the power is silent with regard to the giving of a pre-decisional hearing to the person affected and the administrative decision taken by the authority involves civil consequences of a grave nature, and no full review or appeal on merits against that decision is provided, courts will be extremely reluctant to construe such a statute as excluding the duty of affording even a minimal hearing, shorn of all its formal trappings and dilatory features at the pre-decisional stage, unless, viewed pragmatically, it would paralyse the administrative process or frustrate the need for utmost promptitude. In short, this rule of fair play must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands. The court must make every effort to salvage this cardinal rule to the maximum extent possible, with situational modifications. But, the core of it must, however, remain, namely, that the person affected must have reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise."

49. Initially, it was the general view that the rules of natural justice would apply only to judicial or quasi-judicial proceedings and not to an administrative action. However, in **State of Orissa Vs. Binapani Dei & Ors.29**, the distinction between quasi-judicial and administrative decisions was perceptively mitigated and it was held that even an administrative order or decision in matters involving civil consequences, has to be made consistently with the rules of natural justice. Since then the concept of natural justice has made great strides and is invariably read into administrative actions involving civil consequences, unless the statute, conferring power, excludes its application by express language.

50. In **Canara Bank Vs. V.K. Awasthy30**, the concept, scope, history of development and significance of principles of natural justice have been discussed in extenso, with reference to earlier cases on the subject. The principles of natural justice are those rules which have been laid down by the Courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi- judicial and administrative authority while making an order affecting those rights. Concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statute or in rules framed thereunder. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the fact and circumstances of that case, the framework of the statute under which the enquiry is held. The old distinction between a judicial act and an administrative act has withered away. Even an administrative order, which involves civil consequences must be consistent with the rules of natural justice. Expression 'civil consequences' encompasses infraction of not merely property or personal rights but of civil 'liberties, material deprivations, and non-pecuniary damages. In its wide umbrella comes everything that affects a citizen in his civil life.

51. In **Mohinder Singh Gill & Anr. Vs. The Chief Election Commissioner, New Delhi & Ors.31**, the Apex Court held that 'Civil Consequences' undoubtedly

cover infraction of not merely property or personal rights but of civil liberties, material deprivations and non-pecuniary damages. In its comprehensive connotation, everything that affects a citizen in his civil life inflicts a civil consequence.

52. The question in regard to the requirement of opportunity of being heard in a particular case, even in the absence of provision for such hearing, has been considered by this Court on a number of occasions. In **Olga Tellis & Ors. Vs. Bombay Municipal Corporation & Ors.32** while dealing with the provisions of Section 314 of the Bombay Municipal Corporation Act, 1888, which confers discretion on the Commissioner to get any encroachment removed with or without notice, a Constitution Bench of Apex Court observed as follows:

"It must further be presumed that, while vesting in the Commissioner the power to act without notice, the Legislature intended that the power should be exercised sparingly and in cases of urgency which brook no delay. In all other cases, no departure from the audi alteram partem rule ('Hear the other side') could be presumed to have been intended. Section 314 is so designed as to exclude the principles of natural justice by way of exemption and not as a general rule. There are situations which demand the exclusion of the rules of natural justice by reason of diverse factors like time, place the apprehended danger and so on. The ordinary rule which regulates all procedure is that persons who are likely to be affected by the proposed action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively, depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances which warrant it. Such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence."

53. In **C.B. Gautam Vs. Union of India & Ors.33** a question arose whether in the absence of a provision for giving the concerned parties an opportunity of being heard before an order is passed under the provisions of Section 269 UD of the Act, for purchase by the Central Government of an immovable property agreed to be sold on an agreement to sell, an opportunity of being heard before such an order could be passed should be given or not. Relying on the decision of this Court in **Union of India Vs. Col. J.N. Sinha34 and Olga Tellis** (supra) it was held that:

"Although Chapter XX-C does not contain any express provision for the affected parties being given an opportunity to be heard before an order for purchase is made under Section 269-UD, not to read the requirement of such an opportunity would be to give too literal and strict an interpretation to the provisions of Chapter XX-C and in the words of Judge Learned Hand of the United States of America "to make a fortress out of the dictionary." Again, there is no express provision in Chapter XX-C barring the giving of a show cause notice or reasonable opportunity to show cause nor is there anything in the language of Chapter XX-C which could lead to such an implication. The observance of principles of natural justice is the pragmatic requirement of fair play in action. In our view, therefore, the requirement of an opportunity to show cause being given before an order for

purchase by the Central Government is made by an appropriate authority under Section 269-UD must be read into the provisions of Chapter XX-C. There is nothing in the language of Section 269- UD or any other provision in the said Chapter which would negate such an opportunity being given. Moreover, if such a requirement were not read into the provisions of the said Chapter, they would be seriously open to challenge on the ground of violations of the provisions of Article 14 on the ground of non-compliance with principles of natural justice. The provision that when an order for purchase is made under Section 269-UD-reasons must be recorded in writing is no substitute for a provision requiring a reasonable opportunity of being heard before such an order is made."

54. In **Sahara India (Firm) (1) v. CIT35** the Apex Court held that unless a statutory provision either specifically or by necessary implication excludes the application of principles of natural justice, because in that event the Court would not ignore the legislative mandate, the requirement of giving reasonable opportunity of being heard before an order is made, is generally read into the provisions of a statute, particularly when the order has adverse civil consequences for the party affected. The principle will hold good irrespective of whether the power conferred on a statutory body or tribunal is administrative or quasi-judicial.

55. In **Siemens Engg. & Mfg. Co. of India Ltd vs. Union of India36** it was held by the Apex Court as under:-

"6. Before we part with this appeal, we must express our regret at the manner in which the Assistant Collector, the Collector and the Government of India disposed of the proceedings before them. It is incontrovertible that the proceedings before the Assistant Collector arising from the notices demanding differential duty were quasi judicial proceedings and so also were the proceedings in revision before the Collector and the Government of India. Indeed, this was not disputed by the learned counsel appearing on behalf of the respondents. It is now settled law that where an authority makes an order in exercise of a quasi-judicial function it must record its reasons in support of the order it makes. **Every quasi-judicial order must be supported by reasons. That has been laid down by a long line of decisions of this Court ending with N. M. Desai v. The Testeels Ltd. & Anr. (') But, unfortunately, the Assistant Collector did not choose to give any reasons in support of the order made by him con firming the demand for differential duty. This was in plain disregard of the requirement of law.** The Collector in revision did give some sort of reason but it was hardly satisfactory. He did not deal in his order with the arguments advanced by the appellants in their representation dated 8th December, 1961 which were repeated in the subsequent representation dated 4th June, 1965. It is not suggested that the Collector should have made an elaborate order discussing the arguments of the appellants in the manner of a court of law. But the order of the Collector could have been a little more explicit and articulate so as to lend assurance that the case of the appellants has been properly considered by him. If courts of law are to be replaced by administrative authorities and tribunals, as indeed, in some kinds of cases, with the proliferation of Administrative law, they may have to be so replaced, it is essential that administrative authorities and tribunals

should accord fair and proper hearing to the persons sought to be affected by their orders and give sufficiently clear and explicit reasons in support of the orders made by them. Then alone administrative authorities and tribunals exercising quasi-judicial function will be able to justify their existence and carry credibility with the people by inspiring confidence in the adjudicatory process. **The rule requiring reasons to be given in support of an order is, like the principle of audi alteram partem, a basic principle of natural justice which must inform every quasi-judicial process and this rule must be observed in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law**. The Government of India also failed to give any reasons in support or its order rejecting the revision application. But we may presume that in rejecting the revision application, it adopted the same reason which prevailed with the Collector. The reason given by the Collector was, as already pointed out, hardly satisfactory and it would, therefore, have been better if the Government of India had given proper and adequate reasons dealing with the arguments advanced on behalf of the appellants while rejecting the revision application. We hope and trust that in future the Customs authorities will be more careful in adjudicating upon the proceedings which come before them and pass properly reasoned orders, so that those who are affected by such orders are assured that their case has received proper consideration at the hands of the Customs authorities and the validity of the adjudication made by the Customs authorities can also be satisfactorily tested in a superior tribunal or court."

56. Hon'ble Apex Court **in N. Ranga Rao & sons vs. State of Karnataka and others37** considered the question of exercising revisional power under Section 15 of Karnataka Tax on Entry of Goods Act, 1979 (Act 1979) for determining limitation and held that the initiation of proceedings would take place, when the revisional authority suo motu calls for the records and examines the same, as per Section 15 (4) of Act 1979, which prescribes limitation for initiation of revisional proceedings, whereas Section 15B prescribes limitation for completion thereof. Hence, where the revisional authority called for the records of the case from the first appellate authority within limitation period, the revisional jurisdiction stood exercised within limitation irrespective of the fact that notice to the assessee to show cause against the proposed setting aside of the order of the first appellate authority was issued on a later date. Relevant portion of the judgment is quoted hereinafter:-

"5. To complete the chronology of events, it may be noted that the order of the First Appellate Authority was dated 28.3.1992, the order calling for the records by the Additional Commissioner was around 16.3.1996, the decision, on the question of error in the order of the First Appellate Authority and the loss to the revenue consequent thereto, was dated 16.3.1996, the show cause notice was dated 20.5.1996 and the same was received by the assessee on 24.5.1996. The order ultimately passed by the Additional Commissioner under Section 15(1) was of 14/15.10.1996. Therefore, according to the assessee, mere calling for the records for examination around 16.3.1996 did not amount to exercise of power within the meaning of Section 15(4) of the said 1979 Act and if that be the case then, according to the assessee, issuance of the show cause

notice on 20.5.1996 was beyond the prescribed period of 4 years from the date of the order passed by the First Appellate Authority on 28.3.1992. According to the assessee, in the present case, the Additional Commissioner had initiated proceedings by way of show cause notice on 20.5.1996. According to the assessee, proceedings under Section 15(1) could only be initiated by issuance of a show cause notice. According to the assessee, a mere consideration by the Additional Commissioner in his Chamber on 16.3.1996 regarding error in the order of the First Appellate Authority and the loss to the revenue cannot constitute initiation of proceedings under Section 15(1) and nor did it constitute exercise of power within the meaning of Section 15(4) of the said 1979 Act. Consequently, according to the assessee, the revisional proceedings (suo motu) were time barred.

6. The Karnataka Tax on Entry of Goods Act, 1979 was enacted to provide for the levy of tax on the entry of goods into local areas for consumption, use or sale therein. Section 3 is the charging section. Under Section 3 a tax was levied and collected on entry of goods mentioned in he First Schedule into a local area for consumption, use or sale therein at the rates prescribed. Section 3-A dealt with collection of tax by registered dealer. Chapter III dealt with filing of return, making of assessment, payment of taxes, recovery and collection of taxes. Under Section 5, every registered dealer was required annually to submit a return to the AO within the period prescribed. Section 5(4) and 5(5) provided for passing of assessment orders. Section 8 dealt with payment and recovery of tax. Chapter V dealt with appeals and revision. Section 15 formed part of Chapter V. We quote hereinbelow Section 15 and Section 15-B.

"15. Revisional Powers of Commissioner, Additional Commissioner, Joint Commissioner and Deputy Commissioner: (1) The Commissioner may on his own motion call for and examine the record of any proceeding under this Act and if he considers that any order passed therein by any officer subordinate to him is erroneous in so far as it is prejudicial to the interests of the revenue, he may, if necessary, stay the operation of such order for such period as he deems fit and after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary pass such orders thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment or directing a fresh assessment.

(2) The Additional Commissioner may on his own motion call for and examine the record of any proceedings under the Act, and if he considers that any order passed therein by a Joint Commissioner, or an appellate authority of the rank of a Deputy Commissioner is erroneous in so far as it is prejudicial to the interests of revenue, he may, if necessary, stay the operation of such order for such period as he deems fit and after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment or cancelling the assessment or directing a fresh assessment.

(3) The Joint Commissioner may on his own motion call for and examine the record of proceeding under this Act, and if he considers that any order passed therein by any officer who is not above the rank of Deputy Commissioner is erroneous in so

far as it is prejudicial to the interests of revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment or directing a fresh assessment.

(4) The power under sub-sections (1) to (3) shall be exercisable only within a period of four years from the date of the order sought to be revised was passed.

Explanation: In computing the period of limitation for the purpose of sub-section (4) any period during which any proceeding under this section is stayed by an order or injunction of any Court shall be excluded.

xxx 15-B. Limitation in regard to passing orders in respect of certain proceedings: (1) Notwithstanding anything contained in Sections 6 and 15, where any proceeding is initiated under Section 6 or any records have been called for under Section 15, the authority referred to in the said sections shall pass orders within a period of three years from the date of initiation of such proceedings or calling for the records, as the case may be:

Provided that in respect of the proceedings initiated or records called for before the date of commencement of the Karnataka Taxation Laws (Amendment) Act, 1977, orders shall be passed within a period of four years from such commencement.

(2) In computing the period specified in sub-section(1), the period during which a proceeding, has been deferred on account of any stay granted by any Court or any other authority shall be excluded."

7. A bare reading of section 15(1) indicates that the Commissioner, Additional Commissioner, Joint Commissioner and Deputy Commissioner could suo motu call for and examine the records of any proceedings under this Act if he considered that any order passed therein by any officer subordinate to him was erroneous so as to be prejudicial to the interest of the revenue, he was empowered to stay the operation of such order for such period as he deemed fit and after giving the assessee an opportunity of being heard and after making such inquiry, as he thought fit, could pass such orders as the circumstances of the case would justify, including the order enhancing or modifying the assessment or even cancelling the assessment or even direct a fresh assessment.

8. The pre-conditions to the exercise of this suo motu powers were two fold, namely, error in the order passed by an officer subordinate to the revisional authority and prejudice to the interest of revenue. Once these two conditions stood fulfilled, the revisional authority was authorized to give an opportunity to the assessee of being heard and after making such inquiry as he thought fit he could pass appropriate orders as the circumstances of the case would justify. This power was essentially a supervisory power. However, in order to ascertain whether the officer subordinate to him had passed an erroneous order, which was also prejudicial to revenue, the

Commissioner including the Additional Commissioner etc. was required to call for and examine the record of such proceedings. Therefore, the revisional authority had to call for the records, he had to examine such records, he had to be satisfied regarding fulfilment of the above two conditions and thereafter give opportunity to the assessee of being heard and on making appropriate inquiry the revisional authority was empowered to pass appropriate orders.

9. It is important to note that under Section 15(1) there was no provision for giving a show cause notice as in the case of some other similar enactments. However, the power under sub-sections (1), (2) and (3) of Section 15 was exercisable only within four years from the date of the order sought to be revised. Under Section 15(4), therefore, a period of limitation was prescribed. The revisional authority had to exercise its powers only within four years from the date when the order sought to be revised was passed. Therefore, under Section 15(1) read with Section 15(4), there was no provision for issuance of a show cause notice. The reason is obvious. Section 15(4) required the revisional authority to exercise its powers within four years from the date of passing of the order sought to be revised. The concept of exercising the power is important, particularly in the absence of any provision for issuance of a show cause notice. When the revisional authority suo motu calls for the records for examination and when he examines that records, the exercise of power under Section 15(4) of the Act takes place. This can be equated to initiation of proceedings.

10. There is one more aspect which needs to be considered. Conceptually, there is a distinction between initiation of proceedings and completion of proceedings within the stipulated period. The limitation prescribed in Section 15(4) was the limitation for initiation of proceedings whereas limitation prescribed in Section 15-B was in respect of completion of proceedings within the prescribed period. In our view, a bare reading of Section 15-B with the proviso indicates that Section 15-B was retrospective. Firstly, the Head Note indicates limitation in regard to passing of orders inter alia under Section 15. It stated clearly that, notwithstanding anything contained in Section 15, where any proceeding is initiated under Section 6 or where any records have been called for under Section 15, the authority shall pass orders within a period of three years from the date of calling for the records. The proviso clarified that in respect of proceedings in which records have been called for before the date of commencement of the Karnataka Taxation Laws (Amendment) Act, 1997 (with effect from 1.4.1997) the revisional authority shall dispose of the proceedings within a period of four years from such commencement. This proviso indicates that proceedings in which records have been called for even in cases falling before 1.4.1997 had to be disposed of within four years from the date of commencement of the (Amendment) Act, 1997.

11. In our view, Section 15-B indicated the dichotomy between initiation of proceedings and completion of proceedings. The legislative intent was clear. It demarcated two aspects, namely, commencement of proceedings and completion of proceedings (outer limit). Section 15(4) prescribed limitation for commencement of proceedings whereas

Section 15-B prescribed limitation for completion of the proceedings. We are required to keep in mind that the Legislature intended maximum leeway in cases where an error resulted in loss to revenue. In the circumstances, we are of the view that under the scheme of the 1979 Act, the initiation proceedings took place when the revisional authority called for the records of the case from the First Appellate Authority and, therefore, the jurisdiction stood exercised within the period of limitation.

12. Lastly, we may state that on 1.4.1997 in the present case the tax appeal against the order of the Revisional Authority was pending decision vide Tax Appeal No. E.T. 22/96. Moreover, the law of limitation is generally procedural, hence, in our view, Section 15-B was retrospective. For the above reasons, we find no infirmity in the impugned judgment of the High Court.

13. Before concluding, we may state that, as discussed above, the Karnataka Tax on Entry of Goods Act, 1979 prescribed limitation for initiation of proceedings, it also prescribed limitation for completion of proceedings unlike some other Acts under which the limitation prescribed was only in respect of completion of proceedings. We do not wish to comment about those provisions/enactments. Our present judgment is confined strictly to the 1979 Act herein.

14. For the aforestated reasons, we find no infirmity in the impugned judgment of the Karnataka High Court and accordingly the civil appeal filed by the assessee stands dismissed with no order as to costs. As regards the merits of the case, we express no opinion as the same have not been argued before us."

(emphasis supplied)

57. Considering the aforementioned dictum, the Court has occasion to peruse the supplementary affidavit, which shows that after the impugned order dated 26.3.2021 was passed by the respondent no.3, a notice dated 07.5.2021 was issued, whereby the petitioner was directed to appear on 02.6.2021 alongwith record of purchases effected from M/s Jai Balaji Trading Company GSTIN 09AANPG0918J1ZK. This much is apparent from the notice dated 07.5.2021 that it contained narration of facts leading to blocking of credit under Rule 86A by respondent no.5, which was set aside by the appellate authority. Rule 109 of the SGST Rules, 2017 provides for service of notice in Form GST RVN-01 before an order under Section 108 is passed and exhaustive procedure is given therein, which requires documents to be enclosed specifying the grounds on the basis of which the revisional jurisdiction is sought to be exercised. Contrarily, the notice dated 7.5.2021 was in fact issued without any ground on the basis of which it could be said that there was no material or record available before the respondent no.3 for exercising jurisdiction under Section 108. In the RTI reply dated 28.7.2021 issued by the Deputy Commissioner (Administration) and Public Information Officer, Commercial Tax, Moradabad, which is appended as Annexure SA-1 to the affidavit, it has been informed that the records of the Appellate Authority in Appeal No.95/2020 (2018-19) were neither called for by the office of respondent no.3 nor the same were ever dispatched by the office of the Appellate Authority to the office of the respondent no.3. As such, the

respondent no.3 has assumed the jurisdiction under Section 108 without calling for and examining the record of the aforesaid Appeal filed by the petitioner company. The respondent no.3 has assumed the jurisdiction under Section 108 merely on the basis of letter sent by the respondent no.4. The powers, as conferred under Rule 86A, could not have been exercised merely on the ground that an inquiry has been initiated as there is a suspicion that the transactions were sham.

58. While forwarding the noting dated 24.3.2021, the Joint Commissioner (GST), Commercial Tax Headquarters, U.P. had submitted in para-5 that the department has two options either to prefer the writ petition before Hon'ble High Court and press for stay of the order passed by the Appellate Authority or under the revisional authority under Section 108 the appellate order is to be reviewed and till the finalization of proceeding of revision, the appellate order may be stayed. In para-7 of the said communication, it has also been averred that till date at the headquarter level the revisional power has not been exercised. After deliberation with the superior officials, the Additional Commissioner, Commercial Tax, U.P., has submitted categorical comment in para-5 (ii) of the endorsement dated 24.3.2021 to the Commissioner, Commercial Tax, U.P. that the second option is reasonable and in case the same is approved, accordingly leave may be accorded so that the proposal of stay order may be placed. Consequently, after an endorsement by the Commissioner, Commercial Tax, U.P. dated 24.3.2021, the stay order was passed on 26.3.2021. The entire relevant noting, as averred above, clearly reflects to the Court that even though the revisional authority has exercised under-mentioned provision but there was no independent application of mind.

59. The preconditions for the exercise of powers are basically two folds, namely, error in the order passed by an officer subordinate to the revisional authority and prejudice to the interest of revenue. Once these two conditions stood fulfilled, it was incumbent upon the revisional authority to give an opportunity to the assessee of being heard and after making such enquiry as he thought fit he could pass appropriate orders as circumstances of the case would justify. This power is basically a supervisory power. However, in order to ascertain whether the officer subordinate to him has passed an erroneous order, which may be prejudicial to the revenue, the Commissioner is required to call for and examine the record of such proceedings.

60. In the present matter, admittedly without summoning the record the notice was prepared by the subordinate officers in which two options were indicated to the revisional authority with an observation that in case second option is approved, accordingly stay order may be prepared. This may not be intention of the legislature while incorporating the said feature. Once the supervisory power is being exercised in absence of relevant record merely on the basis of certain noting, which is forwarded to the revisional authority for exercising the powers it is sheer misuse of the power. The said practice cannot be accepted by this Court.

61. After considering the record, the Court is of the considered opinion that while exercising the revisional power the authority has given go-bye to the procedure, that too without application of independent mind. The intent of the

legislature to accord such power under the revision with a rider is to ensure that there may not be errors in the order passed by the officer subordinate to the revisional authority and the order may not be prejudicial to the interest of revenue. On the above parameters there is hardly any scope for taking another view. Admittedly, the order impugned has been passed in absence of record and the revenue authority has proceeded to endorse on the dotted line, which has been submitted by the subordinate officer. Even though, the appellate order was appealable, which clearly reflects that said action is contrary to the procedures contained therein. The order must be supported by reasons but unfortunately the revisional authority/Commissioner did not choose to give reasons in support of order passed by him. This was in plain disregard to the requirement of law. The said order does not satisfy the requirement of law. Therefore, the said action cannot be accepted.

62. For the reasons above, the impugned order dated 26.3.2021 cannot sustain and accordingly, the same is set aside.

63. Consequently, the writ petition stands **allowed.**

64. Let original record be returned to Shri B.K. Pandey, learned Additional Chief Standing Counsel appearing for the State respondents.

65. The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad, self attested by the petitioner alongwith a self attested identity proof of the said person (preferably Aadhar Card) mentioning the mobile number to which the said Aadhar Card is linked.

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

(2021)09ILR A1405
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.09.2021

BEFORE

THE HON'BLE YASHWANT VARMA, J.

WRIT A No. 9105 of 2021
with
WRIT A No. 10581 of 2018
with
WRIT A No. 11015 of 2021

Sushila Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Kamal Kumar Kesharwani

Counsel for the Respondents:
C.S.C., Sri Ashok Kumar Singh, Sri Awadesh Kumar

A. Service Law – Gratuity - U.P. Basic Education [Teachers] Service Rules, 1981 - Rules for Grant of Gratuity to the Teachers of Aided Educational Institutions: Rule 5, 6, 13; U.P. Basic Education Provident Fund Rules, 1975; Rajya Sahayata Prapt Uchchatar Madhyamik Vidyalayo Ke Adhyapako Ki Mrityu Tatha Sewa Nivritee Aanutoshik Ke Niyamawali (Rules 1981); U.P. High Schools and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Rules, 1971 – Gratuity cannot be denied in a situation where a teacher dies prior to reaching the age of retirement and the death having occurred

a year before the age of retirement was being reached. (Para 37)

The sole question which stands posited is whether a failure on the part of an employee to have exercised an option prior to his untimely demise would result in his heirs being deprived of the right to claim gratuity. (Para 7)

a) From the recordal of facts it is evident that insofar as primary educational institutions were concerned, no statutory provision commanded the submission of options in order to be entitled to receive gratuity. The concept of submission of options came to be introduced by virtue of the GO of 23 November 1994 and those which came to be subsequently issued and have been noticed. The Court also takes cognizance of the provisions of the GO of 10 June 2002 though ostensibly made in the context of change of options were what was consistently followed by the Board in respect of teachers who came to enter service post 1994 and is adhered to even today. (Para 29)

b) Rules for Grant of Gratuity to the Teachers of Aided Educational Institutions (1964 Rules): Rule 13 - Rule 13 of the 1964 Rules dealing with the issue of nomination also made provisions for a contingency where a teacher had failed to make a nomination prior to his death. Rule 13 dealing with that eventuality provided that in the event of no nomination having been made it would be the Director of Education who was designated to be the final authority to adjudge who would be entitled to the amount of gratuity. That award as made by the Director was to be binding on all parties. The aforesaid provisions made in Rule 13 are liable to be read in conjunction with Rule 6 which provided that a teacher covered by the 1964 Rules would be obliged to make a nomination upon completion of three years of continuous service indicating the names of the members of his family who would have the right to receive gratuity upon his death. These provisions also indicate that a right of a family member to receive gratuity consequent to the death of a teacher covered by the 1964 Rules was not completely effaced or lost. (Para 30)

c) Comparison between 1964 Rules and 1981 Rules - The position of teachers working in Higher Secondary institutions and governed by the provisions of the 1971 Act came to be drastically altered upon the promulgation of the 1981 Rules. This the Court observes since Rule 3 of the 1964 Rules originally covered even those teachers who were working in Higher Secondary Schools and Degree colleges. Upon the promulgation of the 1981 Rules, teachers working in those categories of institutions came to be exorcised from the ambit of the 1964 Rules.

However, **the distinguishing feature of the scheme applicable to teachers of primary educational institutions was that a failure to submit an option was never considered as a fait accompli. (Para 32)**

In any case they did not introduce or prescribe a corresponding connection between entry into service and the submission of an option. In fact, and as was conceded on behalf of the State, **teachers had been conferred the right to exercise that option up to one year prior to reaching the age of retirement. The only additional stipulation that was placed was of that option being submitted before 1 July of the academic year in which the teacher was to retire. The absence of a negative stipulation and a prescription specifying the adverse consequences of inaction clearly operates in favour of teachers and the petitioners here.** The Court also bears in mind the undisputed position on facts which has emerged of teachers being permitted to submit their options prior to attaining the age of superannuation and latest by 1st of July of the academic year in which they were to attain the age of retirement. Once that is conceded to be the accepted procedure consistently followed, the Court fails to find any justification to hold teachers to be under an obligation to submit an option immediately upon entry into service. (Para 32)

d) GO dates 23 November 1994 does not confer parity upon teachers of primary educational institutions and their counterparts in secondary medium schools and cannot be read as attracting the 1981 Rules. The expression "at par with" as

employed in that Government Order does not lend strength to the contention as urged either especially when a careful and holistic reading of that Order establishes that the aforesaid expression was used only to underline the fact that teachers of aided secondary educational institutions stood at par with other employees of the State Government for the purposes of gratuity. (Para 33)

e) The petitioners cannot be denied the benefit of gratuity - Death being an unforeseen circumstance and an event which is clearly unpredictable could not have resulted in family members of those teachers being denuded of the right to claim gratuity. Undisputedly the teachers and employees in the batch of these writ petitions died prior to attaining the age of superannuation. As per the stand and practice of the State consistently followed, they had a right to exercise an option up to one year prior to their retirement and by the first of July of the academic year in which the date of retirement was being reached. The respondents could not have presumed that a teacher had decided that he would continue upto 60 or 62 years. (Para 34)

It would be wholly erroneous and irrational to hold that a teacher was liable to submit an option prior to his demise. The submission of an option to receive gratuity cannot legally be recognised as being attached to a circumstance which by its very inherent character is unforeseeable and incapable of being prophesized. Teachers while serving under the respondents would be presumed to be aware of the practice and requirement of submitting the requisite option one year prior to attaining the age of retirement coupled with the additional burden of ensuring that the option was submitted not later than the 1st of July of the academic year in which the teacher was to retire. If that was the recognised methodology consistently followed by the respondents, it would be wholly incongruous to recognise a responsibility placed upon teachers to submit that option prior to their untimely demise. On a more fundamental plane it must necessarily be stated that the State has failed to place for the consideration of the Court any prescription, statutory or otherwise, which may have drawn an inviolable line in time which when crossed was envisaged to denude a teacher of his right to claim gratuity. (Para 35)

It is manifest that the decision in *Usha Rani* appears to have rightly taken the position that gratuity cannot be denied in a situation where a teacher dies prior to reaching the age of retirement and the death having occurred a year before the age of retirement was being reached. (Para 37)

f) It may only be observed that the State would have been justified in refusing a claim for gratuity in case a teacher had continued in service beyond the stipulated age of retirement and thereafter died while in service. For instance, in case a teacher has continued beyond the age of 58 or 60 years without exercising the requisite option, he would be deemed to have taken and derived benefit of the extended age of retirement. While serving under the respondents in that extended tenure the teacher may have been presumed to have decided to continue in service till the age of 60 or 62 years. However, in a case where death occurs prior to the teacher attaining the age of 58 or 60 years cannot reasonably merit an assumption being made that such a teacher wanted to continue up to the extended and increased age of retirement. (Para 36)

Writ petitions allowed. (E-4)

Precedent followed:

1. Usha Rani Vs St. of U.P. & 6 ors., Writ-A No. 17399 of 2019 decided on 12.12.2019 (Para 4)

2. Noor Jahan Vs St. of U.P. & 4 ors., Writ-A No. 40568 of 2016 decided on 04 January 2018 (Para 4)

3. Smt. Omwati Vs St. of U.P .& 3 ors., Writ-A No. 8679 of 2018 09 March 2s018 (Para 4)

4. St. of U.P. Vs Usha Rani, Special Appeal Defective No. 40 of 2021 (Para 5)

Precedent distinguished:

1. Prakash Chandra Sharma (Since deceased) through L.R. (Wife) Vs Dy. Director of Education Bareilly Region, Bareilly & ors. (1997) 2 UPLBEC 1155 (Para 22)

2. St. of U.P. & ors. Vs Shashthi Dutt Shastri & ors. 2017 (Suppl.) ADJ 768 (DB) (Para 24)

3. Prakash Chandra Sharma Vs Dy. Director of Education Bareilly Region, Bareilly 1995 (2) E.S.C. 378 (All) (Para 25)

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

1. Heard Sri Kamal Kumar Kesherwani, Sri Akhilesh Kumar, Sri Awadh Narain Rai, learned counsels for the petitioners, Sri J.N. Maurya, learned Chief Standing Counsel assisted by Sri Chandan Kumar, learned Standing Counsel, Mrigraj Singh, Sanjay Kumar Singh and Sri Awadhesh Kumar, learned counsel for the respondents.

2. These three writ petitions were with consent heard together and are being disposed of by this common judgment.

3. The three petitioners here are the heirs of teachers who were working in educational institutions administered by the Board of Basic Education1. Those teachers died while in service and prior to reaching the age of retirement. The age of retirement of teachers as prescribed in Rule 29 of the **U.P. Basic Education [Teachers] Service Rules, 19812** was initially fixed at 58 years. It was thereafter increased to 60 years. In terms of the Twelfth Amendment to those Rules introduced on 9 November 2011, the age of retirement was ultimately increased to 62 years. The teachers in respect of whom the petitioners assert a right to receive gratuity admittedly died before attaining the age of superannuation. Since the respondents had refused to accede or attend to that claim, they approached this Court and preferred the instant writ petitions. The respondents on instructions apprised the Court that they would not be entitled to receive gratuity since those teachers had not exercised an option to receive the same prior to their death.

4. The petitioners have placed reliance upon the decision rendered by a learned Judge in **Usha Rani Vs. State of U.P. And 6 Others3** to contend that the question of whether gratuity would be payable irrespective of whether an option had been exercised by an employee prior to attaining the age of superannuation and untimely death stood settled in their favour. Usha Rani was dealing with a case where the employee had died prior to attaining the age of retirement which at the relevant time was fixed at 60 years. The learned Judge taking note of the previous decisions rendered by the Court in the matter of **Noor Jahan Vs. State of U.P. and 4 other4 and Smt. Omwati Vs. State of U.P. and 3 others5** held that the benefit of gratuity could not be denied to an employee solely on account of an alleged failure on his part to exercise the requisite option prior to his untimely demise and before he had reached the age of superannuation. The learned Judge dealing with the aforesaid question held thus: -

"Similar issue was considered by this Court in the matter of Noor Jahan (Supra) in which this Court vide order dated 04.01.2018 has clearly held that Government Order dated 16.09.2009 does not provide any bar for payment of gratuity in case petitioner's husband had not given option for retirement at the age of 60 years. Relevant paragraphs of the said judgment is quoted below:-

"Learned counsel for the petitioner submits that the order impugned is wholly arbitrary, inasmuch as under the relevant scheme for payment of gratuity, the claim of petitioner's husband is otherwise covered, and the Government Order dated 16.9.2009 does not curtail the payment of gratuity to those employees, who have died before attaining the age of 60 years.

Sri R.B. Yadav, learned counsel for the respondent nos.3 and 4, submits that the denial of gratuity to petitioner is in accordance with the Government Order.

I have heard learned counsel for the parties, and have perused the materials brought on record.

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."

In the matter of Smt. Omwati (Supra), Court had dealt for payment of interest upon delayed payment of gratuity and held that petitioner is entitled for interest. Relevant paragraph of the said judgment is quoted below:-

"The only other issue that survives for consideration is whether, the petitioner is entitled to payment of interest on the delayed payment of gratuity.

This aspect has been dealt with by Division Bench of this Court in Special Appeal (Defective) No.430 of 2016, Smt. Nazma Khatoon Vs. State of U.P. and others where a learned Single Judge had rejected the prayer for interest on delayed payment of gratuity. However, the Division Bench opined that interest is a necessary corollary to the retention of money by another person. It is neither compensatory nor penal in nature. It was so held, upon an earlier Division Bench decision in Smt.

Ranjana Kakkar W/O Late Prof. Amarnath Kakkar Vs. State of Uttar pradesh and others, 2008(10) ADJ 63 (DB).

The Division Bench in Smt. Nazma Khatoon (supra) went on to award 8% interest on the gratuity payable.

Counsel for the petitioner has also relied upon the Government order No.SA-3-1901/10-2002-971/80 dated 30.10.2002, which provides for payment of interest on delay in payment of gratuity and post retiral benefits beyond a period of 3 months from the date they are payable.

Under the circumstances, this Court considers it appropriate to award the same rate of interest on the delayed payment as has been awarded by the Division Bench in Smt. Nazma Khatoon(supra), the rate being 8%.

For the reasons given above, this writ petition is allowed. The impugned order passed by the District Inspector of Schools, Sambhal dated 01.01.2018 is hereby set aside. The respondents are directed to calculate the gratuity payable to the petitioner along with 8% interest thereon by a speaking order and to ensure payment of the said amount to the petitioner within a period of six weeks from the date, a certified copy of this order is filed before him."

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. 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. "

5. The decision of the learned Judge in **Usha Rani** was subjected to an intra court appeal being **State of U.P. And 6 Others Vs. Usha Rani6** That appeal came to be dismissed by the Division Bench on 28 January 2021 in the following terms: -

"By this appeal, a challenge is made to the judgment dated 07.11.2019 and its correction order dated 12.12.2019 whereby the writ petition preferred by the non-appellant was allowed. The writ petition was ordered to governed by the judgment in the case of Smt. Sarvesh Kumari Vs. State of U.P. others decided on 14.05.2019 and also in the leading case of Smt. Ranjana Kakkar Vs. State of U.P. and others reported in 2008 (10) ADJ 63. In the case of Smt. Ranjana Kakkar (Supra) facts were almost similar.

As per the government order, the employees were given option to continue in service beyond the normal period of retirement. The extension of service was permitted from 58 years to 60 years but with denial of the benefit of gratuity.

Options were sought and given by the employees in case of Smt. Ranjana Kakkar (Supra), but in the present case, no option was given by the non-appellant to continue her in service beyond the normal age of retirement with denial of the benefit of gratuity. It is however fact that in absence of option under the government order, it was taken to be a case of deemed option and accordingly family was denied benefit of gratuity. The age of the deceased was 44 years while in the case of Smt. Ranjana Kakkar (Supra), it was 45 years.

In the light of the aforesaid, what we find that the employee who had not continued in service after attaining the age of 58 years in a given case or 60 years in other cases would mean effective option to continue in with for denial of gratuity.

Accordingly, what we find that the present case is covered by the judgment of this court in the case of Smt. Ranjana Kakkar (Supra). An exception can be carved only when they continue in service without withdrawal of option even after the

attaining the age of 58 years in a given case or beyond 60 years in other cases as normal age of retirement was changed from 58 years to 60 years by the amendment in the year 2004.

This Court has taken a view to hold that an employee continue in service beyond 58 years and died thereupon would not be entitled to seek benefit of gratuity in the case of State of U.P. through its Secretary Vs. Prabha Shukla decided on 16.12.2020 but it would not be applicable to the facts of this case.

This appeal is accordingly, dismissed."

6. The Court is informed that the State has preferred a Special Leave Petition before the Supreme Court which is still pending disposal. This Court dealing with identical matters had been disposing of writ petitions on consent of the respondents who conceded that the issue stood settled in light of the judgment rendered by the Court in **Usha Rani.** However, Sri J.N. Maurya, learned Chief Standing Counsel appeared when these matters were taken up initially and submitted that various Rules and Government Orders which would apply had not been brought to the attention of the learned Judge who had proceeded to decide **Usha Rani**. It was his submission that various previous decisions of the Court having a bearing on the question had also not been considered in **Usha Rani.** Learned Chief Standing Counsel submitted that the judgment in **Usha Rani** would thus merit reconsideration. Since only a legal question was raised, the respondents submitted that the same may be decided by the Court without inviting counter affidavits. A compilation of Rules and various Government Orders issued from time to time was also circulated by the respondents amongst parties and placed on the record.

7. The sole question which stands posited is whether a failure on the part of an employee to have exercised an option prior to his untimely demise would result in his heirs being deprived of the right to claim gratuity.

8. The payment of a gratuity insofar as Primary Institutions, Junior High Schools, Higher Secondary Schools and Degree Colleges was governed originally by the **Rules for Grant of Gratuity to the Teachers of Aided Educational Institutions. These Rules came into effect from 01 April 19647**. Those Rules were to apply to all members of the teaching staff of State aided educational institutions of the categories noticed above run either by a local body or private management and recognised and aided by the Department of Education of the State. Rule 5 of these Rules provided that a gratuity equal to six times the pay last drawn by a teacher at the time of his death would be payable provided he had put in not less than three years of continuous service prior to his demise. That Rule reads as follows: -

"5. A gratuity equal to six times of the pay last drawn by a teacher at the time of his death while in service provided he has put in not less than three years continuous service before his death.

Notes - (1) No gratuity will, however, be admissible to the family of a teacher whose death takes place after retirement or of a re-employed pensioner.

(2) "Continuous Service" means all whole-time service whether temporary, officiating or permanent, rendered either in

one or more of the State aided educational institutions of any of the categories mentioned in Rule 3 and includes all periods spent on leave on average pay, or on medical certificate, but it does not include leave without pay."

9. Rule 5 essentially provided for the payment of gratuity in an event where a teacher died prior to retirement subject to the condition that he had rendered not less than three years of continuous service prior to his demise. Rule 6 of the 1964 Rules is in the following terms: -

"6. A teacher covered by these rules, shall on completion of three years' continuous service, make a nomination conferring on one or more members of his family, the right to receive any gratuity that may be admissible under these rules. The nomination shall be made in one of the attached forms as may be appropriated in the circumstances of the case.

Note - If the teacher has not left any family, no gratuity will be payable under these rules."

10. Rule 13 of those Rules which would be of some significance to the question which has arisen is reproduced hereinbelow: -

"13. In the event of no nomination having been made for this purpose before the death of a teacher or in the event of any dispute, the Director of Education, U.P., shall be the final authority and whatever award shall be made by him shall be binding on all parties and no appeal or representation shall lie against his decision."

11. On 08 March 1978, a Government Oder came to be issued dealing with the subject of retiral benefits payable to teachers working in institutions administered by the Board. It essentially provided that pensionary benefits would be payable to teachers working in the aforesaid categories of institutions at the same rate as was being paid to employees in government colleges. The Government Order in this respect made the following provisions:-

"मुझे आपसे यह कहने का निदेश हुआ है कि उत्तर प्रदेश बेसिक शिक्षा परिषद् द्वार संचालित प्राइमरी एवं जूनियर हाई स्कूलों के शिक्षकों को जो लाभत्रयी योजना से अनुशासित हैं वर्तमान नियमों के अधीन जो सेवा निवृत्तिक लाभ उपलब्ध हैं वे राजकीय कर्मचारियों को अनुमन्य पेंशन आदि से अत्यल्प हैं, जिससे वे गत कुछ समय से यह मांग कर रहे थे कि उनकी सेवा निवृत्तिक लाभ इस प्रकार स्वीकृत किये जायें कि उन्हें राज्य कर्मचारियों को अनुमन्य दर पर पेंशन प्राप्त कर सकें। इस विषय पर सम्यंकल्प से विचारोपरान्त शासन ने यह निर्णय लिया है कि 1 मार्च, 1977 को या उसके पश्चात् सेवा निवृत्त हुये या सेवा निवृत्त होने वाले उक्त विद्यालयों के समस्त स्थाई पूर्णकालिक तथा नियमित शिक्षकों को उसी दर पर पेंशन देय होगी, जिस दर पर राजकीय विद्यालयों के समान स्तर एवं श्रेणी के शिक्षकों को अनुमन्य है तथा उसका आगणन भी राजकीय कर्मचारियों के लिये लागू प्रक्रिया के अनुसार किया जायेगा। राज्य कर्मचारियों को अनुमन्य पेंशन की दरें संलग्नक-1 में अंकित है। यह निर्णय निम्नलिखित प्रतिबन्धों के अधीन है-

(1) शिक्षकों को डेथ-कम-रिटायरमेन्ट-ग्रेच्यूटी या मृत्यु के पश्चात् उनके आश्रितों को पारिवारिक पेंशन देय नहीं होगी।

(2) सामूहिक जीवन बीमा योजना का लाभ उन्हें पूर्ववत् मिलता रहेगा।"

12. Dealing with the issue of submission of an option that Government

Order in paragraph 2 made the following provisions: -

"2. मुझे आपसे यह भी कहने का निदेश हुआ है कि उक्त योजना के अंतर्गत पेंशन प्राप्त करने के लिए प्रत्येक कर्मचारी को इस बात का लिखित विकल्प देना होगा कि वह इस योजना के अधीन पेंशन प्राप्त करना चाहेगा अथवा शासनादेश सं0ए-5355/15-3133/1962, दिनांक 17 दिसम्बर, 1965 द्वारा प्रसारित लाभत्रयी योजना के अन्तर्गत पेंशन और उत्तर प्रदेश बेसिक शिक्षा परिषद् भविष्य निधि नियमावली, 1975 के अन्तर्गत बेसिक शिक्षा परिषद् का अंशदान प्राप्त करेगा। जो अध्यापक नगर महापालिका की सेवा से हस्तान्तरित होकर उत्तर प्रदेश बेसिक शिक्षा परिषद् की सेवा में आये है और जिन्होंने लाभत्रयी योजना के लिये विकल्प नहीं दिया है, उन्हे भी इस बात का विकल्प देना होगा कि वह इस योजना के अधीन पेंशन लेना चाहेगे अथवा सम्बन्धित नगर महापालिका के विनियमों के अनुसार पेंशन के लाभों का उपयोग करना चाहेंगे। उक्त विनियमों के अन्तर्गत देय पेंशन के साथ उत्तर प्रदेश बेसिक शिक्षा भविष्य निधि नियमावली, 1975 के अन्तर्गत देय परिषदीय अंशदान अनुमन्य नहीं होगा और उनके खाते में जो कुछ भी परिषदीय अंशदान जमा है, वह संचालित ब्याज सहित, उपरोक्त प्रस्तर-1 (4) में इंगित लेखा शीर्षक में जमा करा लिया जायेगा। मार्च, 1, 1977 के पश्चात् जो भी अध्यापक बेसिक शिक्षा परिषद् द्वारा नियुक्त किये गये हैं या किये जायेंगे उन पर यह योजना अनिवार्य रुप से लागू होगी और उनसे कोई विकल्प भराना आवश्यक नहीं होगा।"

13. In paragraph 6, the Government Order stipulated that all options would have to be submitted by 30 June 1978. Paragraph 6 read thus: -

"6. इस राजाज्ञा से संलग्न विकल्प-पत्र पर प्रत्येक सहायक/प्रधान से विकल्प प्राप्त कर लिया जाये और तद्नुसार उनको सेवा पुस्तिकाओं से इस विकल्प-पत्र को सुरक्षित रखा जाये। यह विकल्प-पत्र दिनांक 30 जून, 1978 तक प्रत्येक अध्यापक से प्राप्त कर लिया जाये और 15 जुलाई 1978 तक इस सम्बन्ध में हुई प्रगति से शासन को अवगत कराया जाये। एक बार किया गया विकल्प अंतिम और अपरिवर्त्तनीय होगा।"

14. The aforesaid Government Order appears to have been issued to give effect to the policy decision to extend benefits of pension to employees and to take cognizance of the provident fund scheme which had come to be introduced in the meanwhile and pursuant to the promulgation of the **U.P. Basic Education Provident Fund Rules, 1975**. By a Government Order of 06 June 1981, the last date for submission of options was extended up to 31 December 1981. It further provided that the aforesaid date would not be extended in future. The relevant extract of the Government Order is reproduced hereunder: -

"उपरोक्त विषयक पर अतिरिक्त शिक्षा निदेशक (बेसिक) के अर्द्धशासकीय पत्रांक पेंशन-2-16124/बावन-9(85)/80-81 के संदर्भ में मुझे आपसे यह कहने का निर्देश हुआ है कि उक्त पात्र में वर्णित स्थिति में राज्यपाल महोदय ने शासनादेश संख्या 5197/15-5-79/77 दिनांक 8-3-78 में उत्तर प्रदेश शिक्षा परिषद् द्वार संचालित स्कूलों के शिक्षकों के संबंध में संशोधित पेंशन योजना को स्वीकार करने का विकल्प-पत्र प्रस्तुति किये जाने की तिथि को जो उक्त शासनादेश दिनांक 8-3-78 के पैरा-6 के अनुसार 30-6-78 तक था, 31 दिसम्बर, 1981 तक बढ़ायें जाने की स्वीकृति प्रदान कर दी है। अतः आपसे अनुरोध है कि आप सभी अधिकारियों एवं बेसिक शिक्षा परिषद् के अधीन

कार्यरत अध्यापकों को यह निर्देश दे दें कि उक्त शासनादेश दिनांक 8-3-78 में स्वीकृत पेंशन योजना के विषय में विकल्प पत्र भरे जाने की पूरी कार्यवाही 31-12-81 के पूर्व ही पूर्ण कर ली जाये। भविष्य में अब इस तिथि को बढ़ाया जाना संभव नहीं होगा।"

15. By another Government Order of 31 March 1982, the State provided that teachers employed in Junior High Schools, Secondary Institutions and Degree Colleges as well as those employed in Primary and Junior High Schools administered by the Board would be entitled to a family pension at par with facilities being provided to the State Government employees. That Government Order came to be issued in light of the the State framing the **"Rajya Sahayata Prapt Uchchatar Madhyamik Vidyalayo Ke Adhyapako Ki Mrityu Tatha Sewa Nivritee Aanutoshik Ki Niyamawali"8**. These Rules were published in the Gazette of 29 August 1981. In terms of Rule 2 thereof, they were to come into effect from 30 June 1978. As is manifest from the title of the 1981 Rules, they were to apply to Higher secondary educational institutions. This is further evident from the fact that the 1981 Rules in turn refer to **the U.P. High Schools and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Rules, 1971**. Though these Rules strictly speaking have no application to the present writ petitions which deals with the case of teachers who were working in primary educational institutions, since they were referred to in extenso by the respondents, the Court deems it apposite to briefly notice the provisions made therein.

Rule 3 of the 1981 Rules was in the following terms: -

"3. यह नियमावली वेतन वितरण अधिनियम, 1971 की परिधि में 30-6-78 या उसके पश्चात कार्यरत केवल उन राज्य सहायता प्राप्त उच्चतर माध्यमिक विद्यालयों के अध्यापकों पर लागू होगी जो किसी स्थानीय निकाय अथवा किसी अशासकीय प्रबन्धतन्त्र द्वारा संचालित है तथा जो 58 वर्ष की आयु पर सेवानिवृत्त होने के पक्ष में अपना विकल्प इस नियमावली की विज्ञप्ति की तिथि के छः मास के अन्दर दे देंगे। विकल्प का एक बार प्रयोग कर लेने पर वह अन्तिम समझा जायेगा। सेवानिवृत्ति की तिथि समाप्त मानी जायेगी।"

Rule 4 provided as under:-

"4. इस नियमावली की विज्ञप्ति की तिथि के उपरान्त नियुक्त अध्यापकों द्वारा अपने स्थायीकरण की तिथि के दो वर्षों के अन्दर 58 वर्ष की आयु पर सेवानिवृत्ति होने के पक्ष में अपना विकल्प न देने पर यह नियमावली उस पर लागू नहीं होगी। विकल्प का एक बार प्रयोग कर लेने पर वह अन्तिम समझा जायेगा।"

16. On 03 December 1991 the State Government issued another Government Order dealing with the issue of the demand by teachers and other employees working in primary schools and Junior High Schools run by the Board to modify options that may have been submitted by them. Dealing with the aforesaid that Government Order made the following provisions;-

"मुझे उपर्युक्त विषयक शासनादेश संख्या 5197/15-5-79/77 दिनांक 8-3-78 तथा शासनादेश संख्या 3181/15-5-81-79/77 दिनांक 6-6-81 के अनुक्रम में से यह कहने का निदेश हुआ है कि अपरिहार्य कारणोंवश कतिपय शिक्षकों द्वारा निर्धारित अवधि तक या तो विकल्प पत्र भरे ही नहीं जा सके अथवा त्रुटिपूर्ण ढंग से भरे गये। फलस्वरुप ऐसे शिक्षक उक्त शासनादेशों द्वारा प्रदत्त सुविधा के लाभों से वंचित रह गये थे और अधिकांश जनपदों के शिक्षक निरन्तर यह मांग कर रहे हैं कि उन्हे उक्त शासनादेश में

अनुमन्य सुविधा का लाभ प्रदान किया जाये। चूंकि उक्त शासनादेशों द्वारा अनुमन्य सुविधा का लाभ प्राप्त करने हेतु निर्धारित अवधि समाप्त हो चुकी थी, जिसके कारण उत्तर प्रदेश बेसिक शिक्षा परिषद् द्वारा संचालित स्कूलों के शिक्षकों जो उक्त सुविधाओं से वंचित रह गये थे, को उक्त सुविधा दिया जाना सम्भव नहीं हो पा रहा था। अतः परिषदीय शिक्षकों द्वार निरन्तर की जा रही इस मांग पर सम्यक् विचारोपरान्त राज्यपाल महोदय ने उन शिक्षकों जो उक्त शासनादेश के अन्तर्गत अनुमन्य लाभ प्राप्त करने हेतु विकल्प देने से वंचित रह गये थे अथवा जिन्होंने पुरानी पेंशन योजना के अन्तर्गत विकल्प प्रस्तुत किया था, को उक्त शासना-देश में निर्धारित अन्य नियमों/शर्तों व प्राविधानों के अन्तर्गत अन्तिम रुप से 90 दिन के अन्दर निर्धारित प्रपत्रों पर पुनः विकल्प प्रस्तुत किए जाने की स्वीकृत सहर्ष प्रदान कर दी है। मुझे यह भी कहना है कि विकल्प पुनः प्रस्तुत किये जाने की उक्त सुविधा उत्तर प्रदेश बेसिक शिक्षा परिषद् के अधीन कार्यरत शिक्षणेत्तर कर्मचारियों को भी आवश्यकतानुसार अनुमन्य होगी।

2. मुझे यह भी कहने का निदेश हुआ है कि जो कार्यरत शिक्षक/शिक्षणेत्तर कर्मचारी इस शासनादेश में दी जा रही सुविधा का लाभ उक्त निर्धारित अवधि के अन्दर प्राप्त करने हेतु विकल्प-पत्र प्रस्तुत नहीं करेंगे उनके सम्बन्ध में यह स्वतः मान लिया जायेगा कि उन पर नयी पेंशन योजना लागू है। इस शासनादेश के निर्गत होने की तिथि के पश्चात् नियुक्त शिक्षक/शिक्षणेत्तर कर्मचारी स्वतः इस सुविधा से आच्छादित माने जायेंगे।"

17. On 23 November 1994 yet another Government Order came to be issued dealing with the subject of gratuity and provided as follows: -

"उपर्युक्त विषयक सचिव उत्तर प्रदेश बेसिक शिक्षा परिषद् इलाहाबाद के पत्रांक बे0शि0प0/पेंशन/17066/92-93 दिनांक 30-10-92 के संदर्भ में मुझे यह कहने का निदेश हुआ है कि उत्तर प्रदेश बेसिक शिक्षा परिषद् के अधायपकों एवं शिक्षणेत्तर कर्मचारियों, सहायता प्राप्त गैर सरकारी जूनियर हाई स्कूलों के शिक्षकों एवं शिक्षणेत्तर कर्मचारियों को माध्यमिक शिक्षकों की भांति 58 वर्ष की आयु पर सेवा निवृत्त होने का विकल्प देने की स्थिति में ग्रेच्युटी की सुविधा दिये जाने की मांग की है। सम्यक् विचारोपरान्त श्री राज्यपाल यह आदेश प्रदान करते है कि जिस प्रकार राज्य सहायता प्राप्त माध्यमिक विद्यालयों के शिक्षकों को 58 वर्ष की आयु पर सेवा निवृत्त होने का विकल्प देने पर राजकीय कर्मचारियों की भांति ग्रेच्युटी की सुविधा अनुमन्य है, उसी प्रकार उ0प्र0 बेसिक शिक्षा परिषद् के अध्यापकों एवं शिक्षणेत्तर कर्मचारियों, सहायता प्राप्त गैर सरकारी माध्यमिक विद्यालयों के शिक्षणेत्तर कर्मचारियों तथा सहायता प्राप्त गैर सरकारी जूनियर हाई स्कूलों शिक्षकों एवं शिक्षणेत्तर कर्मचारियों को 58 वर्ष की आयु में सेवा निवृत्त होने की दशा में ग्रेच्युटी की सुविधा प्रदान की जाये। यह सुविधा उन्ही अध्यापकों एवं कर्मचारियों को अनुमन्य होगी, जो 58 वर्ष की आयु पर सेवा निवृत्त होने का विकल्प निर्धारित प्रपत्र पर प्रस्तुत करेंगे। यह सुविधा उपरोक्त वर्णित सभी शिक्षकों/कर्मचारियों पर इन आदेशों के जारी होने की तिथि से लागू होगी।

2. मुझे यह भी कहना है कि प्रश्नगत लाभ उन्ही अध्यापकों/कर्मचारियों को अनुमन्य होगा जो संलग्न निर्धारित प्रपत्र पर शासनादेश जारी होने के दिनांक से 90 दिन के अन्दर दो प्रतियों में संस्था के माध्यम से पेंशन स्वीकृत करने वाले अधिकारी के पास अपना विकल्प पत्र प्रेषित करेंगे। निर्धारित तिथि तक विकल्प पत्र न प्रस्तुत किये जाने पर यह स्वतः मान लिया जायेगा कि संबंधित अध्यापक या कर्मचारी इस राजाज्ञा में स्वीकृत सुविधा का लाभ प्राप्त नहीं

करना चाहता। एक बार प्रस्तुत किया गया विकल्प अन्तिम तथा अपरिवर्तनीय होगा।"

18. A reading of the provisions so made establishes that gratuity was provided to be payable subject to the teacher submitting an option of retiring at the age of 58 years. It becomes relevant to note that by this time the age of superannuation had been increased from 58 years to 60 years. The Government Order further required all options to be submitted by existing employees within 90 days of the issuance of that Order. A Government Order of 28 November 1998 taking into consideration the report of the Pay Commission of 1997 enhanced the quantum of gratuity payable to a maximum of Rs. 3.50 Lakhs.

19. Taking up the issue of a claim of teachers and employees seeking to modify options that may have already been submitted, the State Government on 10 June 2002 issued the following directions: -

"विषयः- उ0प्र0 बेसिक शिक्षा परिषदीय शिक्षक/शिक्षणेत्तर कर्मचारियों के सेवा निवृत्तिक लाभों में परिवर्तन हेतु विकल्प की सुविधा दिए जाने के सम्बन्ध में नीति निर्धारण।

महोदय,

उपर्युक्त विषयक शासनादेश संख्या-6369/15-5-93-55/89, दिनांक 23-11-94 के अनुक्रम में मुझे यह कहने का निदेश हुआ है कि उक्त शासनादेश द्वारा प्रदत्त विकल्प की सुविधा के लाभ से वंचित रह गये बेसिक शिक्षा परिषद शिक्षक/शिक्षणेत्तर कर्मचारियों के सम्बन्ध में विकल्प परिवर्तन की सुविधा प्रदान किये जाने की मांग पर सम्यक विचारोपरान्त श्री राज्यपाल यह आदेश प्रदान करते है कि उ0प्र0 बेसिक शिक्षा परिषदीय शिक्षकों/शिक्षणेत्तर कर्मचारियों द्वारा सेवानिवृत्त के एक वर्ष पूर्व अर्थात् जिस शैक्षिक सत्र में उनकी सेवानिवृत्ति होगी, उसकी पहली जुलाई तक विकल्प परिवर्तन कर सकते है। किन्तु ऐसे कर्मचारी जो 58 वर्ष की आयु पर सेवानिवृत्ति का विकल्प देते हैं, को सेवा निवृत्ति के पूर्व तक विकल्प परिवर्तन की सुविधा अनुमन्य होगी। यह व्यवस्था इस शासनादेश के जारी होने की तिथि से लागू होगी।"

20. In 2011 pursuant to an amendment to Rule 29 of the Teachers Rules, the age of retirement of teachers in basic education schools came to be increased to 62 years. In light of the aforesaid on 04 February 2004 the State issued a Government Order providing that all facilities and benefits which could be claimed by employees upon submission of an option to retire at 58 years would now be available upon an option being exercised to retire at the age of 60 years. That Government Order made the following provisions: -

"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 बढ़ाकर 62 वर्ष किये जाने की सहर्ष स्वीकृति प्रदान करते हैं। फलस्वरुप 58 वर्ष की अधिवर्षता आयु पर मिलने वाले सेवानिवृत्तिक लाभ अब 60 वर्ष की अधिवर्षता आयु पर तथा 60 वर्ष की अधिवर्षता आयु पर मिलने वाले सेवा निवृत्तिक लाभ 62 वर्ष की अधिवर्षता आयु पर अनुमन्य होंगे।

श्री राज्यपाल महोदय यह भी आदेश प्रदान करते हैं कि जो शिक्षक जुलाई 2003 के पश्चात अधिवर्षता आयु पूर्ण कर सत्रान्त लाभ पर

चल रहे हैं उन्हे भी अधिवर्षता आयु वृद्धि संबंधी लाभ प्रदान किया जायेगा।

इस सम्बन्ध में पूर्व में निर्गत समस्त शासनादेश उक्त सीमा तक संशोधित समझे जायेंगे तथा उनकी (अपठनीय) शर्ते यथावत रहेंगी।"

21. By an Office Order of 16 September 2009, the maximum limit of gratuity was increased to Rs. Ten Lakhs. By another Office Order of 23 December 2011, taking note of the recommendations of the Pay Commission Report of 2008, the respondents introduced the following measures in respect of pension and gratuity:-

"वेतन समिति, उत्तर प्रदेश, 2008 की संस्तुतियों को स्वीकार किये जाने के फलस्वरुप बेसिक शिक्षा परिषद द्वारा संचालित विद्यालयों में कार्यरत शिक्षकों/कर्मचारियों (दिनांक 01-1-2006 अथवा उसके उपरान्त सेवानिवृत्त) के पेंशन एवं राशिकरण की दरों का पुनरीक्षण किये जाने से संबंधित शासन के कार्यालय ज्ञाप संख्या-1754/79-5-2009-2/09, दिनांक 16-9-2009 के प्रस्तरों में संशोधन/व्यवस्था विषयक शासन के कार्यालय ज्ञाप संख्या-2768/79-5-2010-2/09, दिनांक 28-2-2011 के प्रस्तर-1(1) में वित्त विभाग की सहमति से निम्नानुसार व्यवस्था की गयी थी:-

"कार्यालय ज्ञाप संख्या-1754, दिनांक 16-9-2009 के प्रस्तर-4(2) एवं 4(4) के संबंध में यह व्यवस्था उन शिक्षकों/शिक्षणेत्तर कर्मचारियों पर भी लागू होगी, जो दिनांक 01-1-2006 तथा 15-9-2009 के मध्य 33 वर्ष की अर्हकारी सेवा पूर्ण करके सेवानिवृत्त होंगे, जो शिक्षक/शिक्षणेत्तर कर्मचारी दिनांक 01-1-2006 से दिनांक 15-9-2009 के मध्य सेवानिवृत्त हुए हैं, परन्तु उनकी अर्हकारी सेवा 33 वर्ष की पूर्ण नहीं होती है उन्हे पेंशन की पूर्व नियमों के अधीन, उनकी सेवाअवधि के आधार पर अनुपातिक दर से अनुमन्य होगी।"

2. वित्त (सामान्य) अनुभाग-3 के शासनादेश संख्या-सा-3-1622/दस-2010-308/97, दिनांक 10-11-2010 में प्रदत्त आदेश द्वारा राजकीय सेवानिवृत्त कर्मियों के लिये दिनांक 01-1-2006 को अथवा उसके उपरान्त सेवानिवृत्त/मृत कर्मियों को 20 वर्ष की सेवा पर पूर्ण पेंशन का लाभ दिये जाने की व्यवस्था दिनांक 08-12-2008 के स्थान पर दिनांक 01-1-2006 से प्रभावी कर दी गयी है। अतः एतद्द्वारा बेसिक शिक्षा परिषद द्वारा संचालित विद्यालयों में कार्यरत शिक्षकों/शिक्षणेत्तर कर्मचारियों को 20 वर्ष की सेवा पर पूर्ण पेंशन का लाभ दिये जाने की व्यवस्था शासनादेश निर्गत होने की तिथि से प्रभावी होने के स्थान पर दिनांक 01-1-2006 से प्रभावी की जाती है।

3. 60 वर्ष के उपरान्त सेवानिवृत्ति का विकल्प दिये जाने पर सेवानिवृत्ति/मृत्यु की दशा में ग्रेच्यूटी अनुमन्य होगी।"

22. On 23 August 2017 the State Government taking into consideration the recommendations made by the Pay Commission of 2016 enhanced the maximum gratuity payable to Rs. Twenty Lakhs.

23. The learned Chief Standing Counsel has submitted that in accordance with the provisions made in the 1964 and 1981 Rules read with the various Government and Office Orders issued from time to time, it was incumbent upon all teachers to submit an option to receive gratuity within the time frame stipulated therein. According to the learned Chief Standing Counsel a failure on the part of the teachers to timely submit their options

must necessarily be held as depriving them of their right to receive gratuity. It was his submission that the decision in **Usha Rani** did not take notice of the aforesaid requirement and proceeded on the premise that an option was liable to be exercised right up to the time of a teacher attaining the age of superannuation. Sri Maurya learned Chief Standing Counsel placing reliance upon the judgment rendered by a Division Bench of the Court in **Prakash Chandra Sharma (Since deceased) through L.R. (Wife) v. Dy. Director of Education Bareilly Region, Bareilly And Others9** submitted that an option must mandatorily be submitted in accordance with the provisions made in the relevant rules and in the absence thereof a right to receive gratuity is lost. He further contended that an option once submitted and duly taken on record by the State attains finality and could not have been modified or changed. Sri Maurya placed reliance upon paragraph-25 of that decision which is reproduced hereunder: -

"25. During the course of argument learned counsel relying on Rule of 1965 giving benefit of 'Tiple Benefit Scheme' notified by G.O. Of 1965 argued that in the matter of pension Regional Deputy Director is the Competent Authority, and therefore, option exercised by a teacher for getting death-cum-retirement gratuity is required to accepted by the Regional Deputy Director of Education to attain finality. We are not inclined to accept this contention, for the reasons that the benefit of death-cum-retirement gratuity was for the first time accepted by the State Government by G.O. dated 10.8.1978 and consequently, a rule (Niyamavali of 1981) was framed and notified by G.O. dated 29.8.1981 prescribing the manner and procedure to exercise the option An official act is to be done in the manner and procedure prescribed in the Rule framed in that regard and not otherwise. Therefore, we are of the view that for claiming death-cum-retirement gratuity the option is to be exercised and accepted in the manner as laid down in the Niyamavali of 1981 notwithstanding Rule 1965 otherwise the entire Scheme would become unworkable."

24. Learned Chief Standing Counsel then pressed in aid the decision of the Division Bench in **State of U.P. And Others v. Shashthi Dutt Shastri And Others10** and more particularly upon paragraph-19 of that decision which reads thus:-

"19. It is also to be noted that in the present cases the petitioners had already exercised their option to forgo the gratuity and continued in the service till the age of 60 years and as such they cannot turn around and claim that they be provided gratuity at par with the teachers working in Government colleges."

25. Learned Chief Standing Counsel lastly invited the attention of the Court to the judgment of a learned Judge in **Prakash Chandra Sharma v. Dy. Director of Education Bareilly Region, Bareilly11** where the following conclusions came to be recorded:-

"19. The conclusions emerging from the above discussion may be summed up as below:

(i) The option to retire at the age of 58 years exercised by a teacher becomes final and irrevocable after it is counter-signed by the competent Authority referred to in paragraph 16 of the Niyamawali and

copies of the same are endorsed to the Manager of the Institution for being affixed in the Service book and the Controlling Authority namely, the Regional Dy. Director of Education for record as comprehend by Rule 16 of the Niyamawali. The question of withdrawal of the option does not arise thereafter.

(ii) Option to retire at the age of 58 years is, in effect, an option fur death-cum-retirement gratuity as per Government Order, dated 10-8-1978 read with G. O., dated 28-8-1981. The exercise of option and its acceptance/authentication/confirmation, is governed by the G. O. dated 10-8-1978 read with Niyamawali issued vide Government Order, dated 28-8-1981. The Government Orders dated 4-11-1991 read with G. O. dated 6-10-90 do not alter the legal position comprehended by the G.Os. aforesaid. At the most they confer a right in favour of those teachers, who had not been able to opt for gratuity by giving their options to retire at the age of 58 years, to give options for the same within the period stipulated in the G. O. , dated 4-11-1991. It does not confer any right in favour of a teacher who had already opted for retirement at the age of 58 years and whose option has been countersigned/ accepted by the competent Authority, withdraw the same and opt to retire at the statutorily prescribed age of 60 years."

26. Drawing the attention of the Court to the Government Order of 23 November 1994, learned Chief Standing Counsel contended that since that drew a parallel between teachers in primary educational institutions and those working in secondary institutions and placed them at par for the purposes of payment of gratuity subject to them submitting an option to retire at the age of 58 years, the requirements placed by the 1981 Rules would ipso facto apply to the case of the present petitioners also. The submission in essence was that in the absence of an option to retire at the age of 58 or 60 years being submitted, the right to receive gratuity would stand forfeited. It is in the aforesaid backdrop that the Court now proceeds to evaluate the correctness of the contention that Usha Rani is liable to be reconsidered.

27. It may at this preliminary stage be noted that the decisions rendered by the learned Judge and the Division Bench in **Prakash Chandra Sharma** do not deal with the question which falls for determination in this batch. Those two decisions were essentially dealing with the question whether an option once submitted and accepted was liable to be treated as sacrosanct. Answering the same the Court in **Prakash Chandra Sharma** held that an option once submitted and accepted in accordance with the procedure prescribed and prevalent could not be modified. The aforesaid principle was reiterated **in Shashthi Dutt Shastri.** However, as a reading of the principal question framed by the Court would show, the issue here is whether a right to receive gratuity can be said to be lost solely on account of a failure on the part of the teacher to have submitted an option prior to his death and attaining the age of retirement.

28. At the very outset the Court deems it apposite to underline some significant distinguishing features between the 1964 and the 1981 Rules. Firstly, the 1964 Rules did not contemplate an option to receive gratuity being submitted at all. As is evident from a reading of Rule 5, gratuity became payable immediately upon a teacher passing away while in service.

The only additional fetter which stood imposed was of the teacher having rendered three years of continuous service prior to his demise. The Note to that Rule specifically mandated that gratuity would not be payable where the death occurred after the retirement of the teacher. The requirement of an option came to be introduced for the first time by virtue of the Government Order of 8 March 1978 which extended pensionary benefits to teachers of primary educational institutions at par with their counterparts in government colleges. An option from these teachers was liable to be obtained since at the relevant time they were also beneficiaries of the provident fund which came to be created in terms of the 1975 Rules noticed above. The extension of the cutoff date for submission of options as contemplated under the aforementioned Government Order must consequently be understood in the aforesaid and limited context. Options for receipt of gratuity are fundamentally traceable to the Government Order of 23 November 1994. It was this executive direction which for the first time introduced the requirement of an option being submitted. The scheme of this Government Order must necessarily be evaluated bearing in mind the fact that by this time the age of retirement had been extended from 58 to 60 years. It was in the aforesaid backdrop that teachers were called upon to opt either to receive gratuity and exit service at the age of 58 years or continue till attaining the age of 60 years. The said Government Order was then followed up by the Order of 10 June 2002 which provided for options being submitted one year prior to the teacher reaching the age of superannuation and in any case by the 1st of July of the academic year in which the teacher was to retire. While this Government Order principally dealt with the subject of change of options that may have been submitted in terms of the Order of 23 November 1994, the respondents have unambiguously conceded and submitted that the timelines as envisaged under this Order was uniformly and consistently followed with respect to all teachers who may have come to be engaged post 1994 and thereafter. Regard must be had to the fact that the Order of 23 November 1994 which required options being submitted within 90 days of its issuance would necessarily have applied and stand restricted to those teachers who were already in employment on the date of its issuance. The only subsequent Government Order of import and having a material bearing on the question of submission of options was that of 4 February 2004. This Order essentially took into consideration the fact that the age of retirement had come to be increased to 62 and therefore the corresponding requirement of options being invited from teacher to either exit service at 60 years and receive gratuity or continue in service till the age of 62 years. The aforesaid order clearly recited that all previous orders issued on the subject were to be deemed to have been amended only to the aforesaid and limited extent.

29. From the aforesaid recordal of facts it is evident that insofar as primary educational institutions were concerned, no statutory provision commanded the submission of options in order to be entitled to receive gratuity. The concept of submission of options came to be introduced by virtue of the Government Order of 23 November 1994 and those which came to be subsequently issued and have been noticed above. The Court also takes cognizance of the statement of the learned Chief Standing Counsel who stated that the provisions of the Government

Order of 10 June 2002 though ostensibly made in the context of change of options were what was consistently followed by the Board in respect of teachers who came to enter service post 1994 and is adhered to even today.

30. As an ancillary aspect connected with the above, it may be noted that Rule 13 of the 1964 Rules dealing with the issue of nomination also made provisions for a contingency where a teacher had failed to make a nomination prior to his death. Rule 13 dealing with that eventuality provided that in the event of no nomination having been made it would be the Director of Education who was designated to be the final authority to adjudge who would be entitled to the amount of gratuity. That award as made by the Director was to be binding on all parties. The aforesaid provisions made in Rule 13 are liable to be read in conjunction with Rule 6 which provided that a teacher covered by the 1964 Rules would be obliged to make a nomination upon completion of three years of continuous service indicating the names of the members of his family who would have the right to receive gratuity upon his death. These provisions also indicate that a right of a family member to receive gratuity consequent to the death of a teacher covered by the 1964 Rules was not completely effaced or lost.

31. However, the position of teachers working in Higher Secondary institutions and governed by the provisions of the 1971 Act came to be drastically altered upon the promulgation of the 1981 Rules. This the Court observes since Rule 3 of the 1964 Rules originally covered even those teachers who were working in Higher Secondary Schools and Degree colleges. Upon the promulgation of the 1981 Rules, teachers working in those categories of institutions came to be exorcised from the ambit of the 1964 Rules. Rule 4 of the 1981 Rules acts and operates in stark contrast to the provisions made in the 1964 Rules. In contrast to the aforesaid Rules, Rule 3 of the 1981 Rules postulates that those who wish to retire at the age of 58 years would have to submit an option in that regard within six months of the publication of those Rules. It further prescribed that an option once exercised would be deemed to be final. Rule 4 of the 1981 Rules states that teachers who come to be appointed after the publication of those Rules and fail to furnish an option indicating that they desire to retire at the age of 58 years within 2 years of being confirmed in service would not be covered by those Rules. Rule 11 then proceeded to amplify the conditions subject to which gratuity would be payable. One of the primary conditions imposed was the submission of an option to retire at 58 years. The language of Rule 4 seems to indicate that the right to receive gratuity was directly dependent upon the teacher exercising a choice to retire at the age of 58 years and a failure to submit that choice within the time frame stipulated was to result in the 1981 Rules themselves ceasing to apply to such a teacher. The Government Order of 17 February 1999 diluted the rigour of this requirement by providing that an option to retire at the age of 58 years may be submitted a year before attaining the age of superannuation and latest by the 1st of July of the academic year in which the date of retirement was to fall.

32. However, the distinguishing feature of the scheme applicable to teachers of primary educational institutions was that a failure to submit an option was never considered as a fait accompli. As was

noticed above, the first Government Order of 08 March 1978 required all options to be submitted by 30 June 1978. That date then came to be extended up to 31 December 1981. However, and for obvious reasons the aforesaid two Government Orders could have only applied to those teachers who were already in the employment of the respondents. By the subsequent Government Order of 03 December 1991, the respondents required all teachers to exercise an option to receive pensionary benefits within 90 days of the issuance of that Order. The prescription of a 90 days period for submission of options was reiterated in the Government Order of 23 November 1994. However, the string of orders did not deal with the case of those teachers who were and would have come to be engaged by the respondents after their promulgation. Though the order of 10 June 2002 on its plain reading essentially dealt with the situation of where a teacher desired to change the option which had been submitted, it was fairly conceded by the learned Chief Standing Counsel that the stipulations made therein, namely, of options being submitted one year prior to the age of superannuation being reached and in any case by 01 July of the academic year in which the age of retirement was falling was uniformly followed and implemented in respect of all teachers who came to be engaged and employed by the respondents from time to time and post the issuance of the Government Orders of 23 November 1994. On a specific query being put, learned Chief Standing Counsel submitted that this practice of permitting the submission of options prior to attaining the age of superannuation and in accordance with the timelines as prescribed in the Government Order of 10 June 2002 has been consistently followed in the department. Regard must also be had to similar provisions which were made in the Government Order of 17 February 1999 which dealt with the case of teachers employed in government aided and privately managed Senior Secondary institutions. While even that Government Order principally dealt with an issue of change of option and provided that a modification may be made prior to a teacher attaining the age of superannuation, the practice followed remained the same namely of options submitted even at the first instance being permitted to be filed before the respondents one year prior to the teacher attaining the age of superannuation and in any case by the first of July of the academic year in which the date of superannuation were to fall. More importantly neither the 1963 Rules nor the various Government Orders issued in connection with the right of teachers working in primary educational institutions administered by the Board to claim gratuity provided for the same being lost forever or being forfeited consequent to a failure to submit an option. In any case they did not introduce or prescribe a corresponding connection between entry into service and the submission of an option. In fact, and as was conceded on behalf of the State, teachers had been conferred the right to exercise that option up to one year prior to reaching the age of retirement. The only additional stipulation that was placed was of that option being submitted before 1 July of the academic year in which the teacher was to retire. The absence of a negative stipulation and a prescription specifying the adverse consequences of inaction clearly operates in favour of teachers and the petitioners here. The Court also bears in mind the undisputed position on facts which has emerged of teachers being permitted to submit their options prior to attaining the age of superannuation and

latest by 1st of July of the academic year in which they were to attain the age of retirement. Once that is conceded to be the accepted procedure consistently followed, the Court fails to find any justification to hold teachers to be under an obligation to submit an option immediately upon entry into service.

33. The Court also finds itself unable to accept the contention of the respondents that the Government Order of 23 November 1994 having conferred parity upon teachers of primary educational institutions and their counterparts in secondary medium schools must be read as attracting the 1981 Rules. Undisputedly the 1981 Rules have never been adopted by or extended in their application by any order statutory or otherwise to teachers in primary educational institutions governed by the Board. Those Rules were made in the context and backdrop of the 1971 Act which admittedly has no application to this category of teachers. The Court thus finds itself unable to sustain the submission that the 1981 Rules would apply to these teachers merely on the basis of the Order of 23 November 1994. The Court also notes that the said order itself does not either explicitly or implicitly extend the application of the 1981 Rules to teachers working in institutions governed by the Board. The contention as advanced also does not flow impliedly from a reading of that Government Order. The application of Rules cannot be inferred by way of an interpretational sidewind. The expression "at par with" as employed in that Government Order does not lend strength to the contention as urged either especially when a careful and holistic reading of that Order establishes that the aforesaid expression was used only to underline the fact that teachers of aided secondary educational institutions stood at par with other employees of the State Government for the purposes of gratuity. The submissions advanced on the aforesaid lines thus stands negatived.

34. It is in the aforesaid background that the Court now proceeds to consider whether the petitioners here can be denied the benefit of gratuity. Undisputedly the teachers and employees in the batch of these writ petitions died prior to attaining the age of superannuation. As per the stand and practice of the State consistently followed, they had a right to exercise an option up to one year prior to their retirement and by the first of July of the academic year in which the date of retirement was being reached. It is in the aforesaid light that the decision rendered in **Usha Rani** took the view that death being an unforeseen circumstance and an event which is clearly unpredictable could not have resulted in family members of those teachers being denuded of the right to claim gratuity. The submission which came to be accepted was that the respondents could not have presumed that a teacher had decided that he would continue upto 60 or 62 years. Indubitably death is a circumstance which is neither predictable nor is it an occurrence which can possibly be foreseen or anticipated.

35. Viewed in that light it would be wholly erroneous and irrational to hold that a teacher was liable to submit an option prior to his demise. The submission of an option to receive gratuity cannot legally be recognised as being attached to a circumstance which

by its very inherent character is unforeseeable and incapable of being prophesized. Lastly, as was rightly held in **Usha Rani** and the various decisions noticed in that judgment, it would be wholly impermissible for the respondents to assume either that the teacher wished to continue beyond the age of 60 or 62 years or that he wished to forego gratuity merely because an option in that respect could not be submitted prior to their unexpected demise. Teachers while serving under the respondents would be presumed to be aware of the practice and requirement of submitting the requisite option one year prior to attaining the age of retirement coupled with the additional burden of ensuring that the option was submitted not later than the 1st of July of the academic year in which the teacher was to retire. If that was the recognised methodology consistently followed by the respondents, it would be wholly incongruous to recognise a responsibility placed upon teachers to submit that option prior to their untimely demise. On a more fundamental plane it must necessarily be stated that the State has failed to place for the consideration of the Court any prescription, statutory or otherwise, which may have drawn an inviolable line in time which when crossed was envisaged to denude a teacher of his right to claim gratuity.

36. It may only be observed that the State would have been justified in refusing a claim for gratuity in case a teacher had continued in service beyond the stipulated age of retirement and thereafter died while in service. For instance, in case a teacher has continued beyond the age of 58 or 60 years without exercising the requisite option, he would be deemed to have taken and derived benefit of the extended age of retirement. While serving under the respondents in that extended tenure the teacher may have been presumed to have decided to continue in service till the age of 60 or 62 years. However, in a case where death occurs prior to the teacher attaining the age of 58 or 60 years cannot reasonably merit an assumption being made that such a teacher wanted to continue up to the extended and increased age of retirement.

37. Viewed in light of the above, it is manifest that the decision in **Usha Rani** appears to have rightly taken the position that gratuity cannot be denied in a situation where a teacher dies prior to reaching the age of retirement and the death having occurred a year before the age of retirement was being reached. The various Government Orders which have been referred to by the respondents far from casting a shadow of doubt on the correctness of the judgment in **Usha Rani** buttress and support the conclusions recorded therein. For all the aforesaid reasons, the stand of the respondents that the petitioners here would not be entitled to gratuity consequent to a failure on the part of the deceased teacher having failed to exercise an option would not sustain.

38. The writ petitions are consequently **allowed**. The respondents are hereby directed to evaluate the claim of the petitioners for release of gratuity in light of the conclusions recorded hereinabove. The exercise of consideration shall be concluded with expedition and a final decision communicated to the petitioners within a period of 3 months from the date of presentation of a duly authenticated of this judgment before the Basic Education Officer concerned.

(2021)09ILR A1426
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.09.2021

BEFORE

THE HON'BLE ALOK MATHUR, J.

Service Single No. 13029 of 2020
& other connected cases

Dr. Avinash Chandra Srivastava & Ors.
....Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Hari Prasad Gupta, Hari Ram Gupta

Counsel for the Respondents:
C.S.C.

A. Service Law – Non-practicing allowance - U.P. Government Doctors (Allopathic) Restriction on Private Practice Rules, 1983 - Rule 3, 4(b) - U.P. Government Doctors (Allopathic) Restriction on Private Practice (Second Amendment) Rules, 2005.

The 7th Pay Commission recommendations were approved by State of U.P on 09/03/2019 and given effect to vide GO dated 09/08/2019. The benefit of the same was given to the petitioners, and they started receiving the enhanced rate of NPA, till passing of the impugned GOs. (Para 5)

The bulwark of the challenge in this bunch of writ petitions is discrimination meted out to the petitioners by the unreasonable classification introduced by the State Government, by the impugned GOs dated 14/07/2020 and 04/09/2020, both having the effect of disentitling the petitioners who retired prior to 24/08/2009 of the revised rate of Non-Practicing Allowance (NPA). (Para 6)

In one set of writ petitions the GOs dated 14/07/2020 and recovery order dated 16/07/2020 have been challenged, while second set of petitions, the challenge is to the GO dated 04/09/2020 which had amended the earlier GO dated 09/03/2019. The consequential relief sought in both the writ petitions is writ of mandamus to command the opposite parties to pay the NPA as per the existing revised rate of 20% as fixed by the GO dated 09/08/2019. (Para 6)

Maintainability – The present petition at the behest of persons holding Office of Director/Additional Director at the time of the retirement even though initially excluded from the benefit of Non-Practicing Allowance due to operation of the exclusionary clause in the rules of 1983, but subsequently, after amendment of 2005, were granted benefit of Non-Practicing Allowance, would be maintainable. The embargo imposed by the rules of 1983 was lifted when the said rules were amended in 2005 and they became entitled to receive the Non-Practicing Allowance. From 2005 till passing of the impugned order dated 14/07/2020, there is nothing on record to show that petitioners were disentitled from receiving the benefit of Non-Practicing Allowance.

The petitioners being aggrieved by the impugned orders which have disentitled them from the benefit of the Non-Practicing Allowance due to the fortuitous circumstance, that their date of the retirement is prior to 24/08/2009, and not because they were holding the post of Director/Additional Director at the time of the retirement, which grievance can legally and validly be raised by them in the present set of petitions. (Para 23)

An individual cannot be non-suited, just because an Association of which he is a member has also preferred a similar writ petition on the same subject matter. A writ petition is maintainable before the High Court by any person who is aggrieved by the action of the State as being violative of part III of the Constitution. An individual has a right to enforce his fundamental rights enshrined in part III of the Constitution, and the rights to sue, to enforce the fundamental rights is not subservient or subject to a class action by the Association of which he is a member.

In the present case, the Association and the individual members have raised a common challenge to the impugned Government Orders. The petitioners are discontent by the impugned Government orders as they have been personally deprived of the benefit of the Non-Practicing Allowance and therefore they are the "aggrieved" and can validly ventilate their grievance by means of a writ petition u/Article 226 of the Constitution and also that the benefit or otherwise arising from the outcome of the present writ petitions, shall necessarily be of the individual members. (Para 24)

B. Prospective application of Government Orders – The State Government while interpreting the words "prospective/immediate effect", in the GO dated 24/08/2009 have understood it to mean that the benefit of the said order would be given to persons retiring after coming into effect of the said GO, i.e. 24/08/2009.

Prospective application has no correlation to the eligibility of claiming Non-Practicing Allowance (NPA). To make it abundantly clear the prospective operation of such Government orders only means that the revised rates are applicable from that particular day onwards, and no arrears can be claimed on the basis of the revised rates prior to the said date. There is no quarrel about their right to receive NPA, as the petitioners are regularly being paid pension as revised by the State Government from time to time. The allowances are also revised by the State Government from time to time looking into various factors including the cost index of living. Similarly, the NPA has been constantly revised since 1983, and it has always been co-related with the scale of pay an even though prior to 24/08/2009 it was on a slab basis, but still it was roughly a particular percentage of the basic salary which is clearly discernible on a plain reading of the aforesaid GOs. The GO dated 24/08/2009 also revised the rate of NPA and made it 25% of the basic salary. Apart from the revision of the rates in the said GO, there is no such tectonic shift in the policy w.r.t. payment of NPA which the State claims has led to create a watershed between the persons retiring prior to 24/08/2009 and those retiring subsequently, nor any such provision could be demonstrated by the State. **Any such allowance like NPA is not liable to remain stagnant over a period of time in its application to petitioners while it is revised from time to time with regard to others similarly situated.** (Para 55, 92, 93)

C. Retrospective application of impugned Government Order - In the absence of any provision contained in the legislative Act, a delegatee cannot make a delegated legislation with retrospective effect. There is no dispute over the fact that the legislature can make a law retrospectively or prospectively subject to justifiability and acceptability within the constitutional parameters. A subordinate legislation can be given retrospective effect if a power in this behalf is contained in the principal Act. (Para 55)

The Government was exercising its delegated power u/Rule 4 of the rules of 1983, which provided that the State Government could fix the rates of NPA from time to time. The impugned GO dated 04/09/2020 having fixed the rates of NPA w.r.t. the petitioners retrospectively, with effect from 24/08/2009, which is impermissible as per the law laid down by the Apex court. The impugned GO purportedly clarifying the earlier G.O. dated 09/08/2019 provided that the petitioners would only be entitled to NPA which they were receiving at the time of their retirement. In the meanwhile, the petitioners have received enhanced amount of NPA, which is also sought to be recovered by the impugned order. The impugned GO has the effect of refixing the rates with effect from 24/08/2009, therefore is clearly without jurisdiction and arbitrary. Consequently, the GO dated 04/09/2020 is clearly without authority illegal and arbitrary. (Para 56)

Retrospective dis-entitlement of Non-Practicing Allowance is clearly without jurisdiction, illegal, arbitrary and clearly violates all canons of reasonableness. Clause 3 of the GO dated 14/07/2020 states that from 24/08/2009 to 31/12/2015 the persons having retired prior to 24/08/2009 will be entitled to the same amount of Non-Practicing Allowance which they were receiving at the time of retirement. This clause clearly indicates that there was no GO, or any decision

of the Government prior to 14/07/2020 not to revise the rate of NPA w.r.t. the Government doctors who retired prior to 24/08/2009.

The rules of 1983 entitle the Government to fix the rate of NPA from time to time, but there is no statutory provision enabling the Government to give retrospectivity effect to such determination. The rules of 1983 do not contain any provision enabling the State Government while exercising its power u/rule 4 to fix the rates, to make them applicable retrospectively. This fixation of rate with regard to the petitioners has retrospective application, and therefore, beyond the mandate of the State Government u/Rule 4 of the Rules of 1983, and contrary to the law. Therefore, without there being any enabling provision in this regard in the rules of 1983, the impugned order specially clause 3 of GO dated 04/09/2020 is without jurisdiction, illegal and arbitrary. (Para 57)

D. Colourable exercise of Power - The judicial pronouncements by court of competent jurisdiction cannot be set to naught by the action of the legislature or executive as it would amount to an encroachment on the judicial power. (Para 64)

Comparing both the impugned GOs it is noticed that they provide for the same entitlement regarding the petitioners who retired prior to 24/08/2009 and both the impugned GOs are to the effect that the petitioners would be receiving the same amount of NPA which they were receiving at the time of the retirement, without any benefit of revision. (Para 68)

It is well settled that rights and benefits which have already been earned or acquired under the existing rules cannot be taken away by amending the rules with retrospective effect. There cannot be any doubt whatsoever that the GO dated 04/09/2020 is nothing but a repetition of the earlier GO dated 14/08/2020. The respondents could not point out any difference in both the GOs, w.r.t. its application to the petitioners and also w.r.t. their entitlement of NPA. Such an exercise of power as has been done by the State in the present case, cannot be said to be a legitimate in exercise of powers vested in clause 4 of the rules of 1983, and is arbitrary and consequently violative of Article 14 of the Constitution. (Para 69, 70)

Once there is a judicial opinion, even if it is in form of an interim order, the Executive cannot be allowed to be override the said order, and in case the same is done it would amount to transgression of their power, and such an action is liable to be set aside as being without jurisdiction and authority. The G.O. dated 04/09/2020 has the effect of depriving the petitioners of their entitlement to the revised rate of NPA. The GO dated 04/09/2020 is clearly a device or a mechanism used by the respondents to circumvent the interim order of this Court dated 24/08/2020 by which the GOs dated 14/07/2020 and 16/07/2020 were stayed. In case the State was aggrieved by the interim order dated 24/08/2020, it was always open for them to move an application for vacation of the stay, or to move a special appeal, or approach the Supreme Court. The Government does not have any power to override a judicial order by executive fiat. The demarcation of power has clearly been delineated in the Constitution where the power to declare a legislative or executive act to be unconstitutional is vested only with the judiciary. The impugned order dated 04/09/2020 is clearly illegal and arbitrary as it has been passed in the teeth of the interim orders of this Court dated 24/08/2020. (Para 72)

E. Reasonable Classification - The Government has a right to treat different classes differently, and to that extent classification is permissible, but the classes so made should be characterised by certain distinction, and the distinction in the two classes should be based on differential attributes which would have just and rational having nexus to the objects sought to be achieved. (Para 80)

The GO dated 24/08/2009 does not distinguish between pre and post retirees nor does it create any class in its application for revision of the NPA, and therefore the State *post facto* could not have discovered and created two classes where none existed.

GOs which have been issued from time to time in exercise of rule 4 of the rules of 1983, have only approved the revision of the rate of NPA in sync with the recommendations of the Central Pay Commission where also no distinction has been made between serving doctors and retired doctors in its application to NPA, indicating that there never was any such distinction real or apparent as has been sought to be made as per the impugned orders. (Para 82)

The GOs failed the test of reasonable classification and the classification sought to be made on the basis of cut-off date being 24/08/2009 is bereft of reason and also that there is no intelligible differentia between the two classes so created the impugned orders are clearly violative of Article 14 of the Constitution. (Para 83)

F. Government Order to correct the error in earlier Government Order - Firstly there was no error, apparent or otherwise in the GO dated 09/03/2019 and secondly, there was no occasion to correct the said GO, which did not contain any deficiency or error and therefore on this score also the order dated 04/09/2020 itself is illegal and arbitrary. (Para 86)

G. Non-Practicing Allowance is payable to retired Government doctors - The petitioners are receiving a fixed amount as NPA as a part of their pension. The GOs dated 31/08/1989 and 01/02/2003 have explicitly extended the benefit of NPA to the retired Government doctors which would form part of the pension, and therefore the contention of the respondents that the petitioners are not entitled to NPA because they have retired, is clearly wanting in rationality and reasonableness, and even otherwise is clearly contrary to the said GOs, and is therefore rejected. (Para 87)

H. Withdrawal of NPA without opportunity of hearing - The GO dated 24/08/2009 while enhancing the rate of NPA to 25% was *ipso facto* applicable to serving Government doctors, as well as to the retired Government doctors in as much as the earlier GOs dated 31/08/1989 and 01/02/2003 had explicitly extended the benefit of NPA to the retired Government doctors. (Para 88)

Constitution of India - Article 14, 300A – Principles of natural justice - When a vested right sought to be taken away, then it is mandatory to provide an opportunity of hearing to the person concerned, in absence of which the action of the State is liable to be set aside as being violative of principles of natural justice. The revision on the rate of NPA 25% of the basic salary became a vested right of the pensioners and thus was duly protected as property under Article 300A of the Constitution, and they could not be deprived of same without following the procedure established by law. As noticed above, there was no error in the impugned GOs. The petitioners were never afforded any opportunity of hearing before passing of the impugned GOs, and hence on this ground also the impugned GO dated 04/09/2020 are arbitrary and violative of Article 14 of the Constitution. (Para 89)

I. Financial Constraint - The State government being and are duty bound to pay the statutory dues of the employees cannot avoid its liability citing financial constraint. In the instant case there is no denial of the fact that the NPA is admissible to the petitioners and is being paid, it is only the applicability of revised rates which is under question. The claim of the petitioner is based on statutory rules and GOs where they have been entitled for the same, and in this regard wherever there is budgetary allocation of resources, then it is presumed that the provision has been made for the same, and plea of financial constraint would not be acceptable. (Para 96)

It is also noticed that whenever a fresh liability is sought to be created on the State then the contours and parameters of examination are different, and usually, the stand of the State may be accepted as such except when a claim is made on ground of discrimination. **Where one class of persons is already receiving the benefit, and the same is sought to be extended to the other class, then the ground of financial constraint cannot inhibit a claim on ground of equal treatment,** as the Constitutional Courts are under a mandate to give effect to the equality

clause as mandated by Constitution of India. (Para 97)

The impugned recovery orders are illegal and arbitrary inasmuch as the NPA was duly fixed by the Government and paid to them to which they were entitled. This entire exercise was done by the State Government without any involvement of the petitioners, and they were duly entitled for the same. Even otherwise the said recovery will cause immense hardship. (Para 106)

Writ petitions allowed. (E-4)

Precedent followed:

1. D.S. Nakara Vs U.O.I., (1983) 1 SCC 305 (Para 12, 50, 78)

2. V. Kasturi Vs Managing Director, S.B.I., Bombay, (1998) 8 SCC 30 (Para 14)

3. All Manipur Pensioners Assc. Vs St. of Mani., (2020) 14 SCC 625 (Para 14)

4. St. of Raj. Vs Basant Agrotech (India) Ltd., (2013) 15 SCC 1 (Para 55)

5. Madan Mohan Pathak Vs U.O.I., (1978) 2 SCC 50 (Para 62)

6. Goa Foundation Vs St. of Goa, (2016) 6 SCC 602 (Para 63)

7. St. of M.P. & ors Vs Yogendra Shrivastava, (2010) 12 SCC 538 (Para 70)

8. Manish Kumar Vs U.O.I., (2021) 5 SCC 1 (Para 80)

9. Paschim Banga Khet Mazdoor Samity Vs St. of W.B., 1996 (4) SCC 36 (Para 95)

10. St. of Pun. Vs. Rafiq Masih, (2015) 4 SCC 334 (Para 106)

Precedent distinguished:

1. Haryana Financial Cor. & anr. Vs Jagdamba Oil Mills & anr., (2002) 3 SCC 496 (Para 71)

2. St. of Pun. Vs Amar Nath Goel, (2005) 6 SCC 754 (Para 98)

3. Sabhajeet Singh & ors. Vs St. of U.P. & ors., Judgment dated 25.01.2018, ALLHC Service Bench Nos. 1482 of 2015 & 1239 of 2012

Present appeal assails Government orders dated 14.07.2020 and 04.09.2020.

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

1. The petitioners in this batch of writ petitions have raised common grievance, and hence they have been heard together and are being decided by a common judgment. The petitioners are Allopathic doctors who have served under the State Government and have since retired. They are aggrieved by the Government orders dated 14/7/2020 and 04/09/2020 whereby they have been denied the revised rate of Non-Practicing Allowance on the ground that they have retired prior to the cutoff date 24/08/2009, while doctors similarly placed and who have retired after 24/08/2009 has been entitled to the revised rate of Non-Practicing Allowance, and hence, they assert to have been unreasonably discriminated, and have prayed for setting aside of the said Government orders as well as the recovery orders passed in consequence of the impugned orders.

2. The facts in brief are that the petitioners are retired Allopathic Doctors of the Provincial Medical and Health Services of Government of U.P who have superannuated prior to 24/08/2009. The Government of Uttar Pradesh promulgated the U.P. Government Doctors (Allopathic) Restriction on Private Practice Rules, 1983 (hereinafter referred to as, Rules of 1983). By means of the aforesaid Rules of 1983 restriction was placed on Government

Doctors and they were banned from obtaining any pecuniary advantage by engaging in private consultancy, and in lieu of the said restriction a Non-Practising Allowance was made available to them, which was to be determined by the State Government.

3. In exercise of its delegated power, the State Government vide order dated 31/08/1989 has not only revised the rate of Non-Practicing Allowance but also provided that it will be treated as part of pay for all service benefits including DA, TA and other allowances and also for pensionary benefits. Subsequently, the rates were revised in 2003 and they were made applicable uniformly on all including the petitioners.

4. The 6th Central Pay Commission recommendations were approved, with regard to Non-Practicing Allowance, by the State of U.P. by Government order dated 24/08/2009, whichrevised the Non-Practicing Allowance to 25% of the basic pay plus grade pay. The benefit of G.O dated 24/08/2009 did not in any manner disentitle the petitioners, but they were not given the benefit of the revised rates.

5. The 7th Pay Commission recommendations were approved by State of U.P on 09/03/2019 and given effect to vide Government order dated 09/08/2019. The benefit of the same was given to the petitioners, and they started receiving the enhanced rate of Non-Practicing Allowance, till passing of the impugned Government orders.

6. The bulwark of the challenge in this bunch of writ petitions is discrimination meted out to the petitioners by the unreasonable classification introduced by the State Government, by the impugned Government orders dated 14/07/2020 and 04/09/2020, both having the effect of disentitling the petitioners who retired prior to 24/08/2009 of the revised rate of Non-Practicing Allowance. In one set of writ petitions the Government orders dated 14/07/2020 and recovery order dated 16/07/2020 have been challenged, while second set of petitions, the challenge is to the Government order dated 04/09/2020 which had amended the earlier Government order dated 09/03/2019. The consequential relief sought in both the writ petitions is writ of mandamus to command the opposite parties to pay the Non-Practicing Allowance as per the existing revised rate of 20% as fixed by the Government order dated 09/08/2019.

7. Sri Hari Prasad Gupta, Sri Hari Ram Gupta and Sri Manish Mishra Advocates have appeared on behalf of the petitioners, and Sri Ramesh Kumar Singh, Senior Advocate Learned Additional Advocate General assisted by Sri Ashutosh Singh has addressed this court on behalf of the State.

8. It has been submitted by the Counsels appearing on behalf of the petitioners that the U.P Government Doctors Allopathic Restriction on Private Practice Rules, 1983 provides for grant of Non-Practicing Allowance in lieu of their entitlement for private practice at the rates which will be specified by the Government from time to time. It has been submitted that a vested right has been created in favour of the Government doctors for payment of the Non-Practicing Allowance in lieu of the ban on private practice as per the rules of 1983.

9. Subsequent to their retirement, the petitioners have been receiving Non-Practicing Allowance and there is no

dispute with regard to their entitlement to receive the same. They claim that the State is acting illegal and arbitrary by not revising the rate of Non-Practicing Allowance with regard to the petitioners by wrongly interpreting the clause "the revised rates would be applicable with immediate effect" in the Government order dated 09/08/2019 to mean that the same would be applicable only to the persons retiring after the said date, and not the person retiring prior to the said date, like the petitioners.

10. The petitioners would submit that the correct interpretation of the said Government order would be that the revised rates of Non-Practicing Allowance would be effective prospectively across the board, and no person either in service retired can claim arrears of Non-Practicing Allowance, on the basis of revised rates from 01/01/2006 to 24/08/2009.

11. The petitioners claim that they are entitled to the revised amount of the Non-Practicing Allowance as prescribed by the Government from time to time and seek to challenge the decision of the State Government in restricting it only to the fixed amount payable at the time of retirement, as being illegal and arbitrary and violative of Article 14 and 16 of the Constitution of India.

12. Sri Manish Mishra Advocate submitted that the impugned Government orders has created two classes of pensioners with the cut of date being 24/08/2009, dividing both these classes of pensioners, and they have both been held to be entitled to receive Non-Practicing Allowance, but at differential rates, solely on the basis of the date of retirement. It has been submitted that there is no valid justification for creating the two classes, and the date of retirement does not have any rational nexus for determination of the quantum of Non-Practicing Allowance, nor is there any rational basis for such classification and consequently the impugned Government orders are hit by vice of Article 14 of the Constitution of India. It is urged that all the pensioners who form one class, are entitled to the same amount of Non-Practicing Allowance as revised by the Government from time to time, irrespective of date of retirement. To further canvas their submissions, it has been submitted that for a valid classification, there must be some distinguishing feature which separates or distinguishes one class from the other, in which case, the State may validly provide for different amount of Non-Practicing Allowance to such classes. Any such classification, for it to be valid, must necessarily satisfy the twin test, one that it should be based on some intelligible differentia, and secondly, that it should have a reasonable nexus with the object sought to be achieved. It is stated that both these material aspects are lacking in the classes so created, and hence the said impugned Government orders deserve to be set aside being violative of Article 14 of the Constitution. Reliance was placed upon the judgement of the Apex court in the case of D.S. Nakara (1983)1SCC305 to buttress their contention and submitted that their case is squarely covered by the ratio laid by the Apex court therein and as well as subsequent pronouncements of the Apex Court in this regard.

13. It was further submitted that the Non-Practicing Allowance being an integral part of the basic pay of the petitioners was liable to be periodically enhanced and revised as is done with regard to the basic pay and other

allowances of all the pensioners irrespective of the date of retirement following the basic principle that, being a welfare State it is the obligation of the State to provide security in old age, and escape from undeserved want which has been duly recognized, and hence, pension is treated not only as a reward for the past services but with a view to help the employee to avoid destitution in old age. The quid pro quo is that when the employee was physically and mentally alert, he rendered unto master the best, expecting him to look after him in all the fall of life. A retirement system therefore exists only for the purpose of providing benefits.

14. Reliance was also placed on the Judgement of the Supreme Court in the case of **V. Kasturi vs Managing Director, State Bank of India, Bombay(1998) 8 SCC 30** where it was held that the person retiring is eligible for pension at the time of his retirement and if he survives till such time subsequent amendment of relevant pension scheme he would become eligible to enhanced pension and would become eligible to get more pension as per the new formula of computation of pension subsequently brought into force, he would be entitled to the benefit of the amended pension provision from the date of the order. Reliance was also placed on the judgement of the Apex court in the case of **All Manipur Pensioners Association vs State of Manipur (2020) 14 SCC 625** and others where on similar facts Supreme Court held that all the pensioners irrespective of the date of retirement either the 1996 retirees shall be entitled to revision in pension at par with those pensioners who retired post 1999, as they form a single homogeneous class, and the differentiation sought to be made by the State Government was held to be violative of Article 14 of the Constitution.

15. The State of U.P. having introduced Liberalised Pension Scheme in 1961 by making rules which were considered necessary for augmenting Social Security in old age to Government servants other than those who retired earlier cannot be worse off than those who retired later. This division which classified pensioners into two classes is not based on rational principle and if the rational principle is the one of dividing pensioners with a view to giving something more to persons otherwise equally placed, it would be discriminatory.

16. It has been urged that by means of Government Order dated 09/08/2019, the recommendations of the 7th Pay Commission were duly approved, but under the garb of clarifying the said Government Order at the behest of the Director Treasuries, the benefit which had accrued to the petitioners with regard to the rate of Non-Practicing Allowance at the rate of 20% of the basic salary, was withdrawn. It was provided therein that the petitioners would only be entitled to the Non-Practicing Allowance which was being paid to them at the time of the retirement. This clarification has been issued nearly after one year of the approval of the recommendations of the 7th Pay Commission, during which period the Non-Practicing Allowance was being paid to the petitioners at the rate of 20% of the basic salary plus grade pay. It is submitted that once the enhanced rate of the Non-Practicing Allowance was approved and the same was being paid to the petitioners, then a vested right accrued in favour of the

petitioners, and the withdrawal of the enhanced rate of Non-Practicing Allowance without any reason or affording any opportunity of hearing is illegal and arbitrary and violative of the principles of natural justice. It was stated that it was a colourable exercise of power by the State Government in issuing the impugned Government order thereby under the garb of clarification the effect of the earlier Government Order dated 09/08/2019 has been reversed, without there being any reasonable basis in the most illegal and arbitrary manner, and in effect a new policy has been introduced under garb of rectification of error, and on this score also it is ultra vires the rules of 1983.

17. Sri Manish Misra, learned counsel for the petitioners further submitted that once the recommendations of an expert committee like the Commission are accepted, which has submitted a exhaustive report after detailed discussions and consultations with various representatives of pensioners and other Government bodies, and the recommendations are duly accepted and implemented, then the same cannot be reversed in such a casual manner without giving any reasons for the same. It was stated that there are certain matters which require a wider consultation and deep insight to bring forth the relevant issues necessary for taking an informed decision, which can be gathered only after appointing a body like a commission or a committee and handing them over the specialized task like fixation of the pay and allowances, and their recommendations are liable to be accepted or rejected or accepted in modified form by the Government, but once their reasoned and informative recommendations, are accepted by the Government, then they cannot be lightly overturned and reversed without there being adequate and sufficient reasons which is totally lacking in the present case.

18. Sri Hari Ram Gupta, Advocate while assailing the Government order dated 14/09/2020 submitted that the same has been passed only to circumvent the interim orders passed by this Court staying the operation of the earlier Government order dated 14/07/2020 and the consequential order dated 16/07/2020, and therefore it was a colourable exercise of power and is hence ex facie illegal and arbitrary and beyond the competence of the State Government. It was further submitted that the malice of law is clearly evident in the said Government order, which is a vain attempt to reimpose the restriction on payment of the Non-Practicing Allowance to the petitioners as per the recommendations of the 7th Pay Commission, contrary to the interim order of this Court. The said Government order dated 04/09/2020 has only recast the previous Government order dated 14/07/2020 without making any change to the outcome or effect of the previous Government order. It is submitted that the brazenness of the State Government is writ large in issuing the impugned Government order dated 04/09/2020, where they have deliberately ignored the interim orders of this court staying the earlier Government order, and hence it is clearly an overreach of the power and authority and jurisdiction of the State Government in this regard.

19. Sri Ramesh Kumar Singh, Learned Additional Advocate General representing the State in the aforesaid writ petitions while opposing the claim of the petitioners submitted as follows:-

a. With regard to the maintainability of the writ petition it is

submitted that some of the petitioners were holding the administrative posts of Director General/Director and therefore they are not entitled to receive Non-Practicing Allowance, as such Non-Practicing Allowance cannot be included for the purpose of calculation of the respective pension amounts, and they would not have any locus to raise the issues as raised by them.

b. The revisions of Non-Practicing Allowance on percentage basis as provided in Government order dated 24/08/2009 has prospective effect and is not applicable on the persons who retired before 24/08/2009 and were getting Non-Practicing Allowance in accordance with the earlier arrangement on slab basis and no changes have been made in their respective amount of Non-Practicing Allowance amount till date.

c. It is the stand of the State Government that is on account of wrong interpretation of the Government order dated 09/08/2019 the persons who retired before 24/08/2009 were paid the respective pension along with the Non-Practicing Allowance on the percentage basis and after issuance of Government order dated 14/07/2020, the error was rectified, and consequential recovery orders were passed.

d. It has also been submitted that the impugned Government orders were passed to correct administrative errors which had crept in, in interpreting the Government order dated 24/08/2009, and a "Conscious policy" decision has been taken by the State Government.

e. The State has also pleaded financial constraint, as a reason for making the "correction" by means of the impugned Government orders.

f. It has been vehemently submitted that the State Government had rectified its error and by means of the impugned order dated 04/09/2020 paragraph 4(ii)(a) of Government order dated 09/08/2019 has been amended/substituted and now it is provided that Government doctors who were receiving Non-Practicing Allowance @ 25% on the date of their retirement would be entitled to Non - practicing allowance @ 20% of the basic pay as on 01/01/2016 while according to amended paragraph 4(ii)(b) such Government doctors who at the time of retirement were getting Non-Practicing Allowance of a fixed amount on slab basis will be entitled to the same amount of Non-Practicing Allowance they were receiving without any change. In this regard it was categorically stated that the Non-Practicing Allowance amount of pensioners who retired before 24/08/2009 has never been revised till date.

g. It is stated that the State Government is fully empowered to issue orders regarding payment of Non-Practicing Allowance to the Government doctors in service and also for those who have retired, in exercise of power under rule 4 of the rules of 1983.

h. The State has relied upon the Division Bench judgement of this court dated 25/01/2018 in writ petition no. 1482 as the of 2015 in support of the submissions that the petitioners are not entitled for revision/enhancement of the amount of Non-Practicing Allowance.

i. Defending the challenge made to the impugned Government orders being violative of Article 14 in as much as they are based on unreasonable classification, it has been argued by the learned Additional Advocate General that there is a creation of two classes of pensioners, but the classification is in fact reasonable based on distinction between persons who have received Non-Practicing Allowance on slab basis and the persons who have received Non-Practicing Allowance on percentage basis. It was further submitted that the said classification is justified as it is protected under the parameters of the Financial constraints, in the interest of general public at large.

20. I have heard the counsel for the petitioners as well is the learned Additional Advocate General on behalf of the State. The following issues fall for consideration of this court:

A. Whether the writ petitions are maintainable on behalf of Allopathic the Government doctors who have retired prior to the 24/08/2009 and were holding the post of Director General/Director on the date of the retirement?

B. Whether the benefit of enhancement/revision in the rates of Non-Practicing Allowance has any bearing on the date of retirement, and more particularly as to whether the same would be payable/admissible only to the serving Government Doctors and not to the retired Government Doctors?

C. Whether the judgement of the Division Bench of this court dated 25/01/2018 can have any application in the case of the petitioners in challenging the impugned Government orders?

D. Whether the classification created by the impugned Government orders on the basis of date of retirement is valid?

E. Whether the retired Government doctors are entitled for revision rate of Non-Practicing Allowance?

Maintainability of writ petition

21. With regard to the maintainability of the writ it has been submitted that according to Rule 4 (b) of the Rules of 1983 provides the list of persons who were excluded from the benefit of Non-Practicing Allowance which includes persons holding the post of Director/Additional Director, Medical Education and Training and Principle of State Medical Colleges. It is vehemently urged that such petitioners, who are holding the said posts are not entitled to Non-Practicing Allowance, and hence any petition on their behalf, in this regard, would not maintainable.

22. The counsel of the petitioner on the other hand urged that the rules of 1983 were amended, notified/published on 21/06/2005 by The U.P. Government Doctors (Allopathic) Restriction on Private Practice (Second Amendment) Rules 2005 which extended the benefit of Non-Practicing Allowance even to the persons holding administrative post of Director/Additional Director. It is submitted that after the amendment of 2005 the embargo for entitlement of Non-Practicing Allowance imposed by Rule 4(b) of the Rules of 1983 was lifted, and hence even the person holding the said posts became entitled for the benefit of Non-Practicing Allowance, with effect from coming into force of the said amendment.

The Learned Additional Advocate General has further submitted that as per the impugned Government orders, the petitioner would be entitled for the benefit of Non-Practicing Allowance which they were receiving on the date of the retirement, and such persons(Director/Additional Director) who are excluded by the operation of Rule 4(b) would not be entitled to benefit of Non-Practicing Allowance even after the amendment of the 2005 as on the date of retirement they were not entitled for receiving Non-Practicing Allowance. In response it has been submitted that even the persons who have held the post of Director/Additional Director are entitled to Non-Practicing Allowance after the amendment of 2005, and therefore they are aggrieved by the impugned Government orders revising the rate of Non-Practicing Allowance to their disadvantage and hence being "aggrieved" their petitions would be maintainable.

23. On the issue of maintainability, this Court is of the view that the present petition at the behest of persons holding Office of Director/Additional Director at the time of the retirement even though initially excluded from the benefit of Non-Practicing Allowance due to operation of the exclusionary clause in the rules of 1983, but subsequently, after amendment of 2005, were granted benefit of Non-Practicing Allowance, would be maintainable. The embargo imposed by the rules of 1983 was lifted when the said rules were amended in 2005 and they became entitled to receive the Non-Practicing Allowance. From 2005 till passing of the impugned order dated 14/07/2020, there is nothing on record to show that petitioners were disentitled from receiving the benefit of Non-Practicing Allowance. The petitioners being aggrieved by the impugned orders which have disentitled them from the benefit of the Non-Practicing Allowance due to the fortuitous circumstance, that their date of the retirement is prior to 24/08/2009, and not because they were holding the post of Director/Additional Director at the time of the retirement, which grievance can legally and validly be raised by them in the present set of petitions. Even otherwise, the impugned Government orders have been challenged by number of other individual persons and also the Provincial Medical Service Association of which they are members. Accordingly, in light of the above discussion the challenge to the maintainability of the writ petition fails and the petitions are held to be maintainable.

24. Another objection regarding maintainability has been raised by the State stating that when a writ petition has been preferred by the Provincial Medical Services Association, then individual petitions preferred by the members would not be maintainable and deserves to be dismissed. This argument of the respondents is not convincing and does not hold much water. A writ petition is maintainable before the High Court by any person who is aggrieved by the action of the State as being violative of part III of the Constitution. An individual cannot be nonsuited, just because an Association of which he is a member has also preferred a similar writ petition on the same subject matter. An individual has a right to enforce his fundamental rights enshrined in part III of the Constitution, and the rights to sue, to enforce the fundamental rights is not subservient or subject to a class action by the Association of which he is a member. In the present case, the Association and the individual members have raised a common

challenge to the impugned Government Orders. The petitioners are discontent by the impugned Government orders as they have been personally deprived of the benefit of the Non-Practicing Allowance and therefore they are the "aggrieved" and can validly ventilate their grievance by means of a writ petition under Article 226 of the Constitution and also that the benefit or otherwise arising from the outcome of the present writ petitions, shall necessarily be of the individual members, and therefore the writ petitions on behalf of the individual members cannot be dismissed as being not maintainable.

NON PRACTICING ALLOWANCE

25. It is relevant to look into of the archival chronology of the Non-Practicing Allowance in order to get the clarity about the nature of the allowance and also the policy of the Government with regard to the same. This aspect of the matter has also been dealt in detail in the report of the 7th Pay Commission, where it is stated that earlier the doctors in the Government service were allowed private practice. The Railways which was the biggest employer of medical staff under the Central Government allowed the medical officers except the Chief medical Officer to engage in private practice in so far as it did not interfere with the other official duties. Apart from Railways, doctors employed in other Government agencies were generally debarred from private practice and consequently granted a Non-Practicing Allowance at the rate of 50% subject to a maximum of Rs 400/- between 1957-59. The rate of Non-Practicing Allowance varied from Hospital to Hospital and from State to State. This issue was considered by the Third Pay Commission which recommended payment of Non-Practicing Allowance varying between Rs.150/- to Rs.600/-per month. The 4th Pay Commission decreased the rates as compared to the previous commission, but the 5th Pay Commission recommended grant of 25% of the basic pay plus grade pay an the Non-Practicing Allowance and also provided that it shall continue to count towards all service and pensionary benefits without any change.

26. The Pay Commission further considered some specific grounds for grant for treating Doctors in Government service differently and extending Non-Practicing Allowance to them, namely: -

(a) Earlier doctors in Government service were allowed the privilege of private practice or Non-Practicing Allowance in lieu thereof. At that time, the emoluments of doctors were deliberately kept with the presumption that they will make good the loss by private practice.

(b) The basic medical course is of longer duration (4 ½ +1 year internship). Due to this, doctors enter the Government service at a late stage. Whereas in other services averages of entry of graduate direct recruits is about 23 years. In medical branch it is about 27 years. Due do this they have shorter effect of service.

(c) The entry level posts in the cadre of doctors have to be filled by direct recruitment. Accordingly, promotion prospects for them are lesser viz-a-viz officers in other organised services.

(d) The nature and duties and conditions of work of doctors involved certain uncommon deprivation. They have often to work at odd hours beyond the

prescribed working as often they have to attend to urgent cases.

27. The State of Uttar Pradesh accordingly also decided to place restriction on the private practice of Government Doctors and promulgated the "The U.P. Government Doctors (Allopathic) Restriction on Private Practice Rules, 1983".

28. Rules of 1983 imposes restriction on private practice of "Government Doctors". Rule 3 of Rules, 1983 imposes restriction on private practice of Government Doctors and Rule 4 provides payment in lieu of private practice (commonly known as "Non Practicing Pay" or "Allowance").

29. The aforesaid scheme introduced by rules, 1983 was done with an intention to compensate the Government doctors in lieu of ban imposed on the private practice and to recompence them from loss of earnings and further that the Non-Practicing Allowance was treated to be part of pay for all the service benefits including pension.

30. The aforesaid rules were made under Article 309 of the Constitution of India and came into effect on 30th August, 1989. On 31/08/1989 while fixing the rates of Non-Practicing Allowance with effect from 14/08/1988 in clause 2 provided that the Non-Practicing Allowance shall form part of the basic salary of the employee for the purposes of pensionary benefits, dearness allowance, travel/daily allowance. By means of Government order dated 19/02/1990 & 22/03/1990 it was further clarified that Non-Practicing Allowance shall form part of basic salary as described in financial handbook vol II to IV in rule 9(21)(1). The rates of Non-Practicing Allowance were prescribed by Government order dated 31/08/1989 were subsequently revised and enhanced on 01/02/2003.

31. The rules of 1983 delegated the power of fixing the rate of Non-Practising Allowance from time to time to the State Government, and in exercise of the delegated power it proceeded to revise the rates as and when it was necessary, coterminous with the recommendations of the Central Pay Commission.

32. With the submission of the 6th Central pay Commission report in March 2008, recommending that *"that Doctors should continue to be paid Non-Practicing Allowance at the existing rate of 25% of the aggregate of the band pay and grade pay subject to the condition that the Basic Pay plus Non-Practicing Allowance does not exceed Rs.85,000/-"* the State of U.P. by means of Government order dated 24/08/2009, also approved the recommendation of the Pay Commission and revised the Non-Practicing Allowance to 25% of the basic pay plus grade pay. The said Government order also provided that the revised rates of Non-Practicing Allowance would be applicable with immediate effect.

33. The Government Order dated 24/08/2009 provides that after considering the various representations received from officers of medical service the rates of the Non-Practicing Allowance has been revised to 25% of the Pay Band plus Grade Pay. It was reiterated that the Non-Practicing Allowance for all purposes would be considered as part of salary including pensionary benefits. It was further clarified that the revised rates shall be applicable prospectively.

34. The Government order dated 24/08/2009 is very clear in its terms in as much as it seeks to revise the existing rates of Non-Practicing Allowance. It is further stated therein that the rates prescribed shall be effective prospectively, meaning thereby that the enhanced rates shall be payable only from the date of the Government order itself, and not from any previous date.

35. In absence of any provision either explicitly or otherwise, the Government order dated 24/08/2009 could not have been construed to restrict the application of the revision of the Non-Practicing Allowance to the petitioners. It is also noted that by the impugned Government Order only the rates were revised, and no new policy/scheme was framed.

36. Nonetheless, the benefit of the aforesaid Government order, as interpreted by the respondents, was never extended to the petitioners, and they continue to receive Non-Practicing Allowance at the old slab system at the fixed rates.

37. The 7th Pay commission recommended revision of Non-Practicing Allowance to 20% of the basic pay for the employees of the Central Government. The State of U.P. duly considered and accepted the recommendations of the 7th Pay Commission and extended the revision of the rates of the Non-Practicing Allowance to the Government doctors of State of Uttar Pradesh with the condition that the basic salary along with the Non-Practising Allowance should not exceed Rs.2,37,500/- .Clause 2 provided that the Non-Practicing Allowance would for all purposes would be part of the basic salary received by the retired employees. Clause 3 of the said Government order further provided that the benefit of Non-Practising Allowance would be admissible only to those doctors were getting the benefit of the same as per the earlier Government order dated 24/08/2009 **or any other Government order issued earlier in this regard.**

38. The Government order dated 09/03/2019 only revised the rate of Non-Practicing Allowance, and in very unequivocal terms extended the benefit of the same to the retired Government doctors. Clause 3 clearly extended the benefit of Non-Practicing Allowance to those employees who were receiving the same as per Government order dated 24/08/2009 or any earlier Government order in this regard.

39. To give effect to the decision of the Government announcing the rate of Non-Practicing Allowance to 20%, another Government order dated 09/08/2019 was passed referring to the earlier Government order dated 09/03/2019 and stated that a decision has been taken by the Government to revise the rate of Non-Practicing Allowance with effect from 09/03/2019, and consequently there would be a need for revision of pension payment orders for the purposes of payment of pension/family pension.

40. According to Clause 4(i) of the said Government order which applied to the doctors who had retired prior to 01/01/2016 and for payment of their pensionary benefits from 01/01/2016 and 08/03/2019. It provided that the amount of Non-Practicing Allowance which was being paid as on 31/12/2015 will be added to the basic salary as computed on coming into force of the recommendations of the 7th Pay Commission as on 01/01/2016 will be paid as pension while clause (ii) provided that from 09/03/2019 20% of the

basic salary will be paid as Non-Practicing Allowance which will be added to the revised basic salary as on 01/01/2016.

41. In pursuance of the Government order dated 09/03/2019 as well as 09/08/2019 all the petitioner started receiving the Non-Practicing Allowance at the rate of 20% as part of the pensionary benefits. Consequently, giving effect to the aforesaid Government orders, revised pension payment orders were issued to the petitioners which have been annexed along with the writ petitions including Non-Practicing Allowance 20% of the basic pay. As the petitioners were receiving the Non-Practicing Allowance in terms of earlier Government orders, they were extended the benefit of the same and they started receiving the Non-Practicing Allowance at the revised rates.

42. The petitioners continued to receive Non-Practicing Allowance at the rate of 20% of the basic salary till passing of the impugned order dated 14/07/2020 and the recovery order dated 16/07/2020.

43. The impugned Government order dated 14/07/2020 in its recital states that the Director Pension has sought certain clarification as to the quantum of Non-Practicing Allowance admissible to Government doctors who have retired prior to 24/08/2009.In response to the said clarification the G.O dated 14/07/2020 provides that the Government doctors who had retired prior to 24/08/2009 will be entitled to Non-Practicing Allowance at the same rate which was being paid to them **immediately prior to their retirement**.

44. The State Government in its attempt to "clarify" the order dated 09/08/2019 has further provided in clause 3 that from 24/08/2009 to 31/12/2015 in accordance with clause 4(i) of the Government order dated 09/08/2019 the same amount of Non-Practicing Allowance which the Government doctors were receiving just prior to his retirement would be added to the revised basic pay, meaning thereby that petitioners would not be entitled to any revision of Non-Practicing Allowance and the retired Doctor would receive the fixed amount of Non-Practicing Allowance which they were receiving at the time of their retirement, while persons retiring after 24/08/2009 according to fresh meaning/interpretation given to clause 4(ii) will be entitled to Non-Practicing Allowance at the rate of 20% of the basic salary.

45. The aforesaid Government order can therefore be summarised as under:-

A. With regard to the petitioners who retired prior to 24/08/2009 will be entitled to receive Non-Practicing Allowance at the rate which they were receiving at the date of retirement, and the revision of the Non-Practicing Allowance from time to time is inadmissible to them subsequent to 24/08/2009.

B. The clarification has been applied retrospectively in as much as relates back to payment of Non-Practicing Allowance with effect from 24/08/2009, and therefore it seeks to clarify the Government order dated 24/08/2009 and makes it inapplicable to the petitioners.

C. It further creates another class of Government doctors who retired post 24/08/2009, and they will be entitled to the revised rate of Non-Practicing Allowance.

46. One of the present sets of writ petitions was filed challenging the

Government order dated 04/07/2020 and this Court passed an interim order on 24/08/2020 in writ petition no.12938 of 2020 (SS) staying the operation implementation of the order dated 14/07/2020 and 16/07/2020 as well as the recovery of the amount already paid. The interim order was followed and extended in all the other similar cases.

47. Pursuant to the interim order of the High Court staying the Government order dated 04/07/2020 and 16/07/2020,the State Government proceeded to pass another order dated 04/09/2020 purporting to remove the error which had crept in the earlier Government order dated 09/08/2019 and in effect only recast clause 4(ii) of the said Government Order, now providing that those Government doctors who at the time of their retirement were receiving Non-Practicing Allowance at the rate of 25% ,will be entitled to receive Non-Practicing Allowance at the rate of 20% of their basic pay with effect from 09/03/2019. It was further provided that those Government doctors who at the time of their retirement were receiving a fixed amount as Non-Practicing Allowance, would receive Non-Practicing Allowance at the same rate at which they were receiving at the time of their retirement. It was further clarified that with effect from 09/03/2019 there would be no change or revision in the Non-Practicing Allowance.

48. The Government order dated 04/09/2020 in effect creates a paradigm shift in the scheme of payment of Non-Practicing Allowance to the retired doctors of the Provincial Medical Services. In sum and substance, it provides that the doctors would be entitled to receive that component of Non-Practicing Allowance as part of their pension which they were receiving just prior to the retirement, and in other words it actually freezes the rate of Non-Practicing Allowance payable to petitioners who retired prior to 24/08/2009, while other Government Doctors after 24/08/2009 would be entitled to receive Non-Practicing Allowance at revised rates.

49. The impugned order dated 04/09/2020 has also been assailed in the second batch of writ petitions, and this Court by means of an interim order dated 20/01/2021 stayed the order dated 04/09/2020 and also the recovery of the Non-Practicing Allowance from the petitioners.

50. The controversy which has led to filing of the present bunch of petitions by the petitioners, all of whom are pensioners, having served in State of U.P. in the capacity of Allopathic Government doctors, and are receiving pension, are aggrieved by the action of the State Government, whereby those who retired after 24/08/2009 have been held to be entitled to revised amount of Non-Practicing Allowance on percentage basis, while the petitioners who retired prior to 24/08/2009 have been held to be entitled to Non-Practicing Allowance which they were getting just prior to the retirement that is under the slab system without any increment. They claim hostile discrimination has been meted out to them and have therefore challenged the impugned Government orders on the ground that they create two classes of pensioners, without there being any rational basis for such classification and hence are violative of Article 14 of the Constitution as interpreted by the Supreme Court in the case of D.S. Nakara (1983)1 SCC 305 and others subsequent pronouncements.

Prospective application of Government Orders

51. It has been submitted by the respondents that the impugned Government orders have "prospective application" and would be applicable only to persons who have retired after the date of the impugned Government order, and therefore petitioners have been validly excluded from the benefit of revised rate of Non-Practicing Allowance.

52. It has been stated in the counter affidavit on behalf of the respondents that the Government order dated 24/08/2009 was introduced with prospective/immediate effect and persons who retired before 24/08/2009 were getting Non-Practicing Allowance in accordance with the earlier arrangement of slab basis and no changes have ever been made till date, and on that basis have proceeded to justify the impugned Government orders.

53. The State Government while interpreting the words "prospective/immediate effect", in the Government order dated 24/08/2009 have understood it to mean that the benefit of the said, order would be given to persons retiring after coming into effect of the said Government order, that is 24/08/2009. The petitioners on the other hand have submitted that in cases where there is revision of pay scales or allowances which are introduced from a certain date, the benefit of the revised scale is not limited to those who enter service subsequent to the date fixed for introducing revised scales, but the benefit is extended to all those in service prior to the date. The revision when made is made applicable prospectively, and in the present case, all pensioners whenever they retire would be covered by the revised Scheme. The date of retirement becomes irrelevant. But the revised scheme would be operational from the date mentioned in the scheme and would bring under its umbrella all existing pensioners and those who retire subsequent to that date.

54. There is force in the contention of the petitioners that those who have retired prior to 24/08/2009 would be entitled to Non-Practicing Allowance as per Government order dated 01/02/2003 till 24/08/2009, when the rates were revised. Subsequently they would be entitled to the rate as fixed by the Government order dated 24/08/2009, meaning thereby that they cannot claim any arrears for revision of its prior to 24/08/2009. In the case of **V. Kasturi Vs. Managing Director, State Bank of India, Bombay and Anr (1998) 8 SCC 30 .** Ahmadi, **J**.,speaking for the Court in the aforesaid decision highlighted the observations in Nakara's case found at page 333 para 46 to the following effect:

".... the pension will have to be recomputed in the light of the formula enacted in the liberalised pension scheme and effective from the date the revised scheme comes into force. And beware that it is not a new scheme, it is only a revision of existing scheme. It is not a new retrial benefit. It is an upward revision of an existing benefit. If it was a wholly new concept, a new retrial benefit, one could have appreciated an argument that those who had already retired could not expect it."

With regard to the extending the revision of the pension scheme it was held:-

23.However, if an employee at the time of his retirement is not eligible for earning pension and stands outside the class of pensioners, if subsequently by amendment of the relevant pension rules any beneficial umbrella of pension scheme

is extended to cover a new class of pensioners and when such a subsequent scheme comes into force, the erstwhile non-pensioner might have survived, then only if such extension of pension scheme to erstwhile non-pensioners is expressly made retrospective by the authorities promulgating such scheme; the erstwhile non-pensioner who has retired prior to the advent of such extended pension scheme can claim benefit of such a new extended pension scheme. If such new scheme is prospective only, old retirees non-pensioners cannot get the benefit of such a scheme even if they survive such new scheme. They will remain outside its sweep. The decisions of this Court covering such second category of cases are:Commander, Head Quarterv.Capt. Biplabendra Chanda[(1997) 1 SCC 208 : 1997 SCC (L&S) 444] andGovt. of T.N.v.K. Jayaraman[(1997) 9 SCC 606 : 1997 SCC (L&S) 1208] and others to which we have made a reference earlier. If the claimant for pension benefits satisfactorily brings his case within the first category of cases, he would be entitled to get the additional benefits of pension computation even if he might have retired prior to the enforcement of such additional beneficial provisions. But if on the other hand, the case of a retired employee falls in the second category, the fact that he retired prior to the relevant date of the coming into operation of the new scheme would disentitle him from getting such a new benefit.

55. To make it abundantly clear the prospective operation of such Government orders only means that the revised rates are applicable from that particular day onwards, and no arrears can be claimed on the basis of the revised rates prior to the said date. It is also further to clarify that prospective application has no correlation to the eligibility of claiming Non-Practicing Allowance. As discussed above there is no quarrel about their right to receive Non-Practicing Allowance, as the petitioners are regularly being paid pension as revised by the State Government from time to time. The allowances are also revised by the State Government from time to time looking into various factors including the cost index of living. Similarly, the Non-Practicing Allowance has been constantly revised since 1983, and it has always been co-related with the scale of pay an even though prior to 24/08/2009 it was on a slab basis, but still it was roughly a particular percentage of the basic salary which is clearly discernible on a plain reading of the aforesaid Government orders. The Government order dated 24/08/2009 also revised the rate of Non-Practicing Allowance and made it 25% of the basic salary. Apart from the revision of the rates in the said Government order we could not find any such tectonic shift in the policy with regard to payment of Non-Practicing Allowance which the State claims has led to create a watershed between the persons retiring prior to 24/08/2009 and those retiring subsequently, nor any such provision could be demonstrated by the State. This court is not impressed by the argument of the State that the petitioners will only be entitled to same allowances as well being paid to them at the time of retirement, without any revision of rates. The interpretation adopted by the State is clearly erroneous and arbitrary.

Retrospective application of impugned Government Order

It has been submitted on behalf of petitioners that in exercise of delegated power the Government could not have fix

the rates of Non-Practicing Allowance retrospectively, and therefore on this score also the impugned orders are without jurisdiction, illegal and arbitrary. As has already been discussed above the rules of 1983 were made in exercise of powers under Article 309 of the Constitution of India, and the power to fix the rates was delegated to the State Government. The impugned orders have been passed in exercise of the said delegated power under the rules of 1983. The question which arises for our consideration is as to whether in exercise of delegated power, the State Government could prescribe the rates retrospectively? The law in this regard has been considered by the Hon'ble Apex Court in the case of ***State of Rajasthan v.Basant Agrotech (India) Ltd., (2013) 15 SCC 1***

21.There is no dispute over the fact that the legislature can make a law retrospectively or prospectively subject to justifiability and acceptability within the constitutional parameters. A subordinate legislation can be given retrospective effect if a power in this behalf is contained in the principal Act. In this regard we may refer with profit to the decision in ***Mahabir Vegetable Oils (P) Ltd. v. State of Haryan****a (2006) 3 SCC 620, wherein it has been held that: (SCC p. 633, paras 41-42)*

"41. We may at this stage consider the effect of omission of the said note. It is beyond any cavil that a subordinate legislation can be given a retrospective effect and retroactive operation, if any power in this behalf is contained in the main Act. The rule-making power is a species of delegated legislation. A delegatee therefore can make rules only within the four corners thereof.

42. It is a fundamental rule of law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act or arises by necessary and distinct implication. (See West v. Gwynne [(1911) 2 Ch 1 : 104 LT 759 (CA)] .)"

22. In ***MRF Ltd. v. CST*** *[(2006) 8 SCC 702] the question arose whether under Section 10(3) of the Kerala General Sales Tax Act, 1963 power was conferred on the Government to issue a notification retrospectively. This Court approved the view expressed by the Kerala High Court in M.M. Nagalingam Nadar Sons v. State of Kerala [(1993) 91 STC 61 (Ker)] , wherein it has been stated that in issuing notifications under Section 10, the Government exercises only delegated powers while the legislature has plenary powers to legislate prospectively and retrospectively, a delegated authority like the Government acting under the powers conferred on it by the enactment concerned, can exercise only those powers which are specifically conferred. In the absence of such conferment of power the Government, the delegated authority, has no power to issue a notification with retrospective effect.*

23. In ***M.D. University v. Jahan Singh*** *[(2007) 5 SCC 77 : (2007) 2 SCC (L&S) 118] it has been clearly laid down that (SCC p. 83, para 19) in the absence of any provision contained in the legislative Act, a delegatee cannot make a delegated legislation with retrospective effect.*

*24. In A****hmedabad Urban Development Authority v. Sharadkumar Jayanti-kumar Pasawalla*** *[(1992) 3 SCC 285 : AIR 1992 SC 2038] a three-Judge Bench has ruled thus: (SCC p. 292, para 7)*

"7. ... in a fiscal matter it will not be proper to hold that even in the absence of express provision, a delegated authority

can impose tax or fee. In our view, such power of imposition of tax and/or fee by delegated authority must be very specific and there is no scope of implied authority for imposition of such tax or fee. It appears to us that the delegated authority must act strictly within the parameters of the authority delegated to it under the Act and it will not be proper to bring the theory of implied intent or the concept of incidental and ancillary power in the matter of exercise of fiscal power."

*25. On a perusal of the aforesaid authorities there can be no scintilla of doubt that if the power has been conferred under the main Act by the legislature, the State Government or the delegated authority can issue a notification within the said parameters. In the case at hand, the High Court interpreting Section 16 has opined that such a power has not been conferred on the State Government to is*sue a notification retrospectively and, therefore, it can only apply with prospective effect.

26. Dr Manish Singhvi, learned counsel appearing for the State, has submitted that wherever a statutory power is conferred, there is no limitation with regard to exercise of that power and the same could be exercised from time to time and even if the words "time to time" are absent in the statute, the power conferred under the Act could be exercised all over again and there is no limitation to the number of times the power is exercised and if the power is exercised once, it cannot be stated that the power stands exhausted. It is his submission that the administrative power as well as quasi-legislative power could be exercised any number of times and this principle is embodied under Section 21 of the General Clauses Act. The learned counsel would further contend that even if the words "time to time" would not have been there in Section 16 of the Act, the power could be exercised any number of times. To bolster his submissions, he has commended us to the decisions in ***A. Thangal Kunju Musaliar v. M. Venkatachalam Potti [A. Thangal Kunju Musaliar v. M. Venkatachalam Potti, AIR 1956 SC 246] , D.G. Gose and Co. (Agents) (P) Ltd. v. State of Kerala [D.G. Gose and Co. (Agents) (P) Ltd. v. State of Kerala, (1980) 2 SCC 410] , Bansidhar v. State of Rajasthan [Bansidhar v. State of Rajasthan, (1989) 2 SCC 557] and State of M.P. v. Tikamdas [State of M.P. v. Tikamdas, (1975) 2 SCC 100 : 1975 SCC (Tax) 310] .***

47. After so stating the learned Judges analysed the scope of Section 21 of the General Clauses Act and opined that Section 21 embodies a rule of construction and the nature and extent of its application must be governed by the relevant statute which confers the power to issue the notification, etc. Thereafter, the Court enumerated the principle thus: (Shree Sidhbali Steels Ltd. Case [Shree Sidhbali Steels Ltd. v. State of U.P., (2011) 3 SCC 193] , SCC p. 209, para 38)

"38. ... there is no manner of doubt that the exercise of power to make subordinate legislation includes the power to rescind the same. This is made clear by Section 21. On that analogy an administrative decision is revocable while a judicial decision is not revocable except in special circumstances. Exercise of power of a subordinate legislation will be prospective and cannot be retrospective unless the statute authorises such an exercise expressly or by necessary implication."

*48. Analysing further the learned Judges in S****idhbali Steels case [Shree***

Sidhbali Steels Ltd. v. State of U.P., (2011) 3 SCC 193] *opined that by virtue of Sections 14 and 21 of the General Clauses Act, when a power is conferred on an authority to do a particular act, such power can be exercised from time to time and carries with it the power to withdraw, modify, amend or cancel the notifications earlier issued, to be exercised in the like manner and subject to like conditions, if any, attached with the exercise of the power. It would be too narrow a view to accept that chargeability once fixed cannot be altered. Since the charging provision in the Electricity (Supply) Act, 1948 is subject to the State Government's power to issue notification under Section 49 of the Act granting rebate, the State Government, in view of Section 21 of the General Clauses Act, could always withdraw, rescind, add to or modify an exemption notification. No industry could claim as of right that the Government should exercise its power under Section 49 and offer rebate and it is for the Government to decide whether the conditions were such that rebate should be granted or not. The aforesaid authority clearly lays down that the power conferred can be exercised in the context of the words "from time to time" as used in the Act or in aid of the General Clauses Act.*

49. At this juncture, we may fruitfully refer to the meaning given to the words "from time to time" in certain dictionaries and the description made in certain other texts. In Words and Phrases, Vol. 17-A, 1974, "from time to time" has been enumerated in various contexts. We may think it appropriate to reproduce certain contexts which are useful in the present case:

"The phrase "from time to time' means as occasion may arise, at intervals, now and then occasionally. Florey v. Meeker [240 P 2d 1177 : 194 Or 257 (1952)] , P 2d at p. 1190.

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In constitutional amendment, authorizing legislature to alter salaries of named county officers "from time to time', the quoted phrase does not mean from "term to term'. Almon v. Morgan County [16 So 2d 511 : 245 Ala 241 (1944)] , So 2d at p. 514.

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The phrase "from time to time', as used in the Constitution, authorizing the legislature to increase the number of Judges of the Supreme Court from time to time, means occasionally; that is, as the occasion requires, and therefore the words cannot be held to mean that the legislature may not decrease the number of Judges after an increase thereof. State v. McBride [70 P 25 : 29 Wash 335 (1902)] , P at p. 27.

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The Century Dictionary defines the phrase "from time to time' to mean "occasionally'; and the Universal Dictionary defines "from time to time' to mean, "at intervals; now and then'. The phrase is used in such meaning in Acts 1898, c. 123, para 95, which directs the police commissioners of Baltimore, at the request of the park commissioners, to detail from time to time members of regular police force for preservation of order in the parks. Upshur v. Mayor & City Council of Baltimore [51 A 953 : 94 Md 743 (1902)] , A at p. 955.

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The County Board of Supervisors had no authority to alter an election precinct in September, under statute providing that Board may, from time to time, change the boundaries of precincts and providing that changes might be made at regular or special meeting in July, since the two provisions were in pari materia and should be construed together in the light of all the provisions of the statute, the words ''from time to time' meaning ''at times to recur', and not ''at any time'. Laws 1885, p. 193, para 29, Laws 1871-72, p. 380, para 30, S.H.A. ch. 46, paras 29, 30. County Board of Union County v. Short [77 Ill App 448 (1898)] ."

50. In The Law Lexicon, The Encyclopedic Law Dictionary (2nd Edn., 1997, p. 764) the words have been conferred the following meaning:

"From time to time.-- ... ''as occasion may arise'....

The words ''from time to time' mean that an adjournment may be made as and when the occasion requires and they will not mean adjournment from one fixed day to another fixed day. ...

''The words "from time to time" are words which are constantly introduced where it is intended to protect a person who is empowered to act from the risk of having completely discharged his duty when he has once acted, and therefore not being able to act again in the same direction.' The meaning of the words ''from time to time' is that after once acting the donee of the power may act again; and either independently of, or by adding to, or taking from, or reversing altogether, his previous act."

51. In Black's Law Dictionary (5th Edn., p. 601), it has been defined as follows:

"From time to time.-- Occasionally, at intervals, now and then."

52. In Stroud's Judicial Dictionary (5th Edn., Vol. 2, p. 1071), it has been stated as follows:

"From time to time.-- ... ''as occasion may arise' (as per William, J., Bryan v. Arthur [(1839) 11 Ad & E 108 : 113 ER 354] Ad & E at p. 117)."

53. Thus, the conspectus of authorities and the meaning bestowed in the common parlance admit no room of doubt that the words "from time to time" have a futuristic tenor and they do not have the etymological potentiality to operate from a previous date. The use of the said words in Section 16 of the Act cannot be said to have conferred the jurisdiction on the State Government or delegate to issue a notification in respect of the rate with retrospective effect. Such an interpretation does not flow from the statute which is the source of power. Therefore, the notification as far as it covers the period prior to the date of publication of the notification in the Official Gazette is really a transgression of the statutory postulate. Thus analysed, we find that the view expressed by the High Court on this score is absolutely flawless and we concur with the same. We may reiterate for the sake of clarity that we have not adverted to the defensibility of the analysis from other spectrums which are founded on the principles set forth in ***Kesoram case [State of W.B. v. Kesoram Industries Ltd., (2004) 10 SCC 201]*** *as the matter has been referred to a larger Bench and the lis in these appeals fundamentally*

pertains to the retrospective applicability of the notification issued by the State Government as regards the rate of cess on the major mineral i.e. rock phosphate.

56. Undoubtedly the Government was exercising its delegated power under Rule 4 of the rules of 1983, which provided that the State Government could fix the rates of Non-Practicing Allowance from time to time. The impugned Government order dated 04/09/2020 having fixed the rates of Non-Practicing Allowance with regard to the petitioners retrospectively, with effect from 24/08/2009, which is impermissible as per the law laid down by the Apex court in the aforesaid cases discussed herein. The impugned Government order purportedly clarifying the earlier G.O dated 09/08/2019 provided that the petitioners would only be entitled to Non-Practicing Allowance which they were receiving at the time of their retirement. In the meanwhile, the petitioners have received enhanced amount of Non-Practicing Allowance, which is also sought to be recovered by the impugned order. The impugned Government order has the effect of refixing the rates with effect from 24/08/2009, therefore is clearly without jurisdiction and arbitrary. Consequently, the Government order dated 04/09/2020 is clearly without authority illegal and arbitrary.

57. We also take notice of clause 3 of the Government order dated 14/07/2020 which states that from 24/08/2009 to 31/12/2015 the persons having retired prior to 24/08/2009 will be entitled to the same amount of Non-Practicing Allowance which they were receiving at the time of retirement. This clause clearly indicates that there was no Government order, or any decision of the Government prior to 14/07/2020 not to revise the rate of Non-Practicing Allowance with regard to the Government doctors who retired prior to 24/08/2009. This retrospective dis-entitlement of Non-Practicing Allowance is clearly without jurisdiction, illegal, arbitrary and clearly violates all canons of reasonableness. Just because the Government is vested the power to decide upon the "rate" of Non-Practicing Allowance, and the action of the Government to fix rates, though plenary, has to be exercised within the prescribed sphere, in accordance with law, rules and regulations in this regard and not in ignorance of the same. The rules of 1983 entitle the Government to fix the rate of Non-Practicing Allowance from time to time, but there is no statutory provision enabling the Government to give retrospectivity effect to such determination. The rules of 1983 do not contain any provision enabling the State Government while exercising its power under rule 4 to fix the rates, to make them applicable retrospectively.

This fixation of rate with regard to the petitioners has retrospective application, and therefore, beyond the mandate of the State Government under Rule 4 of the Rules of 1983, and contrary to the law laid down by the Apex Court in the case of ***State of Rajasthan v. Basant Agrotech (India) Ltd., (2013) 15 SCC 1.*** Therefore, without there being any enabling provision in this regard in the rules of 1983, the impugned order specially clause 3 of Government order dated 04/09/2020 is without jurisdiction, illegal and arbitrary.

Colourable exercise of Power

58. The impugned order dated 14/07/2019 has been challenged in one set

of the bunch of petitions before us, and an interim order was passed on 24/08/2020 where the operation and implementation of the said Government order along with the consequential recovery order dated 16/07/2020 was stayed. Similar interim orders were followed in other writ petitions forming part of this bunch where the Government order dated 14/07/1990 and the consequential recovery orders were stayed, and the State Government was asked to file its response.

59. The State Government proceeded to pass yet another Government order dated 04/09/2020 stating that there was some error in the earlier Government order dated 09/08/2019 and provided that in clause 4(ii)(a) therein shall be read to the effect that those retired Government doctors who at the time of retirement were receiving Non-Practising Allowance at the rate of 25% would be entitled to the revised rate of 20% with effect from 09/03/2019 while as per clause 4(ii)(b) which is with regard to the petitioners who were getting a fixed amount of Non-Practicing Allowance at the time of the retirement, now provides that from 09/03/2019 they will be entitled to the same amount which they were receiving at the time of the retirement, and it further clarifies that such person's will not be entitled to any revision of the rates of the Non-Practicing Allowance.

60. It has been vehemently urged by the petitioners, that when the entire controversy regarding entitlement of payment of Non-Practicing Allowance was sub judice before this Court, and the interim order dated 24/08/2020 had, been passed staying the Government order dated 14/07/2020, then passing of Government order dated 04/09/2020 on the same subject matter was clearly in conflict and contrary to the interim order of this Court and impermissible and even amounts to contempt of the orders of this Court.

61. A second bunch of writ petitions have been filed assailing the validity of the Government order dated 04/09/2020, and this Court being prima facie satisfied about the illegality, has stayed the operation of the said, order.

62. The issue to be determined by this Court is as to whether the State Government can pass a Government order to put into effect an earlier Government order which has been stayed by judicial order. This issue has been discussed in detail in various judgements of the Apex court, the leading being ***Madan Mohan Pathak v. Union of India (1978) 2 SCC 50*** it was observed by Bhagwati J., speaking also for Iyer and Desai., JJ

The attempt made to supersede the settlements, in so far as they related to the payment of bonus, by enacting the Life Insurance Corporation (Modification of Settlement) Act 1976 failed, firstly because the Act was held to violate the provisions of Article 31(2) of the Constitution and secondly because the Act could not have retrospective effect so as to absolve the Life Insurance Corporation from obeying the writ of mandamus issued by the Calcutta High Court, which had become final and binding on the parties.

63. If by reason of retrospective alteration of the factual or legal situation, the judgment is rendered erroneous, the remedy may be by way of appeal or review, but so long as the judgment stands, it cannot be disregarded or ignored and it must be obeyed. In **Goa Foundation v.**

State of Goa (2016) 6 SCC 602, the Supreme Court held:

"24...The power to invalidate a legislative or executive act lies with the Court. A judicial pronouncement, either declaratory or conferring rights on the citizens cannot be set at naught by a subsequent legislative act for that would amount to an encroachment on the judicial powers. However, the legislature would be competent to pass an amending or a validating act, if deemed fit, with retrospective effect removing the basis of the decision of the Court. Even in such a situation the courts may not approve a retrospective deprivation of accrued rights arising from a judgment by means of a subsequent legislation (1978) 2 SCC 50 : 1978 SCC (L&S) 103]). However, where the Court's judgment is purely declaratory, the courts will lean in support of the legislative power to remove the basis of a court judgment even retrospectively, paving the way for a restoration of the status quo ante. Though the consequence may appear to be an exercise to overcome the judicial pronouncement it is so only at first blush; a closer scrutiny would confer legitimacy on such an exercise as the same is a normal adjunct of the legislative power. The whole exercise is one of viewing the different spheres of jurisdiction exercised by the two bodies i.e. the judiciary and the legislature. The balancing act, delicate as it is, to the constitutional scheme is guided by the well-defined values which have found succinct manifestation in the views of this Court in Bakhtawar Trust v. M.D. Narayan, (2003) 5 SCC 298."

64. In the aforesaid judgements the law has been clearly spelled out by the Apex Court. The judicial pronouncements by court of competent jurisdiction cannot be set to naught by the action of the legislature or executive as it would amount to an encroachment on the judicial power. It is noticed that the rules of 1983 had delegated to the Government the power to prescribe the rates of Non-Practicing Allowance from time to time. In exercise of the delegated power vide Government order dated 19/03/2019 the recommendation of the 7th Pay Commission were approved and were given effect by Government order dated 19/08/2019. The first impugned Government order dated 14/07/2020 in its recital stated that the same was being issued for re-fixing the Non-Practicing Allowance with regard to persons having retired prior to 24/08/2009.

65. In clause 2 of the said Government order it was specifically provided that with regard to the Government doctors who had retired prior to 24/08/2009, will be entitled to receive the same amount of Non-Practicing Allowance which they were receiving just prior to their retirement.

66. On the challenge being made to the said Government order in the instant writ petition an interim order was passed on 24/08/2020 whereby the order dated 14/07/2020 along with the consequential recovery order dated 16/07/2020 was stayed with the direction not to recover the amount already paid to the petitioners as Non-Practicing Allowance.

67. The second impugned Government order dated 04/09/2020 was passed without making any reference to the interim order of this court and purporting to have been made in exercise of rule 4 of the rules of 1983 and to remove the error

which had crept in the earlier Government order dated 09/08/2019. It provided that those Government doctors who just prior to their retirement were receiving a fixed amount as Non-Practicing Allowance will continue to receive Non-Practicing Allowance at the same rate which they were receiving at the time of the retirement.

68. Comparing both the impugned Government orders it is noticed that they provide for the same entitlement regarding the petitioners who retired prior to 24/08/2009 and both the impugned Government orders are to the effect that the petitioners would be receiving the same amount of Non-Practicing Allowance which they were receiving at the time of the retirement, without any benefit of revision.

69. In the aforesaid circumstances there cannot be any doubt whatsoever that the Government order dated 04/09/2020 is nothing but a repetition of the earlier Government order dated 14/08/2020. The respondents could not point out any difference in both the Government orders, with regard to its application to the petitioners and also with regard to their entitlement of Non-Practicing Allowance. Such an exercise of power as has been done by the State in the present case, cannot be said to be a legitimate in exercise of powers vested in clause 4 of the rules of 1983, and is arbitrary and consequently violative of Article 14 of the Constitution of India.

70. The law in this regard has been considered by the Hon'ble Apex Court in the case of ***State of Madhya Pradesh & Ors. V. Yogendra Shrivastava (2010) 12 SCC 538.***

12. It is no doubt true that Rules under Article 309 can be made so as to operate with retrospective effect. But it is well settled that rights and benefits which have already been earned or acquired under the existing rules cannot be taken away by amending the rules with retrospective effect. [See : N.C. Singhal vs. Director General, Armed Forces Medical Services - 1972 (4) SCC 765; K. C. Arora vs. State of Haryana - 1984 (3) SCC 281; and T.R. Kapoor vs. State of Haryana - 1986 Supp. SCC 584]. Therefore, it has to be held that while the amendment, even if it is to be considered as otherwise valid, cannot affect the rights and benefits which had accrued to the employees under the unamended rules. The right to NPA @ 25% of the pay, having accrued to the respondents under the unamended Rules, it follows that respondents-employees will be entitled to Non-Practising Allowance @ 25% of their pay upto 20.5.2003.

71. The respondents have relied upon the judgement of the Apex court in the case of **Haryana Financial Corporation and Another vs Jagdamba Oil Mills and Another (2002) 3 SCC 496,** specially paragraph nos. 10 and 11, where the limits of judicial review have been delineated, and has been observed that the Court's while scrutinizing an administrative decision should not substitute its discretion by the discretion of the administrative authority as if it were sitting in appeal. There is no quarrel with the proposition laid out by the Apex court in this regard, but the same has no application to the facts of the present case. The challenge in the present set of petitions are two Government orders passed in exercise of delegated powers under the Rules of 1983, where the State Government has prescribed the rates of Non-Practicing Allowance, which was a purely administrative exercise, and also this Court is not called upon to give its opinion

about the quantum of Non-Practicing Allowance but only to the manner of exercise of power whereby a certain class of pensioners has been deprived of an allowance retrospectively and hence the said judgement is of no assistance in the present case.

72. Considering the rival submissions it is seen that the G.O dated 04/09/2020 has the effect of depriving the petitioners of their entitlement to the revised rate of Non-Practicing Allowance. The Government order dated 04/09/2020 is clearly a device or a mechanism used by the respondents to circumvent the interim order of this Court dated 24/08/2020 by which the Government orders dated 14/07/2020 and 16/07/2020 were stayed. In case the State was aggrieved by the interim order dated 24/08/2020, it was always open for them to move an application for vacation of the stay, or to move a special appeal, or approach the Supreme Court. The Government does not have any power to override a judicial order by executive fiat. The demarcation of power has clearly been delineated in the Constitution where the power to declare a legislative or executive act to be unconstitutional is vested only with the judiciary. Once there is a judicial opinion, even if it is in form of an interim order, the Executive cannot be allowed to be override the said order, and in case the same is done it would amount to transgression of their power, and such an action is liable to be set aside as being without jurisdiction and authority. The impugned order dated 04/09/2020 is clearly illegal and arbitrary as it has been passed in the teeth of the interim orders of this Court dated 24/08/2020.

Reasonable Classification

73. This Court is called upon to test the validity of the two Government orders dated 14/07/2020 and 04/09/2020 apart from the consequential orders for recovery of the amount of Non-Practicing Allowance paid as per Government order dated 19/08/2019 and a further direction about their entitlement for payment of Non-Practicing Allowance at the rates which has been revised from time to time.

74. The discrimination meted to the petitioners whereby they have been entitled to receive Non-Practicing Allowance on fixed slab basis, while others who have retired post 24/08/2009 are entitled to the revision of the same, is under challenge on the ground that there is no discernible criteria which can distinguish or differentiate between Government doctors who have retired prior to 24/08/2009 and those who have retired post 24/08/2009, as well as the same being illegal and arbitrary, apart from other grounds including not being afforded an opportunity of hearing and also the manner in which such a decision was taken.

75. The watershed which has been created in the present case is the date 24/08/2009, which is the date of issuance of the Government order implementing the recommendations of the 6th Pay commission, whereby the Non-Practicing Allowance admissible in case of the Government doctors was enhanced of 25% basic salary plus Grade Pay. It further provided that the Non-Practicing Allowance shall form part of the salary even for the purposes of retirement benefits, and the revised rates would be applicable with immediate effect.

76. Prior to issuance of the aforesaid Government order dated 24/08/2009 the

Non-Practicing Allowance was being paid at fixed rates under a slab system, and accordingly the same was made admissible to all persons including the petitioners, while post 24/08/2009 implementing the recommendations of the 6th Pay Commission, a fixed percentage of the basic salary as the Non-Practicing Allowance was provided rather than quantifying the same by a fixed amount as had been done earlier.

77. The Learned Additional Advocate General has submitted on behalf of State Government that there are in fact two classes of pensioners, one who are receiving Non-Practicing Allowance at the fixed rates retired prior to 24/08/2009 while others have retired 24/08/2009 and consequently the difference between the two classes is real and apparent and hence both different classes have been treated differently by means of the impugned Government orders.

78. Considering the above submission, this court has to consider whether the classification so made by the impugned Government order is based on some intelligible differentiate justifying the creation of the classes and the raison d'être the which can distinguish the persons included in one class from another. The only consideration for classification which comes forth, as per the State, is the date of retirement. Persons retiring prior to 24/08/2009 have been clubbed into one class, and they would be entitled to Non-Practicing Allowance at the rate they were receiving at the time of the retirement and will not be entitled to any enhancements or revision, while the persons retiring after 24/08/2009 would form the other class, and they would be entitled to the Non-Practicing Allowance at the enhanced rate of 20%. In order to considered this aspect it would be fruitful to advert to extracts of judgement in the case of **DS Nakara v. *Union of India,* (1983) 1 SCC 305 : 1983 SCC (L&S) 145 at page 328**

38. What then is the purpose in prescribing the specified date vertically dividing the pensioners between those who retired prior to the specified date and those who retire subsequent to that date? That poses the further question, why was the pension scheme liberalised? What necessitated liberalisation of the pension scheme?

40. Therefore, let us proceed to examine whether there was any rationale behind the eligibility qualification. The learned Attorney-General contended that the scheme is one whole and that the date is an integral part of the scheme and the Government would have never enforced the scheme devoid of the date and the date is not severable from the scheme as a whole. Contended the learned Attorney-General that the Court does not take upon itself the function of legislation for persons, things or situations omitted by the legislature. It was said that when the legislature has expressly defined the class with clarity and precision to which the legislation applies, it would be outside the judicial function to enlarge the class and to do so is not to interpret but to legislate which is the forbidden field. Alternatively it was also contended that where a larger class comprising two smaller classes is covered by a legislation of which one part is constitutional, the court examines whether the legislation must be invalidated as a whole or only in respect of the unconstitutional part. It was also said that severance always cuts down the scope of legislation but can never enlarge it and in

the present case the scheme as it stands would not cover pensioners such as the petitioners and if by severance an attempt is made to include them in the scheme it is not cutting down the class or the scope but enlarge the ambit of the scheme which is impermissible even under the doctrine of severability. In this context it was lastly submitted that there is not a single case in India or elsewhere where the court has included some category within the scope of provisions of a law to maintain its constitutionality.

42. If it appears to be undisputable, as it does to us that the pensioners for the purpose of pension benefits form a class, would its upward revision permit a homogeneous class to be divided by arbitrarily fixing an eligibility criteria unrelated to purpose of revision, and would such classification be founded on some rational principle? The classification has to be based, as is well settled, on some rational principle and the rational principle must have nexus to the objects sought to be achieved. We have set out the objects underlying the payment of pension. If the State considered it necessary to liberalise the pension scheme, we find no rational principle behind it for granting these benefits only to those who retired subsequent to that date simultaneously denying the same to those who retired prior to that date. If the liberalisation was considered necessary for augmenting social security in old age to Government servants then those who, retired earlier cannot be worst off than those who retire later. Therefore, this division which classified pensioners into two classes is not based on any rational principle and if the rational principle is the one of dividing pensioners with a view to giving something more to persons otherwise equally placed, it would be discriminatory. To illustrate, take two persons, one retired just a day prior and another a day just succeeding the specified date. Both were in the same pay bracket, the average emolument was the same and both had put in equal number of years of service. How does a fortuitous circumstance of retiring a day earlier or a day later will permit totally unequal treatment in the matter of pension? One retiring a day earlier will have to be subject to ceiling of Rs 8100 p.a. and average emolument to be worked out on 36 months' salary while the other will have a ceiling of Rs 12,000 p.a. and average emolument will be computed on the basis of last 10 months' average. The artificial division stares into face and is unrelated to any principle and whatever principle, if there be any, has absolutely no nexus to the objects sought to be achieved by liberalising the pension scheme. In fact this arbitrary division has not only no nexus to the Liberalised Pension Scheme but it is counter-productive and runs counter to the whole gamut of pension scheme. The equal treatment guaranteed in Article 14 is wholly violated inasmuch as the pension rules being statutory in character, since the specified date, the rules accord differential and discriminatory treatment to equals in the matter of commutation of pension. A 48 hours' difference in matter of retirement would have a traumatic effect. Division is thus both arbitrary and unprincipled. Therefore, the classification does not stand the test of Article 14.

79. Further, considering the aspect of reasonable classification, the one other condition for testing the law on the touchstone of Article 14 is the intelligible differentia which distinguishes persons included in the class with the persons excluded from the same.

80. Undoubtedly the Government has a right to treat different classes differently, and to that extent classification is permissible, but the classes so made should be characterised by certain distinction, and the distinction in the two classes should be based on differential attributes which would have just and rational having nexus to the objects sought to be achieved. The law in this regard was enunciated by the apex court in the case of Special Courts Bill (1979)1SCC380, and has been reiterated in the case of **Manish Kumar Vs Union of India (2021) 5 SCC 1:-**

"In the decision of this Court in In Re The Special Courts Bill, 1978, a bench of seven learned judges of this Court laid down certain propositions. We need only allude to those propositions which are apposite for deciding the fate of these cases before us:

"(1) The first part of Article 14, which was adopted from the Irish Constitution, is a declaration of equality of the civil rights of all persons within the territories of India. It enshrines a basic principle of republicanism. The second part, which is a corollary of the first and is based on the last clause of the first section of the Fourteenth Amendment of the American Constitution, enjoins that equal protection shall be secured to all such persons in the enjoyment of their rights and liberties without discrimination of favouritism. It is a pledge of the protection of equal laws, that is, laws that operate alike on all persons under like circumstances.

(2) The State, in the exercise of its Governmental power, has of necessity to make laws operating differently on different groups or classes of persons within its territory to attain particular ends in giving effect to its policies, and it must possess for that purpose large powers of distinguishing and classifying persons or things to be subjected to such laws.

(3) The constitutional command to the State to afford equal protection of its laws sets a goal not attainable by the invention and application of a precise formula. Therefore, classification need not be constituted by an exact or scientific exclusion or inclusion of persons or things. The courts should not insist on delusive exactness or apply doctrinaire tests for determining the validity of classification in any given case. Classification is justified if it is not palpably arbitrary.

(4) The principle underlying the guarantee of Article 14 is not that the same rules of law should be applicable to all persons within the Indian territory or that the same remedies should be made available to them irrespective of differences of circumstances. It only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation, and there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is substantially the same.

(5) By the process of classification, the State has the power of determining who should be regarded as a class for purposes of legislation and in relation to a law enacted on a particular subject. This power, no doubt, in some degree is likely to produce some inequality; but if a law deals with the liberties of a number of well defined classes, it is not

open to the charge of denial of equal protection on the ground that it has no application to other persons. Classification thus means segregation in classes which have a systematic relation, usually found in common properties and characteristics. It postulates a rational basis and does not mean herding together of certain persons and classes arbitrarily.

(6) The law can make and set apart the classes according to the needs and exigencies of the society and as suggested by experience. It can recognise even degree of evil, but the classification should never be arbitrary, artificial or evasive.

(7) The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely,

(1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and

(2) that that differentia must have a rational relation to the object sought to be achieved by the Act.

(8) The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a nexus between them. In short, while Article 14 forbids class discrimination by conferring privileges This fixation of rate with regard to the petitioners has retrospective application, and therefore, beyond the mandate of the State Government under Rule 4 of the Rules of 1983, and contrary to the law laid down by the Apex Court in the case of ***State of Rajasthan v. Basant Agrotech (India) Ltd., (2013) 15 SCC 1.*** *Therefore, without there being any enabling provision in this regard in the rules of 1983, the impugned order specially clause 3 of Government order dated 04/09/2020 is without jurisdiction, illegal and arbitrary.or imposing liabilities upon persons arbitrarily selected out of a large number of other persons similarly situated in relation to the privileges sought to be conferred or the liabilities proposed to be imposed, it does not forbid classification for the purpose of legislation, provided such classification is not arbitrary in the sense abovementioned.*

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(11) Classification necessarily implies the making of a distinction or discrimination between persons classified and those who are not members of that class. It is the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public. Indeed, the very idea of classification is that of inequality, so that it goes without saying that the mere fact of inequality in no manner determines the matter of constitutionality.

(12) Whether an enactment providing for special procedure for the trial of certain offences is or is not discriminatory and violative of Article 14 must be determined in each case as it arises, for, no general rule applicable to all

cases can safely be laid down. A practical assessment of the operation of the law in the particular circumstances is necessary.

(13) A rule of procedure laid down by law comes as much within the purview of Article 14 as any rule of substantive law and it is necessary that all litigants, who are similarly situated, are able to avail themselves of the same procedural rights for relief and for defence with like protection and without discrimination."

80a. The Supreme Court in the case of ***All Manipur Pensioners Assn. v. State of Manipur, (2020) 14 SCC 625 i****n similar circumstances held as under:-*

7.9. In view of the above, we are satisfied that none of the judgments, relied upon by the learned Senior Advocate for the respondent State, has any bearing to the controversy in hand. The Division Bench of the High Court has clearly erred in not appreciating and/or considering the distinguishable facts in Hari Ram Gupta v. State of U.P., (1998) 6 SCC 328; T.N. Electricity Board v. R. Veerasamy, (1999) 3 SCC 414 ; Amar Nath Goyal [State of Punjab v. Amar Nath Goyal, (2005) 6 SCC 754 : 2005 SCC (L&S) 910] ; P.N. Menon [Union of India v. P.N. Menon, (1994) 4 SCC 68 : 1994 SCC (L&S) 860] and Amrit Lal Gandhi [State of Rajasthan v. Amrit Lal Gandhi, (1997) 2 SCC 342 : 1997 SCC (L&S) 512] .

8. Even otherwise on merits also, we are of the firm opinion that there is no valid justification to create two classes viz. one who retired pre-1996 and another who retired post-1996, for the purpose of grant of revised pension. In our view, such a classification has no nexus with the object and purpose of grant of benefit of revised pension. All the pensioners form one class who are entitled to pension as per the pension rules. Article 14 of the Constitution of India ensures to all equality before law and equal protection of laws. At this juncture it is also necessary to examine the concept of valid classification. A valid classification is truly a valid discrimination. It is true that Article 16 of the Constitution of India permits a valid classification. However, a valid classification must be based on a just objective. The result to be achieved by the just objective presupposes the choice of some for differential consideration/treatment over others. A classification to be valid must necessarily satisfy two tests. Firstly, the distinguishing rationale has to be based on a just objective and secondly, the choice of differentiating one set of persons from another, must have a reasonable nexus to the objective sought to be achieved. The test for a valid classification may be summarised as a distinction based on a classification founded on an intelligible differentia, which has a rational relationship with the object sought to be achieved. Therefore, whenever a cut-off date (as in the present controversy) is fixed to categorise one set of pensioners for favourable consideration over others, the twin test for valid classification or valid discrimination therefore must necessarily be satisfied.

8.1. In the present case, the classification in question has no reasonable nexus to the objective sought to be achieved while revising the pension. As observed hereinabove, the object and purpose for revising the pension is due to the increase in the cost of living. All the pensioners form a single class and therefore such a

classification for the purpose of grant of revised pension is unreasonable, arbitrary, discriminatory and violative of Article 14 of the Constitution of India. The State cannot arbitrarily pick and choose from amongst similarly situated persons, a cut-off date for extension of benefits especially pensionary benefits. There has to be a classification founded on some rational principle when similarly situated class is differentiated for grant of any benefit.

8.2. As observed herein above, and even it is not in dispute that as such a decision has been taken by the State Government to revise the pension keeping in mind the increase in the cost of living. Increase in the cost of living would affect all the pensioners irrespective of whether they have retired pre-1996 or post-1996. As observed hereinabove, all the pensioners belong to one class. Therefore, by such a classification/cut-off date the equals are treated as unequals and therefore such a classification which has no nexus with the object and purpose of revision of pension is unreasonable, discriminatory and arbitrary and therefore the said classification was rightly set aside by the learned Single Judge of the High Court. At this stage, it is required to be observed that whenever a new benefit is granted and/or new scheme is introduced, it might be possible for the State to provide a cut-off date taking into consideration its financial resources. But the same shall not be applicable with respect to one and single class of persons, the benefit to be given to the one class of persons, who are already otherwise getting the benefits and the question is with respect to revision.

9. In view of the above and for the reasons stated above, we are of the opinion that the controversy/issue in the present appeal is squarely covered by the decision of this Court in D.S. Nakara [D.S. Nakara v. Union of India, (1983) 1 SCC 305 : 1983 SCC (L&S) 145] . The decision of this Court in D.S. Nakara [D.S. Nakara v. Union of India, (1983) 1 SCC 305 : 1983 SCC (L&S) 145] shall be applicable with full force to the facts of the case on hand. The Division Bench of the High Court has clearly erred in not following the decision of this Court in D.S. Nakara [D.S. Nakara v. Union of India, (1983) 1 SCC 305 : 1983 SCC (L&S) 145] and has clearly erred in reversing the judgment and order of the learned Single Judge. The impugned judgment and order [State of Manipur v. All Manipur Pensioners' Assn., 2016 SCC OnLine Mani 22] passed by the Division Bench is not sustainable and the same deserves to be quashed and set aside and is accordingly quashed and set aside. The judgment and order [All Manipur Pensioners' Assn. v. State of Manipur, 2005 SCC OnLine Gau 118 : (2005) 3 Gau LR 384] passed by the learned Single Judge is hereby restored and it is held that all the pensioners, irrespective of their date of retirement viz. pre-1996 retirees shall be entitled to revision in pension on a par with those pensioners who retired post-1996. The arrears be paid to the respective pensioners within a period of three months from today.

81. Considering the legal principles as enshrined in the renditions of the Apex court we find that the Non-Practicing Allowance was conceived and brought into effect by the U.P Doctors (Allopathic) Restriction on Private Practice Rules, 1983, where rule 3 provided for restriction on private practice, and consequently by rule 4 which stated that in lieu of private practice, Government doctor would be entitled to an amount by way of non-practicing pay or

allowance or both, as the Government may specify from time to time. Giving effect to the rule 4 of 1983, Government order was issued on 31/08/1989 providing in clause 2 that Non-Practicing Allowance would form part of salary for the purposes of post-retirement benefits apart from other benefits stated therein. This aspect, character and nature of the Non-Practicing Allowance was reiterated in the Government order dated 01/02/2003 where rates of the Non-Practicing Allowance were revised. The Non-Practicing Allowance therefore was admissible to the Government doctors who were in service as a measure of compensation for restriction placed on their private practice, and also the same was to continue after retirement and would form part of the pensionary benefits.

82. It is also clear from the rules read along with the Government order issued from time to time, that it was never envisaged that serving and retired Government doctors will be treated differently for the purpose of payment of the Non-Practicing Allowance. Equally discernible is the fact, that no discrimination was ever conceived or explicitly made in any rule or Government order with regard to disbursement of the Non-Practicing Allowance which may have correlation any with date of retirement or on any other basis whatsoever. All the pensioners(Allopathic Government doctors including petitioners herein) form one class and are entitled to the same rate of Non-Practicing Allowance as fixed by the Government from time to time. The Government order dated 24/08/2009 does not distinguish between pre and post retirees nor does it create any class in its application for revision of the Non-Practicing Allowance, and therefore the State post facto could not have discovered and created two classes where none existed. After delving into the Government order dated 24/08/2009 we could not discover any intelligible differentia or any point of distinction between the Government doctors who retired prior to 24/08/2009 and those having retired after the said date. The classification sought to be made by the impugned Government orders is bereft of any reason or valid consideration and therefore arbitrary. Government orders which have been issued from time to time in exercise of rule 4 of the rules of 1983, have only approved the revision of the rate of Non-Practicing Allowance in sync with the recommendations of the Central Pay Commission where also no distinction has been made between serving doctors and retired doctors in its application to Non-Practicing Allowance, indicating that there never was any such distinction real or apparent as has been sought to be made as per the impugned orders.

83. The Government orders in our considered opinion having failed the test of reasonable classification and the classification sought to be made on the basis of cut-off date being 24/08/2009 is bereft of reason and also that there is no intelligible differentia between the two classes so created the impugned orders are clearly violative of Article 14 of the Constitution of India.

Government Order to correct the error in earlier Government Order.

84. Examining the recital and content of Government order dated 04/09/2020, whereby, the same has purportedly been issued to "correct the error", also does not inspire confidence but seems to be a vain attempt to introduce a new policy by

disguising it as an correction of error. The order dated 04/09/2020 has only recast clauses 4(ii)(a) and (b) as existing in the earlier Government order dated 09/03/2019. Clause 4(ii)(b) is applicable in case of petitioners whereby person retiring after 24/08/2009 are entitled to the Non-Practicing Allowance at the time which they were receiving immediately prior to the retirement, meaning thereby that they will not be entitled to any increment.

85. In order to test the reason for passing the impugned Government order, we have to examine the recital that the same has been passed to correct the error occurring in the earlier Government order dated 09/03/2019. The Government order dated 09/03/2019 was passed to implement the recommendations of the 7th Central pay Commission, and consequently revise the rates of Non-Practicing Allowance to 20% of the basic salary. The revised rates of Non-Practicing Allowance were extended as provided in clause 3 therein, to all those persons who were receiving Non-Practicing Allowance as per the earlier Government order dated 24/08/2009 or **any other earlier Government order issued from time to time.** The petitioners being fully covered under clause 3 of the said Government order, their pension payment orders were duly revised and modified. It is contended that even otherwise they were receiving Non-Practicing Allowance as per the earlier Government orders dated 31/08/1989 which was subsequently revised by another Government order dated 01/02/2003, and hence the revision was rightfully made even applicable to them.

86. We have also gone through the recommendations of the 7th Central Pay Commission, and we have not been able to find any such classification, nor the same could be pointed by the Counsel for the respondents, from which it could be demonstrated that the 7th Pay commission itself contained any restrictions with regarding to its application in relation to the retired Government doctors. The State Government having approved the recommendations of the 7th Pay Commission in its application to Allopathic Government doctors, and the decision having been implemented and a notification to this effect having been issued, a heavy onus lies on the State Government to show that a decision was taken earlier was erroneous. No such fact has been pleaded or argued pointing out any error and therefore this Court is of the considered opinion, that firstly there was no error, apparent or otherwise in the Government order dated 09/03/2019 and secondly, there was no occasion to correct the said Government order, which did not contain any deficiency or error and therefore on this score also the order dated 04/09/2020 itself is illegal and arbitrary.

Whether Non-Practicing Allowance is payable to retired Government doctors.

87. It has also been submitted by the State Government that the petitioners who have retired from service are not entitled to the Non-Practicing Allowance as they are not covered by the rules of 1983 and therefore, they cannot claim any rights of the Non-Practicing Allowance. Considering the pleadings as well as submissions of both the parties in this regard, undoubtedly, the petitioners in fact are receiving a fixed amount as Non-Practicing Allowance as a part of their pension. The argument of the State Government seems to be a self-defeating argument in as much as they have themselves admitted that Non-Practicing

Allowance is being paid to the petitioners at a fixed rate which they were getting at the time of the retirement. In fact the Government orders dated 31/08/1989 and 01/02/2003 have explicitly extended the benefit of Non-Practicing Allowance to the retired Government doctors which would form part of the pension, and therefore the contention of the respondents that the petitioners are not entitled to Non-Practicing Allowance because they have retired, is clearly wanting in rationality and reasonableness, and even otherwise is clearly contrary to the Government orders dated 31/08/1989 and 01/02/2003, and is therefore rejected. There is no Government order in existence which has the effect of revoking the aforesaid Government orders dated 31/08/1989 and 01/02/2003 and consequently the arguments of the State opposing the payment of Non-Practicing Allowance on this score to the retired Government doctors fails.

Withdrawal of Non-Practising Allowance without opportunity of hearing

88. The Government order dated 24/08/2009 while enhancing the rate of Non-Practicing Allowance to 25% was ipso facto applicable to serving Government doctors, as well as to the retired Government doctors in as much as the earlier Government orders dated 31/08/1989 and 01/02/2003 had explicitly extended the benefit of Non-Practicing Allowance to the retired Government doctors.

89. The revision on the rate of Non-Practicing Allowance 25% of the basic salary became a vested right of the pensioners and thus was duly protected as property under Article 300A of the Constitution of India, and they could not be deprived of same without following the procedure established by law. As noticed above, there was no error in the impugned Government orders. Further, when a vested right sought to be taken away, then it is mandatory to provide an opportunity of hearing to the person concerned, in absence of which the action of the State is liable to be set aside as being violative of Principles of natural justice. The petitioners were never afforded any opportunity of hearing before passing of the impugned Government orders, and hence on this ground also the impugned Government order dated 04/09/2020 are arbitrary and violative of Article 14 of the Constitution of India.

90. With the introduction of the Liberalised Pension Schemes which has been adopted by the State of U.P. since 1961 it has always been the objective of the Government that the pension paid to the retired Government servants is a social security in old age who has rendered ceaseless service in their heyday, and the quantum of the pension should be such so as to ensure a decent minimum standards of life, medical aid, freedom from want, freedom from fear and enjoyable leisure, and humility of dependents in old age and it should give them economic security. With these objectives in mind and also taking into account the spirit of the Constitution that we have a socialist state, the Government order the impugned Government orders have been scrutinized.

91. There is no Government order in existence which has the effect of revoking the Government orders dated 31/08/1989 and 01/02/2003 and consequently the

arguments of the State opposing the payment of Non-Practising Allowance on this score fails.

92. Another issue which also arises is as to whether any such allowance like Non-Practicing Allowance is liable to remains stagnant over a period of time in its application to petitioners while it is revised from time to time with regard to others similarly situated.

93. As we have already considered above, the Government order dated 24/08/2009 did not distinguish or create any classes of pensioners for the purposes of payment of Non-Practicing Allowance to Government doctors in as much as it merely revised the rates of Non-Practicing Allowance across the board in pursuance to the recommendations of the 6th Pay commission. A careful perusal also reveals that the Government order dated 24/08/2009 was clearly applicable to the petitioners who retired prior to 24/08/2009. There is no reason or justification forthcoming from the State for its nonapplication to the petitioners. It is in fact the executing agency of Government that is, the Department of Pensions, of the State Government which did not extend the benefit of the said Government order to the petitioners and failed to issue revised pension payment orders giving benefit of 25% of the basic pay as Non-Practicing Allowance. The Counter affidavit which has been filed by the pension department is also silent on this aspect. To cover this lapse seems to be the reason for passing of the impugned Government order dated 04/09/2020, so as to justify their action after a lapse of 10 years. Instead of rectifying the mistake the respondent's have compounded the miseries of the retired Government doctors and in other words it amounts to taking advantage of their own wrongs. The basic salaries and all the allowances are constantly being revised upwards by the Government from time to time keeping in view the rising costs which is usually determined by a cost index. Similarly, the Non Practicing Allowance is also being revised from time to time as detailed above, and therefore the petitioners are also entitled for the revised amount of Non Practicing allowance. Their exclusion from revision of the same is therefore arbitrary and illegal.

Financial Constraint

94. It has been submitted by the learned Additional Advocate General that another reason given by the State Government for not revising the rate of Non-Practicing Allowance to persons who retired prior to 24/08/2009 is financial constraint of the State Government. In support of the contention it has been stated that the impugned Government orders, having been scrutinized by the Finance department and therefore the applicant's cannot claim any enhancement in their Non-Practicing Allowance. Counsel of the petitioner on the other hand have submitted that no material has been placed by the State to indicate or substantiate the stand of financial constraint, in absence of which is such an argument cannot be accepted.

95. Considering the rival submissions it is noticed that the State has a right to take a plea of financial constraints whenever the issue pertaining to release or grant of money is under consideration, but in order to sustain such an objection, the State is duty bound to lay before the court certain material from which it can be gathered that the prayer if allowed would entail a heavy financial burden. On the other hand it is

equally correct that the courts can issue a direction to the State to comply with its statutory duties even if the entail a financial burden. The law in this regard is well settled. In **Paschim Banga Khet Mazdoor Samity Vs. State of West Bengal, 1996 (4) SCC 36** it has been held:-

"Para 16- It is no doubt true that financial resources are needed for providing these facilities. But at the same time it cannot be ignored that it is the constitutional obligation of the State to provide adequate medical services to the people. Whatever is necessary for this purpose has to be done. In the context of the constitutional obligation to provide free legal aid to a poor accused this Court has held that the State cannot avoid its constitutional obligation in that regard on account of financial constraints. The said observations would apply with equal, if not greater, force in the matter of discharge of constitutional obligation of the State has to be kept in view."

3.6 Relying upon the decision of this Court in the case of ***Swaraj Abhiyan v. Union of India,*** *(2016) 7 SCC 498 (paras 120 to 123), it is submitted that as held by this Court, a plea of financial inability cannot be an excuse for disregarding statutory duties. Reliance is also placed on the decisions of this Court in the cases of* ***Municipal Council, Ratlam v. Vardichan,*** *(1980) 4 SCC 162; and Khatri (2) v. State of Bihar, (1981) 1 SCC 627 and it is submitted that as observed the State may have its financial constraint and its priorities in expenditure, the law does not permit any government to deprive its citizens of constitutional rights on a plea of poverty. It is submitted therefore that the plea taken by the Central Government that the prayer of the petitioner for the payment of ex gratia compensation for loss of life due to Covid-19 pandemic to the aggrieved families is beyond the fiscal affordability may not be accepted. It is submitted that the fiscal affordability/financial constraint cannot be a ground not to fulfil statutory obligation under the DMA 2005 and the constitutional obligation as provided under Article 21 of the Constitution of India.*

96. In the instant case there is no denial of the fact that the Non- Practicing Allowance is admissible to the petitioners and is being paid, it is only the applicability of revised rates which is under question. The claim of the petitioner is based on statutory rules and Government orders where they have been entitled for the same, and in this regard wherever there is budgetary allocation of resources, then it is presumed that the provision has been made for the same, and plea of financial constraint would not be acceptable. The State government being and are duty bound to pay the statutory dues of the employees cannot avoid its liability citing financial constraint.

97. It is also noticed that whenever a fresh liability is sought to be created on the State then the contours and parameters of examination are different, and usually ,the stand of the State may be accepted as such except when a claim is made on ground of discrimination. Where one class of persons is already receiving the benefit, and the same is sought to be extended to the other class, then the ground of financial constraint cannot inhibit a claim on ground of equal treatment, as the Constitutional Courts are under a mandate to give effect to

the equality clause as mandated by Article of the Constitution of India.

98. The respondents have relied upon the Judgment in the case of **State of Punjab vs Amar Nath Goel (2005) 6 SCC 754** in support of their contentions. The said judgment is distinguishable on facts inasmuch as in paragraph no. 28 of the judgment the Apex court came to conclusion that the benefits as claim there in, were not admissible to the petitioners at the time of their retirement. In the present case the Government in 2020 has held the petitioners not to be entitled for revised rate non practicing allowance retrospectively with effect from 2009. The said amount was admittedly paid and duly received by them. We fail to understand as to why this stand of financial constraint was not taken into consideration, if in case it existed, at the time of approving the recommendations of 7th Pay Commission. The rates were duly revised and the enhanced amount was also paid, and no such difficulty was stated. Even in the impugned orders, only ground for revisiting the earlier Government order is "rectification of error". There is no mention of any financial constraint in the impugned order, and therefore, it is only an afterthought, and on this score fairness on part of the State is clearly lacking. In case there was any financial constraint, then there was no occasion for the State to disburse the revised amount of Non Practicing allowance, which was paid for nearly one year. At this stage, and facts of the present case, the plea of financial constraint his not available to the respondents.

99. Even otherwise, in the present case apart from the averment made in the counter affidavit, there is no material to substantiate the plea raised by the State with regard to financial constraints, and in absence of such material only on the basis of bald assertion this issue cannot be decided in favour of the State, and hence consequently rejected.

Precedentary value of Judgment in case of Dr. Sabhajeet Singh

100. Learned Additional Advocate General while opposing the writ petitions has submitted that the issues canvassed by the petitioners were subject matter of writ petitions nos. 1482 of 2015(SB) and 1239 of 2012(SB) wherein a number of doctors had approached this court seeking benefit of the Government order dated 24/08/2009 and by means of the judgement dated 25/01/2018 the writ petitions were dismissed, and therefore it is contended that the present petition is also liable to be dismissed on the same analogy.

101. The aforesaid writ petitions had been filed seeking a writ of mandamus and following prayer were sought as stated in paragraph 13 of the judgement:-

(i) Issue a writ order or direction in the nature of mandamus commanding the opposite parties to revise the pension of the petitioners counting the element of Non-Practicing Allowance at the rate of 25% of basic pay as the Non-Practicing Allowance is the part and parcel of the basic pay.

(1A) Issue a writ order or direction in the nature of certiorari quashing the clause-III of the Government order dated 24/08/2009 (contained in annexure no. 6 to the writ petition) directing the opposite parties to count the element of Non-Practicing Allowance at least from 01/01/2016, i.e., the date from

which the recommendation of the 6th Pay Commission has been accepted by the State of U.P.

(ii) Issue an order or direction commanding the opposite parties to pay the difference of pension to the petitioners and also pay the interest on delayed payment from the date of due till the date of actual payment."

102. Further, in paragraph 12 of the said judgement it has been stated that "all these petitioners were already retired before the issue of G.O dated 24/08/2009, claiming computation of retiral benefits by taking into consideration, Non-Practicing Allowance 25% of basic pay with effect from 01/01/2006 made representations to this effect and then filed the present writ petitions.

103. From the aforesaid, it is clear that the court was considering the relief as to whether Non-Practicing Allowance at the rate of 25% of the basic pay with effect from 01/01/2006 is admissible to the petitioners or not. The petitioners herein have sought quashing of the Government orders dated 14/07/2020 and 04/09/2020 whereby they been deprived of the benefit of the revision of Non-Practicing Allowance which was granted to them by means of Government order dated 09/03/2019. The aforesaid case is clearly distinguishable from the instant case on facts in issue in the instant writ petition.

104. Secondly, in paragraph 20 of the judgement the Division Bench came to conclusion that "..... Therefore, argument of creation of two classes is thoroughly misconceived and is no basis whatsoever .**There does not exist any such classification**" while in the present case the petitioners have based their claim on the basis that the impugned Government orders which has explicitly created two classes of pensioners with 24/08/2009 being the cut-off date, and the State Government in the counter affidavit filed in the case of Dr Laxmi Chauhan and others writ petition no. 18259 (SS) of 2020 themselves have admitted in paragraph 35 of the affidavit stating "the decision taken by the State Government and the issuance of the impugned Government order, in no manner could be said to be discriminatory, in fact, the same is based on **reasonable classification** and is not in violation of any principles of law." The issues and facts on the basis of which adjudication of claim of the petitioners has been made in the instant petition are completely different from the facts as existing at the time when the earlier petition was adjudicated, and therefore the said judgment would not be a precedent in the present case.

105. In the present bench of writ petitions apart from challenging the legality and validity of the impugned Government order dated 14/07/2020 and 04/09/2020 the writ of mandamus is being sought directing the respondents to pay Non-Practicing Allowance to the petitioners in pursuance of the Government order dated 09/08/2019, and therefore in terms of the prayer made before this court in the present set of writ petitions the scope of the enquiry is limited to the adjudication of rights of the petitioners with regard to their entitlement to receive Non-Practicing Allowance as per Government order dated 09/08/2019, and therefore the Division bench judgement of this court in the case of Dr Sabhajeet Singh and Others is not directly related to the facts in issue in the present set of petitions,

and as considered above is clearly distinguishable and not applicable in the present case.

106. It has also been canvassed on behalf of the petitioners that the impugned recovery orders are illegal and arbitrary inasmuch as the Non-Practicing Allowance was duly fixed by the Government and paid to them to which they were entitled. This entire exercise was done by the State Government without any involvement of the petitioners, and they were duly entitled for the same. Even otherwise the said recovery will cause immense hardship and the petitioners claim protection of the judgement of the Hon'ble Supreme Court in the case of ***State of Punjab v. Rafiq Masih, (2015) 4 SCC 334***

18. It is not possible to postulate all situations of hardship which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to hereinabove, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

(i) Recovery from the employees belonging to Class III and Class IV service (or Group C and Group D service).

(ii) Recovery from the retired employees, or the employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from the employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover.

107. In facts of the present case where we have already held that the petitioners are entitled to the revised amount of Non-Practicing Allowance as per Government order 09/03/2019, then as natural corollary, the consequential recovery orders dated 16/07/2020 are held to be illegal and arbitrary.

108. In light of the discussion made above, all the writ petitions are **allowed** and the impugned orders dated 14/07/2020, 16/07/2020 and 04/09/2020 are quashed, and the petitioners are held to be entitled to Non-Practicing Allowance as revised by the Government order dated 19/08/2019. The amount of Non-Practicing Allowance recovered in pursuance to the impugned Government orders is directed to be refunded along with arrears within a period of three months from today, failing which interest at the rate of 8% per annum will be paid for delay in payment beyond the period of three months. No other point was urged. The questions A to E are answered accordingly.

109. I may put on record an appreciation for my law clerk Mr. Himanshu Mishra, who has ably assisted me in case law research.
